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JEWISH DIVORCE AND THE CIVIL LAW

Millions of people in the United States are bound by two distinct bodies of law: civil and religious.¹ The former system is enforced by penalties placed upon its violators by officials of the State. The latter is only binding on an individual by the dictates of his own conscience. Because many Americans govern their actions by following both these bodies of law, it is imperative that an attorney be aware of this situation so that he may offer his client a solution of his problems in keeping with his civil and religious obligations. Nowhere is this need for awareness on the part of the attorney greater than in the area of marriage and divorce.

Due to the fact that many Americans are bound by both these systems of law, the Illinois legislature, like legislatures in other states, has adopted statutes pertaining to recognizing marriages performed by clergymen.² Even though these legislatures allow a clergyman to perform a marriage ceremony, they have by no means relinquished their control over marriage. It is the civil law rather than the religious which determines whether two parties are capable of a civil marriage. Illinois, although granting clergymen power to perform a marriage ceremony, has not given them power to determine who has capacity to marry. The Illinois civil statutes state the degrees of consanguinity within which marriages are prohibited,³ and clergymen performing marriages in Illinois are bound by these limitations. Since the religious person is not only subject to his religious laws as regards capacity, but also those of the state in which he resides, he must conform to the more restrictive body of law in order to live within both systems.

In retrospect it can be seen that in regard to marriage a religious person is bound to live within two codes, one of which may be more demanding than the other. The legislatures of the various states have recognized this situation and have endeavored to eliminate some of the resulting difficulties by granting a clergyman power to perform a civil marriage ceremony. However, the legislature have not seen fit to completely eliminate this situation by relinquishing to the clergyman power to determine the capacity of the marrying parties. Thus it may be said that in regard to marriage, both the civil and religious law are in harmony as to some points and divergent as to others.

The above discussion of the interplay between civil and religious laws in regard to marriage was outlined to show how it contrasts with the relationship which exists between civil and religious laws in regard to divorce.

¹ Religious law refers to such systems as Canon Law, which governs Roman Catholics, and Jewish Religious Law, which governs Jews.

² ILL. REV. STAT. ch. 89 § 4-5 (1961).

³ ILL. REV. STAT. ch. 89 § 1 (1961).

It has been shown how the civil and religious laws work harmoniously together in such areas as who may perform the marriage ceremony, and how, in other areas, such as marriage capacity, they have no relation to each other—each system setting up its own separate set of rules. In regard to divorce, there is no harmonious relationship between the civil and religious law. The state does not recognize a religious divorce.⁴

At early common law divorce was not known. Marriage was for life. Until 1857, a marriage could not be dissolved in England without an Act of Parliament.⁵ In those early days divorce was granted infrequently and then, only on grounds of adultery. Today, of course, one need not introduce a private bill in the legislature to obtain a divorce. The Illinois legislature, as well as the legislatures of the other states, has enacted a general divorce statute which enumerates the grounds under which an Illinois court may grant a divorce decree.⁶ Today, although divorces are no longer granted by private bills enacted by the legislature but by courts under general divorce statutes, it is, in either instance, the state which dissolves the marriage, not the married parties. Today, although a party must petition the court for a divorce, the court dissolves the marriage, not the parties. Not only does the state court dissolve the marriage on the grounds enumerated in the statutes establishing divorce, it also dissolves the marriage on conditions stated in such statutes.⁷

Because legislatures will not cede any of their power over divorces to religious leaders,⁸ there have arisen conflicts between civil and religious laws governing divorce. The religious law governing a particular individual may have an entirely different approach to, and entirely different grounds for, divorce—if it permits it at all. The religious laws applicable to the Roman Catholic are found in Canon Law.⁹ A Catholic is obliged to obtain permission through the Chancery Office before an attempt is made to get a civil divorce. However, even if a Catholic receives a civil divorce, with the permission of the Chancery Office, such person is prohibited from remarrying.¹⁰ Not only are the civil statutes regarding di-

⁴ *In re Schlaw*, 136 F. 2d 480 (1943); *In re Spiegel*, 24 F. 2d 605 (1928).

⁵ S. Daiches, 8 Jour. Comp. Leg. 215 (3d ser. 1926).

⁶ ILL. REV. STAT. ch. 40, § 1 (1961).

⁷ Under a former Illinois Statute, both parties to an Illinois divorce were denied the capacity to remarry for a term of one year. Hurd's Statute, ch. 40, § 1A (1911).

⁸ *Sokel v. People*, 212 Ill. 238, 72 N.E. 382 (1904); *Chertok v. Chertok*, 208 App. Div. 161, 203 N.Y.S. 163 (1924).

⁹ The laws of the Roman Catholic Church regarding marriages are to be found in the CODE OF CANON LAW, promulgated in 1917 by Pope Benedict XV, title VII, canons 1012–1143 inclusive.

¹⁰ In some cases an annulment is granted by the Church. Vail, *Annulment in Church and State*, 5 DE PAUL L. REV. 217 (1956).

orce founded on a completely different basis than the religious laws of the Catholic Church, they also differ vastly from Jewish divorce laws. It is the purpose of the remainder of this comment to discuss the laws of the Jewish religion in regard to divorce.

To the vast majority who read the Old Testament, it is a book of inspiration, perhaps even history, and religion. However, few individuals think of the Old Testament as a legal code. Yet the Pentateuch¹¹ contains a complete civil and criminal code. Within it can be found a complete code governing the everyday life of the Israelite. Not only did the Israelite guide his daily life by the provisions of the Pentateuch but it also served as his constitution. The Pentateuch contains provisions for a form of government¹² and gives to proper legislative bodies established thereunder, power to enact and expand the law in conformity with the statutes set forth in the Pentateuch. One may also find within the Pentateuch a judicial article. Courts are set up and given the power to interpret and apply the statutes which are set out in the Pentateuch and which are enacted by the proper legislative body. This power is given to the judiciary in the following words:

According to the law which they [judges and legislators] shall teach thee and according to the judgements which they shall tell thee, thou shalt do.¹⁴

Today, this law is binding in conscience upon the devout Jew, particularly as pertaining to the law of personal status.

The basis for Jewish divorce law is found in the Old Testament. The following words which are found in Deuteronomy 24:1-5, establish both the foundation of Jewish divorce law and the grounds for such a divorce:

When a man takes a wife, and marries her; then should it happen that she finds no favour in his eyes, because he had found some unseemly thing in her, he may write her a bill of divorcement and give it into her hands.

The words "he may write her a bill of divorcement and give it into her hands" presume the existence of divorce and merely supply the procedure to be followed. The procedural aspect of a Jewish divorce will be taken up later in this comment. The words "some unseemly thing" contain the grounds for divorce. These words, which contain the grounds for divorce, are very general and require interpretation. The Rabbis in their capacity as scholars and in their official calling as judges interpret these words. The accepted interpretation is that "unseemly thing" means in-

¹¹ The PENTATEUCH consists of the first five books of the OLD TESTAMENT: GENESIS, EXODUS, LEVITICUS, NUMBERS and DEUTERONOMY.

¹² DEUTERONOMY 17:14.

¹³ DEUTERONOMY 48:18.

¹⁴ DEUTERONOMY 17:8-12.

decency in anything. This interpretation implies that there are many grounds for divorce.¹⁵

In the eleventh century it was formally enacted¹⁶ that no such divorce be given without the consent of the wife,¹⁷ unless the grounds are adultery, refusal to partake of marital relations, or any similar behavior which negates the very essence of marriage. It has been said that "the marriage bond is holy; but whilst it is inviolable, it is not indissoluble."¹⁸ By this statement is meant that since a marriage is inviolable, a violation of it must make it terminable. Any act amounting to a violation of the marriage is cause for its termination.

At this point in our discussion, it should be pointed out that the basic concept of divorce as found in Jewish Law differs from that underlying a civil divorce. In a civil divorce, the party seeking such divorce petitions a court to dissolve the marriage. However, it is not the petitioning party or the respondent in a civil divorce that dissolves the marriage, it is the state. Thus it can be said that the state is the active party in a civil divorce because it is the state which dissolves the marriage.¹⁹ The parties to the

¹⁵ The Biblical statutes were enunciatory in nature and required much interpretation. These interpretations were made by those authorized to do so. There evolved, through the many generations, a great mass of interpretive teachings requiring orderly arrangement. The first attempt of assembling this vast accumulation of laws was begun by Hillel about 200 B.C. This effort lasted for some 400 years and the final result was the MISHNA, a compilation similar to a Restatement of Laws, completed about 220 C.E. by Judah, the Prince. This compilation soon required interpretations. The result of all this is the TALMUD—a gigantic work consisting of 63 tractates divided into 523 chapters. These chapters deal with the laws of the Jewish people from which Jewish jurisprudence is derived. It includes laws of purity, chastity, property, contracts, negligence, damages, domestic relations, crimes, evidence—in short, the gamut of basic jurisprudence. It must be pointed out that the TALMUD consists of, among other things, a vast number of reported cases and discussions reconciling and distinguishing decisions of previous cases, as well as construction of statutes. This work of jurisprudence continued and about the 10th century we have an attempt to codify these laws. The outstanding codes are: YAD HAZAKAH, compiled in the 12th century; TUR EBEN HAEZER, in the 13th century and SHULHAN ARUCH EBEN HAEZER, in the 16th century. These codifiers restated the opinions and laws that they considered to be the general and accepted views. At the same time, the body of law grew, that is, decisions multiplied. These were preserved in SH'EYLOT U'TSHUVOT—legal problems and solutions which was compiled by Rabbis as judges. These are the authorities which are relied on by the Rabbis when they are adjudicating matters brought before them.

¹⁶ Code Eben Haezer, Ch. 119 § 3, Comment of Romo.

¹⁷ *Ibid.*

¹⁸ Hertz, *THE PENTATEUCH*, Soncino Press (London, 1952).

¹⁹ The reason for this state of affairs is historical. "For many centuries this . . . concept of the absolute indissolubility of marriage was held to be the civil law of all Christian countries and became a part of Anglo-American common law. The modern concept of civil divorce with the destruction of the marriage bond or status and with the right to remarry finds its origin about the middle of the sixteenth century. In the early days of its existence absolute divorce was granted infrequently. . . . Since that time the

civil divorce are passive in that they do not dissolve the marriage themselves but merely bring the question before the court.

However, under the Jewish concept of divorce, the parties are the active participants. This is so because the parties may dissolve their marriage the same way they entered into it, by mutual consent. It is the husband who gives the divorce and not the court. This is the effect of the biblical words, "and he writes her a bill of divorcement and gives it into her hand."²⁰ The function of the Religious Court in Jewish Law is that of a passive participant. Its role is to attempt to dissuade the parties and counsel them against proceeding with the divorce.²¹ Having failed to change their minds, it is the function of the court to supervise the act of divorcement. The justification for this is that by legally severing their relation the couple is fulfilling their state of mind and heart and the court is merely asked to sanction this state.

As has been said, a Jewish divorce is based upon the mutual consent of both parties. However, if only one party would consent, then the Jewish Religious Court sitting as a "court of equity" would, upon the showing of specific grounds, act with all the power at its disposal to force consent from the reluctant party. It should be recalled that in different periods of history the Jewish Religious Court had temporal power to carry out its orders and that at times physical force was used to force assent from the non-consenting party. Before the court would force a party to consent to the divorce, specific grounds had to be shown. If a husband wanted to have the court compel his wife to consent to the divorce, he had to show one of the following grounds:

adultery or strong suspicion of adultery
 public indecency
 change of religion or disregard of the Jewish laws
 in the conduct of the house
 refusal to cohabit for a year
 refusal to follow the husband to another domicile
 grossly insulting behavior
 an incurable disease which renders marital relations
 impossible.²²

concept of absolute divorce has spread and been liberalized until it has become a part of the statutory law of most of the western nations." Vail, *Annulment in Church and State*, 5 DE PAUL L. REV. 217 (1956). Under this concept one has no right to divorce but he may petition the state to confer a privilege and dissolve the marriage.

²⁰ DEUTERONOMY 24.1.

²¹ To augment the persuasiveness of the court it is pointed out that the Biblical statute prohibits their remarriage should she in the meantime have married someone else. "Her husband who sent her away, may not take her again to be his wife," after she has been married to someone else. DEUTERONOMY 24:4.

²² TALMUD KETHUBOTH, at 72 and 75; EBEN HAEZER ch. XV.

If the wife wished to have the court compel her husband to give her a divorcement, she had to show one of the following grounds:

impotence
 a loathesome chronic disease
 ill treatment of the wife
 engaged in malodorous business
 change of religion
 dissoluteness of morals
 refusal of cohabitation
 refusal to support one's wife.²³

In many European countries, the civil authorities have recognized the Rabbinic courts and have given them exclusive jurisdiction in matters of marriage and divorce among members of their own religious community.²⁴ For instance, in England the Jewish Religious court had the right to grant divorces until 1866. At this time, the Solicitor-General, in a formal statement, advised the Chief Rabbinate that such decrees would no longer be recognized.²⁵ The Chief Rabbinate accordingly issued its new rule that it would not grant a religious divorce until a civil divorce has been obtained or is in the process of being obtained.²⁶

If a Jewish religious divorce is granted in the United States no state will recognize it. *Chertok v. Chertok*²⁷ was an action in New York for an an-

²³ Mielziner, *THE JEWISH LAW OF MARRIAGE AND DIVORCE* (1884).

²⁴ During many centuries of domicile in European countries the Jews were able to maintain the rule of Jewish law and to preserve the functioning of their courts. Guido Kisch, *Relations between Jewish and Christian Courts in the Middle Ages*, in Louis Ginsberg's *JUBILEE VOLUME 201* (English Sec. 1945).

This was true from early Roman history to very recent times. Simon Dubnov, *History of the Jews*, Tel-Aviv, Israel, Vol. III (5th ed. 1950). Lucius Antonius, for instance, granted the right of the Jewish Courts of Justice to adjudicate in all litigations arising among Jews.

In 938 C.E. these courts were converted into courts of arbitration. *De jure* they were merely courts of arbitration, *de facto* they had much more power.

In the Middle Ages even greater autonomy was enjoyed. This jurisdictional status was prevalent in Western as well as in Central European countries.

Among all the institutions of self-government in the Middle Ages, the Jewish court was by far the most distinctive and characteristic. During the Middle Ages the Jewish legal system was so well organized that courts of appeal were differentiated carefully from courts of original jurisdiction.

This was also generally true in Moslem countries. In Germany, at least during the 11th and 12th centuries, the jurisdiction of the Jewish courts was compulsory and exclusive for Jewish litigants. In Christian Spain up to 1492, the decisions of these Jewish courts had the full recognition of the kings and their officers. The application of Jewish jurisprudence indeed continued in Jewry in almost every country until about 200 years ago. Jurisdiction over personal status remained in Jewish courts much later.

²⁵ 72 *SOLICITORS JOURNAL* 744 (1928).

²⁶ 161 *LAW TIMES* 244 (March 20, 1926).

²⁷ 208 *App. Div.* 161, 203 *N.Y.S.* 163 (1924).

nullment of a marriage on the grounds that the defendant at the time of entering this marriage was already married. The defense was that a divorce had been given by the defendant to his previous wife in accordance with Rabbinic Law. The religious divorce proceedings were initiated in New York and when the divorce reached his wife in Russia she was divorced in accordance with Jewish Law. Moreover, the Russian government recognized this religious divorce. However, the New York court held that this religious divorce was void. The court stated that since the religious divorce proceedings had their inception in New York it was merely a Jewish religious divorce granted in New York. It further stated that the proceedings in Russia were merely intended to give effect to the religious divorce obtained in New York.²⁸ The court then concluded that it would not recognize a Jewish divorce granted in the United States.

Although no state in the United States has granted a Jewish Religious court the power to issue divorces, several state courts have passed on the validity of a Jewish divorce which was granted elsewhere. In *Machronsky v. Machronsky*²⁹ the Ohio Appellate Court was faced with the question whether it would recognize as a valid divorce a Jewish Religious divorce granted in Russia. The court held that since the divorce was granted in Russia and under Russian law was valid, it would be recognized in Ohio.

In *Leshinsky v. Leshinsky*³⁰ a New York court was faced with the question of whether to recognize a Jewish divorce granted in Russia. In this case, Mr. Leshinsky brought an action to annul his marriage on the ground that at the time he married his wife she was married to another. The wife's defense was that she was not married at the time of their marriage. She contended that although she had been married previously, at the time she married Mr. Leshinsky, she had obtained a divorce from her prior husband. This was a Jewish religious divorce. The court, upholding Mrs. Leshinsky's defense, stated:

The act of the Rabbi . . . was . . . that of an ecclesiastical court recognized by the Russian government, and vested by it with the power of granting divorces to members of the faith domiciled there. . . . The foreign rabbinical divorce is recognized upon grounds of comity or international law. . . .³¹

²⁸ The judge's opinion in *Chertok v. Chertok* is based on a misconception of the Jewish Law of divorce with regard to the moment of divorcement. Divorcement occurs at the moment of the wife's acceptance of the Bill of Divorcement. Every step up to that point is preparatory to it. Even after the Bill of Divorcement has been written and duly attested to by the witnesses, it is nevertheless revocable and voidable up to the moment of acceptance by the wife.

²⁹ 31 Ohio App. 482, 166 N.E. 423 (1927).

³⁰ 5 Misc. Rep. 495, 25 N.Y.S. 841 (1893).

³¹ *Id.* at 25 N.Y.S. at 842-43.

Generally if a Jew obtains a Jewish religious divorce in a country which gives the divorce legal recognition, all other states will recognize it; whereas it will be regarded as invalid if it is void in the situs country. In *Sokol v. People*,³² an Illinois prosecution for bigamy, the defendant pleaded as a defense a Jewish religious divorce granted in Sefad, Palestine. The Illinois court ruled against this defense and stated that it would not recognize the religious divorce since it was not recognized by the civil authorities in the country in which it was given.

In the issuance of a Bill of Divorcement or *Geht*, there are certain procedures which must be followed.³³ The religious court consists of three Rabbis well versed in the laws of marriage and divorce. The presiding judge begins the proceedings by asking the husband: "Do you freely, without coercion or reservation, give this divorce?" The husband replies in the affirmative. The husband then formally appoints the scribe as his agent addressing him thus: "I want you and authorize you to write a *Geht* for my wife (naming her)." At the same time the husband appoints the witnesses by saying, "You are my witnesses and I want you to sign this *Geht*." The scribe then writes the document in the presence of the witnesses.

On the _____ day of the week, the _____ day of the month, in the year _____ of the creation of the world, according to the number we reckon here, in Chicago the city which is situated on Lake Michigan, I, _____ son of _____, who stand this day in Chicago the city situated on Lake Michigan, do hereby consent with my own will, without force, free and unrestrained, to grant a Bill of Divorcement to thee, my wife _____, daughter of _____, who hast been my wife from time past, and with this I free, release and divorce thee, that thou mayest have control and power over thyself from now and hereafter, to be married to any man whom thou mayest choose, and no man shall hinder thee from this day for evermore, and thus thou art free for any man. And this shall be unto thee from me a Bill of Divorcement a letter of freedom, and a deed of release according to the Law of Moses and of Israel.

_____, son of _____, witness
 _____, son of _____, witness³⁴

The witnesses sign the above in the presence of the court and in the presence of each other declaring that they know that it is a *Geht* for a particular couple. The presiding Rabbi, after carefully reading the document, hands it to the husband and again inquires of him whether he is executing it "of his free will and without reservation." The court then

³² 212 Ill. 238, 72 N.E. 382 (1927).

³³ This discussion of Jewish religious procedures in regard to issuing the *Geht* is not intended to be exhaustive but merely to acquaint the reader with some of the basic elements involved.

³⁴ Text of *Geht*.

addresses itself to the wife asking, "Do you of your free will accept the *Geht*?" She answers in the affirmative. The husband then performs the Act of Divorcement by handing the *Geht* into her hands accompanied by the statement: "Here is your *Geht* and you are divorced with it and free to marry anyone."

Because of the fact that the *Geht* does not contain the signatures of the presiding judges, it is no conclusive proof, by itself, that all the procedure, which are necessary to validate the document, have been followed. The court therefore retains the *Geht* in its files and issues to the parties a Certificate of Divorce certifying that the court has read the *Geht*, that it has seen the divorcement, and that it conforms to all requirements.³⁵

Within all Jewish communities in western countries, the accepted practice is not to grant a religious divorce until a civil divorce has been obtained or is being obtained. Thus today the only people who submit themselves to the Religious Court are those who have already obtained a civil divorce or those in the process of obtaining one. If at this time both husband and wife are willing to be divorced in accordance with Jewish religious law, there is no problem because the Jewish concept of divorce is based on mutual consent. The problem today, arises when the husband is unwilling to give a religious divorce or the wife is unwilling to accept it. It should be recalled that historically, on a showing of certain grounds, a husband or wife was entitled to have the Religious Court exercise all its power to force the non-consenting party to consent. But today, the Jewish religious court lacks this power and thus can not force agreement from the non-consenting party.

Although the Jewish religious court may no longer aid a party in forcing his spouse to consent to a religious divorce, another method of coercion has been employed through the civil courts. This method was tried in *Koeppel v. Koeppel*.³⁶ Mrs. Koeppel, after filing for an annulment, entered into the following contract with her husband:

Upon the successful prosecution of the Wife's action for the dissolution of her marriage, the Husband and Wife covenant and agree that he and she will, whenever called upon, and if and whenever the same shall become necessary, appear before a Rabbi or Rabbinat selected and designed by whomsoever of the parties who shall first demand the same, and execute any and all papers and documents required by and necessary to effectuate a dissolution of their

³⁵ The Certificate of Divorce concludes as follows: "We, the undersigned court, having ascertained and clearly established that the whole proceeding with respect to this *Geht* (here the names of the parties are included) was done properly and in conformity with the ordinances of the Sages, have torn the aforementioned *Geht* . . . Now she is permitted to any man. What transpired before us on such and such a date we have written and sealed at such a place, and given this judicial record to her, so that it may serve her as proof. [Seal of the court.]"

³⁶ 138 N.Y.S. 2d 366 (1954).

marriage in accordance with the ecclesiastical laws of the Faith and Church of said parties.³⁷

After Mrs. Koepfel obtained an annulment she wished to appear before a religious court and obtain a Jewish divorce. Her husband refused to appear and she sued for specific performance of the above mentioned contract. One of the defenses urged by Mr. Koepfel to this action was that granting specific performance of such a contract would be a violation of his free exercise of religion guaranteed under the Fourteenth Amendment to the Federal Constitution. The court ruled against this defense and ordered Mr. Koepfel to appear before the Rabbinate.³⁸ The court stated:

His appearance before the Rabbinate to answer questions and give evidence needed by them to make a decision is not a profession of faith.³⁹

However, the holding in the *Koepfel* case that granting specific performance of a contract to appear before a Rabbinate would not force one into a "profession of faith" and thus would not violate one's right to free exercise of religion, seems to be an erroneous view. The Supreme Court has held that the first amendment religious rights apply to the states through the Fourteenth Amendment.⁴⁰ The Free Exercise Clause, which thus applies to the states, means that one may not be compelled by law to submit to any particular form of worship.⁴¹ It may be true, as the New York Court states, that such an appearance is not a "profession of faith" but it certainly is a forced submission to particular religious forms of procedure. Such type of compulsion would appear to be prohibited by the Free Exercise Clause.

If contracts to appear before a Rabbinate are given specific performance, it not only seems that they are violative of the Free Exercise Clause of the Federal Constitution but that they are violative of the Establishment Clause of the Federal Constitution:

Congress shall make no law respecting an Establishment of Religion.

In order to show that granting specific performance of a contract to appear before a religious court is a violation of the Establishment Clause, as it goes into the Fourteenth Amendment, it must first be shown that the

³⁷ *Id.* at 369.

³⁸ Upon appeal to the Supreme Court, Appellate Division of the State of New York, the lower court's order granting specific performance was reversed on the ground that the agreement was too indefinite to support a judgment of specific performance. The Supreme Court did not review the lower court's reasoning in regard to the constitutional issue raised by Mr. Koepfel.

³⁹ *Id.* at 373.

⁴⁰ *Cantwell v. Connecticut*, 310 U.S. 296 (1910).

⁴¹ *Ibid.*

state is acting, not individuals. This is so because the Fourteenth Amendment only prohibits certain state action not private action.⁴² The Supreme Court of the United States has held that when restrictive covenants not to sell land to members of the Negro race are enforced by a state, it is the state which is acting.⁴³ Thus it would certainly seem that when the state grants specific performance to a contract to appear before a religious court it is the state which is forcing the party to appear.

Having established that the enforcement of a contract to appear before a Rabbinate is state action, it must still be shown to be violative of the Establishment Clause. The meaning of the Establishment Clause was stated by Mr. Justice Black, in *Everson v. Board of Education*⁴⁴ to be as follows:

The "Establishment of Religion" clause of the First Amendment means at least this: . . . Neither [a state nor the Federal Government] can force nor influence a person to go to church or to remain away from church against his will or force him to profess a belief or disbelief in any religion.⁴⁵

It seems that if the state would compel a person to submit himself to a Jewish religious court, it would be tantamount to the state forcing a person to attend church or submit to other religious practices. Because of this, it appears that if a state would grant specific performance to a contract to submit to a Jewish religious court it would violate the Establishment Clause of the Federal Constitution.

Since a contract to appear before a religious court cannot be enforced except in violation of the Federal Constitution, and since Jewish religious courts no longer have any temporal power over members of their religion, it appears that there is no way to force an unwilling person to submit to one. If both parties are agreeable, there is no problem. If one party will not agree there is nothing that can be done. In handling a divorce between people of the Jewish Faith, an attorney should be aware of the above situation and counsel the parties to consent in order to avoid the effects of not obtaining a religious divorce. For example, if a religious woman obtains a civil divorce and her husband refuses to give her a Jewish divorce, she can not, in conscience, remarry, nor will any religious man marry her. If she does remarry without a religious divorce, the second marriage is considered adulterous and absolutely void, and the children of such a marriage are considered to be bastards.

⁴² *Shelley v. Kraemer*, 343 U.S. 1 (1947).

⁴³ *Ibid.*

⁴⁴ 330 U.S. 1 (1947).

⁴⁵ *Id.* at 15. See Note, 12 DE PAUL L. REV. 128 (1962).