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INDIANA: BIRTHPLACE OF MIGRATORY DIVORCE

VAL NOLAN, JR.*

It could hardly have been an accident that William Dean Howells, writing his 1881 novel *A Modern Instance*, selected Indiana as the state in which Bartley Hubbard should seek a divorce from his deserted New England wife.¹ Eastern lawyers would have seen nothing unrealistic in their fictional brethren's detailed acquaintance with Indiana's divorce law;² their wives would have sympathized with the horror that moved one of Howells' ladies to exclaim against the sordidness of being "a witness in an Indiana divorce case!"³ To pass from fiction to fact, it could have occasioned no surprise that the first Supreme Court case testing the faith and credit due a migratory divorce should concern an Indiana divorce, obtained in 1857.⁴

Modern considerations of migratory divorce almost neglect to mention the age of the institution, and few are aware that for some twenty years following its statutory revision of 1852 Indiana occupied in the national mind the place now held by Nevada.⁵ The centripetal force which its easy statutory causes and lax procedures exerted upon the disappointed spouses of the nation made Indiana, apparently, the first divorce mill in our history.⁶

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1. HOWELLS, *A MODERN INSTANCE* c. XXXVII (Riverside College Classics ed.).

2. *Id.* at 462.

3. *Id.* at 475.

4. *Cheever v. Wilson*, 9 Wall. 108 (U.S. 1870). The Cheevers had lived together in Washington, D. C. After separation, Mrs. Cheever went to Indiana and sued her husband for divorce. He appeared in the Indiana proceedings. In its decree, the Indiana court ordered Mrs. Cheever to pay one-third of the rents on certain District of Columbia property to her husband to maintain the children, awarded to him. Defendant collected rents and claimed them under an assignment from Mrs. Cheever. Mr. Cheever sued for the rents and defendant contended the Indiana divorce and the decree were invalid. The Court held that a wife could acquire a domicile separate from her husband in the circumstances, that the Indiana court had jurisdiction and its decree, valid in Indiana, was entitled to full faith and credit. *Barber v. Barber*, 21 How. 582 (U.S. 1859), did not decide full faith and credit issues.

5. CALHOUN, *SOCIAL HISTORY OF THE AMERICAN FAMILY* 47 (1918). "The courts of Indiana were crowded with cases, whose movers were very often citizens of other states, an evidence of the superior facilities there afforded." The Indiana situation is mentioned also in COLE, *THE IRREPRESSIBLE CONFLICT, 1850-1865* (1934) at 171, 172; and in NEVINS, *THE EMERGENCE OF MODERN AMERICA, 1865-1878* (1927) at 216. Perhaps the most important recent consideration of migratory divorce is the symposium in *2 LAW AND CONTEMP. PROB.* 289 (1935).

6. The territory of Utah between 1852 and 1878 required only that a plaintiff declare his intent to reside in Utah. That territory seems to have become a divorce haven between 1875 and 1878. See III HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* (1904) 131-133. "The legislation in Utah begins in 1852 with an act so faulty that its consequences have become notorious in the divorce annals of the United States. A vicious residence clause, coupled with a loose requirement regarding notice and an 'omnibus' provision among the enumerated grounds of complaint became in effect a standing temptation to clandestine divorce seekers from outside the territory." *Id.* at 131. Nevada's rise to fame dates from about 1900. The circumstances are described in Ingram and Ballard,

An exchange of letters,⁷ surely in no way remarkable in themselves, will serve as a starting point for exposition, as it has for investigation :

Charles Tracy Law Office of
W. Howard Wait Tracy, Wait & Olmstead
Dwight H. Olmstead No. 18 William St.

New York Dec. 17, 1858

John B. Niles Esq.
LaPorte

Dear Sir

Under your easy code of divorce⁸ the hopes and fears of parties are naturally excited. A case within my practice renders it important to know what Judge or which branch of your court (as to County) holds the discretionary power of divorcing for grounds not enumerated in the statute most liberally and which most strictly. Some reputation or understanding on that point—as to the tendencies of Judges & counties—must have grown up among the bar and suitors, and my object now is to ask of you information in that regard. The determination of a residence without your state may be materially influenced by a right knowledge of the chances of attack & defence in so important a matter.

Yours very truly
Chas. Tracy

LaPorte Decr. 24, 1858

Chas. Tracy Esq. N.Y.

Dr Sir

Yours of the 17th as recd. Several of our Judges are much alike in their actions in divorce cases & most of them grant divorces, under the clause of the divorce law, in cases where there has been serious fault on the part of the defendant [and] a reconciliation seems impossible.

Probably a divorce would be as readily obtained in this or the Indianapolis circuit as any where. This circuit includes among others: LaPorte & St. Joseph county (South Bend is seat of St. Joseph). The divorce law has been such that Judges could not, in most cases refuse divorce when the case was undefended as a parties [*sic*] own affidavit was made prima facie evidence of residence.

I think a divorce could be as readily obtained in Indianapolis as anywhere in the state.

Respy. Yours
J.B. Niles

The divorce law of the state is about to be essentially modified.

The Business of Migratory Divorce in Nevada, 2 LAW AND CONTEMP. PROB. 302 (1935). Illinois and Iowa may have been divorce centers in the mid-1800s. See note 51 *infra*. In 1910, it was asserted that North Dakota, South Dakota, and Rhode Island had long enjoyed the reputation of divorce centers. Holbrook, *Divorce Laws and the Increase of Divorce*, 8 MICH. L. REV. 386, 392 (1940).

7. These letters are part of the collection of the law office papers of John Barron Niles, a prominent Indiana lawyer who practiced in LaPorte from 1833 to 1879. The collection is deposited with the Indiana University Library.

8. Ind. Rev. Stat. pt. II, c. 4, §§ 6-27 (1852).

The statutory provision that excited the hopes and fears of Mr. Tracy's client was the omnibus clause which concluded the section enumerating grounds for divorce.⁹ At the end of a list including such typical grounds as adultery, abandonment, and cruelty was this catch-all: "Any other cause for which the court shall deem it proper that a divorce should be granted." This clause was not new; it had been on the books since 1824 without provoking recorded mass resort by outsiders to Indiana's courts. The truly significant section, without which out-of-state divorce seekers would have found it impossible to assert their grievances under the omnibus clause, was the new 1852 residence requirement, or rather the virtual lack of one.¹⁰ Bona fide residence in the county at the time of filing the petition was all that plaintiff need show, and his own affidavit was prima facie evidence on the point. No other state, and no territory but remote Utah, made escape by migration so easy.¹¹

9. *Id.* § 7. A history of causes for divorce in Indiana prior to 1852 follows: The 1818 statute allowed either spouse full divorce for seven causes: adultery, matrimonial incapacity, bigamous contract, two years' absence with intent to abandon, desertion and living in adultery, conviction of felony; a wife could get divorce for husband's extremely barbarous and inhuman treatment. Ind. Laws 1817-18, c. 35. In 1824 an omnibus clause, later to be much criticized, was added: A court could divorce in all cases when in its discretion it deemed divorce proper. Ind. Rev. Laws 1824, c. 32. This clause (slightly revised) was upheld in *Ritter v. Ritter*, 5 Blackf. 81 (Ind. 1889), against the constitutional attack that it vested legislative power in the courts. In 1836 was added a ground for the wife whose husband was for two years a habitual drunkard and who failed "for any unreasonable length of time to make provision for his family." Ind. Gen. Laws 1836, c. 37. In the revision of 1838 the causes were set forth as adultery, matrimonial incapacity, conviction of felony, husband's barbarity to wife, the omnibus clause, habitual drunkenness by a husband who fails for an unreasonable time to provide for his family, two years absence by a husband or wife with intent to abandon, "and also for any other cause or causes." Ind. Rev. Stat. 1838, c. 31. The "any other cause or causes" was abandoned in 1843 and the clause regarding a husband's barbarity was modified to cruel or inhuman treatment or conduct towards his wife rendering it "unsafe and improper for her to live with him." Ind. Rev. Stat. 1843, c. 35, § 40. In 1849 the period of abandonment was reduced to one year or a lesser period where the court deemed reconciliation hopeless. Ind. Gen. Laws 1849, c. 62.

10. Ind. Rev. Stat. 1852, pt. II, c. 4, § 6. A complete history of Indiana divorce legislation to 1873 will be found in III HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS (1904) at 115-118, 147, 154, 159, 160. Indiana's first statute allowing judicial divorce was passed in 1818. It fixed no residence period. Ind. Laws 1817-18, c. 35. Twelve months residence was required in 1831. Ind. Rev. Laws 1831, c. 31. This was increased to two years by Ind. Rev. Stat. 1838, c. 31. In 1849 the requirement again fell to one year. Ind. Gen. Laws 1848-9, c. 62. It may be worth mentioning here that the Indiana legislature granted divorces until the 1851 Constitution forbade the practice. IND. CONST. Art. IV, § 22. According to HOWARD, *op. cit. supra*, 96-97, Indiana's legislature was "indiscreet" in granting divorces, and adopted the practice of granting leave "to file bills in the courts in cases where the prescribed cause for divorce by judicial power did not exist." See Ind. Local Laws 1842, c. 117.

11. For Utah, see note 6 *supra*. A fairly complete history of the divorce legislation of each state will be found in III HOWARD, *op. cit. supra* note 6, c. XVII. The statement made about Indiana's preeminence in lax residence requirements is based upon the statutory provisions set forth by Howard. All states but Indiana (and the territory of Utah) seem to have required a period of residence by plaintiff or residence of defendant, or that the cause have occurred while the parties lived together in the state, or that the marriage have been celebrated in the state, or that the cause relied upon have been a cause

Rigid procedures could have been a countervailing force, of course, and the statute did indeed require the prosecuting attorney's resistance to undefended petitions and did prohibit the rendition of decrees upon default without proof.¹² But non-resident service by publication¹³ and the asserted apathy of prosecutors and judges apparently undercut these safeguards.¹⁴ Moreover, the Indiana Supreme Court stamped the seal of finality, at least within the state, upon divorce decrees by holding that they could not be vacated or attacked for any reason except upon regular motion for new trial.¹⁵ Sister states,

in the state where it occurred, or some combination of these provisions. It is worth remembering that sociologists take the position, apparently well supported by the statistics of divorce, that civil divorce legislation has little to do with the rate or number of divorces. Thus, though "the general trend of legislation and of administration in regard both to marriage and divorce has been in direction of greater stringency[,]" the divorce rate has greatly increased. LICHTENBERGER, *DIVORCE* 154 (1931). The subject of the effect of law is discussed in Chapter Seven of this work. The author concludes by quoting with approval WILLCOX, *THE DIVORCE PROBLEM, A STUDY IN STATISTICS* 55, 61 (1891), where Willcox says: "It must be admitted that the influence of law, if not nil, is at least much less than commonly supposed. . . . The conclusion of the whole matter is that law can do little. . . . [T]he immediate, direct and measurable influence of legislation is subsidiary, unimportant, almost imperceptible." The only exception to this generalization seems to be that rigid residence requirements do diminish migratory divorce. "[E]xcept where migration in order to obtain divorces . . . was a dominant factor, . . . legislation of this [increased residence] sort may result in deferring or distributing divorces, but . . . it has little or no effect in diminishing them." LICHTENBERGER, *op. cit. supra*, at 478.

12. Ind. Rev. Stat. pt. II, c. 4, §§ 27 and 13.

13. *Id.*, § 11.

14. "The Divorce Law of Indiana has been made a great bugaboo of late in this and other States, chiefly by the County Clerks in their anxiety for fees. I believe and think I can prove to the satisfaction of any unprejudiced reasonable man that the Divorce Law of our State is just what it should be. . . . Now what does this [bona fide residence] section mean? Not that the court *shall* grant the divorce, but that it *may* when the petition of a bona fide resident shall ask it. . . . [H]ow is a residency to be determined? . . . [F]rom the evidence presented, being a question of fact which, like other questions of the kind, can be arrived at generally from length of time in the country, occupation, behavior, admissions, and fifty other things which would be brought to light if the prosecutor did his duty. . . . How does the matter stand? Simply thus: that as we have a good law that is not enforced owing to the neglect of State officers, we must repeal it and pass one that they will carry out. A pretty cause for legislation is it not? . . . Today Attorneys would say, let the law stand, but make the officers do their duty. Show more of the Brutus and Fitz Stephens character upon the bench—make a few examples—and the laws of Indiana will be deservedly honored and revered, while those who undertake to pervert their ends are paying her the penalty of their perjury in hard labor at the State Prison." This letter, signed "Indiana Law," was printed in the Indianapolis Daily Journal, Dec. 2, 1858, p.2, col.3. The same paper next day, p.2, col.1, carried an unsigned letter whose author was called "one of our ablest and most prominent lawyers." The writer said that "the Courts have been censured, but they are not to blame. They execute the law as they find it; they have no power to make laws, and, so far as I have seen, the Court requires strict proof of the *causes* of divorce, on hearing. [Italics added.] The objection to our laws, grows out of the *ex parte* proceedings, upon constructive notice. . . ." The writer suggested that two years' continuous county residence be required. See also note 45 *infra*.

15. Application for new trial was to be made at the term the decision was rendered, except when causes for new trial were discovered after the term, in which case motion could be made within one year, at most, of final judgment. Ind. Rev. Stat. 1852, pt. II, c. 1, art. 18, §§ 354, 356. The case of *McQuig v. McQuig*, 13 Ind. 294 (1859),

in the few cases found, did not treat Indiana judgments of divorce so tenderly.¹⁶

Reasons for Indiana's liberality are obscure. Horace Greeley, conventional in his views of marriage and divorce, attributed the fact that the state was "the paradise of free lovers" to "the lax principles of Robert Dale Owen and the utter want of principle of John Pettit (leading reviser of the laws),"¹⁷

is extremely interesting both because of its holding and the impetus it may have given to migratory divorces, and because the briefs of counsel are appended to the court's opinion. These briefs throw light on the divorce situation in Indiana and on the law of jurisdiction to divorce as then understood. The McQuigs lived in the state of New York. The husband told witnesses that he could get no divorce in that state but that he had examined the laws of other states and that "Indiana was the easiest." He left his business in temporary charge of another and spent some short time in Indianapolis, where he divorced his wife in 1854. She did not appear. Three and one-half years later she filed a complaint in Marion Circuit Court seeking to vacate the judgment because it was fraudulently procured in that her husband had never been a bona fide resident of Indiana. The trial court charged the jury that domicile was necessary to divorce and also left it to them to determine whether the husband had ever acquired the bona fide residence required by statute. The jury found for the wife. Appellant contended that domicile and residence were not identical and that Indiana required only residence, that the court must necessarily have passed upon the bona fides of the husband's residence and that this concluded the parties as *res judicata*, and that the Indiana statutes prohibited re-opening of divorce decrees. Appellee contended that the decree was void for two distinct reasons: because it was obtained by a fraud on the wife and the court, since the husband was not a bona fide resident as required; and because the divorcing court had no jurisdiction unless the husband was a bona fide resident. The statute relied upon by the husband, providing for the vacating of judgments and excepting divorce judgments, was said not to supersede the old chancery bill to vacate for fraud. The wife's brief closes with this peroration: "And the settlement of the case in accordance with principle, will certainly convey a salutary lesson to that large class of discontented or lecherous pilgrims seeking the Mecca of divorce, who turn their faces toward Indiana, as the happy region where the judgment they wish can be obtained the most easily and the most cheaply." The court held that the statute provided the only procedures for vacating judgments and by its terms excluded divorces. Hence, a divorce decree could be attacked only on motion for a new trial. The case was overruled by *Earle v. Earle*, 91 Ind. 27, 37 (1883); and see *Powell v. Powell*, 104 Ind. 28, 33 (1885).

16. *McGiffert v. McGiffert*, 31 Barb. 69 (N.Y. 1859); the "Millspaugh Case," discussed at length in the *Indiana Daily State Sentinel*, Jan. 30, 1865, p. 2, col. 2, in which a New York judge held an Indiana divorce under the 1859 statute void because plaintiff had not resided the required year in Indiana; a news report of a Kentucky court's holding an Indiana divorce void in Kentucky, *Indiana Daily State Sentinel*, April 23, 1861. Cf. *Hawkins v. Ragsdale*, 80 Ky. 343 (1882). "One of [Indiana's] ablest and most prominent lawyers," see note 14 *supra*, gave it as the "better opinion . . . that if our law has been strictly complied with, and, that appears on the face of the record so as to make the proceedings valid on error here, they are valid everywhere."

17. The Greeley-Owen debate was conducted in the columns of the *New York Tribune* between March 1, 1860, when Greeley made the charge quoted here, till April 31, 1860. It is reprinted in GREELEY, *RECOLLECTIONS OF A BUSY LIFE* 571-618 (1869). Another quotation from the initial Greeley charge is of interest: "A legal friend of mine in that State [Indiana] recently remarked to us, that, at one County Court, he obtained eleven divorces one day before dinner; and it wasn't a good morning for divorces either." In one case within his knowledge, a prominent citizen of an eastern manufacturing city came to Indiana, went through the usual routine, obtained his divorce about dinner time and, in the course of the evening was married to his new inamorata, who had come on for the purpose and was staying at the same hotel with him. They soon started for home, having no more use for the State of Indiana; and, on arriving he introduced his new

and this view occasionally finds currency in modern works.¹⁸ Owen, chairman of the joint committee on the 1852 revision,¹⁹ repudiated the charge that he was responsible for the "state of law which enables men or women to get unmarried nearly at pleasure."²⁰ Probably his erroneous statement that the 1852 revision left the old law "with all its essential features the same"²¹ reflects a lapse of memory and is evidence that there had been an accident in drafting, rather than that the revisors had deliberately deceived the legislature. The accident theory was current in Indiana at the time when the evil was attracting most attention.²²

Influences generally thought to be productive of liberal divorce attitudes and of greater willingness to resort to the law for dissolution of marriage were doubtless strong in Indiana. A Protestant people,²³ too recently frontiers-

wife to her astonished predecessor, whom he notified that she must pack up and go, as there was no room for her in that house any longer. So she went."

There is no indication that the charge against Pettit was true. The "want of principle" alleged is probably based upon Pettit's "hatred of Christianity." He must have gained national notoriety when, as a member of the United States House of Representatives in 1847, he objected to the appointment of a chaplain. See I DUNN, INDIANA AND INDIANANS 449-450 (1919). See the statement of Owen, note 21 *infra*.

18. Owen's responsibility is asserted in *Robert Dale Owen* in XIV DICTIONARY OF AMERICAN BIOGRAPHY 119 (Malone ed. 1934). It is denied in LEOPOLD, ROBERT DALE OWEN 155 (1940).

19. The official records do not show Owen as chairman. I Journal of the House of Representatives, 36th Sess. 1851, 1183, 1212-1216 (1851). But see LEOPOLD, *op. cit. supra* note 18, at 288.

20. The language is Greeley's. New York Tribune, March 1, 1860; GREELEY, *op. cit. supra* note 17, at 570.

21. Owen in New York Tribune, March 5, 1860; GREELEY *op. cit. supra* note 17, at 573-574. "So far as I recollect, the Indiana law of divorce does not owe a single section to Mr. Pettit. Be that, however, as it may, it owes one of its provisions, and one only, to me. I found that law thirty-four years ago, when I first became a resident of the State, in substance nearly what it now is; indeed, with all its essential features the same. It was once referred to myself, in conjunction with another member of the Legislature, for revision; and we amended it in a single point; namely, by adding to the causes of divorce 'habitual drunkenness for two years.' In no other particular, either by vote or proposition, have I been instrumental in framing or amending the law in question, directly or indirectly."

22. The Indianapolis Daily Journal, March 9, 1860, p. 2, col. 2, speaking of the omnibus clause empowering a court to divorce for any cause said: "We say it is a shame to our State and the real shame is in it, and not in the accident that a carelessly worded provision gave the whole Union a chance to be divorced here, and flooded our courts with the abominations of half the dishonored homes on the continent." An earlier letter, published in the Indiana Daily Journal, Dec. 2, 1858, p. 2, col. 3, apparently written by a lawyer and signed "Indiana Law" took the position that the 1852 statute was good but badly enforced. "I would call especial attention to the care with which this section [6, requiring bona fide residence] was drawn by the Legislature of 1852. They seem to have put on all of the additional safeguards—that none but the citizens of the State should enjoy the benefit of this act. They do not only require an affidavit of mere residency, but a bona fide residence."

23. The 1850 census data give a measure of the comparative strength of Catholicism and Protestantism in Indiana. There were in that year 709,655 members of 2032 churches which owned property evaluated at \$1,529,585. Roman Catholic churches numbered 63 of these, their members 25,115, their property \$167,725. By comparison there were 778 Methodist churches, with 266,372 members, worth \$492,560. Baptist: 428 churches,

men to have lost their individualism²⁴ yet possibly already feeling the nascent effects of industrialism with its new pressures and its weakening of the family,²⁵ might be expected to adopt freer divorce laws. Owen's vigorous espousal of the rights of women²⁶ could not have failed to have its effect, and increased divorce seems a concomitant of the modern rise in the status of women. Too, the westward movement left in its wake deserted wives with a strong claim on public sympathy.²⁷ But none of these influences and no combination of them can have been so peculiarly operative in Indiana as to account for its peculiar residence law. The accident theory, therefore, while not thoroughly satisfactory, carries a good deal of conviction.

Whatever its origins, the law's potentialities did not long remain unrealized. By 1857, the influx of divorce seekers had reached a volume sufficient to impel Governor Wright to advert to the problem in his message to the legislature and to recommend the passage of a two-year residence requirement to "relieve our Courts from the pressure of applications for divorce . . . on the part of citizens of other States."²⁸ Any accurate appraisal of the intensity of this pressure would require detailed data, especially since migratory divorces today attract public attention to an extent greatly disproportionate to their relatively small numbers, and a similar exaggeration may have prevailed in the 1850s.²⁹ Yet, the few facts available suggest at least that migra-

138,783 members, \$212,735 evaluation. Presbyterian: 282 churches, 105,582 members, \$326,520 evaluation. SEVENTH CENSUS OF THE UNITED STATES: 1850, 799-807 (1853). Other sects larger than the Roman church were Christian and Friends. The importance of a Roman Catholic population as a factor minimizing divorce is mentioned in SPECIAL REPORTS OF THE CENSUS OFFICE, MARRIAGE AND DIVORCE 1867-1906, Pt. I, 14 (1909). See also LICHTENBERGER, *op. cit. supra* note 11, at 107, 211, 312, "Where Catholic influence in the population is strong the divorce rate is correspondingly low."

24. See 2 CALHOUN, *op. cit. supra* note 5, c. 1 and 2.

25. Changes in material culture and consequently in attitudes toward women, marriage, and divorce are thoroughly discussed in LICHTENBERGER, *op. cit. supra* note 11, c. XI-XVI.

26. See LEOPOLD, *op. cit. supra* note 18, *passim*, esp. c. XVII. Owen's views on women and their rights may be read in I and II DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA, 1850. The subject is indexed in those volumes under "Rights—of married women."

27. See Ind. Laws, 1857, c. XLV, "An act to vest certain rights in married women whose husbands have left the State without making suitable provisions for their maintenance. . . ." "The majority of the divorces were granted at the request of the wife. The step was often in consequence of the husband's abandoning her to seek his fortune in California where the thirst for gold lured." 2 CALHOUN, *op. cit. supra* note 5, at 47.

28. DOCUMENTS OF THE GENERAL ASSEMBLY OF INDIANA AT THE THIRTY-NINTH SESSION, Pt. I, 302 (1857).

29. LICHTENBERGER, *op. cit. supra* note 11, at 180, 206-207. "Proofs have been advanced to show that the importance of migratory divorces is exaggerated very greatly. It is believed that probably not over 3 per cent are of this sort." Cavers thought 5% a "liberal estimate" in 1937. Cavers, *Migratory Divorce*, 16 SOCIAL FORCES 96, 106 (1937). These statements refer to the nation as a whole, of course. The importance of migratory divorce today in Nevada may be seen in the rate of divorce per 1000 population in Nevada. Random recent years are 1940, 46.3; 1943, 85.9; 1946, 136.4; 1949, 67.9. By comparison, the rate for Indiana in 1940 (the last year for which the figure is available) was 2.5. The

tory divorces were numerous indeed. An editorial in the Indianapolis Daily Journal in 1858 protested that of seventy-two divorce actions pending at the beginning of the then current term of the Marion County Court, "more than fifty were brought by non-residents."³⁰ A study of the records and papers from John Barron Niles' LaPorte law office between 1858 and 1866 indicates that of the twenty-two divorces he handled (4% of his total practice), seventeen involved plaintiffs who had come to Indiana probably only to obtain divorces. Of these seventeen, five came from New York, three Pennsylvania, two Massachusetts and Illinois, one California, Connecticut, Michigan, Ohio, and Wisconsin.³¹

With one terminus of the typical migration route suggested by the Niles papers, the other is described by a newspaper editorial.³² "Tippecanoe, Floyd, Jefferson, Allen, LaPorte, every county where a railroad or large population affords good facilities for speedy coming and going, and comfortable hiding, is full of divorce hunting men and women, though, so far as we have noticed, the women outnumber the men, two to one."

The public reception accorded Governor Wright's message seems to have been far more favorable than that given the divorce seekers. The Indianapolis Daily Journal, in one of several jeremiads, purported to speak for the people in passing this illiberal judgment on the foreign applicants:³³ "[W]e are overrun by a flock of ill-used, and ill-using, petulant, libidinous, extravagant, ill-fitting husbands and wives as a sink is overrun with the foul water of the whole house. . . . [N]ine out of every ten have no better cause of divorce than their own depraved appetites. . . ." An Indiana judge is reported to have indicated his subscription to this Victorian view in a similar statement.³⁴ The humiliation of national notoriety probably was responsible for much of the acerbity of such indictments.³⁵

rate for other states in the Union seldom rises above 4 for any of the years mentioned here. 36 FSA, SUMMARY OF MARRIAGE AND DIVORCE STATISTICS, UNITED STATES, 1949 (June 5, 1951) 22-23.

30. Dec. 11, 1858, p. 2, col. 2.

31. These data are the result of research in the Niles collection by Ellis B. Anderson in a seminar in American Legal History at the Indiana University School of Law, 1951. I am indebted to him too for finding the exchange of correspondence set forth at the outset of this paper.

32. Indianapolis Daily Journal, Dec. 3, 1858, p. 2, col. 1.

33. *Ibid.* See also editorials in the Journal, Dec. 11, 1852, p. 2, col. 2; Dec. 18, 1858, p. 2, col. 1; March 9, 1860, p. 2, col. 2. See also the appeal made by a divorced wife's counsel in the brief of *McQuig v. McQuig*, note 15 *supra*. Cf. the defense of the immigrants as "good citizens" who seek to "shake off the drag of their life" without the publicity of legislative divorce at home. Letter in The Indianapolis Daily Journal, Dec. 2, 1858, p. 2, col. 3.

34. "The advocates of free love could not ask a statute more favorable to their views . . . the polygamy of the Mormons was preferable; for it at least obliged husbands to provide for the subsistence and protection of their wives." Quoted without citation of authority in 2 CALHOUN, *op. cit. supra* note 5, at 47.

35. See, for example, the article in the Detroit Free Press captioned "*Miss Judson Goes to Indiana and Gets a Divorce*" reprinted in the Indiana Daily State Sentinel, Feb.

Legislative response to the governor's appeal was immediate but, during the 1857 and the special 1858 sessions, ineffectual, apparently because each chamber insisted upon its own bill in preference to the other's.³⁶ In 1859 the first Senate bill concerned the divorce law, but it was a House bill that finally became law. The new statute required residence in the county and one year's residence in the state at the time of filing the petition, such residence to be proved to the court's satisfaction. A tardy attempt to mitigate the evils of past laxity found expression in a provision permitting defendants served only by publication to set aside within two years those parts of a divorce decree dealing with alimony, property disposition, and custody.³⁷

Now came the test of the charge, heard occasionally prior to 1859, that not bad law but bad judicial administration was the root of Indiana's problem.³⁸ For a few years during the Civil War, and perhaps because of it, the absence of public utterance suggests a conviction that the problem had been solved. Suspiciously though, as early as 1861 and again in 1863 the House of Representatives had before it bills to amend the residence requirements for

19, 1859, p. 2, col. 3. Miss Judson's case attracted wide attention; she had married a Negro and was now seeking a divorce from him.

36. In 1857 the House passed H.R. 70 to amend the section on residence and cause (and two other sections) and therefore indefinitely postponed consideration of H.R. 85 dealing with the same problems. The Senate passed H.R. 70 with sundry amendments, including an emergency clause. The House refused to concur in several unspecified Senate amendments and the bill died. Journal of the House of Representatives, 39th Sess., 178, 201-2, 231, 837 (1857). Regarding H.R. 85, *Id.* at 201, 215, 520. Journal of the Senate, 39th Sess., 387-388 (1857). The Senate passed S. 13 to amend the residence requirement to one year, alter the omnibus clause to read "any other cause in fraud of the marriage contract, occurring previous to the marriage," and to lengthen the period of abandonment which would constitute cause for divorce. Journal of the Senate, 39th Sess., 81, 90-91, 141-2, 281-3 (1857). The House laid the bill on the table and it was never taken up. Journal of the House of Representatives, 39th Sess., 963 (1857). In the Special Session of 1858, H.R. 5, to amend the residence section and repeal the omnibus clause, passed after an unsuccessful attempt was made so to amend it as to prevent divorce in Indiana for any cause. Journal of the House of Representatives, Spec. Sess., 31, 64, 150-2, 183 (1858). The Senate amended it, apparently leaving the omnibus clause as law and adding provisions to allow divorce decrees to be vacated for some purposes. The House took no further action when the bill was returned to it. Journal of the Senate, Spec. Sess., 301-5 (1858). A Senate bill, S. 4, passed second reading during the special session, but the absence of an index in the journal for this session makes attempt to trace it impracticable. I BREVIER LEGISLATIVE REPORTS 25-6 (Nov. 30, 1858)..

37. H.R. 93 became Ind. Laws 1859, c. XL. It contained an emergency clause with the recital that "advantage is daily taken of the existing law by non-resident parties, who are not entitled to divorce." Its legislative history may be traced in Journal of the House of Representatives, 40th Sess., 149, 170, 409, 491, 739-40, 851-2, 873, 961, 998, 1056 (1859) and in Journal of the Senate, 40th Sess., 506-9, 694, 790, 837-8, 963-4 (1859). The House tabled another divorce bill, H.R. 76. Journal of the House of Representatives, 40th Sess., 135, 166, 410 (1859). S. 1 was tabled by the House because H.R. 93 had already passed. *Id.* at 502. Its passage through the Senate is to be found in Journal of the Senate, 40th Sess., 41, 157-9, 209-211, 250, 253-4 (1859).

38. See note 14 *supra*.

divorce.³⁹ By 1865 there could be no doubt. Two bills to prevent migratory divorces were introduced in the Senate, one by Niles.⁴⁰ A further measure was introduced to amend Indiana's practice act under which by agreement of counsel the issues in a case could be referred by the court to a referee, probably always of counsels' selection. In support of a provision to regulate such reference Senator Brown described the organization on the Atlantic seaboard of mercantile businesses whose stock in trade was the Indiana divorce. Fraudulent affidavits of plaintiffs and falsified retainers purporting to come from defendants were placed in the hands of conniving Indiana lawyers. These men referred the issues to, a third lawyer selected by them to further their fraud and to avoid judicial examination of the case, and the court accepted the referee's findings without question. This device produced "hundreds of divorces . . . in the courts of this state annually by non-residents, and in no case [were] the defendants probably . . . aware of the fact until long after the same [had been] procured."⁴¹

39. H.R. 97 to amend the residence and cause sections, Journal of the House of Representatives, 41st Sess., 174, 309, 359, 746-7, 1043 (1861). H.R. 70 to amend the residence section, Journal of the House of Representatives, 43rd Sess., 133, 189, 369, 461 (1863).

40. S. 108, Niles' bill, concerned bona fide residence. It passed the Senate but was lost in the House. Journal of the Senate, 44th Sess., 186, 223, 345, 395 (1865); Journal of the House of Representatives, 44th Sess., 532 (1865). The content of the bill is nowhere stated in detail. S. 268, to prescribe the terms for divorces where causes accrued outside the state, met the same fate as Niles' bill, at the 1865 Special Session. Journal of the Senate, Spec. Sess., 233, 255, 267-268, 311 (1865); Journal of the House of Representatives, Spec. Sess., 374 (1865).

41. "Agencies are established in New York and other Eastern cities, which advertise to procure divorces for any parties desiring same, whether cause exist therefor or not. These agencies have lawyers in this state to whom they send the cases, at the same time forging the name of the defendant to a written retainer which, with a fee, they send to another attorney, in the entire confidence of the thing. These two attorneys enter our Courts, procure the referral of the case to a third attorney, also in the confidence of the matter, who has his fee in the case, and who reports in favor of a divorce without ever receiving or examining any evidence in the case whatever. . . . Upon this report of the referee it would seem, the courts have no discretion but to grant the divorce." VII BREVIER LEGISLATIVE REPORTS 110 (1865). The speech was addressed to a bill to amend Ind. Rev. Stat. 1852, pt. II, c. 1, art. 18, § 349 which provided that, "all or any of the issues in the action whether of fact or of law, or both, may be referred, upon the written consent of the parties." The bill's (S. 16) contents cannot be determined; hence possible subsequent attempts to enact similar bills cannot be traced. It passed the Senate, was recommended for passage by the House Judiciary Committee, but was immediately and permanently tabled in that body. Journal of the Senate, 44th Sess., 36, 47, 104, 140, 155 (1865); Journal of the House of Representatives, 44th Sess., 182, 274, 478 (1865).

Concerning defendants' unawareness of pendency of suit, compare with Brown's statement a similar charge made by Senator Church in support of S.147 in 1867: "Ninety-nine out of one hundred divorces obtained in this state would never be granted if the defendants knew of their pendency and could get here to make their plea." IX BREVIER LEGISLATIVE REPORTS 231 (Feb. 14, 1867). The following advertisement appeared in The New York Weekly Tribune, Dec. 22, 1869, p. 8, col. 4: "Divorces obtained in New York, Connecticut, Indiana and Illinois. Legal everywhere. No charge in advance; Advice free. Address M. House, Counselor, 78 Nassau St., N. Y." Compare Bergeson, *The Divorce Mill Advertises*, 2 LAW AND CONTEMP. PROB. 348 (1935) for the present practice.

This is the only explicit reference to the possibility that any elements of the Indiana bar or business community were exploiting the statutes;^{41a} and as Brown's bill failed of passage it may perhaps be a fair inference that legislators did not attribute the divorce situation to the practice so luridly described.

Government statistics, available from 1867 on,⁴² hardly support Senator Brown's picture of the magnitude of immigration,⁴³ but the assembly considered the divorcing of foreigners sufficiently frequent to merit the introduction of ten more bills through the 1869 session.⁴⁴ In 1871 Governor Conrad Baker devoted a sizeable portion of his message to the assembly to a review of the state's divorce laws, and his speech gives credibility to part at least of Brown's statement of the practices prevailing.⁴⁵ "[W]e might well hope that Indiana divorces would soon cease to be advertised in any of the Atlantic cities, and that refugees and fugitives from the justice of other States would no longer come to Indiana in quest of divorces to be used on their return to their homes as licenses to violate the laws of our sister states."⁴⁶

41a. The business possibilities were of course recognized. See, e.g., Senator Murray's (Cass, Howard, Pulaski Counties) remark in debate on S.1 in 1859: "He was standing up against his own individual interest as a lawyer, when he advocated an amendment of the divorce law." II BREVIER LEGISLATIVE REPORTS 62 (Jan. 23, 1859). The potential role of the business community in securing the adoption or perpetuation of lax divorce legislation is illustrated by the situation in Nevada. See Ingram and Ballard, *The Business of Migratory Divorce in Nevada*, 2 LAW AND CONTEMP. PROB. 302 (1935), and Bergeson, *The Divorce Mill Advertises*, *id.* at 348.

42. See SPECIAL REPORTS OF THE CENSUS OFFICE, MARRIAGE AND DIVORCE 1867-1906 (1909). The inception of these reports, now kept up to date annually, is detailed in LICHTENBERGER, *op. cit. supra* note 11, pp. 100-103.

43. See the statistics, note 50 *infra*.

44. House bills were H.R. 264 in the Special Session of 1865; H.R. 88, 270, 325 in the 1867 session; H.R. 204 in 1869; H.R. 360, 363, 378 in the 1869 Special Session. The committee report on H.R. 378 recommends passage with the familiar phrases "in order that the character of our State may be cleansed from the odium now attached to it" and "that the marriage relation may be rendered in some measure more secure against . . . avarice, perfidy, and brutality. . . ." Journal of the House of Representatives, Spec. Sess., 516 (1869). Senate bills were S. 88 (possibly not relevant to migratory divorce) and S. 147 in the 1867 session. More particular citation to pages of the House and Senate Journals seems unnecessary for most of these bills.

45. "The laws of this State regulating the granting of divorce, and especially the lax manner in which they have been administered in some of our courts, has given Indiana a notoriety that is by no means enviable." The Governor censured the omnibus clause, then passed to immigration for divorce purposes. His description of the manner in which non-residents obtain divorces leaves in doubt how substantial was the compliance with the one-year residence requirement. After referring to people who came to stay only for a year, he speaks of the maintenance of "the appearance of a residence." Touching upon the stigma attaching to Indiana in other states and the disrespect into which law was falling among Indiana citizens who witnessed the evasions practiced, Governor Baker recommended amendment in the following respects: repealing the omnibus clause, changing the cause for cruel treatment to cruel and inhuman treatment, requiring that resident defendants be sued in the county of their residence, requiring that the one year's residence prior to filing must then continue till the case be tried, prohibiting divorce where the cause occurred out of state unless the facts constituted a cause where they occurred, requiring particularity in affidavit and that residence and place of cause be proved on trial. Journal of the Senate, 47th Sess., 59-62 (1871).

46. *Id.* at 62.

The response to the governor's message was again gratifying, although there was a two year time lag before one of the twenty bills introduced finally became law in 1873.⁴⁷ More important, one suspects, than the law's two years' residence provision was the requirement that proof of such residence be set forth in petitioner's detailed affidavit and established on the testimony of two resident freehold witnesses. Similarly remedial were the abolition of the omnibus clause; attempts to give more effective notice; and a provision that within two years, during which plaintiff could not remarry, defendant could move to vacate the judgment of divorce itself (and not merely of alimony, property disposition, and custody).

The efficacy of the statute, the basis of the law today, in erecting protective barriers along Indiana's boundaries can probably be gauged accurately from the fact that reform agitation subsided after 1873. Statistics of the Bureau of the Census likewise are suggestive, although they are pregnant with imponderables and therefore not as decisive as might be hoped.⁴⁸ From 1867 through 1872, when Indiana was granting about ten per cent of the nation's divorces,⁴⁹ the annual number of divorces in Indiana varied between 1096 and 1210. In 1873 the number dropped to 864 and by 1878 had risen only to 1183. In the United States as a whole, however, the number of divorces indicated a steady rise between 1867 and 1878 from 9937 to 16,089.⁵⁰ In the number of divorces dissolving marriages celebrated elsewhere than in the divorcing state (which includes but is by no means confined to migratory divorces) Indiana fell from first in the nation between 1867 through 1871 to fourth during the next five year period, and seventh in the next.⁵¹ Most

47. House bills were H.R. 15, 16, 31, 98, 351 in 1871; H.R. 23 in the 1872 Special Session; H.R. 21, 23, 85, 141, 331, 514 in 1873. Senate Bills were S. 8, 100 in 1871; S. 19, 117, 154 in the 1872 Special Session; S. 19, 154, 339 in 1873. Citation to the history of these bills can be very incomplete at best; since it can serve little purpose it is omitted. See the Journals, which are poorly indexed. It will be noted that, contrary to modern custom, bills introduced at a Special Session did not die at the adjournment of the Special Session but were also set down on the calendar of the next regular session. In accordance with present-day practice these bills are here reckoned as separate bills. The statute is Ind. Laws 1873, c. XLIII, §§ 6-28. An interesting debate on the need for greater stringency in the law is to be found in letters to *The Indiana Journal*, Jan. 10 (p. 2, col. 4), 14 (p. 3, col. 2), and 18 (p. 3, col. 2), 1871.

48. The danger in looking to the divorce statistics of only one state in an effort to draw conclusions about the efficacy of law are well illustrated in LICHTENBERGER, *op. cit. supra* note 11, c. 7.

49. Of 53,574 United States divorces from 1867 through 1871, 5,741 were Indiana's. SPECIAL REPORT OF THE CENSUS OFFICE, MARRIAGE AND DIVORCE 1867-1906, Pt. II, 4 (1909).

50. In the following chronological list, the number of Indiana divorces appears first, followed by the number for the entire United States: 1867: 1096, 9937; 1868: 1126, 10,150; 1869: 1210, 10,939; 1870: 1170, 10,962; 1871: 1139, 11,586; 1872: 1157, 12,390; 1873: 864, 13,156; 1874: 1002, 13,989; 1875: 1052, 14,212; 1876: 1014, 14,800; 1877: 1151, 15,687; 1878: 1183, 16,089; 1879: 1271, 17,083; 1880: 1423, 19,663. SPECIAL REPORTS OF THE CENSUS OFFICE, MARRIAGE AND DIVORCE 1867-1906, Pt. I, 64-65 (1909).

51. The use of these data as an index to Indiana's importance as a center of migratory divorce is fraught with danger. The American people are highly mobile; in 1880,

convincing of all, between 1887 and 1906 Indiana was seventh from the top among states whose divorces were directed against defendants residing in the divorcing state.⁵² Indiana's heyday as a divorce mill was over.

22.1 per cent of all native born persons were living in states other than their birthplaces, presumably for reasons unconnected with any desire to obtain divorces. Assuming that this figure, 22.1 per cent, can be projected backwards in time to the period of 1867, *i.e.*, that it remained constant between 1867 and 1880 (and remembering that it includes all persons, infant, unmarried, etc., and is therefore not strictly comparable with figures taking account only of the movement of married people), it may be revealing to note the number of Indiana divorces dissolving Indiana marriages compared to the number dissolving foreign marriages. 1867 through 1871: Indiana marriages 3,550; other state marriages 1,135; marriages of unknown origin 1,021. 1872 through 1876: Indiana marriages 3,572; other state marriages 817; marriages of unknown origin 665. 1877 through 1881: Indiana marriages 4,985; other state marriages 896; marriages of unknown origin 604. In the 1867-1871 interval, Indiana granted a higher *number* of divorces to plaintiffs whose marriages had been celebrated elsewhere than did any other state. Illinois and Iowa were not far behind however. And Iowa, Kansas, Michigan, Missouri, and Wisconsin all dissolved at least 400 known foreign marriages, for a ratio of divorce of foreign marriage higher than or as high as Indiana's. Ranking higher than Indiana in the *number* of divorces dissolving foreign marriages from 1872 through 1876 were Illinois, Iowa, and Utah. These states plus California, Michigan, and Ohio exceeded Indiana for 1877-1881. Many western states exceeded Indiana in the *percentage* of divorces of foreign marriage for the last period, but the fact that they were states recently settled would seem to render this fact of no reliable significance for present purposes. The problem involved in using these data as the basis for conclusions concerning the volume of migratory divorces is explained in LICHTENBERGER *op. cit. supra* note 11, at 179-80. The data may be found in SPECIAL REPORTS OF THE CENSUS OFFICE, MARRIAGE AND DIVORCE 1867-1906, Pt. II, 697-698 (1909). Causes alleged as grounds for Indiana divorces will be found in the same work at 99, number of divorces by counties at 755.

52. *Id.*, Pt. I at 33. Interestingly, Indiana's rank in the nation for number of divorces per 100,000 population rose from thirteenth in 1880, to fifth in 1890 to fourth in 1900. *Id.* at 16.

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