## RECENT CASES

ARREST WITHOUT WARRANT—REASONABLE GROUNDS—SUSPICION OF FELONY—The defendant, a sheriff in Michigan, arrested the plaintiff without a warrant, on the strength of a telegram from the captain of detectives of South Bend, Indiana, saying, "I hold warrant for F. G. Kratzer charge making false statement, . . . arrest and advise." The charge against the plaintiff was later dismissed and he sued for false imprisonment. *Held:* The defendant had reasonable grounds to suspect that the plaintiff had committed a felony, and the arrest was therefore justified. *Kratzer v. Matthews*, 207 N. W. 982 (Mich., 1926).

An officer's right to arrest without a warrant one whom he suspects of being a fugitive from another State has seldom been passed upon by the courts. The weight of what little authority there is seems to be that the officer may arrest if he has reasonable grounds to believe a felony has been committed, and that the one he is arresting is the guilty person. *Matter of Henry*, 29 How. Pr. 185 (N. Y., 1865); *State v. Whittle*, 59 S. C. 297, 37 S. E. 923 (1900); *State v. Taylor*, 70 Vt. 1, 39 Atl. 447 (1898). No question of Federal law arises as it has been decided that the Constitution, Art. IV, Sec. 2, cl. 2, applies only to extradition and not to an arrest in advance of requisition. *Burton v. New York Central R. R.*, 245 U. S. 315 (1917). In order to afford reasonable grounds for his suspicion, the information to the officer must show that a felony has been committed. The mere statement that an offense has been committed is insufficient. *Cunningham v. Baker*, 104 Ala. 160, 16 So. 68 (1893); *Scott v. Eldridge*, 154 Mass. 25, 27 N. E. 677 (1891).

In the principal case the words "charge making false statement" state only that an offense, and not a felony, has been committed, as the dissenting opinion points out, and it is therefore submitted that the court erroneously held the telegram to be reasonable ground for the defendant to suspect that a felony had been committed.

BILLS AND NOTES—LIABILITY OF INDORSER—NOTE INDORSED AS COLLATERAL—The plaintiff sued defendant as endorser of a promissory note of a third party, pledged as collateral to secure a loan by the plaintiff to the defendant. As a partial defense, the defendant alleged the transferring of the note as collateral for the loan, the satisfaction of part of the loan, and a tender of the balance, which plaintiff declined, it being less than the amount of the note sued upon. *Held:* The plaintiff could not recover the full amount of the note. The personal endorsement by the defendant cannot be said to be collateral security to his already existing personal obligation for the debt. *Mercantile Factor's Corp. v. Warner Bros.*, 214 N. Y. Supp. 273 (1926).

It is well settled that the holder of paper given as collateral may recover the full amount due upon it, although this exceed the debt for which it was pledged, unless it is held subject to equitable defenses which the maker may have against his payee. *Packard v. Abell*, 113 N. Y. Supp. 1005 (1909); *Camden National Bank v. Fries-Breslin Co.*, 214 Pa. 395, 63 Atl. 1022 (1906);

JONES, COLLATERAL SECURITIES AND PLEDGES, 804 (3rd ed. 1912). Any surplus after the satisfaction of his debt will be held by him for the pledgor. *Ducasse v. Keyser*, 28 La. Ann. 419 (1876); *Plant Mfg. Co. v. Falvey*, 20 Wis. 200 (1866). But the court in the instant case held that this rule did not apply, because the plaintiff, by bringing suit against the debtor upon his endorsement instead of upon the debt, cannot convert the suit into a suit upon the collateral, for a debtor cannot by adding another obligation of his own to that which he is already obligated to pay, create a second obligation as collateral to the first. The court reasoned that a debtor's own personal obligation is no part of his personal property and cannot be the subject of such a pledge—is a liability and not an asset. *In re Waddell-Entz Co.*, 67 Conn. 324, 35 Atl. 257 (1896); *Dies v. Wilson County Bank*, 129 Tenn. 89, 165 S. W. 248 (1914); *Internat. Trust Co. v. Union Cattle Co.*, 3 Wyo. 803, 31 Pac. 408 (1892).

It is submitted that the decision in the instant case is correct. But it is illogical to say, as does the court here, that this is not a suit upon the collateral, because the note was given as collateral and the suit was upon defendant's endorsement of the note, and not upon the original debt. The real reason the plaintiff cannot recover the full amount of the note is that as between a debtor and a creditor, the creditor can only recover the amount owed to him. Circuity of action is thereby avoided and the rights of the parties effectually settled.

CARRIERS—CONSTITUTIONAL LAW—RIGHT OF PRIVATE CARRIER TO USE OF HIGHWAYS—The California Railroad Commission ordered a private carrier to cease operating its trucks on the highways unless, and until, the Commission should grant it a certificate of public convenience and necessity, as provided by Cal. Stats. 1917, 330, Cal. Codes and Gen. Laws 1917-21, 1680. By amendment to the original statute, the jurisdiction of the Commission had been extended to private carriers. Cal. Stats. 1919, p. 457, § 2. Upon application to review the order of the Commission, it was contended that the power of the state to prevent one from making the highway his place of business was limited to common carriers. *Held:* The state may completely prohibit the use of its highways by a private carrier. *Holmes v. Railroad Commission of California*, 242 Pac. 486 (Cal., 1925).

It is well settled that the right of a common carrier to use the public highways for the conduct of his business is not a right, but a privilege which the legislature may grant or withhold in its discretion. *Lutz v. New Orleans*, 235 Fed. 978 (D. C., 1916); *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516 (1917); *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781 (1915). The reason for the rule permitting the state to so exclude common carriers is not that they are common carriers, but that they are using the public highway as a private place of business or as the chief instrumentality in conducting such business. *Fifth Avenue Coach Co. v. New York*, 194 N. Y. 19, 86 N. E. 824 (1909); *Cummins v. Jones*, 79 Ore. 276, 155 Pac. 171 (1916); *Greene v. San Antonio*, 178 S. W. 6 (Tex. Civ. Ap., 1915).

In the principal case, the court held that the reason for exclusion applied with equal force to private carriers, and in so holding, maintained the position taken in an earlier decision, where the same court treated the question involved

as one of first impression. *Frost v. Railroad Commission*, 240 Pac. 26 (Cal., 1925). The language used in several cases would seem to indicate an accord with the principal case. *Cf. Le Blanc v. New Orleans*, 138 La. 243, 70 So. 212 (1915); *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18 (1917); *Ex parte Dickey, supra.* In one case, moreover, it has been impliedly held that a statute in many respects similar to the California statute applied to all persons whether they were common carriers or not. *State v. Price*, 122 Wash. 421, 210 Pac. 787 (1922).

A state may not, by mere legislative fiat or constitutional enactment, transmute a private carrier into a common carrier and impose upon it public duties, as such transmutation is beyond the police power of the state and violative of the Fourteenth Amendment in that it constitutes taking private property for public use without compensation. *Producers Trans. Co. v. Railroad Commission*, 251 U. S. 228 (1919); *Michigan Public Utilities Comm. v. Duke*, 266 U. S. 570 (1925); *Allen v. Railroad Commission*, 179 Cal. 68, 89, 175 Pac. 466 (1918). It is submitted that the effect of the holding in the principal case is to subject the private carrier to the same regulations and restrictions as a common carrier and so constitute such transmutation as is expressly forbidden.

CEMETERIES—EASEMENTS—VIOLATION BY BURIAL—The defendant cemetery association permitted the burial of a human body in one of the alleyways adjoining the plaintiff's burial lot, necessitating that the plaintiff walk over the grave to gain access to her lot. Plaintiff brings this action for the violation of her easement over the alleyway. *Held:* Plaintiff could recover. *Dunbar v. Oconomowac Cemetery Ass'n*, 207 N. W. 265 (Wis., 1926).

It is the general rule that the owner of a cemetery lot receives an easement of passage to his lot over the roads and alleys of the cemetery. *Seymour v. Page*, 33 Conn. 61 (1865); *Mt. Greenwood Cemetery Assn. v. Hildebrand*, 126 Ill App. 399 Ct. (1906); *Burke v. Wall*, 29 La. Ann. 38 (1877). In respect to the easement and the rights accruing thereunder, it is the accepted law that the owner of a right of way over the land of another is entitled only to a reasonable and usual enjoyment thereof in view of all the circumstances of the case, and the owner of the soil is entitled to all the rights and benefits of ownership consistent with the easement. *Burnham v. Nevins*, 144 Mass. 88, 10 N. E. 494 (1887); *Grinell Bros. v. Brown*, 205 Mich. 134, 171 N. W. 399 (1919); *Abney v. Twombly*, 39 R. I. 304, 97 Atl. 806 (1916).

Since the above rule bases the rights of the parties upon the test of reasonable use, the issue in the principal case resolves itself into the question of whether the use of land as a passage way is reasonably interfered with by the use of it as a burial ground. The principal case holds that, even though there was no physical obstruction, the defendant's act was a violation of the plaintiff's easement by reason of the prevailing sentiment among people not to pass over a spot where a body is interred. While no cases have been found sustaining a similar application of the rule, there is nothing in the general rule which limits the test to physical obstructions, and so there should be no objection to its application to a case where the interference results from acts which run counter to the prevailing public sentiments. It cannot be seriously doubted

that it is the prevailing sentiment that land in which bodies are buried is sacred and should not be trod upon. Viewed from that angle, the defendant's act certainly interfered with the plaintiff's easement.

This sentiment, moreover, has received judicial recognition. In several instances the courts have held that "the same land cannot properly be used for buriol lots and for a highway at the same time. The two uses are inconsistent with each other, and the one practically excludes the other." *Evergreen Cemetery Assn. v. City of New Haven*, 43 Conn. 234 (1875); *Ritter v. Crouch*, 71 W. Va. 221, 224, 76 S. E. 428, 429 (1912). The above statements, while not made in cases involving easements of a lot owner, show that the courts are in sympathy with the public view. It is therefore suggested that the court in the principal case arrived at a correct and just conclusion in the light of the unusual facts which confronted it.

DIVORCE—DEFENSES—REFUSAL OF SEXUAL INTERCOURSE—The plaintiff wife and the defendant husband were married by a civil ceremony, but entered into an agreement not to carry on sexual relations until the performance of a religious ceremony. Though the plaintiff had been willing to have the ceremony performed, the defendant had refused, and, as a result, they did not live with each other. Plaintiff then sued for separation and maintenance on ground of abandonment since defendant refused to furnish a home. The defense was the plaintiff's refusal of sexual intercourse. *Held:* Judgment for defendant. *Mirizio v. Mirizio*, 150 N. E. 605 (N. Y., 1926).

The New York Civil Practice Act, Laws 1920, c. 925, § 1163, provides: "The defendant in an action for separation may set up, in justification, the misconduct of the plaintiff." The Appellate Division in *Risk v. Risk*, 202 App. Div. 299, 195 N. Y. Supp. 536 (1922), held that the refusal of sexual intercourse was not such misconduct as was contemplated by the statute. It based its decision on the doctrine that acts justifying desertion must be such as would amount to a desertion so as to support a decree of divorce or separation. *Underwood v. Underwood*, 271 Fed. 553 (D. C., 1921); *Golden v. Golden*, 36 Pa. Super. 648 (1908). The great weight of authority is that refusal of sexual intercourse is not desertion as ground for divorce. *Jackson v. Jackson* [1924] P. 19; *Southwick v. Southwick*, 97 Mass. 327 (1867); *Cunningham v. Cunningham*, 60 Pa. Super. 624 (1915). The court expressly overruled *Risk v. Risk*, holding that the marriage was complete by the laws of New York, the wife had breached her obligations, and was therefore guilty of misconduct and of an act that justified desertion. The court is supported by the minority view. *Campbell v. Campbell*, 149 Mich. 147, 112 N. W. 481 (1907); *Parmly v. Parmly*, 90 N. J. Eq. 490, 106 Atl. 456 (1919). The latter case, however, qualified its holding by speaking of "unjustified" refusal. See note, 10 CORN. L. Q. 374 (1925).

One of the two dissenting opinions in the principal case regarded the refusal as justified. In opposition to the majority opinion it pointed out that while collateral agreements should on general grounds of public policy not be allowed to change the legal obligations arising out of marriage; see 74 U. OF PA. L. REV. 629 (1926); this agreement, based on religious and moral sentiments

which society wants to encourage, should be considered in determining which party was guilty of misconduct. Once the agreement is considered, the misconduct is not the plaintiff's but the defendant's. It is submitted that the reasoning of the dissenting opinion, which is that of the weight of authority, is to be preferred.

INTERSTATE COMMERCE—PLANT QUARANTINE—VALIDITY OF STATE LAW—A State statute empowered the State Director of Agriculture to establish such quarantine as might be necessary to keep out of the state diseased plants and injurious insects. Quarantine was established against the alfalfa weevil, and an injunction was granted to prohibit the carriage of alfalfa into the state from portions of surrounding states where the weevil was widely distributed. *Held:* Decree reversed. *Oregon-Washington R. R. & Nav. Co. v. Washington,* Supreme Court of the United States, March 1, 1926.

The power to regulate interstate commerce is plenary, and action by Congress within that power is supreme. *Gibbons v. Ogden,* 9 Wheat. 1 (U. S., 1824). Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, are exclusively within the Federal power, while those which are local in character may be regulated by the states until Congress enacts legislation which manifests the intention to regulate exclusively. *Cooley v. Phila. Board of Wardens,* 12 How. 299 (U. S., 1851). The establishment of quarantine under the police power of the state falls within the latter class. *Reid v. Colorado,* 187 U. S. 137 (1902). In situations which have arisen heretofore where Congress has enacted quarantine laws, they have been held to be in aid of similar state laws and not in conflict with them; *Compagnie Francaise v. Board of Health,* 186 U. S. 380, 396 (1901) (human beings); *Reid v. Colorado, supra* (animals); *Asbell v. Kansas,* 209 U. S. 251 (1908) (animals); although it is fundamental that the state quarantine law could not stand in case of a conflict with the Federal statute.

In the instant case, the Act of 1912, 37 STAT. 315, c. 308, as amended by the Act of 1917, 39 STAT. 1165, c. 179, was held to show the intention of Congress to take over, through the Department of Agriculture, entire control of injurious plant diseases and insects in interstate commerce, thereby excluding action by the states. Congress thus had created broader powers than in the similar cases cited above. Quarantine laws have been generally recognized as of a local nature, and have been left to the states to control. See *Morgan v. Louisiana,* 118 U. S. 455, 466 (1886). To place this control in "a far-off and perhaps supine federal bureau," is a departure the policy of which is doubtful.

NEGLIGENCE—LIABILITY OF EMPLOYER FOR NON-COMPLIANCE WITH CHILD LABOR ACT—EFFECT OF MISREPRESENTATION BY CHILD—The plaintiff, who was injured while working at defendant's printing press, was under sixteen years of age and was employed in violation of a statute making such employment unlawful in that occupation and requiring the filing of a certificate of age from the superintendent of schools. Plaintiff misrepresented his age to the defendant as being over sixteen but the defendant had not filed the required certificate.

Moreover, the plaintiff appeared to be over the required age. *Held:* Plaintiff may recover. *Knoxville News Co. v. Spitzer*, 279 S. W. 1043 (Tenn., 1926).

It is the unquestioned law in the vast majority of jurisdictions that the employment of a child contrary to the provisions of the Child Labor Act constitutes negligence *per se* in the employer towards the child. *Klicke v. Allegheny Steel Co.*, 200 Fed. 933 (C. C. A., 1912); *Mylett v. Montrose Cloak Co.*, 211 Mo. App. 635, 249 S. W. 97 (1923); *Stetz v. Mayer Boot Co.*, 163 Wis. 151, 156 N. W. 971 (1916). *Contra: Berdos v. Tremont Mills*, 209 Mass. 489, 95 N. E. 876 (1911), holding that the negligence is a matter of fact in each case and not negligence *per se*. Furthermore, by the great weight of authority such employment is *per se* the proximate cause of the injury. *Trust Co. v. Peterson Co.*, 219 Mich. 208, 189 N. W. 186 (1922); *Karpeles v. Hein*, 227 N. Y. 74, 124 N. E. 101 (1918); *Chabot v. Glass Co.*, 259 Pa. 504, 103 Atl. 283 (1918).

When the injured child is bringing the suit, the courts almost universally hold that his misrepresentations as to his age do not preclude recovery. The reasons given for these decisions are many: that the protection given by the statute is absolute and cannot be waived by the child; that since the statute was made to protect the child against his own immature judgment, his consent cannot be given to the risks of the employment which by his immature judgment he has decided to take; or that the policy of the statute to protect children would be defeated if the employer were allowed to set up this defense. *Beauchamp v. Sturges*, 250 Ill. 303, 95 N. E. 204 (1911); *Lesko v. Liondale Dye Co.*, 93 N. J. L. 4, 107 Atl. 275 (1919); *Krutlies v. Coal Co.*, 249 Pa. 162, 94 Atl. 459 (1915).

The basic theory of these decisions is undoubtedly the policy of protecting the life and health of children. Such a theory necessitates the taking of an objective view of the situation, an attitude which is most unusual in tort law. If the subjective view were taken, that is, the view which considers the actual state of mind of the parties, there is no doubt that the plaintiff would be estopped. This objective theory is an anomaly in the law of torts but one which now seems too well settled to be questioned.

SEDUCTION—CIVIL LIABILITY OF THE SEDUCER TO THE SEDUCED FEMALE—The defendant, a minor, seduced a girl under eighteen. The girl's mother, the plaintiff, sued on behalf of her daughter to recover damages for the seduction. *Held:* The plaintiff may recover. *Brunet v. Deshotels*, 107 So. 111 (La., 1926).

At common law a father could sue for the seduction of his daughter on the theory that as master he had suffered through the loss of her services. *Mercer v. Walmsley*, 5 Har. & J. 27 (Md., 1820); *Bartley v. Richtmyer*, 4 N. Y. 38 (1850). The seduced female herself, however, had no right of action, for she had consented to the intercourse and, impliedly, to any injury that might result. *Burks v. Shain*, 2 Bibb 341 (Ky., 1811); *Oberlin v. Upson*, 84 Ohio 111, 95 N. E. 511 (1911). Many states have now adopted statutes enabling a woman to sue for her own seduction. *Anthony v. Norton*, 60 Kan. 341, 56 Pac. 529 (1899); *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397 (1892). But there is no such statute in Louisiana, and it has been held there that the seduced woman cannot recover. *Carson v. Slattery*, 123 La. 825, 49 So. 586 (1909); *Overhultz v. Row*, 152 La. 10, 92 So. 716 (1922).

The principal case was distinguished from these cases on the ground that the girl was under eighteen years of age and by statute incapable of consenting to sexual intercourse. Laws of 1912, Act No. 192, 1 La. Const. and Stat. (Wolff, 1920) 398. A similar case was decided the same way in Oklahoma where also there was no statute permitting a woman to sue for her own seduction. *Priboth v. Haveron*, 41 Okla. 692, 139 Pac. 973 (1914). Recovery has also been allowed in actions for damages for the unlawful intercourse or for assault on the ground that the statutes make it impossible for the girl to consent. *Bishop v. Liston*, 112 Neb. 559, 199 N. W. 825 (1924); *Boyles v. Blankenhorn*, 168 App. Div. 388, 153 N. Y. Supp. 466 (1915), aff'd 220 N. Y. 624, 115 N. E. 443 (1917); *Altman v. Eckermann*, 132 S. W. 523 (Tex. Civ. App., 1910).

These cases are to be distinguished from those where two parties, in spite of their mutual consent, are allowed to recover against each other for injuries received in an affray in breach of the peace, and from those where a woman who has consented to an abortion upon herself recovers against the person who performed the illegal operation. In such cases, the interest of the state in preserving the peace, on the one hand, and the illegality of the operation on the other, are given as the reasons for recovery. See Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COL. L. REV. 819 (1924).

In two American jurisdictions and in England, prior to 1922, it was held that if consent had actually been given by a girl below the statutory age for consent, her seducer could not be convicted for assault with intent to rape, or indecent assault, since consent negatives the idea of assault. That is, her consent is valid, but cannot be pleaded as a defense in a criminal action of rape. *Regina v. Martin*, 9 Car. & P. 213 (Eng., 1839); *State v. Pickett*, 11 Nev. 255 (1876); *Smith v. State*, 12 Ohio St. 466 (1861). But see 60 L. R. Stat. 608, 12 and 13 Geo. V, c. 56, 1 (1922)), providing that consent is no defense to an action of indecent assault on an infant; and *Rex. v. Forde*, [1923] 2 K. B. 400. In these jurisdictions it would follow that the girl could not succeed in a civil action, though no cases on that point seem to have arisen. The general rule, however, is that the girl cannot consent to the assault any more than she can to the intercourse. *State v. Jackson*, 65 N. J. L., 105, 46 Atl. 764 (1900); *State v. Clark*, 77 Vt. 10, 58 Atl. 796 (1904).

Thus, fundamentally, the instant case is in accord with the general American view. It may be questioned, nevertheless, whether the judgment was properly given for the plaintiff, since Louisiana has no statute permitting a woman to sue for her own seduction.

WILLS—CONSTRUCTION—CONFLICT BETWEEN "PERSONAL" AND "SEIZED"—The testator left a will in which the following was the only dispositive provision: "I give and bequeath to X all my personal property to which I may die seized and possessed or to which I may be entitled at the time of my decease. I authorize her to sell and dispose of all and everything belonging to me and give title to same." The testator died owning real as well as personal property. *Held:* Both real and personal property passed under the will. *West v. West*, 213 N. Y. Supp. 480 (App. Div., 1926).

It is apparent that the will was the work of a layman who did not under-

stand the language he used. The problem presented to the court is to determine just what the testator intended by the language which he employed. *Phillip's Estate*, 205 Pa. 504, 55 Atl. 210 (1903); *Woelpper's Appeal*, 126 Pa. 562, 17 Atl. 870 (1889). In determining this intention all parts of the will are to be considered. By the heavy weight of authority, however, nothing outside the will may be considered since the inconsistency between the words "personal" and "seized" is patent. *Engelthaler v. Engelthaler*, 186 Ill. 230, 63 N. E. 669 (1918); *Bruce v. Bruce*, 90 N. J. Eq. 118, 105 Atl. 492 (1918); *Jennings v. Talbert*, 77 S. C. 454, 58 S. E. 420 (1907).

The words "seized and possessed or to which I may be entitled" with the power to sell everything, plus the fact that this is the only dispositive provision, seem to indicate that the testator's intention was to dispose of all his estate, real and personal. Such being the solution of the problem, the word "personal" is the one which cannot have its ordinary meaning. The court decided that it meant "own," reading the phrase "my own property." The word may equally well be omitted, as the court points out. Giving the word some such meaning as the court gives it, or omitting it, leaves the remaining parts of the will entirely consistent, passing all the property. The court is aided to some extent in arriving at these conclusions by a presumption against partial intestacy, which, in New York, arises from the mere fact of making a will. *Hadcox v. Cody*, 213 N. Y. 570, 108 N. E. 84 (1915). Any other construction of the will than the one above would cause an intestacy as to the real estate.

Cases like the present one present difficult problems, the solutions of which are not always free from doubt. Thus the construction in the principal case decides that the testator misunderstood the meaning of the word "personal" rather than the word "seized," which is most unlikely. Furthermore, the words "give and bequeath" are used, and these are appropriate to the disposition of personal property. It is, however, submitted that the intention of the testator was properly determined by the court, first, because, from the language which he used, he seems to have intended to dispose of all his property, and, secondly, because of the presumption against partial intestacy.