COKER JEROME GEORGE, Appellant, *v.* PHILLIPA C. M. GEORGE, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT, SINOE COUNTY.

Argued March 21, 22, 1945. Decided May 4, 1945.

1. Where it is contended that a verdict is contrary to evidence, a motion for a new trial is the proper procedure and not a motion in arrest of judgment.
2. A complaint in an action for divorce on the ground of adultery is insufficient if it pleads that the defendant committed adultery with several persons without giving the names of such persons.
3. In an action of divorce on the ground of adultery, the pleas of condonation and procurement are available to the plaintiff when the defendant, invoking the defense of recrimination, charges the plaintiff with adultery.
4. Damages may not be awarded against a co-respondent in a divorce action unless a writ of summons has been served upon him.

The appellant, plaintiff below, brought an action of divorce against his wife, the appellee, in the Circuit Court of the Third Judicial Circuit, Sinoe County. The trial resulted in a verdict favorable to plaintiff and an award of damages against the co-respondent, but on motion in arrest of judgment the court gave judgment denying the divorce. On appeal to this Court, *case remanded* and verdict of the jury ordered set aside together with all the pleadings.

William N. Witherspoon and *Charles B. Reeves* for appellant. *H. Lafayette Harmon* for appellee.

MR. JUSTICE SHANNON delivered the opinion of the Court.

Coker Jerome George, appellant in these proceedings, was married to his wife Phillipa C. M. George, appellee, on January 22, 1941 at Greenville, Sinoe County, and, after a brief period of marital relationship for two years

and ten months, he instituted an action of divorce against her for adultery before the Circuit Court for the Third Judicial Circuit, Sinoe County. Pleadings were conducted to the rejoinder of the said Phillipa C. M. George, defendant before said court, and when the case came up for hearing before His Honor T. Gyibli Collins, assigned judge presiding over the February term, 1944, of said circuit court, he, in passing upon the law pleadings in the case, ruled as follows:

> "The court, after carefully listening to the arguments of counsel on both sides as well as perusing the pleadings filed in this case, hereby observes that the salient point raised in the Answer and other subsequent pleadings is the plea of RECRIMINATION which is a plea whereby the defendant alleges that the plaintiff has been guilty of adultery which the defendant has not forgiven the plaintiff. This point is raised in the fourth count of the Answer, and designates two native girls—Toe-Yu-norh and Yu-norh-Prue—as the co-respondents. The other points raised in said Answer, namely, the complaint being filed in the November Term for the February Term, and the insertion of the name of the assigned judge in one set of pleadings and the name of the resident judge in others, not being of material importance to the case to warrant the dismissal of the complaint, the court will consider them as being immaterial. To this plea of recrimination, the plaintiff in the sixth count of his Reply expressly admits, but sets up in the meantime, a plea of condonation and procurement in justification thereof, whilst the seventh count of the said Reply, notwithstanding this admission made in the sixth count of the Reply, denies each and all of the facts in the Answer contained. Hence the Rejoinder of the defendant contests the legality of said Reply of the plaintiff as being contradictory in its having admitted the charge

of recrimination and at the same time denying each and all of the facts of the charge.

"The court will here observe that under the Act of Legislature relating to Matrimonial Causes, condonation and procurement are defensive pleas that can only be taken advantage of by the accused party in divorces for adultery and not the plaintiff in said suit. From this fact it would therefore appear that the plaintiff-party is not the proper party to raise such pleas in his defense. Such pleas, however, having been badly pleaded in the Reply as is already pointed out by the Rejoinder, the Court is of strong opinion that the Reply of the plaintiff is fatal and is therefore stricken from the records of this case, leaving the plaintiff to prove his alleged adultery and the defendant to also establish recrimination. The question of recrimination, which is a mixed question of law and fact, will be taken to the jury to be by them disposed of according to the weight of the evidence."

Upon the strength of the ruling fully quoted above, the case was heard by a jury and what is one of the surprising phases of the trial is that, despite the dismissal of the reply of the plaintiff wherein the pleas of condonation and procurement were raised, the court nevertheless permitted him to testify to facts tending to establish said pleas. The trial having resulted in a verdict entitling the plaintiff to his divorce and to damages in the amount of fifty dollars against the co-respondent, the defendant entered exceptions in the following words: "The defendant excepts to the verdict of the jury and gives notice that after final judgment an appeal will be taken to the Honourable Supreme Court by bill of exceptions"; but, instead of awaiting the final judgment of the court to carry into effect the notice of appeal so peculiarly given, defendant filed a motion in arrest of judgment which, although very strongly and ably resisted by the plaintiff, was sustained by the

court with a judgment denying the divorce. It is because of this judgment of the court that the case is brought before us upon a bill of exceptions containing six counts.

It is useful to mention here that it was fortunate that the appellant, plaintiff below, in the presentation of his appeal before us opened up the whole case as it was conducted from start to finish; for had he with a little more legal acumen left closed the entire proceedings leading up to a verdict in his favor and merely brought up for our consideration the legal propriety of the trial court's ruling upon a motion in arrest of judgment, this Court would have been left with no alternative but to reverse said ruling, since it appears to us to be unsound and without merit. It is elementary that a party against whom a verdict is given and who desires to contest the soundness of said verdict where he feels it to be manifestly contrary to and against the weight of evidence does so upon a motion for new trial and not upon a motion in arrest of judgment, as was done in this case; so that the trial judge erred in ruling as he did on a motion in arrest of judgment notwithstanding how much he might have been overwhelmingly impressed with the incorrectness and unsoundness of the said verdict. Had the motion been one for new trial, we have no reluctance or hesitancy in saying that his said ruling in a measure would have been sound, proper, and correct.

Said motion embodied three counts. The first count argued that the alleged confession of co-respondent Samuel Troh, which was testified to in evidence by the plaintiff and by some of his witnesses, was obtained through persuasion and inducement in that the said Samuel Troh testified, which testimony was never contradicted or rebutted: (1) That plaintiff had before the commencement of the divorce proceedings told him that he had seen a girl in Sinoe whom he wanted to marry, and, therefore, wanted some way whereby he could get rid of his wife; (2) That to consummate this, his desire, plaintiff

obviously procured some of his laborers to charge him, the said Samuel Troh, co-respondent, with having committed adultery with plaintiff's wife, which, upon repeated reference to him, Samuel Troh each time denied; and (3) That after much effort to extort this confession from him which was abortive, Samuel Troh was persuaded and induced to accept five pounds sterling and it was after this that he made the confession that was given in evidence. The second count argued, as a ground for believing this phase of co-respondent Samuel Troh's testimony, that the plaintiff never took any position against the said Samuel Troh who at the time was his employee as a common laborer, but rather instructed him to go to his gold camp for work, at the same time assuring him that anything he would be in need of he should ask him, the plaintiff, for and he would give it to him. The third count submitted that, even where the court would consider the confession of the co-respondent voluntary, it would nevertheless be forced to arrest judgment because of the forceful evidence on record in support of defendant's plea of recrimination.

Whilst in principle we agree with the trial court in its conclusion as to the third count we cannot agree with its conclusions as to the first and second counts, for, where the plaintiff was confronted with evidence tending to show and to establish that the confession of the co-respondent was obtained by him under persuasion and inducement, it was plaintiff's privilege under the law to have rebutted him. The quality of this evidence cannot be considered to be cured by a verdict of a jury.

Unfortunately, however, the defendant did not raise these issues in a motion for a new trial, but rather elected to submit them in a motion in arrest of judgment which, in our opinion, was both irregular and improper, and the objections duly taken by the plaintiff on this ground should have in consequence been sustained.

From *Corpus Juris* we have the following:

"It is no ground for arresting a judgment that there was error in the admission of evidence at the trial, or that the evidence was insufficient to sustain the verdict. For the purpose of a motion in arrest, the record does not include the evidence taken at the trial." 34 *Id. Judgments* § 165, at 39 (1924).

Where, as in this case, it is contended that a verdict is contrary to evidence, to the law, and to the legal instructions of the court, a motion for a new trial is the proper step to be taken and not a motion in arrest of judgment. 29 Cyc. of Law & Proc. *New Trial* 818, 820 (1908); 20 R.C.L. *New Trial* §§ 55, 56, at 271, 273 (1918); 1 Rev. Stat. §§ 396–98.

In addition to this error committed by the trial judge, there appear to us to be sufficient reasons for the remand of the case, not to the stage where the error in the ruling on the motion in arrest of judgment was committed but to the stage of the commencement of the pleadings; and our conclusions as will be seen hereinafter have resulted from a thorough review of the entire case because of the nature and the scope of the bill of exceptions submitted and approved.

This Court has oft and anon declared that not only should pleadings be clear and logical but they must also be in conformity with set and established principles of law. A careful review of the pleadings in the matter cannot but leave us with the conclusion that they are one of the most artless, unscientific, and fatal set that this Court has had to pass upon recently and, what is peculiar, the weakness is shown by both the plaintiff's and the defendant's lawyers. First of all, and in utter violation of the fact that "the fundamental principle upon which all . . . [pleadings] shall be [construed] shall be that of giving notice to the opposite party" (Stat. of Liberia (Old Blue Book), ch. V, § 8, 2 Hub. 1541), the plaintiff in his complaint pleads substantially that the defendant during coverture "committed adultery with Samuel Troh and

divers others in Tchien District, Liberian Hinterland," without giving the notice required by law as to who the "divers others" are; and, despite the fact that the defendant in plea three of her answer attacks the legal sufficiency of such pleading for want of notice, the trial judge omitted to pass upon it, obviously relegating it to the class of immaterial issues raised in the defendant's answer which he considered not sufficient to warrant the dismissal of the case. The unfair phase is reached when the plaintiff, without first having given the required notice as to who the divers others are, was permitted to give evidence of alleged adulterous intercourse of the defendant with Alfred McCrummada and J. E. Junior, a fact which, besides taking the defendant by surprise, also had the tendency obviously to prejudice the minds of the jury against her and to involve the reputation of other people who had not been given the required legal notice to defend same.

The defendant's answer, though framed with a little more legal precision than the plaintiff's complaint, is also defective since it fails to allege that the acts of adultery wherewith she was charging her husband in recrimination were committed without her procurement and that she had not forgiven him, as is expected of her to do in consonance with the provisions of the Matrimonial Causes Act of 1936. Peculiarly, the plaintiff, in his reply and in answer to this plea of defendant, does not attack the legal sufficiency of the plea in this respect, but seeks to offset it in count six of his reply which says:

> "And also because count 4 of the defendant's Answer is bad *for it is legally untrue* and insufficient answer to the plaintiff's complaint. It was the defendant who against the will of the plaintiff procured Toe-Yunorh and Yu-norh Prue and trained them and gave them to her husband and plaintiff to live with him so that when she the defendant is not present at the camp at Tchien, they could be locum tenens for her until she could be present. This trait of the defendant is part

and parcel of her make-up for she is accustomed to such living for she is a prostitute having had three children for three different men none of whom was her husband. The defendant having procured the said women for her husband, and given them to him as her locum tenens, has condoned the acts of husband in going into them, which act she procured herself . . . and knowing them and having lived with the plaintiff since the procurement of said acts, has condoned said offence and hence cannot bring this plea as a bar to the present divorce."

This plea of the plaintiff seems to both deny and justify, which this Court in the case *Ditchfield* v. *Dossen,* 1 L.L.R. 492 (1907), said is evasive and should not be encouraged and allowed. Whilst plaintiff's plea argues that count four of defendant's answer, which raises the plea of recrimination, "is legally untrue" (all italicized in original) it also admits the truthfulness thereof but seeks to offset it by pleading the procurement and condonation by the defendant with a view to showing defendant's forgiveness of plaintiff for said alleged adulterous acts. The trial judge correctly ruled said reply of the plaintiff out because of such evasive pleading.

We are unwilling to agree with the said trial judge when in another phase of the ruling he observes that "under the Act . . . relating to Matrimonial Causes, *condonation and procurement are defensive pleas that can only be taken advantage of by the accused party in divorces for adultery and not the plaintiff in said suit. . . .*" (Emphasis supplied.) Whilst it is true that they are defensive pleas in actions of divorce for adultery, it is also to be remembered that a plea of recrimination is in its nature a cross-action wherein the party taking advantage of it is, under our statutes, required not only to prove it but also to show that said acts of adultery complained of in said plea were committed within three years of the filing of the action for divorce and that said acts were not forgiven.

Matrimonial Causes Act, L. 1935–36, ch. XVII, § 29. It would be a rather hard and fast rule unfair to the plaintiff to maintain that he or she would be without right and privilege to deny the truth and legal efficacy of a plea of recrimination as a bar to divorce by showing that said acts complained of in said plea were procured and/or condoned by the defendant, which substantially would be forgiveness of said plaintiff by said defendant, especially since said defendant is required to show absence of forgiveness or want of contribution on his or her part to the commission of said acts. We are therefore of the opinion that the trial judge erred when he said that pleas of procurement and condonation as were made to show forgiveness of plaintiff by the defendant are not available to the plaintiff in his reply when the answer against him or her sets up recrimination.

It is necessary to here observe, though the point seems to have been overlooked by both parties at the trial and even by the trial judge himself as well as by the co-respondent, that said co-respondent was never placed under the jurisdiction of the court, either by a summons duly served and returned, by the copy of the complaint served on him, or by some voluntary act of his, so as to have given the court and jury the right to award damages against said co-respondent and in favor of the plaintiff, for although there was a joint writ of summons against the defendant and the co-respondent the returns endorsed on the back thereof only show the defendant to have been summoned and not the said co-respondent. See returns to summons.

In view of the several irregularities pointed out, the Court is of the opinion that: (1) The case should be remanded and the verdict of the jury in the case ordered set aside, together with all and sundry pleadings; (2) The parties be given the privilege of filing new pleadings commencing with the complaint of plaintiff; (3) The plaintiff, now appellant, will pay the costs of these pro-

ceedings which must be a prerequisite to the commencement of the new pleadings; and (4) Should the plaintiff, now appellant, desire to have the co-respondent brought into the case so as to answer in damages, he should pray for and have issued, served, and returned a writ of summons on said co-respondent, and it is hereby so ordered.

Verdict set aside and case remanded.