

THE DIVORCE QUESTION IN THE
UNITED STATES,¹

It is not the purpose of this paper to discuss the moral and ethical aspects of divorce, concerning which little need be said to the members of this Congress, but rather to give a brief historical summary of divorce legislation in the United States, together with an analysis of the causes, social and sociological, that have tended to differentiate such legislation and public sentiment from that existing in England and other countries.

The facts and conclusions given are largely derived from three sources, all recognized authorities in the United States:

1. *Report on Marriage and Divorce*. By Carroll D. Wright, United States Commissioner of Labor.

2. *History of Matrimonial Institutions*. By George E. Howard, Ph.D., of Chicago University.

3. *Bishop on Marriage, Separation and Divorce*.

Divorce legislation in the United States may be divided roughly into three periods: First, the Colonial, lasting to the Revolution of 1776; second, early State Legislation, coming down to the Civil War of 1861, which may be called the formative and crystallizing period; and third, that of the last fifty years, which has been sometimes radical and expansive, sometimes conservative and reactionary, according to the trend of social, economic and religious influences in each State and decade.

I.

In colonial times, from 1620 to 1780, we find an important distinction between the New England, the Middle, and the Southern colonies, both as to marriage and divorce; and since the two are so vitally connected it may be interesting to touch briefly upon the marriage, as well as the divorce situation.

In New England colonies the Puritan spirit of revolt against ecclesiasticism, fostered by contact with the Dutch, expressed itself in two ways as affecting the marital relation: First, by

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forbidding the marriage ceremony to be performed by clergymen, thereby making it purely a matter of civil jurisdiction, (though about 1700, the law was modified so as to *permit* clergymen to officiate); second, by relegating the subject of divorce exclusively to the civil authorities, either judicial or legislative; the former method generally prevailing in Massachusetts and Connecticut, the latter in Rhode Island. In every instance a liberal policy respecting divorce was adopted, whether by statute, or judicial decree; and "canonical separation," or divorce *a mensa et thoro*, was practically abandoned.

The Middle colonies were more conservative. In "New Netherland," later "New York," the doctrines of the Reformation prevailed, and the courts alone exercised divorce jurisdiction. After the English acquired control, the province became subject to the English common law, and judicial divorce *a vinculo* ceased with the English conquest, so that for more than one hundred years preceding the Revolution, no divorce took place in the colony of New York; and for many years after it became an independent State there was not any lawful mode of dissolving a marriage in the lifetime of the parties except by a special act of the legislature. Under the Dutch regime, marriages had to be solemnized by a minister with religious rites, but by the Duke of York's code both religious and civil celebration of marriage was permitted.

New Jersey was in the same position as New York under the English rule. Civil marriage was recognized; divorces could be obtained only through the legislature.

In Pennsylvania, both civil and religious celebrations of marriage were recognized, and the early laws permitted absolute divorce (by the courts) for the scriptural cause. Such divorces were also granted by the legislature. But, both in Pennsylvania and Delaware, the influence of the Quakers tended to restrain the granting of divorces, and in the main family life "was placid and prosaic."

In the Southern colonies we find in Virginia that the religious marriage ceremony was prescribed by law, and civil celebration was not authorized until after the Revolution. In Maryland, the civil ceremony was optional until 1692, when it was forbidden to members of the Church of England, and in 1777 it was entirely abolished. In North Carolina, South Carolina and Georgia either mode of celebration was permitted from the first, although

various attempts were made to abolish the civil ceremony, "apparently to give the clergy a monopoly of the marriage fees."

In the Southern colonies we find a curious anomaly relating to divorce. They were largely settled by English colonists, who, under the decisions of the courts, brought the laws of the mother country with them. But the law of England permitted only a separation from "bed and board" by *decree of an ecclesiastical court*. Absolute divorce was not recognized. While "however, the colonists carried with them the English law, they did not bring likewise the English courts." Therefore, "such laws could be administered only as far and as fast as proper tribunals were established." Jurisdiction in divorce was never conferred by these colonies upon any tribunal, nor is there any instance of legislative divorces until after the Revolution of 1776. Informal separations, however, were frequent; and the Equity Courts took cognizance of separate suits for alimony, contrary to the English practice, where alimony was only an incident to divorce by decree of the ecclesiastical court.

In passing, it should be stated that owing to the sparse settlement of the colonies, to the difficulty of access to a clergyman, or even to a civil magistrate, instances of marriage by "mutual consent" were very frequent in colonial times. These marriages later received judicial recognition under the name of "common law marriages," which were divided into two classes: Marriages *per verba de presenti*, and marriages *per verba de futuro*, followed by subsequent cohabitation and common reputation as husband and wife. Such marriages have been a source of much vexatious litigation, both in the Divorce and Probate Courts; but by recent legislation, looking to publicity and registration of marriages, they have been abolished in nearly one-half of the States of the Union.

II.

EARLY STATE LEGISLATION.

The foundations of the marriage laws of the several States of the Union were laid during the Colonial period. Subsequent legislation has been along lines relating to the forms of celebration and modes of registration. Civil and religious celebrations are now everywhere optional except in two States, Maryland and West Virginia. Nearly every State requires a marriage

license, and provides for a more or less strict method of registration; and as stated above, "common law marriages" have been abolished in nearly one-half of the States.

In the matter of divorce, from 1780 to 1860, there are several features worthy of notice.

First and foremost, is the fact that the Constitution of the United States confers upon Congress no power of legislation concerning either marriage or divorce, which are matters pertaining to the domestic economy of each State. Therefore, a uniform Federal law upon the subject could not be secured without first amending the Constitution.

Second, the early State Constitutions were nearly all silent as to jurisdiction over divorce; consequently the power of granting divorces was left in the hands of the legislative bodies, and nearly every State, new as well as old, has at some time granted divorces through its legislature. Gradually, however, jurisdiction in divorce was conferred upon the courts, although the legislatures still continued to grant divorces by special acts, and finally nearly every State, either by constitutional or legislative provision, has vested such jurisdiction exclusively in the courts. South Carolina, however, has no divorce statute whatever, neither absolute nor limited divorces being permitted; although marriages may be annulled for various ante-nuptial causes.

Third, there arose great diversity in the various States both as to kinds and causes of divorce. While in England, prior to the *Matrimonial Causes Act of 1857*, an absolute divorce could be obtained only by act of Parliament, every one of the United States (except South Carolina), following the colonial policies, permits absolute divorce for one or more causes. On the other hand, twenty-six of the forty-six States have abolished limited divorce, apparently upon the naturalistic theory that "to be married and not married" at one and the same time tends to foster immorality.

As to causes for divorce the policy of each State differs more or less from that of every other. New York permits absolute divorce for the scriptural cause alone. Other States have added cruelty, personal abuse, desertion, conviction of crime, drunkenness, etc. Rhode Island permits the court to grant an absolute divorce for "any act of either party repugnant to, and in violation of, the marriage covenant;" and the State of Washington permits such divorce for "any cause deemed by the court sufficient, or when the court shall be satisfied that the parties can no

longer live together." To the honor of the courts be it said, that rarely have they based their decrees upon these "omnibus" clauses.

The causes for limited divorce are practically the same as for absolute divorce; and it should be added that while as a rule the States which have retained limited divorce give alimony to the wife in such proceedings, solely, yet those States which grant only absolute divorce amply protect the wife and children by separate provisions.

Fourth, at common law the domicile of the wife was always presumed to be the same as that of her husband, and either could obtain a divorce only in the forum of *his* domicile. This rule was based, first, upon the legal fiction of the unity of person of husband and wife; and second, upon the duty of the wife to follow her husband. But as far back as the beginning of the nineteenth century a new doctrine, which has come to be known as the "American Rule" was formulated, and has become firmly rooted in the jurisprudence of the United States. This rule may be stated as follows: "For purposes of *divorce*, a wife may have or acquire a domicile separate from that of her husband;" and it has been adopted and defended by the courts of every State, chiefly upon the ground that "to compel the wife to follow the guilty husband into his domicile for relief would be not only unequal and unjust, but would in many cases be a practical denial of justice." Political, economic and psychological reasons, as well as the sentimental, underlie the adoption of the rule. *Political*, because each State assumes and possesses the right of control of the social status of its own citizens; *economic*, in that the facility of removal by the husband from one jurisdiction to another, (depending often only upon financial ability), would otherwise place the wife at a great disadvantage; *psychological*, because of the growing insistence of the theory that marriage is purely a matter of contract, and not of social status. This theory has been fostered in the minds of many by the almost universal recognition of woman's individual rights of property, and of her equality of opportunity in lines of employment common to both sexes.

All of these reasons may be regarded as an illustration or exponent of the spirit of individualism, which in matters, both of Church and State, has obtained in the United States for nearly three hundred years.

There have, however, been important modifications of this rule, both by the United States Supreme Court, and by the higher courts of many of the States. In the former it is now the law that "full faith and credit" will not be given to a decree of divorce granted by the courts of any State unless such State had been the *common matrimonial domicile* of both parties, or unless the court had acquired jurisdiction over the defendant by personal service within the State. In the State courts, decrees of divorce granted by the courts of other States are recognized only upon the grounds of "*inter State comity*." In other words, if the decree granted by a foreign State is such as conforms in all respects (both as to inception of jurisdiction, and orderly procedure in the cause), to the legal requirements and sense of justice of the State where the defendant resides, then, irrespective of the "full faith and credit" clause, such foreign decree may be recognized.

It will readily be seen that this American Rule has "brought in its train as a logical result much inconvenience and uncertainty, arising from the diverse effect given to divorce decrees outside of the State which granted them, where such State never had or never acquired jurisdiction over the defendant," and the malodorous anomaly exists that a person may be divorced in one State and married in one or all of the other States.

III.

This condition of affairs; the rapid increase in the number of divorces for twenty years after the close of the Civil War,—the number being ten thousand during the year 1867, and twenty-five thousand during the year 1886, an increase of 150 per cent, while during the same period the population had increased but 60 per cent; and the latest statistics indicate that the number of divorces per annum is now over seventy thousand;—together with the increased facilities for divorce offered both by the loose legislation of many States (some requiring a residence of only three or six months, and some adopting the "omnibus" clauses above referred to), and by the lax methods of procedure recognized by many courts, could not fail to arouse the attention of all right-minded men and women. As early as 1879, the American Bar Association appointed a committee on Uniform State Laws, with instructions to report, *inter alia*, upon the existing laws of Marriage and

Divorce. The reports of this committee were interesting and suggestive. Since 1892, many States have appointed commissioners on Uniform Legislation, who act in harmony with the committee of the Bar Association, and some progress has been made in changes of legislation through their combined efforts. Within the past ten years, two other social factors have taken up the work of divorce reform. These are the National Divorce Reform League, and the Inter-Church Conference on Marriage and Divorce. The work of the former has been chiefly statistical and educational. The latter body, composed of members, clerical and lay, of fifteen different church organizations, the Rt. Rev. William C. Doane, Bishop of Albany, being the chairman, has, by written and oral appeals, stirred up an active interest in correcting the evil of divorce, and aroused the public conscience to a realization that stricter if not drastic methods must be adopted. This Conference met at Washington in January, 1905, and appealed to President Roosevelt to take some action. He sent a special message to Congress expressing the hope that uniform legislation on the subject might be in time adopted by the States, and recommended that Congress provide for the collection of reliable and trustworthy statistics relating to marriage and divorce.

This message suggested to William C. Sproul, a member of the Pennsylvania State Senate, the thought which was embodied in an act passed by the Pennsylvania legislature in March, 1905, wherein it is set forth as follows:

"WHEREAS, The constantly increasing number of divorces in the United States has become recognized as an evil of threatening magnitude, fraught with serious consequences to the well-being of our institutions and civilization; and

WHEREAS, The diversity of legislative enactment in the several Commonwealths composing the Union is, in the opinion of the legal profession, of students of social science, and like investigators, a serious obstacle in the way of the correction of this evil; and

WHEREAS, The President of the United States has drawn the attention of Congress to the necessity for uniformity in the divorce laws in every part of the country; therefore:"—

It was provided that the Governor be authorized to appoint three commissioners to examine and codify the laws of Pennsylvania relating to the subject of divorce, and to report the results of their labors to the Governor for submission to the

legislature. And further, the Governor was authorized to request the Governors of other States to co-operate in the assembling of a congress of delegates from such States at Washington for the purpose of examining the laws and decisions of the several States upon the subject of divorce, with a view to the adoption of a draft for a proposed general law, which should be reported to the Governors of all the States for submission to the legislatures thereof, with the object of securing as nearly as might be possible uniform statutes upon the matter of divorce throughout the Nation.

Upon the passage of this act, the Governor of Pennsylvania, the Honorable Samuel W. Pennypacker, appointed as Commissioners on Divorce the three lawyers who were the State Commissioners on Uniform Legislation. This Commission in the performance of its duties held nearly one hundred meetings; prepared a printed compilation of the laws of every State upon the subject of divorce; a codification of the existing laws of Pennsylvania; a "Declaration of Principles," ethical and legal, underlying the problem of divorce; and indirectly, the question of marriage, which was recognized as being at the root of all the evils involved; and also an outline skeleton of a Uniform Divorce Act, expressing in concrete form the abstract principles contained in the above-mentioned "Declaration."

After completing their work the Commissioners reported to the Governor, who then issued an invitation to the Governors of every State to appoint delegates to attend a National Divorce Congress, to be held at Washington in February, 1906. At this Congress,—unique in character as being the only gathering since the Constitutional Convention of 1787, to which the delegates brought the credentials of their respective Governors,—forty-two out of forty-six States were represented.

After careful deliberation for three days the Congress adopted seventeen basic resolutions, four of which relate to Jurisdiction, one to Kinds of Divorce, five to Causes for Divorce, and seven to Methods of Procedure.

It was the unanimous opinion of the one hundred delegates to the Congress that no Federal divorce law was feasible, owing to the practical difficulty of securing an amendment to the Constitution of the United States, to accomplish which would require the approval of two-thirds of the members of each branch of Congress, and the subsequent ratification by the legislatures of three-fourths of the States.

The remaining three Jurisdictional Resolutions provided: That *bona fide* residence of the plaintiff or the defendant should be a condition precedent to bringing a suit in divorce; that no State should grant relief to parties migrating from a sister State, unless the cause of divorce was recognized in such other State; and that the term of residence in the State where the suit is brought should be at least two years.

The purpose of these Jurisdictional Resolutions was to strike the axe at the root of migratory, hasty, collusive and fraudulent divorces, and to check the swelling tide of divorces granted to persons who could not obtain such relief in their own State.

A resolution was also adopted in favor of "limited" as well as "absolute" divorces. This was a return to the present English rule; and, aside from the fact that the consciences of many are opposed to absolute divorce, an opportunity for reconciliation is thereby afforded.

The five resolutions relating to Causes for Annulment of Marriage and Divorce insist that they should be of so serious a character as to defeat the objects of the marital relation, should be clearly defined by statute, and should be diminished rather than increased.

The five or six generally accepted Causes for Annulment of Marriage, Divorce *a Vinculo*, and Divorce *a Mensa*, were enumerated. It was further provided that when conviction for crime is a cause for divorce, it must have been the result of a trial by jury, and be followed by at least two years' imprisonment. Post-nuptial insanity was rejected as a cause for absolute divorce; and desertion should not be recognized as a cause for divorce unless wilful, and persisted in for at least two years.

As to matters of legal procedure, it was recommended that every defendant should be given full and fair opportunity by actual notice to have his day in court, so as to prevent secret and fraudulent divorces; that a party named as co-respondent should be given an opportunity to intervene; that the system of obtaining secret divorces by proceedings before a master or referee should be abolished, and all hearings be had before the court; that in all uncontested divorce cases a disinterested attorney should be appointed by the court actively to defend the case; that no decree should be granted unless the cause is shown by affirmative proof aside from any admissions on the part of the defendant; that neither party should be allowed to remarry until after

the lapse of at least one year after the preliminary decree; that the legitimacy of children of any marriage should not be affected by any decree in divorce unless their illegitimacy be clearly proven; and that no divorce granted by any State should be recognized where the applicant, being a citizen of one State, goes to another State for the purpose of obtaining a divorce.

These resolutions were referred to a committee with instructions to draft a Uniform Divorce Code. Such a Code was submitted to an adjourned meeting of the Congress held at Philadelphia in November, 1906, and was, with a few changes, unanimously adopted.

This Code was confined to the following subjects:

1. Causes for annulment of marriage.
 - a. Impotency, etc.
 - b. Consanguinity, etc.
 - c. Former existing marriage.
 - d. Fraud, force, etc.
 - e. Ante-nuptial insanity.
 - f. Non-age of husband (18 years), and non-age of wife (16 years).
2. Kinds of divorce.
 - a. From the bonds of matrimony, or absolute divorce.
 - b. From bed and board, or limited divorce.
3. Causes for absolute divorce.
 - a. Adultery.
 - b. Bigamy.
 - c. Conviction and sentence for crime.
 - d. Extreme cruelty.
 - e. Wilful desertion for two years.
 - f. Habitual drunkenness for two years.
4. Causes for limited divorce.
 - a. Adultery.
 - b. Bigamy.
 - c. Conviction and sentence for crime.
 - d. Extreme cruelty
 - e. Wilful desertion for two years.
 - f. Habitual drunkenness for two years.
 - g. Hopeless insanity of husband.
5. Bars to relief. *to wit*, collusion, connivance or condonation.

6. When and how jurisdiction, either in annulment or divorce proceedings may be obtained; *to wit*, by personal service upon the defendant within the State in which the suit is brought, or by constructive service (*i. e.*, by publication), where the plaintiff had been a *bona fide* resident, or had become a *bona fide* resident of the State where suit is brought, for a prescribed period, with the proviso that if the cause of action for which suit is brought was not recognized in the State from which the plaintiff had removed, then no relief should be granted.
7. Anyone charged as a *particeps criminis* may be made a party.
8. A requirement that all hearings should be before the court in public.
9. A provision for the appointment by the court of an attorney to defend, in uncontested cases.
10. Defining the nature of proof to be required.
11. Forbidding the impounding of records and evidence in any case.
12. Requiring the first decree in actions of annulment, or for absolute divorce, to be conditional; *i. e.*, a *decree nisi*.
13. That such *decrees nisi* should not become absolute until after the expiration of one year from the entry thereof, thereby prohibiting divorces for the mere purpose of marriage with another party.
14. That decrees for limited divorce should be open to a possible reconciliation, under the control of the court.
15. That the legitimacy of the children of any marriage should not be affected by any decree in divorce, unless their illegitimacy be clearly proven.
16. That the decrees of other States should not be recognized unless obtained in conformity with the conditions as to inception of jurisdiction, service of process, etc., as prescribed by the act.
17. That if the inhabitant of any State should remove to another State in order to obtain a divorce for a cause which is not ground for divorce under the laws of the former State, such decree should be of no force or effect in the original State.

The most important of these provisions were those relating to jurisdiction in divorce, and the service of process upon a defendant; to the effect to be given to the decrees of other States, and of foreign countries; to forbidding any evasion of the laws of the State of one's domicile by removal to another State to obtain a divorce for a cause not recognized in the former; and to the adoption of the *decree nisi*, following the English practice, and that of several of the States.

This Code, with appropriate procedure clauses added, was adopted last year by two States, New Jersey and Delaware. The Pennsylvania State Senate passed the bill, but it failed of passage in the Lower House. It will, however, be introduced again next year, with the recommendation of the Pennsylvania State Bar Association.

The Conference of State Commissioners on Uniform Legislation at its last meeting in August, 1907, unanimously endorsed the act, and the legislatures of several States are considering its adoption. Legislative bodies move slowly, and it is no easy task to educate public opinion in matters requiring a radical change in well-established customs and practice.

While modern tendencies are rather destructive than constructive, and are apt to reject all authority, whether of religion or of political and social precedent, we cannot be too conservative of the institution of marriage. Lax divorce laws are a menace to family life and all that makes it sacred. But the great interest evinced by the members of the National Divorce Congress in the work for which they were convened, gives cause for hope that each year will find State after State adopting this proposed Code, which expresses the best thought and earnest conviction of many able minds.

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