

MIGRATORY DIVORCE*

DAVID F. CAVERS

Duke University School of Law

THE spectacle of states of a federal union vying with one another for the privilege of purveying divorces to the citizens of sister states would seem both obscene and astounding did not familiarity blunt our capacity to react to it. But although we can view the business with more aplomb than might be manifested by the Man from Mars, migratory divorce—to employ the convenient euphemism—still retains a hold upon the interest not only of students of the family and of the law and its processes but of the public at large. Moreover, that familiarity with the existence and general characteristics of this peculiar institution may

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have served to deter inquiry into its particulars. It is on the assumption that this may be true that I have undertaken to discuss some of the questions which migratory divorce poses: Why do people seek such divorces and where? Is the migratory divorce decree valid and what are its legal consequences? What possibility is there of extirpating the traffic? What appraisal should be placed upon the institution?

Each question deserves a monograph in response; any attempt to discuss them all within the confines of a single article is open to the charge of superficiality. In this predicament, I am obliged to seek the refuge of all writers of all survey articles: the hope that a little knowledge will whet the reader's appetite for the more abundant store that can be obtained from more comprehensive studies of the subject.

Before inquiring why people seek migratory divorces, perhaps it would be well to

define that term—at least for the purposes of this article. A migratory divorce is a divorce granted to a person who has left his home in one state and resorted temporarily to another state for the express purpose of obtaining a divorce from its courts. Strictly, of course, the term does not include the divorces which the Mexican courts are happy to grant to applicants by mail. The mail order divorce is an exotic which presents many of the same problems that are raised by the migratory divorce and I shall not always have occasion to differentiate between them. It is, however, important to differentiate between the migratory divorce and the divorces granted to persons whose migration is not ephemeral. Not infrequently, following the *de facto* dissolution of a marriage, one or the other spouse will leave the home state to establish a home elsewhere, possibly to seek a livelihood or perhaps merely to “go back to Mother.” Later this spouse seeks a divorce in the state to which he or she has repaired. Probably the most difficult legal questions are presented by precisely such cases.

I

It is largely a matter of common knowledge why people migrate for divorce. The principal reason, of course, is the fact that the states to which they go provide less exacting grounds for the granting of decrees than do the home states from which the migrants come. For this reason New York with its strict divorce law furnishes a large supply of grist to the divorce mills. South Carolinians keep the Georgia courts busy. The county in which Augusta is situated exports marriages and imports divorces and, as a consequence, has had the highest ratio of divorces to marriages of any county in the nation.¹

¹ U. S. Bureau of the Census, *11th Annual Report on Marriage and Divorce* (1934) Table 15. See also

Another reason for migration is that the divorce mills will often grant decrees more promptly than the courts of the home state will grant them on the same grounds. This feature appeals to those restive spouses for whom time may be of the essence. Another attraction of the migratory divorce is that it leads to less publicity in the home town press. It may be doubted, however, whether the Reno divorce court operates much more mechanically than do the divorce courts of those states which do not cater to divorce migrants.

Some people, I suspect, go to the divorce mill because it is becoming to be regarded as the thing to do. In the days when the Paris divorce mill flourished, a French decree was regarded as having a certain social *cachet*. Still other persons may migrate simply because newspaper publicity has familiarized them with the fact that divorces can be obtained in the divorce mills, and they are reluctant to consult local lawyers to learn their legal rights in their home states. Not long ago a photograph was taken at a Nevada “dude ranch” of a group of paying guests who were awaiting their divorces. This picture, with an informative caption, was widely published in the newspapers. A guest at the ranch told me that subsequently the ranch owner, a woman, was flooded with letters from women in all parts of the country, inquiring how they might secure divorces in Nevada. This episode is a commentary, and a sorry one, on the degree of confidence with which lawyers are regarded, at least by the poor and ignorant, in their own communities.

Brearley, “A Note Upon Migratory Divorce of South Carolinians,” 2 *Law and Contemporary Problems* 329, 332 (June, 1935). Washoe County, Nevada, in which Reno is located, does a thriving trade in marriages as well as divorces; hence its ratio is lower than that of Richmond County, Georgia.

Yet economy is not one of the attractions which the divorce mill offers. Even a mail order divorce will cost more than a divorce obtained in the home town. The usual rate charged for a Mexican decree is \$125. If, however, you do not apply for a divorce at that rate, some of the soliciting offices will write to inform you that the large volume of business has made it possible for them to offer you the special reduced rate of \$100.²

Despite its enterprising competitors, Reno is still the center of the migratory divorce industry. Nevada ousted the Dakotas as the principal source of easy divorce early in this century. For many years, it was necessary to reside in Nevada for six months before suit could be instituted. In 1931, however, Arkansas endeavored to wrest from Nevada its primacy by enacting a law requiring only 90 days residence. Fearing the competing attractions of Hot Springs, the Reno divorce lawyers and hotel proprietors hurried a bill through the Nevada legislature reducing the residence period in that state to six weeks. Idaho also adopted a 90-day law in 1931. But Idaho has not been a significant figure in the competition for the divorce business. The creation of a luxurious winter resort in Idaho, announced with much fanfare this year, will doubtless attract many who prefer winter sports to sun bathing or dude ranching as the anaesthetic for their marital operations.

In 1935 Florida adopted a 90-day law, and evidently Florida competition is be-

ginning to be felt seriously in Nevada. During the past session of the Nevada legislature, a bill was considered which would reduce the residence period from six weeks to three. The lawyers would not suffer from such a change but the hotel proprietors would. Evidently the latter was the stronger group, for the bill did not become a law.

Both Havana, Cuba, and Yucatan, Mexico, have sought to attract some of the migratory divorce business, but suffer under the handicap of high transportation costs. The Mexican border states have specialized in the granting of mail order decrees—with the hearty coöperation of certain American lawyers (chiefly in Texas) who solicit the business from their compatriots (lawyers and laymen alike) by circulars and newspaper advertisements and turn the litigation over to Mexican correspondents. During the 'twenties, the wealthy sought French divorces, but a housecleaning in the Paris bar proved fatal to the business.

II

Strictly, the legal difficulty which the migratory divorce presents does not lie in the evasion of the more stringent divorce laws of the home state. If the migratory divorce decree were granted by a court having jurisdiction, the fact that it resulted in such an evasion of the laws of the home state would not affect its legality. Under the full faith and credit clause of the United States Constitution,³ the home state would be obliged to recognize and give effect to such a decree. The difficulty arises from the fact that the decrees granted are not valid, and hence not entitled to recognition, because the courts which grant them lack jurisdiction.

The term "jurisdiction" is more often

² See Bergeson, "The Divorce Mill Advertises," 2 *Law and Contemporary Problems* 348, 351 (June, 1935). If a case is forwarded by a local lawyer, the fee charged by the Texas correspondent is usually \$80, the local attorney charging as much more as the traffic will bear. Mexican law offices in New York City charge \$225, payable in installments, the final installment being payable "upon the tendering of the certified copy of the final decree of divorce duly translated into English." *Ibid.*

³ U. S. Constitution, Art. IV, Section 1.

used than understood. With lawyerly caution, I shall refrain from defining it. Instead I shall proceed in the law teacher's fashion by resorting to hypothetical cases. Suppose a man in California owes you \$100. So long as he stays there, and will not consent to the institution of the action, you cannot obtain a judgment against him on that claim in North Carolina. The court will hold that your action is *in personam*—against the person—and that the court lacks personal jurisdiction over the defendant since he was not served with process in this state. However, if your debtor were so bold as to come to this state, you could have process served upon him during his stay here, and, even though he were to leave the state immediately after, that would not affect the court's personal jurisdiction over him or the validity of the judgment it might ultimately enter. On a personal claim of this nature, you can sue a defendant wherever you can catch him. Moreover, he can consent to be sued in advance of the institution of the action or even after it has begun, and, in such case, the judgment will be valid even though no process was served in the state.

Suppose, however, that you and Mr. A of Hollywood, California, own land in North Carolina in common. Suppose that you wish to have this land partitioned in a judicial proceeding. You could institute the partition proceeding in a North Carolina court, and it would be carried through even though Mr. A were never to consent to the action nor to leave California. Such a proceeding is said to be *in rem*—against the thing. Personal service is not required even though it is Mr. A's interest in the thing rather than the thing itself that is actually affected by the decree. If the land in question were in California rather than in North Carolina, you could not obtain the partition decree in North Caro-

lina even though Mr. A were present here and were to consent to the institution of the proceeding. In such a situation it would be said that the court lacked jurisdiction over the subject matter of the action. The proceeding being *in rem*—against a thing—that thing must be within the territorial jurisdiction of the court.

Now let us consider a divorce action and assume that Mr. and Mrs. A of North Carolina have fallen out and wish a divorce more promptly than North Carolina will provide it on the grounds available. Courts proceed by analogy in developing the law. Should they follow the analogy to the personal action and permit the divorce to be brought wherever Mr. A lets Mrs. A's process server catch him? The courts have decided against such a policy. They hold that the interest of the home state in the marriage relationship is so great that the mere presence or consent of the parties is not sufficient to give any other court before whom they may appear jurisdiction to dissolve this relationship. Instead, the courts have followed the analogy to the action *in rem*. They have treated the marriage relationship as a thing, and have insisted that this thing be properly before the court. If the court has jurisdiction over the subject matter of the action, then, still following the analogy, the courts do not require that the defendant be personally served or consent to the action. Service by publishing a notice of the action will suffice.

This is not the first time that judges have thingified a concept. Reification, to use a more elegant word, is an intellectual tool that is often abused—and not alone in law—because its metaphorical character is not always realized. In the law of divorce jurisdiction, it has led the courts to focus their inquiry upon the question where this thing, the marriage relation, is located.

The point at which the courts have decided that the marriage relation is located is the domicil of the spouses.⁴ Consequently, only the court of the domicil can give a valid decree of divorce. Personal service, appearance, or consent of the defendant will not validate the decree of any other court. Hence it is important to inquire where one's domicil is in the eyes of the law.

"Domicil" is one of the numerous chameleon terms of the law which take their color from the legal questions in which they are employed, and, since a determination of domicil is involved in a variety of legal issues, its definition is peculiarly treacherous. In contemplation of law, every person has a domicil and, at any given time, only one domicil. One's father's domicil is conferred upon one at birth; one retains this domicil until, after attaining majority, one achieves a "domicil of choice." This is effected by the coincidence of physical presence within a state with the intention to remain there indefinitely, in other words, to establish a home. One who goes to a place with a view to spending a limited period of time there, even though he may have no intention of returning to his previous home, does not thereby become domiciled at that place. He is a resident there but not a domiciliary.

It is evident that any doctrine which rests so heavily upon a person's intent must be elusive and uncertain in application, and so it has proved with domicil. No doubt it was partly to assure adequate proof of domicil that plaintiffs have been required by most divorce statutes to have

⁴In civil law countries, it is true, the nation of which the spouses were citizens or subjects was chosen as the situs of the marriage relationship. This choice, however, could not be satisfactorily applied to a federal nation such as the United States or the British Commonwealth of Nations since in such a nation the problem is to determine where, within the federation, is the seat of the marriage relationship.

resided one or more years within the state before instituting divorce actions. In the divorce mills, these time limits are retained in drastically truncated form, but no genuine effort is made to prove domicil.⁵ The function of the residence requirement in such states is no longer legal but economic. It does not guard against the simulation of domicil; it merely assures the hotel proprietors of a minimum of trade.

The courts have distinguished motive from intent and have held that the mere fact that one migrated to another state for the purpose of obtaining a divorce there would not preclude him from obtaining a domicil if his intent was to establish a permanent home in the jurisdiction to which he had gone.⁶ However, it is evident that the seeker after migratory divorces who spends 43 days in Reno with the intention of packing up and departing as soon as the necessary document is obtained is not domiciled there. He has complied with the statutory requirements as to residence; he has perjured himself before an acquiescent bench and bar to establish color of domicil; but he has not obtained a decree which will withstand attack in another state. There the fact that the Nevada domicil was simulated can be proved by the other spouse; it is a fact upon which the Nevada court's juris-

⁵In Nevada, the legislature seemingly endeavored to dispense with the requirement of domicil by an amendment to the Nevada statute in 1915, but the State Supreme Court by an interpretative *tour de force* continued to find the requirement in the statute. *Walker v. Walker*, 45 Nev. 105, 198 Pac. 433 (1921). If this interpretation had not been made, the Nevada statute might have been held unconstitutional as contravening the due process clause of the 14th Amendment. Interpreted to require domicil, the statute itself becomes invulnerable. Lip service is accorded its requirements in the Nevada divorce courts, while in substance they are disregarded. See Ingram and Ballard, "The Business of Migratory Divorce in Nevada," 3 *Law and Contemporary Problems* 302, 305 (June, 1935).

⁶*Williams v. Osenton*, 232 U. S. 619 (1913).

diction to grant the decree depended and "jurisdictional facts" are open to question in the courts of sister states. Finding the Nevada court lacked jurisdiction, the court of the second state will rule the Nevada decree void. Needless to say, a mail order decree is subject to the same treatment, the principal difference being that proof of its invalidity is simpler.⁷

A decree of a court lacking jurisdiction is said to be a nullity. Let us see some of the consequences which result from that proposition. Suppose Mrs. A returns from Reno to North Carolina. Upon her arrival her husband sues her for divorce. Her Nevada decree divorcing him would be no protection to her. Suppose, instead, Mrs. A after her divorce were to die and Mr. A were to claim a share in her estate as her husband. Here again Mr. A would be successful. Suppose, next, that Mrs. A marries B in North Carolina and an indignant solicitor prosecutes her for adulterous cohabitation. The prosecution will lie. Suppose, again that Mrs. A marries B but her new husband abandons her. She brings suit against him for non-support. He will have a perfectly good defense on the ground that she is still married to Mr. A. Suppose a still further unpleasantness—Mrs. A marries B and has children. Their legitimacy will be subject to question.⁸ So, too, will the legitimacy of Mr. A's children should he marry C in

reliance upon Mrs. A's divorce. All these results are consistent with the theory of the nullity of the void divorce. Why, then, do people persist in getting the void decrees?

The obvious and, I think, sufficient answer is that however such decrees may be regarded by the courts, they are not regarded as social nullities. The status of the person who marries after obtaining such a decree from a divorce mill is obviously far superior socially to that of a person who, dispensing with all legal formalities, merely commences to cohabit with another person. Moreover, paradoxical as it may seem, a void decree of divorce has significant legal consequences. Suppose our Mrs. A, after her return to North Carolina, repents and sues Mr. A for non-support. Although her divorce decree would be a nullity in an action brought by Mr. A, nevertheless, the court of any state will hold that the decree obtained by Mrs. A will preclude her from asserting her marital rights against Mr. A. The decree, the court will solemnly announce, is null and void, but Mrs. A, by reason of having sought that decree, is estopped—will not be heard—to assert herself as Mr. A's wife. Suppose again that Mr. A, learning of Mrs. A's trip to Reno, heaves a sigh of relief and proceeds to wed a California girl. Later, after a second divorce, Mr. A seeks to succeed to the right of a husband in the first Mrs. A's property. In that event he will find himself estopped. Having married upon the strength of the invalid decree, he will not be heard subsequently to attack its validity.⁹

Some decisions suggest that one who merely files a formal answer in a divorce

⁷ The plaintiff not having been physically present in the jurisdiction granting the decree, lack of domicile can be proved by reference to this factor alone and no inquiry need be made as to intent. Interestingly enough, the mail order decrees of the Mexican State Courts are of doubtful validity in Mexico itself. The Federal Supreme Court has several times ruled against them. See Summers, "The Divorce Laws of Mexico," 3 *Law and Contemporary Problems* 310, 313-316 (June, 1935).

⁸ In a number of states, statutes provide that the children of void marriages are legitimate. In such states, of course, the invalidity of a parent's divorce decree would not affect the status of children born of a subsequent marriage by that parent.

⁹ For a discussion of the doctrine of estoppel, see Harper, "The Validity of Void Decrees," 79 *U. of Pa. L. Rev.* 158 (1930); Harper, "The Myth of the Void Divorce," 2 *Law and Contemporary Problems* 335 (June, 1935).

action brought at a divorce mill will by that fact become estopped to contest later the validity of the decree. If this doctrine should become well-established, it will have a very significant effect. Over half the divorces obtained in Reno are obtained after formal answer has been filed, a percentage far higher than will be found in any other jurisdiction. These formal contests accelerate the granting of the decrees, but they do not add to their validity. But if the mere filing of an answer may serve to operate as an estoppel, then both parties will be precluded from attacking the decree, and, except insofar as rights of third parties are concerned, that legal nullity, the void decree, will be pragmatically valid.

One of the favorite devices of lawyers whose clients wish a speedy divorce is to have the spouses enter into a separation agreement and a property settlement preceding the flight to Reno of one of them. The settlement and the doctrine of estoppel combine to render unlikely any further litigation. I should add incidentally that for the granting of a decree for alimony it is essential that the court have personal jurisdiction over the defendant spouse.

As I pointed out earlier in this paper, many divorce decrees are granted to migrant spouses whose purpose in migrating was not merely to obtain a divorce but to obtain a home in another state. Here the problem becomes difficult for the spouses may have different domicils. The convenient device of treating the marriage relation as a thing and locating that thing in the state of the domicil becomes awkward when two domicils are involved. Courts given to the unwitting practice of reification have strived manfully in the effort to locate this concept in one domicil or the other; some have followed the Pudd'nhead Wilson technique of dividing the relation between the two states and allowing either

state to shoot its half of the dog. Analysis of the relevant decisions would call for a paper twice the length of this and would serve only to demonstrate that the law on the point is both uncertain and unsatisfactory.¹⁰ A brief reference to some of the problems may suffice to indicate why a spouse may be married in one state while divorced in another.

A complicating factor in this situation is the rule of law regarding the domicil of a married woman. The common law rule, still followed in England, was that a wife's domicil was always the same as her husband's. Almost a century ago, however, American courts decided that a wife could obtain a separate domicil where her husband's conduct justified her in leaving him.¹¹ Thus, where a husband is guilty of cruelty, the wife can obtain a domicil of her own and sue him there for divorce. But later, when she seeks to rely on that decree in subsequent litigation with him, he may assert that he was not in fact the wrongdoer and that his conduct did not justify her departure. If her domicil depends on his wrongful conduct, then that conduct becomes a fact on which the court's jurisdiction depends. Unless the husband was at fault, the wife did not acquire an independent domicil and hence the court had no jurisdiction to grant a decree at her suit. If, upon examining the "jurisdictional facts," the second court refuses to accept the finding of the first court with respect to the husband's alleged fault, then the wife has no recourse but to appeal to the Supreme Court of the United States,

¹⁰ Leading law review articles on the subject are Beale, "Haddock Revisited," 39 *Harvard L. Rev.* 417 (1926); McClintock, "Fault as an Element of Divorce Jurisdiction," 37 *Yale L. J.* 564 (1928); Bingham, "Matter of Haddock v. Haddock," 21 *Cornell L. Q.* 393 (1936).

¹¹ The leading case recognizing the wife's power to obtain a separate domicil is *Ditson v. Ditson*, 4 R. I. 87 (1856).

asserting that the court of the second state has failed to respect the full faith and credit clause by failing to reach a proper conclusion with respect to the jurisdictional fact involved in the first action. Obviously the Supreme Court is a fantastic forum for the determination of such an issue.

It should be noted that there is no difficulty in a husband's obtaining a new domicile independently of a wife who refuses to follow him. Suppose a husband moves to Connecticut, leaving a wife behind him in New York. Later he obtains a divorce from her in Connecticut. Subsequently, she sues him for divorce in New York. Is the New York court obliged to respect the Connecticut decree and dismiss the wife's suit? This was the question raised before the Supreme Court of the United States in the famous case of *Haddock v. Haddock*, decided in 1906.¹² The Supreme Court held in the *Haddock* case that the divorce decree obtained by the husband in Connecticut was not entitled to full faith and credit in New York. The Supreme Court accepted the finding of the New York court, contrary to that of the Connecticut court, that the husband had been at fault and that the wife's domicile did not follow his to Connecticut. As a consequence of this decision, the validity of a decree obtained by a husband who migrates to a new home without his wife is as uncertain as the decree obtained by the wife who does likewise. Uncertain, that is, in any state other than the state which rendered the decree; in that state the validity of the decree is unquestioned.¹³

¹² 201 U. S. 562 (1906).

¹³ Since the plaintiff is a citizen of the state in which he is domiciled, that state is said to have the right to determine his status even though its decree need not be recognized by the state of which the other party to the status is a citizen. Another anomaly of the *Haddock* case is its recognition of the validity of decrees granted at the domicile of one of the spouses

It should be said, however, that many states are willing to recognize by comity the decrees of other states even where recognition is not compelled by the full faith and credit clause. Nevertheless, those states which, like New York, will act only under constitutional compulsion are the states which tend to be strictest in their requirements for divorce and therefore are the states from which migration most frequently occurs. The result is that where the remedial operation of the doctrine of comity could do the most good it is not applied.

Even though jurisdictional requirements are satisfied, the divorce granted by a court before whom only one spouse is present opens up a possibility of injustice which is very real. In such cases the statutory requirement for the institution of the action can be usually satisfied by giving notice of the pending action by publication in the legal advertising columns of newspapers, an almost certain guaranty that the information will *not* come to the attention of the person to whom it is directed. Actual notice of the pending action therefore depends on the decency of the plaintiff. If the plaintiff desires to inform the absent spouse, he or she may do so, except where the latter's whereabouts actually are unknown. But in many cases of hostility, this will not be done. As a result, a matter vitally affecting the absent party may be disposed of in an *ex parte* action.

Studies conducted by the Institute of Law at Johns Hopkins of the operation of the Maryland and Ohio divorce courts show that this situation is far from infre-

where the other spouse was served with process within that state. 201 U. S. at 570. Where the plaintiff spouse has remained in the state where the parties were domiciled together as man and wife (the "matrimonial domicile"), the decree of the court in that state will be entitled to recognition under the full faith and credit clause. *Id.* at 569.

quent.¹⁴ In fact, cases of divorce without any knowledge of the proceeding by one party are far more numerous, if less publicized, than the true migratory divorces.¹⁵ It is difficult to see how this problem can be met without resort to some new machinery in our courts. Such machinery has in fact been developed in Detroit. The Detroit courts were resorted to by a large number of alien workers who had left wives abroad and had come to Detroit in search of employment. Absence did not make the heart grow fonder, especially when it had to overcome immigration barriers and steamship fares. The number of *ex parte* divorces sought by these workers grew so large that a new office, called the "Friend of the Court," was created as an adjunct to the Detroit divorce court. In cases of this character the Friend of the Court, working in coöperation with the International Migration Service, a philanthropic society, intervened in the proceeding and secured a stay until an opportunity had been granted for the Service to investigate the status of the absent wife. Frequently, it was found that she had no knowledge of her husband's intentions, and, quite possibly, if they had been carried out, she would have remained in ignorance. The intervention of these agencies does not always result in denial of the divorces sought, but it does assure proper notice and the making of proper arrangements for the support of the divorced wives.¹⁶

¹⁴ The whereabouts of the defendant were unknown in 15.6 per cent of the divorce actions instituted in Ohio. Marshall and May, *The Divorce Court—Ohio* (1933) 67-73.

¹⁵ Migratory divorces are estimated at about 3 per cent of all divorces. Cahen, *Statistical Analysis of American Divorce* (1932) 78.

¹⁶ For a discussion of the Detroit procedure, see Wainhouse, "Protecting the Absent Spouse in International Divorce: The Detroit Experiment," 2 *Law and Contemporary Problems* 360 (June, 1935).

III

The Detroit experiment is not typical of efforts to cope with the migratory divorce problem. Regarded as an unmitigated evil, migratory divorce has long been the target of reformers, but they have sought its extirpation rather than the prevention of injuries incidental to it. In the 1880's, agitation for federal action gave rise to a federal investigation which, typically, produced no results. In 1905, President Theodore Roosevelt called a conference of Governors to study uniform state laws on the subject. The conference was equally unproductive. The *Haddock* case in 1906 was the culmination of a series of cases in which the Supreme Court of the United States made clear its disapproval of, if not the law applicable to, the institution. Beginning about 1910, agitation for a constitutional amendment authorizing Congress to enact a federal divorce law was pressed, but, aside from the perennial introduction in Congress of resolutions to that end, this movement has been barren.¹⁷ The Commissioners for Uniform State Laws drafted a Uniform Divorce Act and, when that was ignored by virtually all states, drew up a Uniform Divorce Jurisdiction Act, aimed directly at migratory divorce. Vermont alone adopted the latter act, and then, at its next legislative session, repealed the measure.

On the basis of this experience, I think it may be safely predicted that we shall not solve this problem either by uniform state action or by federal action. There is no more likelihood of Nevada's abandoning its lax divorce practices than there is of Delaware's tightening up its corporation laws. Such action would be at great economic sacrifice. Moreover, there is no

¹⁷ For a depiction of the movements for uniform state or federal divorce legislation, see Lichtenberger, *Divorce* (1931) C.VIII.

conviction of sin to inspire it. Doubtless most Nevada citizens are convinced that they are doing a service to the nation in providing a place of escape for the matrimonially burdened.

Can the courts or legislatures of the states from which the migrants come do anything to stop the business? The courts have pronounced the migratory decrees invalid without deterring resort to the divorce mills. True, they have taken back much that they have said by developing the doctrine of estoppel. But the abandonment of the doctrine of estoppel would give sanction to judicial dislike of migratory divorce at the cost of actively aiding and abetting flagrant injustices.

The courts have granted injunctions at the suit of deserted wives, ordering husbands not to apply for divorces elsewhere. The courts have also granted declaratory judgments at the suit of wives whose husbands have already divorced them elsewhere, the judgments declaring the plaintiffs still to be the lawful wives of the defendant husbands. From a practical standpoint, it is open to doubt just how useful these remedies are.¹⁸ Moreover, they will never be invoked where the divorce is an amicable one, and such it is in the majority of migratory cases.

The state's power to prosecute for bigamy¹⁹ or adulterous cohabitation the

¹⁸ The injunction is of consequence as a deterrent only if the erring spouse wishes to return to his home state. The declaratory judgment may serve to clarify the status of the plaintiff spouse and aid in the future assertion of claims to property. The law relating to these remedies is treated fully in Jacobs, "The Utility of Injunctions and Declaratory Judgments in Migratory Divorce," 2 *Law and Contemporary Problems* 370 (June, 1935).

¹⁹ By marrying in the state granting the divorce, the divorced spouse will avoid the commission of bigamy as that offense is normally defined, since it is the act of contracting the marriage which constitutes the crime and, *ex hypothesi*, the second marriage would be legal where contracted. However, some state:

husband or wife who marries after a migratory divorce exists unimpaired by the doctrine of estoppel. Occasionally where the guilty spouse has succeeded in outraging public opinion in his home town and is pursued by a vindictive wife, the prosecutor will act. Actuarial studies would, I suspect, reveal the risk of such prosecution to be slightly less than the danger of death by lightning. Suppose a local Savonarola became district attorney and brought action in every such case. I think the refusal of juries to convict would discourage him before the electorate had a chance to vote him out of office.

It is such considerations which cast an air of unreality over any speculation as to what the legislatures of the home states might do to penalize the divorce migrant. Any such measure as might be devised would require the support of a determined and an indignant public. This simply doesn't exist today. Reno inspires far more jests than jeremiads.

Perhaps a qualification might be made as to the mail order divorce. The mail order divorce lacks most of the color of legality which inheres in a Nevada decree. Moreover, it is obvious that the judicial machinery provided by the domestic divorce mills, however well-oiled and geared for mass production it may be, can, if properly invoked, operate to prevent gross injustice. No such assurance exists in the case of the mail order divorce. Finally, the mail order divorce traffic is the product of persistent solicitation of business by Mexican and American lawyers, directed chiefly to the ignorant and the poor. In many instances, I have no

define bigamy to include the act of cohabitation following the second marriage and, in such states, assuming the divorce to be invalid, a prosecution for bigamy would be sustained. In most other states, prosecution could be instituted for the lesser offense of adulterous cohabitation.

doubt that poor people are persuaded to pay more for invalid Mexican decrees than they would have had to pay for valid decrees in their home courts. The only mitigating circumstance is that in those states where decrees can be obtained on only one or a few restricted grounds, the mail order decree does equalize the position of the poor who cannot afford the trip to the divorce mill with the position of the well-to-do who can.

Assuming that the mail order divorce traffic should be stamped out, the task is a practicable one. The Federal Government in the exercise of its power over the mails and other forms of interstate and foreign communication could deal quite effectively with the traffic. Already, I understand, a committee of the New York bar has been working for federal legislation to this end.

The prospects are that we shall live with the migratory divorce traffic for some years to come. I see only one sure method of eliminating it, and that is through a change in the divorce laws of those states which now supply the grist for the divorce mills. Given an opportunity for relatively simple, dignified divorce proceedings at home, the number who would migrate for divorce would not be large. Once the number of divorce seekers had fallen to a low level, even the divorce mills might decide that the business did not pay sufficient dividends to justify continued lack of legal respectability. But many years must elapse before this situation comes about. In the meantime, we have the migratory divorce. How shall we appraise it?

IV

Of course, to the persons to whom all divorce is evil, any means of facilitating divorce will be condemned. They can, however, obtain some comfort from the fact that reliable estimates

have placed the volume of migratory divorces no higher than 3 per cent of all divorces.²⁰ The opening of new divorce mills since these estimates were made and the augmented mail order traffic have perhaps increased this percentage. Yet certainly 5 per cent would still be a liberal estimate.

Impossible to calculate but nonetheless significant is the influence which these widely-publicized divorce centers have had on resort to divorce without resort to migration. My guess would be that Reno has caused many more divorces than its courts have granted.

Suppose, however, that one looks at the institution of divorce with a more tolerant attitude. Are the characteristics of migratory divorce such that it should nonetheless be singled out for condemnation? I have already pointed to some of the legal defects which inhere in the migratory decree. Yet I do not think that one is justified in viewing the situation thus created with alarm. So far as the law reports evidence, the number of instances in which these defects have actually caused trouble is small, however distressing that trouble may be when it arises.²¹

That the mechanical *ex parte* procedure

²⁰ See Cahen, *loc. cit supra* note 15.

²¹ It might be supposed that the legitimacy of children would be the source of considerable litigation arising out of the migratory divorces of their parents. In the thirty-year period ending in 1935, less than half a dozen cases of this character seem to have been reported in the American Digest System covering all the reported decisions (chiefly of appellate courts but including courts of first instance in New York State) during the period. While cases involving other issues are more numerous, the number under no heading is large. Perhaps, since property disputes are the principal inspiration of litigation, we must wait until the principals in migratory divorces have had an opportunity to grow old and die before we shall find a volume of cases commensurate with the potential legal troubles that migratory divorce breeds. I am skeptical, however, that a marked increase will be noted; after all, there were migratory divorces aplenty at the turn of the century.

followed in the divorce mills may result in injustices and hardships in individual cases is certainly not to be disputed. However, the number, and I suspect even the proportion, of such cases is probably smaller than that of the cases of hardship and injustice arising in *ex parte* non-migratory cases. There are divorce mills aplenty outside Nevada, Arkansas, and Florida, even though their grist is solely of domestic origin.

One aspect of the migratory divorce problem is not often discussed but is I think worthy of consideration. The laws relating to divorce are obviously an important part of the legal structure of society. How healthy for that society is it that those laws can be evaded by the thinnest sort of legal subterfuge? If such evasion may not harm the family, still what does it do to the law? The problem is accentuated by the fact that, by and large, this evasion is possible only for the well-to-do.

I think there is cause here for concern, but not for great anxiety. Viewed in its relation to the problem of law's functioning in society, the phenomenon of migratory divorce is but one of a great many instances where the law is called upon to play a dual rôle. On the one hand, it is required to preserve a symbol cherished by a people; on the other hand, it is required to furnish a means of preventing that symbol from standing too much in the way of

the desires and practices of everyday life.²² The symbol of the united family, joined by God and dissoluble by man only in extreme cases, has long been part and parcel of American ideology. But changing ways of life have made fidelity to that symbol increasingly inconvenient. The symbol is not destroyed; instead, it is carefully preserved and lawyers and judges are called upon to exercise their wits to evade it. Migratory divorce is one of their solutions. It is distinguished from other instances of the same process in this and other fields of the law only in that the geographical division of the symbolic and practical functions renders the dualism too obvious to be ignored.

There is one question which I believe should be posed to himself by every person who thinks about migratory divorce, for, while he cannot well answer it, its exploration will carry him close to the nub of the problem. The question is this: What would happen, over a period of years, if tomorrow the divorce mills of Nevada and its rival sister states were to close, and no other states were to carry on the migratory divorce business?²³

²² For a stimulating discussion of the relation of law and symbol, see Arnold, *Symbols of Government* (1935).

²³ Professor Ernest R. Groves' penetrating article, "Migratory Divorces," 2 *Law and Contemporary Problems* 293 (June, 1935), is recommended to those who wish to pursue further the sociological implications of the institution.