RECENT CASES.

ADVERSE POSSESSION.

A tax deed void because it shows that several lots in a town were sold at one sale and that the county purchased them as a competitive bidder is void on its face and not admissible in evidence to show color of title to support adverse possession under a statute of limitations. Supreme Court of Oklahoma in *Kellar* v. *Hawk*, 91 Pacific Reporter, 778.

Tax Deed: Color of Title

This case follows the rule expressed by the Supreme Court of the United States in *Redfield* v. *Parks*, 132 U. S. 239.

Several jurisdictions hold that a tax deed though void on its face may show color of title. See *Pharis* v. *Bayless*, 122 Mo. 124, and *Wilson* v. *Atkinson*, 77 Cal. 485.

There is also confusion as to what is necessary to make a deed void on its face.

It has been held that an instrument must be so obviously defective that no man of ordinary capacity would be misled by it. See *Anent* v. *Arrington*, 105 N. C. 390.

CARRIERS.

The plaintiff brought action for damages against Georgia Railroad & Electric Co., for an insult by the conductor of said company, alleged to have been committed by the latter in compelling the plaintiff, a white man, to sit in a portion of a car reserved, by a police ordinance, for negroes, thus publicly intimating that he was a negro, or of African descent. *Wolfe* v. *Georgia R. R. & Electric Co.*, 58 S. E. Rep. 899 (Court of Appeals of Georgia—Oct. 3, 1907). Two points are considered by the Court: (1) Is the defendant street car company liable for insulting conduct on the part of its servants, and (2) is it an actionable insult to call a white man a negro? A street railroad is answerable in damages for the insulting conduct of one of its drivers toward a passenger. *Goddard* v. *Grand Trunk R. R.*, 57 Mo. 202. *Gillespie* v. *Brooklyn Heights R. R.*, 178 N. Y. 347. "The present decision accords with the trend of cases which hold the care of carriers in respect to passengers one of peculiar responsibility and delicacy. Their contract with him is not for mere room and personal existence—but for respectful treatment and that decency of demeanor which constitutes the charm of social life; and that acts need not amount to an assault and battery before the law takes sognizance." *Chamberlain* v. *Chandler*, 3 Mason (U. S.) 242.

Duty of Carriers: Protection From Insult

CARRIERS (Continued).

The second point affords more difficulty. Is it actionable to call a white man a negro? The distinction of the social status of the different classes of citizens has been quite generally recognized throughout our legislation. This difference of races adverted to is recognized almost universally by the laws against inter-marriage. Ex Parte Hobbs, 1 Wood, 537; by the laws for the separation of passengers by common carriers, *Plessy* v. *Ferguson,* 163 U. S. 544; and in the separation of the school children, *Cisco* v. *The School Board,* 161 N. Y. 598. These decisions are based upon the intrinsic differences between the two races, not on the ground of inferiority or inequality. The Court in the case in hand rests its decision, that it is an actionable insult to call a white man a negro, upon the same basis.

Liability of Railroad Co. for Acts of Conductors

Plaintiff held a ticket from stations A to B; when the conductor took up her ticket he agreed, at her request, to stop the train at an intermediate point and assist her to alight. The train stopped at the agreed point, but the conductor failed to assist the plaintiff. There was no platform, plaintiff fell and was injured. Held, these facts did not show negligence on the part of the railroad company.

Appellate Court of Indiana, in *Sellers* v. *Cleveland,* etc., *Ry. Co.,* 81 N. E. Reporter, 1087.

This cases decides that it is outside the scope of a conductor's employment to make agreements with passengers to let them off at points not on the train schedule.

If injury had been caused to a person other than the party with whom the agreement was made, it would seem the company would be liable; *Quin* v. *Powers,* 87 N. Y. 540.

That a conductor is authorized to make contracts with passengers to let them off at points not on the train schedule was held in *R. R.* v. *McCurdy,* 45 Ga. 288, and *R. R.* v. *Young,* 51 Ga. 489.

CONSTITUTIONAL LAW.

Right of State to Expel a Foreign Corporation: Reasonableness of R. R. Rates

The Legislature of Alabama passed a statute providing that the instituting of a suit by a foreign corporation, in a Federal Court, "shall *ipso facto* forfeit all its right or license to engage in or carry on said business, originating and terminating in this State, of freight or passengers, and its right or license to engage in or carry such business, in this State, shall by said Act be revoked, or shall cease." Other statutes were passed

CONSTITUTIONAL LAW (Continued).

making two and one-half cents per mile, the maximum rate for intra-state passengers, fixing the maximum intra-state freight rates on certain articles, and providing that the rate in force January 1, 1907, should be the maximum intra-state rate on articles other than those mentioned. *Held,* that the statute first mentioned above is contrary to the Constitution of Alabama, which gives the right to all corporations to sue in all courts. That, while a State may arbitrarily expel a foreign corporation, yet if it solicits that corporation to come into the State, to do certain acts and enter into contracts suggested by itself, and those acts have resulted in contracts, vesting in the corporation title to property and the right to use it, the State will be taken to have waived its right to expel without cause. A statute passed expelling such a corporation, deprives the corporation of its property without due process of law, impairs the obligation of contracts entered into at the solicitation of the State, is a breach of an implied legislative contract existing between the corporation and the State and is a refusal to give equal protection of the laws to both foreign and domestic corporations. Further, the Court found that sufficient had been shown by the complainant railroad, to overcome the burden on its part of showing the rate unreasonable. *Seaboard Air Line* v. *Railroad Commissioners,* 155 Fed. 792. See *Perkins* v. *Railroad,* 155 Fed. 445.

CORPORATIONS.

A trust deed was executed, making A trustee to receive any dividends of certain stocks, whether in money or scrip of any description, and pay over the same to the tenant for life, with remainder to B or his heirs. Dividend obligations were issued. In a contest between the tenant for life and remainderman *held,* these obligations must be regarded as part of the income and therefore become the property of the tenant for life. (Robinson's Trust, 218 Pa. 481.)

Dividends: Scrip-Dividends: Income and Principal: Life Tenant: Remainderman

This decision is in line with Pennsylvania rulings. The leading case on this question is Earp's App. (28 Pa. 368), which, however, did not go to the extent of the principal case. In Earp's Appeal the enhanced value of the stock and accumulated profits prior to the testator's death was considered as belonging to the principal, and only such stock, issued from profits amassed subsequently, was regarded as income. In the principal case no distinction appears to be made in this respect. Both cases are *contra* to the English view. *Hoopes* v.

CORPORATIONS (Continued).

Rossiter, 1 McClel. 527; *in re Barton Trust*, L. R. 5 Eq., 238. Massachusetts courts, in following the English rule, have held that dividends of stock (to which dividend obligations are essentially similar, except for the lack of voting power), accrue to the remainderman. *Minot* v. *Paine*, 99 Mass. 101; *Balch* v. *Hullett*, 10 Gray, 408. While in New Jersey (*Van Doren* v. *Olden*, 19 N. J. L. 117), and in New York (*Clarkson* v. *Clarkson*, 18 Barb. 646; *Simpson* v. *Moore*, 18 Barb. 638; *Lowry* v. *Farmers' Loan and Trust Co.*, 172 N. Y. 137), the cases seem to adhere to the doctrine of the present case. However, in both the last mentioned jurisdictions, masters are appointed to determine the quantum of stock issued from increased value, from the income or earnings, and whether from earnings previous or since the investment.

Liability on Unpaid Stock Subscriptions

A creditor of a corporation being himself a stockholder therein, instituted proceedings against some only of the stockholders to enforce payment of their unpaid balances. It was objected that all must be found as defendants. *Held*, the plaintiff need not join all the stockholders as defendants, and the whole claim will be apportioned among those before the Court, the plaintiff paying his own pro rata share. *Blood* v. *La Serena Land & C. Co.*, 89 Pac. 1090 (Cal.) 1907. See note appearing elsewhere in this issue.

CRIMINAL LAW.

Evidence: Identification by Voice Alone

Witness was attacked at night from behind; she did not see her assailant, but he spoke a few short sentences. She became insensible without having seen him. Several days later a number of suspects were made to speak within the hearing, but not the sight of the witness. She identified the accused by his voice. He was a complete stranger. *Held*, this evidence admissible not as mere matter of opinion, but as direct and positive proof of a fact and its probative value is a question for the jury. The Supreme Court of Florida in *Mack* v. *State*, 44 Southern Reporter, 706.

The rest of the evidence on which the accused was convicted was purely circumstantial. The decision is supported by *Commonwealth* v. *Williams*, 105 Mass. 62, and *Commonwealth* v. *Hayes*, 138 Mass. 185, though in both these cases the witness had heard the accused speak at least once prior to commission of the crime.

EVIDENCE.

Two questions are raised in the case of *State* v. *Baruth*, 91 Pacific, 977 (Supreme Court of Washington, Oct. 10, 1907), as to the admissibility of statements against defendant made by the deceased—(1) while the defendant was present and hearing, and (2) while the defendant, accompanied by a third party, was in an adjoining room, the door between being closed, but heard what the deceased spoke—in fact commented to the third person on the statements being made by the deceased in the adjoining room. The Court held that the statements made while the defendant was in the presence of the deceased, under such circumstances as she would be reasonably expected to reply thereto, were admissible; but that all statements made by the deceased after the defendant went into the adjoining room with the third party were inadmissible even though she heard the further accusations, understood and commented on them.

Statements Calling for Denial: Presence of Defendant

While the general practice is to admit such evidence only where the accusations are made under such circumstances that the defendant would be reasonably expected to reply, yet this decision goes to the extreme in holding the evidence inadmissible under the facts of the case. The fact that the defendant listened to the statements of the deceased and commented thereon to the third person in her presence, thus showing that she both heard, understood and believed that the third person heard, should overcome the contrary presumption created by the physical barrier between the accuser and the defendant. Clearly the abuse of discretion by the lower Court in admitting such statements was not such as to give grounds for reversal of judgment by the appellate court.

GIFTS.

B gave his wife, the defendant, the contract of sale to T, of a certain plot of ground, together with the deed, directing her to place the same in escrow in her name, until the payment of the purchase money by T. The defendant did as directed. It was *held* that as between the defendant and her step-son this constituted a valid *donatio causa mortis*. (*Davie* v. *Davie*, 91 [Wash.] 950.) The points raised by the contestants of the gift were among others: (1) the insufficiency of the delivery; (2) the futility of an attempt to convey a gift of land orally. The second ground of contention was met by the rule of law, which, in a contract for the sale of real estate, operates as a conversion of the same, by changing the title of property in the vendor to a personal right to the pro-

Causa Mortis: Delivery

GIFTS (Continued).

ceeds of the sale (*King* v. *Ruchering*, 21 N. J. Eq. 599; *Bender* v. *Luckenback*, 162 Pa. 18).

The disposal of the question of delivery was perhaps less aptly or satisfactorily accomplished. In *Phinny* v. *State*, 36 Wash. 236, a case upon which the Court placed great stress, the chief reason for the decision was that inasmuch as the rights of a creditor were not at stake, the doctrine of constructive delivery should be given wide license and latitude. The Court in the principal case saw, therefore, in the handing over of the contract of sale and the deed, a constructive delivery, considering it preposterous to require the delivery of that which was not then in existence and could not, therefore, be physically transmitted. In *Waite* v. *Grubbs*, 43 Ore. 236, an oral gift of money buried at various places on a farm was held a good *donatio causa mortis*. The case under dicsussion, while in line with this, seems to carry the doctrine of constructive delivery to its ultimate bounds and beyond, *Pennington* v. *Gittings* (2 Gill & Johnson [Md.] 208).

Quaere: might not the principal case be upheld on the ground that the delivery of the written evidence of a chose in action will constitute a valid *donatio causa mortis*, regarding the contract of sale as such evidence?

INSURANCE.

Life Insurance: Beneficiary: Designation of Beneficiary: Vested Interests

The question arose as to whether A, the deceased, could, after designating his wife as the sole beneficiary of a policy upon his life, with no provision as to substitution or alteration after the death of the beneficiary change the same for the benefit of his daughter, the plaintiff. It was *held* that immediately upon the issuance of the policy the beneficiary interest vested in the wife, and could not be divested by A without her consent or that of her representatives after her decease. (*Smith* v. *Ins. Co*,. 34 Super. Pa. 72.)

This decision is in accord with the doctrine on this question. The instant a policy is issued the interest of the beneficiary becomes vested; *Glanz* v. *Gloeckler*, 104 Ill. 573; *Gould* v. *Emerson*, 99 Mass. 154; *Scott* v. *Dickson*, 108 Pa. 6.

Hani v. *German Life Insurance Co.*, 187 Pa. 276, coincides directly with the principal case.

The second portion of the decision has been followed generally; *Washington Central Bank* v. *Hume*, 128 U. S. Rep. 195; Anderson's Est. 85 Pa. 202.

One of the theories upon which an opposite conclusion has been reached is, that, this is a chose in action, which, like all

INSURANCE (Continued).

choses of the wife not reduced to possession during the joint lives of the husband and wife, passes to the former if he survive, and upon the death of the wife may be disposed of by him; *Olmsted* v. *Key*, 85 N. Y. 593. Another theory is that since the whole object in procuring the policy and paying the premiums was to protect the wife, upon her death the object ceasing, he could dispose of the beneficiary interest by will or otherwise; *Kernan* v. *Howard*, 23 Wis. 108. The last mentioned decisions have not, under statutes, been followed in their respective jurisdictions, 95 N. Y. Supplement, 780; *Canterby* v. *Ins. Co.*, 102 N. W. 1096.

MUNICIPAL CORPORATIONS.

Disposal of Surplus Electric Power

A city issued bonds under legislative authority for the purpose of establishing a public electric lighting system. The funds thus procured were insufficient, however, to extend the system throughout the city's territorial limits, but to the extent that the system was in operation the plant was adequate and there was surplus power. The city proposed to dispose of the surplus power to private parties for compensation, and to use current funds of the city to effectuate this purpose. A private company having previously received from the city a franchise to install a lighting plant and supply individuals with light and power, sought to restrain the city from thus disposing of its surplus electricity. *Held*, the city might so dispose of its surplus power. See note appearing elsewhere in this issue.

NEGLIGENCE.

Contributory Negligence of Child Under Ten

A child eight and one-half years of age was run down by a trolley car at a crossing, the evidence tending to show that the car was negligently operated. The child had crossed the track, and being frightened, turned back when the car was less than fifty feet away and was injured in attempting to recross the track.

Held, that the question of contributory negligence on the part of the child was for the jury, and that the trial Judge properly refused to non-suit the plaintiff.

The degree of care required of such a child is to be determined by *her* maturity and capacity; *Smith* v. *North Jersey St. Ry. Co.*, 67 Atl. Rep. 753. The same rule prevails else-

NEGLIGENCE (Continued).

where; *Railroad Co.* v. *Stout;* 84 U. S. 657; *Birge* v. *Gardiner,* 19 Conn. 507. In other jurisdictions the degree of care required is that exercised by *ordinarily careful* children of the same age under like circumstances; *Munn* v. *Reed,* 86 Mass. 431; *Strudgeon* v. *Village of Sand Beach,* 107 Mich. 496. The plaintiff is required to prove affirmatively that the child was in the exercise of due care; *Hayes* v. *Norcross,* 162 Mass. 546.

In cases where the degree of contributory negligence was no greater than in the case under discussion, the question was not allowed to go to the jury; *Hayes* v. *Norcross, supra; Miles v. Railroad Co.,* 4 Hughes (Fed.) 172.

Liability of Wholesaler to Consumer

A declaration averred that the defendant negligently put diseased ham into a can and sold the same to a retailer; that the plaintiff purchased the same and was made sick by eating the ham. Demurrer. *Held,* the demurrer was sustained on the ground that there is no implied warranty of wholesomeness by a manufacturer in the sale of food to a retail dealer; *Tomlinson* v. *Armour,* 65 Atl. Rep. 833 (N. J.). See note appearing elsewhere in this issue.

SALES.

Bailment or Conditional Sale; Parol Testimony

Plaintiff, after failure on part of his prospective vendee to complete a contract of sale for certain cars, leased in writing the cars, to the said prospective vendee, with right of purchase. These cars came into the hands of the defendant, claiming through the original lessee. *Held,* that the instruction of the Court below that the writing created a bailment and not a sale, submitting to them at the same time, the question whether the written agreement contained the real contract of the parties, or the transaction was really a sale, was correct; *American Car Co.* v. *R. R.,* 218 Pa. 519. The first part of the instruction was in line with the established principle that a lease with a right to purchase, passes no title to the property, but merely gives the right to purchase at the expiration of the lease; *Powell* v. *Eckels,* 96 Mich. 538. The instrument being unquestioned and unambiguous in itself, could not be varied by parol testimony; *Andrews* v. *Mann,* 92; Ill. 40. As the testimony admitted was not to vary the written instrument, but to show whether the instrument represented the real agreement between the parties, the conclusion reached by the Court seems correct.

WILLS.

Testamentary Capacity: Belief in Spiritualism as Evidence

A testator devised his property to trustees to establish and maintain a Spiritualist church and library. He was a Spiritualist of a pronounced type, believing in many impossible occurrences; *e. g.*, that his mother, long since dead, was in the habit of coming to his room and kissing him good-night, and that his son, who died in infancy, had grown to manhood in spirit land and had recently appeared before the testator and patted him on the cheek, etc. The belief was in accordance with the articles of faith of the Illinois Spiritualist Association, and the testator specifically denied in his will that he was influenced by "spirits," although strong evidence to the contrary was srown at the trial. *Held,* that there was not a scintilla of evidence of insane delusion which might have rendered the deceased incapable of testamentary capacity, nor of any undue influence, and that the question ought not to have been submitted to a jury; *Owen* v. *Crumbaugh,* 81 N. E. Rep. (Ill.), 1044.

That a mere belief in spiritualism does not, *ipso facto,* constitute an insane delusion, rendering the believer wanting in testamentary capacity, is well established; *in re Spencer,* 96 Cal. 448; *Brown* v. *Ward,* 53 Md. 376. The present case, however, is, it is believed, an extension of the doctrine which cannot be supported on principle or by authority. The conclusion on the facts is inconsistent with the tests laid down in the decision itself. See paragraphs 1 and 2, page 1051. An exactly opposite conclusion was reached by the Supreme Court of Indiana only a month earlier; *Steinkuehler* v. *Wempner,* 81 N. E. Rep. 482, and the same result was independently reached in Michigan a month later; *O'Dell* v. *Goff,* 112 N. W. 736. The reasoning of the courts of Indiana and Michigan is supported by the weight of authority; *Robinson* v. *Adams,* 62 Maine, 369; *Thompson* v. *Hawkes,* 14 Fed. 902.

On principle, it is submitted, no reason can be assigned for taking from the consideration of the jury evidence of delusions (in the mind of a testator), which cannot be accounted for on any rational basis, merely because such delusions are in harmony with, or even constitute, a certain religious belief.

For an extreme view, contrary to this case, see *Lyon* v. *Home,* L. R. (1868) 6 Eq. 653, 692.