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Criminal Conservation--Damages--Refusal of Writ of Error

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STUDENT NOTES AND RECENT CASES

CRIMINAL CONSERVATION — DAMAGES — REFUSAL OF WRIT OF ERROR.—At the October, 1929, term of the Circuit Court of Monongalia County, Urban H. Lawlis brought an action of trespass on the case against James E. Brewer. The plaintiff's declaration charged that the defendant enticed, persuaded and procured the plaintiff's wife to abandon and desert him and that on divers occasions the defendant wickedly debauched and carnally knew the plaintiff's wife. The defendant defaulted and the case was tried on a writ of inquiry before a jury. The reason for defendant's default, as stated in his affidavit which was made a part of the petition for a writ of error, was that on the day of the trial, counsel whom he had previously employed refused to proceed with the case. The jury returned a verdict for the plaintiff for \$15,500.00 and judgment was entered thereon. The plaintiff proved by the opinion of a deputy assessor that the defendant was worth somewhat in excess of \$13,000.00. Defendant has a wife and dependent children and is more than fifty years old. Counsel later employed by the defendant petitioned the Supreme Court of Appeals for a writ of error relying chiefly on excessive damages and surprise to the defendant occasioned by withdrawal of counsel. A writ of error was refused.

The case is interesting from three points of view: (1) the in-

ferential law thereby established, (2) the large amount of the verdict, (3) the character of the right recognized.

The action of the Supreme Court in refusing the writ of error is undoubtedly the law of the principal case. Assuming the petitioner has saved timely exceptions to all questionable rulings of the circuit court and has properly presented his petition and the record so that he cannot on a later attempt make any better showing, then the refusal of the writ is in effect an affirmation of the judgment of the lower court. It is a final adjudication of the rights of the parties involved and as to them and the facts presented it is conclusive. No opinion is expressed and no decision is given which can be cited as a precedent but a court of last resort has acted finally on a matter properly before it. This action becomes the law of the case involved and a guide as to what the court may do in the future under a similar fact situation. "The prophecy of what the courts will do in fact and nothing more pretentious is what I mean by the law."¹ It may be objected that the refusal of the writ can not be cited and that it lays down no rule, principle or standard applicable to similar future situations. Why can it not be cited? It is submitted there is no reason why it should not be. If the fact situation, the rulings of the circuit court and the action of the appellate court were all of record and accessible, the refusal of the writ could be urged the same as any other legal precedent, simply as one of the stimuli to persuade a court to hold the same way under a similar fact situation. Inability to cite comes not as a result of the court's action not being law but as a result of two other things; first, the lack of any accessible authentic record, and second, because it has not been done. The second is no reason at all. To the contention that no rule or principle is expressed we submit none is necessary. It is what the court will do rather than the rules or principles it lays down in decisions that is the law. In this state it is discretionary with the Supreme Court of Appeals to grant or refuse a writ of error. In numerous cases the writ is refused and for various reasons. Each refusal is the law of the particular case although such law must come by inference from the court's action rather than from express language. It would seem to be a great advantage if proper records could be kept of all the cases wherein the Supreme Court has refused to review a case and these records made accessible to the members of the bar in some such manner as are the decided cases. This would furnish some means of determining what the court will probably do the next time it is

¹ Holmes, Jr., "The Path of the Law," 10 HARV. L. REV. 457, 461 (1897).

asked to review the judgment in a similar case. This, it seems, would save both time and expense in preparing records and asking for appeals which are destined in advance to failure.

(2) It is submitted that the verdict in the principal case for \$15,500.00 is excessive. The opinion of a deputy assessor was that defendant was worth something in excess of \$13,000.00. It would seem from the verdict that instead of trying to arrive at the damage to the plaintiff the jury estimated the probable value of the defendant's property and then found a verdict sufficient to take it all. Considering that the defendant is an old man with a dependent family, and without any adequate means of support, it seems that the law in trying to rectify a bad situation created a worse one. It did not affirmatively appear of record that defendant was married or that he had a dependent family. It will hardly be contended that the mere absence of such proof justified the inference that the defendant had no dependent family or that there were no mitigating circumstances.

It is generally held that punitive damages may be awarded in an action of criminal conversation.² It seems, however, that this rule would not justify the verdict in the principal case. In *Allen v. Rossi*,³ a verdict for \$6474.17 for criminal conversation and alienation of affections was held excessive where there was no evidence that the defendant had an income. It seems that the mere lack of evidence that defendant had an income was considered as a mitigating circumstance. No West Virginia case has been found where damages have been awarded in an action of criminal conversation. The nearest analogy seems to be a very few cases involving the alienation of affections. In only one of these is the question of damages brought squarely before the court. In *Gross v. Gross*,⁴ a wife sued her father-in-law for alienating her husband's affections. The verdict was for \$12,500.00. Brannon, President, has this to say in the opinion:

“Speaking for myself, it seems to me that the damages found are heavy, almost confiscatory. If the defendant had murderously slain the plaintiff, her father could not have recovered beyond \$10,000. Under the circumstances, and there are those mitigating, I would say that the verdict is heavy. If on the jury I would not have found it; but there it is.”

While the result of this case is an approval of the verdict it

² 13 R. C. L. 547; Note, 16 L. R. A. (N. S.) 675.

³ 146 Atl. 629 (Me. 1929).

⁴ 70 W. Va. 317, 73 S. E. 961 (1912).

would seem that the court could find little comfort or encouragement in the language of Brannon, President, for approving the verdict and judgment in the Brewer Case.

It has been repeatedly held in this state that in case where the damages are indeterminate and the law gives no specific rule of compensation the verdict of a jury will not be disturbed unless the amount is so large or small as to indicate that the jury were influenced by corruption, partiality or prejudice, or misled by some mistaken view of the case.⁵ It has also been held that no difference of opinion, between court and jury, however decided, justifies an interference with the verdict because of the amount of damages.⁶ But the court does not follow these rules. In fact it would seem that it does just the opposite. In *George v. Norfolk and Western Railway Company*,⁷ the plaintiff was arrested by an officer without authority and taken before a justice of the peace and fined. In a suit for false imprisonment he was awarded a verdict of \$3000. On appeal the verdict was held excessive and a new trial granted. In *Thomas v. Lupis*,⁸ the plaintiff was severely cut about the head and face in an automobile accident. The evidence was not clear as to the extent or permanency of the injury. On appeal a verdict of \$8000 was held excessive and the case remanded for retrial. In both cases the damages were indeterminate. In neither of them is there the slightest evidence that the jury was influenced by partiality, corruption or prejudice except the size of the verdict. The court looks at the facts and at the verdict and concludes that the verdict is excessive. How does the court reach this conclusion? Simply by substituting its own judgment for that of the jury. No other way is possible. Yet we find Hatcher, President, saying in *Landau v. Farr, supra*, "A new trial on a mere difference of opinion between court and jury as to the amount of recovery in an action of tort for unliquidated damages ought not to be granted." It is submitted that this difference of opinion is the most potent factor in the process of reasoning by which the court arrives at the conclusion that the verdict is excessive. It is not the writer's purpose to condemn this check on large verdicts whether it be founded on a difference

⁵ *Landau v. Farr*, 104 W. Va. 445, 140 S. E. 141 (1927); *Truschel v. Rex Amusement Co.*, 102 W. Va. 215, 136 S. E. 30 (1926); *Holt v. Elevator Co.*, 78 W. Va. 785, 90 S. E. 333 (1916); *Goshorn v. Foundry Co.*, 65 W. Va. 250, 64 S. E. 22 (1909).

⁶ *Battrell v. Ohio River Ry. Co.*, 34 W. Va. 232, 12 S. E. 699 (1890); *Landau v. Farr, supra*, n. 5.

⁷ 80 W. Va. 317, 92 S. E. 430 (1917).

⁸ 87 W. Va. 772, 106 S. E. 78 (1921).

of opinion or otherwise. Rather we think it is a wholesome influence in the law. What is to be regretted, however, is that the rule governing excessive verdicts was not applied to the Brewer Case. It might have been applied with a just and healthful effect.

(3) The West Virginia Court in refusing the writ of error in the case under consideration lines up with the overwhelming weight of authority in recognizing the right of a husband to recover damages in an action of criminal conversation against the seducer of his wife.⁹ In such an action the essential injury to the husband is said to consist in "the defilement of the marriage bed—the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of consortium with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive."¹⁰ It might well be questioned whether this action should be encouraged or looked upon by the courts with favor. In the first place the damages in this action are essentially punitive.¹¹ No argument is needed to show that the rule of punitive damages is an anomaly in our law and it has often been doubted whether it should ever be applied to civil actions. In some jurisdictions the doctrine has been entirely repudiated.¹² The whole idea of allowing punitive damages in a civil action for tort is perhaps a relic of the obsolete remedy called "appeal" which Blackstone,¹³ says, "was an accusation by a private subject against another for some heinous crime, demanding punishment on account of the particular injury, rather than for the offense against the public." "It had its origin," says the author, "in those times when a private pecuniary satisfaction called a weregild was constantly paid to the party injured, or his relations to expiate enormous offenses." Weregild meant the money value of a human being. This old remedy called appeal in the early common law was discouraged and virtually abolished by statute of Westminster II, 13 Edward I, Ch. 12 requiring that if the appellee should be acquitted, the appellant should suffer a year's imprisonment and pay a fine to the king, besides damages to the appellee, etc.¹⁴ Thus passed away the basis of punitive damages in civil actions. Since the efficacy of the remedy of criminal conversation depends almost entirely upon

⁹ See 13 R. C. L. 535 and cases cited.

¹⁰ *Begouette v. Paulet*, 134 Mass. 123.

¹¹ *Peters v. Lake*, 66 Ill. 206; Note, L. R. A. (N. S.) 675.

¹² *E. g.*, *Barnard v. Poor*, 21 Pick. (Mass) 378; *Fay v. Parker*, 53 N. H. 342 (1873); *Greeley, etc. Ry. Co. v. Yeager*, 11 Colo. 345, 18 Pac. 211 (1888); *Riewe v. McCormick*, 11 Neb. 261, 9 N. W. 88 (1881).

¹³ Vol. 4, p. 383.

¹⁴ 4 Blackstone, 316.

punitive damages, which at best rest upon a foundation none too secure, it might well be considered whether the action should be encouraged. In the second place it might be suggested that, at common law, the right of action for damages for seduction of the wife is in some measure based upon the obsolete idea that the wife is one of the husband's chattels, and that the consortium and right of marital intercourse are his property, for the loss of which, by wrongful inducement, the husband ought to be compensated with money. In 1 Cooley on Torts, 3rd edition, page 464, the author says:

“If we direct attention to the remedies which, at common law, the husband might have against third persons for the violation of his rights as husband, we find them all grounded upon or permeated with the ideas which mark their origin in a rough and uncultivated society. . . . Social changes have been going on more rapidly in modern times than the modification of legal principles, and the common law of family rights is, in most particulars, not greatly different now from what it was when it tolerated a man in inflicting personal chastisement on his wife or his marriageable daughter.”

By virtue of the numerous emancipation laws and the great and political advances made by the modern woman, the wife now has virtually every prerogative the husband has. It would be absurd, therefore, to give the husband a right of action based upon the common law theory that the wife is his inferior and that he has a property right in her companionship and affection. If the action is to be recognized some other basis must be found for it. In the third place it may be said that a law which allows the husband to be paid money for criminal conversation with his wife is revolting to a majority of men, and may tend more to encourage blackmail than to protect the home. It is submitted that such law places a price upon adultery and tends to commercialize the privileges of the marital relationship. It may be that the best way to suppress such conduct would be by means of a penal statute condemning both the *particeps criminis*. It may be observed here, that the West Virginia Court, so far as the writer has determined, has never formally committed itself one way or another with reference to the action of criminal conversation, and is, therefore, free to adopt any view which it deems best calculated to promote the social interest. It is instructive to note also in this connection that England has abolished the action of criminal conversation by

statute.¹⁵ In lieu thereof the injured husband is required to join the adulterer as a co-respondent in a suit for divorce, unless such joinder is dispensed with by the court upon sufficient grounds, and if the adultery is proved, damages therefor are recovered against the co-respondent.¹⁶ Some states deny the husband a right of action against one who has merely deprived him of his wife's affections.¹⁷ Louisiana has refused to allow a husband any right of action for damages either for alienation of his wife's affections or for criminal conversation.¹⁸ In view of these recent decisions it seems that a court would not be doing violence to stare decisis to discourage the action of criminal conversation or at least to place a decided check upon large and oppressive verdicts rendered therein. Whatever the outcome we feel that the resources of the common law are capable of a nearer approximation to perfect justice than was attained in the Brewer Case.

—FLETCHER W. MANN.

¹⁵ 20 and 21 Victoria, ch. 85, § 59.

¹⁶ *Quicke v. Quicke*, 2 Sw. & Tr. 419.

¹⁷ *Sherry v. Moore*, 155 N. E. 441 (Mass. 1927).

¹⁸ *Moulin v. Monteleone*. 165 La. 169, 115 So. 447 (1927).

PROPERTY SUBJECT TO RESTRICTIVE COVENANTS—EMINENT DOMAIN.¹—Restrictive covenants have been employed very extensively in modern times for the purpose of safe-guarding property against undesirable uses of adjacent property. They have been looked upon with favor by the courts and there is now no question of their enforceability against the covenantor and purchasers of the property with notice of the restriction.²

With the increasing use of this device a number of problems have arisen. Among them is to what extent the owners of land

¹ This note was prepared as part of the work in an Honor's Course.

² *Catt v. Tourle*, L. R. 4 Ch. App. 652 (1868-9); *Tulk v. Moxhay*, 2 Phil. 774, 11 Beav. 571 (1848); *Webb v. Robbins*, 77 Ala. 176 (1879); *Bryan v. Grosse*, 155 Cal. 132, 99 Pac. 499 (1909); *Baker et al. v. Lunde et al.*, 96 Conn. 530, 114 Atl. 673 (1921); *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503 (1891); *Peck v. Conway*, 119 Mass. 546 (1876); *Kettle River Ry. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469 (1889); *Talmage v. East River Bank*, 26 N. Y. 105 (1862); *Korn v. Campbell*, 192 N. Y. 490, 85 N. E. 687 (1908); *Boyden et al. v. Roberts et al.*, 131 Wis. 659, 111 N. W. 701 (1907); *Eason v. Buffaloe*, 152 S. E. 496 (Ga. 1930); *Dixon v. Van Sweringen*, 31 Oh. St. 56, 166 N. E. 887 (1929); 2 *TIFFANY, REAL PROP.*, 2nd ed., 1446; 33 *HARV. L. REV.* 813; 24 *L. QUAR. REV.* 366.