DIVORCE

The Reno Method, and Others

by **WILLIAM L. PROSSER**

DIVORCE IS a specter-ridden branch of the law. The scandalized and indignant ghosts of black-robed ecclesiastical figures, long since dust, stalk through the courthouse when the plaintiff takes the stand and testifies concerning the misunderstanding at the bridge table. Our courts are dealing not so much with law as with a sad mixture of religion, liberalism, and expediency.

Divorce has always been a religious matter, since the law of Moses permitted a man whose wife found no favor in his eyes to write her a "bill of divorcement" and send her out of his house. The Christian doctrine which underlies our law is derived from two somewhat ambiguous passages in the gospels according to Matthew and Mark, in which disputing theologians have been able to find an absolute prohibition of all divorce whatever, a sanction for divorce on the ground of adultery only, and an approval of liberal divorce provided there is no remarriage. Upon this controversy, which has raged for some nineteen hundred years and is no nearer solution, the Catholic Church superimposed the article of faith that marriage is a sacrament.

If marriage is a sacrament, it follows that only a priest can dissolve it. For that reason, the power of divorce, in Catholic England, was exclusively in the hands of the ecclesiastical courts, whose judges were priests and whose law was the law of the Church. Their interpretation of the scriptures was that there could be no such thing as absolute divorce, as we now know it, but only a separation "from bed and board" (on such grounds as adultery and cruelty) or what we now call an annulment (for causes such as a prohibited relation between the parties, existing at the time of the marriage). When Henry VIII obtained the most notorious divorce in history from Catherine of Aragon, there was no court in all England which could give it to him when the Church refused.

Henry got his divorce by act of Parliament and incidentally created his own church in the process. For three full centuries afterward, Englishmen could do no more than follow his example. Parliamentary divorces were obtainable by those with wealth and influence. Almost invariably they were on the ground of adultery, and obtained by the husband. It was not until 1857 that a divorce court was created

in England, with adultery as the only ground. That court has been merged since then with probate and admiralty jurisdiction and is familiarly known as the Court of Wills, Wives, and Wrecks. It has been a great deal in the public eye of late, thanks to the Duchess of Windsor and Mr. A. P. Herbert's bill, which was finally enacted, to remedy a situation which, in many respects, was even worse than anything in the United States.

Running the Gamut

The American colonies did not take over the established church and its ecclesiastical courts. The courts which were created here had only the powers of the courts at common law, which did not include divorce. Thus the only resort was the legislature. The early history of divorce in this country is a disgraceful record of political relief to gentlemen with influence who were weary of their wives. The open scandal of such divorces led at last to their prohibition by constitutional amendment in most of the States and to the passage of statutes which conferred divorce jurisdiction on the courts.

The upshot of all this is that the courts have no powers except those that are expressly given to them by the written law. As a result, we have literally fifty-two different divorce laws in the United States and her territories. No two of the States are alike in this respect. They range all the way from South Carolina, which refuses to allow divorce at all and permits only limited separation, up through New York and the District of Columbia, which require adultery as the sole ground, to such States as Kentucky, which specifies some fifteen grounds in elaborate detail.

There is no apparent rhyme or reason in the distribution of these statutes. Massachusetts, with her Puritan and Catholic background, has relatively liberal divorce laws; New York and New Jersey, with their liberal, cosmopolitan centers, are extremely strict. Georgia and Minnesota are liberal, while Florida and Iowa are not. Even in the same State, over a period of years, the laws have varied. One can trace three different periods in the history of North Carolina, in which she was first conservative, then liberal, then strict again. The cycle seems to begin with a rigid divorce law, which is modified by adding new statutes piecemeal, to fit some individual case, until a public scandal or an attack from some religious group leads to their repeal — after which the process starts all over again.

Adultery is recognized as a ground for divorce everywhere except in South Carolina. Most States — but not all — recognize cruelty, and it is here that the courts have played some part in opening the door to liberal divorce.

Nearly all the statutes require something more or less extreme: "cruel and inhuman treatment," "extreme cruelty," "intolerable cruelty," "indignities to the person," and the like. It is at least possible that what the legislature had in mind in each case was nothing less than an actual physical beating. But the courts recognized very early that there might be worse kinds of treatment than mere assault and battery. They proceeded to define "extreme cruelty" as any conduct which threatens to do injury to life or health or to make a continuation of the marriage unsafe.

From this there has been born that "mental cruelty" which has so greatly amused the newspapers — described as a systematic course of ill treatment, continued scolding and faultfinding, unkind language, studied contempt, and petty acts of a malicious nature. The plain truth of the matter is that it is a rare household which, given only one side of the story, cannot produce enough of this sort of thing to make out a plausible case in court. There has been an increasing inclination to listen with sympathy to the wife's tearful narrative of the brutal husband's rough language. The courts of the State of Washington have gone so far as to say that mental cruelty is any conduct which makes it impossible for the parties to live together without unhappiness — and this of course amounts to nothing more than a divorce for incompatibility.

Medieval Survivals

Close after cruelty follows desertion, which must be continued for one, two, or three years prior to the commencement of the suit. The penchant of our lawmakers for applying epithets is again illustrated by the adjectives which are coupled with desertion: it must be "willful," "obstinate," "determined," "persistent," "intentional," or "malicious." Desertion means more than nonsupport, which sometimes is listed as a separate ground; it is the

deliberate leaving of one spouse by the other and living apart with the intention not to return. It should be obvious that the presence on the statute books of such a ground for relief affords an opportunity for any couple tired of matrimony to strike off the shackles; all that is necessary is for the husband to desert the wife, who must then merely wait the required time before suing.

After desertion, in a descending scale of importance, follow such grounds as habitual drunkenness, imprisonment in some State institution, incurable insanity, nonsupport, and sexual impotence — which last seldom appears in court, however large a part it may play in causing the actual separation. In addition, there are a great many freakish provisions, passed to cover some particular case, such as the rather common one that a divorce shall be granted whenever there has been continuous separation under a court decree for a period of five years.

No picture of the law of divorce would be complete without mention of the old ecclesiastical defenses, which were given such terrifying names as collusion, connivance, condonation, and recrimination.

The courts of the church were very suspicious of divorce suits and careful that the sacrament of marriage should not be set aside merely because husband and wife had agreed on it. At the slightest indication that there had been collusion between the parties or that one had aided the other by providing grounds for divorce, the church would at once throw both parties out of court and deny any relief at all. This attitude was continued by the American courts when they took over divorce jurisdiction. If any evidence comes before the court today that there has been co-operation between the parties, it is the duty of the judge, of his own motion, to interfere and dismiss the case or even to set aside the decree after the divorce has been granted.

"Condonation" rested on the notion that the church would not resurrect, as ground for divorce, an offense which had been forgiven; so that, if a wife continued to live with her husband, with full knowledge of the facts, she was denied relief.

"Recrimination" goes back to the natural position of the church that a divorce would be granted only to an innocent party. If the plaintiff herself has been guilty of conduct which would be ground for divorce, she has no standing before the law. Or, as Professor Chafee of the Harvard Law School is reported to have put it —

> Both parties having behaved in such manner that the continuance of the marriage relation is intolerable, relief is refused to both, and the happy home is ordered restored.

Such is the law in the books. The whole theory is that the suit is a contest, a controversy, with hostile parties and nothing concealed from the court. But, when we look at the law in action, we find an entirely different state of affairs.

Getting a Divorce

In the ordinary jurisdiction, the woman who wishes a divorce — and, with relatively few exceptions, divorce suits are brought by women — goes to a lawyer, who draws a paper variously entitled a declaration, a petition, or a complaint. This document proceeds to allege that on a particular date her husband deserted her and has uninterruptedly continued the said desertion until the present time. Or, if she cannot or will not swear to that, the ground is that over a period of years he has "subjected her to a deliberate and systematic course of cruel and inhuman treatment, of which the following are specific instances" — and there follow a series of those lamentable incidents without which no marriage would be complete.

This paper is served on the husband, together with a summons, which gives him some thirty days to answer it.

He does not answer it. He does nothing at all.

The point of the whole matter is that he is not required to answer it. He cannot be compelled to defend himself, and, if he does not, the court will have no evidence except that of the wife.

At the end of the thirty days, the plaintiff's attorney files an affidavit declaring that the suit is uncontested and puts the case on the court calendar.

There is then a delay of about ninety days — the exact period being fixed by statute or court rules, to permit any last-moment change of heart.

When the case is called for hearing, the plaintiff, her lawyer, and two or three witnesses

to corroborate her story march into the courtroom — a melancholy little parade, the women usually in tears, the attorney invariably full of dignity.

The plaintiff takes the stand, testifies to her residence in the State, her marriage, and the bare outline of the things alleged in the paper which the judge has before him.

Her witnesses add a word in support of her story.

The judge may ask her one or two questions, in a perfunctory manner, but he is usually a gentleman, there are many other cases waiting, and so the issue is a foregone conclusion. He signs the order which the attorney has ready for him.

It is all over and altogether it has taken less than ten minutes.

Where is the husband all this while? At the other end of a telephone, waiting to hear the good news.

Why did that marriage really go on the rocks? Nobody knows — perhaps not even the lawyer. There has been no contest, no hostile party, and no assurance whatever that we have got at the whole truth.

It is no wonder that we are haunted by ecclesiastical ghosts.

This is by no means an exaggerated picture. Five years ago, Leon C. Marshall and Geoffrey May conducted a survey of the divorce records of Maryland and Ohio for the years 1929 and 1930, under the auspices of the Institute of Law of Johns Hopkins University and the Judicial Councils of those two States. Neither Maryland nor Ohio can be classified as a particularly liberal state, as to divorce laws. In all, the records of 10,075 divorce suits were examined. The cases in which the issue of divorce and its grounds was contested amounted to less than four and one half per cent of the total. The rest were uncontested — in other words, cases such as that described above. There is no reason to believe that any different record would be found in the other States of the Union.

The Lady in the Bedroom

In New York and the District of Columbia, where the only ground is adultery, divorce goes equally by default, but the process is not so easy.

Adultery is difficult or, at least, embarrassing to prove. But the courts have helped matters out by creating a presumption that, when a man and a woman are found together in a bedroom, the worst possible interpretation is to be put upon the matter. In the words of an ancient judge, "it is presumed he saith not a paternoster there." All that is necessary is for the husband to be found in a hotel bedroom with a lady who is not his wife, preferably in some state of partial undress. On this evidence, the court automatically grants the divorce.

There are plenty of vermin on the roll of attorneys who will furnish the room, the feminine exhibit, and the detectives who break in the door and include a charge for this service in the fee. These divorce offices commonly touch the edges of prostitution, blackmail, and other rackets, and the whole situation is an utter disgrace.

The pattern of our law of divorce, then, is one of a set of involved and widely differing statutes on the books, which pay lip service to the demands of the churches that divorce shall be granted only on genuine and serious grounds, if at all; while, as these laws are administered in our courts, what we really have is a system of consent divorce, with a miserably clumsy and expensive system of registration. The situation is not unlike that which existed under prohibition — the law requires that divorces be granted only on prescription, while the speakeasy in the courthouse around the corner pours them out in volume at so much a head.

Contrary to the popular belief, the problem is not primarily one of perjured testimony. Most witnesses in divorce cases tell only the literal truth, so far as they go. Desertion is easy to accomplish, if the wife is only willing to wait; "mental cruelty" is an inevitable accompaniment of any marriage which has been a failure; and even the blonde in the black pajamas is a physical fact, although she may have been hired for the evening. The evil lies rather in the shabby attempt to compromise between the stand of the churches and the increasing demand for liberal divorces.

No one can be very well pleased with such a picture. It seems likely that the situation will be worse before it becomes better. The divorce rate is increasing rapidly, and any effort to alter the law to deal with it invokes such violent opposition from those who are

opposed to all divorce that it is clear that our present laws will be with us yet a while. Something may be accomplished by the domestic-relations courts in many of our larger cities, which make some attempt to discover the actual facts in each case and now and then refuse the divorce, particularly where there are children to be protected. But such courts are feasible only in the cities, and even they are handicapped by hearing, in uncontested cases, only one side of the story. No real solution exists short of a slow process of education and a definite decision as to whether we really want consent divorce.

RENO — AND AFTER

THERE ALWAYS has been one jurisdiction in this country to which refugees from matrimonial conflict have fled for easy divorce. Once it was Indiana, then the Dakota Territory, and still later Utah. In recent years Nevada has reigned supreme.

As everyone knows, divorce is a business in Reno. The life of the town depends on it, from the hotels and the gaming houses to the Young Men's Christian Association, which would otherwise be unable to fill its dormitory or balance its budget. It is useless to repeat what everyone knows. A town with a population of twenty thousand has reached in one year a peak of more than four thousand divorces, which have provided its gratified inhabitants with a revenue of more than a million dollars — a magnificent reversal of the usual process by which the public supports the lawyers and the courts.

A business so pleasant and lucrative will have its competitors. Arkansas and Idaho are attempting to draw the divorce trade, and we have the edifying spectacle of the courts of three States scrambling for customers, like so many salesmen of crackers, pickles, or dried fish. Mexico has been hanging hopefully on the outskirts and is even willing, for what they may be worth, to provide divorces by mail — an innovation which is frowned on by those conservatives who consider that divorce should continue to remain a branch of the hotel business.

Divorce is quite simple in Reno. The applicant journeys thither for a vacation of forty-two days among very pleasant surroundings, has her choice of several convenient grounds, and escapes a public hearing unless she insists on it.

But a commercial enterprise must be judged by its product. What actual value has a Reno divorce?

It is repeating an old story, quite familiar to all competent lawyers, to say that, legally speaking, it has no value at all. The result is precisely as if it never had occurred. The divorce is not even valid in the State of Nevada, as the Supreme Court of that State has declared on the four occasions when the question has been brought before it. The Supreme Court of the United States has held, in three decisions back in the old Dakota days, that such a divorce is no divorce at all. There are some sixty or more decisions in the other States of this country to the same effect. On not one single occasion has any court of last resort outside the State where the divorce was granted ever decided that it was legally binding and entitled to recognition. The law is uniform and beyond all question.

Apparently no amount of repetition by lawyers can convince the public at large that a divorce granted on the basis of a temporary residence anywhere — in Nevada, Arkansas, Idaho, Mexico, or Paris — is not worth the paper on which the decree is written. The reason is very simple. The power to grant a divorce, to determine that a party has ceased to be married, lies exclusively in the courts of the State in which he has his home. The legal word for it is *domicile* — meaning the place where he resides *with the intention to stay*. In the absence of such an intention, neither the Nevada legislature by its own bootstraps nor any other authority in this country, short of a constitutional amendment, can create a jurisdiction in the State.

The Nevada courts are quite aware of these limitations and have not challenged them. The record shows a permanent resident in Nevada in every case; but that record is open to attack in every court of law in the country. And, when it is attacked, the fact of the temporary residence will speak for itself.

After Reno, then, the parties are still married. The carefree male visitor to that earthly paradise who returns with his decree may find that he not only still has a wife but that he has stirred up trouble enough to make his life a burden to him for some time to come.

He is still required to support the spouse of whom he expected to be rid forever, and he may go to jail if he does not or be sued by those who furnish her the necessities of life. He may find that he has given her ground for divorce, with alimony or for a suit for separate maintenance; and the Nevada decree is worse than useless as a defense. She still retains her interest in his property; if he owns real estate, he may find that he cannot sell it without her consent. And, if he dies, she will inherit her share of his estate as his wife, because there has been no divorce.

If he marries for the second time, his difficulties really begin. The second marriage is entirely void, and any children born of it are illegitimate in the eyes of the law. The second wife has no legal rights whatever, whether of support, property, or inheritance; nor has the husband any legal right to her society, property, or estate. She may be sued for alienation of affections by the annoyed and vindictive first wife, in States where "heart balm" has not been abolished by statute. The climax may come when the gay divorced husband finds himself prosecuted by the State for the crime of bigamy — or for adultery or fornication or lewd and lascivious cohabitation or other things which have a most unpleasant sound. To all of these he has no shadow of a defense under the criminal law. None of these possibilities is in the slightest degree remote or fanciful; each of them finds ample support in a series of decisions in our appellate courts.

They Still Go West

Every lawyer worth his salt knows all of the foregoing. Why, then, do people flock to Reno to obtain a decree which the Supreme Court of Nevada herself has declared to be worthless? Why do even the children of prominent lawyers incur such a risk?

It must be confessed that some of the risks are not very serious. Criminal prosecutions for bigamy and adultery seldom occur; the danger is there, but only an infuriated spouse with political influence is likely to move the prosecuting attorney to take action. Property rights may, to some extent, be adjusted by contract before the divorce, and the question of inheritance may be taken care of by a similar contract or by a will. For the rest, it is a matter of trusting to the good sense and restraint of the other partner.

Many go to Reno from New York, where an individual with any sense of common decency shrinks from the hotel room and the hired blonde in the black pajamas. The Nevada decree, of course, is not necessarily the end. With the social stigma removed by the trip to Reno, remarriage will provide a legal basis of adultery, on which a valid divorce can be obtained; the thing is often done in two steps instead of one. So long as the arrangement is carried out, nothing goes wrong; it is only when it is broken that disaster follows.

But there remains a large group of unfortunates who go to Reno because they do not understand the legal invalidity of the decree. Undoubtedly there is gross misrepresentation of the law by Nevada attorneys eager for the fee — a form of common swindling which is a disgrace to a sovereign State. And many, of course, go because any divorce would be contested bitterly — and defeated — at home. They are not to be envied when they return to face a deserted and justly indignant spouse and the perils of the law.

There is no immediate remedy for all this. A federal divorce law would be a desirable thing, but it would require a constitutional amendment and would meet with furious opposition. The only ultimate remedy is a slow education by the lawyers, which may teach the public in time that this state of affairs is not to be desired.

Next month:

"I'm a Husband-Housewife,"

by David A. Bates