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trial would be obligatory upon the court. However, this question of the effect of the statute has never been before the court as the desire to waive the jury has always been mutual between the parties until the accused found that the judge had decided for the state.

In the absence of statute it must be concluded that the effect of the motion by the defendant to waive the jury is to place the burden upon the court to determine the expediency of such a procedure. However, no case has been found holding that the defendant is in a position to demand a trial by the court. Likewise, no case has been found where the court sustained the defendant's motion for a trial without a jury over the objection of the state's attorney. The following cases hold that the court is correct in sustaining the objection to the motion to waive: *Morrison v. State*, supra; *State v. Mead*, supra; *Ickes v. State*, supra. The cases generally agree that the court has the final word in determining the right to waive the jury trial in criminal cases. This is best expressed by the words of Justice Sutherland in the case of *Patton v. United States*, supra, at p. 312, "The duty of the trial court in determining a motion of waiver of jury is not discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departure from that mode of trial". This in its last analysis means that the judge must be certain that a trial by the court in the particular case will be just as expedient as a jury trial before the older method will be dispensed with.

H. C. SMITH.

CARRIERS—LIMITATION OF ACTIONS FOR RECOVERY OF OVERCHARGES IN KENTUCKY.

For the past few years the principal railroads of Kentucky have declined to pay *bona fide* claims for overcharges on Kentucky intrastate shipments unless such claims are presented within two years from the date of delivery of the shipments. Formerly these claims were paid if filed within five years. No recent decision of the courts or modification of the statutes has been cited in support of this change of position by the carriers. Numerous complaints have been voiced by shippers whose claims have been rejected on this ground, but thus far no action involving this point has been decided by the Court of Appeals.

As used herein the term "overcharges" is confined to charges in excess of rates lawfully established and filed with the Railroad Commission as provided by Section 201g-3 of the Kentucky Statutes. There appears to be no question but that the two year limitation period provided in Section 819 of the Statutes is applicable to actions brought under Sections 816 (extortion), 817 (discrimination), 818 (preference),

and 820 (long-and-short haul statute). The leading case sustaining this view is *Louisville & Nashville R. R. Co. v. Walker*.¹

In order to determine when claims for overcharges are barred by limitation it is necessary first to consider the nature of the action or actions which may be maintained for the recovery of such overpayments. The solicitor of a prominent railroad of the state, in answer to an inquiry from a shipper, recently wrote: "An overcharge claim is based upon the violation of a statute which now requires tariffs to be published and filed with the Railroad Commission and which likewise requires tariffs and rates so published to be observed. A carrier charging more or less than the published tariff rate does so in violation of this statute."

From this statement it seems that the carriers are of the opinion that actions for the collection of overcharges must be brought under Section 201g-6 of the Statutes, and that the two year limitation provided in Section 201g-17 will apply to such sections. It is to be noted, however, that the Act of which these sections are a part also contains Section 201g-18, which reads: "The rights, privileges and remedies herein prescribed shall not be in lieu of, but in addition to the rights, privileges and remedies now existing in such cases under the statutes or the common law."

The question thus arises—were existing common law and statutory remedies saved by Section 201g-18, and if so, what are these remedies? No Kentucky cases have been found which bear directly upon this point. In *Southern Ry. Co. v. Frankfort Distillery Co.*² Commissioner Stanley, speaking for the court, said: "A common law action lies to recover a sum charged in excess of scheduled rates, and no prior application to the Railroad Commission or other body is necessary." Since this statement was not material to the issues involved and as no pertinent cases were cited in support thereof, it must be considered as dictum.

Section 22 of the Interstate Commerce Act³ contains a saving clause which is substantially the same as Section 201g-18 of the Kentucky Statutes. This clause has been the subject of numerous decisions of the federal and state courts. Briefly, these decisions have held that existing common law and statutory remedies are not saved by Section 22, when the continuance of these remedies would be inconsistent with the several provisions of the act, but that they are saved in so far as they do not conflict with the act. To illustrate, in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*⁴ it was held that a common law action could not be maintained in a state court for damages alleged to have been caused by the charging of an unreasonable tariff rate on an interstate shipment. The court said that the reasonableness of a lawfully published rate was an administrative question

¹110 Ky. 961, 63 S. W. 20, (1901).

²233 Ky. 771, 26 S. W. (2d) 1025, (1930).

³49 U. S. C. A. Sec. 1.

⁴204 U. S. 426, 51 Law. Ed. 553, (1907).

which should be presented originally to the Interstate Commerce Commission. To the same effect is *Robinson v. Baltimore & Ohio R. R. Co.*,⁵ where the published rate was alleged to be discriminatory.

But in *Pennsylvania R. R. Co. v. Puritan Coal Min. Co.*⁶ it was held that an action for damages caused by the railroad's failure to furnish cars for interstate coal shipments could be maintained in a state court, because no administrative question was involved. With respect to the saving clause, the court said: "That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute."

Does an action for the recovery of overcharges present an administrative question or merely a question of law? In *Great Northern Ry. Co. v. Merchants Elevator Co.*,⁷ the carrier contended that an action for the recovery of charges in excess of published rates on interstate shipments could not be maintained in a state court until the Interstate Commerce Commission had passed upon the disputed question of construction. The court denied the contention and said: "What construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute. When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law." The court also said that when it is necessary in the construction of a tariff to determine on evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the commission before a court can take jurisdiction.

The conclusion to be drawn from these decisions is, that the saving clause in Section 201g-18 will not apply where an overcharge claim involves an administrative question, such as the peculiar meaning of words or the existence of a usage. In this type of cases the complaint should first be presented to the Railroad Commission under Section 201g-6 and the two-year period of Section 201g-17 would apply. If, however, the overcharge claim presents only a question of law, as is ordinarily the case, the saving clause would be applicable and the claimant would not be limited to the remedy in Sections 201g-6, but would have the choice of existing common law or statutory remedies.

The suggestion has been made that an action for the recovery of overcharges can be maintained on the written contract expressed in the bill of lading and that the limitation period of fifteen years in Section 2514 is applicable. The bills of lading generally used by the railroads contain the provision, "subject to the classifications and

⁵222 U. S. 506, 56 Law. Ed. 288, (1912).

⁶237 U. S. 121, 59 Law. Ed. 867, (1915).

⁷259 U. S. 285, 66 Law. Ed. 943, (1922).

tariffs in effect on the date of the issue of the Bill of Lading." While this provision may by contract fix the amount of the freight charges to be paid by the shipper, it does not follow that if a greater amount is paid, the carrier is bound by the written contract to refund the overpayment.

The carrier is, however, bound by an implied contract to make such refund.⁸ On this obligation the provisions of Section 2515 apply. This statute provides that an action upon an implied contract shall be commenced within five years next after the cause of action accrued.

Section 2515 would also be applicable if the action be founded upon mistake, and in addition thereto the claimant could invoke the aid of Section 2519, which reads: "In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

It has been held, however, that this statute runs from the time the mistake, by ordinary diligence, ought to have been discovered.⁹ As the railroads are required by Section 201g-3 of the Statutes to keep their tariffs on file for public inspection, a shipper by reasonable diligence should discover the mistake at the time the charges are paid. The benefits to be derived from Section 2519 are accordingly remote.

In conclusion it is submitted that an action for the recovery of charges in excess of tariff rates is ordinarily barred in five years from the date the charges are paid. If, however, the action presents an administrative question, such as the peculiar meaning of words or the existence of a usage, it is barred in two years unless complaint has previously been presented to the Railroad Commission.

J. E. MAEKS.

CONTRACTS—USURY.

A—Early History.

Originally usury meant the reserving of any interest for the use of money.¹ Usury has been recognized and condemned since the earliest times, being prohibited by the early laws of China, in the Hindu Institute of Menu, and the Koran of Mohammed.² The taking of usury was an offense at Common Law, and the usurer was not only punished by the censures of the church in his life time, but was denied

⁸ *Cullen v. Seaboard Air Line R. Co.*, 63 Fla. 122, 58 So. 182, (1912).

⁹ *Provident Assurance Soc. v. Withers*, 132 Ky. 541, 116 S. W. 350, (1909).

¹ *Bowyer's Law Dictionary*, Student's Ed. 1928;

Ex Parte Berger, 193 M. 16, 90 S. W. 759, 3 L. R. A. (N. S.) 530 (1905);

Marshall v. Beeler, 104 Kan. 32, 178 Pac. 245, (1919);

² *Chancellor Kent; Durham v. Gould*, 16 Johns. 376, (1819).