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# Jugements inédits

## Aliénation d'affection

MARCOUX v. BULMAN, C.S.Mtl, n° E-130649,
6 février 1935, juge en chef GREENSHIELDS

**Aliénation d'affection. — Abandon du foyer. — Divorce étranger. — Responsabilité. — Montant des dommages. — Instructions aux jurés. — Prescription de l'action. — C.c. arts 2261, 2262, 2267.**

I have before me two motions, one by the plaintiff, for judgment according to the verdict of the Jury, and another by the defendant, for judgment *non obstante veredicto*, dismissing plaintiff's action, or, subsidiarily, that the verdict be quashed and a new trial be ordered.

I shall first deal with the motion of the defendant. If that motion is not in one form or another granted, the plaintiff's motion will succeed, and he will obtain a judgment according to the verdict.

The defendant's motion, in substance, alleges ; that the action was served on the defendant on the 20th of April, 1934 ; that, as appears by the evidence, and by the verdict of the Jury, the alleged offences or quasi-offences were committed in the years 1928, 1929 and 1930, and the plaintiff was aware of the commission thereof not later than 1930 ; that, moreover, the effect of the plaintiff's mind and morals, alleged by him to have resulted from such offences or quasi-offences, and to which he contributes the damages, became apparent immediately after the desertion of his wife in March, 1930 ; that the humiliation for which he asks further damages, and for which $5,000.00 damages were awarded by the verdict of the Jury, was suffered in the year 1930 ; and, concludes the defendant, the present action is prescribed in virtue of Articles 2261, 2262 and 2267 C.

Without prejudice or waiver of this plea of prescription, the defendant alleges, that the amount awarded by the Jury is grossly exaggerated. With respect to this I have only to say, that an Appellate Court may grant a new trial. Whenever the amount awarded is so grossly excessive or insufficient that it is evident that the Jurors have been influenced by improper motives or led into error, a Judge in the first instance should not interfere with the quantum of the verdict. The defendant cannot succeed on that ground.

Secondly, says the defendant, the evidence of the Mis-en-cause was illegally excluded by the learned trial Judge.

No conclusions were asked against the Mis-en-cause. Just why the plaintiff's wife was made Mis-en-cause is difficult to determine. If there had been a conclusion affecting her marriage with the plaintiff, or a prayer for any

judgment which would have in any way affected her rights under her marriage with the plaintiff, possibly she should be impleaded as Mis-en-cause. During the trial, and after the plaintiff had declared his case closed, the defendant called the plaintiff's wife as a witness, not on her own behalf as Mis-en-cause — there was no issue between her and the plaintiff, but called her as a witness for the defendant on the issue with the plaintiff. Plaintiff's Counsel objected to her competency as a witness against her husband, the plaintiff. I maintained the objection. It was admitted that by correspondence (whatever that may mean) somebody obtained a document from a Mexican Tribunal, declaring that a Divorce had been granted between the plaintiff and his wife. There is no proof that either the plaintiff or his wife ever asked for this Divorce. There is no proof that this Mexican Tribunal had any jurisdiction to grant Divorces even to residents or persons in Mexico. I rule that this Divorce or pretended Divorce was absolutely null. I did not, and I was not asked to declare it void. I went much farther than saying it was voidable. I said it was absolutely void *ab initio*, and that the Mis-en-cause was and still is the wife of the plaintiff, and I applied the provisions of our law, which is the law of public order, that no wife could be heard as a witness against her husband ; that she was not a compellable witness, much less a competent witness, and she was not heard. The defendant can get no relief from me on this ground.

The defendant then proceeds to say : The Jury was misdirected by the learned trial Judge with regard to the "legal principles concerning the damages recoverable in a cause of this nature, and concerning the duty of the plaintiff to mitigate the damages". When the directions or charge to the Jury had been completed, the learned Counsel for the defendant was asked if he had anything to suggest, and he made some suggestions in the presence of the Jurors. I was of opinion that his suggestions were completely covered by what had been said to the Jurors, and I am still of opinion that there was no misdirection as to any legal principles concerning damages, or as to the duty of the plaintiff to mitigate the damages. I told the Jury that it was the duty of the plaintiff to use every endeavor to secure an occupation, and thereby lessen or mitigate the damages. I have nothing more to add, except that the defendant can get no relief on this ground.

Finally, the defendant says : They Jury was misled by unfair and improper comments of the learned trial Judge upon the facts. If the learned Counsel would point out what was unfair or what was improper, I would be able to deal with it. For the benefit, or the disadvantage, whichever may be the case, of an Appellate Court, I may state, that in my opinion not only is a trial Judge entitled to, but is bound to give the Jury his assistance in weighing and considering the evidence. While the Jurors are the masters of the facts, the trial Judge is entitled to give the Jury the benefit of his opinion on the facts, and is entitled to express an opinion as to the proving value of the testimony of any witness. This has been repeatedly recognized in England by the highest Courts, particularly in Criminal cases, in which cases the rule is much more vigorously applied that in Civil cases.

The defendant will get no relief on this ground.

There remains only for consideration the question of prescription. To deal with that I take the facts as submitted to answered by the Jurors. I

accepted the finding of the Jurors as conclusive of the facts submitted to them. Their answers were unanimous. I state the facts briefly as found by the Jurors : The plaintiff and his wife, Enid Evans, were married on the 21st or 22nd of November, 1917. Two children, a boy and a girl, were born of the marriage ; the boy on the 26th of August, 1920, and the girl on the 9th of August, 1925. The plaintiff and his wife lived happily together until the beginning of the year 1928. At this last mentioned date the defendant began to pay the plaintiff's wife undue attention, and by such undue attention he gained an ascendancy and influence over her, and did, from the beginning of the year 1928 until the desertion of plaintiff's wife in March, 1930, alienate her affections from her husband. He did humiliate the plaintiff by his actions, and in the month of March, 1930, the plaintiff's wife deserted her husband and took with her the two children, the boy and the girl, and ever since then his wife has lived apart from her husband, and has refused to return to him and to the conjugal domicile. The defendant conspired with the plaintiff's wife to bring about the desertion and her refusal to return to her husband, the plaintiff. The plaintiff's wife in the year 1930 applied for a decree of Divorce from her husband, the said application being made to an alleged Mexican Court, and the defendant went through a form of marriage with the plaintiff's wife at the City of Albany in the State of New York. The defendant influenced the actions of the plaintiff's wife in the application for a decree of Divorce from a Mexican Court, and also in consenting to go through a form of marriage with the defendant at the City of Albany. And the Jurors further said, that before the plaintiff's wife left him, the defendant did alienate her affections. Moreover, the Jurors said, the plaintiff's loss of his position with the Bell Telephone Company was caused solely by the acts and conduct of the defendant, and when asked in what did such acts and conduct consist, they answered, "By the alienation of her affections, and by the humiliation of the plaintiff". Asked as to damages, the Jurors said, that the plaintiff suffered actual damages and pecuniary loss through the loss of his position, pension, property and necessary expenses to the amount of $17,500.00 ; and they further say, that the defendant by his acts did cause the plaintiff damages in moral suffering, humiliation and the breaking up of his home, to the extent of $5,000.00. They assign as the acts, those referred to in questions six and seven. They say further, that the plaintiff became aware of his wife's desertion on the occasion of his visit to Cambridge, in the United States, which was probably sometime in the latter part of the month of March, 1930.

I will refer, briefly, to the issues as joined by the pleadings.

The defendant's plea is substantially and essentially a plea of Not Guilty. But it is somewhat detailed. The defendant denies that he ever alienated the affections of the plaintiff's wife, and he traverses in his plea practically all the affirmative allegations of the plaintiff's declaration ; but he affirmatively says, among other things, that the description of the Mis-en-cause is incorrect, and he means by that, that the Mis-en-cause is not the wife of the plaintiff. Then he proceeds to affirmatively allege, that for many years before the defendant met the Mis-en-cause her life in common with the plaintiff had been rendered intolerable by the latter's jealousy, violent temper and excessive use of alcoholic liquors ; that even if the defendant had never met the Mis-en-cause, she would have been unable, owing to plaintiff's jealousy, violent temper and excessive

use of alcoholic liquors, as aforesaid, to continue living with him as man and wife. And he adds : the defendant never had any intimate connection with the Mis-en-cause until she had left the plaintiff and had obtained a Divorce from a competent Mexican authority, and had been married to the defendant in the City of Albany, in the State of New York, on the 6th day of April, 1931. And concluding the defendant says : The estrangement of the Mis-en-cause from the plaintiff was due, not to any improper illegal or negligent act on the part of the defendant, but solely to the plaintiff's own fault and negligence.

The situation is clearly defined by the defendant. He says, in effect, to the plaintiff : I did not alienate your wife's affection ; you had lost her affection long before I had anything whatever to do with your wife. It is true I have now her affection, and I have her. She is my wife and not your wife, and I am living with her, and, incidentally, I may add, and with your children.

It will be observed that the defendant did not ask that a question should be submitted to the Jury covering the affirmative part of his plea. If the defendant was certain of the truth or the foundation of his affirmative plea, it is somewhat strange that he did not ask the Jury to decide, whether the husband, the plaintiff, had lost the love and affection of his wife by his violent temper, by his excessive use of alcoholic liquors. No question of that kind was put to the Jury, and the reason is perfectly manifest, now, after the proof is made. There was no proof whatever to justify such a statement. There was no suspicion of the existence of such a condition established before the Jury.

Then, accepting the finding of the Jury, from the beginning of 1928 the defendant continued his attentions to the plaintiff's wife, and gradually he obtained over her, as the Jury found, an ascendancy and influence. In March, 1930, the plaintiff was called to Quebec on business. His wife accompanied him either to the railway station or to his office on the eve of his departure. She was accompanied by the children. She kissed him a fond farewell. He went to Quebec and was delayed two or three days longer than he expected and when he returned home his house was empty. His wife had gone with the two children and the servant maid who had been in the plaintiff's employ. The plaintiff described the effect of this discovery upon him. I do not dwell on it. But he proceeded to endeavor to locate his absent wife and children ; and I here have no hesitation in saying, that the plaintiff was devotedly fond of his wife and passionately fond of his children. Finally, the plaintiff discovered, through the Telephone office, that the defendant had been telephoning his wife, the Mis-en-cause, at Cambridge, near Boston, and towards the end of March, by that means, the plaintiff located his wife in an appartment at Cambridge. She was there living under the name of Mrs. Charteris, which is the second name of the defendant ; his name being, Ralph Charteris Bulman. He went to Cambridge and he met his wife. The first thing he saw, according to the proof — almost the first thing he saw on entering her apartment was, a large photograph of the defendant. He begged his wife to return to Montreal. She said, I have a cousin here that I would like to consult before I decide. He agreed and they went together to the cousin's house. His wife went in to see her cousin. After sometime she returned to him and said, that her cousin wished to see him, the plaintiff, privately. He left his wife in the motorcar and went in to see her cousin. Her cousin kept him for sometime, and when, he came out his wife had

disappeared and he was unable to find her in Cambridge. She closed up her apartment. The plaintiff continued his searches for her, and finally located her in a cottage near St. Albans Bay. She was there living with the children under the name of Mrs. Lane. Seven days, from the 3rd of May, 1930, to the 13th of September of the same year, the defendant is found at this town or village of St. Albans, and there he registered in the Hotel under the name of Mr. and Mrs. Lane of Sorel, P.Q. He is constantly in the society of this lady while he is there. There can be no doubt about that. He tells a story to explain his presence there. He says he went as a message boy to bring parcels or letters from the mother of the Mis-en-cause. He found it necessary, he says, to register as man and wife at the Hotel. Seven days, at least, as I have said, he acted as a message boy. I did not hesitate to tell the Jury that they were entitled to believe his story if they wished. But they, apparently, did not, and I am in entire accord with their view in that respect.

Finally the wife came back to Montreal, and here she secured a house or apartment under the name of Mr. and Mrs. Ballantyne. At least one of the children was entered in a school under the name of Ballantyne. We have the testimony of the defendant, that he saw nothing of the Mis-en-cause ; had no relations whatever with her, but all the while, according to the finding of the Jury, he was conspiring with her to go through the farce of a Mexican Divorce. At sometime, in the year 1930, someone received a document, written in the Mexican language, purporting to declare a Divorce between the plaintiff and his wife. The exact date that document bears I am unable to state, inasmuch as the document itself was not filed, probably because no one could read it. It probably, however, was received sometime at the end of March, or the beginning of April, 1931. At least, the defendant says that after a Divorce had been obtained from a competent Mexican authority, the defendant married the Mis-en-cause on the 6th of April, 1931. As I have already said, the defendant and the Mis-en-cause, and the plaintiff, were always domiciled in the Province of Quebec ; they had no other domicile. The defendant explains the circumstance of this marriage. He says his father was going to the States. He was going with him, and he thought that he would take the lady along and they would be married in passing through Albany. They went before somebody ; whether he was a Justice of the Peace or an Archbishop or a Policeman, does not appear. Somebody did, at the City of Albany, in the State of New York, declare two Canadians, who went there for that purpose, man and wife, and they returned after the ceremony to Montreal as man and wife, and they took up their conjugal domicile, exidently, at Vercheres, in the Province of Quebec, and there they lived as man and wife under the name of Mr. and Mrs Ralph Charteris Bulman, and from and after that time, and continuously, the defendant asserts that the Mis-en-cause is his wife, and not the wife of the plaintiff, and that he and not the plaintiff has all the marital rights over the Mis-encause, and which rights appertain only to a lawful husband. It is actually on these statements of facts that I am called upon to decide, whether the plaintiff's action, in part or in whole, is prescribed by the lapse of two years.

The plaintiff entered the employ of the Bell Telephone Company as a young man, after leaving his University. He gradually progressed and was promoted from time to time until 1932. He reached a position which gave him a salary of about $5,000.00 a year, with a pension attached. After the catastrophe over-

came the plaintiff, by the breaking up of his home, the Bell Telephone Company kept him on for sometime at a reduced salary, and finally, on the 31st of May, 1932, they discharged him from their employ because he failed to do his work. The Jurors heard the evidence upon this question, and they unanimously said, that the plaintiff lost his position with the Bell Telephone Company solely by the acts and conduct of the defendant. I accepted that. That was the maximum of the plaintiff's loss, so far as the defendant could cause loss in that direction. Those damages were finally established and "made manifest", to use the words of the Supreme Court in another case, on the 31st of May, 1932. The plaintiff's action was served on the 20th of April, 1934, which is less than two years from the happening of the event which caused a loss, according to the Jurors, of $17,500.00. The Jury said the plaintiff did suffer actual and pecuniary loss through the loss of his position, pension, property and necessary expenses, and the loss of his pension took place on the 31st of May, 1932, and the dismissal of the plaintiff, or the cancellation of his contract of hire with the Bell Telephone Company was due solely to the illegal act of the defendant.

The Jurors also found, that the defendant had suffered damages through, what the plaintiff's Counsel called, moral suffering, humiliation and the breaking up of his home. He was certainly humiliated, and his conjugal home was broken up, says the Jury, through the fault of the defendant, and the conspiracy of the defendant with the Mis-en-cause, and today, and every day, that home remains broken up, and the defendant is committing with the Mis-en-cause, a wrong against the plaintiff, and so long as the defendant and the Mis-en-cause live as man and wife when they do not possess that status or quality, they do a wrong to the plaintiff, which the Jury is entitled to assess in damages in dollars and cents.

I hold that the damages which were made manifest and suffered by the plaintiff on the 31st of May, 1932, were not prescribed at the institution of the action. The damage which was caused to the plaintiff when his wife deserted him in March, 1930, have continued ever since. The total damage was not, and could not then be determined. The plaintiff for months, if not years, implored his wife to return to him. He had hopes, unfounded through they were, that she would return, and so far as his position was concerned, it was only on the 31st of May, 1932, that it was completely lost, with all its attendant and consequent damages.

The case of *City of Montreal* v. *McGee* [1], was referred to me by the learned Counsel for the defendant, as supporting the defendant's plea of prescription. With the holding in that case I have no fault to find, or criticism to offer. McGee met with an accident through the neglicence of the City of Montreal. He brought action for the recovery of damages. His action was maintained and the damages were assessed at a certain sum, which he collected. Later on he thought he had not recovered enough, and he took a second action. The second action was taken at a time when, if it had been the first action, it would have been prescribed, and the Supreme Court simply recognized the well known English rule, "one blow one action", and held, that the second action did not lie. The Supreme Court accepted the statement of Lord Adam in an English case :

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[1] (1900) 30 R.C.S. 582.

> *"There was only one wrongful act on the part of the defendants, and in my opinion as soon as the act was committed the right of action to recover all damages arising from it arose. It is always impossible to ascertain accurately what sum of damage will cover the injury, but although the amount of damages awarded him to some extent is speculative, yet the evil resulting is far less than would be the evil of allowing successive actions of damages from time to time arising from the same originating cause".*

No one will gainsay the wisdom of such a statement. If the facts were the same in the present case I should not hesitate to follow it. But it is not a similar case with which I am dealing. In the case of *Grenier* v. *City of Montreal*[2], which comes near the present case, Ramsay J., among other things said :

> « *For instance, in the present case, the earth to raise the level of the street was deposited more than two years before the institution of the action, but it does not follow that any actual damage arose then. It may have been months and weeks before the full effect of the alteration was manifest, and it is not sufficient to say that there was a protest two years and six months before, if such a protest may be for impending damage to prevent any presumption of acquiescence* ».

In that case the then Chief Justice of the Court of Appeal, Sir A. A. Dorion, said :

> *(Translation)* « *Moreover, these damages are continuous in this sense, that they were not all manifested the moment of the raising of the level of the street when that act was done, but successively* a mesure *as the water spread over the property of the Appellant where it remained and damaged the plaintiff's property. In such a case it is not the moment at which the work done that the prescription commences to run, but at the very moment when each damageable fact manifests itself* ».

And the judgment of the Superior Court which dismissed the action on the ground that it was prescribed by two years was reversed and the action maintained.

In conclusion I hold, that not only in this case is the damage continuous, but that the wrong or délit is repeated every day the defendant continues to live as man and wife with the plaintiff's wife. Every day the defendant persists in his claim that he has full marital authority over the wife of the plaintiff and continues to live as man and wife with her, he commits a wrong against the plaintiff, and it is a wrong against the plaintiff which is assessable in damages :

CONSIDERING that the plaintiff's action at the time it was served on the defendant was not prescribed, and plaintiff's action was not extinguished or denied :

CONSIDERING that the defendant's motion for judgment *non obstante veredicto*, or, alternatively, for a new trial, for the reasons mentioned in his motion, is unfounded in law and in fact :

DOTH DISMISS the defendan't motion, with costs :

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[2] (1880) 25 L.C.J. 138 (B.R.).

CONSIDERING that the plaintiff's motion for judgment according to the verdict, is well founded :

CONSIDERING that the verdict of the Jury is justified by the evidence made before it :

DOTH GRANT the plaintiff's motion for judgment according to the verdict.

CONSIDERING that the defendant's plea is unfounded in law and in fact :

DOTH DISMISS the defendant's plea : DOTH MAINTAIN the plaintiff's action, and DOTH CONDEMN the defendant to pay to the plaintiff the sum of $22,500.00, with interest on the same from the date of this judgment, reserving for further adjudication the prayer of the plaintiff for coercive imprisonment, and DOTH CONDEMN the defendant to pay all costs.

*MEMORANDUM OF REFERENCES CONSIDERED*

*City of Montreal* v. *McGee*, (1900) 30 R.C.S. 582.
*L'Hussier* v. *Brousseau*, (1908) 33 C.S. 345.
*Kerr* v. *The Atlantic Ry.*, (1895) 25 R.C.S. 197.
*Grenier* v. *City of Montreal*, (1880) 25 L.C.J. 138 (B.R.).
*City of Montreal* v. *Chevalier*, (1921) 30 B.R. 468.
*Lalonde* v. *Bélanger*, (1879) 24 L.C.J. 96.
*Langevin* v. *Canadian Light & Power Co.*, (1921) 59 C.S. 366.
*Griffith* v. *Harwood*, (1900) 9 B.R. 299.
*Montreal St. Ry. Co.* v. *Boudreau*, (1905) 36 R.C.S. 329.

## Aliénation d'affection

HARBEC v. LEBRUN, C.S.Mtl, n° 242849 ;
4 mai 1948, juge H. PERRIER

**Aliénation d'affection. — Abandon de foyer. — Dommages.**

LA COUR, après avoir entendu les parties par leur procureur sur le mérite de la cause ; après avoir examiné les procédures et les pièces produites, entendu la preuve et délibéré ;

Le demandeur reproche au défendeur de lui avoir ravi l'affection de son épouse et lui réclame $5,000 à titre de dommages.

Le demandeur, lorsqu'il a épousé, le 1er décembre 1943, Marie-Paule Tremblay, était âgé de 45 ans, veuf et père d'un enfant malade, hospitalisé à Saint-Jean-de-Dieu ; son épouse était âgée de 26 ans. Les deux époux ont fait un mariage d'intérêt, le demandeur recherchant surtout une compagne qui prendrait soin de sa maison et de son enfant, tandis que sa femme, lasse de travailler péniblement pour gagner sa vie, espérait trouver la sécurité et le confort d'un foyer.