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Discretion of the Court in Ruling Upon a Motion for a New Trial in West Virginia

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tends toward the "physical or moral advantage" of the promisee's land, that is, "unless it benefits the land itself". If the purpose was "to benefit the covenantee in his particular use of the land," the agreement should be considered a purely personal one, enforceable, perhaps, between the makers, but not as to others.

This doctrine seems to be unsound. The court felt that the conception of an equitable servitude should be limited to the protection of interests in land. Even so, it is difficult to conceive of a servitude benefiting land as such. It is always someone's "particular use of land", as for residence purposes, and not the inherent quality of land as land, that is protected. The case, however, is actually one of a servitude benefiting the ownership of a business. Presumably the coal miners, in the absence of the disturbing influences of agitators, would remain more contented, more loyal and more efficient in their work. The validity of this sort of an equitable servitude has already been suggested.

—M. T. V. H.

DISCRETION OF THE COURT IN RULING UPON A MOTION FOR A NEW TRIAL IN WEST VIRGINIA.—Throughout the entire course of the West Virginia decisions, it has frequently been asserted by the Supreme Court of Appeals that a motion for a new trial is addressed to the sound discretion of the trial court, although only recently, it seems, has the court found it necessary to define the principle, or reason, upon which this discretion rests. The rule has generally been stated as broadly and unqualifiedly by the courts of other states. Nevertheless, it must often have occurred to members of the profession that such a statement can not be literally true, or is true only with reference to certain particular phases of trial error. Perhaps there is no great difficulty in the way of conceding the general proposition that such a discretion, as broadly as stated, exists in all those instances where the motion is based upon matters of fact, or mixed law and fact, for example, the probative sufficiency or weight of the evidence, newly discovered evidence, *etc.* But it is difficult to conceive how a court can consistently have any discretion where it appears that the motion is based upon plain prejudicial error of law, such as the admission of proper evidence or the submis-

sion of erroneous instructions to the jury.[1] In some jurisdictions, where the motion involves consideration of pure errors of law, it has been said that the court, conceding the existence of the error, has a discretion to say whether the error is prejudicial.[2] But such a statement would seem to require qualification. If the error of law is of such a nature that its effect upon the verdict may fairly depend upon, or be modified by, the facts or circumstances of the case coming under the observation of the trial court, then the court may logically be granted a measure of discretion in determining the probable effect of the error. Otherwise, the existence or non-existence of prejudice would not seem properly to be determinable by the exercise of judicial discretion. Certainly, if the error of law be conceded to be prejudicial, there would be no room for the exercise of discretion. Some courts go so far as to base the discretion in any case upon broad equitable considerations of justice, allowing the trial court to play fast and loose with the verdict, the inquiry being simply whether "justice has been done" by the verdict. The latter theory, of course, would make no distinction between pure error of law and error based upon the facts or circumstances of the case. The court questions the result of the trial and not the propriety of the procedure by which the result was attained. A "just" verdict is permitted to stand in spite of errors and an "unjust" one is set aside without seeking for positive trial errors.[3] That such an exercise of discretion, being nothing more than a substitution of the court's opinion for that of the jury, in its unlimited application, is an invasion of the province of the jury, would seem to need no argument.

The present attitude of the West Virginia Supreme Court

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[1] Many cases make a distinction between errors based on law and those based on facts, or mixed questions of law and facts. Altman & Taylor Co. *v.* Gunderson, 6 S. D. 226, 60 N. W. 856 (1894); O'Brien *v.* Brady, 23 Cal. 243 (1863); Cochran *v.* O'Keefe, 34 Cal. 554 (1868); Hinkle *v.* San Francisco, *etc.* Co., 55 Cal. 627 (1880); Sandmeyer *v.* Dakota Fire & Marine Ins. Co., 2 S. D. 346, 50 N. W. 353 (1891); Weeks *v.* Lowerre, 8 Barb. 530 (N. Y. 1850). In some states, statutes deny the courts any discretion as to pure errors of law. United States *v.* Trabing, 3 Wyo. 144, 6 Pac. 721 (1885); Nesbet *v.* Hines, 17 Kan. 316 (1876).

[2] Hewitt *v.* Jones, 72 Ill. 218 (1874); Central *etc.* Co. *v.* Ogletree, 97 Ga. 325, 22 S. E. 953 (1895). See 29 Cyc. 1011, note, and additional cases there cited.

[3] McLanahan *v.* Universal Ins. Co., 1 Pet. 170, 7 L. Ed. 98 (U. S. 1828); Rowe *v.* Matthews, 18 Fed. 132 (1883); Farewell *v.* Chaffey, 1 Burrows 54 (1756); Edmondson *v.* Machell, 2 Term R. 4 (1787); Waters *v.* Waters, 26 Md. 53 (1866). A verdict will not be set aside because it is erroneous in view of an unconscionable plea of coverture filed with reference to a woman who is living as a *feme sole.* Deerby *v.* The Duchess of Mazarine, 2 Salk. 646. Where a trifling trespass is made the basis of frivolous litigation, the court will refuse to set aside a verdict for the defendant, although the plaintiff appears to be entitled to nominal damages. Macrow *v.* Hull, 1 Burrows 11 (1764). "Where the amount in controversy is only four dollars, the maxim *'De minimis non curat lex'* applies, and a new trial will not be granted for irregularities." York *v.* Stiles, 21 R. I. 225, 42 Atl. 876 (1899).

upon this question seems to have resulted from a gradual process of evolution away from an originally very general statement of the rule. In *Tefft* v. *Marsh*,[4] decided at the first sitting of the court, it is broadly asserted that "a motion for a new trial is always addressed to the discretion of the court". This proposition has been as broadly repeated, and theoretically has been sustained, in many subsequent and no few comparatively recent decisions. Nevertheless, the court has consistently recognized the binding force of the verdict, in the absence of positive prejudicial error. In many of those cases in which the discretion is stated in its broadest terms, it will be observed that the court, in considering the assignments of error, seems to be searching merely for *errors of law*, and not for an *abuse of discretion*. Owing, perhaps, to the fact that there is not any practical difference in effect between an abuse of discretion and a plain error of law, both being legally erroneous, the court likely has not found any great necessity for making a distinction between phases of trial error falling within and those falling without the discretion of the court. A clear tendency in this direction will be observed in the comparatively recent case of *Hodge* v. *Charleston Interurban R. Co.*,[5] where the court says:

> "There is no discretionary power or authority in a trial court to set aside a verdict and grant a new trial, without legal ground therefor, such as lack of evidence, a preponderance of evidence against it, error in rulings, misconduct of the jury or the like."

This case, which is a plain precursor of the more definite limitation later to follow, definitely negatives the idea that a trial court has any control over a verdict, when such control would be based upon mere general equitable considerations of justice.

In a more recent case, *Shipley* v. *Virginian R. Co.*,[6] the Supreme Court has finally, apparently for the first time, announced a criterion which seems to furnish a fairly definite means of differentiation between the different classes of error with reference to application of the trial court's discretion upon motions for a new trial. In this case, a motion for a new trial was made before a special judge who had not presided at the trial and consequently

[4] 1 W. Va. 38 (1864).
[5] 79 W. Va. 174, 90 S. E. 601 (1916).
[6] 104 S. E. 297 (W. Va. 1920).

had not personally observed the details of the trial procedure. The Supreme Court held that the special judge had no discretion whatever in passing upon the assignments of error, explaining that whatever discretion reposes in a trial court upon such a motion is based solely upon the assumption that personal observation of trial details has created a peculiar competency in the trial court to pass upon questions of error. The court says:

> "Under our decisions, such discretionary power of a judge presiding at a trial is very limited. In such cases he has none at all, unless there is legal ground for a new trial. . . . . Observations respecting such discretion, found in the books, probably mean no more than that the judge's decision as to the sufficiency of a ground urged for a new trial, when there is a condition calling for judgment as to the existence thereof, will not be disturbed by the appellate court. If an apparent and prejudicial error was committed in the course of the trial, there is no discretion in the court to refuse a new trial. If, on the other hand, there is not so much as a shadow of error in the proceedings, there is no discretion to grant one."

The principles announced in this case, apparently sound, place very broad limitations upon the unqualified general discretion announced in the earlier decisions. Since the court may exercise a discretion only where personal observation of trial matters will aid that discretion, it necessarily follows that pure errors of law which are prejudicial ordinarily can not be mitigated by any discretionary view that the trial court may take of them. It is believed that the recent case merely states in definite formula a rule which has long been tacitly assumed and applied by the court.

—L. C.

EFFECT OF MERE PROTESTS BY SERVIENT OWNER ON ADVERSE USER.—In order to permit the acquisition of easements by long continued user the English courts (probably after the passage of the statute of 21 Jac. I. c. 16) resorted to the fiction of a lost grant instead of solving the problem directly by applying the Statute of Limitations by analogy as had probably been done under prior statutes. This has become the law quite generally. In many jurisdictions the result of the adoption of this fiction has been to accomplish substantially the effect of applying the Statute of Limitations by analogy. This is certainly true in those jurisdictions