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Richard H. Wels

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## NEW YORK: THE POOR MAN'S RENO

RICHARD H. WELS

The citizens of twentieth century America live in an age in which distances have been telescoped, and in which political boundaries exist only to be crossed. Ease and speed of transportation and communication have made it almost as possible to be married in New York and divorced in Nevada as it is to have breakfast in New York and dinner in California. Yet our Federal system, reserving as it does to the states all power in matters relating to the status of the individual (including marriage and divorce)<sup>1</sup> imposes upon the citizen who seeks to take advantage of his twentieth century mobility clouds as to the title of his new flexibility, and many obstacles to the full enjoyment of it. The doubts attendant even in the Supreme Court upon the validity and effect of migratory divorces have made the phrase "One Nation Under God" seem as illusory to many a migratory divorcee as Wendell Willkie's "One World".

Each of the forty-eight states has today a divorce law which differs in important particulars from the divorce laws of the other states. Still other divorce laws have been enacted by Congress for the District of Columbia, and by territorial legislatures for Hawaii, Alaska, and Puerto Rico. Even the divorce mill of the Virgin Islands, which glowingly advertises its product with the lure of a "Federal decree", is governed by still another law. When such laws are invoked between husband and wife who are residents of the jurisdiction applying them, there is of course, no problem as to their validity. It is when such laws are invoked as between persons who are not bona fide residents of the jurisdiction that our judges are pricked by thorny problems and such strange and quixotic decisions as those in *Williams v. North Carolina*,<sup>2</sup> *Estin v. Estin*,<sup>3</sup> and *Rice v. Rice*<sup>4</sup> are put on display for the amusement of the bar, the press, and the public. The diversity of our state laws on marriage and divorce often produces the situation described by Mr. Justice Jackson in his dissenting opinion in the *Rice*<sup>5</sup> case in which the unhappy husband who had died left a wife who could not become his widow, and a widow who was no longer his wife.

All states, of course, do not have divorce mills. While some, such as

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<sup>1</sup> U. S. CONST. AMEND. X.

<sup>2</sup> 317 U.S. 287 (1942), 325 U.S. 226 (1944).

<sup>3</sup> 334 U.S. 541 (1948).

<sup>4</sup> 336 U.S. 674 (1949).

<sup>5</sup> *Id.* at 676.

Arkansas, Idaho, and Florida, have deliberately keyed their laws to the revenue of the divorce trade, and have sought through such traffic to compensate for the lack of real gold mines within their boundaries, other states have rigorously sought to restrict their divorce courts to bona fide residents of long standing who have legitimate cause for divorce. Gresham's Law, however, is applicable to our courts as well as to our economy, and, just as bad money drives out good money, so a few divorce mills within the United States frustrate the efforts of other states to maintain honest courts, even honest divorce courts, in the best sense of our Anglo-American tradition.

It has been a habit among many of us at the bar in the East to talk derisively of the divorce practice in states such as Arkansas, Idaho, Florida and Nevada. We have sneered at their local laws under which a person who has been physically present in the jurisdiction for six weeks and who is known by the court to be packed and ready to return to his home in the East as soon as his decree has been signed is treated as a bona fide resident of the state. We have talked about the mockery and the fraud attendant upon divorce proceedings in such states as though we ourselves here in New York enjoyed both a model divorce law and a model divorce practice. We have surely forgotten the old maxim that people—even lawyers—who live in glass houses shouldn't throw stones. For it was of the divorce practice in New York that the Committee on Law Reform of the Association of the Bar of the City of New York was writing when, on February 8, 1945, it submitted a report recommending amendments to the New York divorce laws in which it said:

Your Committee's purpose is to attempt to remedy some of the evils attendant upon divorce actions themselves. We submit no panacea but we urge a liberalization of the divorce laws under proper legal sanctions. We do so in the hope that we may thus eliminate what has come to be recognized as a scandal, growing out of widespread fraud, perjury, collusion, and connivance which now pervade the dissolution of marriages in this State. We also aim to remove evils arising in actions for annulment on the ground of alleged fraud in the inducement of the marriage. Many such actions are themselves conceived in fraud, being designed to circumvent the requirements of actions for divorce.<sup>6</sup>

In the sense that the grounds for divorce are severely limited, New York has the strictest divorce laws in the United States. New York courts can only grant a decree of divorce on the grounds of the defendant's

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<sup>6</sup> The Association of the Bar of the City of New York, Committee on Law Reform, *Report on the Proposal to Amend the Civil Practice Act by Providing for Grounds Additional to Adultery for Absolute Divorce*.

adultery.<sup>7</sup> While New Yorkers can themselves obtain migratory divorces elsewhere in the American community, neither reciprocity nor comity has been extended so as to permit migrants from other states to avail themselves of New York's divorce courts. The statute provides that in order for the New York court to entertain a divorce action, both parties to the action must have been residents of the state when the adultery was committed or have been married within the state, or, the offense having been committed in the state, the plaintiff was a resident of the state when the action was commenced. Where the adultery was committed outside of New York, New York may also entertain jurisdiction if the plaintiff was a New Yorker both at the time that the offense was committed, and when the action was commenced.<sup>8</sup>

To the lay mind divorce usually connotes any judicial action which dissolves a marriage. In that sense adultery is not the only available cause for divorce in New York, since the statutes permit marriages to be dissolved for other reasons. Thus, marriages may be annulled in New York where at the time of the marriage either party was under the age of consent,<sup>9</sup> already married,<sup>10</sup> an idiot or a lunatic,<sup>11</sup> impotent,<sup>12</sup> or otherwise lacked the capacity to enter into a binding marriage or agreement. Marriages may also be dissolved under New York law where the consent of one of the parties thereto was obtained by fraud, force, or duress.<sup>13</sup> The distinction, of course, between such proceedings and divorce is that the court decree declaring the marriage annulled states that the marriage never validly existed, while the divorce decree pronounces that a marriage, once legally constituted, no longer exists. The effect of both, however, is precisely the same—it puts an end to a state of matrimony which is no longer desired.

New York courts are also empowered to declare marriages dissolved under still other circumstances. Thus, marriages are incestuous and void where contracted between an ancestor and a descendant, a brother and a sister, an uncle and a niece, or an aunt and a nephew.<sup>14</sup> Marriages may also be dissolved where either husband or wife has been sentenced to imprisonment for life, even though the offending spouse may under the

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<sup>7</sup> N. Y. CIV. PRAC. ACT § 1147.

<sup>8</sup> *Id.*

<sup>9</sup> N. Y. DOM. REL. LAW § 7.

<sup>10</sup> N. Y. DOM. REL. LAW § 6.

<sup>11</sup> N. Y. DOM. REL. LAW § 7.

<sup>12</sup> *Id.*

<sup>13</sup> N. Y. DOM. REL. LAW § 7.

<sup>14</sup> N. Y. DOM. REL. LAW § 5.

parole laws be released from prison at some future date.<sup>15</sup> Under the so-called Enoch Arden law, a marriage may also be dissolved where it is shown that a husband or wife has been absent for five successive years, and the plaintiff does not know whether such absentee is longer living.<sup>16</sup> And, finally, New York courts may dissolve a marriage on proof that one party to it has been incurably insane for five years or more.<sup>17</sup>

So far as statutory language is concerned, New York's basic divorce law differs from that of other states in that it does not recognize mental cruelty, drunkenness, abandonment, cruel and inhuman treatment, or incompatibility as grounds for divorce. On the surface, its retention of the ecclesiastical concept of awarding a divorce only for the cause of adultery lends New York law an apparent severity which it does not in fact possess, and has caused many critics to describe it as archaic. The acid test lies, however, not in statutory language but in the answer to the question of how difficult these laws have made it for New Yorkers to have their marriages dissolved. For those answers we must look not to the words of the statute themselves, but to the practices to which those words have given rise.

The present divorce statute was first enacted (substantially in its present form) in 1787.<sup>18</sup> In establishing adultery at that time as the sole ground for divorce, the Legislature then intended to make divorce as difficult as possible for the purpose of preserving the family unit. For many years this result was attained, and the statute exercised a severe restraint upon divorce actions. Adultery, the only recognized cause for divorce, was a criminal offense which prosecutors could be counted upon to prosecute. In addition, it carried, when exposed, heavy social penalties. Social ostracism and extensive publicity were the lot of anyone upon whose brow a court of the State of New York placed the scarlet letter.

The twentieth century has brought with it, however, a profound change in the social and moral values of our community. In the judicial year ending June 30, 1947, some 7,744 New Yorkers who were charged with adultery by their spouses in New York matrimonial actions<sup>19</sup> did

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<sup>15</sup> N. Y. DOM. REL. LAW § 6; *Brookman v. Brookman*, 161 Misc. 741, 292 N. Y. Supp. 918 (Sup. Ct. 1947).

<sup>16</sup> N. Y. DOM. REL. LAW § 7-a.

<sup>17</sup> N. Y. DOM. REL. LAW § 7. The Statute provides that if the marriage be annulled because of the insanity of wife, provision must be made for the care and maintenance of the wife.

<sup>18</sup> *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, 459 (1884).

<sup>19</sup> FOURTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK,

not defend themselves against the charge. Yet, except where the personalities involved were public figures or the evidence was particularly erotic or bizarre, few such cases were reported in the press. And, of course, not a single person in the state was criminally prosecuted for adultery by any of the sixty-four district attorneys. This is not because the District Attorneys are remiss in their duty. It is just that they are sufficiently sensitive to public opinion and public morals to know that the public does not sympathize with such prosecutions, and that convictions would be difficult to obtain. In our New York society of today, adultery is shrugged off as a commonplace affair which does not materially affect the social or community status of the persons involved.<sup>19a</sup>

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LEGISLATIVE DOCUMENT (1948) No. 18. Appendix B, Table 8 discloses that for the judicial year ending June 30, 1947, Official Referees of the Supreme Court disposed of 7,774 undefended divorce actions, 4,580 undefended actions for annulment, 240 undefended separation actions, and 468 undefended actions under the Enoch Arden law (N. Y. DOM. REL. LAW § 7-a). Table 6 of the same Appendix shows that in the same year there were tried in the Supreme Court throughout the State a total of 944 defended matrimonial causes of all categories.

<sup>19a</sup> In *Schmidt v. United States*, 177 F.(2d) 450, the petitioner appealed from an order of the United States District Court for the Southern District of New York denying his petition for naturalization on the ground that his admission that he had engaged in sexual intercourse with unmarried women established that he was not a person of good moral character. The Court of Appeals for the Second Circuit unanimously reversed the order of the District Court and granted the petition for naturalization. Chief Judge Learned Hand, writing the court's opinion, said: "It is true that in *Estrin v. United States*, 80 F.(2d) 105, we held that a single act of adultery, unexplained and unpalliated, was alone enough to prevent the alien's naturalization; but we refused to say whether under the "common standards of morality" there might not be "extenuating circumstances" for such a single lapse. In *Petitions of Rudder et al.*, 159 F.(2d) 695, 698, the question arose as to what those circumstances might be. Each of several aliens had been living for years with a single woman in an adulterous union, which apparently had not been concupiscent. Either the alien or the woman had been unable, for one reason or another, to get a divorce. We admitted them all because we did not "believe that the present sentiment of the community views as morally reprehensible such faithful and long continued relationships under the circumstances here disclosed." In *United States v. Rubia*, 110 F.(2d) 92, the alien was admitted upon substantially the same facts, save that he had had a good war record. In *United States v. Francioso*, 164 F.(2d) 163, we admitted an alien who had married, and was living with his niece under circumstances where we thought that "the moral feelings, now prevalent generally in this country" would not "be outraged because Francioso continued to live" with his wife and with four children whom he had had by her. The last case in which we passed on the clause was *Repouille v. United States*, 165 F.(2d) 152, 153, where the alien, in order to relieve his family of crushing expense, had killed his child who was a hopeless bed-ridden idiot. We thought that such conduct did not conform to "the generally accepted moral conventions current at the time"; but we added: "Left at large as we are, without means of verifying our conclusion, and without authority to substitute our individual beliefs, the outcome must needs be tentative; and not much is gained by discussion." In two very recent cases, *United States v. Manfredi*, 168 F.(2d) 752; *United States v. Palombella*, 168 F.(2d) 903, the Third Circuit by an equally divided court of all six judges, affirmed orders admitting two aliens in the following circumstances. In the first

This deterioration in the moral fabric of the community has, of course, been reflected in the attitudes of the courts towards cases involving matrimonial matters. Instead of implementing the expressed public policy as stated by the Legislature in the statute, our courts and our judges have been conditioned by public opinion to dispose of matrimonial matters in the same manner as ordinary commercial litigation, without any expressed concern for the larger public interest.<sup>20</sup> This twentieth century attitude of our judges is perhaps best demonstrated by the extraordinary decision of the Appellate Division, First Department, in *Phillips v. Oltarsh*.<sup>21</sup>

In that case Mrs. Hetty Phillips and Abraham Oltarsh were both New York residents. Each was married in New York to another New Yorker. The two of them had journeyed from New York to Reno solely for the purpose of there obtaining Nevada divorces from their respective New

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case, an unmarried man admitted that he had had occasional meretricious relations with a single woman for pay; in the second case, the facts were the same, except that the alien had a wife and children in Italy, from whom he had apparently not been legally separated.

The foregoing are the only cases that we have discovered in Courts of Appeal which touch nearly enough upon the case at bar to be important; and it must be owned that the law upon the subject is not free from doubt. We do not see how we can get any help from outside. It would not be practicable—even if the parties had asked for it, which they did not—to conduct an inquiry as to what is the common conscience on the point. Even though we could take a poll, it would not be enough merely to count heads, without any appraisal of the voters. A majority of the votes of those in prisons and brothels, for instance, ought scarcely to outweigh the votes of accredited churchgoers. Nor can we see any reason to suppose that the opinions of clergymen would be a more reliable estimate than our own. The situation is one in which to proceed by any available method would not be more likely to satisfy the impalpable standard, deliberately chosen, than that we adopted in the foregoing cases: that is, to resort to our own conjecture, fallible as we recognize it to be. It is true that recent investigations have attempted to throw light upon the actual habits of men in the petitioner's position and they have disclosed—what few people would have doubted in any event—that his practice is far from uncommon; but it does not follow that on this point common practice may not have diverged as much from precept as it often does. We have answered in the negative the question whether an unmarried man must live completely celibate, or forfeit his claim to a "good moral character"; but, as we have said, those were cases of continuous, though adulterous, union. We have now to say whether it makes a critical difference that the alien's lapses are casual, concupiscent and promiscuous, though not adulterous. We do not believe that discussion will make our conclusion more persuasive; but, so far as we can divine anything so tenebrous and impalpable as the common conscience, these added features do not make a critical difference."

<sup>20</sup> In *Winans v. Winans*, 124 N. Y. 140, 146, 26 N. E. 293, 295 (1891), the Court of Appeals said: "A divorce suit, while on its face a mere controversy between private parties of record, is as truly viewed, a triangular proceeding sui generis, wherein the public or government occupies in effect, the position of third party. And while this third party is not specially represented by counsel, it is for this purpose to be represented and protected by the judges. *Murphy v. Murphy*, 8 Phil. 357."

<sup>21</sup> 273 App. Div. 715, 80 N. Y. S. 2d 153 (1st Dep't 1948).

York spouses, then marrying each other, and returning to New York. Once in Nevada, they had filed papers in which they described themselves as residents of Nevada and, as such, had sought decrees of divorce from the Nevada courts. Mrs. Phillips had succeeded in obtaining her Nevada decree but Mr. Oltarsh, whose New York wife had declined to file an appearance in the Nevada action, had not been successful. After the granting of a decree to Mrs. Phillips, she and Mr. Oltarsh took the train together from Reno to New York. On the train, Oltarsh promised Mrs. Phillips that he would attempt to obtain his wife's consent to the Nevada proceedings and then would marry her. He urged her rejection of another suitor and promised her that if she would reject his rival, he would pay her a weekly salary until she was re-married, "which I hope will be soon and to me".<sup>22</sup> Mrs. Phillips accepted the offer, and, Oltarsh thereafter repenting and defaulting, she obtained judgment against him for these defaulted payments. Extraordinarily enough, the Appellate Division did not find the contract void as against public policy, but ordered a new trial for the purpose of having the jury determine the duration of the period over which the weekly payments were to be made.<sup>23</sup>

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<sup>22</sup> *Id.* at 717, 80 N. Y. S. 2d at 154. See also *Phillips v. Oltarsh*, 59 N. Y. S. 2d 366.

<sup>23</sup> In a prior action on this contract the plaintiff (Mrs. Phillips) received a jury verdict for \$2100 representing installments for the 28-week period from August 28, 1943, to February 24, 1944. A motion to set aside the verdict, to direct a verdict in favor of the defendant, and to dismiss the complaint was thereafter granted by the trial judge. *Phillips v. Oltarsh*, 59 N. Y. S. 2d 366, on the ground that the agreement violated both the spirit and the letter of Section 61-a, Civil Practice Act, which outlaws actions for breach of promise to marry. In his opinion Mr. Justice McCullen said: "I have concluded that plaintiff's own testimony, considered in the light of the attendant circumstances hereinabove narrated, discloses an agreement by defendant to marry plaintiff or else to pay her \$75 each week as long as she would reserve herself for defendant, to be his wife at some future time. The true underlying consideration for defendant's promise to pay plaintiff \$75 a week while she remained unmarried was that she would continue to hold herself free to marry defendant as soon as he was able to marry her. The rejection by plaintiff of Mr. Weinstein's proposal of marriage was to be only incidental; certainly, looking at the case realistically rather than technically, it was not to constitute full performance by plaintiff of her part of the contract. It was plainly contemplated that if plaintiff was to keep on receiving the weekly payments she would reject not only Weinstein's proposal, but that of any other suitor who might come along. This understanding was implicit in the arrangement, which, according to plaintiff's own testimony, looked to eventual marriage with the defendant. If the plaintiff's artful words on the witness stand are not taken too literally, and if one considers the substance of her story, it seems to me that one is forced to the conclusion that what the defendant really promised, if he made any definite promise at all, was to marry the plaintiff or else to pay her \$75 a week as long as she stayed unmarried. It is for breach of this agreement that plaintiff is suing, and if it were not for Article 2-A, Civil Practice Act, and for the fact that defendant, to plaintiff's knowledge, was a married man, I think this would be a frank breach of promise to marry suit. It seems to me that the case is as if defendant had said to plaintiff in so many words: 'I promise to pay you, and as long as you hold yourself



The decision of the Appellate Division is particularly strange in view of the fact that not one but two bases existed on which to ground a finding that the cause of action was against public policy. The suit itself was so akin to suits for breach of promise to marry that it might conceivably have been held to run afoul of the statute outlawing such actions in New York.<sup>24</sup> And, even more strongly, the transaction itself having as its object the destruction of the marriage relationship, ample opportunity existed for the court to rule that public policy required the dismissal of the suit.

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free to marry me, I will pay you \$75 a week until our marriage comes about.' It is true that plaintiff has tried very hard to put a different face upon the matter, but I believe that any other conclusion as to the true nature of the arrangement or agreement between these parties is contrary to the credible evidence in the case. The arrangement or agreement, as I have here construed it, conflicts not only with the spirit, but also with the letter of Section 61-a, Civil Practice Act, which declares all causes of action based upon 'breach of contract to marry' to be against public policy. To the extent that the evidence given for plaintiff is credible, it shows an understanding with defendant, before the parties went to Reno, that they would procure divorces from their respective spouses, and then marry each other; that when plaintiff taxed defendant, on the return trip from Reno, with having broken his promise to her by having failed to procure a divorce from his wife, he again promised her that eventually they would be married, and that, in the meantime, he would pay her a weekly sum. At best there was a promise by defendant to marry plaintiff to which was attached an alternative promise to supply her with a regular weekly income. Not only does the promise to marry fail, but also the alternative promise attached to it; neither the promise nor its appendage may be legally enforced. Incidentally, quite apart from any statute, any arrangement which these parties made looking to their marriage to each other would be unenforceable, as the defendant was already married, a fact which plaintiff knew. So that she could not expect to hold him legally to any promise of marriage or to any agreement made in contemplation of marriage." The decision of the trial judge was unanimously reversed without opinion by the Appellate Term, and the plaintiff's verdict was reinstated. *Phillips v. Oltarsh*, 63 N.Y.S. (2d) 674, and the decision of the Appellate Term was affirmed by the Appellate Division, also without opinion, in *Phillips v. Oltarsh*, 271 App. Div. 997, 69 N.Y.S. (2d) 362 (1st Dept. 1947). In the subsequent action, the trial judge held the prior judgment to be res adjudicata, and directed judgment for the plaintiff. The decision of the Appellate Division in the subsequent case assumed that the agreement was a valid one, but held that it had not decided the question of the duration of the agreement.

<sup>24</sup> N. Y. CIV. PRAC. ACT § 61-a-61-i. This prohibition, enacted in 1935, declared actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry to be outlawed as against the public policy of the State. The trial judge had expressly found the agreement against public policy and violative of both the spirit and the letter of the statute. *Phillips v. Oltarsh*, 59 N. Y. S. (2d) 366, 369-370. The tendency of the courts to undercut this statute is exemplified by *Burger v. Neumann*, 300 N. Y. 495, 88 N. E. (2d) 724. In that case the plaintiff alleged that the defendant, to whom she was not married, was the father of her child. She alleged that the paternity of the child had been acknowledged by the defendant, and that he had agreed to make financial provision for the child until it became 21. The action was based on such oral agreement, and a motion to dismiss on the ground that the action was barred by Article 2-A of the Civil Practice Act was denied. 189 Misc. 88, 69 N. Y. S. (2d) 661. This decision was affirmed by the Appellate Division, 275 App. Div. 710, 86 N. Y. S. (2d) 871 (2nd Dept., 1949), and by the Court of Appeals.

This same lack of aggressive concern for the marriage relationship has been manifested in the New York courts' gentle handling of the out-of-state divorces obtained by its nomadic citizenry. To some degree New York's present attitude towards these transitory divorces may be said to be conditioned by the acrobatic precedents of the Supreme Court of the United States as that ultimate forum hurdled from *Haddock v. Haddock* to the first *Williams* case, and then back again to the second *Williams* case. Yet the Supreme Court, for all its august tumbling, can not be made the sole scapegoat since New York's tolerance of transitory decrees<sup>25</sup> dates back to long before the line of confusion engendered by the Supreme Court which caused Mr. Justice Jackson, in his dissenting opinion in *Estin v. Estin*, to comment:

If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married, and, if so, to whom. Today many people who have simply lived in more than one state do not know, and the most learned lawyer cannot advise them with any confidence. The uncertainties that result are not merely technical, nor are they trivial; they affect fundamental rights and relations such as the lawfulness of their cohabitation, their children's legitimacy, their title to property, and even whether they are law-abiding persons or criminals. In a society as mobile and nomadic as ours, such uncertainties affect large numbers of people and create a social problem of some magnitude. It is therefore important that, whatever we do, we shall not add to that confusion. I think that this opinion does just that.<sup>26</sup>

New York has always held that to every marriage, and to every matrimonial action relating to a New York marriage, there are three parties—the husband, the wife, and the State of New York which has a strong public interest to preserve that marriage.<sup>27</sup> That concept, and that public interest, would have afforded a basis from the start for New York's courts to have struck down as invalid out-of-state divorces obtained by its citizens, just as such foreign divorces obtained by Englishmen have been completely disregarded by the British courts.<sup>28</sup> The New York courts have, to the contrary, chosen to disregard that public interest and to look upon each matrimonial matter as merely a controversy between the husband and the wife to which ordinary rules of ordinary civil litigation

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<sup>25</sup> *Kaufman v. Kaufman*, 177 App. Div. 162, 163 N. Y. Supp. 566 (1st Dep't 1917).

<sup>26</sup> 334 U. S. 541, 553 (1948).

<sup>27</sup> *Winans v. Winans*, 124 N. Y. 140, 26 N. E. 293 (1891).

<sup>28</sup> It is the law of England that it is the courts of the state in which the parties to the marriage are domiciled, and only those courts, which have any competence to decree dissolution of a marriage. *Salvesen v. Administrator of Austrian Property*, (1927) A. C. 641.

are applicable. Thus, from the first our courts developed the doctrine that, even where the one party to the marriage had openly and flagrantly gone to another state solely for the purpose of evading New York's laws, obtaining a divorce there on grounds not available to him in the place of his domicile, and then returning to New York, the foreign decree could not be successfully challenged where the other party had consented to this foreign decree by entering an appearance in the foreign action.<sup>29</sup> By this convenient doctrine of estoppel, New York chose to abdicate its function of preserver of the family unit, and permitted meretricious relationships to flourish in New York under the air of respectability given them by foreign decrees of dubious validity.<sup>29a</sup>

And, so far as the immediate parties to the marital bargain were concerned, it was only this air of respectability which was really sought by the out-of-state action. They wanted to go through the motions of something that looked sufficiently like a divorce to permit them to live with new mates on a basis meeting the minimum requirements of convention.

It is, perhaps, characteristic of the materialistic nature of our modern society that it is only when property rights have become involved that the New York courts have been sufficiently roused from their indifference to declare invalid the same out-of-state decrees which had been previously afforded protection. Thus, after a Florida decree, a New York husband (a college professor) returned to his home, remarried, lived with his second family, and years later died. It was only then when his two sets of heirs quarreled over his estate that the New York courts held that the Florida decree was totally without validity, and that, although he had remarried and his second marriage had been afforded respectability and

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<sup>29</sup> *Lilienthal v. Lilienthal*, 192 Misc. 1022, 83 N. Y. S. 2d 71 (Sup. Ct. 1948); *Kaufman v. Kaufman*, 177 App. Div. 162, 163 N. Y. Supp. 566 (1st Dep't 1917); *Schneider v. Schneider*, 232 App. Div. 71, 249 N. Y. Supp. 131 (2d Dep't 1931). However, the New York courts have been reluctant to recognize Mexican divorces, even where both parties have appeared in such Mexican action, and have consistently held such Mexican divorces to be without effect. *May v. May*, 251 App. Div. 63, 295 N. Y. Supp. 599 (4th Dep't 1937).

<sup>29a</sup> In *Farah v. Farah*, 92 N. Y. S. (2d) 187 (Sup. Ct. 1949) an ingenious effort to avoid the doctrine of estoppel was frustrated by the Special Term. A Nevada divorce was obtained by the New York wife, and a separation agreement was embodied in the Nevada decree, under which the New York husband agreed to make weekly payments of a stipulated sum for the support of his wife and their infant child. Five years later the wife brought an action against her former husband in New York in her capacity as guardian ad litem for the child to have the separation agreement entered into as void against public policy, to require the father to provide suitably for the plaintiff's maintenance, and to have the Nevada divorce declared invalid. In granting the husband's motion for summary judgment, Mr. Justice Hofstadter held that the complaint did not state a cause of action in the absence of allegations that the child was without adequate support or that any right to such support was in danger of invasion. The court conceded, however, that the child was not barred from attacking the Nevada decree.

recognition on the basis of such decree, it was only the heirs stemming from his first marriage who could lawfully inherit from him.<sup>30</sup>

This same materialistic approach has been responsible for the concept of "divisible divorce", which Mr. Justice Jackson, in his dissenting opinion in the *Rice* case,<sup>31</sup> erroneously states was improvised by the Supreme Court in *Estin v. Estin*.<sup>32</sup> Actually, that concept was improvised by the Court of Appeals in the *Estin* case, and was merely adopted by the Supreme Court when it affirmed the Court of Appeals decision as being the law of New York, and law which did not contravene the full faith and credit clause of the Constitution.<sup>33</sup>

In the *Estin* case both spouses were domiciled in New York. The wife obtained a New York decree of separation, which included an award of alimony. Subsequently the husband commenced a divorce action in Nevada, in which the wife was served constructively and entered no appearance. The husband was awarded a divorce decree by the Nevada court, and thereupon ceased paying alimony under the New York separation decree on the theory that, his marriage having been terminated, his responsibilities as a husband were also terminated, and the New York award was superseded. The Court of Appeals accepted the finding of the Special Term that the husband had become a bona fide resident of Nevada, and held that under such circumstances Nevada had power to dissolve the marriage wheresoever contracted. The Court of Appeals held however, although the Nevada decree was a valid one which dissolved the marriage, and, although normally such a valid divorce decree overrides an incongruous alimony provision of a prior separation decree, that the New York separation decree had vested a final and unconditional property right in the wife which could not be disturbed by the Nevada decree of divorce. In affirming, the Supreme Court held that, although New York must give full faith and credit to that part of the Nevada decree which divorced the parties, it need not give full faith and credit to that part of the decree which related to the alimony. Once again our materialistic philosophy asserted itself—to resist the out-of-state decree insofar as it sought to extinguish property rights, but to sustain it insofar as it extinguished family ties and family life.

A curious aftermath to *Estin v. Estin* occurred in *Lynn v. Lynn*.<sup>34</sup> As in the *Estin* case, Mrs. Lynn had obtained a New York judgment of sep-

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<sup>30</sup> *In re Lindgren's Estate*, 293 N. Y. 18, 55 N. E. 2d 849 (1944).

<sup>31</sup> 336 U. S. 676 (1949).

<sup>32</sup> 334 U. S. 541 (1948).

<sup>33</sup> 296 N. Y. 308, 73 N. E. 2d 113 (1947).

<sup>34</sup> 275 App. Div. 269, 88 N. Y. S. 2d 791 (1st Dep't 1949).

aration requiring the payment of alimony by her husband. Again, as in *Estin v. Estin*, Mr. Lynn proceeded to Nevada, established a residence there, and instituted an action for divorce. Again, his residence in Nevada was found to be bona fide. But, unlike Mrs. Estin, Mrs. Lynn proceeded to Nevada, appeared in the divorce action, and was unsuccessful in her attempt to oppose it. A Nevada decree of divorce was entered without making provision for alimony. The bona fides of Mr. Lynn's residence in Nevada had been adjudicated in the Nevada action, and on that basis it was accepted by the New York court. The New York statutes dealing with actions for divorce and separation provide that, even after judgments have been awarded and regardless of separation agreements, the courts have full power at any time to open up their judgments and either increase or decrease the alimony award, or, where no award has been previously made, to make one.<sup>35</sup> Despite the fact that she made no application in Nevada, the wife five years later made an application to the New York Supreme Court to revise the judgment of separation so as to increase substantially the prior award of alimony. At Special Term, Mr. Justice Walter held that not only did he not have power in the face of the Nevada decree to increase the award of alimony but that the Nevada judgment in an action in which the wife had personally appeared had the effect of terminating the marriage and any obligation that the husband had to pay even the prior New York alimony award.<sup>36</sup>

It should be noted that, in *Estin v. Estin*, Mr. Justice Douglas, speaking for the majority of the Court, talked of the wife's vested interest in the sum finally and unconditionally owing her under the New York decree of separation.<sup>37</sup> It ought also to be noted that, while Mrs. Estin had been served only constructively and had not appeared in the Nevada

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<sup>35</sup> N. Y. CIV. PRAC. ACT § 1170. In *Schneidman v. Schneidman*, 65 N. Y. S.2d 876, 878 (Sup. Ct. 1946), the court said: "The courts have held that under Section 1170 of the Civil Practice Act a court is authorized at any time after final judgment to annul, vary or modify such an award; or, if there was no such award, to make one by amendment. The effect of this statute is to write a reservation to that effect into every final judgment. The jurisdiction of the court over the parties and over the incidental subject matter is prolonged and to that extent the action is deemed pending."

<sup>36</sup> 192 Misc. 720, 82 N. Y. S.2d 397 (Sup. Ct. 1948).

<sup>37</sup> 334 U. S. 541, 548 (1948). Mr. Justice Douglas said: "The New York judgment is a property interest of respondent, created by New York in a proceeding in which both parties were present. It imposed obligations upon petitioner and granted rights to respondent. The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations. Cf. *Curry v. McCanless*, 307 U. S. 357, 366 (1938). . . . Since Nevada had no power to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment."

action, Mrs. Lynn had gone to Nevada, had appeared, and had vigorously contested the action there. Yet, despite these vital differences, the Appellate Division, by a three to two division, reversed Mr. Justice Walter and held that, on the authority of *Estin v. Estin*, the New York Supreme Court at Special Term was clothed with ample power to increase its prior award of alimony in the separation decree. Ruling that the New York support order survived the Nevada decree and that, since under New York law support orders may be increased or decreased by the Supreme Court, Mr. Justice Shientag, speaking for the majority of the Appellate Division, and citing with approval Mr. Justice Douglas' opinion in the *Estin* case, pointed out that the result was to accommodate both New York and Nevada by restricting each State to matters of her dominant concern.<sup>38</sup> And what was New York's dominant concern in this matrimonial problem? Not the preservation of the marriage ties or the status of the individuals, but assuring that the wife not be left impoverished or become a public charge.

Those New Yorkers endowed with sufficient of the world's goods to permit them to journey to an "easy" divorce state in the West and stay there for the six weeks period required to obtain the divorce decree that satisfies the appearance of respectability required by our society find an easy and convenient solution to their marital problems, even though they may be creating devils with which to torment our probate courts and their heirs in later years. But what of those New York citizens who do not have the fare, the funds for hotel accommodations, or the ability to be absent from business or employment which are needed to avail themselves of easy divorces in Nevada, Idaho, Arkansas, Florida, or the Virgin Islands? If anything is basic in our nation and in our society, it is the concept that before the law all men are created equal, that all citizens shall receive equal treatment in our courts regardless of pocket-book or credit rating. It is, perhaps, a judicial awareness of the ease with which quick solutions to marital complexities are available to those able to pay for them, and a judicial sense of fairness, that has caused our judges to turn New York into a poor man's Reno for all with sufficiently elastic consciences.

The device which made it possible to transform New York into an easy divorce state, despite the severity of its divorce laws, and to establish there a divorce mill with the assistance of the bench and bar is the so-called undefended matrimonial calendar.

Our entire Anglo-American body of law is based on the theory that

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<sup>38</sup> 275 App. Div. 269, 275, 88 N. Y. S. 2d 791, 797 (1st Dep't 1949). See, however, the dissenting opinion of Mr. Justice Cohn.

by cross-examination the truth will out and justice will be done. More than ninety per cent of all matrimonial actions in New York are uncontested.<sup>39</sup> As a result, no one is present to test the testimony given by the plaintiff's witnesses, and attorneys know that the prima facie case which they present will not be challenged either by the defendant or by someone representing the public interest.

Even the prima facie case which is presented is not required to be more than meagre in its quality or quantity. Essentially, all that is required is proof that the defendant was found in a room with a person of the opposite sex (who need not be identified beyond the positive fact that such person was *not* the husband or wife of the defendant), that both were found in a semi-undressed condition—and that is all.<sup>40</sup> Under the New York law, as developed by the courts, the fact of adultery is customarily proved by circumstantial evidence of opportunity and inclination. As Mr. Justice Gaynor, speaking for the majority of the Appellate Division in *Kerr v. Kerr* said, seeking bedroom privacy was certainly strong evidence of inclination. And, he said, when a man and a woman who are not married are found together in a hotel bedroom, the courts will presume that the purpose of their visit was not "to say a paternoster".<sup>41</sup>

At least since 1907, that has been the judge-made law in New York. As disclosed by District Attorney Hogan of New York County in his recent exposé of divorce mills operating in Manhattan,<sup>42</sup> the same unidentified woman served in many cases as the correspondent. In none of those cases was an act of adultery committed. In many she did not even undress, but merely arranged to be found in bed in the same room as the newly arrived defendant who had never seen her before, and presumably would never see her again. Yet the testimony of the persons who broke into the room by pre-arrangement and found her there with the defendant was sufficient, under the controlling decision of *Kerr v. Kerr*, to justify the New York courts to issue a decree of divorce. Not

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<sup>39</sup> THE FOURTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK, LEGISLATIVE DOCUMENT (1948) No. 18, shows in Appendix B, Tables 6 and 8, that in the judicial year ending June 30, 1947, the Supreme Court disposed of 13,062 undefended matrimonial actions of all categories throughout the State, and 944 defended matrimonial actions.

<sup>40</sup> *Jacobstein v. Jacobstein*, 201 N. Y. Supp. 1 (Sup. Ct. 1923), *aff'd*, 209 App. Div. 846, 204 N. Y. Supp. 918 (4th Dep't 1924), *aff'd*, 240 N. Y. 693, 148 N. E. 761 (1925); *Miller v. Miller*, 212 App. Div. 114, 208 N. Y. Supp. 113 (1st Dep't 1925); *Hutchinson v. Hutchinson*, 53 Misc. 441, 104 N. Y. Supp. 1074 (Sup. Ct. 1907), *aff'd*, 119 App. Div. 888, 105 N. Y. Supp. 1122 (1st Dep't 1907).

<sup>41</sup> 134 App. Div. 141, 118 N. Y. Supp. 801 (2d Dep't 1909).

<sup>42</sup> See New York Journal-American, Dec. 1, 1948, p. 1 *et seq.*

only sufficient, but where, as in the recent case of *Slawinski v. Slawinski*,<sup>43</sup> the justice at Special Term refused to grant a divorce on such evidence, he was reversed by the Appellate Division which inferentially held by its decision (without opinion) that such evidence required the court to make a finding of adultery and award a decree.

The facts in the *Slawinski* case are important only in that they are typical of the evidence which the Appellate Division today finds adequate for the granting of a divorce. In his opinion at Special Term refusing to confirm the referee's report, and dismissing the complaint, Mr. Justice Greenberg said:

Plaintiff seeks a decree of divorce predicated on the testimony of one witness to the effect that on March 15, 1943, the female defendant occupied a room in his house and that he found her in bed with "her boy friend". The entire record on this pertinent issue is: "Q. During the year 1945 where did you live? A. 2501 Creston Avenue, Bronx. Q. Did the defendant, Rita Slawinski, have a room in your house? A. Yes, she did. Q. Can you recall the middle of January, 1943, what happened? A. On March 15, 1943, I woke up about five o'clock in the morning, and I had to walk to her room, and I found her and her boy friend in bed together. Q. Did you know him? A. I knew him for some time. Q. In what condition did you find them? A. I found them in bed together with their clothes on a chair. Q. Did you find how they were dressed? A. They were undressed. I seen their clothes on a chair there. They were undressed. Q. Was that man in bed at that time? A. He was in bed with her. Q. Was that man the plaintiff in this action? A. It was not." A recommendation that a decree should issue in favor of the plaintiff was made by the official referee on the basis of this testimony. This court finds the record woefully inadequate to justify a granting of relief to the plaintiff. In the first place the witness to the claimed act of adultery bears the same name as the plaintiff and there is no explanation what relationship, if any, is between the two parties. In the second place the witness did not indicate why he had "to walk to her roon" at five o'clock in the morning. For all that appears from the record this witness walked into the room of the defendant where he had no right to be without knocking on the door and for no obvious reason. His entire testimony reeks with grave suspicion and indicates strongly that the facts were manufactured to suit plaintiff's objective. To countenance a divorce in such a situation would be to make a mockery of the law and to hold the courts up to ridicule and contempt. In such a situation the court obviously will not lend its assistance.

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<sup>43</sup> 275 App. Div. 766 (1st Dep't 1949). The decision at special term appears in *New York Law Journal* January 3, 1949, p. 12, col. 1.



It is a curious feature of undefended matrimonial actions that where the judge at Special Term on his own review of the record has refused to confirm the Official Referee's report and grant a dissolution of the marriage, the Appellate Division has, in reversing the case, taxed costs on appeal against the unhappy defendant who had neither defended nor participated in the appeal. The real respondent, of course, was actually the justice at Special Term, but no costs of course could have been awarded against him.<sup>43\*</sup>

The knowledge of the bar that this type of evidence would result in the granting of a New York divorce has, of course, constituted an open invitation to the commission of perjury and of frauds upon the court, such as were disclosed by the District Attorney of New York County earlier this year. The bar and the public have been encouraged in taking advantage of this invitation by the manner in which such uncontested matrimonial cases have been tried.

Involving as they do only a question of fact (i.e., whether an act of adultery was committed by the defendant), such cases are customarily referred by the Supreme Court at Special Term to an Official Referee, normally a former judge who has reached the age of retirement. The Official Referees have followed the practice of disposing of these cases on a mass production basis. It is rare that the trial of a single case will take as long as fifteen minutes. Four witnesses are customarily heard by the court in each case—the plaintiff who testifies as to the marital status, the process server who has made service upon the defendant, and two persons who found the defendant and the co-respondent enjoying an opportunity and inclination for adultery. Such dignity as is normally expected in a court house is often dissipated by the handing of a card by the court clerk to the plaintiff's attorney. This card lists in order the questions which the court expects to be asked of the witnesses and which, if properly answered, will afford a basis for the award of a decree. If the attorney deviates from the pattern of questioning appearing on the card, he will normally be stopped by the Referee or the clerk, and cautioned to ask the questions, and only the questions appearing on the card. It is obvious from the attitude and comments of most Referees and court room attendants that they, together with the plaintiffs and their attorneys, are in on the big secret and are fully acquainted with the traffic that is indulged in before them.

Despite the ease with which divorces are granted from the undefended matrimonial calendar, many persons without the means of going to an-

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<sup>43\*</sup> *Stoll v. Stoll*, 275 App. Div. § 816, 89 N. Y. S. (2d) 712 (1st Dep't 1949).

other state are reluctant to avail themselves of a New York divorce because of an unwillingness to have a judicial finding of adultery on their records. The New York courts have sought to be accommodating to such persons too, and have through this same uncontested matrimonial calendar been able to effect easy dissolutions of marriage without such findings. As noted *supra*, annulments of marriages can be granted by the New York courts on a showing that one of the parties to the marriage was fraudulently persuaded to enter the marriage state. Judge Desmond of the Court of Appeals has estimated that more than one hundred and fifty types of fraud have been judicially recognized by the Supreme Court as a basis for such annulments.<sup>44</sup> These have covered a wide range, from a finding of fraud in a case where a husband was induced to marry by his wife's representation that spirits of the other world in which he believed had ordered their marriage<sup>45</sup> to misrepresentation of status as an American citizen.<sup>46</sup> In recent years, however, two bases for an annulment have been particularly recurrent and fashionable. One of these has been the defendant's strong representation before marriage that he or she desired a family and intended to have children. It has been a common occurrence for such an action to allege that it was only years after the marriage that the wife discovered that her husband had been using contraceptives throughout the marriage relation. And, oddly enough, there has been no dearth of witnesses to ante-nuptial conversations as to the parties' desire and intention to have children.<sup>47</sup>

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<sup>44</sup> In an address delivered on April 9, 1948, at Siena College. The *Statistical Bulletin of the Metropolitan Life Insurance Company for August, 1949* (Vol. 30, No. 8, pp. 8-9) points out that "At the peak in 1946, when close to 22,000 annulments were granted in the United States, they represented only 3.5 per cent of the total dissolutions. In California and New York, however, they were of much greater importance. Thus, in California, last year, annulments constituted one ninth of all legal marriage dissolutions. In New York, they were an even larger proportion of the total: almost one quarter of the marital dissolutions in 1940, and now almost one third. In fact, for the period from 1940 to 1948, New York and California, together, accounted for two thirds of the annulments granted in the United States."

<sup>45</sup> *Hides v. Hides*, 65 How. Pr. 17 (N.Y. Sup. Ct. 1883).

<sup>46</sup> *Truiano v. Truiano*, 121 Misc. 635, 201 N. Y. Supp. 573 (Sup. Ct. 1923). See also *Lederkremer v. Lederkremer*, 173 Misc. 587, 18 N. Y. S. 2d 725 (Sup. Ct. 1940), and *Miodownik v. Miodownik*, 259 App. Div. 851, 19 N. Y. S. 2d 175 (2d Dep't 1940).

<sup>47</sup> In *Coppo v. Coppo*, 163 Misc. 249, 297 N. Y. Supp. 744 (Sup. Ct. 1937), the plaintiff husband invoked as a witness to the representation the deceased former husband of the defendant. He testified that the former husband, on his deathbed, committed the defendant wife to the care of the plaintiff "and upon the plaintiff's natural hesitancy to contemplate the death of defendant's former husband, said husband further in defendant's presence told the plaintiff that if he would marry the defendant, that she, the defendant, would proceed to have children by the plaintiff, and thereupon defendant's former husband while upon the bed in the hospital placed the hands of the defendant and the plaintiff together." Thereafter, upon the death of the first husband, the defendant reaffirmed this deathbed

But our considerate courts are now removing the necessity of recalling such conversations and presenting such witnesses. In the recent case of *Lembo v. Lembo*,<sup>48</sup> the court noted that "the referee does not make a finding of any direct statement and representation by defendant to the plaintiff, prior to their marriage, that he desired and intended to and would have children with her and rear a family, and there is no evidence to that effect. Her testimony is that when she consented to and did enter into the marriage with the defendant she expected to have the normal sexual relations of husband and wife with the object of having issue of the marriage. The learned referee accordingly reports, as a finding of fact, that at the time of the marriage the plaintiff relied upon what the referee terms the 'implied warranty' inherent in every marriage and believed defendant would cohabit normally with her."<sup>49</sup> Opening the door wide to applications for annulments from childless couples, Mr. Justice Eder held that "where parties agree to enter into marriage, there is, in such consent, an implied representation, by each, to have children of the union, and no express representation is required, and that a continual refusal by one of them to have issue of the marriage, without any adequate excuse, constitutes a fraud affecting the validity of the marriage entitling the aggrieved spouse to an annulment of the marriage."<sup>50</sup>

Another recurrent state of facts which has been a common basis of actions for annulment in recent years has been an allegation, in cases where the parties were married in a civil ceremony, that the defendant had promised that this would be followed by a religious ceremony, and that, had it not been for this promise, the marriage would not have occurred. On such allegations, many annulments have been granted by our courts.<sup>51</sup>

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promise and "promised that after their marriage they would have a lovely baby boy." In *Gianotti v. Gianotti*, 60 N. Y. S. 2d 74 (Sup. Ct. 1946), the action was not commenced until nine years after the marriage. In *Bentz v. Bentz*, 188 Misc. 86, 67 N. Y. S. 2d 345, (Sup. Ct. 1947), twelve years had elapsed. The court in that case said: "Claims of this character are being presented to the Courts of this State in ever-increasing numbers, largely by those who cannot or will not, for various reasons, resort to the statutory ground for divorce. This subterfuge, so apparent, in many recent cases, if permitted to persist, will inevitably tend to belittle the institution of marriage and bring discredit upon the Courts."

<sup>48</sup> 193 Misc. 1055, 86 N. Y. S. 2d 206 (Sup. Ct. 1949).

<sup>49</sup> *Id.* at 1056, 86 N. Y. S. 2d at 207.

<sup>50</sup> *Id.* at 1057, 86 N. Y. S. 2d at 209.

<sup>51</sup> *Taylor v. Taylor*, 181 Misc. 306, 47 N. Y. S. 2d 401 (Sup. Ct. 1943); *Hubner v. Hubner*, 64 N. Y. S. 2d 513 (Sup. Ct. 1946); *Vonbirojanis v. Von Brack*, 64 N. Y. S. 2d 885 (Sup. Ct. 1946); *Cart v. Cart*, 28 N. Y. S. 2d 61 (Sup. Ct. 1941). Similarly, annulments have been granted on allegations that the defendant, in order to induce the marriage, had falsely represented that after marriage he would adopt plaintiff's religious faith. *Williams v. Williams*, 194 Misc. 201, 86 N. Y. S. 2d 490 (Sup. Ct. 1947); *Taylor v. Taylor*, 181 Misc. 306, 47 N. Y. S. 2d 401 (Sup. Ct. 1943).

As each new type of fraud has been advanced, it has been at first accepted by the courts. As the bar has become acquainted with such acceptance and brought large numbers of actions grounded on such state of facts, the bench has tended to become jaundiced and to look at such actions with a certain amount of skepticism.<sup>52</sup> At the appearance of such skepticism, the popularity of the particular type of fraud has dwindled and another has been developed to take its place. At the present moment, there has been a sudden increase in undefended matrimonial actions based on the Enoch Arden laws,<sup>53</sup> and the *New York Law Journal* has been carrying almost daily advertisements directed to spouses allegedly absent for more than five years notifying them that such actions have been commenced.

In 1947 the Legislative Committee of the Affiliated Young Democrats of New York State described our New York divorce situation as follows:

The laws of the State of New York relating to divorce are more archaic and anachronistic than in any other state excepting South Carolina. Their rigidity in form has given rise to a system of fraud, make-believe and easy divorce in which the bench, the bar, and the public have been open-eyed participants. The restrictions of the divorce laws as they now exist have defeated their own purpose, and, in fact, for those who are willing to bear the stigma of adultery in a judicial record, divorces in New York are easier, less expensive, and more binding than those in Nevada. The existing situation in the divorce courts of this state amounts to an open and public scandal. The Legislature should create a commission on which will be represented the three principal faiths of the state, the bench, the bar, the women of the state, social scientists and the press to consider and recommend revision and modernization of the state's divorce laws which will restore dignity, decency and self-respect to that branch of our courts.<sup>54</sup>

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<sup>52</sup> Chief Judge Crane dissenting in *Mirizio v. Mirizio*, 242 N.Y. 74, 87, 150 N.E. 605, 610 (1926), said: "Besides, there is a large matter of public policy involved in a case like this. The man and wife are not the only ones interested. The public is largely concerned in this question of divorce and the dissolution of homes. Any judge who has held a Special Term in our large cities is acquainted with the large number of uncontested divorce cases, and has had the feeling that they are frequently based upon perjury. The number of divorces is a matter of public comment and criticism. While the courts must grant decrees where honest testimony bring the cases within our statutes, yet at the same time they should be careful not to let down the barriers or make it easy for deception. . . . This would open wide the door for the annulment of marriages where absolute divorce could not be obtained upon the statutory ground."

<sup>53</sup> THE FOURTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK, LEGISLATIVE DOCUMENT (1948) No. 18, Appendix B, Table 8, shows that for the judicial year ending June 30, 1947, there were 468 undefended actions under the Enoch Arden law.

<sup>54</sup> *The Young Democrat*, December, 1947; *The New York Times*, Jan. 5, 1948.

The movement for reform of New York's divorce laws is of long standing. As long ago as 1911, State Senator Franklin D. Roosevelt introduced a resolution in the New York Legislature (unanimously passed by both Houses) calling for New York's representatives in Congress to initiate passage of a uniform national divorce law.<sup>55</sup> The *New York Times* for September 8, 1911, reported that "Senator Roosevelt does not believe that a Federal divorce law should be as rigid as the statute enacted in this state, where absolute divorce can be obtained on only one ground. But, on the other hand, he believes that the divorce laws of Nevada and some other Western states are too lax." The passage of the Roosevelt resolution in 1911 was the last constructive act taken by the Legislature towards an over-all revision of our laws on marriage and divorce.

The Committee on Law Reform of the Association of the Bar of the City of New York in 1945 proposed that New York's divorce laws be amended by creating as additional grounds for divorce those grounds commonly a basis for divorce in other states such as abandonment, habitual intemperance, neglect or refusal to provide, cruel and inhuman treatment, etc.<sup>56</sup> Although two members of the Legislature were members of the Bar Association committee and signed the report, neither introduced the bill, and it was not until three years later that Assemblyman William T. Andrews introduced it in the Legislature where it died.<sup>57</sup> This bill, of course, is subject to the criticism that it made no procedural changes and that, since the undefended calendar would continue, the same persons who were willing to commit frauds and perjury as to adultery would not hesitate to commit them as to cruel and inhuman treatment, and the other grounds to be provided.

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<sup>55</sup> The movement for a uniform divorce law has been of long standing. In 1848 the first uniform divorce bill was introduced into Congress. Forty-four years later the Judiciary Committee of the House reported (in 1892) that "it was an invasion of the domestic rights of the people for Congress to enact uniform marriage and divorce laws." In 1905 the Governor of Pennsylvania issued a call to the governors of the several states, requesting them to cooperate in the assembling of a Congress of Delegates with a view to adopting a draft of a general law so as to secure uniform statutes on divorce throughout the country. Forty-two states accepted this invitation, met in Washington, and adopted resolutions. But the law proposed was enacted only by Delaware, New Jersey, and Wisconsin. See *Proposed Uniform Statutes Relating to Annulment and Divorce submitted by the full Committee on Resolutions to Congress, 1906*, in folio pamphlet, v. 8, and *National Congress on Uniform Divorce Laws, Washington, 1906, Proceedings*.

<sup>56</sup> The Association of the Bar of the City of New York, Committee on Law Reform, *Report on the Proposal to Amend the Civil Practice Act by Providing for Grounds Additional to Adultery for Absolute Divorce*.

<sup>57</sup> STATE OF NEW YORK, ASSEMBLY BILL No. 2592 (Int. 2402), February 24, 1948. The additional grounds for divorce provided in this bill were already grounds in New York for a separation.

At the 1948 session of the Legislature, the proposal for a Commission to consider the over-all problems of marriage and divorce laws in New York was introduced by Assemblyman Bernard Austin.<sup>58</sup> In the 1949 session that proposal was again introduced, this time by Assemblywoman Janet Hill Gordon.<sup>59</sup> Both of these resolutions died in committee. Early in 1948 the Association of the Bar of the City of New York created a Special Committee on the Improvement of the Divorce Laws, and, under the auspices of that committee, a Citizens Committee for the Improvement of the Divorce Laws has been formed and is actively attempting to obtain legislative action.

In November, 1948, the operation of divorce mills in New York was forcefully brought to the attention of the public by the District Attorney of New York County.<sup>60</sup> This exposé served to launch a great public demand for revision of New York's laws relating to marriage and divorce. Virtually every newspaper in the metropolitan area urged the Legislature to take immediate steps to create a commission to investigate the problem and to come up with recommendations.<sup>61</sup> Bar Associa-

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<sup>58</sup> STATE OF NEW YORK, ASSEMBLY BILL No. 2505 (Int. 2326) February 20, 1948.

<sup>59</sup> STATE OF NEW YORK, ASSEMBLY BILL No. 1549 (Int. 1499) February 8, 1949.

<sup>60</sup> New York Journal-American, Dec. 1, 1948, p. 1, et seq. New York Times, Dec. 1, 1948, p. 1, col. 3; Dec. 2, 1948, p. 1, col. 1; Dec. 3, 1948, p. 21, col. 3 and p. 24, col. 5.

<sup>61</sup> Thus, the New York Daily News, in an editorial entitled *New York's Divorce Snafu* had already said on January 7, 1948: "The solution proposed—a representative legislative commission with delegates from all groups primarily interested—seems to us as sound a suggestion as has ever been offered on the subject. If the 1948 Legislature will act on the Young Democrats' proposal and appoint such a commission, we believe it will perform a historic service for the people of New York State." The New York Herald Tribune urged legislative action in editorials entitled *Divorce and the Legislature*, Dec. 7, 1948, p. 32, cols. 2, 3, and *Intimidation in Albany*, Jan. 22, 1949, p. 10, col. 2. On January 26, 1949, in an editorial entitled *Time for a Divorce Commission*, the Herald Tribune, p. 22, cols. 1, 2, said: "District Attorney Hogan presents another unsavory installment of the New York divorce racket. The situation still stands the same, which is that when two people desire divorce for reasons good or bad they are forced into an established rigmarole of fraud in which the state, the judges, and lawyers, to say nothing of the personally interested parties, are all equally guilty. The present investigation may well result in sending a handful of lawyers and professional witnesses to prison, but farther than that it hardly dares go. Society is being handed a memorandum on a rotten state of human relations. Aside from the immediate detail of properly prosecuting the cases against individuals, the important question remains unanswered. This is whether the people of New York approve of the existing false front. Divorce is widely practiced, either by going to another state or by staying home and chancing our institutionalized claptrap. The point is whether New York wishes to continue its studied refusal to recognize people and problems as they are. Opinions on divorce are endless. If such an instrument is to be recognized, which it is under law, it follows that the existing mess calls for intelligent examination and debate, with a view toward fundamental correction. The first step should be to get the facts, all of them. After that let us hear the arguments for and against change. Finally, then, public opinion must decide. Haste is decidedly unlikely, and indeed inadvisable. But New York needs

tions, Protestant and Jewish church and ministers groups, women's organizations, all demanded legislative action at the session which convened in January, 1949.<sup>62</sup>

A survey made by the *New York Herald-Tribune* in December, 1948, of the 92 legislators representing New York City in Albany showed that, of the 59 legislators who could be reached, 14 advocated the creation of a Commission, 18 had no comment, and 19 declared themselves unalterably opposed to any change in the laws. Only a handful favored the *Andrews Bill*.<sup>63</sup> Yet of the 14 who favored the Commission, none introduced the resolution calling for it, and no legislation dealing with marriage or divorce was introduced in the Legislature other than the commission bill introduced by Assemblywoman Gordan. Nor, in his requests for legislation, was the subject of divorce referred to by the Governor. Despite the great clamor from the public, the press, and the bar urging revision, the pressure for retention of the status quo was even greater. It is important to understand the basis for such opposition.

Early in December, 1948, the Right Reverend Robert E. McCormick, presiding judge of the New York Archdiocesan Tribunal of the Roman Catholic Church, issued a statement urging the Legislature to pass a law abolishing divorce entirely in this state rather than consider any revision of the present divorce laws. Monsignor McCormick, while conceding that the present law was a bad law from the legal standpoint, said that the addition of other grounds for divorce would make it a worse law. He said that if the Legislature were really interested in the welfare of the

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to make a start. We urge upon the Legislature now in session at Albany that a simple and practical beginning would be to create an investigatory commission, broad in membership, empowered to search out the whole story of marriage and divorce in New York. The responsibility is on Republicans and Democrats alike. A moderate amount of courage would shine." On January 22, 1949, in an editorial entitled *A Study of Divorce Laws*, the *New York Times*, p. 12, col. 3, said: "We believe there is a widespread, though not by any means unanimous, acceptance of the opinion that New York's divorce laws need to be changed or at least thoroughly re-examined. The soundest approach, and probably the only practicable way from a political standpoint, is to have a state commission authorized by the Legislature make a study of these laws and report back to the Legislature at the 1950 session. It seems apparent that this is as much as the advocates of divorce law reform can hope to obtain at this session. It is also a method which should be acceptable even to opponents of any major change in the laws. We urge that this step be taken."

<sup>62</sup> Bar associations which have come out for divorce law reforms include the Association of the Bar of the City of New York, the New York Women's Bar Association, Suffolk County Bar Association, Newburgh City Bar Association, Jamestown Bar Association, Tioga County Bar Association, and War Veterans Bar Association. Only the Richmond County Bar Association has adopted resolutions in opposition. The New York State Council of Churches and the New York City Association of Jewish Ministers also urged revision of the divorce laws.

<sup>63</sup> *New York Herald-Tribune*, Dec. 19, 1948, sec. II, p. 5, cols. 1, 2.

people and of the state itself, it would correct the situation and ban divorce in New York entirely.<sup>64</sup> This viewpoint was also summarized by State Senator Francis J. Mahoney, who said:

This problem like all similar problems involves morals and demands logical reasoning. Some of those who seize on the currently popular interest in the situation to expound their respective solutions, often initiate their thinking by disregarding or denying the origin, nature and purpose of matrimony. Having thus dispensed with the moral element, they proceed to prove themselves deficient in logic. In order to avoid occasional perjury in divorce suits, they propose to sacrifice the very foundation of matrimony. They would make divorce easier by extending the grounds for divorce. They argue that if divorce could be obtained for cruelty or incompatibility (whatever that is), perjury would be reduced or prevented. Presumably they contend that it would be less perjurious to swear falsely as to cruelty or incompatibility than it would be to swear falsely as to adultery.<sup>65</sup>

The position of these advocates of the status quo is premised on the belief that revised divorce laws would increase the number of divorces and broken marriages in New York. But today any New Yorker who wants one gets a divorce. In addition to the more than thirteen thousand marital dissolutions which last year occurred in our own courts, many thousands of New Yorkers obtained divorces in other states. Divorce was available to them at their asking and only at the expense of their consciences. Nor do revised divorce laws create more broken homes. As the Bar Association committee said, "Divorce is an effect, not a cause. It is adultery, cruelty, desertion, failure to provide, drunkenness, and incompatibility, etc., that destroy marriages. Divorce does not occur until after the marriage has been completely wrecked."<sup>66</sup>

It is possible to have divorce laws which salvage marriages, and the proof of that comes from the Division of Domestic Relations of the Court of Common Pleas in Toledo, Ohio, which for twelve years has been presided over by Judge Paul Alexander, Chairman of the Special Committee on Divorce and Marriage Laws and Family Courts of the American Bar Association. Under the proposals drafted by the committee, and placed in operation in Judge Alexander's Court, the divorce court is equipped with an adequate staff which attempts to go beyond the legal peg on which the divorce action is hung, and to find out just what was the cause

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<sup>64</sup> New York Herald-Tribune, Dec. 11, 1948, p. 1, col. 5.

<sup>65</sup> New York Herald-Tribune, Dec. 8, 1948.

<sup>66</sup> The Association of the Bar of the City of New York, Committee on Law Reform, *Report on the Proposal to Amend the Civil Practice Act by Providing for Grounds Additional to Adultery for Absolute Divorce.*



of the breakup of the marriage, whether the marriage can still be saved, and what is best for the husband and wife, the children, and the state. The old concept of awarding a divorce as punishment for the misdeed of one spouse is replaced by the new approach of diagnosis and treatment.<sup>67</sup>

But specific solutions for New York's divorce problem are beyond the scope of this article. Our present laws, from a lawyer's viewpoint, are bad because of the corrupting effect which their administration has had upon our courts. The keystone of our Western democracy is the integrity and honesty of our courts, and the knowledge that any citizen who has been aggrieved will obtain just and honest dealing there. Our divorce practice has become an evil in that it has corrupted and degraded those courts. Witnesses who do not hesitate to commit perjury in an undefended divorce action in the Supreme Court will not hesitate to commit such perjury in a criminal prosecution or equity action in the same or other courts. And, when they know that their frauds and their perjury are countenanced by our courts without reprisal, a blow has been struck at our democratic way of life which will have serious repercussions.

New York has been the leader among the states in most progressive social legislation. It should not be the laggard in laws relating to our most vital problem—the family. The next Legislature ought to create a Commission, on which all elements in the state will be represented by thoughtful and outstanding men and women, which will review all aspects of the problem, listen to all points of view, and present recommendations for a model law to the Legislature and the public.

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<sup>67</sup> Judge Alexander's classic exposition of the twentieth-century problems of marriage and divorce, and his proposed solution as evolved through the Toledo experiment, appears in the *JOURNAL OF THE AMERICAN JUDICATURE SOCIETY*, August, 1948 (Vol. 32, No. 2, pp. 38-47).