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(20 S. W. 209, 111 Mo. 506.)

Supreme Court of Missouri, Division No. 2. Sept. 20, 1892.

Appeal from circuit court, Lewis county; Benjamin E. Turner, Judge.

Action by Jennie Beck, by her next friend, Oliver Beck, Sr., against Elijah Dowell, executor. From a judgment for plaintiff, defendant appeals. Affirmed.

Blair & Marchand and M. McKeag, for appellant. Clay & Ray, F. L. Schofield, and J. C. Anderson, for respondent.

GANTT, P. J. This cause was appealed from the circuit court of Lewis county to the St. Louis court of appeals. That court, in an opinion by Judge Rombauer, affirmed the judgment of the circuit court, (40 Mo. App. 71;) but Judge Biggs being of the opinion that the conclusion reached by the majority, that evidence of the financial condition of the plaintiff, in an action when the evidence will justify the jury in awarding exemplary or punitive damages, was admissible, is in conflict with and opposed to two decisions of this court, to wit, Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74, and Stephens v. Railroad Co., 96 Mo. 207, 9 S. W. 589, the cause was, under the constitution, certified to this court.

1. When the cause was heard in the court of appeals, the instructions were not in the record. No efforts were made to supply them in that court, and that court rightly proceeded on the assumption that the trial court had correctly declared the law to the jury. Since the case has reached this court, a certified copy of the instructions has been filed with the record. The propriety of considering these declarations of law by this court, under these circumstances, suggests itself at once. While this court obtains jurisdiction to "rehear and determine a cause so certified to us by either of the appellate courts, as in cases of jurisdiction obtained by ordinary appellate process," there is nothing in the constitution that justifies parties in assuming that we will or can take cognizance of matters not in the record. When a record is deficient in any material respect, the practice is uniform that the party desiring the absent record should suggest the diminution, and apply for a writ of certiorari, or file stipulations in this court, supplying the record. In this case nothing of the kind has been done, but from the brief of the appellant, we take it he assumes that these instructions are properly before us. There is no hardship in requiring parties to govern themselves by the rules of procedure, established for the disposition of causes. For the purposes of this appeal, these instructions are no part of the record, and the cause will be determined on the presumption that the trial court correctly instructed the jury. Parties must pursue legal methods in perfecting their transcripts, and in the proper courts, and in proper seasons.

2. The point in this record, then, is that upon which the court of appeals divided. Is evidence of the financial condition of the plaintiff admissible in an action for damages, when there are circumstances of oppression or malice? That exemplary damages may be recovered in actions for trespass or personal torts accompanied by circumstances of malice or oppression is no longer open to question in this state. Buckley v. Knapp, 48 Mo. 152. Nor is it controverted that it is perfectly competent to show the financial ability of the defendant in such a case. The case of Stephens v. Railroad Co., 96 Mo. 214, 9 S. W. 589, was an action for compensatory damages alone, and the learned judge who wrote the opinion expressly says: "There is nothing in the case to justify the giving of exemplary damages, and the damages should be confined to compensation for the injuries sustained." The case of Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74, had no element in it justifying exemplary damages, and this court held that it was not improper to exclude evidence of the mother's financial condition in a suit for the death of her child which had been drowned in a pond, "in view of the fact that she had been allowed to state her condition in life, and that she did her own housework and had no servant." We do not think either of these cases can be considered as decisive of the point in this case. Exemplary damages are allowed, not only to compensate the sufferer, but to punish the offender. Franz v. Hilterbrand, 45 Mo. 121; Callahan v. Caffarata, 39 Mo. 137. The evidence in this case tended to show that the plaintiff was a girl about 16 years old; that her father was a tenant of defendant; that on the day she was shot by defendant her father and his sons were trying to water a cow in a lot of the defendant; that a difficulty ensued, —a general fight; that she was standing in the lot looking on, unarmed, when the defendant turned upon her, and shot her through the thigh. In other words, the defendant, with a deadly weapon, shot an unarmed girl without lawful provocation. We think there was ample evidence from which the jury could find willful, wanton injury. In 1 Suth. Dam. p. 745, it is said: "In actions for torts, the damages for which cannot be measured by a legal standard, all the facts constituting and accompanying the wrong should be proved; and though there be a legal standard for the principal wrong, if aggravations exist they may be proved to enhance damages; and every case of personal tort must necessarily go to the jury on its special facts. These embrace the res gestæ and the age, sex, and status of the parties; this, whether the case be one for compensation only, or also for exemplary damages, when they are allowed." In Bump v. Betts, 23 Wend. 85, the supreme court of New York, on a question of excess-

ive damages, pointed to the fact that the defendant had the command of great wealth, and that the plaintiff was a poor man. In McNamara v. King, 7 Ill. 432, in an action for assault and battery, the court permitted the plaintiff to show he was a poor man with a large family. The supreme court of Illinois, in affirming that ruling, said: "We are also of the opinion that the circuit court decided correctly in admitting the evidence and giving the instruction. In actions of this kind, the condition in life and circumstances of the parties are peculiarly the proper subjects for the consideration of the jury in estimating the damages. Their pecuniary circumstances may be inquired into. It may be readily supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessaries of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured." In Grable v. Margrave, 4 Ill. 372, in an action for seduction, the trial court admitted evidence to show plaintiff was a poor man. The supreme court, on appeal, said: "The court therefore decided correctly in admitting evidence showing the pecuniary condition of the plaintiff. This evidence does not go to the jury for the purpose of exciting their prejudices in favor of the plaintiff because he is a poor man, but to enable them to understand fully the effect of the injury upon him, and to give him such damages as his peculiar condition in life and circumstances entitle him to receive." In Gaither v. Blowers, 11 Md. 536, in an action for assault and battery, the trial court having admitted evidence for the plaintiff, with a view of increasing his damages, that he was a laboring man and had a wife and children to support, the supreme court, after quoting the language of McNamara v. King, 7 Ill. 432, says: "This is good sense, and is sustained by the decisions in most of the states. An injury done to a person not dependent on manual labor for the support of himself and family is in no wise as great as one to a person so situated." In Reed v. Davis, 4 Pick. 215, the supreme court of Massachusetts, in an action for trespass in forcibly evicting plaintiff from his home, says: "One of the defendants stated to a witness, in answer to his inquiry whether he thought the plaintiff could not make him suffer, that 'the plaintiff had been to jail, and sworn out, and was not able to do anything.' Now, that circumstance was to be taken into consideration by the jury. There is nothing more abhorrent to the feelings of the subjects of a free government than oppressing the poor and distressed under the forms and color, but really in violation, of the law." "It is found that the dwelling house was small, but the damages are not to be graduated by the size of the building. The plaintiff also was poor. He had seen better days, but had been reduced in his circumstances. He was thought not to be able to do anything in vindication of his rights at the law." In Dailey v. Houston, 58 Mo. 361, this court said: "It is next insisted that the court improperly told the jury that, in the estimation of damages, they might take into consideration the 'condition in life of plaintiffs, and their pursuits and nature of their business.' There is no doubt but that, in estimating damages in such cases, the jury may properly take into consideration the pecuniary condition of the parties, their position in society, and all other circumstances tending to show the vindictiveness, or atrocity or want of atrocity, in the transaction, and which tend to characterize the assault." This decision of Judge Vories was concurred in by all the judges. It has never, to our knowledge and so far as we can ascertain, been questioned, denied, or criticised. It is in harmony, as we have seen, with the decisions of other courts of great ability. It is in harmony with the tendency of the courts to place before the triers of facts, whether court or jury, every fact that will aid them in arriving at a correct verdict. It is evident in this case its effect was not to create prejudice or passion. There is nothing that smacks of either in the verdict. Accordingly we affirm the judgment of the court of appeals, as indicated by the opinion of the majority of the judges of that court, on this as well as all other points ruled in the case, and it will be so certified to that court.

All concur.

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HAYNER v. COWDEN.

(27 Ohio St. 292.)

Supreme Court of Ohio. Dec. Term, 1875.

Error to district court, Miami county.

James Murray, J. T. Janvier, and H. G. Sellers, for plaintiff in error. Conover & Craighead and Morris & Son, for defendant in error.

WRIGHT, J. The slander alleged in the petition consists in falsely charging plaintiff, a minister of the gospel, with drunkenness. It is also averred that the words were spoken of and concerning him in his ministerial profession and pastoral office. The demurrer admits all that is averred, and thus this question is raised: Are words which charge a minister of the gospel with drunkenness, when spoken of him in his profession or calling, actionable per se? We answer that they are. We understand the rule to be, that words spoken of a person tending to injure him in his office, profession or trade are thus actionable. 1 Starkie, Sland. 9; Townsh. Sland. & L. § 182; 2 Add. Torts, 957 (section 2, c. 17, Edition of 1876 of this book, has a large collection of authorities on the subject); 1 Am. Lead. Cas. 102; Foulger v. Newcomb, L. R. 2 Exch. 327; Demarest v. Haring, 6 Cow. 76.

Calling a clergyman a drunkard was held actionable in McMillan v. Birch, 1 Binney, 176; Chaddock v. Briggs, 13 Mass. 251.

Such words are actionable because they tend to deprive him of the emoluments which pertain to his profession, and may prevent his obtaining employment. It is not, as counsel seem to suppose, that giving a clergyman this right of action is because his office is higher than that of his fellow men. It is a right which belongs to all who have professions or callings, and in this clergymen are not different from others.

This principle is entirely different from that upon which proceeded the cases of Hollingsworth v. Shaw, 19 Ohio St. 430; Dial v. Holter, 6 Ohio St. 228; Alfele v. Wright, 17 Ohio St. 238. In all these, the words imputed a criminal offense, and did not relate to profession or calling.

Upon the trial of the case, it was insisted by defendant that the words were not spoken of the plaintiff in his character as a minister. The court fairly left this to the jury, and said if they were not so spoken, they would find for defendant. The jury find this issue for the plaintiff, and in the face of that finding, it is impossible for us, sitting as a court of error, to say that they were not spoken of the plaintiff in his character or capacity as a clergyman. If they were as we have seen, they are actionable.

In the cases cited by defendant—Lumly v. Allday, 1 Tyrw. 217; Brayne v. Cooper, 5 Mees. & W. 249; Ayre v. Craven, 2 Adol. & E. 2; Buck v. Henly, 31 Me. 558; Redway v. Gray, 31 Vt. 292; Van Tapel v. Capron, 1 Denio, 250—it was held that the words spoken did not touch the plaintiffs in their various trades or employments. But to charge a minister with drunkenness does have such an effect. Congregations would not employ clergymen with intemperate habits, and the development of such a vice would be cause for speedy removal from office. When the question is reduced to a mere matter of dollars and cents, the purity, the integrity, the uprightness of a minister's life is his capital in this world's business.

Against the objection made, plaintiff offered evidence of the wealth of the defendant, and in the charge the court said this evidence might be considered in connection with the question of exemplary damages. We see no error in the admission of the evidence or the charge of the court upon the subject. That punitive or exemplary damages in a proper case may be given is not an open question in Ohio. In Roberts v. Mason, 10 Ohio St. 277; Smith v. Pittsburg, Ft. W. & C. Ry. Co., 23 Ohio St. 10, the court allowed the jury to consider the wealth of defendant in connection with the question of punitive damages. If, then, punishment be an object of a verdict, a small sum would not be felt by a defendant of large wealth. The vengeance of the law would scarcely be appreciated, and he could afford to pay and slander still. There are cases which put the admission of the evidence upon this ground. Alpin v. Morten, 21 Ohio St. 536, intimates that the reason is to enable the jury to determine how much plaintiff has been injured. This case collects the authorities on both sides of the question, to which might be added McBride v. Laughlin, 5 Watts, 375; Wagoner v. Richmond, Wright, 173; Sexton v. Todd, Id. 320; 2 Greenl. Ev. 249; 1 Am. Lead. Cas. 199, note 6; Horsley v. Brooks, 20 Iowa, 115; Buckley v. Knapp, 48 Mo. 153. We see no error in the admission of the evidence, or the charge of the court on the subject.

There are some other questions raised by counsel, to which we briefly allude:

The defendant asked the court to charge the jury: "If they find that the words spoken by the defendant of and concerning the plaintiff were untrue, and that the defendant has not reasonable cause to believe them to be true, yet, if they are satisfied from the evidence that the defendant did believe them to be true, such state of facts would not warrant a verdict for punitive or exemplary damages, but for compensatory damages only." With which request the court refused to comply, but, on the contrary, charged the jury that such was not the law, to which the defendant then and there excepted.

We do not understand the law of slander to be, that it is a defense that the slanderer believed his words to be true, when he had

no grounds for so believing. Belief must have a foundation in something. Take away the foundation, and what can be left? The charge seems to us a solecism. Belief can only be claimed as a defense, or in mitigation, where it is based upon such facts or reasons as would incline a reasonable person so to believe. Inasmuch as this charge was asked in reference to exemplary damages, and there was evidence tending to show that the words had been spoken under circumstances indicating wantonness and recklessness, the charge was properly refused.

It appears to be seriously argued that in a minister of the gospel a single act of intoxication is not a fault, and therefore a charge of that kind cannot be injurious. We can hardly assent to this proposition. In a religious teacher one offense of the kind must be considered a grave departure from propriety and duty; and to say that the act has been committed is calculated to impair usefulness.

As to the question of excessive damages: The verdict was large; still we do not think defendant can complain, in view of all the circumstances of the case.

Judgment affirmed.

SCOTT, C. J., and WHITMAN and JOHNSON, JJ., concurred. DAY, J., dissented.