

## PROTECTING THE ABSENT SPOUSE IN INTERNATIONAL DIVORCE: THE DETROIT EXPERIMENT

DAVID W. WAINHOUSE\*

Story, writing in 1841, said: "Upon the whole, the doctrine now firmly established in America upon the subject of divorce is, that the law of the place of actual *bona fide* domicile of the parties giving jurisdiction to the proper courts to decree a divorce for any cause, allowed by the local law, without any reference to the law of the place of the original marriage, or the place, where the offence, for which the divorce is allowed, was committed."<sup>1</sup> Seven years prior, on the occasion of Story's first edition (1834), such a statement would not have been justified in view of the uncertainty and the paucity of judicial decisions.

By the time Bishop wrote his *Marriage and Divorce*, in 1852, the complication of separate domicils had arisen creating the necessity of recasting and refining Story's generalization with respect to "the domicile of the parties." If the husband "commits an offence which entitles [the wife] to have the marriage dissolved," wrote Bishop, "she is not only discharged thereby immediately, and without a judicial determination of the question, from her duty to follow and dwell with him, but she must abandon him, or the cohabitation will amount to a condonation, and bar her claim

\* A.B., 1923, LL.B., 1927, Harvard; B.C.L. 1927, Oxford. Member of Maine and New York Bars. Assistant United States Attorney, since 1934. Formerly Assistant Director of Research, Council on Foreign Relations, 1929-1932; Director, International Migration Service, 1932-1934. Lecturer, Fordham University, 1932-1934. Co-author of *Survey of American Foreign Relations, 1931-1932*, Enlarged Latané's *History of American Foreign Policy*. Editorial writer, *Christian Science Monitor*.

<sup>1</sup> CONFLICT OF LAWS (2d ed. 1841) §230a.

Marriage as an indissoluble institution seems to have been unknown in primitive law. Roman law recognized divorce under two forms: (a) by mutual consent; and, (b) by repudiation on the part of one of the spouses (Cod. Just., 5, 17, 8). There were no formal requisites. The *Lex Julia de adulteriis*, in the more developed stage of Roman law, provided that a notification of the repudiation (*libellus repudiij*) should be given in the presence of seven witnesses. With the Christian emperors, the law experienced a radical change (Ulp. REG., 6, 10). By 331, in the reign of Constantine, severe punishment was inflicted upon the spouse who repudiated the marriage without just cause which was limited to three in number: where the husband is a despoiler of graves, a poisoner, or a homicide; where the wife is a poisoner, a procuress, or an adulteress.

Certainly divorce was a well known institution and commonly practiced amongst Jews, Greeks, and Romans. The principle of indissolubility of marriage was proclaimed by the Apostles and triumphed with St. Augustine who conceived the idea of marriage as a sacrament.

to the remedy. In other words, she must establish a domicile of her own, separate from the husband."<sup>2</sup>

The assertion that the spouses could maintain separate domicils raised the question of which domicile could grant a divorce. The logic of the situation required the answer which Bishop gave. "To entitle the court to take jurisdiction, however," he said, "it is sufficient that one of the parties be domiciled in the country; it is not necessary that both should be."<sup>3</sup> The principle that the domicile of either party could grant a divorce has given rise to complexities, which raise fundamental problems in the administration of the divorce laws both here and abroad.

#### DIVORCE WITH A DEFENDANT SPOUSE ABROAD

What are some of the problems that arise where the husband in this country institutes an action of divorce? How and in what way can the spouse who is abroad, usually in some remote European village, plead to the libel? No one will deny that the courts in this country by and large are eager to make a just and proper disposition of the controversies before them. Yet, when the contest is one-sided, where there is no answer of any kind by the absent spouse, it is obvious that the court is acting as a mere rubber stamp in granting a divorce decree. The formal requirements are ceremoniously adhered to by judge and attorney, and the golden seal of the court on the final decree is an ironic symbol in the face of the substantial fee paid by the client to his attorney.

An examination of the operation of some of the aspects of divorce law and its effect upon the defendant spouse residing abroad will indicate the way in which the judicial mill functions.

One of the most common statutory grounds for divorce in the United States is desertion. Men of foreign nationality residing here resort to this ground most frequently because it is the easiest ground to "prove" on account of our immigration laws, particularly the immigration laws and their administration since 1924. A husband creates an appealing spectacle when he comes into court and states that he has sent his wife and children steamship tickets to join him here, produces proof that he has been supporting his family over many years by exhibiting postal money orders, etc., and alleges that his wife will not write to him (neglecting to tell the court that his wife can neither read nor write). But the spectacle abroad is much more appealing. The wife and children have vainly tried to come to the United States. They have gone to the American Consulate, twice or three times perhaps, for their immigration visa. It involved great expense to come up to the city from the village. Each time the Consul informed the wife that he could not give her a visa. He feared that the family might become a public charge if it came to the United States inas-

<sup>2</sup> MARRIAGE AND DIVORCE (1st ed. 1852) §728. See also *Ditson v. Ditson*, 4 R. I. 87 (1856), where Bishop's view was followed.

<sup>3</sup> BISHOP, *op. cit. supra* note 2, §727. This view is followed in most of the states, but see *People v. Baker*, 76 N. Y. 78 (1879); *Duncan v. Duncan*, 265 Pa. 464, 109 Atl. 220 (1920); *Lister v. Lister*, 86 N. J. Eq. 30, 97 Atl. 170 (1916); and *Harris v. Harris*, 115 N. C. 587, 20 S. E. 187 (1894).

much as the husband was earning but \$22.50 a week. How could he support a family of five, the Consul inquired. Furthermore, there is a great deal of unemployment in the United States. If the husband should lose his job, the family would go on relief and become a public charge. This side of the picture is not presented to the judge. The court grants the divorce on the ground of desertion.

Is this desertion?

Under the law of the state of Illinois, for example, a plaintiff may be divorced from the defendant who has "wilfully deserted or absented himself or herself from the husband or wife without any reasonable cause for the space of one year."<sup>4</sup> The plaintiff husband files his petition in Chicago alleging desertion as the ground for divorce. The petition sets forth, *inter alia*, that the petitioner has for the past five years repeatedly requested his wife in Italy to join him; that he has sent her support regularly; that he has supplied her and his children with passage from Naples to Chicago; and, that notwithstanding these efforts, his wife and children have refused to join him.

In Italy, the situation is quite different from that portrayed by the husband in his petition to the Cook County Superior Court in Chicago. The defendant has made desperate efforts to come to the United States. Her conduct was anything but "wilful desertion." The simple fact is that the Immigration Act of 1917, Section 3, excludes from admission into the United States: "persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude. . . ."<sup>5</sup> The defendant in this case was refused an immigration visa because she was at one time convicted of a crime involving moral turpitude. She fell squarely within the excluded classes of aliens as set forth in Section 3 of the 1917 Act. While this fact was known to the husband, the petition contained no allusion to the real state of the situation in Italy. The petition was granted on a one-sided presentation of "facts." The lives of the wife and children in Italy have been affected by a court in Chicago which has acted in total ignorance of the true situation.

In divorce proceedings where the spouses are separated by national frontiers, default on the part of the absent spouse, as the term is used in the law, is a common occurrence. The courts do not like to grant a divorce on default. Many states provide that the "cause of divorce be fully proved by reliable witnesses." A provision of that sort breaks down in cases of international divorce. The court in practice hears the witnesses produced by the petitioner, and one's own witnesses are usually "proper" witnesses. The presentation is not a contest to ascertain the truth, but a thoroughly one-sided affair in which, in effect, the court is asked to give legal sanction to the wishes of the petitioner. Hasn't the court been asked to perform a task for which the judicial process is not suited, particularly in cases where it has no means of ascertaining whether the default is real, technical, or fraudulent? One

<sup>4</sup> ILL. REV. STAT. (Cahill, 1931) c. 40.

<sup>5</sup> 39 STAT. 875 (1917), 8 U. S. C. A. §136(e).

might even go further and state that the present judicial machinery is inadequate to deal with divorce where there is no contest.

It probably is not an exaggeration to state that there are literally thousands of women, particularly in the rural and backward districts of the European countries, who are divorced from their husbands in the United States but do not know it. In fact, in many instances, the divorced husbands here remarry and continue correspondence with their former wives who are utterly ignorant that they are divorced. In some instances, the man maintains a family here and one abroad, the wife here and the former wife abroad being unaware that they are sharing one husband.

These problems suggest that the common law procedure of notifying the absent spouse that an action for divorce has been brought against him or her is faulty and in need of drastic revision. It is an arresting illustration of the persistence of *stare decisis* in a world transformed by time, technology, and the creative spirit. The rules concerning notice which the courts evolved were undoubtedly suited to the type of social and economic existence which obtained in this country nearly a century ago. The community was agricultural, the population homogeneous and rooted to the soil. Giving notice to a defendant to appear and defend a divorce action, or any action for that matter, was a simple affair. The world was as large then as it is now, but man confined himself to a very much smaller part of it then than he does now.

Notwithstanding the rapid and amazing changes that have taken place in our social existence—a society on wheels—no corresponding changes, with very rare exceptions, can be said to have taken place in the divorce procedure to keep pace with a changed world. Today, as eighty or more years ago, the plaintiff “serves notice by publication” upon the defendant spouse who is out of the jurisdiction. The plaintiff’s attorney sends a copy of the order of publication to the defendant to an address supplied to him by his client. The address, more often than not, is a fictitious one. The letter finds its way back to the attorney’s office with the familiar notation, “person unknown.” The attorney and his client having made “diligent efforts” to serve the defendant, and due and proper proof thereof having been made, the court may proceed to declare the marriage dissolved.

In many of the states, there are statutes giving the defendant wife the right to counsel for whose services the husband is obliged to pay. In many cases, the wife may have a good and meritorious defense, but how is she to get it before the court if she has no counsel, or is not aware of the fact that she is entitled to legal services? When a wife in Lewof, a small village in Poland, receives a paper in English print from America, she takes it to the notary and asks him to tell her its contents. He hints to her that it is an important paper, but without compensation he cannot really tell her what it contains. The notary has a monopoly in the village on translations from English into Polish, and since his price is not determined by the law of supply and demand, the wife pays the fee requested. It is a notice to appear and defend an action of divorce instituted against her by her husband. How can she

appear! Detroit is five thousand miles away. Where is she to get the money for transportation? The crop yielded only ninety dollars last year; there are four children to feed and care for. Who is to defend her interests in Detroit?

The difficulties suggested are by no means exhaustive. There is obviously a need for making the divorce action a two-sided contest. At least an opportunity should be afforded the defendant to present her side of the case. The means whereby this can be made possible has been the concern and responsibility of social workers and not that of lawyers.

#### THE DETROIT EXPERIMENT

In the Circuit Court of Wayne County, Detroit, Michigan, an unusually large number of foreign-born men, in the balmy economic days of 1927 to 1930, brought divorce actions against their wives residing abroad, generally upon the ground of desertion. The wives abroad could not or did not appear; there was no answer to the petition, and in due course the decree was granted. The proceedings were in effect *ex parte*. The problem assumed scandalous proportions, and even the popularly elected judges were aroused by what they believed were frauds upon the court, but not having the means of ascertaining the facts, were helpless to remedy the situation. Obviously the judicial arm, in the absence of some kind of machinery, could not reach out to some remote village in Jugoslavia where the defendant wife might be living to ascertain whether, for example, there were two, three, or five children of the marriage and whether a child's age was 21, 23, or 9; and whether the allegations in the petition, with respect to desertion, were true or false. The court in these cases was entirely at the mercy of the petitioner, a strange, and indeed an extraordinary, perversion of the independence and integrity of the judicial system.

There is attached to the Circuit Court of Wayne County an institution known as the Friend of the Court,<sup>6</sup> created by the legislature in 1919 and charged, *inter alia*,

<sup>6</sup> MICH. COMP. LAWS (1929) §§12783-12787.

"An Act for the protection of dependent minor children and to compel enforcement of chancery decrees where there are minor children in divorce cases, who are liable to become public charges and are not properly cared for by their custodians and to enforce the payment of amounts decreed them in court of chancery. . . .

"12784—Sec. 2. It shall be the duty of the 'Friend of the Court' in their respective counties to examine all records and files in divorce cases where decrees have been rendered and there are dependent minor children and ascertain if said dependent minor children regularly receive the various and definite amounts decreed them by their respective circuits, that the same is applied for their support, maintenance, education and betterment, and that said dependent children are properly cared for by their custodian. To bring into court when necessary by citation or otherwise all persons who are delinquent in making said payments or who have the care, custody, support, maintenance and education of said dependent minor children and to ascertain if said dependent minor children are receiving the proper care, maintenance and education and whether they are liable to become a public charge.

"12785—Sec. 3. Said 'Friend of the Court' shall have full power by citation or other order duly issued by the circuit court to compel the attendance of witnesses to take testimony and to do each and everything necessary, including the taking of contempt proceedings, to collect any and all delinquent payments due to said dependent minor children, to make recommendations to the circuit courts for the betterment of the conditions of said minor children and ascertain the moral and general conditions surrounding said dependent minor children and shall report the result of his findings in writing to the circuit court. . . ."

with the responsibility of protecting minors and to compel the enforcement of chancery decrees where there are minor children in divorce cases. The office of Friend of the Court of Wayne County consists in the main of the Friend of the Court, five assistants, and fifteen investigators. It is the right arm of the Court in divorce proceedings, and has served to prevent fraud from being perpetrated upon the Court as well as to make its decrees effective.

A reading of the Michigan statute, setting up this body, indicates that the emphasis is entirely upon protecting dependent minor children within the jurisdiction of the court. Notwithstanding the fact that the statute is silent on the situation where the father is in the jurisdiction of the Court and children out of its jurisdiction, nevertheless the socially-minded judges of the Circuit Court of Wayne County and social service agencies interested in protecting the welfare of children saw in this statute an opportunity to use social service agencies in bringing to the Court's attention the family history not alone of the plaintiff but also of the plaintiff's wife and children abroad. The International Migration Service<sup>7</sup> was particularly fitted to make these social investigations abroad for the Friend of the Court because of its long experience with separated families and its far-flung organizational facilities.

Thus, when the husband files his petition for divorce against his wife, resident abroad, the Friend of the Court examines the husband and obtains from him certain skeleton facts concerning his family history, the number of children, where they reside, the character of his employment, his earnings, etc. Upon discovering that there are children of the marriage, the Friend of the Court sends a copy of the report to the International Migration Service requesting that the wife abroad be interviewed concerning the charges in the petition, the manner in which the children are living, who supports them, and such other facts as will enable the court to dispose of the petition intelligently. This report is recast in the New York office into language which, let us say, the office in Berlin will understand. The offices of the International Migration Service are staffed with trained social workers<sup>8</sup> who know the language, the customs, and the social service resources of the country. If the wife and children reside in Frankfurt-am-Main the Berlin office calls upon a local social service organization to secure an interview with the wife and to oblige it with a

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In England there is a somewhat analogous institution known as the King's Proctor. In petitions for the dissolution of marriage or for declarations of nullity of marriage, the King's Proctor, under the direction of the Attorney-General, and by leave of the Court, intervenes in the suit for the purpose of proving collusion between the parties. 23 & 24 Vict. c. 144, §7; 36 & 37 Vict. c. 31.

<sup>7</sup>The International Migration Service is an international social service organization founded in 1923 for the purpose of uniting separated families. It is a voluntary organization, non-profit making, and supported entirely by voluntary contributions. Its headquarters are in Geneva, and there are office branches in New York, Paris, Marseilles, Prague, Berlin, Warsaw, and Athens. It has in addition trained and tried correspondents in some fifty other countries. In its more than ten years of existence this organization has developed extraordinary facility for making social investigations in the remotest parts of the world and through its personnel has gained leadership in the field of international family case work.

<sup>8</sup>Many of the social workers in the foreign offices have been trained in the United States.

full and complete history of the family, particularly the wife's reaction to the divorce petition, the number of children, their ages, their mode of living, etc., etc.

A report which came back in one of the Detroit cases from a wife in Lithuania is well worth while quoting at length, in her own words, for it indicates the character of the reports that are usually obtained. No one reading it can fail to be struck by its directness, simplicity, and honesty.\*

On the 15th August 1933, my husband filed his petition in the Court of Detroit to divorce him from me; in this connection I have the honor to state and explain as follows:

There are no grounds for thinking that I and my daughter Genovaite live in Stalingrad, U. S. S. R., for as a matter of fact both we are living in Lithuania, in the village of Salakas, where I have come from U. S. S. R. at the time specified below. He filled his bill of complain on grounds of cruelty (it must be understood my cruelty) and desertion, which do not agree with truth and are a sheer fiction. I certify that from November 1923 till the end of the year 1927 I was getting fifteen dollars a month for me and my children's living, but his assertion that I refused to come back to the United States of America is groundless, for I never did it. It is true that we were married in Lichbourg, Pennsylvania, on the 10th January, but it was in 1911, not in 1912, for even our son Johas (John) was born in autumn 1911. It is true that both we lived in Michigan from 1916 till 1921, but this is not true that we separated in Leningrad on May 1st, 1922, for in that year I came back to Lithuania, and joined him here, in Salakas; we lived here together, and on April 25th, 1923 our daughter Genovaite was born to us. He says he is sure I am living with another man, but such his conviction is wrong, unfounded; I live with the said daughter Genovaite, my mother-in-law, his own mother, and his sister; and I have no other man, the blessing and wedding of our Church being dear to me. Until our children, John, Violet and Aldona had gone to America we corresponded with my husband and kept up our relations, but after their departure I no longer knew my husband's address, because he ceased writing; and even my gone children could not give me their father's address for they did not know it either.

"I state that I do not agree to be divorced. And the conditions of my life are these; I live in the village of Salakas together with my mother-in-law, and my husband's sister; I earn my and my daughter's living with the trade of a seamstress, which I have not wholly acquired, and in summer I hire myself out to work by the day; yet my life is getting worse on account of my poor health and weak eyes. As I have stated, I do not agree to be divorced and agree to live with my husband and consent to join him; but he must send me money for my and my daughter's journey. But since the life in America is getting worse, it would be better for my husband to come back to Lithuania and live with me and our daughter together for he will be able to earn for us all sufficiently.

"What I really want is that all we live together; therefore I ask my husband to endeavor to bring it about, especially as on it depends our daughter Genovaite's happiness, considering her young age—she is not twelve as yet—and one understands what it means for a child when it has not its father or mother by itself. I have provided for her as much as I have been able to; she is now in the fifth grade at school. My health and eyes, I say, are getting worse, therefore her life may become harder; and until she joins her father it is necessary that he were sending for her living though eight dollars a month. My hus-

\*The legal validity of these reports submitted to the Friend of the Court raises the problem to what extent they run counter to the right of cross examination. Thus far, the question has not been contested. It should be pointed out that this legal difficulty can be overcome by the taking of depositions which requires the giving of notice to the other side.

band can understand that I also need money to live, therefore, if he does not consent to do it freely, I beg the Court to adjudge to me for my livelihood, and especially eight dollars a month for our daughter."

The signature of the wife is attested to by a priest and two witnesses, with the statement: "We certify that the report was written in our presence and that the statements made in it are true, because ..... 's life in Salakas is known to us well."

In this socio-legal coöperation between the Court and the International Migration Service, it is obvious that the Friend of the Court cannot act as attorney for the wife abroad. Some one must represent the wife. Answers to petitions, motions for temporary alimony, motions to dismiss, motions to vacate a decree, negotiations with the attorney for the plaintiff, and a score of other details surrounding the divorce contest, are not functions given to the Friend of the Court by the statute. The Detroit Legal Aid Bureau was accordingly invited to coöperate and act in the capacity of attorney for the wife whenever the circumstances of the case warranted representation. Thus, when the wife is interviewed by the social worker, she is asked whether she would like to have a lawyer represent her. A copy of the report is sent to the Friend of the Court, and one to the Legal Aid Bureau with the request that it file an appearance on behalf of the wife and take such steps as will protect her interests as well as that of the children.<sup>10</sup>

Interviews with the wife abroad quite often cannot be secured within the time the respondent must file her answer. Under such circumstances, the International Migration Service informs the Friend of the Court and requests more time. Since the Court will not act on the husband's petition without some kind of recommendation from the Friend of the Court, the wife's rights are not prejudiced where a report is not filed within the statutory period to appear and answer. The Friend of the Court's inaction automatically serves to extend the time to appear and answer. This is a salutary device, for, were the International Migration Service obliged to secure reports within the statutory period, many cases would go by default. Where the wife, for instance, resides in some remote village in Rumania, over mountains accessible only by mule and usually impassable in the winter months, a report by a social worker who has to make the journey, let us say from Bucharest, is apt to be more than three months in coming. In Czecho-Slovakia, the social worker in the more remote parts of the country "rides the circuit" once every three months. The International Migration Service might ask for a report just after the worker has been through the village not to return there for another three months. In such situations the Friend of the Court is apprised of the reasons for the delay and requested to act accordingly.

<sup>10</sup> By statute, the husband in Michigan may, in the discretion of the court, be obliged to pay the wife's attorney's fees. MICH. COMP. LAWS (1929) §12735.

## THE RESULTS OF THE EXPERIMENT

The experiment in socio-legal coöperation involving the International Migration Service, the Detroit Legal Aid Bureau, and the Friend of the Court has been carried on for four years. During that period the three agencies handled some one hundred and twenty-five cases. Some tentative conclusions may now be drawn.

It is apparent that the Immigration Acts of 1917 and 1924, as they are now drawn and interpreted by the administrative and judicial bodies, aid disruption of family life. In a majority of the cases handled in Detroit the husbands left their wives with every intention of sending for them as soon as it was economically feasible. The social history of the families studied indicate that the relations between husband and wife abroad were what might be termed normal. The pattern usually present in separated families obtained in most of these divorce cases. Correspondence the first year is fairly regular and so are remittances from the husband to the wife. In the second year the correspondence grows less frequent, but, notwithstanding this, the husband sends his postal money orders. In the third or fourth year, he will send steamship tickets for his wife and children. Months elapse, and sometimes years of waiting. The family abroad has been caught in the immigration law web. Recriminations set in. The husband can't understand why his wife and children do not join him, and the wife cannot make the husband understand that the consul will not give her a visa because he is afraid the family will become a public charge, or because of one of the children cannot pass an intelligence test, or another is afflicted with tuberculosis. Seeing no possibility of his wife and children joining him where his bread and butter is, the man sets up another establishment here. In a large majority of the cases, the husband, at the time of the commencement of the divorce proceedings, was living with a "wife" in Detroit by whom he had had several children. His desire for a divorce is merely to regularize the status of the second "wife" and to legitimize the children of the second relation. Little did Congress realize that in enacting the Immigration Acts of 1917 and 1924 it was contributing a substantial amount of grist for the American divorce mill.

It is fair to state that 90 per cent of the cases handled would have gone by default were it not for the coöperation of these three agencies. This estimate is based on the experience of the Detroit Circuit Court prior to the time the experiment went into effect. Concretely, the appearance of the International Migration Service in the divorce contest has prevented a fraud upon the Court. Moreover, whenever a decree dissolving the marriage has been entered, it carried with it a direction to the husband to support the children in some stipulated amount, and, in many cases, alimony for the wife. Invariably the recommendation of the International Migration Service with respect to the amount needed for the support of the children abroad—in Poland, ten dollars a month will keep two children well fed and clothed—is accepted by the Friend of the Court who in turn recommends that amount to the Court. It is the duty of the Friend of the Court to see that the sum decreed is

paid regularly. That money is sent to the children abroad directly or through the International Migration Service, depending upon the convenience in each individual case.

In some twelve cases when the International Migration Service learned from the wife in Europe that the land and the house she occupied belonged to her husband, it requested the court in Detroit to direct the husband to transfer the property to the wife or the children as the case might be. A proper deed is drawn up abroad and sent on to Detroit for execution, and then returned to the residence of the wife for registration. The importance of this to the wife and children cannot be overstated, for in the agricultural regions of Europe, particularly, the economic welfare of a family is closely tied to the soil, and to vest ownership of a piece of land in the wife or the children assures the economic security of the entire family.

#### CONCLUSION

The experiment described arose out of a desire to fill a gap in divorce procedure where the litigants involved are separated by oceans and frontiers,<sup>11</sup> a gap which very often resulted in a fraud upon the court and a gross injustice upon the wife and children. The collaboration between the Friend of the Circuit Court of Wayne County in Detroit, the Detroit Legal Aid Bureau and the International Migration Service, voluntary in character and without the benefit of legal sanctions, fills the gap in very large measure. Its drawback lies in the fact that two voluntary organizations are performing a function which is properly one of government.

One of the chief objects of government is to secure and protect the social interest of the individual. The problem presented here suggests that the present legal machinery must be changed to fulfil this object with respect to the administration of legal difficulties which concern individuals separated by frontiers. Lawyers as specialists in social arrangements should be alive to this need, for, as one jurist has stated, "let us think of the problem of the end of law in terms of a great task or great series of tasks of social engineering."<sup>12</sup>

<sup>11</sup> Divorce is not the only field that is subject to this criticism. Workmen's Compensation and probate, where the relatives, heirs, or legatees, reside abroad, are other illustrations.

<sup>12</sup> POUND, *THE SPIRIT OF THE COMMON LAW* (1921) 195.