RECENT CASES.

ADMINISTRATORS—COMPLETING CONTRACT.—IN RE ALLAM'S ESTATE, 49 Atl. 252 (Penn.).—Where an administrator in his discretion completed some unfinished building contracts of the decedent, thereby creating new debts. *Held,* that the debts contracted by the decedent in his life-time took precedence over the debts contracted by the administrator.

Morrow v. *Morrow,* 2 Tenn. Ch. 549, which seems to be the only case in this country with a practically similar state of facts, decided that, even where the decedent had authorized the carrying on of his business, the debts contracted by him in his life-time were entitled to priority of payment over such debts as were contracted by his administrator. The present decision is in conformity with the English case of *Labouchere* v. *Tupper,* 11 Moore P. C. 221.

BASTARDY—EVIDENCE—CORROBORATION OF PROSECUTING WITNESS.—STATE v. MEARES, 39 S. E. Rep. 245 (S. C.).—The judge refused to charge that the testimony of the mother should be corroborated in some material particular before a verdict of guilty could be rendered. *Held,* that it was not error.

It is the law in England that a mother's testimony must be corroborated in some material particular before a man can be adjudged the putative father. But this is a statutory rule, and in the absence of such a statute, no corroboration is required. 29 *Am.* v. *Eng. Emc. Law,* 834. The court rules that even if the mother could be regarded as an accomplice, it would still be unnecessary to corroborate her testimony, and quotes *State* v. *Prater,* 26 S. C. 207, 2 S. E. 112. "It is true that the proper practice is for the presiding judge to advise the jury not to convict upon the uncorroborated testimony of an accomplice, but we know of no authority which requires that they shall be directed to acquit unless the testimony of an accomplice is corroborated."

CONSTITUTIONAL LAW—DUE PROCESS—ABSENCE OF ALLEGED LUNATIC FROM HEARING.—JETTA SIMON v. JOHN V. CRAFT, 21 Sup. Ct. 836.—In pursuance of a writ issued under the Alabama Civil Code, 1886, Section 2393, the plaintiff in error was taken into custody and remanded to await the decision of a jury as to her sanity. The statute provided that the sheriff serving the writ was to determine whether it would be consistent with the health and safety of any person so taken to have him or her present at the place of the trial. In this particular case the sheriff decided the question against the plaintiff in error, and she was not allowed at the hearing, wherein she was found to be of unsound mind. *Held,* that such a proceeding was not in violation of the 14th Amendment of the United States Constitution.

In all cases where the principle of "due process of law" is concerned, the main consideration is whether the condemned person has had sufficient notice

and adequate opportunity to defend himself. *Louisville* v. *Nashville R. R. Co.* v. *Schmidt,* 177 U. S. 230; *Iowa Central R. R. Co.* v. *Iowa,* 160 U. S., 389. As early as 1870 the Supreme Court of Alabama in *Fore* v. *Fore,* 44 Ala., 418, held that the mere serving of the writ upon a supposed lunatic brought the defendant into court. The plaintiff in error was thus technically before the court, and she suffered the loss of no constitutional right if she did not, either through counsel or her guardian "ad litem," enter at that time her matters of defence.

CRIMINAL LAW—LIBEL—TRUTH AS JUSTIFICATION.—STATE v. BROCK, 39 S. E. Rep. 359 (S. C.).—The constitution of South Carolina provides that in all criminal prosecutions for libel, the truth of the alleged libel may be given in evidence, and the jury shall be the judges of the law and the facts. *Held,* that an instruction by the judge that this provision did not go any farther than to allow truth as a mitigation was error.

The case of *State* v. *Lehre,* 2 Brev. 446, 4 Am. Dec. 596, decided that a person indicted for libel could not give any evidence tending to prove the truth of the libelous matter in justification without the consent of the prosecutor. Other cases have granted this right in prosecutions, for the publication of papers investigating the official conduct of men in public capacity, or when the matter published is proper for public information. The court holds that the provision of the constitution of 1895 goes further, permitting all persons indicted for libel to show the truth of the libel. It also makes the jury the judges of the law and the facts, and does not give the judge the right to declare what shall be the effect of the testimony.

DEATH OF PARENT—DAMAGES.—STAHLER ET AL v. PHILA. & R. RY. CO., 49 Atl. 273 (Penn.).—The defendant company negligently caused the death of plaintiffs' father, who was accustomed to make them a yearly allowance. *Held,* that the plaintiffs' right to recover damages was not affected by the fact that they inherited their father's estate.

The true measure of damages in similar cases generally has been laid down as being the pecuniary loss to the survivors, entitled to compensation. *Chicago* v. *Major,* 18 Ill. 349; *McIntyre* v. *N. Y. R. Co.,* 37 N. Y. 287; *Baltimore R. Co.* v. *Kelly,* 24 Md. 271. The fact that an inheritance is gained does not decrease the loss sustained by the withdrawal of a yearly allowance. A close analogy is found in the United States rule that the amount recovered is not reduced by the amount of insurance carried by the deceased. *Railroad Co.* v. *Kirk,* 90 Penn. 15; *Althorf* v. *Wolf,* 22 N. Y. 355; *Sherlock* v. *Alling,* 44 Ind. 184.

EVIDENCE—ADMISSIONS—ATTEMPT TO BRIBE—AGENCY—NOWACK v. METROPOLITAN ST. RY. CO., 60 N. E. 32 (N. Y.).—The "investigator" of a corporation, employ to see to the witnesses and to take their statements and to interview witnesses, on the trial of actions against it, attempted to bribe witnesses to testify in favor of the corporation. *Held,* that evidence of this was admissible against the corporation, though there was no proof that it authorized the act.

That a corporation, as well as another master, is liable for the injury done another by its agent, though unauthorized to do the particular act, is quite well established, *Railway Co.* v. *McMahon,* 103 Ill. 485, *Railroad Co.* v. *Rambo,* 59 Fed. 75, 8 C. C. A. 6, though the contrary is held in *Green* v. *Town of Woodbury,* 48 Vt. 5. This case, however, goes to an extreme and, on the broad ground of preserving purity in justice, holds the master to answer and admits this evidence against him though no injury was actually done to the other party by the agent's act.

EXCHANGES—PROPERTY RIGHT IN MARKET QUOTATIONS—WHAT CONSTITUTES PUBLICATION.—BOARD OF TRADE OF CHICAGO V. HADDEN-KRULL CO. ET AL., 109 Fed. 705 (Wis.).—A board of trade, in furnishing market quotations, made upon the transaction of its exchange, to customers for their exclusive use, either by means of a ticker or by putting them on a blackboard, does not publish them in such a way as to lose property right therein.

That there is a property right in such quotations has been well established. *Telegraph Co.* v. *Gregory,* (1896) 1 Q. B. 147. But in the case of credit rating companies, who send books to their subscribers under contract that the books remain the property of the distributor and if found in other hands than subscribers will be confiscated, etc., etc., it has been held that inasmuch as the number of subscribers is practically unlimited there is a publication of these volumes. *Todd* v. *Oxnard,* 75 Fed. 705; *Jellewers' Mercantile Co.* v. *Jellewers' Weekly,* 49 N. E. 872 (N. Y.). The case of *Callaghan* v. *Meyers,* 128 U. S. 617, carries the doctrine of publication to a considerable extent. In that case a reporter of decisions, in compliance with a statute of Illinois, deposited a certain number of copies with the Secretary of State, for purposes provided for by law, and although he did not expose them for sale in the usual way, this was held to constitute a publication sufficient to deprive him of his property right, the reasoning of the court being that, "whatever the occasion for it, the public, or an indefinite portion of it, were assured of access to the books without further action on the part of the author."

FELLOW SERVANTS—VICE PRINCIPAL—INSTRUCTION—NEW OMAHA THOMPSON-HOUSTON ELECTRIC LIGHT CO. V. BALDWIN, 87 N. W. (Neb.) 27.—One Brinkman, a foreman in the employ of the plaintiff in error, while assisting the defendant in error, a lineman named Baldwin, also a servant of the Electric Co., negligently injured the latter, while in the discharge of his duties. From the evidence it appears that at the time of the accident Brinkman was not acting towards the defendant in error in the capacity of a foreman.

The trial court charged the jury that since Brinkman was a foreman he was a vice-principal and that the company was liable, negligence being admitted. This was objected to, council contending that at the time Brinkman was not acting as foreman, and that in any case, whether he was a fellow servant or not was a question of mixed law and fact, and hence for the jury.

On appeal the court *held,* that the capacity in which Brinkman was acting when the accident occurred was immaterial, since he was a vice-principal in any case. Judgment affirmed.

This case is interesting as showing to what an extreme length the Nebraska courts have carried the "vice-principal doctrine," a doctrine which has either been repudiated, or much modified in most of the states. Nebraska, however, follows the Ohio doctrine as laid down in *Bena Stone* v. *Kraft*, 31 Ohio St. 287, which held substantially as above.

GIFTS—CHOSE IN ACTION—DECLARATION OF HUSBAND.—FIRST NATIONAL BANK OF RICHMOND v. HOLLAND, 39 S. E. Rep. 126 (Virginia).—A certificate for shares of stock was delivered without indorsement to the defendant by her husband as a gift. The husband's creditors demanded that the stock should be applied to his debts. *Held*, a certificate of stock, a chose in action, is not within the code declaring that no gift of "goods and chattels" shall be valid unless by deed or will, or unless the donee have actual possession.

In many cases stock has been treated as other kinds of personal property and trover sustained, *Maryland Fire Ins. Co.* v. *Dalrymple*, 25 Md. 242; *Freeman* v. *Harwood*, 49 Maine 195. Contract for sale of shares is contract for sale of goods within the statute of frauds. *Tisdale* v. *Harris*, 20 Pick. 9. The court in this case reviews the several sections of the Code in which the words "goods and chattels" are found, and declares that these terms in every instance are limited in meaning to corporal personal property.

Giving the words "goods and chattels" in the section in controversy the same construction, the court holds that choses in action are not included. A similar decision is found in *Kirkland* v. *Brune*, 31 Grat 126.

INSANE FELLOW SERVANT—PRESUMPTION.—ATKINSON v. CLARK, 64 Pac. 769 (Calif.).—Plaintiff was injured while tearing down some walls at a state asylum for the insane on which some of the inmates were working. There was no negligence on the part of the asylum officials in selecting the inmates who were put on such jobs. *Held*, there can be no presumption that the inmates were dangerous and unskillful from the fact alone that they were insane.

Apparently there is no case in point. The decision would appear to be a correct one, however. There are undoubtedly numerous forms of insanity in which the afflicted persons fully retains the skill of his hands and an ordinary realization of common dangers. Arguing from the standpoint of custom and usage it may be said that in a great many of our large state insane asylums in this country the labor of the inmates figures as an important factor in the maintenance of the premises and the performance of various menial duties.

LIKENESSES—USE FOR ADVERTISING—RIGHT OD PRIVACY.—ROBERSON v. ROCHESTER FOLDING BOX CO. ET AL., 71 N. Y. Supp. 876.—Defendants without authority published and circulated lithographic prints of plaintiff with advertisements of their business thereon. Plaintiff was hereby made the subject of scoffs and jeers, causing her humiliation and sickness. *Held*, to be an invasion of her right of privacy for which she might maintain action to restrain publication and for damages.

This decision is another forward step on the part of the courts in establishing and protecting the right of privacy. The theory upon which the action

is allowed is new, at least in instance and few precedents can be found to sustain the plaintiff's claim. The leading case of *Schuyler* v. *Curtis*, 147 N. Y. 434, in refusing the relief sought did not deny the existence of this right, but held that whatever right of privacy a person possessed died with him and could not be enforced by relatives. *Corliss* v. *E. W. Walker Co.*, 64 Fed. 280, distinguished between public and private characters, holding that a private individual should be protected against the publication of any portrait of himself, but that with an individual in public life it was different—a distinction followed in this case. The court here grants the relief sought, upon the ground that the plaintiff's personal comfort had been interfered with without her consent and to her injury. Her feelings were wounded and the respect with which she was held by the community was diminished by being thus brought into unnecessary and unwarantable notice. The principles of natural justice demand that individuals be protected against such invasions of their privacy.—(*See editorial comment supra.*)

MANDAMUS—TELEPHONE COMPANIES—DISCRIMINATION.—STATE EX REL. GWYNNE v. CITIZENS' TELEPHONE CO., 39 S. E. Rep. 257 (S. C.).—Defendant refused to furnish the petitioner with telephone facilities because the petitioner had not complied with a previous contract with the defendant, whereby he agreed to use the defendant's telephone exclusively. *Held*, that mandamus would lie to compel defendant to furnish petitioner with a telephone.

Cases like *Aiken* v. *Telegraph Co.*, 5 S. C. 358 and *Pickney* v. *Telegraph* Co., 19 S. C. 71, 45 Am. Rep. 765 seems to have conveyed the impression that telegraph and telephone companies were in no sense common carriers. But these actions were brought to recover damages for errors in the transmission of messages. Telegraph companies are in no sense to be regarded as common carriers and are liable for improper transmission of messages only upon proof of negligence, but they are like common carriers in that they are bound to serve all those impartially all those applying to them. 6 *Am. & Eng. Enc. Law*, (2nd Ed.) 261. The court holds, quoting *State* v. *Nebraska Telephone Co.*, 17 Neb. 126, 52 Am. Rep. 404, that a telephone company cannot arbitrarily refuse its facilities to any person who offers to comply with its reasonable regulations, and argues that the refusal to agree to use defendant's telephone system exclusively is not sufficient to relieve the defendant from its obligation to serve the public, of which the petitioner was one, without any discrimination whatsoever. If there had been any breach of contract, of which the defendant had any right to complain, its remedy was an action to recover damages for such breach of contract.

MARITIME LIENS—MASTER OF A DREDGE.—THE JOHN MCDERMOTT, 109 Fed. 91.—*Held*, the master of a dredge, not capable of being navigated, and not earning any money which passes through his hands, and who is really general superintendent of the work, having charge of the men on board, and himself performing the duties of engineer, fireman, and general deck hand, is entitled to a lien on the vessel, the same as any seaman.

The privilege of a maritime lien is not confined to that class of seamen who possess a peculiar nautical skill but includes all those whose services are in furtherance of the main object of the enterprise on which the ship is

engaged. *Steam Dredge, No. 1,* (D. C.) 87 Fed. 760; *The Atlantic,* 53 Fed. 607. Regarding the question of a non-navigable dredge being subject to a maritime lien, there is no satisfactory test as to what floating structures are, and what are not, subject to admiralty jurisdiction, but Judge Hanford, in *McRae* v. *Bowers Dredging Co.,* 86 Fed. 344, where he declares that a steam dredge is within the jurisdiction of an admiralty court, suggests a good rule by his reasoning that "She has mobility, and her element is the water. She can be used afloat and not otherwise. She has carrying capacity, and her employment has direct reference to commerce and navigation."

MUNICIPAL CORPORATIONS—STREETS—TELEGRAPHS—POLES IN STREETS—POWER TO PROHIBIT ERECTION—STATE EX REL. WISCONSIN TELEPHONE CO. v. CITY OF SHEBOYGAN, 87 N. W. (Wis.) 657.—Appeal from a judgment in favor of the defendant. This is an action of mandamus against the city of Sheboygan and others.

The relator, the Wisconsin Telephone Co., sought to erect and maintain poles and wires in Sheboygan, a city of about 50,000 inhabitants, and were prevented from so doing on the ground that the relator refused to comply with certain conditions, regarding rates of fare, free use of poles by the city, etc., which conditions the city of Sheboygan claimed were proper police regulations. *Held,* that city had no such power. Judgment was therefore reversed.

The present case is certainly very near the line. The tendency in most states has been towards giving municipalities considerable scope in the exercise of its police owners to regulate the overcrowding its streets with unsightly poles and wires. And this jurisdiction has laid down a liberal doctrine in the city of Marshfield, case 78 N. W. 735, 102 Wis. 604., but appears to wish to restrict corporate powers more closely in the present instance.

NEGOTIABLE INSTRUMENTS—ALTERATION.—HOFFMAN v. PLANTERS' NATIONAL BANK, 39 So. E. Rep. 134, (Virginia).—H. signed a note, payable to herself, and, without endorsing it, gave it to W. to take up a note held by a bank signed by W. and indorsed by H. The bank struck off the name of H. as payee, and inserting that of W. had W. indorse it. *Held,* that this was a material alteration, avoiding the note as to H.

Whether signing the note as drawer and omitting to put her name on the back thereof as indorser was accidental or not is immaterial. It was an incomplete instrument, its defects not being such that authority to complete the instrument was to be implied from the nature of the contract or from custom. Changing the note by erasing the original and inserting a different payee is a material alteration. *Robinson* v. *Berryman, 22* Mo. App. 512.

NUISANCE—POWDER MAGAZINE.—TUCKASHNISKY v. LEHIGH & W. COAL CO., 49 Atl. 308 (Penn.).—A powder magazine, containing explosives in small quantities, originally located in a non-residence district, but around which people had settled, was struck by lightning and exploded, injuring the plaintiff, who lived nearby. No complaint had ever been made about this

magazine. *Held,* as a matter of law, the powder magazine was not a nuisance, and hence that the plaintiff could not recover, without proving negligence on the part of the defendant.

The keeping of the explosives in certain places and under certain conditions may be a nuisance per se... *Cheatham* v. *Shearon,* 1 Swan. 213; *Laflin-Rand Powder Co.* v. *Tearney,* 23 N. E. 389 (Ill.). The present case is extraordinary in that the question of the existence of a nuisance was not left to the jury. *Heeg* v. *Licht,* 80 N. Y. 579; *Prussak* v. *Hutton,* 30 N. Y. App. Div. 66.

PARTIES—JUDICIAL SALE—SETTING ASIDE DEED—CHILLING BIDDING—LIMITATIONS.—TOOLE v. JOHNSON, 39 S. E. Rep. 254. (S. C.).—At a sale under execution, an attorney made the announcement that he hoped nobody would bid against his client, who would bid the amount of the judgment, and buy in the land for the children of the decedent. *Held,* that the statute began to run against a person seeking to set aside the sale because of chilling the bidding from the time of the discovery of the fraud.

Fraud without concealment is not sufficient. *13 Am. & Eng. Enc. Law, 729. State* v. *Furlong,* 60 Miss. 839. The court does not follow these cases, but holds that the provision of the Code—"any action for relief on the ground of fraud is not to be deemed to have occurred until the discovery by the aggrieved party of the facts constituting the fraud"—is to be construed literally, and that there is nothing in the provision to limit its application to secret frauds.

POLICE REGULATION—DOMESTIC ANIMALS.—SIFERS v. JOHNSON, 65 Pac. 709 (Idaho).—A statute, prohibiting the herding or grazing of sheep within two miles of an inhabited dwelling, is a valid exercise of the police power of the State, and is not unconstitutional. Stockslager, J., *dissenting.*

The court adjudges the statute to be intended to prevent conflicts, resulting from the clash of interest between sheep raising and farming, and also to protect the health of the settlers. This decision seems to extend the police power of a state to great lengths, and almost to sanction the taking of property without due process of law. The judges in this case were governed in rendering their decision by the opinions of Cooley and Tiedeman, regarding the extent of a state's police power. *Cooley's Con. Lin.,* 704-5; *Tiedeman's State & Fed. Control of Per. and Prop.,* 838.

REPLEVIN—CUSTODY OF PROPERTY—SALE BY ONE IN POSSESSION—CONVERSION.—MOHR v. SANGAN, 63 S. W. 409 (Mo.).—A plaintiff having acquired possession by replevin, sold the property during the pendency of the suit. *Held,* that such property was in custodia legis, and hence he was liable for conversion.

There appears to be an irreconcilable conflict of authority upon this point. Of the cases which hold that property taken under a writ of replevin remains in custodia legis, even when the possession is delivered to the plaintiff in the suit, he being regarded only as standing as a substitute for the sheriff,

McKinney v. *Purcell,* 28 Kan. 446; *Hunt* v. *Robinson,* 11 Cal. 262, are examples. On the other hand, *White* v. *Dolliver,* 113 Mass. 400; *Coen* v. *Watkins,* 62 Mo. App. 502, hold that property does not remain in custodia legis after it has been delivered to the plaintiff in the replevin suit and that such plaintiff may sell it and pass a good title, being liable to defendant, if the latter is successful, only for the value of the property. While *Donohue* v. *McAleer,* 37 Mo. 312, hold that such property may be sold, *Bank* v. *Owen,* 79 Mo. 429 proceeds on the theory that it is in custodia legis. By this decision, however, the position of the Missouri courts upon this question is clearly defined.

STREET RAILROADS—RIGHT IN HIGHWAY—DRIVER OF VEHICLE.—WOODLAND v. NORTH JERSEY ST. RY. CO., 49 Alt. 479 (N. J.).—The plaintiff, in a well lighted street, at night, when about to cross the highway in his carriage, saw a trolley car approaching 250 feet away. He at once proceeded to cross, with his horse on a walk, without further watching the approach of the car which collided with his carriage, causing him personal injuries. Upon the trial of his action the court refused to nonsuit on the ground of contributory negligence. *Held,* on error, that the ruling was correct.

The point in this case is not whether the plaintiff was negligent but whether his negligence so clearly appears that the case should have been taken from the jury. The plaintiff was only required to extend his observation to an approaching car that, proceeding at customary and reasonably safe seed,, would threaten his safety, *Railway Co.* v. *Block,* 322 L. R. A. 374.

A driver may obtain a right of way over a street railroad, where, in the reasonable exercise of his rights, he reaches the point of crossing in time to safely go upon the tracks in advance of the approaching car, the latter being sufficiently distant to be checked, and if need be, stopped, before is should reach him. *Railroad Co.* v. *Miller,* 36 Atl. 885.

TELEPHONE COMPANIES—POLES—FIXTURES—LICENSE—REVOCATION.—REDFIELD TELEPHONE AND TELEGRAPH CO. v. CYR. ET AL., 49 Atl. 1047 (Me.).—The poles and fixtures of a telephone company, which has erected its poles along a highway by the permission of the municipal officers, do not become a part of the realty, but remain chattels, subject to seizure and sale on execution.

It was held in *Paris* v. *Water Co.,* 85 Me. 330, that water pipes, hydrants, etc., were real estate of the purpose of taxation. It has also been held that gas and water pipes are mains, and the poles and wires of an electric light plant were appurtenances to the realty, on which were built the operating plants. *Capital Gas Light Co.* v. *Charter Oak Ins. Co.,* 51 Iowa, 31; *Fechet* v. *Drake,* (Ariz.), 12 Pac. 694; *Badger Lumber Co.* v. *Marion Electric Co.,* 29 Pac. 476; Appeal of Des Moines Water Co., 48 Iowa, 324. In *Newport Ill. Co.* v. *Tax Assessors,* the contrary view is taken as to the poles and wires of an electric light plant. The present case decides that telephone poles and wires are not appurtenant to the realty, but mere chattels.

TRADEMARK—INJUNCTION.—OMEGA OIL *Co.* v. WESCHLER ET AL., 71 N. Y. Supp. 983.—Plaintiff under the trademark of "Omega Oil" manufactured a green liniment, green being the distinctive color of the labels and advertisements also. The defendants placed upon the market a green medicated soap, put up in green wrapping, under the name of "Omega Oil Medicated Soap," using in the manufacture a small quantity of "Omega Oil." *Held,* that the defendants be restrained from using the words "Omega Oil."

The decision is based on the assumption that the liniment and the soap, being used for essentially the same purposes and therefore coming into direct competition with each other in sale, belong to the same class of goods. *Carroll* v. *Ertheiler;* 1 Fed. 688. The choice of the words "Omega Oil," and of the color was calculated to deceive the public into the belief that plaintiff's article was put up for sale in another form, or that the soap was manufactured by plaintiff or by his consent—a species of competition which courts of equity hold to be unfair. *Fairbank Co.* v. *Bell Mfg. Co.,* 77 Fed. 869. Nor does the use of a part of the product in the manufacture, allow the use of the name. *Church & Dwight Co.* v. *Russ,* 99 Fed. 276. But the mere use of the color, green, in articles and wrappings apart from the name, cannot be enjoined. *Fischer* v. *Blank,* 138 N. Y. 244.