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Alienation of Affections

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ALIENATION OF AFFECTIONS

The recent decision of *Keator v. Welch and Binmore*,[1] handed down by Justice Surveyer of the Superior Court of Quebec, reached a conclusion squarely contrary to Louisiana jurisprudence. Following French and Belgian and prior Quebec doctrine and jurisprudence, a right of recovery for alienation of affections was maintained under the general tort article of the Quebec Civil Code.[2] As to the well-known Louisiana decision[3] upon the question, the Quebec Court said: "It is impossible to accept, under our law, the ruling of the majority of the Court . . . of Louisiana . . . the court having refused, in the said case, to look into the French doctrine or jurisprudence on the subject . . ."[4]

An examination of French doctrine and jurisprudence makes it plain that, while the existence of a right to recover damages for alienation of affections is disputed among some of the earlier writers, the more authoritative commentators and decisions are now unanimous that recovery can be had by the injured spouse against the accomplice in adultery.[5] This recovery is allowed under the provisions of Article 1382 of the Code Napoleon[6]—an article to which the French writers give an application general enough to

1. 41 Rapports de Pratique de Québec 414 (1938), decided by Justice Edouard Fabre Surveyer. See "The Position of the Civil Law in Quebec," address delivered by Judge Surveyer at the dedication of Leche Hall (April 8, 1938), to appear in a forthcoming issue of this REVIEW.

2. Art. 1053, Quebec Civil Code: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."

3. Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1927).

4. Keator v. Welch and Binmore, 41 Rapports de Pratique de Québec 414, 418 (1938).

5. 2 Fuzier-Herman, Rép. (1887) Vo. Adultère, nº 320: *"Or, il est évident que l'époux, victime de l'adultère, éprouve un dommage; donc, il lui est dû une réparation pécuniare, sauf aux juges à veiller à ce que l'exercice d'un pareil droit ne devienne pas, pour un mari ou pour une femme, la source d'une spéculation scandaleuse."*

3 Dalloz, Jur. Gén. (1846) Vo. Adultère, nº 125, after referring with disapproval to the doctrine advanced by a few French commentators to the effect that there should be no recovery for alienation of affections, states: *"On ne saurait nier le préjudice immense que fait éprouver l'adultère à l'époux qui en est victime, et dont il détruit le repos, brise les affections, bouleverse l'existence entière. On ne saurait non plus découvrir de motif sérieux pour excepter un pareil préjudice de la disposition si générale et si juste de l'art. 1382 précité."*

See also 8 Demolombe, Traité des contrats (1882) nº 515; Dalloz, Supp. Jur. Gén. (1887) Vo. Adultère, nºs 93 et seq.; Poitiers, 4 février 1837, Sirey, 1837.2.374; Cass. ch. crim., 22 septembre 1837, Sirey, 1838.1.331.

6. Art. 1382, French Civil Code: *"Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."* (Every act whatever of man, that causes damage to another, obliges him by whose fault it happened, to repair it.)

govern all social relations.[7] Damages are measured by the rule established in their Article 1149,[8] which permits a creditor to recover ordinarily for the loss which he has sustained or the profit of which he has been deprived. However, only the "material and moral damages proved" may be recovered.[9]

In Louisiana, apparently divergent trends in policy exist with regard to two closely related actions:[10] that for breach of marriage promise, and that for alienation of affections. In the former situation, recovery has been reluctantly allowed[11] because Article 1934 (par. 3) of the Civil Code of 1870 specifically provides damages for breach of the marriage promise. In the case of the action for alienation of affections, however, no express provision of law stood in the way and the courts have been able to circumvent the general tort provisions of Article 2315.

When the *Monteleone* case came before Judge Cage of the Civil District Court of Orleans Parish, he reached the conclusion that in Louisiana the only action for adultery is a suit for divorce, and he expressed the opinion that the possibility of Article 2315 being sufficiently comprehensive to grant relief to the injured spouse in an alienation case was worthy of only the slightest con-

7. 8 Demolombe, op. cit. supra note 5, nº 516: *"Le principe de la responsabilité civile édicté par les articles 1382-1383, est, dison-nous, de la généralité la plus absolue; il gouverne toutes les relations sociales!*

"Il n'y a pas de profession, depuis les plus humbles jusqu'aux plus élevées industrielles ou libérales; il n'y a pas d'art, de condition, d'état, pour lesquels on puisse réclamer l'irresponsabilité des délits ou des quasi-délits qui pourraient y être commis.

"C'est la conséquence du texte même de la loi, qui n'admet ni distinction ni exception, et du principe essential d'équité, sur lequel ce texte repose."

8. Art. 1149, French Civil Code: *"Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé, sauf les exceptions et modifications ci-après."* (The damages due to the creditor are, in general, for the loss which he has suffered and for the profit of which he has been deprived, saving the following exceptions and modifications.)

9. Dalloz, Supp. Jur. Gén. (1887) Vo. Adultère, nº 94.

10. It is interesting to note that, while there is an action for alienation of affections in most other civil law jurisdictions, the action for the breach of the marriage promise is absent. Daggett, The Action for Breach of the Marriage Promise, Legal Essays on Family Law (1935) 39 et seq.

11. Morgan v. Yarborough, 5 La. Ann. 316 (1850); Smith v. Braun, 37 La. Ann. 225 (1885). In the *Morgan* case (at p. 323) the court said: "In conclusion, we may take occasion to observe, that this is the first time we or our predecessors have been called upon to consider an action of this kind. It is a fact creditable to our people; and we hope that such actions may not become frequent. While we are bound, under our jurisprudence and Code, to recognize the right of action, we are constrained to say that a female of refined sensibility could scarcely bring herself to such a suit; and that the appeals which are usually made to juries in such cases, on the score of the wounded affections of the woman, can have little foundation in truth. Such suits are not infrequently the mere instruments of extortion; courts and

sideration.[12] On appeal, the Louisiana Supreme Court through Chief Justice O'Niell as its organ, listed "several very obvious reasons why none of the great lawyers who have graced Louisiana's bar has ever heretofore thought that an action for damages for alienation of a wife's affections would be consonant with the system of law peculiar to Louisiana."[13] The reasons listed, in effect, are: (1) that damages for alienation of affections are essentially punitive or exemplary damages—a type of damages not authorized in civil cases in Louisiana;[14] (2) that there is no positive law to be found on the subject in Louisiana; (3) that the law undertakes only to control and regulate human conduct—not human nature; (4) that the law considers marriage in no other view than as a civil contract and that there is no right of action for damages ex delicto against one who induces another to violate his or her contract with a third person; (5) that a wife is not one of her husband's chattels and that services and affections are not his property, for a man can have no kind of property in the company of one who is his equal in the eyes of the law; (6) that the best way to suppress conduct leading to alienation of affections would be by means of a penal statute; (7) that a law allowing compensation for such a wrong would be revolting to many people; (8) that such a law would tend to encourage blackmail; (9) that since Article 2294 of the Civil Code of 1825[15] (present Article 2315) was an abbreviation of the corresponding article of the Civil Code of 1808[16] which merely restated a fundamental principle of Roman law, Article 2315 must be subjected to the same construction and limitations which had been put upon similar provisions in the jurisprudence of Rome and Spain; and, since it was certain that under Roman and Spanish laws there was no

juries should, therefore, cautiously restrict relief to cases of real injustice."

12. Moulin v. Monteleone, Supreme Court Docket No. 28466, p. 9: "... while Article 2315 declares that every act of man which causes damage to another obliges him by whose fault it occurred to repair it, there are any number of acts which cause damage which do not fall within the purview of this article because they are *damnum absque injuria.*

"In my opinion, the law of Louisiana never has given such an action as this brought, and so far as I am concerned personally, I hope it never will."

13. Moulin v. Monteleone, 165 La. 169, 172, 115 So. 447, 448 (1927).

14. Cf. Note, infra p. 226.

15. Art. 2294, La. Civil Code of 1825: "Every act whatever of man that causes damage to another, obliges him, by whose fault it happened, to repair it."

16. La. Civil Code of 1808, p. 320, 3.4.16: "Every act whatever of man, that causes damage to another, obliges him by whose fault it happened, to repair it, even though the fault be not of the nature of those which expose to the penalties of simple or correctional police."

right of action for alienation of affections,[17] Louisiana courts must likewise refuse to grant a right of action.

This last argument is the only position taken by Chief Justice O'Niell which seems open to question. In truth, the origin of Article 2315 can not be fixed with certainty; but, it is, as Chief Justice O'Niell points out in his opinion,[18] an exact translation of the tort article of the Code Napoleon.[19] Thus, it would seem that our present article might possibly have been taken from the Code Napoleon and it may not be a mere abbreviation of the corresponding article of the Civil Code of 1808. Furthermore, there is reason to believe that the latter article itself was taken directly from a French source rather than from Roman or Spanish law. This position is supported by reference to the *projet* of the Code Napoleon which contains the following article:

> "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui, par la faute duquel il est arrivé, à le réparer, encore que la faute ne soit point de la nature de celles qui exposent à des peines de police simple ou correctionnelle."[20]

The language used in the French text of the Louisiana Civil Code of 1808 conforms exactly with this text, varying only in the omission of the words "de l'homme" at the beginning of the article, and even this slight omission is not made in the English version which reads: "Every act whatever of man . . ." This is almost uncontrovertible argument that the article of the Louisiana Civil Code of 1808 was taken from the *projet* of the French Civil Code, and since in addition the provision in the Louisiana Civil Code of 1825 reproduces the article which was finally adopted in the Code Napoleon, it would seem that French authorities might very well have been followed had the Louisiana court been of the opinion that by so doing public policy would be served best.[21]

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17. The authority cited by Chief Justice O'Niell in support of this statement is Las Siete Partidas, 7.9.5 (2 Moreau Lislet and Carleton's Transl. (1820) 1176).

The absence of an action for alienation of affections in Roman law must have been the necessary consequence of the complete freedom of divorce in later Roman law. Cf. Buckland and McNair, Roman Law and Common Law (1936) 29.

18. Moulin v. Monteleone, 165 La. 169, 180, 115 So. 447, 451 (1927).

19. Art. 1382, French Civil Code.

20. Projet de la Commission du Gouvernement, an VIII (1800) Bk. III, tit. III, Art. 16. (Arts. 17 and 18, are likewise identical with the two subsequent articles in the La. Civil Code of 1808).

21. Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1927) in effect overruled Hennessey v. Wahlig, 155 La. 465, 99 So. 405 (1924). The court in *Moulin v. Monteleone* tried to distinguish the two cases by saying that *Hennessey v.*

The proper approach in examining the problem presented by alienation of affections cases, however, should not only be an examination into historical background but should more particularly be an inquiry into its present desirability. This inquiry involves a consideration of the social functions which the action performs and the objections which may be made to it.

The action for alienation of affections has been consistently allowed in England and in most of the United States.[22] At common law a husband's right of action for damages for alienation of a wife's affections is, according to Blackstone, based in some measure upon the idea that the wife is the inferior of the husband and that her companionship, services and affections are his property, for the loss of which, by wrongful inducement on the part of another man, the husband ought to be compensated.[23] Conversely, at common law, the wife can have no such right of action for alienation of the affections of her husband. Chief Justice O'Niell points out the fallacy of retaining the action if there can be found no better basis for its continued existence than the obsolete notion of the wife being the husband's chattel:

> "It is just as true that a man can have no kind of property in the company, care or assistance of one who is, in every sense, his equal in the eyes of the law. It is not the wife's inferiority, but her want of superiority, that denies her the right of action, accorded the husband at common law, to recover damages for alienation of the affections of the other spouse. In Louisiana, the wife, by virtue of several recent emancipation laws, has practically every prerogative that the husband has."[24]

The argument that the action for alienation should not be based upon legal principles "permeated with the ideas which mark their

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Wahlig was not a suit for damages for alienation of affections at all but that the cause of action was slander. However, the following quotation from the *Hennessey* case shows that the court in *Moulin v. Monteleone* was hardly justified in so distinguishing the two cases: " . . . The husband is legally entitled to the possession and society of his wife, and to her aid and assistance, as long as he complies with the obligations arising from the contract of marriage.

"Any invasion of such marital rights, whether by the father or mother of the wife, or by a third person, without just or reasonable cause, necessarily constitutes an act resulting in damages to him, and imposes upon the trespasser, by whose fault it happened, the obligation of repairing the injury. R.C.C. 2315." (155 La. at 468, 99 So. at 406)

22. 13 R.C.L. 1458 and cases there cited.

23. 3 Blackstone, Commentaries on the Laws of England (Sharswood's ed. 1860) 143.

24. Moulin v. Monteleone, 165 La. 169, 177, 115 So. 447, 450 (1927).

origin in a rough and uncultivated society"[25] appears unanswerable.

In support of retaining the action for alienation of affections, the position is often taken in some common law jurisdictions that its abolition would lead to an increase in lawlessness. The remedy of damages is said to serve certain broad social purposes[26]—the preservation of family solidarity,[27] the protection of the interest of the public in security from intentional and unjustifiable interference by an outsider with the stability of the home, and the prevention of evils resulting from sexual promiscuity. It is pointed out that husband and wife reciprocally have a legal right to the affections, services and consortium of each other,[28] and those who favor the action contend that any alienation of these affections, accompanied by a loss of consortium and services, constitutes a violation of that legal right. They further argue that if persons are denied access to the courts, they will take matters into their own hands with consequent violence and an increased disrespect for the law. Still no apparent hardship seems to have developed as a result of Louisiana's refusal to grant the action. The injured spouse always has the privilege of obtaining a divorce.[29] Furthermore, the action for alienation—assuming that it is an honest action by a plaintiff actually injured—is seldom brought until all hope of preserving the marriage is gone. Instead of preserving the family and protecting the home, it only adds to the antagonism which exists between the two spouses and spreads publicity deleterious to the reputations of all parties concerned.

It might be urged that newspaper publicity and journalistic scandal have caused the public to ignore the benefits of the action, and that isolated cases of abuse have been given the appearance of universality. On the other hand, it might be claimed that the worthy and reasonable cases have been ignored by the newspapers. However, the type of people who are really harmed by the conduct at which the action is directed are those who

25. 1 Cooley, Torts (3 ed. 1906) 465, quoted in Moulin v. Monteleone, 165 La. 169, 178, 115 So. 447, 450 (1927).

26. Brown, The Action for Alienation of Affections (1934) 82 U. Pa. L. Rev. 472.

27. Id. at 505-506.

28. Art. 119, La. Civil Code of 1870: "The husband and wife owe to each other mutually, fidelity, support and assistance." Cf. Leon Green, Relational Interests (1934) 29 Ill. L. Rev. 460, 468, that an action for alienation of affections is based on the damage done to a "relational interest."

29. Arts. 138, 139, La. Civil Code of 1870.

refuse to accept money as a compensation for their injury or to expose themselves to scandal and publicity, and therefore it would be useless to search court records for "deserving cases."

Even if it should be granted for the sake of argument that the alleged injuries—loss of a spouse's love and society, the destruction of home and happiness, and the suffering endured in the anguish and distress of mind—do justify substantial damages, there may still be very serious objections to the action which will more than balance the advantages derived from it. One objection to the action is that the uncertain basis for damages often makes them largely punitive. The types of damage that result are not capable of precise measurement. As a result a wide range of discretion is left to the jury. Thus it is only natural that damages are indefinite and usually excessive, bearing little, if any, relation to the actual injury suffered by the plaintiff. Since the jury is entitled to take into consideration many indefinite and purely psychological injuries, the moral indignation and emotional sympathy of the jury is often expressed by granting recovery to an "outraged" plaintiff against a "dishonorable" defendant for the plaintiff's mental suffering and disgrace. In such cases serious injustice to the defendant may very well result.

However, any argument against the action based on possible injustice to the defendant may lose some of its force when it is remembered that such a defendant is not entitled to overmuch sympathy. The contention is advanced that, if he is to be held at all, it must be shown that he intentionally interfered with the marital relations of another person, that is, he deliberately attempted to break up a home and in a measure at least succeeded; and the conclusion is reached that, should the uncertain basis for damages frighten some persons who would otherwise commit such offenses, the action has served its purpose. However, this position both presupposes the guilt of the defendant and leaves out of account the factor of blackmail. Perhaps the greatest single evil attributed to the action is that it is rapidly becoming nothing more than a vehicle of extortion. Many suits are brought in the hope of extorting out-of-court settlements or of recovering exorbitant damages for entirely fictitious injuries. The law of extortion or blackmail is ineffectual to remedy the evil of unfounded actions and extra-judicial settlements, since the dread of publicity prevents the issue from ever being raised. As a result of

the large number of extortion cases, several states have abolished the action for alienation of affections.[30]

But does the fact that the action is an instrument of blackmail and extortion justify its complete abolition? Such abuses are connected with a large number of remedies afforded in other fields of litigation, especially in regard to actions for divorce, personal injuries and insurance recoveries. The same objections which are made to the action for alienation might likewise be applied to these actions. The answer to this argument is manifest. Admitting that actions for divorce, personal injuries and insurance recoveries have been gravely abused and need reforming, the continued existence of an action for alienation of affections, if it might otherwise be desirably abolished, is not thereby excused.

The pain accorded innocent members of the families of the parties by the resultant notoriety, the inadequacy of damages as a remedy for injuries of this kind, the ineffectiveness of the action from a preventive viewpoint,[31] and the publicity which results from such an action furnish further objections. All in all, there can be slight doubt that the interests which the action seeks to protect are of less importance than the interests upon which it has a harmful effect.

With regard to the decision reached in *Moulin v. Monteleone*, another very potent argument that could be advanced by one in favor of allowing an action for alienation is that the Louisiana Supreme Court in reality usurped the function of the legislature when it deprived all persons of their remedy. To decide contrary to the apparently inclusive language of Article 2315 of the La. Civil Code of 1870 and the interpretations placed upon similar provisions in the French law by the French jurisprudence and the more authoritative commentators, might very well seem to be unjustifiable in view of the fact that the public policy involved should be the subject of legislative determination. It is submitted, however, that in the light of the dictates of public policy

30. Comment, (1936) 30 Ill. L. Rev. 764, n. 1 lists the various state statutes abolishing "heart-balm" actions and enumerates the states in which bills were reported by the newspapers to have been introduced.

31. The proponents of legislative abolition contend that injunctive or criminal sanctions are more appropriate to accomplish the purposes which the action for alienation is supposed to serve and that in any event the damage remedy has proved its ineffectiveness as an inhibiting instrumentality. Feinsinger, Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions (1935) 10 Wis. L. Rev. 417, 418.

and the recent trend toward abolishing the action as evidenced in legislation on the subject in a number of the states, the Louisiana Court was justified in the conclusion reached. The court rightfully felt that the public good would not be advanced by allowing such an action. Therefore, instead of looking to the French authorities, it asserted its privilege of deducing the meaning of Article 2315 of the Civil Code from the "spirit" which pervades the Code. Furthermore, it is suggested that the rule of decision in the Quebec case of *Keator v. Welch and Binmore* is an unfortunate one. The case was decided on the basis of French and Belgian authorities and in conformity with Quebec jurisprudence; there was no discussion of public policy.

In conclusion, even admitting the historical basis of *Moulin v. Monteleone* to be doubtful, it is submitted that the court was entirely justified in its refusal to fasten upon Louisiana the evils which it so clearly saw would result from the action for alienation of affections.

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