RECENT CASES

ASSAULT—DEFENSE OF PROPERTY—ATTACHMENT.—STATE v. SELENGUT, 95 ATL. (R. I.) 503.—*Held,* the owner of property resisting an officer, attaching his property as that of another, is guilty of assault and battery.

It is a general rule that one may use reasonable force in the protection of his property against a trespasser. *People v. Elixeira,* 123 Cal. 297; *Wright v. Southern Express Co.,* 80 Fed. 85. It is also well settled that an officer becomes a trespasser when he attempts to attach property without authority. *Lassiter v. State,* 163 S. W. (Tex.) 710; *State v. Hartley,* 75 Conn. 104. The officer acts at his peril, in attaching property, that he attach the right property. And the owner may use reasonable force to prevent the seizure of his property under an attachment against the property of another, under the rule laid down in *Comm. v. Kennard,* 8 Pick. (Mass.) 133; *Smith v. State,* 105 Ala. 136; *Wentworth v. People,* 5 Ill. 136. However, the rule as laid down in the principal case is followed in New York, Ohio, New Hampshire and Vermont. *People v. Hall,* 31 Hun. (N. Y.) 404; *Faris v. State,* 3 Ohio St. 159; *State v. Richardson,* 38 N. H. 208; *State v. Buchanan,* 17 Vt. 575, cited in instant case. The latter cases take the position that, when an officer takes property wrongfully, it may be replevied, and this is considered the wiser and more expedient course.

C. Y. B.

BILLS AND NOTES—PAROL EVIDENCE—AMBIGUITY—INDORSER.—OVERLAND AUTO CO. v. WINTERS ET AL., 180 S. W. (Mo.) 561.—A note reading "We promise to pay" was signed by one Winters; the appellant, his associate in business, signed on the back. *Held,* a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, and the legal effect of this blank endorsement cannot be varied by parol evidence. Ellison, P. J., *dissenting.*

The decision of the court is based upon section 63 of the Negotiable Instruments Law. Parol evidence is only admitted to show the real meaning where there is an ambiguity. *Couturie v. Roensch,* 134 S. W. (Tex.) 413; *Plonter's Chemical and Oil Co. v. Stearns,* 66 So. (Ala.) 699; *Harding v. Harding-Coor Co.,* 218 Fed. 715. An ambiguous "We promise" has been explained by parol evidence in *Dunbar Box and Lumber Co. v. Martin,* 103 N. Y. Supp. 91, and in *New England Electric Co. v. Shrok,* 145 Pac. (Cal.) 1002. In view of these decisions, the contention of the dissenting justice that the appellant could be found a co-maker by the explaining of the ambiguous "we promise" in the note seems to be well founded. See *Long v. Gwinn,* 66 So. (Ala.) 88. However, a strict construction of the Negotiable Instruments Law has been followed in most jurisdictions. *National Exch. Bank v. Lubram,* 29 R. I. 64; *Baumersh v. Kuntz,* 53 Fla. 340; *Burwell v. Gaylord,* 119 Minn. 426.

A. S. B.

CARRIERS—CONNECTING SERVICES—RELATION OF CARRIER AND PASSENGER AT JUNCTION-POINT.—TEXAS & PACIFIC RY. CO. v. BIGGER ET AL., 36 SUP. CT. REP. (U. S.) 127.—In an action for the death of a passenger from exposure at a junction-point, *held,* that under a contract to connect with another carrier for a destination beyond the contracting carrier's own route, the relation of carrier and passenger continues while the latter is waiting for connections, although the defendant's own portion of the transportation has been completed. White, C. J., and Van Devanter and McReynolds, J. J., *dissenting.*

The extraordinary liability of a carrier to a passenger ceases with the termination of the perils incident to the journey. *Smith v. Ry. Co.,* 29 Ore. 539. In the case of carriers providing a place of egress, the relation continues until the passenger has had a reasonable time and opportunity to avail himself of the means of egress in safety. *Ry. Co. v. Krouse,* 30 Ohio St. 222. Where the defendant's contract contemplates intermediate changes, the protection continues during the waiting interval. *Baldwin v. Ry. Co.,* 68 Conn. 567. It does not, however, extend to one waiting for a connection not within the contemplation of the defendant's contract. See *Powell v. Ry. Co.,* 220 Pa. St. 638. A carrier of passengers on a through-route coupon is generally held to assume responsibility only with respect to his own portion of the route. *Ry. Co. v. Jones,* 155 U. S. 333. It has been held, however, that in such cases his responsibility as a carrier continues until a similar responsibility has been assumed by the next succeeding carrier. *Knight v. Ry. Co.,* 56 Me. 234. Other authorities relieve him from the carrier's liability upon the safe delivery of the passenger at the junction-point. *Davis v. Ry. Co.,* 25 Tex. Civ. App. 8. The former view clearly advances beyond the doctrine of *Baldwin v. Ry. Co., supra,* but is supported by the imperfect analogy from connecting carriers of freight. *Ry. Co. v. Young,* 25 Neb. 651.

C. R. W.

COMMERCE—INTER-STATE COMMERCE COMMISSION—POWER TO REQUIRE PROVISION OF TANK-CARS.—PENN. RY. CO. V. U. S. ET AL., 227 FED. 911.—Under Interstate Commerce Act, Sect. 1, defining "transportation" as including cars, and requiring every carrier "to provide such transportation upon reasonable request therefor," *held,* that the Interstate Commerce Commission has no power to require a railroad company to provide tank cars for use by an oil refinery. Thompson, D. J., *dissenting.*

By the common law as applied to carriers in general, the duty to provide facilities was limited to the actual equipment. *Steamship Co. v. Work & Supply Co.,* 131 Ga. 831 (ship-owner). Special public callings, however, are bound to provide for reasonably foreseeable public needs. *Ry. Co. v. Marshall,* 74 Ark. 597. This involves the provision of such cars as may be the only suitable and proper kind for any regular species of traffic. *Forrester v. Ry. Co.,* 147 N. C. 553 (ventilated cars, for fruit). Long-established usage may enlarge this duty. *Steamship Co. v. Ry. Co.,* 104 Md. 693. Statutes relating in general terms to the provision of facili-

ties are presumably to be construed with reference to the common law. *Hardware Co. v. Ry. Co.*, 150 N. C. 703. Accordingly the provision under construction has been construed as extending only to the prevention of discrimination and not to the specification of proper facilities on grounds of expediency. *Elev. Co. v. Ry. Co.*, 110 Minn. 25, 36. The established power of the commission to regulate, with a view to equal treatment, the distribution of particular kinds of cars, should be distinguished from the principal case. *I. C. C. v. Ry. Co.*, 215 U. S. 452 (coal cars). Similarly the power to pass upon the expediency of practices affecting rates, in fixing rate schedules. *State v. Ry. Co.*, 47 Ohio St. 130 (tank cars v. bbl. packages).

C. R. W.

CONSTITUTIONAL LAW—DUE PROCESS—POLICE POWER—DISCRIMINATION AGAINST LABOR UNION.—JACKSON ET AL. V. BERGER, 110 N. E. (Ohio) 732.—*Held*, that a statute making it a criminal offense for an employer to discharge or threaten to discharge an employee because of affiliation with a labor organization is unconstitutional, being contrary to the Fourteenth Amendment.

The Fourteenth Amendment was adopted primarily for the protection of the negro, when it was discovered, that, although the Thirteenth Amendment had abolished slavery, legislation restricting his liberty was being enacted. *Slaughter House Cases*, 16 Wall. 36. However, it was later construed to include the securing of equal rights for all persons. *Ex parte Virginia*, 100 U. S. 339. Contractual rights, as a specie of property, or as included within the definition of liberty, are fully protected by the due process clauses. *Holden v. Hardy*, 169 U. S. 336. So the liberty of entering into labor contracts is within the constitutional guarantee. *Braceville Coal Co. v. People*, 147 Ill. 66. The Fourteenth Amendment did not take from the states the police powers reserved to them at the time of the adoption of the constitution. *Barbier v. Connolly*, 113 U. S. 27. The police power of a state is broad; its limits are difficult to determine. *Com. v. Alger*, 7 Cushing (Mass.) 84. Although it has been expanded, due to the changing conditions of society, yet it cannot be used as a cloak for oppressive and unjust legislation which makes unequal restrictions. *Holden v. Hardy*, supra; *Barbier v. Connolly*, supra. The Federal government was held to be unable to enact a law similar to that of the principal case, as contrary to the Fifth Amendment. *Adair v. U. S.*, 208 U. S. 161. So a state, by virtue of the Fourteenth Amendment, was placed under a similar restriction in the enactment of such a law. *Coppage v. Kansas*, 236 U. S. 1; *State ex rel. Smith v. Daniels*, 118 Minn. 155. The authorities are in accord that such legislation as was enacted in Ohio, in an effort to prevent discrimination against labor unions, is unconstitutional, being contrary to the Fourteenth Amendment in that it abridges the employer in his freedom of contract, whereas the employee is in no respect hampered. *Coppage v. Kansas, supra;* see XXIV YALE LAW JOURNAL, 676.

J. McD.

CONSTITUTIONAL LAW—LOCAL OPTION—POWER OF LEGISLATURE TO REGULATE AFTER VOTE BY COUNTY.—*Ex Parte Pricha,* 70 So. (Fla.) 406.—The constitution of Florida provided that the counties might determine whether the sale of intoxicants should be prohibited therein. After a county had voted to allow the sale, the legislature enacted that in those counties where the sale was permitted, no intoxicants could be sold in less quantities than one half pint, and then only in sealed receptacles, and not to be consumed on the premises. *Held,* such law is constitutional. Taylor, C. J., and Ellis, J., dissenting.

The legislature has the power to regulate the liquor traffic in the absence of a constitutional provision to the contrary. *People v. Schafrau,* 168 Mich. 324. The power to regulate is not the power to prohibit. *Andrews v. State,* 50 Tenn. 165; *Mernaugh v. City of Orlando,* 41 Fla. 433. Nor does the power to regulate confer power virtually to prohibit. *Ex parte Patterson,* 41 Tex. Cr. Rep. 256. As this statute neither prohibits nor virtually prohibits the liquor traffic, it seems that it is a valid exercise of the police power. The construction put upon this local option clause of the constitution—that it merely gives the power to decide whether or not the sale shall be absolutely prohibited—is in accord with that of other courts. The Kentucky court in construing a similar statute, says in *Board of Trustees v. Scott,* 125 Ky. 545: "The only thing that ever has been submitted is: Shall the sale be prohibited? If the vote is that it shall not be, then the sale is nevertheless subject to police regulation by the state. . . . . In fine, the effect of a 'wet' vote has always been construed to be that the legislature is then left a free hand to deal with the traffic in such community as may seem to it to be expedient."

R. C. W.

CONDEMNATION PROCEEDINGS—PROSECUTION OF APPEAL.—IN MATTER OF CITY OF NEW YORK V. GREEN, NEW YORK LAW JOURNAL, JAN. 19, 1916.—*Held,* In condemnation proceedings, the owner of the land may accept payment of award and still prosecute an appeal on ground that award was insufficient.

It is settled, as a general rule, that after a party receives payment of a judgment or decree, he cannot appeal therefrom, or prosecute an appeal theretofore taken. *Ducy v. Patterson,* 119 Am. St. Rep. (Colo.) 284; *People ex rel. Dunn v. Burns,* 78 Cal. 645. The reasons for the general rule as tersely stated in *Paine v. Woolley,* 80 Ky. 568 are as follows: "If the collection of the judgment be right, the appeal must be wrong, and if the appeal is well taken, the judgment ought not to have been collected." There is an exception to the general rule, namely, where the amount found in favor of the litigant by the judgment or decree is due him in any event, the only question to be determined by the appellate court is whether or not he is to receive a greater or an additional sum; then his acceptance of the amount awarded him by the judgment which he seeks to review does not preclude him from prosecuting a writ of error to obtain more. *Reynes v. Dumont,* 130 U. S. 354; *Jackson v. Brockton,* 182 Mass. 26. The distinction between the cases in which the acceptance of the fruits of the judgment bars the appeal, and those that do not is, whether or not

there is a possibility that the appellant will have to refund part of the amount received. In the principal case there is a possibility that the commissioners, upon a second appraisal, will make the award smaller, which would seem to place the principal case in the class barred by acceptance of the fruits of the judgment.

C. Y. B.

FOOD—DISEASED MEAT—ACTION AGAINST PACKER—DEFENSE—INSPECTION.—CATANI V. SWIFT & CO., 95 ATL. (PA.) 931.—In an action against the packer to recover for injury resulting to a consumer from the diseased condition of meat sold to the consumer by a dealer in the original packages, *held,* it is not defense that the meat was inspected and approved by federal inspectors under Act of Congress (U. S. Comp. St. 1913, Sects. 8717-8728) authorizing such inspection. Brown, C. J., *dissenting.*

A statute of Pennsylvania provided that "in every sale of meats, lard and other articles used for food . . . there shall be an implied contract that the goods are sound and fit for household consumption." P. L. 87, 3 P. & L. Dig., 2d E., p. 6727. The federal act of March, 1907 (34 U. S. Stat. 1256), provides that "any person who shall sell or offer for sale or transportation for interstate or foreign commerce, any meat or meat food products which are diseased . . . or otherwise unfit for human food, knowing such meat food products are intended for human consumption, shall be guilty of a misdemeanor." Neither of these statutes says anything about negligence.

Independently of statute, however, there are many cases which allow the ultimate consumer to recover against the packer or manufacturer. Manufacturer of pies, *Parks v. Yost Pie Co.,* 93 Kan. 334, L. R. A. 1915 C. 179; bottler of coca-cola, *Jackson Bottling Co. v. Chapman,* 64 So. (Miss.) 791; pork packer held liable to ultimate consumer for injuries resulting from packer's failure to inspect, *Ketterer v. Armour & Co.,* 200 Fed. 322. Some cases base the right of the ultimate consumer to recover on an implied warranty of the manufacturer. *Chapman v. Roggenkamp,* 182 Ill. App. 117. "And such warranty is available to all who may be damaged, including the retailer as well as the ultimate consumer." *Mazetti v. Armour & Co.,* 75 Wash. 622. But it has been held that retailers and innkeepers and victuallers furnishing such goods for food are not liable for the injuries resulting, though the food is in fact poisonous, *Trafton v. Davis,* 110 Me. 318 (i. e., in the absence of evidence of negligence on the retailer's part); *Valeri v. Pullman Co.,* 218 Fed. 519. *Contra, Doyle v. Fuerst & Kraemer,* 129 La. 838. The decision of the principal case seems clearly right on principle and under the statutes involved.

S. B.

JUSTICES OF THE PEACE—APPEAL—JURISDICTION—FICTITIOUS SET-OFF AND COUNTERCLAIM.—ROSE V. O'BRIEN ET AL., 87 S. E. (W. VA.) 378.—*Held,* That a defendant in an action before a justice of the peace is not permitted to file a fictitious and unproved set-off or counterclaim, and thereby raise the amount in controversy so as to bring it within the appellate jurisdiction of a circuit or superior court.

It is a fairly well established rule of law that a defendant may set up a bona fide counterclaim and increase the amount in controversy up to the amount where an appeal may be had. *Hutts v. Williams,* 55 Ind. 237; *Parks v. Hulme,* 33 Ky. (3 Dana) 499. *Contra, Ross v. Evans,* 30 Minn. 206. But to entitle the defendant to an appeal he must offer evidence in the trial before the justice of the peace to support it, else he will be presumed to have abandoned it. *Kurtz v. Hoffman,* 65 Iowa 260; *Texas & N. O. R. R. Co. v. Hook,* 30 Tex. Civil App. 325. If it clearly appear, however, that the defendant has introduced a fictitious counterclaim for the manifestly obvious purpose of increasing the amount in controversy so as to bring it within the limit of appeal, no appeal will be allowed. *Manchester Paper-Mills Co. v. Heth,* 18 S. E. (Va.) 189; *Steele v. Walton,* 3 Pa. Co. Ct. Rep. 211; *Northern Pacific Rwy. Co. v. Booth,* 152 U. S. 671. Furthermore, where it is shown that an appeal from a justice's court is improperly pending before a county court, the latter may and should refuse as a matter of law to take jurisdiction of it. *Edwards v. Mandemack,* 13 Ill. 633; *Chicago & N. W. Rwy. Co. v. Weaver,* 112 Iowa, 101. Bad faith on part of defendant can never be presumed, however, and the counterclaim must be patently fictitious before a court will dismiss it. *Bickford v. Travelers Ins. Co.,* 67 Vt. 418; *Filler v. Tyler,* 91 Va. 458. The rule laid down in the principal case denying an appeal on a fictitious counterclaim, is clearly correct.

L. W. B.

REWARDS—COMPLIANCE WITH CONDITIONS.—SIMPSON V. TWENTY-EIGHTH ST. CO., 156 N. Y. Supp. 87.—A reward was offered for lost rings, "no questions asked," if returned to the office of the Prince George Hotel. The plaintiff gave information to the effect that she had seen the rings taken, and personally identified the taker, thus leading to criminal proceedings by which the rings were recovered. *Held,* that plaintiff was not entitled to the reward. Bijur, J., *dissenting.*

An offer of reward is governed by the ordinary rules of contract: namely, that the offerer may prescribe what terms he chooses, and there must be substantial compliance with such terms. *Stair v. Heska Amone Congregation,* 159 S. W. (Tenn.) 840; *Zwolanek v. Baker Mfg. Co.,* 150 Wis. 517. The precise situation in the principal case is infrequent, if not unique, inasmuch as such an offer is intended to induce the supposed wrongdoer to return the goods and consequently the question whether performance has taken place does not usually arise. Here there is much similarity to those cases where a reward is offered for the "arrest and conviction" of an offender. On this point, courts differ as to what constitutes substantial compliance. According to one line of holdings, the reward is not earned by any amount of information alone, so long as the plaintiff does not himself do the acts of arresting and prosecuting. *Chambers v. Ogle,* 174 S. W. (Ark.) 532; *McClaughry v. King,* 79 C. C. A. (Ark.) 91; *Williams v. West Chicago St. R. Co.,* 191 Ill. 610. The opposite view is taken in some decisions, which declare that procuring the arrest and conviction by giving the necessary information is sufficient performance

to entitle to recovery. *Bloomfield v. Maloney,* 142 N. W. (Mich.) 785; *Elkins v. Board of Commissioners of Wyandotte County,* 91 Kan. 518; *Stone v. Wickliffe,* 106 Ky. 252. Even if the criminal is killed, resisting arrest, and never brought to trial. *Smith v. State,* 151 Pac. (Nev.) 512. The principal case is quite evidently decided along the stricter lines of the former of the above groups; dissenting Judge Bijur seeming to prefer the interpretation of the second. Clearly the dominant object of the offer—the return of the rings—has been achieved by the plaintiff. Nevertheless *she* did not return them, nor cause them to be returned *to the office,* as stipulated. Furthermore, though doing all that lay within her power, she did not herself complete the process she set in motion.

C. B.

TRUSTS—CONSTRUCTIVE TRUST—DESTRUCTION OF CODICIL BY TESTATOR RELYING ON PROMISE OF DEVISEE.—THARP V. THARP, 40 LAW TIMES, 111.—Testator limited his estate to use of defendant for life, with power of appointment in defendant, and in default of appointment to plaintiff. Subsequently he executed a codicil to the will omitting the power of appointment. Defendant promised the testator's wife that he would appoint to the plaintiff, if the power was given him. Testator, relying on this promise, destroyed the codicil. Defendant appointed to himself. *Held,* the plaintiff is entitled to a declaration that defendant holds for him.

Whenever title to realty or personalty is obtained by one under such circumstances as would render his retention of it a fraud on another who in justice is entitled thereto, equity will impress the subject matter with a trust. *Gilpatrick v. Glidden,* 81 Me. 137; *Bacon v. Bacon,* 150 Cal. 477. Where one, on the making of a will, or thereafter, expressly or impliedly promises testator that he will hold for a particular purpose, and the testator relies thereon, equity will raise a trust to enforce the promise. *Jones v. Badley,* L. R. 3 Ch. 362; *Benbrook et al. v. Yancy,* 96 Miss. 536; *Whitehouse v. Bolster,* 95 Me. 458. Where an heir by his promises to use the property in a particular manner prevents the making of a will, whereby an intestacy results, equity will create a trust. *Grant v. Bradstreet,* 87 Me. 583. The same is held where one prevents a change in a will. *Dowd v. Tucker,* 41 Conn. 197. Actual fraudulent intent at the time of the representation is not necessary. *Powell v. Yearance,* 73 N. J. Eq. 117. The novelty of the principal case lies in the fact that a power of appointment was left in the will at the instance of the donee, while in the cases cited a direct gift of property was either made or withheld at the instance of the person who expected to reap the benefits.

R. C. W.

WILLS—ABROGATION BY AGREEMENT—PRESUMPTION—LAPSE OF TIME.—HENDERSON V. BISHOP, 95 ATL. (PA.) 663.—Where decedent's widow and heirs, claiming that they were the only parties interested in his estate, agreed in a writing, which was duly recorded, that the will should be destroyed and that they should take under the intestate laws, and for more than thirty years thereafter neither the agreement nor the pos-

session of those holding under it was questioned, *held:* the presumption was that all parties interested in the will had signed the agreement. Moschzisker, J., *dissenting.*

A contract between the beneficiaries of a will, renouncing the provisions of the will and providing for a division of the property is valid and enforceable. *In re Stone's Estate,* 109 N. W. (Iowa) 455. Also an executory agreement between the heirs founded on mutual and valuable consideration for a settlement of their testator's estate is enforceable. *Kirkman v. Hodgin,* 151 N. C. 588. And it is a natural corollary that both the beneficiaries under a will and the testator's heirs may make a valid agreement *inter se* disposing of the property contrary to the provisions of the will. *Apgar v. Connell,* 79 Misc. Rep. (N. Y.) 531. Where the will is destroyed by agreement of all the parties in interest, the result is to vest an undivided interest in the heirs at law, even without a written contract to that effect. *Dueringer v. Klocke,* 149 N. Y. Supp. 332. But on the other hand it has been held in Wisconsin that parties interested in a testate estate are not competent to substitute their will for that of the testator and a court is powerless to give validity to any such scheme. *Cowie v. Strohmeyer,* 136 N. W. (Wis.) 956. And an agreement between beneficiaries of a will, which destroys a valid trust thereby created and allows the property to come directly to the cestui, thus radically upsetting the testator's scheme, cannot be enforced. *Brady v. Hanson,* 68 Misc. Rep. (N. Y.) 198. The point as to a presumption arising by mere length of tenure of those holding under such an agreement as this—i. e., a presumption that all parties interested in the will had signed the agreement—seems to be new. From the facts of the case it would seem that the statute of limitations should be decisive of the question, without a reference to any presumptions of any kind.

S. B.