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CRENSHAW— DIVORCES IN A TWILIGHT ZONE

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While no opinion poll has been taken of the lawyers in Montana and hence one cannot speak with too great certainty in the matter, it is believed that the opinion of the majority of the Supreme Court in **Crenshaw v. Crenshaw**[1] has thrown the members of the bar into a state of considerable confusion.

The decision is noteworthy (1) because it condemns as a mere pleading of legal conclusions a type of complaint for divorce quite commonly assumed to be an adequate statement of ultimate facts, and (2) because in view of considerable uncertainty as to whether a judgment based on a complaint which fails to state a cause of action is open to collateral attack, numerous existing divorce decrees founded on similar complaints may now be open to question.

Had the court contented itself with holding, as it did, that the rather sketchy complaint was in sufficient, and that it could not be aided by allegations inserted in the reply under the heading of

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1 (1947 .....Mont....., 182 P. (2d) 477.

"Cross-complaint to Defendant's Cross-complaint," not too much fault could be found with the decision. Or if the court had held that the case was one in which it might reject the findings of the trial court because there existed a preponderance of evidence against such findings, and had proceeded, as it did, to find the plaintiff's evidence insufficient to make a case, the members of the bar would not have been particularly startled, as there are plenty of instances in the Montana reports in which the Supreme Court has undertaken to upset the findings of the trial judge and even of the jury, and to make its own findings of fact, notwithstanding conflicts in the evidence. In this state, as is probably the case everywhere, the border line between cases in which the court will and in which it will not overturn findings of fact in the lower court is not too well settled.[2]

What has created the confusion among members of the bar is the fact that the majority of the court, not being content to dispose of the case on these other grounds, proceeded to analyze the attempted statement of a cause of action for divorce set out in the "Cross-complaint to Defendant's Cross-complaint" included in the reply, and held these allegations insufficient. They read as follows:

[2]For statements of the rule, see Fousek v DeForest, (1931) 90 Mont. 448, 4 P. (2d) 472, and Casey v Northern Pac. Ry. Co. (1921) 60 Mont. 56, 198 P. 141. For recent decisions on which the court was sharply divided see Cullen v Peschel (1943) 115 Mont. 187, 142 P. (2d) 559. (Johnson, C. J.: "I agree with the majority in their opinion of the preponderance of the evidence; but since this court has not been given the authority to overrule the jury in that respect, I am compelled to concur with the above dissenting opinion."); Miller v. Miller (1948) .....Mont....., 190 P. (2d) 72. (The court examined a partially disintegrated deed which the trial court found had originally been signed, and found that the trial judge was wrong. It was claimed that chemical action of ground moisture during nine years while the deed was buried had obliterated the ink used in the signature. Neither court suggested the desirability of procuring expert testimony on the questioned document.)

"That since said marriage, the defendant has been guilty of extreme cruelty, in that said defendant has inflicted grevious and bodily injury, and mental suffering upon the plaintiff by pursuing such a course of conduct toward her and such treatment of her, existing in and persisted in for more than one year immediately preceding the commencement of this action, which justly and reasonably is of such a nature and character as to destroy the peace of mind and happiness of the plaintiff and to entirely defeat the proper and legitimate objects of marriage, and to render the continuance of the married relation between the plaintiff and the defendant perpetually unreasonable and intolerable. That in part, such conduct and treatment are as follows:

"That since said marriage and particularly during the past five years, defendant has been rough, tough, overbearing, cruel, brutal, and neglectful in his treatment of the plaintiff; that he has nagged her and found fault with her in many things she has done; that defendant cannot write intelligibly and during their married life, plaintiff has had to be the bookkeeper, auditor and letter writer for the defendant in his various transactions. During all said time, plaintiff has tried to reason with defendant, but when she has done so, defendant has raged and become violent. That defendant is cunning and in public can act like a gentleman, but in private, defendant, in his treatment toward plaintiff, has acted like a 'hell cat.' That all through the transactions concerning the acquiring of the Crenshaw Apartment House property and during the period of time from 1937 to this date, plaintiff has assisted defendant assidously in the purchase, improvement and remodeling of said property and in the financing and managing of the same; much of which time defendant

> has been away and left to plaintiff the sole responsibility of said property. That despite the careful considerations which plaintiff has given said property, defendant has found fault with her and has never treated her with respect and consideration which a husband should treat a wife. . . .
>
> "That defendant by his mean and uncouth attitude as aforesaid, has annoyed and irritated plaintiff and has caused her to worry and become nervous, to lose sleep and to become impaired in health.
>
> "That plaintiff has remonstrated with defendant and has endeavored to have him treat her as a husband should treat a wife, but he has failed and refused to do so. That plaintiff can no tonger live with defendant as his wife, and that by reason of the treatment of the plaintiff by the defendant, there is no love or affection between plaintiff and the defendant and the continuance of the marriage relation between the defendant and the plaintiff is intolerable to the plaintiff."[3]

The language was held to constitute a recital of a series of mere legal conclusions. It was held that the pleading did not contain a statement of essential facts; that it was not sufficient to charge the grounds for divorce in the language set out in the statute, but that the pleader "must charge the time, place and circumstances and from these facts it must be determined if the conduct is cruel . . . as defined by the statute."[4]

It appears that no attack was made upon this pleading in the district court, by demurrer or otherwise, and apparently evidence was received in sup-

[3]182 P. (2d) at p. 486.
[4]Id., p. 487.

port of it without objection. The objection that it did not state facts sufficient to constitute a cause of action was first raised on appeal.

As to whether the majority of the court were correct in condemning the language used in the pleading as insufficient to state a cause of action, no critical comment is necessary, as the dissenting opinion of Mr. Justice Angstman forcefully criticizes the decision. Mr. Justice Angstman not only points out that the condemned language sufficiently charges infliction of grevious bodily injury, but that in the absence of attack upon the pleading in the lower court and in view of the failure of the defendant to demand a more definite statement or a bill of particulars, the allegations should have been held sufficient when attacked for the first time on appeal. He calls attention to "respectable authority" holding that it is sufficient under these circumstances to charge cruelty in the language of the statute "without pleading the evidence constituting the cruelty."[5] He said:

> "If defendant desired a more definite statement of time and place of the cruelty relied upon he should have raised the point in appropriate manner. If he was unable to meet the charges because they were too indefinite as to time, place and circumstances, he is the one to raise that objection. Neither this court nor the lower court is obligated to raise the point of its own notion.
>
> "The only reasonable inference that can be drawn is that defendant well knew the time, place and circumstances of the cruelty relied upon by plaintiff and did not desire a more

[5] Id., p. 492.

> definite statement thereof. He does not now contend that they were too general to enable him to prepare his defense."[6]

The dissenting opinion also said on another point involved in the case that while the trial court might have disregarded the cross-complaint or stricken it from the files had it been attacked in the lower court, yet "in legal effect the parties and the court considered the cross-complaint set out in the reply as an amendment to the complaint . . . The parties without objection tried the case on that theory and do not now raise any question regarding the propriety of the plaintiff's cross-complaint."[7] With respect to the sufficiency of the evidence the dissent argued (citing **Poague v. Poague**)[8] that there was substantial evidence supporting the court's findings and that "upon this state of facts we are not permitted to disturb the judgment, being governed by the oft-repeated rule that this court will not overturn the findings of the trial court unless there is a decided preponderance of evidence against them."[9]

In striking down this pleading as void, as containing nothing but legal conclusions, the majority of the court appears to have gone far beyond anything it has heretofore done in dealing with other types of cases.- See, for example, the court's discussion in the case of **Linney v. Chicago, etc., R. R. Co.**[10] There, in pointing out what would constitute a sufficient allegation of ultimate fact in a negligence case, the court said:

[6] **Id.**, p. 493.
[7] **Id.**, p. 491.
[8] (1930) 87 Mont. 433, 288 P. 454.
[9] 182 P. (2d) at p. 495.
[10] **Id.**, p. 236.

> "To illustrate: If the plaintiff in this case had alleged that the defendant company in the operation of the cars did so without giving any warning of their approach to the driver of plaintiff's automobile, the complaint would have contained an allegation of negligence in general terms which would render the complaint sufficient as against a general demurrer. The failure to give warning may have consisted of the failure to ring a bell, blow a whistle or display a light. The general term would be the failure to give warning; the specific act would be any one of the suggested omissions."[11]

The court now holds that in a divorce complaint based on mental cruelty "you must charge the time, place and circumstances and from these facts it must be determined if the conduct is cruel . . . as defined by the statute."[12]

In such a divorce case the appellate court is poorly equipped to determine whether the course of conduct "justly and reasonably is of such a nature and character as to destroy the peace of mind and happiness of the plaintiff." or "to defeat the proper and legitimate objects of marriage and to render the continuance of the married relation perpetually unreasonable and intolerable."[13] In making this a ground for divorce the legislature must have intended that the trial court should take into consideration psychological factors which would vary with the individuals involved. Clearly mere words spoken by one spouse to the other may suffice to constitute cruelty of this character. Presumably absence of any words should suffice, as in the

[11] **Id.**, p. 236.
[12] 182 P. (2d) at p. 487.
[13] R.C.M. 1935, §5738.

case where one spouse refused to speak to the other. The legislature clearly recognized its inability to specify just what words would constitute mental cruelty. It did not purport to define with particularity the type of conduct which would come within the statute. The court has held that continuous nagging may be ground for divorce.[14] In the **Crenshaw** case plaintiff charged "that he has nagged her and found fault with her in many things she has done."[15] Unless we are to assume that the court now holds that nagging is no longer a ground for a divorce, we must assume that in the **Crenshaw** case the court has held that the plaintiff must allege the days on which nagging occurred, what words were used in the alleged nagging (with perhaps what preceded the use of the words), and the place where the words were used, and that if an appeal be taken, the language pleaded must be sufficient to convince the court that it constituted nagging and not merely "little flare-ups" or "mere austerity of temper, petulance of manners, rudeness of language, or even occasional sallies of passion" which "do not threaten bodily harm or impairment of health."[16] It requires no expert in domestic affairs to know that one party to a marriage may suffer excruciatingly and intolerably from words which when used toward another person might simply "go in one ear and out the other." It is the trial judge who alone can deal with such problems and he should be in a position to deal with them on the basis of a complaint of the type and kind here discussed.

[14]Putnam v. Putnam (1929) 86 Mont. 135, 282 P. 855.
[15]182 P. (2d) at p. 486.
[16]**Id.**, p. 489.

The majority cast aside the argument that the defendant was apparently satisfied with the complaint since he demanded no greater specification, by saying that in a divorce suit public policy must be taken into consideration, since the state makes itself a party to every marriage, and hence the suit is not a mere controversy between private parties.

But surely the state's interest in these matters does not go to mere procedural matters, or to the form of a complaint. The primary purpose of the complaint is to inform the defendant of the charges against him. If he is satisfied, as he was here, there should be no rule of public policy which requires the court to propound a rule of pleading merely for the rule's sake.

From now on the careful lawyer will have to insert in a divorce complaint charging mental cruelty all of his evidence, for the decision wipes out the distinction between the pleading of evidence and the pleading of ultimate facts. And since the complaint "must charge the time, place and circumstances,"[17] the well-advised client will keep a careful day-by-day memorandum of the acts of cruelty, so that the attorney may be furnished the required particulars.

In a day when the tendency is toward more simplified pleadings, and the requirement of less elaboration in the complaint (defending opponent being protected by discovery procedures and his right to demand a bill of particulars),[18] it seems

[17]**Id.**, p. 487.

[18]For an illustration of the modern treatment of pleading, see Form 9, "Complaint for Negligence," Appendix on Forms, FEDERAL RULES OF CIVIL PROCEDURE.

odd that in Montana a complaint to quiet title may be stated in a single short sentence,[19] and a complaint for negligence at a railroad crossing may simply charge failure to give warning of the approach of a train,[20] but a complaint for divorce on the ground of extreme cruelty must, in effect, plead all the evidence.[21]

The majority of the court seemingly regarded the defect in the pleading as so serious as to deprive the court of jurisdiction to grant a divorce, for the court quoted from text authority as follows:

> "Besides the court has no jurisdiction of any matter not contained in the pleadings; and if the Chancellor should assume to make an adjudication not justified by the pleadings, his decree would be coram non judice, and void on the face of the proceedings; and this would be so, even though the facts proved would have abundantly supported the decree had there been pleadings justifying the proof."[22]

[19]Slette v. Review Publishing Co. (1924) 71 Mont. 518, 230 P. 580.

[20]**Supra,** note 10.

[21]For a useful statement of the test for determining the distinction between ultimate facts and evidential or probative facts see Nichols v. Nichols (1896) 134 Mo. 187, 35 S.W. 577. Defendants, charged with having "wrongfully enticed, influenced and induced plaintiff's husband to abandon her," argued that this was but a statement of a conclusion of law, and that the acts done and words spoken should have been stated. The court said: "The ultimate fact which is constitutive of the cause of action in this case is that of wrongfully inducing the husband of plaintiff to abandon her. The methods adopted to accomplish that purpose are mere matters of evidence, from which the ultimate fact is proved, or may be inferred. Various methods may have been adopted to accomplish the purpose, and a denial of them, if stated, would not form a single issue involving the whole remedial right. They would be probative, and not constitutive, facts. In the opinion of the jury, an inference that defendants wrongfully induced plaintiff's husband to leave her might not be drawn from one or more acts proved, but might readily be drawn from them all, taken in the aggregate. No issue could therefore be made upon each act and statement of defendants that would conclude the right of plaintiff to recover. Wrongfully inducing plaintiff's husband to abandon her is conclusion of fact, depending upon the proof of acts, declarations, and conduct of defendants. It is not a conclusion of law, but a fact from which a legal conclusion is to be drawn."

[22]182 P. (2d) at p. 484.

It is this reference to want of jurisdiction which apparently has the members of the bar guessing. It brings to mind the language of the court in **Crawford v. Pierse.**[23] In that case the court said:

> "Jurisdiction is the power to hear and determine the particular case presented for consideration, and to render such a judgment as the law authorizes in that case. In other words, it is the power to hear and determine the questions **coram judice** in that particular case."[24]

and:

> "It is elementary that when the judgment-roll upon its face shows that the court was without jurisdiction to render the particular judgment its pronouncement is in fact no judgment. It cannot be enforced. No right can be derived from it. All proceedings founded upon it are invalid and ineffective for any purpose. It is open to collateral attack. The court which rendered it may set aside at any time as an encumbrance upon its records . . . An affirmance of such a judgment on appeal cannot make it valid . . . Nor can the legislature by curative statute give it life or force."[25]

and also:

> "The court cannot redress a particular wrong unless the facts constituting the wrong are made manifest to it in a written complaint, as provided by the statute. It is only by this means that its general power can be brought into activity in a given case. If the pleading is not sufficient to put the defendant in the wrong, the court cannot grant redress. A judgment based upon such a pleading is invalid.

[23] (1919) 56 Mont. 371, 185 P. 315.
[24] **Id.**, p. 376.
[25] **Id.**, p. 375.

> The pleading is in effect no more than a piece of blank paper. And, since when a judgment has been rendered on default, the complaint, with the memorandum indorsed upon it that default has been entered, the summons with the proof of service, and a copy of the judgment constitute the record, (Rev. Codes, sec. 6719) the record itself discloses the infirmity of the judgment. It is thus exposed to collateral attack at any time when it is sought to be made the basis of a right."[26]

Many members of the bar had come to assume that the court would no longer follow **Crawford v. Pierse.**[27] It is not generally the law.[28]

But in the recent case of **Lindsey v. Drs. Keenan, Andrews & Allred,**[29] the court again quoted with approval this language of **Crawford v. Pierse.**[30] Perhaps the court still thinks that it is good law.

If then the language of the pleading in **Crenshaw v. Crenshaw** is wholly insufficient because "there is no specific charge giving the defendant notice of what he is called upon to answer,"[31] and if in consequence, " the court has no jurisdiction of any matter not contained in the pleadings,"[32] and in consequence the "decree would be coram non judice, and void on the face of the pleadings,"[33]

[26] **Id.,** p. 377.

[27] Especially since the decision in State ej rel. Delmoe v. District Court (1935) 100 Mont. 131, 46 P. (2d) 39. See, howeevr, Hanrahan v. Anderson (1939) 108 Mont. 218, at p. 237; 90 P. (2d) 494.

[28] See for example, in respect to actions for divorce, Kelsey v. Miller (1928) 203 Cal. 61, 263 P. 200 at p. 211; In re McNeil (1909) 155 Cal. 333, 100 P. 1086 at p. 1089; C.J.S. p. 826, Note 50; C.J. p. 175, note 56.

[29] (1946) .....Mont....., 165 P. (2d) 804, 163 A.L.R. 487.

[30] In the Lindsey case the complaint disclosed affirmatively that there was not the necessary want of probable cause.

[31] 182 P. (2d) at p. 487..

[32] **Id.,** p. 484.

[33] **Id.,** p. 484.

and if, under such circumstances "it is thus exposed to collateral attack at any time when it is sought to be made the basis of a right,"[34] what is the status of the hundreds of divorce decrees which have been entered upon substantially identical complaints, and of the parties to those decrees who have since remarried and in some cases had children by the new marriages?

To satisfy his curiosity the writer asked the clerk of one district court to pull from the files the judgment-rolls in some fifty divorce cases which had been disposed of prior to the decision in the **Crenshaw case.** Approximately three-fourths of the samples taken disclosed complaints charging extreme cruelty based on the statute relied upon in the **Crenshaw** case—that is to say, mental suffering resulting from a course of conduct as defined in the statute, section 5738.[35] In a majority of those cases it would be extremely difficult to distinguish the language used from that contained in the **Crenshaw** case. In each case the pleader first alleges a course of conduct in the language of the statute and then proceeds to particularize. The following are taken from three rather typical complaints and the language here quoted in each case followed the general allegations in the language of the statute.

> Complaint No. 1:
> "That during said period of time, and as a part of said course of conduct, the defendant has acted in an unpleasant and disagreeable manner toward the plaintiff, and has persistently ignored and disregarded the happiness, welfare and peace of mind of the plaintiff; that de-

[34]**Supra,** note 22.
[35]R.C.M. 1935.

fendant did upon many and various occasions quarrel bitterly with plaintiff and without any sufficient reason therefor; that defendant has been continually nagging and otherwise fault-finding with plaintiff; that defendant's conduct has been and now is arbitrary and tyrannical, which has given rise to quarrels in the home, thus disturbing and upsetting plaintiff's state of mind, happiness and well-being; that defendant has acted coldly toward plaintiff, has displayed no affection for him, and has plainly indicated by her conduct, actions and statements that she no longer cares for plaintiff, and that there is in fact no longer any love and affection between them."

Complaint No. 2:

". . . plaintiff alleges that the defendant has constantly since the time of their marriage berated him and abused him and called him vile and loathsome names and has constantly since the time of their marriage quarreled with him and nagged at him over trivial matters and plaintiff alleges that the defendant no longer cares for him or loves him and has told him to get a divorce and has told him that she would no longer live with him. Plaintiff alleges that the conduct of the defendant toward him has made it impossible for them to live together as husband and wife, and her conduct toward him has destroyed the marriage relationship between them."

Complaint No. 3:

". . . and that such actions and conduct on the part of the defendant consist in part of the following:

That the defendant constantly nags and scolds plaintiff and continually finds fault with what the plaintiff does or says;

That the defendant has a violent temper and without provocation flies into fits of rage and uses profanity in the presence of plaintiff and their children, and has called plaintiff vile and vicious names;

That defendant is not companionable and refuses to associate with plaintiff's friends and acquaintances, even to the extent of visiting the plaintiff's own parents;

That by reason of said actions on the part of the defendant, plaintiff was forced to leave their home on May 2, 1947, and has continued to live separate and apart from the defendant since that time."

It would be a matter of considerable interest to make a thorough and extended analysis of a substantial number of complaints upon which divorce decrees have been based in all districts throughout the state. It is believed that such an analysis would disclose hundreds and perhaps thousands of complaints similar to those just quoted. Most members of the bar would have great difficulty in finding them any more efficacious than that found insufficient in the **Crenshaw** case.

In most of the cases examined, the divorce was entered upon defendant's default. Defendant was not present or represented at the time of the trial and if evidence of matters outside of the complaint was received, the complaint could not be "deemed amended" under the rule of **Blackwelder v. Fergus Motor Co.**.[36]

If these decrees are open to collateral attack, what happens if one of the parties dies possessed of a substantial estate and his former wife chooses

[36] (1927) 80 Mont. 374, 260 P. 734.

to claim an interest in his estate? If he remarries, may his new wife have the marriage annulled? What are the rights of the children of a subsequent marriage? The books are full of startling examples of what happens when a successful collateral attack is made upon a divorce decree.[37]

The decision may yet lead to one good result. Sooner or later a divorce decree founded on a complaint like that in the **Crenshaw** case will be attacked collaterally. The court will then have to decide whether to invite raids by ex-wives upon their former husbands' estates or to allow a later marriage to be annulled for invalidity of an earlier divorce.[38] Then, perhaps, the court may, at long last, repudiate the doctrine of **Crawford v. Pierse,** and frankly adopt the rule of **In re McNeil.**[39]

[37]Williams v. North Carolina (1945) 65 S. C. 1092, 89 L.E. 1577, 325 U. S. 226 (Conviction of bigamous cohabitation); German Savings Society v. Dormitzer (1904) 24 S. C. 221, 48 L.E. 373, 192 U. S. 125 (property claimed by heirs of divorced wife); Smith v. Foto (1938) 285 Mich. 361, 280 N.W. 790, 120 A.L.R. 801 (husband permitted to attack property settlement in Florida divorce suit on ground wife's previous Michigan divorce void); Sammons v. Pike (1909) 108 Minn. 291, 120 N.W. 540, 23 L.R.A. (n.s.) 1254 (Ejectment for wife's share in husband's real property); In re Christensen's Estate (1898) 17 Utah 412, 53 P. 1003, 41 L.R.A. 504 (Divorced wife granted share in estate of husband who had remarried and had children by the later marriage.)

[38]R.C.M. 1935, §5731 would doubtless save the new set of children from bastardization.

[39]**Supra,** note 27.