

BERRY v. DA COSTA.

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Jan. 13.

Breach of promise of marriage—Excessive damages—Affidavit of defendant on motion for a new trial.

Upon a motion for a new trial, in an action for breach of promise of marriage, on the ground that the damages are excessive,—*semble*, that the Court will not receive the affidavit of the defendant, for the purpose of explaining or contradicting the evidence given at the trial.

In such a case, where the plaintiff has been seduced by the defendant, it is no misdirection to tell the jury, that, in estimating the damages, they are at liberty to take into their consideration the altered social position of the plaintiff in relation to her home and family, through the defendant's conduct towards her.

THIS was an action for breach of promise of marriage.

At the trial before Erle, C.J., at the sittings at Westminster after the last term, the facts proved were as follows:—The plaintiff, a young person who resided with her mother, a milliner and lace maker at Notting Hill, having casually met the defendant, who was described as a gentleman of considerable fortune, had, without very much solicitation, but under a distinct promise of marriage, left her mother's home, and resided at several different lodgings with the defendant, and ultimately went with him to Paris under pretence that the marriage was to take place there. Eventually the plaintiff was cast off, and the defendant married another woman.

A good deal of evidence was called on the part of the defendant to shew that the young lady's conduct was the reverse of respectable; and attempts were made to discredit the character of one of the parties at whose house she had lodged with the defendant; but these failed.

In his summing-up, the Chief Justice told the jury, that—the promise and breach being proved—the plaintiff was entitled to compensation in damages, not only for the loss of an advantageous settlement in life, but also for the degradation and misery which had resulted to her from the defendant's conduct. He also made some remarks about the dishonour brought upon her family by his conduct.

The jury, after some consideration, returned a verdict for the plaintiff with 2500*l.* damages.

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Huddleston, Q.C., moved for a new trial on the ground of misdirection and that the damages were excessive. On the first ground he submitted that the learned judge was wrong in leading the jury to believe that they were at liberty to give the plaintiff damages for the desolation brought upon her home and dishonour upon her family by the acts of a seducer; and that he ought to have told them that the damages were to be measured by the loss the plaintiff herself had sustained by the defendant's breach of promise,—the loss of an advantageous settlement in life. He referred to *Toulmin v. Hedley* (1) to shew that the Court will grant a new trial for misdirection, though they should think the direction in terms correct, if the direction was such that it might have been misunderstood by the jury. As to the damages, he submitted that they were clearly vindictive and under the circumstances outrageously excessive; the jury probably being influenced by the course which the learned counsel had been instructed to take at the trial, and also being misled by the exaggerated statement made at the trial as to the defendant's means. He also proposed to read an affidavit of the defendant. Upon a doubt expressed by the Court as to the propriety of receiving an affidavit of the party in such a case, the learned counsel referred to *Hawker v. Seale* (2), where this Court, notwithstanding the 14 & 15 Vict. c. 99, s. 4. (3) in an action of crim. con., received an affidavit of the defendant, denying that he had ever had criminal intercourse with the plaintiff's wife.

[ERLE, C.J. The Court will determine the admissibility of the affidavit, if it should become material. In the meantime its contents may be stated.]

The affidavit alleged that the defendant was not the seducer of the plaintiff, and detailed the circumstances attending their first meeting; and it further alleged that the defendant's income did

(1) 2 Car. & K. 157.

(2) 17 C. B. 595.

(3) That was a motion on the ground of *surprise*, where the affidavit of the party was always required. In *Smith v. Woodfine*, 1 C. B. (N.S.) 660, the defendant's affidavit was received for the purpose of pledging himself to the bona

fides of the application, but not for the purpose of explaining or contradicting the evidence given at the trial. And see *Ling v. Croker*, 2 C. B. (N.S.) 760, where the Court declined to receive the affidavit of the plaintiff's wife in a similar case.

not exceed 700*l.* per annum, and that in the greater part of it the defendant had only a life interest.

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WILLES, J. A rule is asked for in this case upon two grounds,—first, that my Lord misdirected the jury,—secondly, that the damages are excessive. I am of opinion that there was no misdirection. I apprehend, that, in ascertaining the proper amount of damages in an action for a breach of promise of marriage, the jury are not limited to the mere pecuniary loss which the plaintiff has sustained, but may take into their consideration the injured feelings and wounded pride of a woman to whom such a wrong has been done. This has been so often laid down, that I will content myself with referring to a modern instance, the case of *Smith v. Woodfine* (1), in this court, where all the authorities upon the subject are cited and considered. The supposed misdirection consisted in the Lord Chief Justice's pointing out to the jury the contrast between the former position of the plaintiff as the daughter of an honest and respectable mother, and her present degraded condition as the defendant's cast-off mistress, and telling them that they might take that into their consideration in assessing the damages. It is impossible that the jury could have understood him to mean that they were to add to those damages a solatium for the outraged feelings of the mother and family of the plaintiff. If that had been the fair result of the summing-up, undoubtedly it would have been a misdirection. The jury would have no right to consider that. The summing-up amounts to this,—that the damages which the plaintiff was entitled to, were, not merely the loss she sustained in not becoming the wife of a gentleman of property, but that she was also entitled to be compensated for the aggravation of that loss by reason of her prospects of marrying another being materially lessened. I put this in the driest language I can select. My Lord, no doubt, further intended to intimate to the jury that in estimating the amount of compensation due to the plaintiff for her injured feelings and wounded pride, they might legitimately take into their consideration the position of a young girl who had sustained an injury such as this defendant had inflicted upon the plaintiff,

(1) 1 C. B. (N.S.) 660.

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in returning to her mother's house, not as a virtuous and respected member of the family, but compelled as it were to skulk into the home she had made desolate, without daring to lift her eyes to her parent's face. I use the word "injury" throughout, because the mode of estimating the damages in cases of this sort stands upon a totally different footing from that which obtains in the case of a breach of an ordinary contract to deliver or to accept goods. Then, as to the amount of damages,—the Court is called upon to exercise an exceedingly nice jurisdiction, and to interfere with that which is the peculiar and exclusive province of the jury so long as they are not misled by prejudice or gross mistake, or misconduct themselves. For that also I refer to *Smith v. Woodfine*. (1) The jury there gave 3000*l.* damages; the motion took very much the same course as the motion has taken upon the present occasion; and the Court lay it down that they will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent that they have been actuated by undue motives. It is not suggested that there has been any error or misconception on the part of the jury here, or that they have been influenced by any undue motives. The facts were all before them, and it was for them to pronounce their opinion upon them. It is suggested as a ground of misconduct on the part of the jury, that the damages they have given are, upon a view of all the circumstances, outrageously excessive and disproportioned to the justice of the case. We are not called upon to say whether or not we, if sitting in the place of the jury, would have awarded so much, or whether the substantial justice of the case would not in our opinion have been satisfied by a somewhat less amount. But we cannot shut our eyes to the fact that not only has the plaintiff lost the opportunity of marrying a gentleman in a position of life far superior to her own, and been deprived by the loss of her virtue of the opportunity of contracting a happy marriage with another man, but by the course taken at the trial imputations upon her character were unsparingly showered upon her. Indeed, every endeavour seems to have been made to shield the defendant by heaping charges and insinuations upon every one. Having chosen to take that

(1) 1 C. B. (N.S.) 660.

course, I think it is not competent to the defendant now to complain that the jury have given a larger amount of compensation than they probably would have given if a different course had been pursued. I must own I think it was a case for very considerable damages; and I cannot say what the amount should have been, though the amount given is perhaps more than I should have felt disposed to give. Upon the whole, however, I see no ground upon which we can properly interfere.

KEATING, J. I am quite of the same opinion. As to the alleged misdirection, I entirely agree in the view of my Brother Willes respecting the observations of the Chief Justice; and it seems to me to be impossible that the jury could have been misled by them, because he had before in clear terms laid down the true rule for the estimate of damages, and he repeated it again after the expressions objected to. Taking it all together, it was quite impossible for the jury to be led by them to suppose that they might give the plaintiff damages for the grief and discomfort brought upon her mother and the other part of her family by the conduct of the defendant towards her. I also entirely agree as to what are the proper functions of the Court in dealing with the amount of the damages. Without saying what I should have done if I had been a jurymen, I must confess I think the damages here were measured upon a very liberal scale,—aggravated, no doubt, by the injudicious line of defence. I cannot, however, say that they are so excessive as to justify us in interfering upon that ground.

MONTAGUE SMITH, J. I am of the same opinion. For the reasons already given by my two learned Brothers, I think there was nothing in my Lord's summing-up which can be called misdirection. As to the damages, I entirely agree that the discretion of the Court in interfering to disturb the verdict on the ground that the jury have given excessive damages, is one which is to be exercised with extreme care. In commercial cases there is something like a standard by which the Court may judge of the propriety of the amount given. But in cases of this sort, it is peculiarly the province of the jury to say from all the surrounding circumstances what compensation the injured party is entitled to receive. It is quite impossible to analyze the elements of their verdict. The jury are clearly entitled to take into their consideration the

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wounded feelings and the altered social position of the plaintiff, and also the condition in life of the defendant. There was evidence that he was a person of considerable property; and it was suggested that he had large expectations. He might have shewn at the trial what his means really were: and even now, when he makes an affidavit, and has had an opportunity of curing the omission, he has not availed himself of it. As to the observation that the jury were probably angry at the cross-examination of the plaintiff's witnesses and the general line of the defence, all I can say is, that we have no means of entering into the minds of the jury and seeing how much of the sum awarded is attributable to that sort of feeling. But I can well understand, that, as the imputations sought to be cast upon some of the witnesses failed, the jury might well have come to the conclusion that the imputations upon the plaintiff were false also. Without, therefore, saying what I should, if exercising my own unbiassed judgment upon the matter, have considered a sufficient compensation for the defendant's breach of promise, I do not see enough to warrant me in interfering with the verdict of the jury.

Rule refused.

Attorney for defendant: *Hanrott.*

Jan. 12.

MALPAS v. THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Contract—Parol evidence—Carrier.

A., by parol, made arrangements with the defendants, a railway company, to convey cattle for him to K. station; he at the same time, without noticing its contents, signed a consignment note, by which the cattle were directed to be taken to E., an intermediate station on the line to K. :—

Held, that parol evidence was admissible to shew that the defendants had agreed to carry on the cattle to K., as it did not contradict but only supplemented the written contract.

Jeffery v. Walton (1) remarked on.

DECLARATION against the defendants, as common carriers, for not delivering certain cattle of the plaintiff within a reasonable time. There was also a count in trover.

(1) 1 Stark 267.