Conveyances of Land Identified by Monuments of Appreciable Width

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damages in such cases is peculiarly within the province of the jury, and that the court would not set aside the verdict as excessive unless it was plainly the result of passion or prejudice. In view of the foregoing holdings it would seem that remittitur is improper in personal injury cases, since a trial court abuses its discretion by setting aside a verdict as excessive unless it is so flagrantly excessive as to appear the result of passion or prejudice, and if the latter is present a remission will not cure the defect. However, remittitur was not in issue in these cases.

Although the decisions of this State have settled only a few problems concerning remittitur, the following conclusions are ventured.

(a) The trial court may on its own motion without the assent of the recovering party remit that portion of the verdict representing separable items, the amounts of which are known or are ascertainable, where those items were erroneously submitted to the jury.

(b) The defendant must be granted a new trial where the verdict is flagrantly against the evidence, or where there is proof of ample prejudice, passion, or indifference on the part of the jury.

(c) It is uncertain whether the party liable may except to a voluntary remittitur in a case of unliquidated damages where the court finds no fault with the verdict except that the jury's estimate of the damages exceeds the amount it thinks might properly have been found.

CLARENCE CORNELIUS.

CONVEYANCES OF LAND IDENTIFIED BY MONUMENTS OF APPRECIABLE WIDTH

When property is conveyed and identified by monuments of appreciable width, the question arises as to the particular part of the monument that is to control. The problem is raised most frequently when the boundary is a highway, private way, or water course, and it is the purpose of this note to discuss briefly the construction to be put upon such a conveyance in Kentucky.

In the case of Blalock v. Atwood, the court said that a conveyance of land bounded on a public way carried with it the fee to the center of such way, unless a contrary intention appeared upon the face of the instrument or from the circumstances. The court gave the reason for such a holding as being that the purchaser of the lot, doubtless, would not have purchased it but for the usual benefits of the street; therefore,

he paid an increased price for the lot. The usual benefits are the right to build houses fronting on the street, with windows, doors, and door steps that may extend beyond the line of the street, and the right to install vaults under the sidewalk. Also if the grantor retained the property right in the street up to the dividing line between the street and the lot, he could deprive the grantee of the right of ingress and exit from the street. If such were true, the grantor could deprive the grantee of the right to light and air, to plant trees, and to erect awnings. In the case of *Schnieder v. Jacob*, the court gave as the reason for such a holding in regard to highways that it is against public policy to allow hostile landowners to own the small strips of land that would be created upon the abandonment of a highway.

The real question involved is whether or not there has been sufficient expression of intention to exclude the highway or street on the part of the grantor, as the instrument is construed in favor of the grantee. In the *Schnieder* case the court held that where the deed described the land as bounded on a street and made reference to a plat, the conveyance carried with it the fee to the center of the highway. In the case of *Jacob et al. v. Woolford*, the court held that a conveyance of land described by metes and bounds and being bounded by a highway carried with it the fee to said highway although no mention was made of the highway. The *Blalock* case held that a conveyance of land described as bounded "on", "by", or "as running along" a highway will convey the land to the center of the way. This is true even though the length of the side boundary lines as given would carry them only to the side of the highway. There is dictum in the *Blalock* case which tends to show that Kentucky would follow the majority ruling in holding that a conveyance in which the land is described by the use of the words "side", "margin", or "edge" of the highway carries only to the side of the highway. There are no cases in Kentucky in which there is a direct holding concerning land conveyed and described by a monument

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2 86 Ky. 101, 5 S.W. 350 (1887). See cases cited in note 1 supra.
3 *Schnieder v. Jacob*, 86 Ky. 101, 5 S.W. 350 (1887); *Henry v. Board of Trustees of Dioceses of Kentucky*, 207 Ky. 846, 270 S.W. 476 (1925).
8 *Supra*, note 7.
9 154 Ky. 39, 157 S.W. 694 (1913).
on the side of the highway, but it is submitted that the majority rule
giving to the grantee the fee in all the land which the grantor owns in
the highway is the better rule. The Schnieder case also held that
where land is described as bounded by a highway which is to be laid in
the future and the plan of it is on a map or plat, the conveyance car-
ries with it the fee to the center of said planned highway.

Although it does not appear that the Kentucky court has passed on
the question of interpreting a conveyance bounded by a private way or
alley, there is nothing to indicate that it would apply a rule different
from that used in case the boundary is a highway. A majority of courts
allow a conveyance of land bounded by a private way or alley to carry
with it the fee to the center of the way, unless a contrary intention
appears. This is true because the theory behind such a rule is the
same as that given in regard to land bounded by a highway. Possibly
the only distinction between the conveyances of lands bounded by high-
ways and those bounded by private ways is to be found where the
grantor reserves the right to use the private way; the majority of
courts hold that such a conveyance excludes the private way.

In the case of Williamsburg Boom Co. v. Smith, the court set out
the law concerning a conveyance of land bounded by tidal and non-
tidal streams as follows:

"It is the rule of the common law that the right of land owners
bounding upon tidal waters extends only to the ordinary high
water-bound mark, and that the bed beyond it belongs to the
state, for the use of the public; but grants of land upon navigable
rivers, above tidewater, vest the soil ad flum aquae in the grantee,
unless the terms of the grant clearly show an intention to stop at
the margin of the river."

As in the case of highways, the real question involved in the conveyance
of land bounded by a stream above tidewater is whether or not there
has been sufficient expression of intention to exclude the bed of the
stream.

The Kentucky court accepts the common law definition of a navi-
gable stream, saying that a stream to be navigable must be one in which
the tide ebbs and flows. In some cases we find the court speaking of a
stream as being navigable, but it is only for a practical purpose. There

27 See notes 1 and 13 supra.
28 9 C. J. 205, note 51.
29 84 Ky. 372, 1 S. W. 765 (1886).
are no navigable streams within the common law definition in Kentucky. Thus in Kentucky the conveyance of land bounded by a natural stream is presumed to carry with it the fee to the center of the bed of the stream. Kentucky is in accord with the majority of courts in allowing a conveyance of land bounded on a natural non-navigable stream to carry with it the fee to the center of the bed of the stream, but it is a small minority in following the common law definition of a navigable stream. The great majority of courts repudiate the old common law definition and declare a stream navigable if it is navigable in fact and exclude the bed of such stream from private ownership.

The Kentucky court has held that where a conveyance called for the "Cumberland river and its meanders", the deed carried with it the fee to the thread of the stream. A similar conclusion was reached where trees and monuments on the bank of the river were called for in the river line description. In all of the cases regarding land bounded by natural streams, the deed called for monuments on the bank or the meanders of the stream.

Because Kentucky owns the Ohio river to the north bank, the Kentucky court has a rather unusual rule with regard to conveyances bounded by that river. In the case of City of Covington v. State Tax Commissioner et al, the court held that a conveyance of land bounded on the Ohio river, nothing appearing in the deed to the contrary, carried with it the fee to the center of the stream. Thus, even though the state owns to the far shore, the riparian owner takes only to the thread of the stream.

A Kentucky case has not come to the attention of the writer in regard to conveyances of land bounded by artificial bodies of water. The majority of courts hold that in a deed of land bounded by an artificial pond, canal, ditch, or mill race the deed carries with it the fee to all the land owned by the grantee, unless a contrary intention appears on the face of the instrument.

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27 Berry v. Snyder, 66 Ky. 266 (1867); Miller v. Hepburn, 71 Ky. 326 (1871); Williamsburg Boom Co. v. Smith, 84 Ky. 372, 1 S. W. 765 (1886); Huffman v. Charles et al., 97 S. W. 775 (Ky. 1906); Reichert v. Ellis Ferry Co., 184 Ky. 150, 211 S. W. 403 (1919); Jenkins v. Sadler, et al., 212 Ky. 581, 279 S. W. 982 (1926); City of Covington v. State Tax Commissioner et al., 231 Ky. 606, 21 S. W. (2d) 1010 (1929); Tiffany, Outlines of Real Property (1929) 421, Sec. 343.

28 Cooley v. Golden, 117 Mo. 33, 28 S. W. 100 (1893); Kinkead v. Turgeon, 74 Nebr. 573, 104 N. W. 1061 (1905); Tiffany, Outlines of Real Property (1929) 422, Sec. 343.

29 Williamsburg Boom Co. v. Smith, 84 Ky. 372, 1 S. W. 765 (1886).
30 Reichert v. Ellis Ferry Co., 184 Ky. 150, 211 S. W. 403 (1919); Herndon v. Smith, 211 Ky. 91, 276 S. W. 1081 (1925).
31 231 Ky. 606, 21 S. W. (2d) 1010 (1929).
33 9 C. J. 191, note 27.
34 Ibid.
35 Ibid.
In summary, it is submitted that in the conveyance of land bounded by a highway, street, private way, natural non-tidal streams, or artificial ponds, canals, ditches, and mill races the conveyance carries with it the fee to the center of such way or body of water, unless a contrary intention appears.

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