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CRUELTY AS A GROUND FOR DIVORCE IN MINNESOTA†

By ROBERT KINGSLEY*

As has been common in most states, the first divorces in Minnesota were legislative in nature,¹ but this mode of procedure seems to have ceased in 1851,² so that the constitutional prohibition thereof in 1857³ had been anticipated in practice. The first general divorce law set out six grounds for divorce: adultery, impotency, imprisonment in the penitentiary, wilful desertion, cruel and inhuman treatment, and habitual drunkenness.⁴ This act was amended in 1855, by adding the following sweeping provision:

"When it shall be made fully to appear that from any other reason or causes existing, the parties cannot live in peace and happiness together, and that their welfare requires a separation."⁵

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†This article is one of a series of similar articles on cruelty as a ground for divorce. For other articles in the series consult: (1929) 8 Mich. State Bar Jour. *196, (1929) 14 Iowa L. Rev. 266. This series, the writer believes, is a necessary first step toward a proper discussion of the nature of cruelty as a ground for the severance of marital ties. It is felt that it is necessary for any work to proceed along the line of discovering first what the present state of the law is before attempting any real discussion of the "whys" or the "ought-to-bes."

Furthermore, because local statutes differ, it has seemed better to attempt to make such purely analytical studies jurisdiction by jurisdiction. These studies should in due course be followed by a general analytical study of the whole country, comparing the facts as they are found in the different states. When that has been done, the way will be cleared for the real discussion. Save in occasional instances only an analytical critique of the Minnesota cases has been made.

¹Minn. Laws 1849, ch. 27, 28 & 30; 1851, ch. 20, 21, 22 & 23.

²At least no legislative divorces subsequent thereto are listed in Kelly, Index-Digest of Minnesota Laws. It was in this year that the first general divorce law was enacted. Minn. Rev. St. 1851, ch. 66, sec. 7, *infra* at footnote no. 4.

³Minn. constitution, art. 4, sec. 28.

⁴Minn. Rev. St. 1851, ch. 66, sec. 7. This statute, in subdivision 5, on cruelty read as follows: "Where 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 to her husband."

⁵Minn. Laws 1855, ch. 17, sec. 4 (7). Of this Act, Mr. Justice Flandrau said: "Previous to the year 1855, a divorce could only be granted for six causes—adultery, impotency, imprisonment in the penitentiary of either party, wilful desertion for one year, cruel and inhuman treatment, and habitual drunkenness for a year. In 1855, to meet a particular case, the legislature (as we think subsequent events have fairly proven) improvidently

This extremely liberal statute was repealed by the revision of 1866, which eliminated entirely the new section thus added in 1855, and reduced the statement of the earlier statute⁶ to the simple statement that:

"A divorce from the bonds of matrimony may be adjudged and decreed by the district court . . . for either of the following causes: . . . *Third*. Cruel and inhuman treatment; . . ."

This provision has remained unchanged until the present.⁵

To approach the construction of this⁹ statute by a consideration of the *language* used by the court in its various decisions does not seem to be productive of any very definite results. Depending as the court favored or disfavored a divorce in the case then before it, it used liberal or strict language in its opinion. To attempt to reconcile, for example, the following statement, taken from a case in which a divorce was sustained:

"Clearly, matters between this husband and wife had reached a state where living together was out of the question. The trial court had the parties before it, and decided that defendant was to blame for this condition. The evidence supports this decision sufficiently to prevent our reversing the order refusing a new trial."¹⁰

with the following from a case in which the denial of a divorce was in question:

"The record discloses an unfortunate condition of incompatibility, but we agree with the trial judge that both parties are at

added the following clause to the law: 'When it shall be made fully to appear that from any other reason or causes existing, the parties cannot live in peace and happiness together, and that their welfare requires a separation.' True v. True, (1861) 6 Minn. 458, 464.

⁶Supra, in footnote no. 4.

⁷Minn. Rev. St. 1866, ch. 62, sec. 6.

⁸It has been, successively: Minn. Rev. St. 1866, ch. 62, sec. 6; Minn. G. S. 1878, ch. 62, sec. 6; Minn. G. S. 1894, ch. 62, sec. 4790; Minn. Rev. Laws 1905, sec. 3574; Minn. G. S. 1913, sec. 1711; and is now Mason's 1927 Minn. Stat., sec. 8585.

⁹Apart from True v. True, (1861) 6 Minn. 458, supra in footnote no. 5, all the reported divorce cases seem to have arisen under the present statute.

¹⁰Hertz v. Hertz, (1914) 126 Minn. 65, 67-68, 147 N. W. 825, 826. Notice, also: "A continuance of the relations of husband and wife meant to them continuous disorder, conflict, ill-will, harmful alike to themselves, their children and the community in which they lived." O'Neil v. O'Neil, (1921) 148 Minn. 381, 384, 182 N. W. 438, 439-440, and the following from a case granting a limited divorce under the statute which is now Mason's 1927 Minn. Stat. sec. 8609; "If nothing but misery is to be attained by living together, then what warrant is there in compelling the continuance of that existence?" Widstrand v. Widstrand, (1902) 87 Minn. 136, 138, 91 N. W. 432, 433.

fault, and that neither of them is entitled to release at the hands of the court."¹¹

results in nothing which may be relied on as a guide in other cases. The court, in each instance, it is submitted, has stated merely its conclusion in the form of a reason.

One other method of approach is, then, open, viz., to resort to the *facts* of the individual cases as given in the reports, and to attempt to deduce from that material the rules which actuate the court in its decisions. Certain difficulties at once present themselves. We are dealing with the reports of cases in an appellate court, whose problem is not: Shall a divorce be granted or denied? but: Shall the action of the trial court be affirmed or reversed? The problem thus created will be dealt with at a later point.¹² A second problem is omnipresent, namely the multiplicity of facts in most divorce cases. Rarely does a case present one allegedly "cruel" fact situation apart from the presence of other, and complicating, conduct. The court has, in fact, in at least one case, intimated that acts, not of themselves serious, may by their accumulation over a period of years constitute cruelty in their totality.¹³ However, for almost all the major situations, there are cases in which a course of conduct is isolated; and, beyond this, where a given act, or type of act, regularly appears in a number of cases, accompanied by a variety of other conduct, it would seem proper to regard this constant as, itself, at least a serious constituent of cruelty. In any event, it seems worthwhile to attempt a classification of the kinds of conduct which,

¹¹Riebeling v. Riebeling, (1902) 85 Minn. 383, 88 N. W. 1103.

¹²Infra at p. 267.

¹³Mullen v. Mullen, (1916) 135 Minn. 179, 182, 160 N. W. 494, 495: "While, perhaps, no single act in the course of the years these parties lived together would be sufficient to constitute what is known as cruel and inhuman treatment, yet aside from the three specific acts of violence which I think are fairly proven by the testimony, the constant and habitual course of treatment by the defendant of his wife, consisting of neglect, and in many instances amounting to contemptuous treatment, carping criticism, habitually applied to her, taking this accumulation of the years it seems to me to amount to one of the most insidious forms of cruelty, when applied to a sensitive woman"; and see, O'Neil v. O'Neil, (1921) 148 Minn. 381, 384, 182 N. W. 438, 439: "Little differences between the husband and wife, commencing early in their wedded life, were multiplied and enlarged upon as time wore on, and at about the time of the commencement of this action had grown into an irreconcilable conflict to be healed and remedied only by the soothing and calming effect of a judgment and decree of divorce." The cases involving "nagging," and similar conduct, infra, footnote no. 52, are, of course, all examples of an accumulation of acts—but these all of the same character.

either singly or in connection with other misconduct, have appeared in suits for divorce on the ground of cruelty.¹⁴

Each case presents, analytically, two distinct problems: Has the defendant's conduct been cruel objectively; and has it been cruel subjectively? In other words, each case raises two points: (1) Has the conduct here been such as ever, under any circumstances, and between any two people, can be denominated as "cruel" and recognized as entitling the party towards whom it was directed to a divorce; and (2) if so, was it "cruel" when applied by *this* defendant to *this* complainant? Not every case discusses both of these problems at length. The existence of one or the other may be obvious, (or, in an appellate court, the record, by failure to take exceptions, may be in such a condition that only one aspect need be considered—the answer to the other question being taken for granted). But, whether discussed or not, an affirmative answer to *both* questions is implicit in every decision granting (or sustaining) a divorce.

1. OBJECTIVE CRUELTY

Turning first, then, to what I have called "objective cruelty." The statute of 1851,¹⁵ as we have seen¹⁶ indicated a distinction between cruel and inhuman treatment "practiced by using personal violence" and that practiced "by any other means." This may well serve as a convenient division for the purposes of our analysis.¹⁷

Personal violence, in the form of a battery, committed by one spouse on the other, universally has been treated as cruel.¹⁸ With this designation the Minnesota cases agree;¹⁹ and, since the

¹⁴In the following footnotes I have indicated in parentheses the accompanying conduct in each case.

¹⁵Minn. Rev. St. 1851, ch. 66, sec. 7.

¹⁶Supra, footnote no. 4.

¹⁷Consult the quotation from *Williams v. Williams*, (1907) 101 Minn. 400, 404, 112 N. W. 528, 530, *infra*, at footnote no. 27.

¹⁸Consult, for example: *Evans v. Evans*, (1790) 1 Hagg. Cons. 35; 1 Bishop, Marriage, Divorce and Separation 1527-1532.

¹⁹*Westphal v. Westphal*, (1900) 81 Minn. 242, 83 N. W. 988 (vile and obscene language, attacks on parents, fraud); *Cochran v. Cochran*, (1904) 93 Minn. 284, 101 N. W. 179 (vile and obscene language, accusations of adultery); *Longbotham v. Longbotham*, (1912) 119 Minn. 139, 137 N. W. 387 (public accusations of adultery); *Rose v. Rose*, (1916) 132 Minn. 340, 156 N. W. 664; see: *Baier v. Baier*, (1903) 91 Minn. 165, 97 N. W. 671 (profanity, neglect); *Haver v. Haver*, (1907) 102 Minn. 235, 113 N. W. 382 (vile and obscene language, neglect); *Gilman v. Gilman*, (1921) 150 Minn. 271, 185 N. W. 469 (nagging); *Hrdlicka v. Hrdlicka*, (1927) 171 Minn. 213, 213 N. W. 919 (limited divorce, other conduct being

line between actual and threatened violence—between battery and assault,—although clean-cut in theory, is in this type of case almost indistinguishable, the cases have recognized, also, threats of violence, whether put into action or not.²⁰

But a technical battery, or assault, is not the only possible attack on the physical integrity of the injured spouse. Other types of conduct may also operate, directly, to produce physical injury. The court has, therefore, recognized, at least for a limited divorce, excessive demands for sexual intercourse;²¹ and allegations of neglect to provide food, clothing, suitable lodging, and proper medical care are common.²²

These, then, are the types of conduct constituting direct injuries to the person—personal violence—which have been presented to the Minnesota court and treated by it as objectively cruel. Although, as we have seen,²³ the statute no longer contains the provision referring to "other means" of practicing cruel and inhuman treatment, the court has always treated cruelty as something wider than mere physical violence. In an early case²⁴ the court recognized that, under a proper showing as to the subjective aspects, a long continued course of nagging was ". . . about as cruel and inhuman as it could have been without inflicting

present); and see: *Colahan v. Colahan*, (1902) 88 Minn. 94, 92 N. W. 1130, where the violence was found to have been excusable.

²⁰See *Longbotham v. Longbotham*, (1912) 119 Minn. 139, 137 N. W. 387 (public accusations of adultery); and see: *Haver v. Haver*, (1907) 102 Minn. 235, 113 N. W. 382 (neglect, vile and obscene language).

²¹*Grant v. Grant*, (1893) 53 Minn. 181, 182, 54 N. W. 1059, where, however, the court said: "Whether this would be reason for granting an absolute divorce we need not decide." It seems probable, however, that the court would recognize such conduct as ground for divorce a vincula when a case arises. It has been generally so recognized in other states having at least as strict an attitude as Minnesota. Consult: *Kingsley, Cruelty as a Ground for Divorce in Iowa*, (1929) 14 Iowa L. Rev. 266, 270-271, where the Iowa cases are collected and discussed; consult, also: *Kingsley, Cruelty as a Ground for Divorce in the State of Michigan*, (1929) 8 Mich. State Bar Jour. *196, *201.

²²See: *Baier v. Baier*, (1903) 91 Minn. 165, 97 N. W. 671 (vile and obscene language and assault); *Haver v. Haver*, (1907) 102 Minn. 235, 113 N. W. 382 (assault, vile and obscene language); *Heinze v. Heinze*, (1909) 107 Minn. 43, 119 N. W. 489 (vile language, permitting insults by others); *Mullen v. Mullen*, (1916) 135 Minn. 179, 160 N. W. 494 (nagging); *Moulton v. Moulton*, (1927) 172 Minn. 96, 214 N. W. 771 (permitting insults by others); and see, as a ground for limited divorce: *Bechtel v. Bechtel*, (1907) 101 Minn. 511, 112 N. W. 883, 12 L. R. A. (N.S.) 1100; *Martinson v. Martinson*, (1911) 116 Minn. 128, 133 N. W. 460 (vile and obscene language, nagging).

²³*Supra*, at footnotes nos. 4-8.

²⁴*Marks v. Marks*, (1894) 56 Minn. 264, 57 N. W. 651, 45 Am. St. Rep. 466; *Marks v. Marks*, (1895) 62 Minn. 212, 64 N. W. 561.

corporal punishment"²⁵ and allowed a divorce; and in the famous case of *Williams v. Williams*²⁶ the court said:

"There are two well-recognized classes of such misconduct [cruel and inhuman treatment within the meaning of the divorce law.] The first is the obvious one of actual or threatened physical violence of such character as to endanger life, limb, or health, or to create a reasonable apprehension of it. . . . The second is such other equivalent and serious misconduct which, unjustified in fact, is so plainly subversive of the relationship of husband and wife as to make it impossible that the duties of married life should be discharged, or its objects attained, and to be so hopelessly inimical to the health or the personal welfare of the injured party as to render continuance of the relationship intolerable."²⁷

As a distinction from cruelty consisting of personal violence, the label "mental cruelty" has been applied to this type of conduct.

At the outset, it may be convenient to refer to a group of cases in which the conduct complained of either constituted, or approximated, some other, and distinct, ground of divorce. No case seems to have arisen in Minnesota in which actual adultery was urged on the court as constituting cruelty; but in *Tschida v. Tschida*,²⁸ the husband complained of conduct on the part of his wife in associating with another man, under circumstances such as to justify a belief that their relations were criminal, although adultery was not alleged, nor was there an attempt to prove actual adultery. Of this situation the court said:

"The effect upon . . . [the husband] . . . compelled to be absent from the home when the situation was such, can well be imagined . . . We think . . . [the wife's] . . . conduct with Clark justified finding cruel and inhuman conduct warranting divorce."²⁹

The principal point of interest about this case is not its actual decision, for in so holding the court but followed the trend of authority,³⁰ but the language of the court in distinguishing two

²⁵*Marks v. Marks*, (1895) 62 Minn. 212, 213, 64 N. W. 561.

²⁶(1907) 101 Minn. 411, 112 N. W. 528.

²⁷*Williams v. Williams*, (1907) 101 Minn. 400, 404, 112 N. W. 528. Consult, also: *Bechtel v. Bechtel*, (1907) 101 Minn. 511, 112 N. W. 883, 12 L. R. A. (N.S.) 1100; *Mullen v. Mullen*, (1916) 135 Minn. 179, 182, 160 N. W. 494, 495; *Gall v. Gall*, (1925) 165 Minn. 291, 206 N. W. 450; and cf.: *Hrdlicka v. Hrdlicka*, (1927) 171 Minn. 213, 215, 213 N. W. 919, 920, where the court, granting a limited divorce, said: "This long course of unkind words, swearing, vulgar accusations, disagreeable and penny-exacting conduct sears and scars, provokes bitterness, breeds rebellion, creates agony of mind and tends just as effectively as personal violence to produce unbearable domestic misery."

²⁸(1927) 170 Minn. 235, 212 N. W. 193, discussed in: (1927) 2 Notre Dame Lawyer 217; (1927) 13 Va. L. Rev. 654.

²⁹*Tschida v. Tschida*, (1927) 170 Minn. 235, 237, 212 N. W. 193, 194.

³⁰The court cited: *Van Camp v. Van Camp*, (1921) 53 Cal. App.

cases cited on behalf of the wife.³¹ Of these cases, the court said:

"Both cases were decided on demurrers holding that the cruelty charged amounted to no more than flirting with persons of the opposite sex."³²

thus indicating that the conduct of the guilty spouse, if not actual adultery, must, at least, be a close approximation thereto.

Two other species of conduct have been urged on the court but rejected. In *Dion v. Dion*³³ the wife sued for divorce on the ground that the husband had been committed to the state reformatory. This was refused, the court refusing to interpret the words "state prison," as the statute then read,³⁴ to include the reformatory. On rehearing, the plaintiff raised the suggestion that this was cruelty. This suggestion the court briefly rejected, saying:

"We cannot adopt this view. Clearly, neither the involuntary submission to a sentence of the court by a party convicted of a crime or the act of committing such crime, when it does not directly involve his wife, can be treated as a cruel or inhuman act on his part toward her."³⁵

When viewed in the light of the cases wherein "nagging,"³⁶ or bad language³⁷ were held to be cruelty, this decision seems out of line. It is submitted that the possibilities (for it must be remembered that the court is holding that this *never* can be cruelty) of such conduct seriously affecting the wife are at least as great

17, 199 Pac. 885; *Craig v. Craig*, (1905) 129 Iowa 192, 105 N. W. 446; *Atchinson v. Atchinson*, (1896) 99 Iowa 93, 68 N. W. 573; *Burns v. Burns*, (1917) 173 Ky. 105, 190 S. W. 683; *Eistedt v. Eistedt*, (1915) 187 Mich. 371, 153 N. W. 676; *Bearinger v. Bearinger*, (1912) 170 Mich. 661, 136 N. W. 1117; *Hofmann v. Hofmann*, (1921) 232 N. Y. 215, 133 N. E. 450; *Holm v. Holm*, (1914) 44 Utah 242, 139 Pac. 937. The Iowa cases cited are discussed in *Kingsley, Cruelty as a Ground for Divorce in Iowa*, (1929) 14 Iowa L. Rev. 266, 276-277, the Michigan cases in *Kingsley, Cruelty as a Ground for Divorce in the State of Michigan*, (1929) 8 Mich. State Bar Jour. *196, *204-*205, and the New York cases in (1922) 7 Cornell L. Q. 258. It should be noticed that, of the cases cited, the *Eistedt* and *Hofmann* Cases involved actual, proved adultery.

³¹*Hancock v. Hancock*, (1908) 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N.S.) 670, and *Benson v. Benson*, (1915) 45 Utah 514, 146 Pac. 564.

³²*Tschida v. Tschida*, (1927) 170 Minn. 235, 238, 212 N. W. 193, 194.

³³(1904) 92 Minn. 278, 100 N. W. 4 and 1101.

³⁴Minn. G. S. 1894, sec. 4790(4). It should be noticed that, the next year, the Revised Laws of 1905 expressly included commitment to the state reformatory. Minn. Rev. L. 1905, sec. 3574(4). The section was again amended, on a different point, in 1909: Minn. Laws 1909, ch. 443, sec. 1(4), to read as it stands at present. Mason's 1927 Minn. Stat., sec. 8585(4).

³⁵*Dion v. Dion*, (1904) 92 Minn. 278, 279-280, 100 N. W. 1101.

³⁶*Infra*, footnote no. 52.

³⁷*Infra*, footnote no. 51.

as in the situations in which mental cruelty is recognized. The explanation probably lies in a hesitancy on the part of the court to treat a type of conduct, not quite meeting the legislatively established standard for one ground of divorce, as a ground under a different name. But such an attitude seems erroneous. Imprisonment for crime is made a ground for divorce irrespective of any effect on the other spouse. But to have held this conduct "cruel" would still have left it to the plaintiff to prove that the subjective tests had been met. Hence the seeming relaxation of legislative standards would have been off-set by the introduction of a new requirement, not present in the ground approximated.

The last situation of this type is the refusal of intercourse. This, likewise, has arisen in but one case. *Segelbaum v. Segelbaum*.³⁸ The trial court had found that the wife, although she had cohabited with the husband, had for a period of years refused to have marital intercourse. The husband urged that this was a ground for divorce; but the supreme court, after referring to the fact that the English action for restitution of conjugal rights lay only to compel cohabitation and not to compel marital intercourse, said:

"... the tenor of the American decisions ... is not to recognize the denial of marital intercourse by either of the parties as in itself a ground of divorce, either under the head of 'desertion' or 'cruelty.'"³⁹

In so far as it held that such refusal was not desertion, the court was correct historically, and in accord with the weight of authority;⁴⁰ but in holding that such conduct never can constitute cruelty, the court runs counter to a well settled group of cases in at least one jurisdiction.⁴¹ Again, it is submitted, the court has

³⁸(1888) 39 Minn. 258, 39 N. W. 492.

³⁹*Segelbaum v. Segelbaum*, (1888) 39 Minn. 258, 260, 39 N. W. 492, 493.

⁴⁰For some discussions of the refusal of marital intercourse as constituting desertion, consult: (1920) 69 Univ. of Penn. L. Rev. 77; (1923) 22 Mich. L. Rev. 166; (1925) 10 Cornell L. Q. 374; (1925) 25 Col. L. Rev. 105; (1923) 32 Yale L. J. 404. The whole question is annotated in Moll. *Sexual Abnormalities as Factors in Divorce Cases*, (1923) 40 Medico-Legal J. 128. Cf.: *Mirizio v. Mirizio*, (1926) 242 N. Y. 74, 150 N. E. 605, aff'd (1925) 212 App. Div. 524, 209 N. Y. S. 117, discussed in: (1926) 74 Univ. of Penn. L. Rev. 851; (1926) 6 Boston Univ. L. Rev. 195; (1926) 39 Harv. L. Rev. 778; (1926) 35 Yale L. J. 758; (1926) 3 Wis. L. Rev. 488.

In at least one state, such conduct has been declared by statute to constitute desertion. Cal. Civ. Code, sec. 96.

⁴¹Michigan: consult: *Menger v. Menger*, (1890) 83 Mich. 319, 47 N. W. 219, 21 Am. St. Rep. 605; *Whitaker v. Whitaker*, (1896) 111 Mich. 202, 69 N. W. 151; *Murnon v. Murnon*, (1901) 128 Mich. 680, 87 N. W. 1039, 8 Detroit L. N. 861; *Wercode v. Wercode*, (1907) 147 Mich. 398, 110

erred in holding that such conduct, where unjustified and long continued—for the refusal should, undoubtedly, be so limited—is not *objectively* cruel.

Turning from these cases of acts which are almost, although not quite, grounds for divorce under other designations, we turn to conduct which is attackable solely as constituting cruelty. Probably the clearest case of such misconduct—certainly the one most readily acted upon by the courts—is defamation. In what seems to be the earliest Minnesota case to attempt to designate what acts constitute cruelty, the court held that an unfounded charge of adultery, publicly made by a husband against his wife, was cruelty,⁴² and this holding has been adhered to in all subsequent cases.⁴³ In the famous case of *Williams v. Williams*,⁴⁴ the situation was reversed, the charges having been made by the wife to her husband. The court held this, likewise, to be cruel,⁴⁵ although it indicated that it would require stronger proof of the subjective element.⁴⁶

But, although this is the commonest form of defamation between spouses, there is no indication that the doctrine is limited to this charge. In *Longbotham v. Longbotham*⁴⁷ a false allegation of commitment to an insane asylum, and in *Taylor v. Taylor*,⁴⁸ an allegation that the wife falsely had charged her husband with non-support were treated as of sufficient legal merit to justify consideration (although, in the end, the court found the allegation

N. W. 942; *Wagner v. Wagner*, (1918) 203 Mich. 328, 168 N. W. 1019; discussed in *Kingsley, Cruelty as a Ground for Divorce in the State of Michigan*, (1929) 8 Mich. State Bar Jour. *196, *205-207.

⁴²*Wagner v. Wagner*, (1886) 36 Minn. 239, 30 N. W. 766.

⁴³*Clark v. Clark*, (1902) 86 Minn. 249, 90 N. W. 390; *Cochran v. Cochran*, (1904) 93 Minn. 284, 101 N. W. 179 (vile and obscene language, battery); *Longbotham v. Longbotham*, (1912) 119 Minn. 139, 137 N. W. 387 (assault and battery); *Eaton v. Eaton*, (1924) 161 Minn. 293, 201 N. W. 289; see: *Colahan v. Colahan*, (1902) 88 Minn. 94, 92 N. W. 1130, where, however, the court found the charge was made on probable cause; *Jokela v. Jokela*, (1910) 111 Minn. 403, 127 N. W. 391, where the court found the conduct not subjectively cruel; and *Gall v. Gall*, (1925) 165 Minn. 291, 206 N. W. 450.

That the making of such charges is ground for limited divorce was held in *Hrdlicka v. Hrdlicka*, (1927) 171 Minn. 213, 193 N. W. 919.

⁴⁴(1907) 101 Minn. 400, 112 N. W. 528.

⁴⁵Accord: *Hertz v. Hertz*, (1914) 126 Minn. 65, 147 N. W. 825 (vile and obscene language, nagging); *Brodsky v. Brodsky*, (1927) 172 Minn. 250, 215 N. W. 181 (nagging); *Eller v. Eller*, (1930) 182 Minn. 133, 233 N. W. 823, discussed in (1931) 3 Dakota L. Rev. 384 (other slander).

⁴⁶Consult, *infra*, footnotes nos. 61-63.

⁴⁷(1912) 119 Minn. 139, 137 N. W. 387.

⁴⁸(1929) 177 Minn. 428, 225 N. W. 287.

untrue in the first case, and the charge well-founded in the second). And the making of such charges, if the essential subjective elements—principally here lack of probable cause—be present, is cruel even though they are made in the pleadings in divorce actions between the parties.⁴⁹

In these cases, the damaging effect of the conduct is caused, or at least intensified, by the fact that it creates public disfavor. Is it enough that the defendant has been guilty of a course of conduct which, although carried on in private, nevertheless creates injured feelings on the part of the other spouse? Such private acts as have been raised in litigation seem to fall, roughly, into five groups: (1) private charges of unchastity;⁵⁰ (2) the use of profane and abusive language;⁵¹ (3) nagging;⁵² (4) abuse of third parties for whom the complainant has affection;⁵³ and (5) incompatibility.⁵⁴ Of these, the first four have, sometimes alone, but more usually in conjunction with other acts, been treated as cruelty. In an early case⁵⁵ the court recognized that, granting the presence of subjective elements, nagging alone might be

⁴⁹*Consult Gall v. Gall*, (1925) 165 Minn. 291, 292, 206 N. W. 450, where the court, granting a divorce on this ground in part said: "Without at all trying to verify her admission . . . he began this action in which the charges were made public."

⁵⁰*Eaton v. Eaton*, (1924) 161 Minn. 293, 201 N. W. 289.

⁵¹*Westphal v. Westphal*, (1900) 81 Minn. 242, 83 N. W. 988 (violence, abuse of plaintiff's relatives); *Cochran v. Cochran*, (1904) 93 Minn. 284, 101 N. W. 179 (violence, public charges of adultery); *Hertz v. Hertz*, (1914) 126 Minn. 65, 147 N. W. 824 (nagging, false charges of adultery); see: *Heinze v. Heinze*, (1909) 107 Minn. 43, 119 N. W. 489; and see *Colahan v. Colahan*, (1902) 88 Minn. 94, 92 N. W. 1103, and *Haver v. Haver*, (1907) 102 Minn. 235, 113 N. W. 382, where the language was held to have been justified.

⁵²*Marks v. Marks*, (1894) 56 Minn. 264, 57 N. W. 651, 45 Am. St. Rep. 466, and (1895) 62 Minn. 212, 64 N. W. 561; *Hertz v. Hertz*, (1914) 126 Minn. 65, 147 N. W. 825 (vile names, false charges of adultery); *Mullen v. Mullen*, (1916) 135 Minn. 179, 160 N. W. 494 (violence); *O'Neil v. O'Neil*, (1921) 148 Minn. 381, 182 N. W. 438; *Brodsky v. Brodsky*, (1927) 172 Minn. 250, 215 N. W. 181 (false charges of adultery); *James v. James*, (1930) 179 Minn. 266, 229 N. W. 128; see: *Segelbaum v. Segelbaum*, (1888) 39 Minn. 258, 39 N. W. 492; *Heinze v. Heinze*, (1909) 107 Minn. 43, 119 N. W. 489; *Gilman v. Gilman*, (1921) 150 Minn. 271, 185 N. W. 469; *Dauer v. Dauer*, (1926) 169 Minn. 148, 210 N. W. 878; as a ground for a limited divorce, consult: *Martinson v. Martinson*, (1911) 116 Minn. 128, 133 N. W. 460; *Hrdlicka v. Hrdlicka*, (1926) 171 Minn. 213, 213 N. W. 919.

⁵³*Westphal v. Westphal*, (1900) 81 Minn. 242, 83 N. W. 988 (violence, abusive language).

⁵⁴*Reibeling v. Reibeling*, (1902) 85 Minn. 383, 88 N. W. 1103; but see *Widstrand v. Widstrand*, (1902) 87 Minn. 136, 91 N. W. 432.

⁵⁵*Marks v. Marks*, (1894) 56 Minn. 264, 57 N. W. 651, 45 Am. St. Rep. 466, and (1895) 62 Minn. 212, 64 N. W. 561.

cruelty, and this attitude has since been maintained,⁵⁶ the court saying in a comparatively recent case:⁵⁷

"An unvarying course of fault finding, insult and oppression, unrelieved by a pleasant word, and persisted in for years, may become more intolerable than blows. . . ."⁵⁸

But mere incompatibility, standing alone, has not been considered an adequate ground for absolute divorce,⁵⁹ although, in a case seeking only a limited divorce, the court easily allowed the separation.⁶⁰

2. SUBJECTIVE CRUELTY

The discussion thus far has treated of conduct which, considered objectively—considered without reference to any particular man and woman—has been classed by the court as "cruel." It has been suggested, already, that, to justify a divorce for cruelty, the conduct complained of must be not only cruel when tested by an objective standard, but cruel subjectively—cruel when inflicted by the particular defendant on the particular plaintiff.

As to the plaintiff, this requirement that the conduct be subjectively cruel has long been recognized. In the first case to treat "nagging" as objectively cruel,⁶¹ the court emphasized the need for proof of the subjective element:

"Such a course of ill-treatment, long continued, where the acts of the husband are studied and malicious, *and the wife is sensitive*, may be cruel and inhuman treatment *if it has a serious effect on her health, or causes her great mental suffering; but the effect on her must be of a serious character.*"⁶²

⁵⁶Consult the cases cited, *supra*, in footnote no. 52.

⁵⁷Mullen v. Mullen, (1916) 135 Minn. 179, 160 N. W. 494.

⁵⁸Mullen v. Mullen, (1916) 135 Minn. 179, 182, 160 N. W. 494, 495, and consult the further quotation from this case and from O'Neil v. O'Neil, (1921) 148 Minn. 381, 182 N. W. 438, *supra*, in footnote no. 13.

⁵⁹Reibeling v. Reibeling, (1902) 85 Minn. 383, 88 N. W. 1103; Baier v. Baier, (1903) 91 Minn. 165, 97 N. W. 671.

⁶⁰Widstrand v. Widstrand, (1902) 87 Minn. 136, 138, 91 N. W. 432, 433, the court saying: ". . . we do not find the record to disclose such a persistent method or system of cruelty on the part of the defendant as would justify an absolute divorce. . . . While the law cannot release people from the marriage tie simply because they are unhappy, yet when it appears that the interests of both parties would be conserved by a separation rather than a continuation, there should be some relief; and the statute referred to comprehends such cases. After considering the history of these parties, their peculiarities, their repeated separations and reconciliations, their differences in temperament, habits, and tastes, it seems to us that it would be unwise to withhold the relief sought, especially since the health of plaintiff has been affected. If nothing but misery is to be attained by living together, then what warrant is there in compelling the continuance of that existence?"

⁶¹Marks v. Marks, (1894) 56 Minn. 264, 57 N. W. 651.

and this has been followed by similar language in subsequent cases.⁶³

The existence of this requirement of subjectivity has made it necessary—at least in cases of “mental cruelty”—to consider in some detail the manners and character of the plaintiff. For example, in a case in which the objective cruelty consisted of unfounded charges of unchastity, the court refused a divorce, saying:

“Her language, however, was much coarser than his own. She was guilty of cruelty on her part. She assaulted him, it appears practically without contradiction, in a manner which attained the limit of disgusting indecency. Propriety precludes the detailed narration of her misconduct, indescribable and insufferable. She showed wrong on his part; but the record demonstrates that she was in no position to complain.”⁶⁴

The cases on subjective cruelty are, unfortunately, somewhat obscured in the opinions of appellate courts by the very fact that they are courts of review. It is not always clear whether the court is sustaining the action of the trial court because (1) the reviewing court itself thinks the evidence showed (or did not show) subjective cruelty; or (2) the reviewing court feels itself unjustified in reversing a finding on this point made by the trial court—two approaches which are, of course, entirely different. There is, however, adequate authority for the necessity of a finding on the point by a trial court, and, while, here as elsewhere, the ordinary inferences operate, so that some conduct at least would so normally be subjectively cruel that the mere evidence of the existence of such conduct (objectively cruel) would support a finding that it had been subjectively cruel, yet, it is submitted, a prudent plaintiff would offer, in aid of any available inferences, definite evidence of the subjective effects of the misconduct complained of.

When we turn to consider the extent of a requirement of subjectivity as concerning the defendant, our problem may well be stated in more traditional terms as a matter of intent. Where actual malice (that is, an actual intent to injure body or feelings) can be shown, the problem is easy;⁶⁵ and, in addition, the existence of malice, here as in other fields of law, may be inferred from

⁶²Marks v. Marks, (1894) 56 Minn. 264, 266, 57 N. W. 651. (Italics added.)

⁶³See, for example: Mullen v. Mullen, (1916) 135 Minn. 179, 160 N. W. 494, and the cases cited, *infra*, in footnote no. 64.

⁶⁴Jokela v. Jokela, (1910) 111 Minn. 403, 404, 127 N. W. 391; and see: Clark v. Clark, (1902) 86 Minn. 249, 90 N. W. 390; Haver v. Haver, (1907) 102 Minn. 235, 113 N. W. 382.

⁶⁵Marks v. Marks, (1895) 62 Minn. 212, 64 N. W. 561; Gall v. Gall, (1925) 165 Minn. 291, 206 N. W. 450.

the party's conduct. And, again as elsewhere, a qualification must be made: acts done in the heat of a sudden passion, provoked by misconduct of the plaintiff, are not intentional or malicious, hence not cruel.⁶⁶

From this qualification follows a necessary converse: if the defendant had no intent, either express or implied, to injure the complainant, then his conduct, although it may have been cruel objectively, will not justify a divorce.⁶⁷ This rule operates in two classes of cases.

If the defendant was, at the time of the alleged misconduct, so insane as not to realize the nature of his act—the familiar “right and wrong” test of the criminal law—then his conduct is not subjectively “cruel.” This situation was first raised in Minnesota in the case of *Longbotham v. Longbotham*.⁶⁸ In that case, the defendant had attempted to amend his pleadings, during the trial, so as to allege that he had been insane at the time of committing the acts complained of. The supreme court sustained the trial court in its refusal to permit the amendment, on the ground that such amendments were within the discretion of the trial court, which did not appear to have been abused. Incidentally, however, the court said:

“Insanity is a defense to an action for a divorce on the ground of cruel and inhuman treatment, if at the time the alleged acts of cruelty were committed the defendant was laboring under such a defect of reason as not to know the nature of his acts or that they were wrong.”⁶⁹

This dictum was followed, a few years later, by actual holding in *Kunz v. Kunz*,⁷⁰ the court saying:

“The finding of cruel and inhuman treatment of plaintiff by defendant would have ample support in the evidence were it not plain that all defendant's conduct, which furnishes the basis for the finding adverse to her, is but the symptom and result of a disordered mind. It is a typical case of delusional insanity, its first manifestation having as a subject matter the two persons

⁶⁶*Colahan v. Colahan*, (1902) 88 Minn. 94, 92 N. W. 1130.

⁶⁷*Widstrand v. Widstrand*, (1902) 87 Minn. 136, 137, 91 N. W. 432, 433: “. . . We do not find the record to disclose such a . . . system of cruelty on the part of the defendant as would justify an absolute divorce.” (Italics added.) *Dion v. Dion*, (1904) 92 Minn. 278, 279-280, 100 N. W. 1101: “. . . clearly . . . the involuntary submission to a sentence of the court by a party convicted of a crime . . . can [not] be treated as a cruel or inhuman act on his part toward her.” (Italics added.)

⁶⁸(1912) 119 Minn. 139, 137 N. W. 387.

⁶⁹*Longbotham v. Longbotham*, (1912) 119 Minn. 139, 142, 137 N. W. 387, 389.

⁷⁰(1927) 171 Minn. 258, 43 N. W. 906.

nearest defendant's heart. . . . However serious, from plaintiff's standpoint, the situation may be, to whatever extent he has been unjustly accused and otherwise harassed, he is not entitled to a divorce. That is for the simple reason that his wife's conduct, of which he now complains, is explainable on no other hypothesis than that of aberration. Insanity itself not being a ground for divorce, its symptoms and results cannot have that effect. Insanity is a mental disease, and disease of the mind no more than illness to the body is recognized by the law of this State as ground for divorce. 'If insanity itself after marriage is no cause for divorce, nothing which is the consequence of it can be.' . . . Any change of the law in that respect must come from the Legislature rather than the court."⁷¹

It is this same doctrine that the conduct must have been intentionally cruel, it is submitted, which supports the rule that the making of false charges against the complainant is not cruelty if the defendant made them under a reasonable belief in their truth.⁷²

⁷¹Kunz v. Kunz, (1927) 171 Minn. 258, 258-259, 213 N. W. 906.

⁷²Hertz v. Hertz, (1914) 126 Minn. 65, 67, 147 N. W. 825, 826; "There was no attempt to show that . . . [the] . . . charges were true, or that she had reasonable ground for her evident conviction that her husband was unfaithful;" Taylor v. Taylor, (1929) 177 Minn. 428, 432, 225 N. W. 287, 289: "Her conduct was not malicious, but was at least such as she believed necessary and proper. Her action in this respect was had through the office of the district attorney of Brown County, Wisconsin. It was obviously in good faith;" see: Wagner v. Wagner, (1896) 36 Minn. 239, 30 N. W. 766.