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THE ACTION FOR CRIMINAL CONVERSATION.

I. NATURE OF THE ACTION.

BLACKSTONE says that "adultery or criminal conversation with a man's wife, though it is a public crime, left (by the law of England) to the spiritual courts, yet, considered as a civil injury, the law gives a satisfaction to the husband for it by the action of trespass *vi et armis* against the adulterer, wherein the damages received are usually very large and exemplary."

The actions of trespass and case are concurrent remedies for the injury; but Chitty, in his work upon Pleadings, says that, though it had been usual to sue in case, trespass was preferable, as the injury has always been described as committed with force, the law supposing force and constraint, the wife having no power to consent: Chitt. Plead. 167. In some cases the loss of services of the wife to the husband may be alleged; but, unless the wife has been enticed away, it has been said, in the case of *Yundt* v. *Hartranft*, 41 Ill. 12–17, that the real ground of recovery relates to the injury which the husband sustains by the dishonor of his bed, the alienation of his wife's affection, the destruction of his domestic comfort, and the suspicion cast upon the legitimacy of her offspring; the degradation which ensues and the mental anguish which the husband suffers. Loss of service is generally averred in the declaration, by way of aggravation of damages, but need not be proved; that is, it will not defeat the action if not proved: but where particular damages are claimed for loss of services, then they must be

shown. When it is doubtful whether the criminal conversation can be proved, and the defendant has been guilty of enticing away or harboring the wife, it is advisable to add counts for such injury; but in such cases there must be an allegation that the party knew that she was the wife of the plaintiff, and it must be proved: 2 Chitt. Plead., note *e*. The action of *crim. con.* has always been and still is treated as one partaking more of a criminal than a civil character, and is a tort for which the defendant can be arrested and held to bail, and if found guilty can be taken on execution and imprisoned. The action can be maintained by the husband against a seducer of his wife, even if the wife is dead or dies pending the action. In England the action of *crim. con.* is now abolished by positive statute, and the seducer is made a co-respondent in all divorce cases, and damages may be recovered against him in the same action; and it should be so here, for if the evidence is sufficient to obtain a divorce on the charge of adultery with any particular person, it would be sufficient to sustain an action for damages against that person, and the matter can as well be adjusted by one action as by two.

To persuade or entice away or harbor a wife without a sufficient cause is actionable, and the old law was so strict upon this subject that if one's wife missed her way upon the road it was not lawful for another man to take her into his house unless she was benighted and in danger of being lost or drowned, but a stranger might carry her behind him on horseback to market or a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce. In England previous to the stat. 20 & 21 Vict., c. 85, it was customary but not necessary for the husband, learning the wife's adultery, to sue at common law the *particeps criminis*, before proceeding in the ecclesiastical court, and then to plead in this court the verdict; which, if in his favor, was considered as tending to rebut any presumption of connivance. But in this country, such a verdict against a seducer could not be admitted in evidence against a wife in a suit for divorce, because such a verdict, although upon the same subject-matter, would not be between the same parties, and there is no recorded case in this country where it has been so admitted.

II. DECLARATION.

A declaration for criminal conversation need not state and set forth each particular act of adultery, and it will be sufficient if it is

alleged that it took place on or about a day specified, and on divers other days and times after that day: 2 Chitty 642.

It is unlike a bill for divorce, where time and place must be specified, and with all the uncertainties of human testimony no man can foresee the chances and accidents of a trial. And as to immaterial circumstances, great latitude should be allowed.

Bill of Particulars.

In the great case of *Tilton* v. *Beecher*, the first skirmish which took place, between the two contending parties, was over a motion made by the defendant's counsel to compel the plaintiff to furnish a bill of particulars.

The motion was first made before Judge NEILSON, and refused, on the ground that as the defendant had not excepted to the sufficiency of the complaint that he had no power to grant such an order. An appeal was then taken from his decision to what is known as the General Term of the Supreme Court, where several judges sit in banc, and was affirmed. A further appeal was then prosecuted to the Court of Appeals, the highest court in that state, which decided that Judge NEILSON did have the power but that it was a matter for the discretion of the court below, to be exercised in all descriptions of actions where the circumstances are such as that justice demands that a party shall be apprised of the matters for which he is to be put on trial, and it could not be assigned for error, whether the *nisi prius* judge did either grant or refuse it.

When the decision was promulgated an application was immediately made to Judge MCCUNE, who, after listening to most elaborate arguments, decided to grant the order under the following restrictions:—

1. The plaintiff should be limited as to his proof of specific acts of adultery, to those named by him in his bill of particulars.

2. That this order is not to be construed as prohibiting the plaintiff from introducing, on the trial of this action, testimony which may be admissible under the general rules of evidence, as to any acts other than the specific acts of adultery, declarations, writings, documents and confessions, in which alleged confessions no particular time and place shall have been referred to.

After this order had been entered, by a curious proceeding, which seems, to one not a practitioner in New York courts, utterly inconsistent with the practice as laid down by the Court of Appeals,

an appeal was taken to the Supreme Court and the rulings of Judge McCune reversed, which ended the matter, and the case went to trial on the original complaint or declaration.

The arguments of the counsel who were engaged were very interesting, and are well worth a careful perusal. Those of *Shearman*, Judge *Morris*, *Beach*, *Evarts* and *Pryor* are very able. That of *Shearman*, for the defendant, exhibits great research, and those of *Morris* and *Pryor*, are especially able. The defendant's counsel contended, with great plausibility, that the charges made were of a most serious character, and that a defendant ought to know in advance what the particular acts complained of were, and the times and places when they were committed; but the plaintiff said such a course was but an ingenious method to compel them to show their hand to their adversary and to exhibit to them their proofs in advance, and that a party had no right to have an inquisitorial examination of his adversary's evidence, with a view to ascertain if perchance something cannot be found which will possibly aid him; that the law always considers sacred the rights of both parties to keep secret the preparations and means of attack and defence, and that if a litigant had a right to know what evidence his adversary intended to introduce against him that such a principle would include the brief of the counsel and all of the facts in the case, together with the instructions of the client, and further, that if a bill of particulars was allowed that the plaintiff could never step beyond the facts and times set forth in that bill.

But Mr. *Pryor* presented the matter in the most striking light when he said, that the great fact, which must be borne in mind, "did the defendant commit the act of adultery and not where he did it, and that time and place were not the essence of the offence." Then passing beyond this he said, referring to Mr. Beecher, that "if he be innocent he is entitled to a vindication—not a vindication that he did not commit the adultery in Livingston street or on the 10th day of August 1868—but a vindication that he never committed the act at any time or at any place. A petty thief striving to escape the penitentiary may congratulate himself if he be let go by a flaw in the indictment or variance in the proof; but this defendant can be content and the world will be content with no such acquittal; what he wants, and what the world demands, is a settlement of the issue raised by the pleadings, a decision, a determination of the fact alleged by the plaintiff and denied by the

defendant that he committed the act of adultery at all. When he gets that vindication it will be sufficient and satisfactory, but if he escapes from the fangs of justice by a variance in the proof or a defect in the indictment he will go a fugitive with the indelible mark of Cain upon his brow. So, then, it is due to the defendant, it is due to plaintiff, who, if the defendant is guilty, has sustained the most enormous wrong which one man can inflict upon another; it is due to the plaintiff that it shall be investigated by an impartial tribunal and determined by the country, not whether the wrong was perpetrated upon him one day or another, at one place or another, but it is his right to have tried and decided the great fact whether he has sustained the wrong at all. A bill of particulars, while it would advise the defendant, would limit the plaintiff in his evidence. To one it would be a shield, to the other a sword." See 2 Bishop on Marriage and Divorce, sec. 607.

III. PROOF OF MARRIAGE.

The first thing to be done on the trial of a *crim. con.* case is to prove the marriage of the plaintiff with the woman that he claims to be his wife, and with whom the adultery was committed; and it cannot be proven by cohabitation, but the actual fact must be proven by the minister who married them, or by any person who was present and witnessed the marriage. And it was laid down as an axiom by the old writers on the law of evidence, such as Starkie and Phillips, that bigamy and criminal conversation are the only two cases at common law which require such proof of the fact of marriage: *Morris* v. *Miller*, 4 Burr. 2057.

Bishop, in his work on Marriage and Divorce, vol. 1, sect. 442, says: "The marriage has been required to be proved by evidence other than cohabitation and repute, in actions for criminal conversation and on indictment for polygamy, for adultery, for incest, and for loose and lascivious cohabitation;" see also sects. 445 and 6.

C. J. PARKER, in the case of *Younger* v. *Foster*, 14 N. H. 114–119, says: "Were not the authorities so strong it might be questioned whether this evidence of cohabitation and reputation ought not to be admitted in cases of *crim. con.*, and in prosecutions for adultery and bigamy, for the simple reason that it has a legitimate tendency to prove the fact. If larceny, and robbery, and murder, may be proved by circumstantial evidence, the inquiry naturally arises why cases of *crim. con.*, &c., may not be so also. It is very clear that they may except in the matter of proof

of the marriage. Some writers say that a marriage in fact, while others say an actual marriage, must be proven, although there does not appear to be any difference in the meaning of these expressions."

In the case of *The State* v. *Winkley*, 14 N. H. 480, the court undertook to define these terms, and the conclusion arrived at was that they denote the marriage, as proved by direct evidence, as, for instance, by the testimony of witnesses who were present at the ceremony, in distinction from the proof by indirect evidence, such as reputation, cohabitation, acknowledgment, and the like.

The marriage can of course always be proved by a certificate of marriage, but in such cases you must prove the identity of the parties.

In Illinois a license to marry is to be obtained from the clerk of the county court, or they shall cause their intention to marry to be published at least two weeks previous to the marriage, in the church or congregation to which the parties, or one of them, belongs. Ministers of the gospel, judges and justices of the peace may perform the service of marriage, and then make a certificate, together with the license, to the county clerk's office; and where the marriage is celebrated according to the rules and principles of a religious society or denomination, and there is no minister, then the clerk or secretary of such society or denomination makes a certificate thereof and returns that, together with a license, if one has been issued, to the county clerk. This certificate is then recorded and carefully preserved, and such certificate or a copy of the same, or of the entry in such registry certified by the county clerk under the seal of the county shall be received of the marriage of the parties therein stated: R. S. p. 695.

The fact of the marriage may be proved by the clergyman or other officer who solemnized it, or by any one who was present at the marriage, and now, in Illinois, by the parties themselves When the marriage is proved by the person who was present it should be shown that the person who solemnized at least purported to be a priest or magistrate; and some courts hold that it must be shown that such person had been in the habit of acting, or had acted in this capacity, and that they acted on this particular occasion, was not enough, although the law will presume that the person who solemnized the marriage under claim of authority

had such in fact, otherwise he would expose himself to the penalties of the law.

In most cases, as where a person who solemnizes a marriage purports to be a priest, the court holds that it must be shown that he had some accompanying badge of office, as, for instance, that he wore the habiliments of a priest or had been known to officiate as a minister of the gospel. In Maine, on the trial of an indictment for adultery, the witness having testified that he saw the ceremony performed, but could not tell by whom and gave no description of the person performing it, whereby his official character could be indicated, the evidence was held insufficient, though the performance was followed by cohabitation. Church records are not evidence of marriage as in England.

IV. The Evidence of the Offence.

The evidence in a *crim. con.* case is the same as that in a case of divorce for adultery, and can be proved by circumstances, and is generally so.

Adultery, say the books, is peculiarly a crime of darkness and secresy. Parties are rarely surprised in it, and so it not only may, but ordinarily must be established by circumstantial evidence. The testimony must convince the judicial mind affirmatively that actual adultery was committed, since nothing short of the carnal act can lay a foundation for divorce. But a fundamental principle, never to be lost sight of in these cases, is that the act need not be proved in time and place. Circumstances need not be so specifically proved as to produce the conclusion that the fact of adultery was committed at that particular hour or in that particular room, and Dr. Lushington said:

"It is not necessary to prove that the adultery with which a party is charged should have occurred at any particular time and place. The court must be satisfied that a criminal attachment subsisted between the parties, and that opportunities occurred when the intercourse, in which it is satisfied the parties intended to indulge, might with ordinary facility have taken place."

There is always an attempt made to show that the intimacy of the parties was consistent with innocence, but Lord Stowell once said that "courts of justice must not be duped." They will judge of facts as other men of discernment, exercising a sound and sober judgment on circumstances that are duly proved. Again, he says that:

"The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion, for it is not to lead a harsh and intemperate judgment moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature, they are facts determinable upon common grounds of reason, and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties and artificial reasonings, and upon such subjects the rational and legal interpretation must be the same."

These points relating to the proof of adultery may be summarized as follows: adultery implies three things: *First.* The opportunity. *Secondly.* The disposition in the mind of the adulterer. *Thirdly.* The same in the mind of the *particeps criminis.*

And the proof of their concurrence may lie in detached testimony, no one witness being able to establish more than a single one or two of the links, or it may come in any other form. And yet when we come to consider what particular circumstances are admissible in evidence, in distinction from what combination of circumstances should be accepted by a jury as sufficient, we find a very wide range. If perfect concord exists between married persons, the less likely is it that adultery will be committed. Therefore the terms on which the parties lived is a material circumstance in the issue; then the acquaintance with the defendant, and following that alienation of the affection of the wife, his meeting her, and riding or walking out with her, correspondence, the concealment of meetings of the paramour by the wife, watching for, and if they were shown to be very familiar with each other, and are seen to indulge in familiarities, it is considered that they would be much more familiar when beyond the reach of observation. To enumerate, or attempt to enumerate, what particular facts and circumstances are required or proper, would be useless and even impossible, for every case has its own peculiarities.

And I can only refer to the general rule upon this subject, which is about as well stated in the recent case of *Daily* v. *Daily*, 64 Ill. 323, as in any other. Said Justice WALKER, in that case, "there

is much testimony tending to establish the truth of the charge, but, as in all or nearly all such cases, there is no direct and positive evidence of the acts charged. In such cases the parties generally use every effort to conceal the act, and courts and juries are compelled to determine the question from the behavior of the parties and from a great variety of circumstances, either of which, when considered alone, would be insufficient to prove the charges, but when considered together may be, and frequently are amply sufficient to establish the offence. It, like all other charges, may be established by circumstantial evidence, and the evidence need only when considered together convince the mind that the charge is true."

If direct, positive evidence should be required, but few divorces would be obtained on this ground.

I need not stop here to enlarge upon the importance of circumstantial evidence, for whole treatises have been devoted to it; but Chief Justice SHAW said, in the *Webster Murder Case*, that in the absence of direct testimony, it would be injurious to the best interests of society if such proof could not avail in judicial proceedings. If it were necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security would go wholly undetected and unpunished. The necessity, therefore, of resorting to circumstantial evidence, if it be a safe and reliable proceeding, is obvious and absolute. Crimes are secrets. Most men conscious of criminal purposes and about the execution of criminal acts, seek the security of secrecy and darkness. It is therefore necessary to use all other modes of evidence besides that of direct testimony, provided such proof may be relied upon as leading to safe and satisfactory conclusions; and, thanks to a beneficent Providence, the law of nature and the relation of things to each other, are so limited and combined together that a medium of proof is often furnished, leading to inferences and conclusions as strong as those rising from direct testimony.

Detectives' evidence and propriety of employing them.

The propriety of employing detectives to ascertain whether an offence has been committed, was fully considered in the following cases and approved: *The President and Trustees of the Town of St. Charles* v. *O'Malley*, 18 Ill. 412; *Cross* v. *People*, 47 Id. 159; *Gray* v. *People*, 24 Id. 344; *Bennett* v. *Waller*, 23 Id.

87. But in the recent case of *Blake* v. *Blake*, the majority of the judges of the Supreme Court in the same state condemned it with a good deal of emphasis and asperity. But three of the judges dissented from the opinion and held it perfectly proper. "The law imposes upon the husband," says Bishop, "the obligation to watch over the morals of his wife, and protect her against associations which might expose her to hazard her purity; or, by lowering her standard of virtue, prepare the way for the approaches of the seducer; and a husband may, when he suspects her of infidelity, watch the movements and actions of his wife, and I am unable to see any objection in employing detectives or anybody else to ascertain facts which will disclose the truth as to the guilt or innocence of a husband or wife—not to get up or manufacture testimony, but to ascertain facts."

V. A wife is not a competent witness in an action brought by a husband against a third person for criminal conversation, and even if she is divorced she would not be competent: *Rea* v. *Tucker*, 51 Ill. 111.

VI. Defences.

As to the matters which the defendant is at liberty to show, they are as follows:

1st. Connivance and collusion at the offence.

2d. The husband's bad conduct, which is admitted in mitigation of damages; as, for instance, that the husband abused her and turned her out of doors, and the bad terms on which they lived.

3d. The wanton manners of the wife, that she made the first advances, or that she has committed adultery with others before the commission of the offence with the defendant.

4th. The husband's criminal conversation with other women.

5th. His gross negligence and inattention in regard to her conduct with respect to the defendant, and any other facts tending to show either the little intrinsic value of her society or the light estimation in which he held it.

Connivance has been defined to be the corrupt consenting of a married party to the conduct in the other of which he afterwards complains, and it is a bar to the action, because what a man has consented to he cannot set up as an injury.

It is a thing of intent resting in the mind, and may consist in

a passive permitting of the adultery or other misconduct, as well as an active procuring of its commission.

Whenever a husband suspects his wife of infidelity to his bed, he may watch her and even leave opportunities open for her in order to obtain proof of her guilt, but for this purpose he must neither lay temptations in her way nor provide the opportunities. But, as Lord STOWELL said, "it is one thing to permit and another to invite; he is perfectly at liberty to let the licentiousness of his wife take its full scope, but he must not contrive the meeting or invite the adultery, and then decamp and give the opportunity." The burden of proof is of course on the party setting up the connivance, and the testimony must be strongly inculpatory, admitting of no dispute. But there can be no connivance at any act without some knowledge of its existence.

Collusion is the next of kin to connivance, and is an agreement for one of them to commit the act, and is more frequently shown in divorce cases. Connivance may exist without collusion, but collusion is (generally) connivance for a particular purpose, and connivance and collusion are bars to the action.

The state of the affections and feelings entertained by the husband and wife toward each other, prior to the adulterous intercouse, may be shown by their previous conversation, deportment and letters of the wife addressed to other persons.

The letters of the wife, in order to be admitted in favor of the husband, must have been written before any attempt at adulterous intercourse had been made by the defendant.

The infidelity or misconduct of the husband cannot be set up as a legal defence to the adultery of the wife, but in mitigation of damages only: 4 Esp., 237.

VII. DAMAGES.

It has not been the policy of the law to confine the recovery of the injured party to the precise amount of money which he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and anguish growing out of the injury. Nor is it true that the husband, being absent from home, he therefore could have sustained no loss of service by reason of his wife being debauched. He had a right to her services in the nurture of his children, as well as a virtuous example to them by her. He had