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**TORTS—MAY A COMMON CARRIER REFUSE TRANSPORTA-
TION TO A PASSENGER BELIEVING HIM TO BE DRUNK
WHEN IN FACT HE HAS NOT BEEN DRINKING AT ALL?**

The case of *Southeastern Greyhound Lines v. Klatt*,¹ decided by the Kentucky Court of Appeals, permitted the plaintiff to recover damages for humiliation and injured feelings as a result of being refused passage on one of the defendant's busses. The refusal was based upon the driver's belief that the plaintiff was intoxicated. The jury was instructed to the effect that if it found that the plaintiff was sober or not so intoxicated as to make him an unfit passenger, it was to find for the plaintiff. An additional instruction was given to the effect that if the defendant reasonably believed that the plaintiff was intoxicated so as to make him an unfit passenger, the jury should find for the defendant.

These instructions may have been contradictory if the first meant that if in fact the plaintiff was not intoxicated the defendant should be liable and if the second instruction meant that if the defendant reasonably believed that the plaintiff was intoxicated it should be absolved from liability. So, the jury may have based its decision for the plaintiff on one of two basic findings of fact:

- (1) The plaintiff was not in fact drunk or not so drunk as to make him an unfit passenger.
- (2) The defendant did not have reasonable grounds to believe that the plaintiff was so far intoxicated as to make him an unfit passenger.

Whatever the jury's finding, upon which it based its verdict for the plaintiff, the Court of Appeals refused to interfere with it. The reason given was that the evidence was conflicting, justifying a submission of the case to the jury, and that, "The recovery in the case before us does not rest upon a mere scintilla."²

In affirming this decision the court did not discuss the problem of the right of a carrier to refuse transportation. And in this respect, for what the case is authority is a matter of conjecture. It might be authority for the proposition that a carrier is liable for damages resulting from an unreasonable refusal of transportation. On the other hand, the court may have laid down the proposition that if a carrier mistakenly believes one to be in an unfit condition for transportation

¹ 300 Ky. 505, 189 S.W. 2d 731 (1945)

² The instructions according to the court were copied from a prior case, *Chesapeake & Ohio Railway Co. v. Gatewood*, 155 Ky. 102, 159 S.W. 660 (1913)

³ *Supra*, note 1.

it is liable though the belief was a reasonable one. If so, the case may be open to severe criticism.

Whatever the case held, the factual situation involved raises an important problem. Suppose the belief of drunkenness, though mistaken, was a reasonable one? Should the carrier nevertheless be liable if damages can be shown? If the question is answered in the affirmative, then it may be concluded that if a carrier refuses transportation it does so at its peril.

At common law carriers were under a general obligation to receive and carry all proper persons who presented themselves for that purpose, and who paid or tendered a reasonable compensation for the service. The reason for this rule was the public nature of the employment independent of any contractual relationship.⁴ The law in Kentucky as established by the cases, has not deviated from this original concept; and it has frequently been stated as being one of the bases of the Court's decision. Quite naturally difficulty has arisen over the term "proper person," since, as an incident to their general obligations to the public, common carriers have been given the right and duty to make reasonable and proper rules for the conduct of their business, so that it depends largely upon the type of carrier involved as to the interpretation given of a "proper person." Some persons may be excluded as being "improper" by an airplane carrier,⁵ who would not be excluded by a railroad carrier. In general, however, a proper person may be defined as one whose appearance, conduct, and condition apparently entitle him to be carried as a passenger. In its appraisal of the passenger, the carrier is bound to exercise a reasonable discretion, according to the conditions as they appear at the time.

It is well established that a carrier is not an insurer of the passenger's safety but is liable to its passengers for the negligent acts and omissions to act on the part of its servants.⁶ However, in proving negligence there is involved the essential element that the carrier or its servants had knowledge, or with proper care could have had knowledge, that the wrong was imminent or likely to occur.⁷ In this lies a basis for the right of a carrier to refuse transportation to a person appraised to be an "improper person" according to the reason-

⁴ 3 THOMPSON, NEGLIGENCE (1902) sec. 2541.

Reesor v Paducah & Illinois Ferry Company, 152 Ky. 220, 153 S. W. 222 (1913) Bogard's Adm'r. v Illinois Central Railroad Co., 144 Ky. 649, 139 S.W. 855 (1911)

⁵ Casteel v American Airways, Inc., 261 Ky. 818, 88 S.W. 2d 976 (1935)

Bogard's Adm'r. v Illinois Central Railroad Co., 144 Ky. 649, 139 S.W. 855 (1911) 3 THOMPSON, NEGLIGENCE (1902) sec. 3225.

⁶ Louisville & Nashville Railroad Company v Bell, 166 Ky. 400, 408, 179 S.W. 400, 403 (1915)

⁷ Clark's Adm'r. v Louisville & Nashville R. R. Co., 20 Ky. L. Rep. 1839, 1841, 49 S.W. 1120 (1899)

able rules and regulations of the carrier. One would hardly presume to hold a carrier liable for the acts of an "improper person" and yet deny to it the right to reject such a person, when, by the exercise of reasonable prudence and discretion, the person is believed to be in no fit condition to be carried and in all probability will be guilty of some misconduct.

In this state, not only have the rights of a carrier been strictly defined, but the law has gone so far as to make the conductor of a train the agent of the Commonwealth in order to afford the passengers on the train protection beyond that owed by the carrier.¹⁰ By legislative enactment, the Legislature has forbidden the drinking of intoxicants and has also forbidden boisterous and riotous conduct aboard common carriers while it has imposed upon the carrier the duty of enforcing such law.¹¹ By virtue of the age-old concept of a common carrier's general duty to the traveling public, a common carrier is not deprived of the right and opportunity to protect the lives and general well being of its orderly passengers, and in so doing to protect itself from liability for acts of misconduct by one passenger against a fellow passenger.

The court in recognizing the seriousness of this problem, stated in *Loupsville & Nashville Railroad Company v. Bell*,¹² with reference to the above mentioned statutes, that, " we have given to these sections of the statutes a liberal construction to promote the purpose of their enactment, which was to protect well-behaved and orderly passengers from violence, indignity or insult at the hands of other passengers, and to place in the power of the carrier adequate means to protect its passengers without subjecting itself to liability if it act with reasonable prudence and discretion." It should be noted that, by such language, the court excluded any unwarranted or arbitrary refusals of passengers by carriers under a color of right.

The right of a common carrier to refuse to carry a passenger has been upheld in cases where the person desiring transportation was only so intoxicated as to merely "affect his conduct,"¹³ and where the person was intoxicated and had been guilty of misconduct on a previous occasion.¹⁴ But, on the other hand, the court held in *Reasor v. Paducah & Illinois Ferry Company*,¹⁵ that the mere fact that a passenger had been guilty of misconduct on a previous trip was not sufficient ground to justify the carrier in refusing him passage, if at

¹⁰ *Chesapeake & Ohio Railway Company v. Pruitt*, 157 Ky 133, 138, 162 S.W 781, 783 (1914).

¹¹ Ky. R. S. (1946) secs. 244.020, 277.260.

¹² 166 Ky 400, 408, 179 S.W 400, 403 (1915)

¹³ *Chesapeake & Ohio Railway Co. v. Selsor*, 142 Ky 163, 134 S.W 143 (1911).

¹⁴ *L. & N. R. R. Co. v McNally* 31 Ky L. Rep. 1357, 105 S.W 124 (1907).

¹⁵ 152 Ky 220, 153 S.W 222 (1913).

the time he applied to the carrier for passage he was sober and conducting himself in a decent and orderly manner.

Mention here has been made of only a few of the cases classifying the so-called "improper person" as decided by the Kentucky courts. However, the carrier's right to refuse transportation has been further upheld where the person desiring transportation was in the advanced stages of tuberculosis and was adjudged by a doctor to be too sick to travel, and where carriage of such a passenger would delay the carrier and cause undue inconvenience to the other passengers.¹⁶ The rule was further applied when the passenger was a blind man traveling without an attendant, thus depending upon chance acquaintances or the carrier's servants for aid.¹⁷ Further still, this right to refuse is extended to cover all persons riding for criminal purposes,¹⁸ or anyone riding for any purpose detrimental to the interests of the carrier, such as a competitor in business.¹⁹

However, the specific problem to be discussed is the alleged intoxicated person, and the brief resume above is intended only as a background for the consideration of this problem. On the basis of what has been said, the general rule might be stated that a carrier is under no duty to accept a person as a passenger who is intoxicated to such an extent as to render it probable that he will be dangerous or disagreeable and annoying to the other passengers. This rule imposes upon the carrier the duty to determine whether the applicant is a proper person to be carried. What is to be the criterion for such a determination? In most cases the question will have to be determined, as stated above, by the appearance, conduct, and condition of the applicant, and in occasional instances by the personal knowledge which the servant of the carrier may have of the person.

There is little dispute that the reasons which the law recognizes as sufficient to justify a common carrier in refusing to receive and carry passengers willing to pay the fare relate to the character or condition of the proposed passenger, or to the inability of the carrier to accommodate the person due to lack of room in the vehicle. Thus, where the carrier, from the appearance, conduct, or condition of the applicant has reasonable cause to believe, and in good faith does believe, that the safety or convenience of its passengers will be infringed upon by a particular person who presents himself for transportation if he is carried, it may refuse to accept him and is not required to wait until events have justified its belief. From this state-

¹⁶ *Casteel v American Airways, Inc.*, 261 Ky. 818, 88 S.W. 2d 976 (1935).

¹⁷ *Illinois Central Ry. Co. v. Allen*, 121 Ky. 138, 89 S.W. 150 (1905).

¹⁸ *Thurston v Union Pacific R. R.*, 4 Dill. 321, Fed. Case No. 14,019 (1877)

¹⁹ *Barney v. The Oyster Bay and Huntington Steamboat Co.*, 67 N.Y. 301, 23 Am. R. 115 (1876).

ment it can be concluded that it is not the fact of mere intoxication that disables a person from being carried, but rather the degree of intoxication and its effect upon the individual, and whether such intoxication tends to make him either dangerous or obnoxious to the other passengers. It is believed that herein lies the solution to the problem. It may be assumed that carriers do not make unwarranted and arbitrary refusals to properly qualified passengers. This assumption is based upon the character of the service offered by common carriers and upon the fact that it is essential to their business that they act at all times with reasonable prudence and discretion. So, it may be further assumed that in any case of refusal, the carrier has some grounds, however slight, for its refusal. We have seen that mere intoxication is not necessarily the disabling factor, but may be only one of many reasons for the applicant's condition. It has been pointed out that a carrier must base its right to refuse solely upon the appearance, conduct, and condition of the applicant at the time he presents himself for transportation. The rule in the *Bogard* case, says in effect that a carrier may refuse to carry passengers whose conditions or conduct from intoxication or "other things" is such as to make their presence on the train "dangerous" to the lives and health of the other passengers.²⁹ The writer believes that the law will permit a carrier to refuse to carry a passenger whom he reasonably believes to be intoxicated and in no fit condition to be carried, although, in fact, he has not been drinking at all. In any case of refusal, the main question is whether the refusal is *reasonable under the existing circumstances*. This question is properly one for the consideration of the jury under proper instructions. Thus this right of refusal should be subject only to a test similar to this: If the servant of the carrier has reasonable grounds to believe, and in good faith does believe, that the passenger is not in a fit and proper condition to be carried, and that in all probability he will be a source of danger either to himself or to the other passengers, or will at least unreasonably annoy or offend them, the carrier should be justified in refusing such a person transportation. In this test, justice is assured by the requirements of reasonable grounds and actions in good faith on the part of the carrier. Intoxication will only be considered in the light of its effect upon the individual and whether its effects were sufficient to satisfy the "reasonable grounds" necessary under the test given above.

Carriers seek by reasonable and necessary rules and regulations, to render service to the public more safe and efficient. To accomplish this they hold themselves out only as carriers of goods and persons which are in a fit condition to be carried. No one would presume to hold a carrier liable for refusing to carry a load of dynamite improperly packaged, so by analogy, no one should presume to hold a

²⁹ *Supra*, note 6.

carrier liable for refusing to carry a load of "dynamite" in the person of a passenger who has reasonably been appraised to be an improper person for carriage.

In exercising their right to refuse to carry "improper persons" carriers are held to a greater standard of care than in exercising their right to eject passengers. The right to eject is generally based upon statutory grounds, and in all such cases the reason for such ejection had already accrued. On the other hand, the right of refusal is based on more abstract grounds, since no actual misconduct has accrued, but merely appears imminent. Therefore, it is essential that carriers be given a wide discretion in their enactment of reasonable rules and regulations and the enforcement of them if the traveling public is to be protected from humiliation, annoyance, discomfort, and mental pain, not to mention physical injury, at the hands of the less considerate passengers.

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