Case Comments

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CASE COMMENTS

BOUNDARIES—ADVERSE POSSESSION—EVIDENCE.—Action to quiet title to a tract of land. The land was in the shape of a bow, a ridge separating the waters of Mud Lick Branch from Sand Lick Branch before they each enter into Pond Creek. On July 8, 1850, one Hunt obtained a patent to land on the Mud Lick side, and on June 11, 1860, one McCoy obtained a similar patent on the Sand Lick side. Plaintiff claims the land is part of the Hunt patent and the only point in dispute is the following description: "Thence running up said ridge S. 50° east 157 poles to 3 chestnut oaks on a bench." Plaintiff contends that the call or line in dispute should be run around the top of the ridge, that he has title by adverse possession, and that the statement of defendant's vendor after he parted with the title that if he owned any land on the Mud Lick side he did not know it, was admissible.

In the absence of some controlling indication to the contrary when a description of boundaries of land calls for a line from one monument to another a straight line is intended. Baker v. Talbott, 6 T. B. Monroe 179; Crutcher v. Shelby Railroad District, 3 Ky. Law Rep. 533; Haskell v. Friend, 196 Mass. 198. Lines should never be deflected except to conform to the intention of the parties. Carter v. Elk Coal Co., 176 Ky. 378.

The only evidence of adverse possession was the occasional cutting of timber by the immediate vendee of Hunt. One may not acquire title by adverse possession except to the extent of his boundaries unless he takes actual possession beyond the boundaries. Terry v. Loudermilk, 158 Ky. 253; Combs v. Stacy, 147 Ky. 222.

Kentucky follows the general rule in holding that the statements of a grantor after he has parted with title are inadmissible. Aylor v. Aylor, 158 Ky. 713; Bennett Jellico Coal Co. v. East Jellico Coal Co., 152 Ky. 588; Varney & Wife v. Orinoco Mining Co., 201 Ky. 571. J. H.

ACTION OF EJECTMENT—ADVERSE POSSESSION.—Plaintiff claims title by adverse possession. When the defendant took possession the land was vacant and unoccupied. Plaintiff's ancestor lived in the neighborhood of the land in question and for many years previous to his death had gone upon the land and cut timber. These occasional trespasses on the land were his only acts of ownership. He paid the taxes on the land until his death in 1911, and after his death and until 1919 his widow and heirs cut timber and paid the taxes.

It is the general rule that in order to acquire title by adverse possession the adverse holding must be exclusive, continuous, and uninterrupted for the statutory period; the adverse holder must, as some of the opinions express it, "keep his flag flying." Asher v. Pace, 198 Ky. 285; Young v. Pace, 145 Ky. 405. As a necessary corollary of this principle it is well established that occasional acts of trespassing by cutting timber is not such a continuous occupancy as will eventually ripen into a possessory title. Muse v. Payne, 144 Ky. 30; Stearns and Lumber Co. v. Buyatt, 168 Ky. 111; Bibb v. Daniels, 183 Ky. 659.
In some jurisdictions it has been provided by statute that an enclosed tract of land shall be deemed possessed when it has been used for the supply of fuel or fencing timber for the purpose of husbandry or the ordinary use of the occupant. Murphy v. Dofoe, 18 S. D. 42; Pittman v. Hill, 117 Wis. 318; Adams v. Clapp, 36 Bains 316. It should be noticed that these statutes are not applicable when the timber has been cut for general sale. DuPont v. Davis, 35 Wis. 631.

Payment of taxes does not itself amount to sufficient possession as will start the running of the statute. Overton v. Overton, 123 Ky. 311; Consolidated Ice Co. v. New York, 166 N. Y. 92; Whitman v. Shaw, 166 Mass. 451.

In Kypodel Coal & Lumber Company, 165 Ky. 432, defendant bought the land at a sheriff's sale and took a tax deed therefor which was void. He never went into possession but paid the taxes. It was held that the payment of the taxes was not sufficient evidence of possession to start the statute running.

In some jurisdictions evidence of payment of taxes is inadmissible on behalf of the adverse holder. Whitman v. Shaw, 166 Mass. 451; Stevens v. Rhinelander, 28 N. Y. Super. 285. Other states, while regarding it as evidence entitled to little credit, admit it as a circumstance to show possession. Dickinson v. Boles, 59 Kan. 224; Sauer v. Giddings, 90 Mich. 50; Draper v. Shoot, 25 Mo. 197. The latter ruling represents the weight of American authority on the question and seems to be sounder in theory and practice.

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In 157 Ky. 530, in addition to the payment of taxes, timber was cut and sold. It was held that there was not sufficient evidence of possession to satisfy the requirements of actual possession.

However it has been held that payment of taxes in connection with the best and most practicable use of the soil to which it is adapted constitutes actual possession. Wheeler v. Gorman, 30 Minn. 42.

In Kelsey v. Murray, 9 Watts (Pa.) 111, plaintiff paid all the taxes for 30 years and defendant refused to have the land assessed in his name. It was held that plaintiff had the better title.

Kentucky follows the general rule in holding that payment of taxes and occasional acts of trespassing by cutting timber are not sufficient of themselves to satisfy the requirements of adverse possession.

In ejectment the plaintiff must either trace a paper title back to the Commonwealth, or show a possessory title in himself or his vendee for the statutory period. Logan v. Williams, 160 Ky. 641; Stephens v. Stephens, 165 Ky. 353. He must recover on the strength of his own title and not on the weakness of the defendant's. Read v. Fletcher, 170 Ky. 498; Lee v. Pittman, 173 Ky. 761. Kentucky follows the general rule on this point. Fitzgerald v. Aldridge, 201 Ky. 846. J. H.

**VENDOR AND PURCHASER—LIABILITY OF VENDORS FOR DEFICIENCY IN QUANTITY OF LAND SOLD TO A SECOND PURCHASER—SALE BY ACRE OR IN GROSS.**—Lands consisting of several contiguous tracts were executed
by deed to a real estate agent and described by the vendor as 345 acres, more or less. Of this the agent sold 2 tracts, one 78 acres and the other 80 acres. The remainder was sold to F. and described in the deed as 185 acres, more or less. After this transaction the agent paid his vendor the balance of his indebtedness to him and was relieved from all liability. F. being put in possession of his respective boundary, had it surveyed and discovered a shortage of 45 acres. He thereupon sued the agent and the agent's vendor for the deficit. Judgment was rendered against both defendants. Held, that each grantor was liable to his grantee for the deficit in describing the land. Therefore the plaintiff obtained relief from both grantors as it was proper to settle all the controversy in one case and avoid circuity of action. Upon appeal the decision of the lower court was affirmed.

A purchaser of land suing for a deficit may join his grantors as a party in order to avoid circuity of action. *Crane v. Prather, et al.*, 4 J. J. Marsh (27 Ky.) 75. When there is a deficit of more than ten per cent in the quantity described in the deed, there is relief even if the sale is in gross. *Hunter v. Keightley*, 148 Ky. 335, 213 S. W. 201. In a deed the words “more or less” are often added to the number of acres described therein. This is only a relief from the necessity of exactness, and not from gross deficiency. *Boggs v. Bush*, 137 Ky. 95, 122 S. W. 22; *Rust v. Carpenter*, 153 Ky. 672, 166 S. W. 180; *Lassiter v. Farris*, 202 Ky. 330.

**Wills—Limitation of Absolute Estate by Subsequent Language.**—The testator, by his will, gave to his wife, “all my property, both real and personal estate,” and provided that “at the death of my wife, all property belonging to her shall be equally divided between my heirs, as follows,” etc. The appellee in the instant case, was the devisee of this property mentioned in the will and brought this action for specific performance of a contract entered into by her and the appellant and by which the latter agreed to purchase a certain tract of land of the former. This particular property was one of those devised to the appellee, and appellant refused to buy it because the will gave to the appellee merely a life estate in the property with remainder to testator's children and not a fee simple.

The primary rule in interpreting a will is to ascertain the intention of the testator from the language employed in the entire testamentary instrument, and to construe it accordingly, unless to so do would contravene some positive rule of law or public policy. 40 Cyc., p. 1386; *Patrick v. Patrick*, 135 Ky. 307; *Lydon v. Campbell*, 204 Mass. 530. An absolute estate, therefore, given in the clause of a will, may be limited by a subsequent clause which indicates that the testator intended to make such a restriction upon the estate. However, if the limitation is restricted to such property devised as the taker of the absolute estate may leave or not dispose of, the limitation is void because of its repugnancy to the absolute gift. 40 Cyc., p. 1587; *Colt v. Heard*, 10 N. Y. 189; *Foster v. Smith*, 156 Mass. 379. It follows that in
fathom the intention of the testator in the present case, as shown in the will, it is to determine whether he intended his heirs to divide among themselves at the death of his wife, the remainder of an absolute estate given to her, or wished them to secure all the estate granted to the wife, after she had enjoyed it during her lifetime. In the former case, the wife has a fee simple in the estate granted to her; if the latter intention prevails, she has only a life estate in the property. The words employed in the will, clearly show that the devise made was unqualified and absolute, and such being its character, it invested the wife with a fee simple title to the property, and by implication also gave her power to sell or otherwise dispose of it. The subsequent language in the will, calling for a division of the property at her death, does not indicate that the testator intended to limit the fee previously given, but more reasonably conveys the meaning that such of the property as the wife failed to dispose of during her life or as should remain at her death should go to the testator's children as directed by the will. The instrument considered in toto nowhere indicates that the testator intended to place any restriction on the wife's power to dispose of the property. Recent cases in this jurisdiction that have produced facts of a similar nature support such a construction placed upon the present will. Plagenborg v. Molendyk, 187 Ky. 509; Linder v. Llewellyn's Adm'r., et al., 190 Ky. 388; Greenway v. White, 196 Ky. 750. In the case first mentioned the testator gave to his wife all of his remaining estate after the payment of his debts, and after her death, "any remaining estate, both real and personal, shall be given to my children." The wife was held to have taken a fee and the limitation over of what remained was void. In the second named case, the wife of a testator was given an absolute devise by a will which gave all his property to her, with the remainder at her death to be divided among other relatives.

The court in determining the instant will as passing a fee simple title has liberally and reasonably followed previous cases that have firmly established this theory and has likewise voiced the public policy of the state in regard to this problem as evidenced by section 2342 of the Kentucky Statutes, which provides: "Unless a different purpose appear by express words or necessary inference, every estate in land created by deed or will without words of inheritance, shall be deemed a fee simple or such other estate as the grantor or testator had power to dispose of." Snyder, et al. v. Snider, et al., 202 Ky. 321.

Homicide—Aggressor—who Renewed Combat—A Question for the Jury.—As they were returning from church, two young men engaged in a friendly scuffle, which soon developed into a fight. Defendant got the worst of the fight and went to his home and secured a revolver. He returned to the fray and shot and killed his opponent who tried to escape by hiding behind a rock. The jury found the defendant guilty of murder and fixed his punishment at life imprisonment. The
Court of Appeals was asked to set the verdict aside upon the grounds of excessive punishment.

An aggressor cannot plead self-defense where the difficulty results in a killing. In such a case the defendant is guilty of murder or manslaughter. This is the general rule which is followed in Kentucky; 21 Cyc. 305; Odor v. Commonwealth, 80 Ky. 82; Taber v. Commonwealth, 82 S. W. 443, and Blankenship v. Commonwealth, 66 S. W. 944.

Where the original difficulty has ceased and the party has opportunity of declining further combat and he renews the difficulty or continues the struggle he becomes the aggressor; 21 Cyc. 305.

The defendant in the case under consideration, by returning to the fray, became the aggressor and his plea of self-defense could not be sustained. There was evidence sufficient to support the jury's finding, and their verdict was not of such a nature as to evidence passion and prejudice. The findings of fact by a jury are not subject to the review of the appellate court, whose jurisdiction is confined to questions of law arising upon the record. 3 Cyc. 348; Lincoln v. Power, 151 U. S. 436. If there is any evidence legally sufficient to sustain the verdict of a jury it will not be disturbed. Sharpe v. McReary, 20 Ky. Law Report 911; Alley v. Hopkins, 19 Ky. Law Report 1515. The rule in Kentucky as laid down by the principal case is that the appellate court will not set aside the verdict of a jury because punishment is severe, where there is no evidence of passion or prejudice on the part of the jury. Polly v. Commonwealth, 201 Ky. 740.

E. R. J.

GRAND JURY—INDICTMENT FOUND AND RETURNED IN ABSENCE OF JUDGE VOID.—Nine of eleven indictments returned against one M. for violation of various provisions of the liquor enforcement statute, were returned by a grand jury impaneled, charged, and sworn by the Commonwealth's attorney and not by a regular judge or a special judge of the court. A special judge presided during part of the time, but vacated the bench before the end of the session of the grand jury. In the absence of a judge presiding the grand jury returned in the courtroom the several indictments in question. These indictments were received by the clerk, who indorsed bail thereon and ordered bench warrants. The orders showing the several steps mentioned were all entered by the clerk without direction from and in the absence of any judge.

Mere technical defects in the constitution of the grand jury and in the form of the indictment are held in most jurisdictions to be insufficient to quash the indictment returned. However where the preliminary proceedings in the impaneling, swearing, or charging are not merely defective or irregular but are illegal and void, the indictment returned is void. 6 Corpus Juris, pp. 1004-1005; Meiers v. State, 56 Ind. 336; Lindsay v. State, 24 Ohio, Cir. Ct. R. 1; Rianes v. State, 147 Ala. 691.

It seems that in a plea of abatement to an indictment, if objections to the election and qualification of the jury are not made before going
to trial thereon, the plea is insufficient. *Dyer v. State*, 79 Tenn (11 Lea.) 509; *State v. Larkin*, 11 Nev. 314.

The grand jury is formed under the direction of the court. *Thayer v. People*, 2 Doug. (Mich.) 417. The judge of the court is the one upon whom the duty rests to impanel and swear the jury. This duty is not given to the Commonwealth's attorney.

An order of the court entered when there is no judge of the court present or presiding is a nullity. An indictment found and returned by a grand jury which was not duly impaneled and sworn by a judge, or a special judge lawfully authorized to do so, is void. Such an indictment when so returned does not become valid by the orders that may be entered showing its return and the indorsement of bail thereon made by the clerk in the absence of the judge or without his authority. Ky. St., sections 378 and 2250; *Com. v. Pulan*, 3 Bush 47; Criminal Code, sections 119-121; *Sublett v. Gardner*, 144 Ky. 190; *Muncy v. Gibson*, 153 S. W. 964; *Farris v. Mathews*, 149 Ky. 455; *Meridith v. Com.*, 201 Ky. 309.

H. H. G.

**JUDGES—COUNTY JUDGES HELD ENTITLED TO COMMISSIONS ON MONEYS RECEIVED UNDER THE PROHIBITION ACTS.**—Section 1731, Ky. Statutes, allows judges of county, quarterly, city or police courts, where the jurisdiction is concurrent with circuit courts, to collect the same fees allowed by law to the circuit clerks in Commonwealth cases where the services are similar. Section 1721 allows circuit clerks in Commonwealth cases to collect ten per cent of all fines levied, and section 2554a-41, Ky. Statutes gives quarterly, justices and police courts concurrent jurisdiction of all offenses, the punishment of which does not exceed $300.00 and sixty days in jail. That this act applied to violations of the prohibition law was decided in *Lakes v. Goodloe*, 195 Ky. 240.

Since 1895 clerks have been collecting ten per cent of all fines in Commonwealth cases but it does not appear that county judges have made any claim to the fees, probably because nothing of consequence was collected by county judges prior to the passage of the prohibition laws. But since the passage of this law, fines have increased and appellant seeks to collect commission on $1,500.00 collected by him in this way.

It was argued that the intention of the legislature was that this should be an extra compensation to circuit clerks for their services in Commonwealth cases and that it was not intended for the benefit of those whose services are compensated by the schedule of fees in section 1731. The court however was unable to agree to this contention, stating that the intention of the statute was clear that county judges and justices of the peace should be entitled to the same fees collected by circuit clerks for similar services in courts of concurrent jurisdiction in Commonwealth cases. The word fee is defined in Cochran's Law Lexicon as "a recompense for official professional services," in C. J., volume 21, p. 1009, as "a charge or emolument or compensation for particular services or acts, every kind of compensation allowed by law,"
and the court was of opinion that these definitions were sufficiently broad to include the commission awarded the clerk as a fee and it must be applied to the other officers. *Craig, Auditor of Public Accounts v. Shclton*, 201 Ky. 750.

**COUNTIES—HIGHWAY CONTRACTORS HELD LIABLE TO EMPLOYEE FOR NEGLIGENCE.**—Deceased was killed while in the employment of appellants, state road contractors, through the negligence of one of his fellow employees. Appellants were at the time engaged in building roads for the county, a governmental function, and they claimed non-liability on this ground: that they, as contractors to perform the governmental function, would not be liable for negligence to their employee, because the state or county doing the same work would not be liable.

The fact that the county or state would not be liable may be conceded (*Coleman v. Esken*, 111 Ky. 131; *Leavell v. Western Kentucky Asylum*, 122 Ky. 213; *Ketterer's Admr. v. State Board of Control*, 131 Ky. 237; *Moss v. Rowlett*, 112 Ky. 121; *Blue Grass Traction Co. v. Grover*, 135 Ky. 655, 123 S. W. 265; *Schneider v. Cahill*, 127 S. W. 143; *Ockerman v. Woodward*, 165 Ky. 752), but when an independent contractor, for a named consideration, takes it upon himself to do the work of the municipality, the reason for the rule ceases. The reason for the exemption is that if the public funds were to be diverted to the payment of damage claims then the more important work of government which must be performed would be seriously impaired if not totally destroyed. Now, it is a well known maxim of law that when a reason for the rule ceases, the rule should cease also.

It has been held by this court that a contractor is not liable for an injury occasioned by a defect in the road by reason of work being done on the road by the contractor (*Moss v. Rowlett*, 112 Ky. 121; *Ockerman v. Woodward*, 165 Ky. 752), but the case under consideration is different. It is a case of negligence of an employer towards an employee, and the court stated that it had never held and could see no reason for holding that a contractor who undertakes on his own account to do work for the county for a named consideration, using his own materials and employing his own labor, should not be liable to an employee for negligence to that employee causing his death.

The court has recognized this principle in two leading cases: *Jones & Co. v. Ferro Concrete Construction Co.*, 154 Ky. 47, and *O'Connell Co. v. Telegraph Co.*, 162 Ky. 468; holding that a recovery could be had for injury done to employee through negligence of an independent contractor, notwithstanding the contractor was in the employment of county, state or city and was engaged in government work.  

**RAILROADS—FAILURE TO KEEP PROPER LOOKOUT—GROSS NEGLIGENCE.**—Appellee was crossing the tracks of the appellant at a public street in her automobile when one of the wheels of her car dropped into a deep hole between the rails. This caused the car to stop and the engine
to "go dead." She was attempting to start the machine when she sud-

The automobile was struck and demolished. Evidence showed that the

The lower court held the appellant guilty of gross carelessness

It is held in every state either by virtue of decisions or upon the

In regard to rate of speed in which the train is running, it can be

The rate of speed in which the appellant's train was approaching

lookout, would appear to show clearly that the appellant was guilty of negligence in the use of a great rate of speed.

The case is in harmony with the general authority and decisions that hold the railroad company in such cases is guilty of negligence. *C. & O. Railway Co. v. Boren*, 202 Ky. 348.  

**Carriers—No Liability for Loss of Poultry in Car Partly Loaded.**—Appellants, poultry dealers, were, upon their application, furnished an empty poultry car by the appellees, common carriers. The car was placed in the appellees' yards where it was to be loaded by the appellants for shipment. At the end of the second day while the car was about two-thirds loaded, the doors of the car were locked by the appellants' agent, who kept the keys in his possession during the night following. Between the time the car was locked and seven o'clock the next morning, the car was broken into and approximately 2,000 pounds of poultry stolen therefrom. There was no competent evidence given or offered showing any negligence or failure of the appellees to use ordinary care during the night.

The rule of law is well established in most jurisdictions that if goods are merely placed in a railroad company's depot for the convenience of the consignor, and are not ready for shipment until the consignor has done something further to them, the railroad company is not liable. *Stapleton v. Grand Trunk Ry. Co.*, 133 Mich. 187, 94 N. W. 739. The fact that the goods were in the appellees' car instead of in the open yards or in the depot would not create any greater liability.

Numerous cases have held that the liability of a common carrier does not begin until there has been a complete delivery of the goods for immediate transportation with the knowledge and consent of the carrier. *Louisville & N. R. Co. v. United States*, 29 Ct. Cl. 405; *Dunnington & Co. v. L. & N. R. R. Co.*, 153 Ky. 338; *Nelson v. C. & O. R. R. Co.*, 157 Ky. 256. However, the carrier's liability begins when it receives freight for immediate shipment, and such liability is not dependant upon the issuance of the bill of lading. *Garner v. St. Louis, I. M. & S. Ry. Co.*, 79 Ark. 353, 96 S. W. 187. There is no liability until the actual bailment is made. *Collier v. Swinney*, 16 Mo. 484.

Assuming that the car had been completely loaded and was ready for shipment, then in case the car and its contents were destroyed by fire, or the car was broken into and the goods carried away by thieves, it would seem to appear that the carriers would be liable. *Cincinnati, N. O. & T. P. Ry. Co. v. Compton*, 33 S. W. 220.

The liability of the carrier does not cease, when he is delivering goods to the consignee, until the goods are placed on the side track. *Gulf & C. Ry. Co. v. Fuqua & Horton*, 84 Miss. 490, and until notice of the arrival of the goods is sent to the consignee. *Chicago, R. I. & P. Ry. Co. v. Kendall*, 72 Ill. App. 105. Thus we see that the liability of the carrier does not cease until notice of the arrival of the goods is sent to the consignee, and it is only right and equitable that the liability of the carrier should not begin until he has had notice from the consignor.
that the goods are ready for shipment. *Peter Fox & Sons Co. v. L. & N. R. R. Co.*, 202 Ky. 187.

Carriers—Passengers Wilfully and Maliciously Assaulted, Entitled to Recover Both Compensatory and Punitive Damages.—Appellee was riding on a street car of appellant with one Lovejoy, who was intoxicated, and the two had given little cause to the conductor to become angry. The conductor told the motorman to call the police and appellee, upon being notified of the intent to arrest him, proceeded to get off the car when the motorman struck and beat him severely with a steel lever. Appellant’s witness testified that appellee had begun the assault by kicking the motorman.

The lower court gives appellee both compensatory and punitive damages.

That a carrier is liable for any ill-treatment to a passenger by its servant is a legal doctrine that is too far settled in our courts to admit of doubt. Hutchinson in his treatise on Carriers, section 595, says, "The passenger is entitled to respectful treatment from the carrier and his servants, and to protection by the carrier. . . . As against the assaults and violence of his servants, the passenger has the right to claim an absolute protection, and the carrier will undoubtedly be held responsible for any unnecessary personal abuse or violence of which they may be guilty in their treatment of the passenger whilst engaged in discharging their duty." *Goddard v. The Railway*, 57 Me. 202; *Sherley v. Billings*, 8 Bush (Ky.) 147; *Stewart v. Railroad Co.*, 90 N. Y. 583; *McKinley v. Railroad Co.*, 44 Iowa 314.

As to the liability of the carrier in exemplary damages for such injury to a passenger, the courts in general, while not allowing recoveries on so liberal a basis as in the case of the award of compensatory damages, have almost universally held the carrier to answer in punitive damages whenever it could be shown that the conduct of the carrier’s servant during the performance of the latter’s duties of employment was divergent from and at variance with the protection which the carrier is bound to afford each of its passengers. As Hutchinson explains it, "Whenever this is the case the law allows another element to enter into the compensation of the amount of damages, not because the plaintiff is entitled to anything more than strict compensation, but for the sake of the salutary effect which such examples may have in deterring the carrier as well as others from the perpetration of similar wrongs." (Hutchinson on Carriers, section 312.)

The grossness of the act of appellant’s servant in this case established one of those circumstances where the court would be justified in adding to the punishment of the appellant such exemplary damages as would seem beneficial to strengthen in the conscience of the carrier the understanding that such acts by its servants should be denounced in the future.

In all these cases, however, where punitive damage is awarded, it is proper for the court to instruct the jury to consider any provocation
of the servant by the passenger in mitigation of the exemplary damage. Renfro v. Barlow, 131 Ky. 312 (where the jury was instructed to consider provocation in mitigation of punitive damages but not actual damages.) Louisville Ry. Co. v. Frick, 158 Ky. 450.

Nevertheless, the court is under no duty to instruct the jury in regard to provocation unless this instruction has been requested or the provocation has been pleaded. L. H. & St. L. Ry. Co. v. Roberts, 144 Ky. 330. In the case under discussion, the kicking of the motorman by appellee may have been sufficient cause to show that the punitive damage should have been mitigated. But in the absence of any request that an instruction be given on this issue, it was not erroneous for the court to submit no details on the question of provocation to the jury. Ohio Valley Electric Railway Co. v. Webb, 302 Ky. 341.

Limitation of Actions—Recovery Must Be Had Upon New Promise, if Made After Bar Is Complete.—Defendants were payees of a note and discounted it at plaintiff's bank. After the maker had failed to pay, the plaintiff relying on the defendants' promises to pay it, made after the statutory period had run, let the debt drag for thirteen years after the note matured before instituting suit on it. They based their action on the defendants' new promise to pay. Defendants pleaded the statute of limitations. As to that plea, the court held that the statute of limitations was a personal plea only and was available to no one but the obligor. (Hyden v. Calames, 161 Ky. 593; Baker v. Begley, 155 Ky. 234.) Further, that the new promise if made after the statutory period had run could not revive the original obligation, which must then be regarded as dead, but the action must be brought on the new promise. (Carr's Exor. v. Robinson, 8 Bush 269; Gilmore v. Green, 14 Bush 772; McCracken County v. Mercantile Trust Co., 34 Ky. 344). Defendant then contended that the interest should run only from the date of the new promise, but the court said that as the new promise created a new obligation, it could be restricted to any part of the original debt, but when not so restricted an unconditional promise to pay naturally includes the interest which is an integral part of the debt and is carried with it unless segregated by agreement. Wherefore, judgment was given for plaintiff for the amount of the note with interest from date. West v. W. T. B. Williams & Sons, Bankers.

Divorce—Jurisdiction of Appellate Court of Divorce Decrees.—Appellant, the husband of appellee sued for divorce charging his wife with conduct proving her to be unchaste. She denied the charge, and by counterclaim sought a divorce on the ground of cruel and inhuman treatment. Judgment was rendered for the wife, and both parties appeal from the allowances for alimony.

By section 950, Kentucky Statutes, it is provided that no appeal as a matter of right can be taken for the recovery of money or personal property if the value in controversy be less than $500.00, nor to reverse a judgment granting a divorce. Since the passage of this statute it has been uniformly held in Kentucky that the appellate court has
no jurisdiction to reverse a decree of the chancellor granting a divorce. On the other hand it is equally well settled that the court can review the evidence and it is satisfied that no alimony should have been given it can set aside the decree so far as concerns the question of alimony. 


In *Auxier v. Auxier* it is held that the appellate court had no jurisdiction to review a judgment granting a divorce even though it is contended that the lower court in granting the divorce acted without jurisdiction, and in *Irwin v. Irwin*, 105 Ky. 632, the court says:

"But even if we concede the contention of the appellee that the ground of divorce relied on in the supplemental petition is a status and did not begin to exist until the first whole day of its existence, to-wit, the eleventh day of July, 1892, and that the supplemental petition was prematurely filed, it does not seem to us a question of any importance on this appeal as section 950, Kentucky Statutes, provides that no appeal shall be taken to the Court of Appeals to reverse a judgment granting a divorce. The judgment of the chancellor on this question is a finality, and can not be reviewed here."

In *Barrett v. Barrett*, 11 K. L. R. 287, and in *Ross v. Ross*, 11 K. L. R. 306, the court refused to reverse a judgment granting a divorce even though the court erred in dismissing the husband's petition, as the effect of the judgment was to free him from the bonds of matrimony just as effectually as if his petition had been sustained.

The principal and only reason for the statute was the inconvenience that might result from annulling a decree of divorce after one of the divorced parties had married. In *Maguire v. Maguire*, 7 Dana. 131, the court holds that it does not feel authorized to limit the application of the statute to one class of decrees for divorce, but that it is bound to apply it to all divorces decreed by a court of equity in this state.

It is, however, settled in Kentucky that an appeal lies from a decree refusing a divorce. *Wesley v. Wesley*, 181 Ky. 135; *Parker v. Parker*, 104 S. W. 1028; *Goodpaster v. Goodpaster*, 102 S. W. 324. The reason is obvious. The purpose of the statute is to allow divorced parties to remarry without waiting two or three years for the decision of the appellate court. When a divorce is refused, the paries can not legally marry, and there is no reason to apply the statute.

In Ohio no appeal is allowed except from an order dismissing the petition without a final hearing or a final order of judgment or from an order restraining the husband from disposing of his property pending divorce proceedings. *Petersine v. Thomas*, 28 Ohio State 598. Rhode Island has a statute similar to the Kentucky Statute and a few other states by statutory or constitutional provision have denied this power to the appellate court. *Hertel v. Hertel*, 202 Kentucky 422. J. H.

**Divorce—Husband and Wife—Domicile.** Appellee and appellant were married in February, 1919. Less than a year later appellant with
her husband's consent attended a church convention in a nearby city. Arriving at her home on her return, appellant found it locked; forcing an entrance, she discovered that her personal belongings had been removed. An explanation of the situation is shown by the following extracts from a letter written by appellee to appellant: "I have secured for your use a furnished room;" "ready for your occupancy;" "I have arranged for your meals;" and "I have instructed that it (appellant's furniture) be held or disposed of as you direct." Appellant, however, continued to reside in the former home, repeatedly attempting to induce appellee to return to it. Upon his refusal to do so she on February 13, 1920, filed suit for maintenance, alleging cruelty and abandonment on part of appellee. March 9, 1920, appellee filed his answer and counterclaim, alleging abandonment by appellant in refusing to proceed to the rooms he had rented for her, and filing a copy of the letter to appellant above abstracted. The question whether the refusal of the wife to follow her husband to his new domicile is desertion on the part of the wife is a comparatively new one and practically every case cited under this issue has been determined in the present century.

The general rule as to the right of the husband to determine the family domicile is settled. The right of a husband to change his residence and the obligation of the wife to follow him is undoubted. *Caldwell v. Caldwell*, 70 Pa. Super. Court 332. Refusal of the wife to accompany her husband to a domicile selected by him is an abandonment and if continued for the statutory period becomes ground for divorce. *Winkles v. Powell*, 55 So. 536, 173 Ala. 46. The husband is the head of the household, nominally at least, and has the right to fix and choose the domicile and the husband is not guilty of desertion where he simply removes the domicile from one place to another. *Mitchell v. Mitchell*, 185 N. W. 62, 193 Ia. 153.

It is the wife's duty to live with her husband and to go wherever he provides a home and refusal to do so without jurisdiction constitutes desertion. *Coleman v. Coleman*, 164 Ky. 709. When the husband establishes a new domicile and in good faith urges his wife to live with him there, her refusal to accept, if without sufficient reason, amounts to "desertion." *Roberson v. Roberson*, 169 Pac. 333, 41 Nev. 276. It is only when the husband has established a new domicile which is a reasonable place of living and in good faith has offered the new abode to his wife and she without sufficient cause has refused to comply with his selection that a cause of action for divorce arises. *Bibb v. Bibb*, 179 Pac. 214, 39 Cal. App. Rep. 406. Though a husband has the legal right to determine the place of abode of the family and the wife must submit to his decision, such power must be exercised in a reasonable and just manner and cannot be exercised arbitrarily, nor used as a means of procuring dissolution of the marital relation. *Hall v. Hall*, 71 S. E. 103, 69 W. Va. 175.

Some states seem to determine the question of desertion according to whether the husband has requested the wife to follow him and
furnished her with the necessary money for removal. Where the husband establishes a new home and requests his wife to follow him and furnishes her with the means with which to travel and she declines to take up the residence with him, he is not guilty of deserting his wife. *Roby v. Roby*, 77 Pac. 213, 10 Idaho 139. Where the husband moved from Washington, D. C., to Idaho, it was held that the court was justified in finding that the wife was guilty of desertion, tho the husband did not send the wife money with which to travel from Washington to Idaho. The wife had not expressed any willingness to go to Idaho nor suggested in any way that she was lacking in funds. *Mitchell v. Mitchell*, 185 N. W. 62, 193 la. 153. While it is the duty of the wife to submit to her husband's choice of a family domicile, she is not bound to follow him unless it is his wish that she do so and if he does not request her to accompany him, she is not guilty of desertion. *Collett v. Collett*, 157 S. W. 90, 170 Mo. App. 590.

Kentucky in a few well considered cases on the point adopts and follows a broader, more equitable view. It is the duty of the wife to accept such residence as the husband may select without unwarranted parsimony or stubbornness on his part. *Klein v. Klein*, 29 Ky. L. R. 1042; *Clubb v. Clubb*, 23 Ky. L. R. 650. The husband possesses the prerogative to select the domicile in which he and his wife shall reside and, under ordinary and proper circumstances, this right is practically arbitrary, but he must act in good faith and be sincere and fair in all transactions relating thereto, and if so, the failure of the wife to accept the domicile provided may be interpreted as abandonment, but the abode chosen must be commensurate with their past method of living or made necessary by misfortune. *Watkins v. Watkins*, 202 Ky. 141.

**CARRIERS—CARRIER'S LIABILITY FOR INJURY TO PASSENGER ENTERING WAITING ROOM TWO HOURS BEFORE TRAIN TIME—DUTY OF CARRIER TO MAINTAIN DEPOT IN SAFE CONDITION, NOT CONFINED TO PASSENGERS.**—Appellee had purchased a six months' family ticket from appellant. On the occasion in question, appellee entered appellant's depot two hours before the scheduled departure of her train. In seeking a seat in the open and crowded waiting room, appellee fell thru a hole in the floor and was injured.

Was appellee a passenger? If not, was she a licensee or an invitee? The liability of the railroad depends upon the answer to these questions.

If a person goes upon the premises of a carrier, into a station, etc., with an intention, in good faith, of becoming a passenger, he occupies, ordinarily, the status of a passenger, provided his coming upon the premises is within a reasonable time before that at which the conveyance of the carrier on which passage is to be taken is scheduled to depart. 4 R. C. L., section 491; *Heinlein v. Boston and P. R. Co.*, 147 Mass. 137; *Fremont E. and M. R. Co. v. Hegblade*, 72 Neb. 773; *Phillips v. So. Ry. Co.*, 124 N. C. 123; *Abbot v. Ore. R. Co.*, 46 Ore. 549; *Kidwell
v. C. and O. R. Co., 71 W. Va. 664. One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported under a contract, and is received and accepted as such by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from the circumstances. The question is whether the person has presented himself in readiness to be carried under such circumstances in reference to time, place, manner, and condition, that the railroad company must be deemed to have accepted him as a passenger. Webster v. Fitchburg R. Co., 161 Mass. 298. The purchase of a ticket does not make one a passenger unless he comes under the charge of the carrier and is accepted for carriage by virtue of it. I. C. R. Co. v. O'Keefe, 168 Ill. 115. It is his coming to the station within a reasonable time before with the intention to take the next train that creates the relation of passenger. Phillips v. So. Ry., 124 N. C. 123.

As to what constitutes a reasonable time depends, in the absence of statutory provision, upon the circumstances and is usually a question for the jury. Where, however, by statute or rule a reasonable time is fixed during which a station must be open, that time will be regarded as the reasonable time within which the intending passenger may be at the station before the departure of his train, and enjoy the rights and privileges of a passenger. 4 R. C. L., section 491. Ky. Stats., section 784, requires a railroad company to keep its ticket office and waiting room open thirty minutes immediately preceding the scheduled time of departure of regular passenger trains. A traveler went to the station five hours before her train was due and was assaulted. Under the statute the court held that it was the duty of the carrier to provide facilities for intending passengers within a reasonable time before the departure of its trains; that thirty minutes was a reasonable time; and that by coming to the station five hours before the scheduled time of departure of the train plaintiff did not become a passenger; that there was no obligation upon the railroad to furnish accommodations for the entertainment for an indefinite length of time to those who contemplate in the future becoming its passengers; that there was no invitation, either express or implied until within thirty minutes before train time; and that consequently it owed no duty to appellant other or different from that owing to any ordinary person. I. C. R. R. Co. v. Laloge, 109, 896. One who had arrived at a station two hours earlier and was still using the company's tracks was held no longer a passenger. L. and N. R. R. Co. v. Bays' Admr., 142 Ky. 400. From such citations it will be seen that appellee was not a passenger.

While the carrier may be liable in many cases to persons not presenting themselves for transportation at a proper place and in a proper manner, and therefore not to be regarded as passengers, yet such liability must depend upon the rule as to negligence toward mere licensees.
or trespassers. 4 R. C. L., section 499. A railroad company as a carrier of passengers must provide adequate station accommodations and safeguards where it usually takes on and puts off passengers and it is bound to keep its station in a safe condition and failure to perform its duty in this respect will render it liable to those going on the premises in response to the company's invitation and suffering injury thru the carrier's neglect and who are themselves without fault. 4 R. C. L., section 641. It has been held that such liability extends to those coming either to assist outgoing or greet incoming passengers. Union Depot and R. Co. v. Londoner, 50 Colo. 22; Ala. and Great So. R. Co. v. Godfrey, 156 Ala. 202; Fremont E. and M. R. Co. v. Hegblad, 72 Neb. 778. As a general rule railroad tracks and rights of way, except at public crossings or at public streets and highways, are exclusively railroad property and all persons who go upon the tracks or right of way, except at such places, without the express or implied invitation so to do, are trespassers or licensees, and must take such premises as they find them and the company is under no duty or obligation to keep the premises in a safe condition for such use. A person is not a trespasser or a mere licensee, however, who goes upon the station premises, or approaches thereto, upon business connected with the railroad company. In such cases, his going thereon is held to be express or implied invitation of the railroad company and the company must keep the places to which he is thus invited in a reasonably safe condition for such use. L. and N. R. R. Co. v. Schneider, 174 Ky. 730. In the instant case, what was appellee's business with the railroad two hours before her train time?

Citing L. and N. R. R. Co. v. Schneider, supra, and distinguishing the present case from I. C. R. R. Co. v. Laloge, supra, and L. and N. R. R. Co. v. Bays' Admr., supra, the court says: "Appellee went to the station to become a passenger on one of the company's trains. The waiting room was open. This was an invitation to enter. She entered and was injured by reason of the hole in the floor, and there can be no doubt of the company's liability unless she was guilty of contributory negligence, which, we conclude, was a question for the jury." Evidently, the court reaches the conclusion that appellee was an invitee. Or, support might be found for the court's conclusion in the theory that the general public are entitled to find safe platforms, etc., if they go on the carrier's property, whether they have business there or not. It has been said that depot grounds are quasi public. 4 R. C. L., section 643. Railroad depot grounds and passenger houses are quasi public and a person going to such houses and passing over such depot grounds in a proper manner, is not a trespasser, but where persons go upon or pass over grounds connected with railroad depots, they are presumed to know that the place is dangerous and hence are required to use care and prudence commensurate with the known danger of the place. Servants of a railroad company, knowing the enhanced danger at depot grounds on account of persons constantly passing and repassing
are required to exercise a greater degree of care and prudence for the preservation of life and limb than at other places where persons have no right to be and the employees have no right to expect them. *I. C. R. R. Co. v. Hammer*, 72 Ill. 347. The majority rule seems to be otherwise. A person who goes to a station house and on the platform, not for purpose of any business, or to meet expected friends, or to see others depart, but as a mere spectator, for his own pleasure and convenience, is there at his own risk and peril and cannot recover damages for personal injuries received in consequence of a defective platform. *Burbank v. I. C. R. R. Co.*, 42 Ia. Ann. 1156; *L. & N. R. R. Co. v. Minnis*, 202 Ky. 472.

L. C.