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Divorce--Cruel or Inhuman Treatment as Ground For

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reasonable care);  State v. Snider, 81 W. Va. 522, 94 S.E. 981 (1918) (failed to distinguish between two degrees of statutory murder).

The rule was extended in  State v. DeBoard, supra.  There the defendant was being menaced by several individuals. One instruction given indicated that there was but one person (the deceased) molesting the defendant, and stated the defendant's right of self-defense against him alone. The instruction was held curable. The court settled this and the instant case by the same rule as applied in the earlier cases, without distinguishing them, so that it now seems well established that the incomplete instruction rule has been extended to include instructions incomplete as to fact.

The policy behind holding an incomplete instruction curable is that the jury cannot be misled by such an instruction because it does not actually misstate anything, but merely has an omission which is supplemented by another instruction. In extending the rule to factually incomplete instructions, it would seem that the distinction should have been recognized and that the policy on which the rule is based should have been considered.

R. A. K.

Divorce—Cruel or Inhuman Treatment as Ground For.—Proceeding by wife against husband for separate maintenance on ground of cruel or inhuman treatment under W. Va. Code c. 48, art. 2, § 4 (Michie 1949). They were married in 1944. He began to treat her with coldness and indifference almost immediately. He refused to converse with her, failed or refused to come to meals and many times used profane language toward her. He refused to visit her while she was being treated at a hospital. H's demurrer was overruled and the trial chancellor granted the decree. H appealed. Held, that the conduct of the husband did not constitute cruel or inhuman treatment. Decree reversed; cause dismissed. Davis v. Davis, 70 S.E.2d 889 (W. Va. 1952).

It should be noted that the decision in the above case does not expound new law in West Virginia. The law on this subject seems to be well settled and has been so since the case of Goff v. Goff, 60 W. Va. 9, 53 S.E. 769 (1907). The purpose of this comment then is not to bring new law before the bar, but merely to point out and
discuss the decisions which the West Virginia court has handed down since 1936. The cases prior to that time have been discussed. Colson, *West Virginia Divorce Law*, 43 W. Va. L.Q. 298 (1937).

The Code provides that cruel or inhuman treatment is ground for an absolute divorce as well as separate maintenance. W. Va. Code c. 48, art. 2, §§ 4 and 29 (Michie 1949). The problem arises when an attempt is made to find what the legislature means by the phrase "cruel or inhuman treatment."

In a suit for divorce where cruel or inhuman treatment is relied upon, the result depends upon the circumstances of each case. *Kessel v. Kessel*, 131 W. Va. 239, 46 S.E.2d 792 (1948). Since then a general definition is from a practical standpoint impossible, a treatment from a more specific angle is thought desirable.


Obviously, the courts feel that acts such as these could have been easily forgiven and forgotten had there been the proper disposition on the part of each to overlook the faults and failings of the other.
On the other hand, our court has found the following to be sufficient to constitute cruel and inhuman treatment: several bodily assaults on wife by husband, *Finnegan v. Finnegan*, 134 W. Va. 94, 58 S.E.2d 594 (1950); hitting, slapping and kicking wife while attempting to choke her, *Miles v. Miles*, 131 W. Va. 513, 48 S.E.2d 669 (1948); false accusation of prostitution made by husband to wife, *Cochran v. Cochran*, 130 W. Va. 605, 44 S.E.2d 828 (1947); several violent blows and brandishing of a knife over wife, *Myers v. Myers*, 127 W. Va. 551, 33 S.E.2d 897 (1945).

It appears that some of the acts which have been held sufficient to amount to cruelty are inconsistent with those not amounting to cruelty. The answer to this apparent conflict can be found by applying the subjective test of: was this conduct cruel when inflicted by the particular defendant upon the particular plaintiff?

From the above holdings it can easily be seen that in this jurisdiction violence or apprehension thereof is not an indispensable element of statutory cruelty. However, actual violence, to constitute a ground for divorce, must be attended with danger of life, limb or health, or be such as to cause reasonable apprehension of such danger. *Smith v. Smith*, 125 W. Va. 489, 24 S.E.2d 902 (1943).

It is also well settled that mere incompatibility is not such a circumstance upon which a decree of divorce may be obtained. *McLaughlin v. McLaughlin*, 126 W. Va. 498, 29 S.E.2d 1 (1944).

It is upon this point of incompatibility that the West Virginia court, in its very admirable attempt to keep intact existing marital relationships, has perhaps been somewhat strict. For example, see *Harbert v. Harbert*, 130 W. Va. 704, 45 S.E.2d 15 (1947). In that case, the court, even after concluding that the parties were unhappily married and that they likely could never get along together, declined to grant a divorce.

Accepting the fact that many marriages are formed by incompatible individuals capable of being happily married to others, and the fact that a great proportion of these marriages will end in divorce in any event—what is to be gained by such a strict interpretation of the statutory phrase “cruel or inhuman treatment”?

Since it is well known that a marriage broken early is less devastating than one broken after a number of years of attempted
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adjustment, it seems that perhaps society would profit by a less stringent interpretation. It is further suggested that the stand taken by the courts in Peterson v. Peterson, 240 P.2d 1075 (Okla. 1952) and Wilson v. Wilson, 229 Minn. 126, 38 N.W.2d 154 (1949), and the dissenting opinion in Cottle v. Cottle, 129 W. Va. 344, 40 S.E.2d 863 (1946), would be well worth a thought. In these opinions it is stated that where the conduct of either spouse is such as utterly to destroy the legitimate ends of matrimony it is sufficient to constitute cruelty.

A very apt summation of what appears to be the present tendency toward a more liberal policy is found in Pavletich v. Pavletich, 50 N.M. 224, 174 P.2d 826 (1946). There the court said that denial of divorce seldom restores life to families sociologically dead when they come into court, and that if anything is preserved it is but the dead and empty shell of what has been and is no longer.

C. F. S., Jr.

MINES AND MINERALS—OWNERSHIP OF CONTAINING SPACE.—W, owner in fee of a tract of land, conveyed it, excepting and reserving the "... oil, gas and brine and all minerals, except coal ... the term 'mineral' as used herein does not include clay, sand, stone or surface minerals ... " to T, who reconveyed to P, subject to the exception stated. Thereafter, W leased said tract to D, "... for the purpose of searching for, exploring, drilling and operating for and marketing oil and gas. ..." W and D later entered into a gas storage agreement, whereby D was given the right to use and occupy the Big Lime stratum underlying said tract, for the purpose of "... injecting and storing gas therein and removing gas therefrom. ..." Pursuant to this agreement, D drilled a well to the Big Lime stratum but no oil or gas was produced therefrom, and later D piped gas from elsewhere for storage in said stratum. P sought to enjoin D from using the Big Lime stratum for storage of gas, alleging in his bill that there were no recoverable minerals in the Big Lime stratum, and hence D was guilty of a continuing trespass. D demurred. The circuit court sustained the demurrer, overruling the court of common pleas and certified the question to the supreme court of appeals. Held, that W's deed operated to pass title through