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CRUEL AND INHUMAN TREATMENT AS GROUNDS FOR DIVORCE

CLIFFORD E. McDONALD*

WITHIN the past generation the attitude of the American people toward divorce seems to have undergone a complete metamorphosis; yet the laws governing domestic relations and divorce have not been altered materially. It is a matter of statistical record that there are more divorces granted today than ever before in the history of our country; yet we hear less of the divorce problem and the divorce evil than we did a generation ago.

What was once regarded as an extraordinary remedy of last resort for a situation grown intolerable by abuse has now become in the opinion of many a convenient refuge for those who desire surcease of marital inconvenience. Consequently many of those people who enter upon a contract of marriage with the understanding that in case a mutual dissatisfaction should ensue, a divorce would release them, are greatly surprised to learn that the termination of their voluntarily assumed status is a matter entirely outside their own province and dependent upon a judicial tribunal of large discretionary capacity.

The writer is informed by a practicing attorney that during the past year four prospective parties to an action for divorce and who consulted him were greatly surprised to learn that a mutual desire for dissolution was not even sufficient to commence such proceedings, and one instance of an openly expressed intention on the part of a person before a wedding ceremony to commence action for divorce about a year subsequent to the marriage came to the writer's attention during the past year.

Every practicing attorney will concede that there is a growing tendency to regard a divorce as a matter of privilege. Thus it is not surprising that in view of the trend toward federal control in our government there should arise vehement contenders that the grounds and reasons for divorce should be standardized throughout the United States so as to give all citizens equality in their privileges at the bar; and also that our federal courts should administer the standardized remedy.

This article is prepared in order to clarify the impression of those people who regard our superior state courts as clinical laboratories where sacred marital vows are voided upon application, and for those who

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would establish a common government divorce mill to eject single and free all couples who come joined in wedlock and seek to evade its responsibilities; and who would degrade the status of marriage by placing the administration of its dissolution in a body of men to regulate just as the United States mails, interstate commerce, labor problems and prohibition are regulated.

The power to dissolve the marriage status is statutory and is not a common law power.¹

Consequently the right of a person seeking relief by divorce is directly circumscribed by and dependent upon the will of the legislative body; and as the court derives its jurisdiction from the same fountainhead, the petitioner for relief is put to the task of proving to the court that his cause is founded on fact and rests within the limits of its jurisdiction. In the United States all divorces are judicial and are either absolute or limited. Legislative divorces have been abolished, though in many democratic systems of government the legislative control of the marriage status is still in force. In England the legislative department of government conferred power to hear and determine marital questions upon the ecclesiastical courts. In the United States, there being no ecclesiastical courts, the legislature of each state vests the power and jurisdiction in a court of its own selection, usually the courts of equity.

A suit for divorce is a proceeding *in rem*. It regards only the status of the marital relationship, and the dissolution or maintenance of that relationship is the primary *res* for adjudication. This is true despite the fact that a decree of divorce may include the disposition of children or property, because such disposition flows from the original decision and is but ancillary thereto. Consequently the question of the personality or personal deficiency of a party to a suit for divorce does not constitute the gravamen of the action, but are simply evidentiary of the advisability of the dissolution sought.

Matrimonial actions are neither actions at law nor suits in equity; they are entirely statutory by nature, more closely resembling criminal than civil proceedings. Where the statute is silent the practice usually follows the rule in equity.

Although marriage is a contract, suits for divorce are not actions *ex contractu*, nor are they *ex delicto*. *Mott v. Mott*,² holds, however, that "although marriage creates a status, a suit for divorce is nevertheless an action in contract within the meaning of the statute providing for the filing of a counter complaint seeking affirmative relief."

¹ *Cook vs. Cook*, 56 Wis. 195, 14 N. W. 33.

² 82 Cal. 413.

The reason for this rather unique position of actions involving marriage and divorce is public policy. Our courts have long since held that marriage is a status and the marital relation being essentially a matter of public interest and controlled by the state for the welfare of the people, it cannot be dissolved for light cause or by mutual consent; and though both parties to such a law suit may be eager for relief the consent of the state is a condition precedent to its validity. A party cannot waive a thing essential to the integrity of such proceedings.

The courts in divorce matters have wide discretion which may not be disturbed on appeal except for abuse. But where a statutory ground for divorce is shown to exist a court has no discretionary right to deny a divorce, unless there exists a statutory ground for denial. These grounds are few. The most common being collusion, condonation, equal guilt and laches; these grounds are by their nature defensive.

Marriage, being a status, the venue for matters pertaining to it is that tribunal which has proper jurisdiction over the domicile of the parties.

In Wisconsin the circuit court has jurisdiction over divorces. There are seven grounds for divorce and they are as follows:³

- (1) For adultery.
- (2) For impotency.
- (3) When either party, subsequent to the marriage, has been sentenced to imprisonment for three years or more; and no pardon granted after a divorce for that cause shall restore the party sentenced to his or her conjugal rights.
- (4) For the wilful desertion of one party by the other for the term of one year next preceding the commencement of the action.
- (5) When the treatment of the wife by the husband has been cruel and inhuman, whether practiced by using personal violence or by any other means; or when the wife shall be guilty of like cruelty to her husband or shall be given to intoxication.
- (6) When the husband or wife shall have been a habitual drunkard for the space of one year immediately preceding the commencement of the action.
- (7) Whenever the husband and wife shall have voluntarily lived entirely separate for the space of five years next preceding the commencement of the action, the same may be granted at the suit of either party. And such living apart for five years or more, pursuant to a decree of divorce from bed and board, without request during that period by either party to the other in good faith for a reconciliation and revocation of said judgment, shall not be any bar to an absolute divorce upon this ground at the suit of either party; provided further, however,

³ Wis. Stat. 247.07.

that no divorce absolute upon this ground shall be granted unless six months of such separation shall be subsequent to the time when this act shall go into effect.

Except in rare instances it is not difficult to determine the merits of actions based upon such clearly defined and fundamental grounds. However, the words "treatment cruel and inhuman whether practiced by using violence or any other means" admits of great latitude and calls for real acumen, caution, and judicial discretion on the part of the trial court.

It was formerly the rule in Wisconsin, and still is in a few states, notably Illinois, that cruelty in order to be a ground for divorce must result in actual bodily harm or reasonable apprehension thereof, and must have been repeated more than once unless excessively violent. But this view has been repudiated in Wisconsin, and the modern doctrine is that any unwarranted conduct by either spouse which is by nature cruel and which causes mental suffering suffices to bring the cause within the purview of the statute. Such suffering need not have impaired the health of the injured party, if in the opinion of the trial court its continuance would do so and there being sufficient reason to believe such conduct probable of repetition.⁴ The general rule states further than when both parties are at fault the probability of bodily harm should be much more imminent to the party seeking relief.

Generally speaking, the courts dissolve the marriage status when the petition is upon the ground of cruelty rather to prevent future cruelty than to punish past offenses. *Cook vs. Cook, supra*. Wisconsin and most of the states have abandoned the semi-barbaric view that physical violence is alone sufficient to prove cruelty. No one can deny that what might be cruel and inhuman treatment to one person might not constitute cruelty to another person under different circumstances and in a different environment. The latitude given in such matters to the trial court is of necessity large. A few well directed blows in a fistful encounter between parties habitually given to friendly battle would not be comparable to a slap administered by an ill tempered mate to a refined and peaceable spouse. A continued ignoring of her charms might be far more lacerating to the tender sensibilities of a gentlewoman than a quick blow struck in sudden anger.

Quarreling without provocation coupled with a continual habit of nagging and berating may be cruel and inhuman treatment especially when coupled with a display of physical force.⁵

The continued silence of one party toward the other for a long period of time may be cruel and inhuman treatment especially if the

⁴ *Johnson vs. Johnson*, 107 Wis. 186, 83 N. W. 291.

⁵ *Cervenue vs. Cervenue*, 143 Wis. 393, 127 N. W. 942.

parties occupy the same living quarters and eat at the same table, and if the silent party is sulky, morose or sullen.⁶

Threats made in anger, whether justifiable or not, do not in the absence of other evidence carry sufficient importance to warrant proof of cruel and inhuman treatment unless frequently repeated or connotative of real intent, in which case such threats ordinarily suffice.⁷

In *Crichton vs. Crichton*,⁸ the court held that to use vile epithets toward a wife and threaten her with bodily harm when coupled with the act of shoving and pushing the wife with but slight violence together with a tendency toward drunkenness was sufficient to prove cruel and inhuman treatment. In order to show cruel and inhuman treatment toward a party through the instrumentality of a third person the ordinary rules apply unless procurement or prior assent is established defensively.

It is not necessary to establish a fixed or persistent habit of cruelty in order to lay a proper foundation of proof; ordinarily two or more acts are sufficient provided there is not too great a lapse of time between them. This is true even in jurisdiction where only physical cruelty is a ground for divorce.⁹

It is necessary that intention, wilfulness or malice be an element of the cruel and inhuman treatment in order that the cruel and inhuman treatment become recognized as a proper ground. Some jurisdictions object of this rule if the unintentional cruelty is such as to injure the health of the petitioner. A wife is equally entitled to protection from extreme cruelty on the part of the husband where his actions are the result of delusions (not insanity) or where they spring from unwarranted jealousy, as she would be if his cruelty were intentional. Repeated injuries, physical or mental, cannot be explained away upon defense on the ground of playfulness or a distorted version of humor.

Consequently it is difficult to describe or circumscribe the limits of cruelty or inhuman treatment. In the case of *Robinson vs. Robinson*,¹⁰ the court held in granting a divorce to a husband whose health had become seriously injured because his wife became a healer in the Christian Science Church and persisted against his remonstrances. "a divorce is not punishment to the offender but is relief to the sufferer." Whether the matter proved is sufficient ground for divorce depends on the question whether it has injured the health or reason of the petitioner. This is the important test.

⁶ *Reinhard vs. Reinhard*, 96 Wis. 555, 71 N. W. 803.

⁷ *Freeman vs. Freeman*, 31 Wis. 235.

Hacker vs. Hacker, 90 Wis. 325, 63 N. W. 278.

⁸ 73 Wis. 59, 4 N. W. 638.

⁹ *Abbott vs. Abbott*, 192 Ill. 439, 61 N. E. 350.

¹⁰ 66 N. H. 600.