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THE QUESTION OF ENGLISH DIVORCE

AN ESSAY

The Eugenics Education Society

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LONDON
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NOTE

THE writer much regrets that no time has been available since the regrettable death of the Archbishop of Canterbury to modify the special reference which is made to his opinions herein. He trusts, therefore, that his comments may be taken as merely referring to the opinions of those who may think upon this subject identically with the late Archbishop.

NOTE

SINCE these lines have been in print, Vol. II. of the Twelfth United States Census has reached the writer. Although its contents do not appear to give material for the calculation of an exact divorce rate per mille, they contain a statement which appears to confirm very decidedly the writer's comment on page 104 of the present volume, on the reliability of the hitherto existing United States returns. The statement that is now made is to the effect that at the United States census of 1900 the total number of persons divorced at that time was seven-tenths of 1 per cent. of the total number of persons married. That is, the rate was 7 per mille. Although this rate is a total one, and not an annual one, it is quite evident that it throws a new, and entirely favourable, light upon the question alluded to by the Archbishop of Canterbury, of which mention is made on page 117 herein.

THE QUESTION OF ENGLISH DIVORCE

I

PREFATORY

DURING the nineteen hundred odd years that have elapsed since the basis of all morality and religion was first authoritatively declared to be one of Love, the civilised world has built many noble edifices upon that foundation; not, however, without passing through intervals of reaction that, at times, seemed destined to destroy completely the work that had been so well and truly laid.

For in the transition of the nations, and especially in the processes by which the ideas of finality and completion that the

original system tacitly, if not actively, propounded, have been shaken off, mankind has more than once found itself face to face with foes whose victory would have implied a return to chaos, and who had to be defeated by the aid of but half-trained and hesitating legions. The risk, however, was faced, the doubtful battle won; and now, in our time, we find ourselves attempting with no small success to give effect to the principles avowed by those long since dead, though their living voices did but cry in the wilderness.

It is true that as we have grown we have discarded many of the weapons of old time as outworn, and unsuited to our needs. Religion is no longer an iron casket of inextensible boundaries. Honour we consider maintainable without resort to the violence of personal conflict. Order, we find, is best secured by lenient, rather than by ferocious, laws. And, above all, we rule nowadays by Public Opinion; a power that has grown from

the size of a grain of mustard seed into a tree that bids fair in years to come to number all the great moralities as branches of its own trunk.

It may be that there are those who see great danger in the possibility of so vast and inchoate a power swallowing up, as it were, the older organisations of society. But it must not be overlooked that, in our day at least, the tendency of Public Opinion is distinctly towards a great morality.

Now this morality of Public Opinion, though identical in all essentials with that of the older forms, insists on the necessity of decentralisation, so to say.

Just as in politics Public Opinion itself has demanded, and has obtained, the control of its own affairs in every separate locality, so its morality demands that the greatest possible personal responsibility should be given to, and accepted by, the individual; and should be properly and wisely exercised by him to the benefit of the State as a whole.

To enumerate instances of this tendency is, perhaps, but to propound the obvious; but it may be recalled that it is not many years since intoxication was the custom of every well-born citizen. Now, it need hardly be said, such a thing is extremely rare among the upper classes; whilst among the lower it is emphatically less general than of yore. Thus, Public Opinion—not the law—has killed a practice that but a short time ago was looked upon as a fitting test of virility. Again, but a short time since it was a demand of Honour to give and accept challenges to duels for the most trivial, as well as for the most serious, personal differences of individuals. In our time such atrocities are, indeed, illegal. But so they have been since the days of Elizabeth. It was Public Opinion that made the law effective; and Public Opinion that alone was strong enough to uproot custom and to defy the absurd demands of Honour.

But it is, perhaps, needless to enlarge

upon so well-recognised a fact as the immense latent power of Public Opinion. There is, however, a point that affects the method in which this great power brings its force into action which is not, perhaps, quite commonly appreciated to the full. That point is that in very many cases in the past, and in one case maybe at least in the present, Public Opinion has declined, and still declines, to enforce its pressure in the checking of particular offences, because it considers that the punishments the law has ordained to meet the offence are immoderate or unjust or unsuitable. And this it has done, and still does, although the particular practice may be one that is clearly and obviously to the detriment of society, and although it is, in fact, so recognised by Public Opinion itself.

At first sight this peculiar laxity might seem to argue that Public Opinion is really indifferent to the maintenance or improvement of morality. As a fact, however, the reverse is the case; and the paradox

really occurs because Public Opinion is often some few years in advance of statesmanship. It was Burke who declared that he must wait until "this public nuisance had festered into a crime."

The process that occurs seems to be something of this sort. The practice of some greater or less offence gradually grows up, and rapidly threatens to become a veritable danger to society. The law which has been made to meet the offence happens to be out of date, either by reason of the ferocity of its enactments or by that of some other cause. Public Opinion is willing to give the existing law a fair trial, and assists it, in the first instance, by itself openly condemning the offence. Time passes on, however, and the offence not only does not diminish, but actually increases; until at length Public Opinion becomes suspicious that the law itself is at fault, and waits with more or less eagerness for statesmen to propound a remedy. If the offence in question is one that injures a very large proportion of the

public individually, the voice of Public Opinion makes itself heard, and statesmen who are unwilling to alter the law speedily find themselves either compelled to do so or to retire into private life. If, on the other hand, the offence injures a comparatively small proportion of society and the objectionable law still continues unaltered, Public Opinion not seldom contents itself with merely deploring the circumstances. But—and herein lies the point—from that time forth Public Opinion looks with a too lenient eye upon the actual offence itself. Examples of the former condition will occur to everyone; whilst the old felony laws, the old laws against religious heresy, the laws against duelling, and, more recently, the laws of divorce as affecting bigamy, are some instances, among many, of the latter proposition.

Thus we arrive at a third proposition, the truth of which is hardly to be doubted. It is, that if there be in existence amongst us a class of offence that is commonly recognised as being seriously detrimental

to the health of the nation, but which is improperly dealt with by the law, we cannot hope to check its growth by obtaining the active support of Public Opinion until the law is altered. More and more does this become the case, too, if the offence itself does but injure directly a comparatively small proportion of society, and is, in its nature, especially intimate to the private life of the individual rather than to his public life.

It seems to be in such cases as these that statesmen, knowing perhaps better than the public the exact ramifications of the offence, should themselves, if necessary, cause the law to be altered without awaiting the time when the market-place can see for itself that the disease has passed well-nigh beyond human control. Above all does this seem to be the case, too, when the offence is of a nature that is contrary to the actual interests of the State itself.

Of all the many questions affecting morality that now await, or are in course

of, solution, perhaps no one is more important than that dealing with the conditions which should govern the marital relations of the sexes.

Unquestionably there can be no reasonable person who supposes for a moment otherwise than that the institution of Matrimony, and the principle of monogamy, as accepted by the Christian religion, is destined, and rightly destined, to be the basis upon which these relations must inevitably rest. Such an assumption is axiomatic. Yet it would be idle to deny that there is at the present time in England a distinct feeling of dissatisfaction existent at what are popularly termed the hardships and injustices of Marriage. Closer inquiry into the matter, however, seems to show that the dissatisfaction alluded to is really caused, not by the institution of Matrimony as such, but by what are alleged to be the inequalities and absurdities of the Divorce Laws that now obtain in England.

Side by side with this dissatisfaction

appears also another, and a most serious evil; an evil far more important even than the very important one that is said to cause individuals to suffer, it may be, life-long misery for the good of the State. For, in regard to this latter, it may well be that such a condition should morally obtain, if—but only if—no method of alleviating it can by any means be devised.

The evil, however, that is most serious is that which is caused by the refusal of persons to submit any longer to conditions that are to them replete with indignities and miseries, no matter by what authority, or by what alleged necessity those hardships are imposed; and by their too frequent relapse subsequently into ties unsanctioned by morality. That such an attitude of behaviour, if at all widely adopted, can only terminate disastrously to the nation, and can only end in reducing the relation—or status, as it has been better described—of Marriage to an inconsiderable irrelevance, is evident. Unhappily it seems to be notorious that the

attitude that has been described is very widespread; and that Public Opinion, far from imposing the utmost pressure of its discountenance upon those who adopt this course of action, is much more inclined to see no more of such matters than is absolutely forced upon its notice. Now there must almost certainly be some reason actuating Public Opinion to assume so questionable a laxity towards an admittedly dangerous social evil; and it seems possible that if that reason can be discovered no small step will have been taken towards effecting a remedy of the disease.

It cannot be too clearly borne in mind that existing Public Opinion aims most especially at elevating the general standard of society by every means in its power in order to increase the moral stability of the whole. It has already recognised that it is impossible to expect increased morality among the lowest classes unless their material surroundings are improved; recognised, too, that good education must be given before every individual of a State

can be expected to direct his private actions to the general good. In both of these directions to progress, although much remains to be done, very much has already been effected. And not in these directions alone, but in many other minor ways also.

The result of these exertions is plain to be seen, and cannot be described as otherwise than entirely satisfactory. Every form of violent crime—and almost every form of minor offence—shows so notable a tendency to decrease that, when the increase of population and the great publicity of modern life are taken into consideration, the progress can only be described as remarkable.

Yet, in spite of the evidence of such facts as these to show that the general standard of morality is on the up-grade, there is but very little doubt that, even after every allowance has been made for the modern influence of publicity, marital infidelity shows little, if any, tendency to decrease.

There are, of course, several theories put forward to account for this deplorable state of things. It is urged by some that the decline of the power of religion, as it is termed, is the greatest contributory factor to this immorality. Yet there has never been any age in the world's history when the local centres of religions have been so widely distributed and so actively supported as they are at present. Moreover, as has been said, not every form of vice is on the increase ; a fact that seems difficult to reconcile with a diminishing religious tendency, if such there be.

Again, it is said that the standard of living in very many cases has increased so far as to have created a large class of luxurious idlers having no aim or object in life beyond the gratification of their own ever-changing wishes. That such a class does exist, and always has existed, admits perhaps of as little contradiction as the statement that at the lower end of the scale of society there does exist, and always has existed, an irreclaimable residuum of the

population entirely devoted to crime. It is not in such sporadic growths as these that real danger lies in ordinary times, for their principles are revolting to the great mass of the people. Certainly, there is more danger in the existence of an immoral class, whose members, by reason either of birth, or of influence, or of wealth, are more likely to influence others by their example than are the members of the merely sordid class of criminal. Yet if such a class exists in our society—and there are those who plainly assert that it does—Public Opinion may be relied on to correct it, provided always that Public Opinion considers that no reasonable excuse exists which can by any means minimise the gravity of the offence and of the example.

It does not seem, therefore, that either of the causes commonly assigned as accounting for the indifference manifested by the stable classes of society towards the question of marital infidelity is sufficiently cogent to compel unqualified agreement.

There remains, then, but one course open to us, and that is to examine the state of the law; for, as has been already shown, if the law on any important matter is manifestly inadequate and unjust, and there seems to be no likelihood of an alteration in its provisions, Public Opinion is very much apt to sympathise with the offender rather than with the law, until some improvement is effected in the latter.

The points, then, that seem to require solution are especially, perhaps:—

1. Is it the case that the English Divorce Laws are framed unjustly or absurdly?

2. If they are, is there any beneficial alteration that can be made in them in order to ensure that Public Opinion shall not only be deprived of any reasonable excuse for palliating dangerous immorality, but shall also be induced to put an entire stop to it, as far as may be?

The answers to these questions, so far as several years of study on the subject have informed the writer, are set forth

hereafter; and they are premised by a short history of the whole question of Divorce, and by certain succinct statistics connected with the subject.

Below are given the various authorities to whom reference is made in the ensuing pages, and these sources of information have been supplemented in the cases of foreign countries by the kind courtesy of the British representatives on the spot and of the State Statistical Departments.

Since these lines were written an important contribution to the history of Divorce has appeared in the pages of the new edition of the *Encyclopædia Britannica,* written by the President of the Divorce Court, Sir Francis Jeune, and the writer has not hesitated to supplement his own investigations by adopting, in all doubtful points, the results of the researches of so eminent and so accurate an authority. It is great subject for regret that Sir Francis Jeune has found himself unable, in his article, to give some general or detailed expression of his views upon the condition

of the present laws themselves; for no layman certainly, and probably very few lawyers, can hope to attain to the authority with which such an expression would have been invested, or to approach the lucidity with which his statement would surely have been set forth.

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II

EVER since the earliest days of civilisation, of which we possess authentic records, marriage has existed in some form or other among all nations; and, concurrently with marriage, divorce, in some form or other, has existed also.

The Jews

For the purpose of a sketch of the various conditions of divorce that have existed in the past, or that obtain in the present, it is perhaps unnecessary to attempt to follow history further back than the days of the Jews.

The system of marriage that obtained in the epoch of Abraham appears to us to have been a monogamistic one in name only, for it was one which recognised concubinage in so many ways as to make the whole marriage institution of those times practically a polygamous one.

The ancient laws of Jewish marriage, as well as those of their divorce, may be found in the Mosaic books of the Bible; and it is therefore unnecessary to refer to them, further than to say that divorce amongst the Jews was permitted for reasons other than adultery, and especially amongst the adherents of the school of Hillel. Adultery itself, as might be expected, amongst a semi-barbarous tribe, such as the Jews then were, was punishable with death; just as, until a very few years ago, it was so punishable among the Zulus.

The Romans

From a very early period in the history of Rome its citizens were divided into three great classes — the Patricians, the Clients, and the Plebeians. Amongst the early Romans marriage was regarded, as with the Hindus and Greeks, as a religious duty that a man owed as much to his ancestors as to himself, for the shades of the departed ancestors were only to be satisfied by receiving their customary offerings at the hands of a direct descen-

dant. If no direct descendant existed, however, an adopted descendant was permitted to obviate the extinction of the family and to appease the requirements of the shades. Amongst the Patrician class marriage was limited to fellow-patricians or to those who were members of an allied community. The ceremony was a religious one, conducted by the high priests, and consisted in the breaking of a salted wheat cake by the bride and bridegroom in the presence of those officials and of ten witnesses. This Confarreatio, as it was called, was the most solemn of the three forms of marriage, and there seems some reason to think that it was most usual between persons whose children were destined to become vestal virgins or *flamines diales*. It could only be dissolved by the solemn ceremony of Disfarreatio; granted, for the most part, in the case of the wife's childlessness.

Confarreatio

Confarreate marriage, however, also involved the wife's passing into the "hand" or power of her husband; and, except

Manus

in so far as it was restrained by special legislation, the authority of a husband in the matter of divorce was absolute. It is said, however, that as early as the days of Romulus the State asserted its interest in marriage by forbidding the repudiation of a wife except for adultery, or the drinking of wine, under penalty of entire loss of property to the offender. In later times Confarreatio fell into disuse, and Cicero only mentions the forms of Co-emptio and Usus.

Co-emptio

For many years Plebeian unions appear, on the other hand, to have been considered by the ancient Romans as unworthy of legalisation, for Confarreatio was denied them, and Co-emptio had still to be invented.

Servius Tullius, sixth King of Rome, however, conferred upon the Plebeians the rights of citizenship, and introduced the civil ceremony of marriage called Co-emptio. It is probably not accurate to speak of this form as one of marriage,

as, strictly, it was the acquisition by the husband of *manus*—power—over his wife.

The XII. Tables

In the year 303 the Roman law was codified and amended into the form known as the Law of the XII. Tables. Under these amended Laws marriage that had been entered into without solemnity, and which, consequently, did not involve the subjection of the wife to the husband, was recognised, as well as marriage by Confarreatio and Co-emption.

Usus

In all probability Plebeian marriages at this time were often loosely contracted, partly because of the legal disabilities already referred to, and partly because of the objection of the women to renounce their rights to independent property.

Now, however, the XII. Tables provided that if a woman, married neither by Confarreatio or Co-emption, desired to retain her independence though married, she must periodically absent herself for three nights from her husband's house; or, if she did not so absent herself for twelve months, she must submit to his power as

in the cases of Confarreatio and Coemption. The Tables also appear to have granted great freedom of divorce.

Lex Julia, B.C. 90

The *lex Julia* appeared at length, by which divorce was permitted to either husband or wife, whilst imposing also, in the interest of the public, considerable restrictions on the undesirable liberty of divorce that obtained before its enactment.

A bill of divorce, given in the presence of seven witnesses, was required, as also the public registration of the divorce. The act was, however, purely one of the person performing it, and no idea of judicial interference seems to have been entertained. The *lex Julia*, however, sought for the first time in its history to restrain divorce by imposing pecuniary consequences on the parties.

Constantine's legislation, circa A.D. 331

A series of enactments succeeded which modified and extended the provision of the *lex Julia*, until in the year 331 A.D. the Emperor Constantine laid down certain causes for which divorce could be obtained without the imposition of pecu-

niary penalties. The causes for which divorce was granted in this Emperor's reign were various, and, to our ideas, occasionally somewhat laughable; for they included, besides adultery and murder, such old-world offences as the preparing of poisons and the violation of tombs.

Constantine's conversion to Christianity, however, enabled the Church, that was now rapidly rising into ever greater catholic eminence, not only to assert most emphatically the religious character of the marriage ceremony as opposed to the civil, but also to obtain from the Emperor the power of establishing Ecclesiastical Courts.

These most important courts continued to exist side by side with the Civil Courts for many centuries; and, until well on into mediæval times, were favourably distinguished from the Civil by the greater enlightenment and humanity of their enactments and procedure. From the Ecclesiastical Courts, too, presently began to emanate the codex of the "Canon Law"; and amongst the eventual canonical pro-

nouncements of the Catholic Church—many centuries later than this time, however—was the one that marriage was in true fact a sacrament, and must therefore be considered as indissoluble for ever. This decision, indeed, was not finally arrived at until the seventh session of the Council of Trent, in 1547, when the great division occurred between the Roman Catholic and Protestant Churches; and at this time also the respective sacraments of the Churches were definitely settled both in number and nature.

Justinian's legislation, circa 500 A.D.

No other alteration of great importance occurred in the Roman system of divorce before Justinian's time. Prior to this Emperor's reign marriage appears always to have been terminable by the mutual consent of the parties. Justinian, however, limited this freedom, and finally allowed comparatively few causes as sufficient justification for divorce. His earlier decrees ordained three especial causes for divorce; one of which was "long captivity" and another "reversion to monasticism." Both

of these causes, of course, were practically equivalent to the more modern conception of desertion, in that they were emphatically a breach of matrimonial obligations. Later on in his reign Justinian fell more under the ever-growing influence of the Church; and, cancelling his previous divorce laws by a fresh decree, he ordained that all persons who dissolved their marriage by mutual consent should forthwith retire into monasteries, and should forfeit the whole of their estates. Of this forfeiture one-third was to pass to the monasteries, or, in other words, to the Church, and the other two-thirds only became the inheritance of the heirs.

It is, however, of interest to note that Justinian's prohibition of divorce by mutual consent was repealed by his successor, Justin; the hundred and fortieth Novel that contained the decree stating that "it was difficult to reconcile those who once came to hate each other, and who, if compelled to live together, frequently attempted each other's lives."

"He yielded," says Gibbon in memorable words, "to the prayers of his unhappy subjects, and restored the liberty of divorce by mutual consent; the civilians were unanimous, the theologians were divided, and the ambiguous word which contains the precept of Christ is flexible to any interpretation that the wisdom of a legislature can demand."

By degrees, however, and in course of time, the administration of divorce itself passed into the hands of the Ecclesiastical Courts solely, and practically ceased to exist, at least as a civil process. The history of the Church in later times, therefore, becomes also the history of divorce.

The history of the Church, as has been said, shows that in mediæval times there grew up a practice within it which asserted that divorce could not ever be considered permissible. Nevertheless, the Church found that marriages might be annulled *ab initio* in certain deserving cases. Some of the cases that appeared thus deserving might seem to our minds to be very un-

usual; for marriages were not only frequently annulled on account of the consanguinity of the parties in the eighth degree, but even on the ground that a forbidden affinity had been established between persons who had committed adultery. It is thus clear that divorce in some form was found absolutely necessary even in the most powerful days of the Church.

Canon Law

Of the history of the Canon Law and of the Apostolic Constitutions, by means of which the Church has achieved so many and such remarkable triumphs, it may be well to say a few words; for it affects the question of divorce even at the present day.

The foundations of Canon Law were the rules that were made by the very early Christian Church to regulate its relations to the secular powers, its own internal administration, and the general conduct of its members. As times grew more political, and therefore more elastic, Canon Law was gradually extended so as to in-

clude within its scope the opinions of the early Fathers; and finally, even the decretals of successive popes.

Canon Law is, however, not to be confounded with Ecclesiastical Law. Canon Law has the Church for its source; whilst Ecclesiastical Law has the Church for its subject. Nor must it be confounded with the Canon; for this was simply a catalogue of the writings that formed a rule of the truth revealed by God for the instruction of men. These writings were first of all considered to be contained in the Old Testament, and later on in the New.

Apostolic Constitutions

The Apostolic Constitutions seem to have been the first code of Church regulations among the early Christians. Most of these date from the end of the third century after Christ died; but some of them from the early part of the fourth. In the fifth century the frequent letters of advice which the bishops of those days solicited and received from their chief bishop—now known as the Pope—came to be known and accepted as decretals;

and were added in great part to the Canon Law. Some time during the sixth century some more rules of the early Church transpired. They came from Syria, and were known as the Apostolic Canons.

Apostolic Canons

About the year 692 A.D. circumstances made it desirable that the Council of the Churches held in Trullo should discuss both these Apostolic Constitutions and the Canons. In the result this Council adopted the Apostolic Constitutions for the Greek Church, but rejected the Apostolic Canons. The Latin Church, on the other hand, adopted neither the one nor the other; though later on in time some fifty of these regulations grew into the Western Church.

Council of Trullo, 692 A.D.

At the end of the eighth century the Council of Nicæa added some more canons; and this Council was the authority of the Greek Church until the middle of the ninth century.

Council of Nicæa, 787 A.D.

In 1054 A.D. the Eastern and Western Churches became finally divided from each other.

1054 A.D.

Mediæval Times in the Western Church

By such means, and by such events as these, the bulk of the Canon Law grew, and continued to grow, in equal step with the authority of the Church; until, in mediæval days, the Western Catholic Church possessed a very extended judicial system indeed. So much was this the case that it was the practice for its clerical administrators to receive a careful training in the Canon Law at the Bologna University; and from thence to travel far and wide—literally almost to the Ultima Thule—to administer the Church's law. So well, too, did the Church use the prodigious powers it thus obtained that it was then no uncommon thing for a suitor to request the transfer of his cause from the jurisdiction of the Civil to that of the Ecclesiastical Courts. Indeed, at that time the punishments of the Civil Courts were merely an elaborate system of fines, imposed in great part for the benefit of some particular individual. Evidence, in our sense of the word, was unknown; and the innocent party had

little else to rely on for assistance than the fortuitous proof that might chance to be given by ordeal, judicial combat, and the like.

The Church's more humane and reasonable judgments, therefore, were accepted on all hands; and it is perhaps not too much to say that the contention of the Church that all nations were, in fact, brethren, enabled the initiation of international law; since for many years the popes were the accepted arbiters between princes and princes, as well as between prince and people.

Decline of Canon Law

It was so, however, that the eventual strife of Pope and Anti-pope, combined with the ever-increasing desire of the prelates to pronounce in favour of princes, and with the arrogance of the Ecclesiastical Courts, went far to bring about the decline both of the Canon Law and of its source.

Present position of Canon Law

At the present day, nevertheless, the Canon and the Canon Law still remain so widely extant that their scope may be

said to include in broad accuracy all Roman Catholic countries, at least in their theory of marriage and divorce; but not those countries which have accepted the principles of the Reformation.

By the regulations of the Canon Law, marriage and its dissolution continued to be governed in England, too, until the time of the Reformation.

The Reformation

The leaders of the Reformation in England did not omit to turn their attention to the Romish laws of divorce which still obtained there; for at that time a Royal Commission projected a very liberal revision of the laws. This Commission included among the causes which it considered should be deemed to justify divorce, Desertion, Savage temper, Continued absence, and Incompatibility of temperament. It also recommended that Separation should be abolished and superseded by these laws.

Reformatio Legum Ecclesiasticarum

Mainly, perhaps, owing to the death of Edward VI., these reforms were never enacted, although they were recommended

by a Royal Commission under the presidency of Archbishop Cranmer, and although they received the support of so distinguished a man as John Milton, among many others.

Divorce Act of 1857

It seems almost incredible, but it is none the less true, that Protestant England continued content to remain, even after the Reformation, subject to the Roman Catholic theory of divorce and separation until so lately as the year 1857. It is true that in Elizabeth's reign the Ecclesiastical Courts did pronounce some decrees of divorce. But they were stopped by the Star Chamber; and until the year 1857 marriage in England remained theoretically indissoluble, except by annulment. Scotland, on the other hand, had accepted some part of the greater leniency of the Reformation proposals; and, from the time of the Reformation itself, divorce for adultery became competent for either spouse in Scotland. In 1573 it was also accepted in Scotland that malicious desertion should be good cause for divorce

thereafter; and these principles still obtain.

In consequence of the persistent adhesion of the legislature in England to laws that were unsuitable to the needs of the people, a state of morality had been produced long before 1857 that was entirely disgraceful. So much was this the case that one of the most authoritative writers on the subject of Marriage and Divorce states that "second marriages without divorce, adultery, and illegitimate children were of everyday occurrence, while polygamy was winked at, though a felony on the statute book." *W. H. Bishop*

It should be borne in mind that this state of things existed in England not fifty years ago, and as a direct result of an inefficient system of law. Immediately that law was altered, public opinion altered; and now, of course, a wilful bigamist is regarded as an outcast of society in England.

Previously to the passing of the Act of 1857, a characteristic evasion of the law of

indissolubility of marriage had become perfectly competent for those who could afford it; for although the law remained unchanged in its declarations, the practice was devised of obtaining complete divorce by private Act of Parliament. At this time Ecclesiastical Courts were still in existence. The procedure, therefore, for an injured partner was as follows. First, he had to obtain a divorce *a mensa et thoro*—from the table and couch—from the Ecclesiastical Courts. This decree was the Roman Catholic decree of separation, and was practically the same as our present decree of judicial separation. Secondly, he had to bring an action for damages against the adulterer in the civil courts. Thirdly, he had to institute proceedings in the House of Lords. In this final step, it is true, the proceedings were almost purely formal; for the representatives of the Church in the House of Lords seldom, if ever, raised the least objection to the passing of such Acts of divorce; and several hundreds of them were passed.

Indeed, in regard to the whole matter the Church at that time seems to have been actively silent.

The expenses and the disgusts of this sequence of suits, however, were soon found to be so heavy that none but rich men could afford to obtain relief. Perhaps the general opinion of the country upon these laws was accurately expressed by Mr. Justice Maule in 1845, when he addressed one whose wife had robbed him and had run away with another man, and who was charged before him with the then common offence of bigamy, in the following terms: "You should have gone to the Ecclesiastical Courts, and obtained a divorce *a mensa et thoro*," said Mr. Justice Maule satirically; "then you should have brought an action and obtained damages, which the other side would probably not have been able to pay; and you would have had to pay your own costs, perhaps a hundred or a hundred and fifty pounds. Then you should have proceeded to the House of Lords, where, having proved

that these preliminaries had been complied with, you would have been able to marry again. The expense might amount to five or six hundred, or perhaps a thousand pounds. You say you are a poor man and have not as many pence. But I must tell you that there is not one law for the rich and another for the poor."

It is curious to note that this procedure obtains in the case of Irish divorces to this day.

This scandalous state of things, however, though condemned by every unprejudiced mind, remained unalleviated till 1857. Only then it was that, by the greatest exertions of the Ministry of the day, a Bill was brought in by the Attorney-General of the time, Sir Richard Bethell. This Bill was not devised indeed so much to enlarge the causes for which divorce could be obtained as to consolidate the three suits which had hitherto been necessary to obtain divorce at all; and at the same time to mitigate their prohibitive expense. It is true that perhaps the greatest lawyer

and the widest intellect of that time—Lord Lyndhurst—did his utmost to obtain some relaxation of the proposed laws, and strenuously urged—just as the Royal Commission of Edward VI. had urged in their *Reformatio Legum*—that wilful desertion was sufficient cause for divorce; but his exertions were defeated by the conjoined efforts of the whole bench of bishops, and of Mr. Gladstone.

The opposition to the Bill grounded itself upon the assertion that marriage was indissoluble; although that opposition had witnessed for years its dissolution by an evasion of the law without protest.

Present Position

This Act of 1857 still remains—with a few minor amendments—the Act that governs divorce and separation at the present day.

Its provisions

Its main provisions may be summarised as follows:—

1. All jurisdiction in matrimonial matters is exercised by the Civil Court of Divorce.

2. Cause for divorce against a woman

is adultery. The husband may claim pecuniary damages against the co-respondent for the loss of his wife.

3. Cause for divorce against a man is adultery, coupled with cruelty or desertion for more than two years; bigamy and adultery; incestuous adultery, or rape, alone; and unnatural offence. The wife cannot claim pecuniary damage for the loss of her husband, but the Court may order the husband to pay maintenance.

4. The old ecclesiastical separation, *a mensa et thoro*, is abolished under that name; but a new remedy, with a similar effect, is introduced, and is called Judicial Separation. This may be obtained by either husband or wife on the ground of the adultery of the partner; or on that of cruelty; or on that of desertion without reasonable excuse for two or more years. Since 1895 it may also be obtained by the wife, but not by the husband, in cases of aggravated assault; of serious assault for which the husband has been fined £5 or

imprisoned for two months; desertion, persistent cruelty, and wilful neglect.

5. No divorce is granted where collusion between the parties is proved to have existed.

6. In case of divorce, alimony is provided for children; and power to vary settlements on the wife is given to the Court in the case of her offence.

7. No decree of divorce is to be made absolute till after six months from the decision of the original case; during the passing of this time any person may give information to the King's Proctor of collusion between the parties, or that material facts have not been brought before the Court; and the Proctor may, if he thinks advisable, oppose the decree absolute.

8. No remarriage is permitted to judicially separated persons, but they may resume cohabitation without any formalities.

9. Remarriage after divorce is permitted, but no clergyman of the United Church of England and Ireland is com-

pelled to solemnise the remarriage of divorced persons.

10. Nullity of marriage may be decreed for various prenuptial failings, omissions or commissions; *e.g.* consanguinity, or marriage of a minor without parents' consent.

11. Either husband or wife may sue for restitution of conjugal rights, if one has withdrawn from the society of the other without sufficient reason. The Court can order the delinquent to return to live under the same roof; and in case of his refusal to comply with this decree, shall deem him to have been guilty of desertion without reasonable cause, and a suit for judicial separation—but not for divorce—may thereupon be initiated forthwith, on this ground alone.

Voluntary Separation

To these permissions and restraints has to be added the case of a voluntary separation between husband and wife by mutual consent. No remarriage is permitted to the parties in such a case; and the husband remains liable in law for the wife's debts in the future.

Such, then, has been, in brief, the history, and such the enactments, of English divorce down to the present day.

Points to be attained by any Divorce Act

Before turning to examine closely the details of this Act of 1857, it may be well to consider what should be the results to be striven for by any Divorce Act whatever.

In the first place, no Divorce Act must be so wide as to militate against the great principle of marriage by its laxity.

In the second place, no Divorce Act must be so harsh as to bring the principle of marriage into indifference or disrepute, or sexual offence into toleration, by an unreasonable severity, or by a general unsuitability to human sympathies.

In regard to the first of these propositions, it may be well to notice at once a contention that is sometimes put forward even by those who adhere to the Protestant Church. It is that, in view of the many difficulties that are alleged to stand in the way of a satisfactory system of divorce, and also in order to

assume a thoroughly logical position, it might be better to forbid all divorce and all judicial separation whatever.

The objections to this course are many, and are very weighty.

Divorce, as has been already shown, has always been found necessary in some form or other from the earliest times; and the only complete example to the contrary has been the modern one of the State of South Carolina. Newfoundland, indeed, has no divorce laws; but its population is principally of Roman Catholic religion. In the case of South Carolina, according to Mr. W. H. Bishop, the absence of any laws of divorce very soon led to a general recognition of the patriarchal custom of concubinage; and also necessitated an alteration of the State laws of the disposal of property to provide for illegitimate children. Even in Roman Catholic countries, too, in which no divorce is, or ever has been, permitted theoretically, a practical equivalent has been existent

for centuries; for those who can afford to show that they are even remotely connected by blood, as well as by matrimony, are not infrequently placed in a position to have their marriage annulled. Moreover, in Italy at the present day, parliamentary agitation is in progress to obtain the power of civil divorce. In our own country the principle of the indissolubility of marriage that existed up to 1857 not only led to frequent and open bigamy and to general and notorious immorality, but finally produced also a recognised evasion of the law.

It may perhaps, therefore, be taken that the Roman Catholic principle of the indissolubility of marriage cannot be allowed to prevail in this kingdom again.

As to the degree of lenience that should obtain in divorce, several considerations must influence us.

The Prayer Book lays down the reasons for which matrimony was ordained—reasons so authoritative and un-

answerable as to be conclusive—in the following order :—

Firstly, it was ordained for the procreation of children.

Secondly, for the avoidance of sin.

Thirdly, for mutual society and sympathy.

If, therefore, divorce is to be permitted in any form—and that it must be permitted is unanswerably certain—it is clear that it should be given so far as possible for the causes that destroy the reasons for which matrimony was instituted.

For whilst, on the one hand, it is true that no material circumstance can destroy the ideal of Marriage—although perhaps that ideal can never be actually attained to by more than a very few in each generation—yet, on the other, the general recognition of the extreme importance of the institution of matrimony cannot but be very much impaired if the breach of these reasons is permitted to pass unheeded. And

the reasons given in the Prayer Book are together the feeble expression in words of the ideal itself.

Marriage, says a well-known authority, is a status of life, an Order. In some slight degree, that is, marriage may be likened to the semi-secular Orders of the past, such as the Templars, or the Knights of Malta; or, making allowance for the opposition of objective, to the many monastic bodies of the present. Yet, although in these Orders there must always have been many men not so elevated as the best of their comrades, it would be rash to suppose that the Orders themselves could have maintained their eminence had they refused to take notice of a deliberate breach by their members of the objects of the Order, on the ground that its ideal could not thus be impaired.

Now the offence of adultery, which is everywhere considered as a most complete offence against matrimony, does not necessarily create an absolute de-

struction in the future of any of these three causes; but its collateral results may be so important that for obvious reasons of State its prohibition is entirely requisite.

Again, the offence of physical cruelty, which our laws designate as being good cause for divorce when conjoined with adultery, cannot be said—detestable though it be—invariably to destroy the physical reasons for matrimony. We are, therefore, if we accept, as we must, the Church's authoritative declaration of the reasons for the institution of matrimony, in the position of having selected as good cause for divorce two conjoined matters neither of which separately, and strictly speaking, necessarily, destroy the matrimonial bond. Yet no thinking person would deny that this inclusion is manifestly necessary.

During the debate of the Act of 1857, Mr. Gladstone made use of some remarkable words which have acquired a new importance since the question of the dissolubility of marriage in England has been

finally decided. "We have many causes," he said, "more fatal to the great obligations of marriage" (than adultery), "as disease, idiocy, crime involving punishment for life, and which, if the bond be dissoluble, might be urged as a reason for divorce."

That seems to be the position to-day. There are still many causes more fatal to the obligations of marriage than those for which divorce is now granted that are not recognised as good cause for divorce in England, for it is the immediately physical aspect that has hitherto been accepted as the main consideration of matrimony. For instance, habitual drunkenness, insanity, incurable disease, sentence of prolonged imprisonment, prolonged desertion, complete incompatibility of temperament—every one of these constitute an entire and impassable breach of the matrimonial bond and of the reasons for which matrimony was ordained.

It seems, therefore, clear that we must cease to regard the matrimonial bond as

being solely one of physical importance, and that we must consider also those other divergencies which are, in fact, by far the most frequent of the originating causes of matrimonial disaster.

So far, the principle of this Act of 1857 has alone been considered, and it is plain that it has attempted to confine divorce to a very limited number of offences of a purely physical character, and those offences not ones of the most fatal importance to the maintenance of the marriage bond.

Act of 1857 in detail

Let us now turn to the consideration of the detailed provisions of the Act, and endeavour to ascertain if any serious hardship or injustice is contained in them.

The first matter that arrests our attention is the differentiation that is made between the legal aspect of an identical sin in a man and in a woman. A man can divorce his wife for adultery alone, but a wife cannot divorce her husband for adultery unless it be combined with cruelty or desertion.

England is almost the sole exponent amongst Protestant nations of this remark-

able discrepancy. Almost every other legal system makes an equality between the sexes.

The original legal reason which accounts for this distinction is, however, clearly stated by Sir Francis Jeune in the very able article that has been already alluded to. He says, "It"(the reason) "is that the wife is entitled to an absolute divorce only if her reconciliation with her husband is neither to be expected nor desired. This no doubt was the view taken by the House of Lords"—in the case of a Mrs. Addison in 1801.

Perhaps it can hardly be said, however, that the legal reason is one that commends itself thoroughly to lay minds of to-day.

Much has happened since 1801.

At that date the orgies of the French Revolution—which, amongst other things, practically swept away the laws governing sexual relations in France—had but just yielded to the rising autocracy of Napoleon. England was in the throes of a gigantic war, from which she was not to emerge

for thirteen dreary years longer. The whole political fabric of Europe was quivering on its foundation.

Nor, indeed, was the condition of social affairs in England out of keeping with the general atmosphere of tempestuous violence that prevailed. Intemperance, both of speech and of action, was the dominant characteristic of society; the characteristic even of many individuals in the House of Lords itself. In many cases it was the characteristic of the law itself; for sixteen years after this time — three years after the Battle of Waterloo — Lord Ellenborough pronounced the general law of the land to be that, in cases of appeal, there should be a trial by battle, unless certain exceptions happened to exist.

Even the great moralist Bentham, in writing but a very few years before this date to point out the absurdity of duelling, had added, "It entirely effaces a blot which an insult imprints upon the honour. Vulgar moralists by condemning public

opinion upon this point only confirm the fact."

In 1801, too, highway robbery was still a common occurrence; bribery and corruption were rampant in the land; our very seamen were captured by press gangs, and subjected to awful brutalities in the name of discipline after they were captured. Both at this time, and for long after it, multitudes of women and children were working almost naked for the bare living that was to be obtained by dragging coal trucks along subterranean passages so narrow that they could only be traversed on all fours. The sale of wives by their own husbands at Smithfield Market was then no dim and incredible tradition. No statesman had as yet ventured to propound a Factory Act, even if the conception of such a thing had ever crossed any man's mind as being at least desirable if it were not attainable. In no direction was any serious attempt made to deal with crime otherwise than by the most drastic repression; in no direction was

there the smallest effort to elevate the condition of the masses; least of all, perhaps, was there any general suspicion that a woman might really be after all entitled to the same consideration as a man in matrimonial affairs.

Perhaps, then, it is hardly to be wondered at if the House of Lords in 1801 should have considered that a wife was only entitled to an absolute divorce if her reconciliation with her husband was neither to be expected nor desired. Nor need we be surprised to find that the Lords thought that a husband was entitled to a divorce whether his reconciliation with his wife was to be desired and expected or not. Perhaps, however, in 1902, we are less prone than were the Lords of 1801 to believe that it should be the duty of an injured wife so far to recognise her subordination to her husband as to accept unquestioningly the law's severe treatment of an action in her, the practice of which it indulgently concedes to her husband.

"Why," asked Lord Thurlow, speak-

ing in the House of Lords on this very Addison case—"why do you grant to the husband a divorce for the adultery of the wife? Because he ought not to forgive her, and separation is inevitable. Where the wife cannot forgive, and separation is inevitable by reason of the crime of the husband, the wife is entitled to the like remedy."

Putting aside the question whether there is, as Lord Thurlow stated, any offence of an individual that ought never to be forgiven, it is at least certain that if adultery is that offence, modern thought proscribes it equally both in man and woman, and declines to credit the idea that a man ought in duty to be much less forgiving than a woman.

The popular justification, as opposed to the legal, of this difference of status between man and woman should perhaps be touched upon, however unworthy it may seem of consideration. It is commonly said that the offence of adultery should be dealt with more severely in the case of a

woman than of a man, because the result may affect the family so much more.

In the first place, it seems to be overlooked that though this act in a man may not affect his own family, it may very readily affect some other family.

In the second place, this act in a man is only less likely to effect the destruction of all the reasons for his marriage with his wife by the extent of the latter's power of forgiveness; a power, it may be added, that evidently the law is of opinion should not be too freely exercised, since it allows the wife complete liberty to leave her husband for ever for this very cause.

In the third place, the man by his act constitutes himself an accomplice, and should therefore be liable to equal treatment.

Lastly, too, the law itself seems to be doubtful of the justice of its own decree in this particular case, for it declares that a woman may obtain a divorce from her husband for rape, though she may not for adultery. The offence against the State

in the former case is no doubt greater than in the latter, for it is adultery and violence combined. But the offence against the wife is precisely the same in both cases, and she merits relief therefore equally.

But let us examine in more detail the principle of the Lords of 1801 that a wife is only entitled to an absolute divorce if her reconciliation with her husband is neither to be expected nor desired.

After what offence, or what number of offences, on the husband's part, should we cease to entertain this desire and expectation? Are we to expect or to desire of a woman that she should be reconciled to a husband who is notoriously an evil liver, though he may not happen to have been cruel to his wife, or to have deserted her? Can we reasonably expect or desire that a woman should be compelled to remain for ever as the wife of a man who has permanently deserted her, or has subjected her to years of cruel behaviour, even though actual adultery may not be prov-

able against him? These seem to be questions that admit of but one answer.

Yet if we turn even to the Act of 1857, rather than to the dictum of the Lords of 1801, for guidance as to whether in such contingencies we ought to desire and expect reconciliation, we find no very stable pronouncement. At the first glance it would seem that the Act is hardly of opinion that we should so desire and expect; for, in the case of the husband's adultery, or desertion, or cruelty—separately, and whether those acts have been perpetrated only once, or oftener—it pronounces that the wife is free to obtain a judicial separation from him, and to remain absolutely apart from him for the remainder of their joint lives, if she so choose. Here, then, is a clause that would rather seem to point to the Act's hesitating belief in the likelihood of any human being possessing either a desire or an expectation of witnessing a reconciliation in cases of single adultery, desertion, or cruelty. But a little later on we find

that the Act ordains that if a wife does so obtain a judicial separation, she shall never be free to remarry so long as her husband lives. Thus, then, the Act seems to be contemplating a reconciliation between the parties sooner, rather than later; else it could not be justified in taking away with one hand what it gives with the other. For to punish the immorality of the guilty by enforcing celibacy upon the innocent—to lay down that a situation exists meriting legal relief, and to relieve it by offering the innocent party his choice between the lifelong disuse of a natural function and a condonation of the offence of the guilty party—may well appear to many to be reducing serious statesmanship to a mere mockery.

Again, if it be true that no Divorce Act should be so framed as to militate by its laxity against the sanctity of the great principle of marriage, can it be said that this distinction of offence between the sexes does not do so? Suppose that a husband errs, is forgiven, and in spite of

forgiveness, continues to live the life of a libertine. What is the result that in most cases may reasonably be expected to occur, and that in very many cases does occur? It seems to be but citing common knowledge to say that many a woman who has forgiven her husband's errors not once nor twice, has at last become so disheartened and disgusted at their repetition that, whether she has separated from him or not, she has finally come to ridicule both by her word and her deed the sanctity of the marriage that her husband has long since contemned. And, it may be added, that deed once done, legal remedy becomes impossible; for no divorce can be granted to mutual offenders. Thenceforth the marriage of that couple, though they be living in open adultery, becomes for the first time absolutely indissoluble.

Now let us turn to the husband's position in matrimony under the existing differentiation between the offences of a husband and of a wife.

It is no doubt commonly supposed—it

may even have been one of the motives that prompted the original decision—that by this enactment men escape the consequences of an immoral act comparatively lightly, as compared with women. It is a remarkable fact, however, that the retention of the principle of separation in our laws not infrequently reverses the incidence of this injustice, and makes the law as unjust to men as it has already been shown to do to women.

This occurs in the following manner. Adultery in a man is not punishable by divorce, but his wife may obtain judicial separation from him solely on this account. Now the result of judicial separation is that the wife usually obtains the same alimony, and very often the same charge of the children of the marriage as she would have done had she been able to divorce her husband; but, in addition to that, if she chooses to obtain a judicial separation, she can prevent her husband from ever remarrying, although she herself declines to live with him, or to have

anything to do with him except to receive his financial support. The fact that the wife herself in such a case cannot remarry either is no answer to the injustice; as a fact, it not infrequently merely adds another individual to the number of those whom the laws of separation drive to immorality.

It is plain, therefore, that such a punishment as judicial separation is far more severe to an offender than is divorce itself; for it imposes a disability that is absent under divorce—the disability of remarriage.

Nor is this all. It is obvious that adultery coupled with cruelty or desertion must be a more serious offence than adultery alone. Yet, for the single offence of adultery a husband is often punished far more severely than for the greater one of adultery coupled with cruelty or desertion; for though his wife may obtain judicial separation for the latter offence, it is all she can obtain for the former.

Again, as the law stands now, there exists another and an equally great injustice. It is this. If either husband or

wife discover sufficient offence in their partner to justify a decree of divorce, the innocent party has the personal option of proceeding either to divorce or to judicial separation without the slightest interference in his choice on the part of the Court. It is, therefore, obvious that any partner who is actuated by unworthy personal motives has in his hands a life power to control the future career of the offender, and that this power is exercisable, not by an unbiassed judge, but by the very person of all others in the world who is the least fitted to pronounce an equitable judgment.

If it be objected that it is optional in many other cases of offence to the injured person to frame his accusation upon a less matter than the utmost, the reply seems evident. In all other cases the offender is benefited by having the lesser offence laid to his charge, but in this case, on the contrary, he is placed in a much worse position.

Yet another grave injustice exists in

these laws apart from the question of separation. It is unfortunately a matter of common knowledge that young persons are not seldom induced to marry by the pressure of such persuasion as falls little short of compulsion. If in their later years such persons find that their marriage has resulted unhappily, no remedy is open to them except one that can alone be obtained by the commission of a sin. Their lives have been laid down for them by others who may have been indifferent to the welfare of their wards, or possibly ambitious for their own, or who may even have been unfitted to exercise any judgment of a great degree of importance in any walk of life whatever. The result, however, is the same to the person most concerned. He may have been practically subjected to compulsion in taking the oath; but, even if he has, the oath in this position—alone in life—is binding upon him. He can never gain any redress, or effect any escape from the consequences of another's acts, except by committing a sin.

One more point remains—the question of pecuniary damages that are obtainable against a co-respondent by an injured husband.

Modern Public Opinion has so far condemned this power that the law bestows upon a husband—though not upon a wife—that suitors avail themselves of it much less frequently than aforetime. It is, however, still within the power of an injured husband to state the price at which he estimates the damage that has accrued to him by the loss of his wife; that is to say, the pecuniary value of his wife to him. Comment upon this provision of the law is, perhaps, unnecessary.

Such results as these seem in themselves sufficient to stamp the Act of 1857 as being, at the best, only a very incomplete measure; but there still remains to consider further the inclusion of the doctrine of Separation among the provisoes of the Act, and to endeavour to ascertain if that principle is in itself a good one, or if its existence does any-

thing to rectify the discrepancies already pointed out.

The principle of Separation

The principle of Separation appears to be traceable back to the times when the conception of the cardinal virtues included that of permanent celibacy; and, consequent upon the widespread influence of the Western Catholic Church, it was generally made use of before the Reformation to counteract in some degree the difficulties inevitably attendant upon a policy which declined to recognise the dissolubility of marriage by divorce. The subtle process of reasoning, however, which enabled the Western Church, and still enables the Church commonly known as the Roman Catholic Church, to argue that, though marriage is essentially indissoluble, it may be declared null and void for comparatively unsubstantial causes, was not one that commended itself to plainer minds. Eventually, therefore, though in some cases after the lapse of many years, and even centuries, from the Reformation, all Protestant countries admitted the

opposite principle of the dissolubility of marriage by divorce; but, and however strange the corollary may seem, scarcely one, if any, of those countries have even now entirely relieved their legal systems from the burden of this monastic conception of separation.

Theoretically, of course, the principle of separation has long been demonstrably fallacious, for it is but compulsory celibacy at its best. Practically, its fallacy depends upon the facts that human nature, as a whole, will not tolerate celibacy that is permanently enforced upon it, and that if an attempt is made so to enforce it the principle of matrimony will be in danger of becoming rapidly undermined.

In retaining in some degree, however, the principle of separation, almost all Protestant legislatures have recognised the dangerous results that are reasonably certain to ensue if any separation can be made permanent. England and a few of her colonies alone are the Protestant countries which totally disregard this prob-

ability; in every other case separation, more or less prolonged, constitutes good cause for divorce.

The view that has hitherto been held in England, though with notable exceptions amongst its wisest statesmen, has been that divorce between parties is to be discouraged in every possible way; and that it is better to allow permanent separation to take place between disagreeing partners—which is equivalent, of course, to divorce without the power of remarriage—than to recognise the extreme likelihood of persons thus permanently separated becoming but so many agents for the spread of immorality.

It is, perhaps, *prima facie* open to doubt if the practical benefits that can possibly accrue from permitting permanent separation without the power of remarriage can at all counterbalance the encouragement that it appears to give to the commission of immorality.

Legally, Separation is merely a survival of the theory of the absolute indissolubility

of marriage, and of those Romish tenets which once permeated the whole of our religious ceremonies. Certainly no odium should attach to a law that is good in itself merely because its origin may happen to be unpalatable to us; but equally certainly, when such a law is bad, its unsatisfactory, and certainly human, origin is no valid reason for preserving it.

Judicial separation as we know it is practically the old Canon law of divorce *a mensa et thoro*. It enables an inharmonious couple to part for the rest of their lives, but permits neither side of it to remarry unless the other be dead. A very slight amount of consideration is sufficient to show that such an arrangement is manifestly prejudicial to the interests of the State as well as to those of the individual; for it is neither more nor less than a tacit encouragement of that immorality which the institution of marriage was partly designed to prevent. Separated couples

are practically placed at this day in a very similar position to that in which they were under the laws of Justinian; for either the individual must lead a life of celibacy, or be content to remain forbidden to remedy an offence he will be likely to commit, and that the law, by permitting his separation, whilst refusing him remarriage, practically connives at. In 1900 there were no less than, in round numbers, forty thousand bastards born in England; but no statistics, of course, could show how many of these were traceable to the existence of the laws of separation.

So recently as the year 1895 an Act was passed, amending that of 1857, by which the Legislature actually sought to extend the operations of this evil principle of separation. In that year it was enacted that a married woman whose husband has (1) been guilty of an aggravated assault upon her; or (2) been convicted of assault upon her and sentenced to pay a fine of more than £5,

or to imprisonment for more than two months; or (3) has deserted her; or (4) has been guilty of persistent cruelty to her, or of neglect—might obtain an order of separation from her husband. This Act has been very largely made use of by the poorer classes—in the year 1900 no less than 6,661 separation orders were made by Courts of Summary Jurisdiction in England and Wales—and it would, perhaps, be difficult to overstate the possibilities of immorality that it has created. Strangely enough, too, the Legislature in this case has once more proceeded upon the principle of unequal treatment of the sexes, though in exactly the contrary direction of the unequal treatment that it metes out in the case of divorce. For in no one of these cases can the husband obtain separation from the wife.

Thus, in divorce, the wife cannot divorce her husband for the offence for which he can divorce her; but, in Separation, the husband cannot separate from

his wife for the reasons for which she can separate from him.

No authority appears to offer any reason for this double contradiction in the law; and unauthoritative reasoning hesitates even to attempt to reconcile enactments that result in making it easier for a man than for a woman to obtain divorce, and easier for a woman than for a man to obtain permanent separation. For permanent separation is, to all effect, divorce, though without power of re-marriage.

It is, on the other hand, the case that separation may sometimes be converted subsequently into divorce. But here, again, what the law gives with one hand it takes away with the other; for divorce cannot be obtained except for adultery coupled with desertion or cruelty. Now when once a judicial separation has been obtained, the plea of desertion very often can no longer hold; whilst that of cruelty—apart from its revolting idea—can scarcely ever be

possible, for the parties are bound by the separation not to harass or interfere with each other.

The power of conversion of a separation into a divorce, therefore, is generally only a really practical matter when the separation has been originally obtained on the ground of desertion or cruelty, and can consequently be coupled with a subsequent adultery. Otherwise, the power to plead desertion or cruelty is, for the most part, non-existent after separation has been obtained.

The other kind of separation, called Voluntary separation, or separation by mutual consent, possesses all the immoral possibilities of Judicial separation; and in addition the husband continues to be liable for the debts of his wife even after the separation has taken place, so long as she lives.

In cases of separation by mutual consent it is, no doubt, usual for the wife, or for trustees on her behalf, to covenant with the husband to indemnify him against his

wife's future debts, in return for his covenant to provide maintenance for her.

Such an indemnity, however, can obviously only be of value where the wife has a separate estate with which to satisfy her creditors.

If, next, we turn to consider the more detailed and intimate objections to the existence of our separation laws, apart from their immoral tendency, very little consideration will show how much they are open to abuse. Suppose, for instance, that a husband or a wife, by reason of violent temper, utter want of consideration, or any other similar cause whatever, makes the home unbearable to his partner. What remedy has the latter got? Practically very little. Except the acts of offence are very marked indeed, there is no sufficient justification for any legal interference at all; and, even when they are very marked indeed, the wife alone has the power of obtaining a separation from her husband. Then assume further that, as is very frequently the case, the injured party

declines to be subjected to such miseries any longer, and decides to leave the home. What happens then? In such a case his partner can, except his own offence has been very grave, institute a suit for the restitution of conjugal rights, and can obtain a decree compelling the other's return. If that partner still refuses to return, or to comply with the order of the Court, the Court cannot compel him to do so; but his act will then constitute, *ipso facto,* wilful desertion, and a judicial separation—but not a divorce—can forthwith be obtained against him, perhaps the really innocent person. Thus he can be condemned to a life of celibacy, or immorality, that must last as long as his partner is alive. Especially, too, we should notice in this connection the very great power that is given to a wife and that is denied to her husband. Violent-tempered women are, perhaps, not less common than violent-tempered men; whilst unreasonableness, fanaticism, extreme jealousy, extravagance, and revengeful-

ness are perhaps especially feminine characteristics. Yet a husband whose wife makes his house unbearable on these accounts is placed in the following position :—(1) He can obtain no divorce or separation from his wife. (2) If he leave his wife he continues, subject to the exceptions mentioned, liable for any expenses or debts she may incur ; and she may nullify even those exceptions by refusing to apply for restitution of conjugal rights or to obtain a judicial separation in any form. He may, it is true, at any time attempt to protect himself by adopting the unpleasant expedient of publishing his repudiation of his wife's liabilities ; but even this repudiation does not free him from liability, for it can only be pleaded against creditors who can be proved to have seen the repudiation.

Neither is it at all commonly possible for the husband to plead the cruelty of his wife as ground for judicial separation. The present view of the Legislature on the point of cruelty is governed by Lord

Russell's case in 1897; though the definition of cruelty it then upheld was not in any sense a new one, and did no more than emphasise the judgment of Lord Stowell on the point, given many years ago. Lord Stowell defined cruelty as a reasonable apprehension of bodily hurt, and laid especial stress upon the point that "the apprehension must be reasonable; it must not be an apprehension arising from an exquisite and diseased sensibility of mind." He continued his judgment in these words: "Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance, by calling in the succours of religion and the consolation of friends; but the aid of the courts is not to be resorted to in such cases with any effect." Sir Francis Jeune, however, states that this definition does not exclude a course of persistent ill-treatment, even if it do not amount to personal violence,

provided that the person complaining be not the author of his or her own wrong.

It is at least permissible to doubt whether the possession of a sensibility that is not necessarily either exquisite or diseased—a contingency opposed apparently to Lord Stowell's experience—is now really to be thought sufficient cause for condemning its possessor to the possible destruction of the animal machine, be he either man or woman.

Indeed, since 1895 the Legislature has arrived at the conclusion that there may exist, in fact, some justifiable sensibility in a woman, short of one that is diseased. Not, indeed, a sensibility of a very exquisite kind, but still one that no husband is legally presumed to possess. A wife whose husband has assaulted her may now obtain a judicial separation from him, summarily; but not a husband whose wife has assaulted him.

Again, and to consider the case of persistent ill-treatment constituting legal cruelty, provided that the person com-

plaining be not the author of his or her own wrong. The question at once presents itself, under what circumstances is the authorship of the wrong to be assumed? Let us take a concrete instance of no very inconsiderable frequency, unfortunately. Suppose that after years of mutual unhappiness one partner of a marriage commit a marital infidelity. Assume, too, that the other avail himself of his right to condone the offence and—let us not say, in order to—subsequently practise not only the ill-treatments, short of violence, of aforetime, but also those others which injured persons can especially devise under such circumstances. Would not the law say to such an offender complaining of his ill-treatment subsequently that his sin had constituted him the author of the ill-treatment? Would not his friends agree with the law? Would he find religious consolation in the words, "Woe unto him by whom the offence first cometh"? Yet no one can doubt that the original offence lay, not

in the sin, but in the mutual aversion of the parties which made the sin almost inevitable.

To return, however, to the question of Separation. It is usually accepted that evidence of a couple continuing to reside under the same roof is almost indisputable evidence of their being man and wife in the fullest acceptance of the term. It is, however, perfectly possible for an ill-disposed partner—especially a woman—to refuse the obligations of matrimony without much likelihood of the fact being capable of proof. It is, therefore, especially likely in such a case that at a somewhat later period a judicial separation may be granted on the ground of adultery upon the application of the really guilty person against the partner who was originally the innocent one of the two; and the latter may thus be debarred from remarriage, perhaps for the rest of his life, from no real fault of his own.

When, therefore, in addition to the certain immorality inherent in any system

of Separation, it is remembered that the blending of such a system with laws of divorce can produce such grotesque results as have already been described, it seems probable that the principle should be dealt with as the leaders of the Reformation wished to deal with it.

It is sometimes said, however, that the existence of Separation laws provides a useful interval for the parties concerned in the decrees of such suits to reflect whether or no it would not be wiser after all for them to come together again and resume matrimonial life. It would be instructive — though at present it is impossible — to know what proportion of judicially separated persons, as a fact, ever do come together again; and still more so to learn how the separation laws can effect this assumed result in any way which would not be equally practicable if they did not exist at all.

Conclusions of the Act of 1857

Thus, then, the opinion perhaps may be safely held that the Act of 1857 is bad, because it is :—

1. Unequal. (*a*) It allows a different standard of offence to the sexes; (*b*) it varies the standard itself, in the case of divorce, unduly against the woman; and, in the case of separation, unduly against the man.

2. Immoral. (*a*) It includes the laws of separation, which of themselves directly tend to promote immorality; (*b*) it denies to young or inexperienced persons who have been persuaded into marriage ignorantly, or against their real wishes, the opportunity of redeeming their mistake subsequently, except by committing a grave sin.

3. Contradictory. It pronounces the greater punishment for the less offence. For judicial separation is a far heavier punishment than divorce, and adultery is a far less offence than adultery coupled with cruelty or desertion.

4. Illogical. It declines to recognise as good cause for divorce offences and conditions that more thoroughly defeat the reasons and obligations of marriage laid

down in the Prayer Book than do the offences which the law now recognises as good cause.

5. Uncertain. It enables a suitor to vary the relief laid down by the law to suit his own ends. For when the greater offence has been committed against him he may proceed upon the lesser count, although the result of such action is to the greater detriment of the offender.

6. Unsuited to present requirements. It makes no provision to remedy any insurmountable differences, except physical ones.

Perhaps it is not too great an assertion to say that each one of these six conclusions is removed from the field of opinion, and must be classed as a fact. Hereafter more freedom has been assumed in the expression of personal opinion, especially in the pages dealing with the steps that seem desirable to take in future Divorce Acts.

III

Arguments against alteration of the law

BEFORE proceeding to discuss the exact nature of the amendments that seem to be the most required in our present laws of divorce, it may perhaps be well to direct attention to the arguments that would be most likely to be adduced against any alteration of the laws at all.

It does not seem unreasonable to suppose that some opposition, at least, to wider divorce laws might emanate from the Church; and no doubt if the Church were to assume such an attitude its opposition would be most weighty and powerful. Most probably, too, if the Church proceeded at all upon the lines of its opposition to the Divorce Act of 1857, it would put forward as its base argument the position that the Church

had never recognised the dissolubility of marriage at all, and that it did not do so now.

Indissolubility of marriage

This, however, would be an argument so entirely contrary to the general sense of Protestant civilisation, so retrogressive and Romish in principle, and so disastrous if carried into effect, certainly to the nation, and probably to the Church itself, that, except as a logical basis, it might not be urged very formidably. The more so would this be the case, inasmuch as the only argument in support of it would be a theological one that was of no very convincing certainty even in the days when theology most obtained.

Since 1857, however, there have not been wanting signs that the convincing proofs of necessity which the Church felt it its duty to demand before ceasing to oppose the passage of the Divorce Bill of that date have made themselves evident to a very wide section of its most earnest supporters. There remains, perhaps, among Protestants at least, but few persons who

are prepared to maintain that the difficulty of ascertaining the precise nature of the offence that is described by one of the words of our Lord (πορνείας) can outweigh the importance of devising some means whereby the sanctity of the all-important doctrine of Marriage may not only be preserved, but enhanced to the utmost limit. Nor are there still among us many who believe that the increased responsibility that is daily being more and more cast upon the individual concurrently with an increased freedom from undue restraint has been, or is likely to be, attended with results other than beneficial on the whole to the State. From the highest to the lowest—and perhaps not more amongst laymen than amongst Churchmen—it is recognised that even if there may have been some departure from an undeviating acceptance of religious dogma, yet still that there has never been an age when the great moralities that the Church has done so much to propagate in the past have been more widely reverenced and accepted

than at present. From the highest to the lowest, too, it is recognised—and again, perhaps, scarcely more amongst laymen than amongst Churchmen — that for our grandest and most powerful institutions to be able to diffuse their full benefits as widely as of old among the nation it is necessary that they should take full advantage of the wider interpretations that centuries of experience has given to old truths. For these reasons, and for many others, there should be much cause for hope that no great party in the State would blindly adhere to a policy that is no longer practicable, and that all would unite in a statesmanlike attempt to solve a problem of immense importance to the nation.

The Family

Another argument which would probably be most strongly urged would be that any alteration of the existing divorce laws would certainly endanger and impair the tone of Family life, and would thus strike directly at the foundation of society.

It is probably a misapprehension that

the family, rather than the individual, is the basis of society.

Even, however, if the family is to be regarded as the basis of society, it is not to be forgotten that precisely this forecast was made by the opponents of the Divorce Act of 1857. The fulfilment of it, however, does not appear to have been realised, at any rate, in any greater degree than the retention of the laws of separation among the provisions of the Act may reasonably be answerable for; for any increasing sexual immorality amongst us is surely less likely to have been caused by a common belief that the family, as such, is to be regarded as an institution of the past, than by a widespread recognition that the laws governing that institution are ill-suited for its maintenance in the present day.

Probably, however, the real truth that is intended to be conveyed by the statement that the family is the basis of society is, that the principle of marriage is the fundamental basis upon which all civilised nations have built up their social systems.

Unquestionably, marriage is the basis upon which civilised nations very correctly have built; and they have done so because they thus obeyed the teachings of Christianity, and at the same time furnished themselves with a sound position from which to treat the rights of succession to property and other cognate matters. But to argue from this fact that a reasonably lenient system of divorce strikes at the principle of marriage, and is therefore immoral, cannot but be beside the mark. Such an argument would also imply that any second marriage whatever must be wrong; for surely a union that has been abrogated by death is scarcely more finally brought to an end than one which has been ended by the cancellation of all the reasons for which matrimony was instituted.

Nor must it be forgotten, when it is urged that wider divorce laws are certain to injure the family sentiment, that the divorce laws can in fact have little to do with such a matter; for they come into play, not to destroy an existing senti-

ment, but to remove the false semblance of a sentiment that circumstances have long previously destroyed.

If, however, it be urged that the knowledge that such wider laws existed would be an incitement to many to indulge in sensual transgressions, which under strict laws they would be unwilling to risk, it is, perhaps, sufficient to point to the notorious and widespread connubial faithlessness that exists under our harsh laws at present, and to offer the opinion that more liberal legislation would be likely to contribute towards greater propriety, because it would render the stability of the marriage contract much more dependent upon individual exertions.

Perhaps, however, there may be those who consider that the strongest reply to such an argument is by an appeal to experience. The answer to that appeal can be made with confidence. England, and a few of the colonies that accepted her laws, so to say, in bulk, when they

first became colonies, stand alone among Protestant nations of the world in practically only allowing adultery as good cause for divorce. Yet no one can say that the family life of other nations is impaired, or that the foundation of their society is endangered. In any case, Scotland seems remarkably stable, and surely would earnestly resent any such imputation of an impaired family life, or of a lower moral tone being cast upon it.

If it be urged that the experience of other nations is not on all fours with our own because national characteristics differ, the answer seems evident; for several of our colonies, our own flesh and blood—besides Scotland—have long ago relaxed their divorce laws without ill effect, and others are following the same example.

It cannot be too strongly urged that greater individual freedom invariably creates a greater sense of individual responsibility; nor can it be too forcibly recalled that all history has shown that

unduly severe and harsh laws end by promoting the very offence that they essay to check, and alienate Public Opinion from condemning the offence itself.

Lower general morality and the sanctity of marriage impaired

Another very definite prophecy that was made during the debates of 1857, and one that would almost certainly be made again, is that relaxation of the divorce laws would surely tend to lower general morality, and to lessen the consideration in which the sanctity of marriage is held at present.

The experience, however, of other and kindred nations appears to be sufficiently stable ground to justify the most prudent legislator in doubting the eventual realisation of such an opinion.

French Revolution and cognate matters

No doubt, it might conceivably be possible to relax divorce laws so far as to be prejudicial to general morality. Such a course, however, as has been followed in past days by communities but just recovering from periods of anarchy and bloodshed, or by the wilder

sections of some of the least-restrained American States, is scarcely to be feared amongst ourselves. No sensible person wishes to destroy, or to lessen in the least degree, the essential sanctity of marriage; on the contrary, every sensible person most earnestly wishes to enhance it. But many thoughtful people are distinctly of the opinion that that sanctity and consideration is rapidly becoming less and less, and that offences against the marriage laws are every day becoming more venial in Public Opinion, because of the unjustifiable contradictions, omissions, and injustices of the present law of divorce.

No Demand for Reform

The final argument that seems likely to be presented in opposition to any reform of our divorce laws is that there is no demand for such a reform; that people are very well content as they are; and that, upon the whole, the law, however bad, works fairly well. It is, indeed, true that upon so delicate and so complicated a matter as the laws of divorce

very few persons can reasonably be expected to express in public whatever inchoate dissatisfaction they may suffer in private; and it is true, both because considerable attention has to be devoted to the detail of the subject before it can be thoroughly grasped, and because the attitude of one setting himself deliberately forward to advocate a reform of the system is very liable indeed to be misinterpreted. Not every man cares to attempt, as Lord Lyndhurst said in the debate on the Act of 1857, "to do justice to that portion of society which has no advocates of its own; which is subject to the laws made by us" (the Lords and Commons) "and which is sometimes the victim of those laws." But for the rest, a citizen of the United Kingdom in 1902 must be fortunately situated if he cannot call to mind some one or more persons of his acquaintance who have not been subjected to apparently unnecessary suffering and hardship in his matrimonial relations.

If, however, some further proof of the very real demand that does exist—it may be in silence—is required, it is, perhaps, sufficient to point to the advantage that is taken of more lenient divorce laws by nations whose conditions closely approximate to our own, and whose general morality certainly cannot be said to be inferior to our own.

It is true—as will presently be explained at length—that it is inadvisable to form definite conclusions as to the whole working of any divorce law from a knowledge of the number of divorces or separations that are taken year by year under its provisions; but these conclusions are far more likely to be misleading upon the point of comparative national morality, at least, in the case of a country with laws as severe as our own, than in that of one whose laws are more lenient. If, however, any reliable conclusions at all may be drawn from figures, the fact that in England some seven thousand judicial separations

are granted every year, is an abundant proof of the demand for relief. For judicial separation is divorce; though divorce without the power of remarriage.

It is, no doubt, true that we have but some five hundred actual divorces every year. But that, of course, is because our laws make it very difficult to obtain divorce, not because there is no demand for it. *Per contra,* the other European countries—countries whose laws, unlike ours, consider that compulsory celibacy is not a likely means of promoting morality—we find that the divorces granted exceed by far the number of separations granted.

Clearer proof, therefore, by figures alone, of the existence of a very real demand for greater leniency in divorce could, perhaps, scarcely be found.

If, then, such is the condition of things —and whether or no it is exaggerated everyone can judge for himself—it cannot be correct to suppose that the law does work fairly well.

Certainly it seems difficult to suppose that the Act of 1857 can reasonably be held to attain to the utmost finality, either from the Christian or the legal point of view. For no human law can be beyond the power of improvement that combines in itself the six greatest contraventions of the principles of equity. Nor is there, apparently, any need to lay undue stress upon the impossibility of applying rigorous logic in such a case as that before us; for, as will presently be shown, the reforms that are of real importance to effect in it involve no great amount of unusual endeavour.

Suggestions for remedies

The destructive arguments in the matter being now before us in some degree, it becomes necessary to present the future and constructive side of the question.

First of all, then, let us recapitulate the two positions necessary to maintain in the framing of a satisfactory divorce law; and subsequently abide by them as far as possible.

These positions are :—

1. No divorce law must be so wide as to militate by its laxity against the great principle of marriage.

2. No divorce law must be so harsh as to bring the principle of marriage into indifference or disrepute, or sexual offence into widespread toleration, by an unreasonable severity or by a general unsuitability to human needs.

Experience of other nations

Next, let us tabulate the causes for which divorce is given in other Protestant nations, or in Roman Catholic countries to their Protestant subjects. The figures parallel to the name of each country represent, where obtainable, the number of marriages and divorces in the stated year and the proportion of divorces per 1,000 marriages approximately. In cases where the number of Roman Catholic marriages (in which divorce cannot be granted) affect the proportion such numbers have been deducted, where ascertainable.

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Austria . .	1900	214,214, less Roman Catholics, say, 160,000 — 54,214	1,313	24·1	Adultery. Condemnation for crime. Wilful desertion. Immoral habits. Infectious diseases. Ill-treatment. Threats. Serious vexations. Unconquerable aversion after separation has been tried and found useless.
Hungary . .	1900	169,687, less Roman Catholics, say, 82,031 — 87,656	2,066	23·5	
Bavaria . .	1901	49,277	500	10	Adultery. Malicious desertion. Local desertion. Condemnation to imprisonment for ten years. Murderous attempt on partner or child. Marked enmity, dislike, and aversion, after separation has been tried.
Belgium . .	1901	57,131	891	14·5	Wife's adultery. Husband's habitual adultery in his home. Outrageous conduct. Ill-usage. Grievous injury. Condemnation to infamous punishment. Unwavering and legal expression of parties that their common life is insupportable.

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Denmark . .	1900	18,500	391	21·5	Concealed impotency. Leprosy. Incurable insanity. Adultery. Bigamy. Penal servitude for three years. Separation for three years.
England and Wales	1900	257,480	700	2·5	Wife's adultery. Husband's adultery, coupled with cruelty or desertion for two years. Bigamy. Unnatural crime. Rape.
France . .	1900	299,084	7,157	23·9	Adultery. Acts of violence, including abusive language. Desertion. Continued refusal. Disease. Habitual drunkenness. Concealed premarital unchastity of the wife. Conviction for crime, over five years. Separation after three years.
Germany . .	1899	471,519	14,142	30	Adultery. Desertion. Refusal. Impotence. Disease. Insanity, but not idiocy. Acts of violence or gross abuse. Confinement for crime in a fortress, or flight to avoid such punishment. Drunkenness and incurable extravagance. Refusal of maintenance. Insuperable aversion.

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Greece . .	No returns of divorce available				Treason. Wife's adultery. Wife's attempt on husband's life. Wife's abortion. Husband's adultery. Impotence. Monasticism. (There are also several trivial offences descended from antique Byzantine Law, which are falling into disuse.)
Luxembourg .	No returns of divorce available at present				Wife's adultery. Husband's adultery under common roof. Acts of violence, including threatening language. Condemnation to a dishonouring penalty. Unwavering and legal expression of parties that common life is insupportable.
Netherlands .	1901	40,261	561	14	Adultery. Malicious desertion. Imprisonment for four years. Acts of dangerous violence.
Roumania . .	No returns of divorce available				Adultery. Acts of ill-treatment. Acts of excess. Condemnation to penal servitude. Threatening language. Mutual consent of parties legally expressed that common life is insupportable.

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Russia . .		Russo-Greek Church, as per Yverne's report . . .		1·7	Adultery. Impotence. Sentence involving deportation. Desertion for five years. Concealed premarital unchastity. Murderous attempt. Refusal. Incurable disease. Insanity. Depravity of life. Cruelty. Grave crime. Penal exile.
		Lutheran Church, ditto . .		6·7	
N.B.—The latest Russian statistics available give the average rate of divorce to 10,000 marriages between 1867–1886 as 14·7, *i.e.* as 1·4 to 1,000 marriages. They appear to make no distinction between the figures for the two Churches mentioned above.					
Saxony . .	1900	37,986	865	22·7	Adultery. Unnatural offence. Bigamy. Desertion for one year. Incurable drunkenness. Self-mutilation. Dangerous cruelty. Condemnation for three years. Change of religion.
Servia . . .	1899	24,456	340	14	Adultery. Treason. Murderous attempts. Secession from Christianity. False accusation of immorality. Imprisonment for seven years. Desertion for seven years. Wilful desertion for four years.

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Scotland . .	1900	32,449	195	6	Adultery. Malicious desertion. Bigamy. Unnatural crime. Rape.
Sweden . .	1899	31,710	387	12	Adultery. Infidelity after betrothal. Incurable disease. Murderous attempt. Insanity over three years, declared incurable. Mutual aversion. Sentence to loss of civil rights. Conviction of grave crime. Prodigality. Drunkenness. Violent temper.
Norway . .	1899	15,530	121	7·8	Adultery. Unnatural crime. Bigamy. Malicious desertion for three years. Disappearance for seven years. Penal servitude over seven years. Impotency. Leprosy, or incurable disease.
Switzerland .	1901	25,379	1,027	40	Adultery. Murderous attempt. Ill-usage. Sentence to degrading punishment. Wilful desertion for two years. Incurable insanity for three years.

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
United States of America . .	No official returns are available for a later period than the years between 1867–1886; and in those returns only fifteen States give statistics of marriage and divorce which are pronounced to be even approximately correct. So far as the incomplete returns of these fifteen States go, they seem to show the proportion of 55·5 per mille; but this figure is quite unreliable, and should be disregarded. There were some fifty States in the Union in 1886.				Vary very much. South Carolina alone permits no divorce. Broadly the following causes are good:—Adultery. Bigamy. Impotence. Idiocy. Wilful desertion (for period varying between six months and five years; fifteen States decree one year; three States five years; one State six months). Felony. Unnatural crime. Imprisonment (one State seven years, and so on down through less periods to one year in New Hampshire). Extreme cruelty.
BRITISH COLONIES.					
Canada (generally)	1900	33,316, less Roman Catholics, 13,316 = 20,000	19	1	Adultery by wife. Incestuous adultery of husband. Bigamy. Unnatural crime. Adultery and cruelty. Adultery and desertion.

NOTE. — In Ontario, Quebec, North-West Territories, and Manitoba, divorce can only be obtained by Act of Parliament.

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Cape of Good Hope	1901	9,243	78	8·4	Adultery. Malicious desertion. Unnatural crime. Perpetual imprisonment. Long absence. Refusal.
Natal . . .	1901	1,368	7	5·1	Adultery. Malicious desertion for eighteen months.
Newfoundland .		No divorce exists			Appears to have no law of divorce.
New South Wales	1900	9,996, less Roman Catholics, 1,964 = 8,032	216	26·9	Adultery. Unnatural crime. Wilful desertion for three years. Continued drunkenness and refusal of support for two years. Imprisonment for seven years. Frequent conviction and denial of support. Murderous assault. Repeated cruelty during two years.
Queensland . .	1900	3,371	12	3·5	Almost identical with England.
South Australia .	1900	2,305	7	3	The same as in England.
Tasmania . .	1900	1,332	4	3	The same as in England.

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Victoria . .	1900	8,308, less Roman Catholics, 1,268 = 7,040	105	14·9	Adultery. Wilful desertion for three years. Habitual drunkenness for three years coupled with denial of support or cruelty. Imprisonment for seven years. Frequent conviction and denial of support. Murderous assault.
New Zealand .	1900	5,860	85	14·5	Adultery. Wilful desertion for five years. Habitual drunkenness and failure to support, or drunkenness and neglect. Penal servitude for seven years. Murderous attempts.
West Australia .	1900	1,781, less Roman Catholics, 334 = 1,447	16	11	Same as in England.

Results of this comparison

A glance at this table will show that there are no Protestant countries in the world, except England and five or six of its colonies, which are of opinion that adultery combined with cruelty or desertion should alone, practically, be sufficient cause for divorce. We see, too, that everywhere else the wife is allowed divorce for adultery equally with the husband. We also learn that almost every country, if not every one, makes a particular point of including among the good causes for divorce Desertion, Prolonged separation, or Imprisonment for some term or other. Every colony, except those which have our own laws of divorce, also include these causes in some form or other.

We learn further that Cruelty, Habitual drunkenness, and Incurable insanity are also causes very generally accepted.

We may also notice that the percentage of divorces taken per 1,000 marriages varies according to no very definite rule. As the divorce laws become wider, in most cases, but not in all, the percentage of

divorce taken becomes rather greater; but the figures obtainable are not for exactly similar periods in different countries, and so are not to be relied on for exact, though they may be for substantially, comparative accuracy. This greater percentage, of course, can almost certainly mean nothing more than that civilised human nature, being approximately equal in morality, certain countries whose laws seldom allow divorce are naturally able to record a smaller number of divorces; just as we ourselves now are able to record fewer instances of capital punishment since execution for theft was abolished. However, even the extremest percentage —about 40 divorces per 1,000 marriages, or 4 per cent.—in countries with lenient laws, cannot surely be taken as evidence of the existence of a very dangerous condition of their society. Or, if it be so taken, we ourselves, who have the strictest laws, and therefore the fewest recorded divorces of any country, must be in an almost equally bad condition; for this four

per cent. is the measure of our superiority. Again, two contiguous countries such as Belgium and France, both with very wide laws, record percentages respectively of 14 and 24 divorces per 1,000 marriages.

It is to be observed also that, in the case of England and those of the colonies which retain equally severe divorce laws, the proportion of divorces per 1,000 marriages is singularly equal—about 3 per mille—except in the case of West Australia, where, possibly for some local reason, the rate rises as high as 11 per mille. Canada, it is true, has a rate of only 1 per mille; but no doubt the fact that great expense has to be incurred in four of her provinces in obtaining the necessary Act of Parliament for divorce accounts for much, if not all, of the difference.

It may also be noted that Natal, which has an almost identical divorce law with Scotland—that is, rather a wider one than the English—has a divorce rate that is also practically identical with the Scotch

one; whilst the Cape Colony, with a slightly wider law, has a slightly higher rate.

In the case of those colonies which have yet more lenient laws we find, similarly, a rule and an exception. In quite recent years New South Wales, New Zealand, and Victoria have relaxed their divorce laws very considerably. The proportion of divorce per mille has consequently risen; but as between two of these colonies it remains singularly equal at the approximate figure of 14·7. New South Wales, on the other hand, with an almost identical law of divorce, has a proportion of 26·9. Since the passing of the New South Wales Act of 1892, however (which granted this leniency of divorce), the number of divorces taken has fallen from 306 to its present number of 216; that is, a decrease of about 30 per cent. has taken place in face of a greater latitude of divorce and a very steady marriage rate. The discrepancy between the figures of New South Wales and the other

two colonies is said to be accounted for by a large accumulation of cases immediately upon the passing of the law of 1892.

If, however, we take the latest average rate of divorce in these three colonies with divorce laws that approximate closely to the general run of European laws, we obtain a rate of 18·8 per mille. And, singularly enough, if we take the average rate of the fourteen European countries with lenient laws (that is, omitting England and Wales, Scotland, and those countries which make no divorce returns), we arrive at the very similar figure of 18·5.

It seems, therefore, reasonably evident that a proportion of about 18 divorces per 1,000 marriages is the present measure of the number of marriages in Protestant communities with reasonably lenient divorce laws, that are likely to result so disastrously as to demand dissolution in the interest of the State; and it can hardly be said to be a figure of dangerous size.

If, then, we assume this proportion of 18 divorces per mille to be a correct average

under reasonably lenient laws of divorce and apply it to our own society, we arrive at a startling result.

For in the year 1900 there were 257,480 marriages registered in England and Wales; in 1899 there were 262,334. If, then, our divorce laws assimilated in any considerable degree to those of other Protestant communities, we should expect to find 4,634 divorces in 1900 and 4,722 in 1899. The number of decrees that were made absolute, however, in England and Wales were only 512 in 1900 and 468 in 1899. Unless, therefore, some motive is at work in England and Wales that is operating nowhere else, it would seem that we are denying relief to more than 4,000 couples per annum for no reason that appeals to other Protestant nations. Yet, as a fact, no motive really appears to be at work in England and Wales uniquely, for something like 7,000 judicial separations—that is, divorce without the power of remarriage—are granted every year. Our singularity, then, as opposed to other nations,

seems to lie in the fact that we prefer to compel some 10,000 persons per annum to perpetual celibacy, or immoral living, rather than permit them the opportunity of redeeming a perhaps unavoidable mistake.

There seem to be also some other facts that may be gleaned from the foregoing tables and figures.

The first of these is that, as matters stand throughout the world at present, lenient divorce laws do not make the direct commission of sexual immorality alone any more probable than do strict ones. For every country without exception makes the act of sexual immorality itself good cause for divorce. More lenient laws, therefore, cannot increase the commission of actual sexual offence for the sake of obtaining divorce, for even now persons so acting are already liable to it. In England, it is true, we do not always grant divorce for matters that are directly sexual; for we do not permit a wife to divorce her husband for adultery, though we do permit her to do so for rape. But

this fact simply proves that our strict laws do not do as much to punish sexual immorality as more lenient systems do. Another very important fact that is fairly evident is, that the number of divorces sought for in the world on account of direct sexual immorality constitutes but a very small proportion of the whole. An apparently probable estimate of what that proportion is may be arrived at by taking the divorces granted in countries with laws so strict that practically only direct sexual immorality is considered as good cause. These countries are England and Wales, Scotland, Canada, Natal, and four of the Australian colonies; and their average proportion of divorce per mille is 4·4. Generally, the correctness of this figure cannot, of course, be proved until statistics exist in every country that will show the separate causes for which divorce has been granted in each case. So far as the writer knows, the only statistics which give these causes are the latest Russian and American ones for the years between 1867–1886.

These show that only about 10 per cent. of the Russian divorces granted in those years were for direct sexual immorality. But prolonged absence accounted for about 65 per cent. and loss of civil rights (*i.e.* penal servitude) for nearly the remaining 25 per cent. In the American case the causes of nearly half the divorces are returned as "Unknown." Of the other half, about 14 per cent. are for adultery; about 50 per cent. for cruelty and desertion (probably equivalent mainly to unconquerable aversion); about 13 per cent. for drunkenness; and the balance for combinations of causes.

There seems, therefore, nothing to show that a very strict code of divorce, or a very expensive process of divorce, does not merely defeat its own ends; for mankind will not be compelled to endure such evils as drunkenness, cruelty, or unconquerable aversion in the home; and if the law refuses to sanction its action, it will act without that sanction. But, without that sanction, the encouragement of prudent

marriage is negatived, and instead is encouraged the procreation of bastard children and the commission of general immorality.

A third fact is that, apparently, our national morality, if judged by the light of our strict divorce laws, is by no means superior to that of other nations. For, if we add the number of our divorces to that of our judicial separations (in 1900 divorces 512 ; judicial separations 6,661), we get a total of 7,173 couples who are—except as to 512 of them—for all purposes of immorality, though not of morality, divorced. It may be added that if we were to reckon all these couples as actually divorced—as for all purposes except that of direct morality they are—the English proportion of divorces per mille would become 27·9 instead of 2·5 ; and would, therefore, be more than 50 per cent. higher than the average European figure of (including Scotland) 17·7.

It need, perhaps, hardly be added that the number of separations in foreign

Protestant countries, as compared with the number of their divorces, is very small. They have proceeded upon the principle that, if couples vitally disagree, it is better to allow them the opportunity of leading moral lives apart from each other. This principle, however, does not appeal to us.

As against this view of national morality, however, there appears a very eminent opponent. The Archbishop of Canterbury, if he was correctly reported, offered the opinion to Convocation, in the early part of 1902, that the tone of society generally, and the moral law generally, in the United States must be lower than it is in England, because the number of divorces in the United States is proportionately greater than the number of divorces taken in this country. The writer is unaware of the source from whence His Grace has derived figures to arrive at any accurate proportionate rate of divorce; for the United States authorities inform the writer that the 1889 Report of the United States Labour Commissioners is

the most recent publication on the matter, and that official report expressly states that its marriage returns are so incomplete that the total number of marriages for any one year cannot be given.

The opinion seems based on a misapprehension, however, in any case. In its widest sense it appears to mean that the moral sense of the United States must be lower than that of England, because the people of the United States consent to place upon their statute books very wide laws of divorce. It cannot, that is, merely mean that their moral sense is lower because they abide by the laws that have been made.

Now, and generally, the wider the scope of any law of restraint, the more the persons that are affected thereby.

The intention of all divorce laws is, primarily, an intention of restraint.

The wider, therefore, that they are, the more persons they affect in restraint, and the more their effect tends towards morality, so long as their punishments

are not so severe as to produce rebellion against them nor their permission so wide as to negative their restraints.

Further, divorce being in the nature of a punishment to the guilty party and in that of a reward to the innocent one, by as much as reward is facilitated, by so much, at least, is punishment facilitated. For, in each divorce case, there cannot be more innocent persons concerned than there are guilty.

However, in His Grace's opinion, the leniency of the United States divorce laws is the criterion of the general moral sense of that community; and the proportionate size of that moral sense is to be estimated by the number of divorces taken under those laws. Presumably, therefore, the same test is universally applicable.

Now the divorce law of the Netherlands is far more severe than that of Bavaria or of Sweden, for instance.

Therefore the general moral sense of the Dutch is higher than that of the Bavarians or Swedes.

But the number of divorces granted both in Bavaria and in Sweden is proportionately less than that in the Netherlands.

Therefore the general moral sense of the Dutch is lower than that of the Bavarians or Swedes.

Again, in South Carolina there is no divorce law at all, and consequently there are no divorces. But His Grace would surely be the last person to assert that the moral sense of South Carolina is superior to that of England; for there, according to the eminent authority Bishop, concubinage is so generally recognised that the laws of inheritance have had to be modified.

In a narrower sense the fallacy of the Archbishop's generalisation seems to lie in the fact that nations are not, any more than men, the more virtuous and moral because their immoralities do not happen to come under the scrutiny of law. Good cause for divorce in most of the United States is very wide. Many persons therefore are affected. In England good cause

is very narrow. Few persons therefore are affected. But it seems as impossible to argue from these facts that the English sense of morality is better than the American as to argue that lying is infrequent in England because only perjury is directly punishable at law.

Finally, too, it must be certain that the Archbishop would not assert that such matters as Insanity, Unconquerable aversion or its equivalents, and the like are necessarily breaches of the moral law in themselves. Yet these form good cause for divorce, not only in the United States, but very generally, and would be, there is little doubt, the most important factors in producing the greater proportion that His Grace has discovered and deplored.

No divorce statistics are any complete criterion of the morality of a country, and the stricter the laws of divorce of a country are, the less of a criterion the statistics are; for the stricter the laws within limits, the more likelihood there is of secret offence. And further than that. Lenient laws of

divorce, as a fact, by no means always imply a greater percentage even of divorces. In Sweden, for instance, where the law of divorce is perhaps as lenient as in any country in the world, the proportion of divorces per thousand marriages is lower than in Holland, which has laws of a severity only surpassed by our own. In the Orthodox Church of Russia, similarly, with much wider divorce laws than ours, the percentage of divorces only exceeds our own by a decimal fraction, if M. Yverne's figures are to be relied upon.

In Victoria and New Zealand the percentage of divorce is only about half that of New South Wales with identical laws.

In West Australia, again, with laws of English ferocity, the percentage of divorce is higher than in Bavaria, in spite of the latter's reasonable enactments.

Recommendations

Summing up all these various considerations, it seems quite plain that the first step to be taken in amending our laws of divorce is to purge them of any tendency to encourage, or connive at, im-

morality. Therefore the Separation laws should meet with our first attention.

It has already been shown that these laws, by permitting married couples to live apart, whilst at the same time enforcing celibacy upon them by refusing them the power of remarriage, must tend towards immorality.

It has also been urged that, even if immorality does not result, it is not just to impose this disability upon separated couples.

Neither is it necessary.

The strongest argument in favour of necessity seems to be that one which urges that if the remarriage of separated couples were to be permitted a powerful inducement to immorality would be created by the ease with which those who had committed a matrimonial offence would be placed in a position to marry the person with whom they had offended, and that thus marriage would gradually come to be regarded as a contract terminable at will. Such an argument, however, loses sight of the fact that, under certain

circumstances, marriage is already a contract terminable at will—at the will of the party offended. It also loses sight of the fact that separation by mutual consent is not only a termination at will of the marriage contract in every one of the essential reasons for which matrimony was instituted, but is also a tacit permission to the offending party to continue his offence practically freed from all possibility of any marital responsibility whatever. The argument, then, so far as it concerns adultery is not one against the remarriage of separated couples, but against the principle of separation itself.

So far, again, as it concerns separation for cruelty or desertion, this argument that remarriage should not be permitted to either party punishes the innocent equally with, and probably more than, the guilty, and certainly makes it probable that both parties, finding themselves debarred from pursuing a natural life legally, will follow one that is without sanction of the law.

Here again, then, it is not remarriage that must bear the weight of the argument, but the principle of separation.

The popular opinion, too, that the real motive actuating one or both parties in a divorce suit is generally the desire of marrying some third party finds refutation in what statistical evidence there is. In the State of Connecticut, and in Switzerland, Holland, and Berlin, the numbers of divorced persons remarrying at all in each year is stated to be only about one-third of the total number of persons divorced. The writer's own investigations, indeed, seem to show that in Switzerland this proportion is somewhat greater; but such evidence as there is of the whole fact may be taken as discrediting the popular opinion. This remarriage rate, it may be added, does not differ widely from that of the second marriages of widows and widowers of the same age.

It may no doubt be argued from these figures that if such reluctance is shown to remarriage among divorced persons, it

would not be likely to be any less in England than abroad if our separation laws were amended, and that, consequently, the result upon existing immorality would be small. This objection, however, seems to underrate altogether the power of Public Opinion in England, or the moral tendency of that opinion. "Freer divorce," said Lord Lyndhurst, in arguing in 1857 for the inclusion of desertion as good cause for divorce, "is likely to contribute to greater propriety of conduct, because it makes the contract much more dependent on the exertions of the parties themselves." If that opinion was true in 1857, it is doubly true now. We should certainly remember that—even years ago when it was much weaker than it is now—unaided Public Opinion was strong enough to abolish from polite society so well recognised a demand of honour as duelling. Prize-fighting, too, habitual drunkenness, and such-like, Public Opinion successfully struggled against; and Public Opinion exercised its strength because the time

came when it considered all these practices to be inexcusable and unreasonable. Again, immediately that the law was so altered as to make bigamy inexcusable and unreasonable, Public Opinion at once condemned an offence of which it had before been tolerant. It would rather seem, then, that we have much reason to suppose that if we now choose to alter the laws that govern the offence of adultery so as to make it also an unreasonable and inexcusable act, we shall meet with no undesirable results, but rather the contrary.

It may indeed be asked if those Protestant countries which have adopted lenient laws of divorce find that, in general, marital infidelity is less frequent with them than it is with us.

Opinions upon this point seem to differ. Even, however, if it be no better with them than it is with us, it is to be remembered that they retain a practice that is tolerably certain to result disastrously. Almost all, if not all, Continental nations arrange the marriages of their sons and daughters by

the pleasure of the parents, totally irrespective of the wishes of the future couple.

To revert, however, to the argument. By enacting a greater leniency in the laws of divorce we are placed also in a position to utilise, if necessary, severer means of restraint than under an already harsh law it is possible to make use of. If our laws of divorce were made reasonably lenient and of equal justice, there is, as has been said, but little doubt that Public Opinion would very soon utterly condemn marital infidelity in any case, for there would be no excuse for it as there is now. But whether Public Opinion did so increase its severity or not, all reason for palliating the offence would have passed away, and there would then seem to be no obstacle in the way of imposing upon offenders against the law a measure of actual personal discipline of no very lenient kind. At present no punishment whatever is meted out to those found guilty of adultery, except in a most perfunctory way. A co-respondent, if he be a man, may indeed be mulcted in damages

and so forth; but this principle is falling more and more into disuse, happily, and for obvious reasons. No doubt certain social disabilities are, at any rate temporarily, imposed upon wives who are proved in open court to have been unfaithful to their husbands; though the same remark is thought not to be applicable to every wife whose mode of life is impossible of misinterpretation. But a very effectual check might be imposed upon marital infidelity, if once all reasonable excuse for it were removed, by subjecting all married persons found guilty of adultery during cohabitation to the disgrace and inconvenience of a more or less prolonged term of imprisonment. Such a proposition is no doubt altogether novel, and as the laws now stand it would be not only impossible to effect, but be another source of weakness added to those of the present laws themselves if it ever were effected. Once, however, that both man and woman were in a position to obtain an equal and not dishonourable relief at the hands of the

law, there would seem to be no great reason for not severely punishing any persons who preferred to set the law at defiance rather than accept the relief it offered.

In this connection it may be thought, perhaps, that some such punishment might be inflicted upon single co-respondents, as well as upon married ones. A little consideration, however, will show that the attempt to do so would raise difficulties that would be likely to defeat the objects of any divorce law.

Perhaps enough has now been said to show that the laws of Separation are undesirable, unnecessary, and also inefficacious to promote morality; indeed, that they have a directly contrary tendency.

In any reform of our divorce laws, therefore, it seems clear that it would be wise to progress to the principles of the Reformation, and to abolish the Separation laws altogether, so far as they are recognised by law. Voluntary separa-

tion, unhappily, could not be so directly swept away; but as it is the immediate result of a too rigid system of divorce, it would be likely to be much less freely made use of under a more benign system.

If, then, this step were taken, the position would be that divorce alone would be the remedy for injured parties; but divorce only in such extreme cases that the great body of injury would remain untouched.

Before, however, entering on the question as to how far any relaxation of the causes good for divorce is practicable, there is another correction feasible that involves only an exercise of common justice.

Assuredly, a wife should be allowed to divorce her husband for the same cause for which he can divorce her. Attention has already been drawn to the arguments that affect this point, and it perhaps does not call for any further comment.

Let us now consider if, and in what way, it is possible so to reform the remaining laws of divorce as to make them more effective agents in the interests of the State than they are at present.

To this end let us first of all recite once more what are the reasons and primary objects of marriage, as authoritatively laid down in the Prayer Book of the Church of England; let us recall that the policy of permitting no divorce at all has never succeeded in any country in which it has been tried, and, therefore, cannot be entertained as within the scope of practical politics; and let us set out once more the main objects to be attained in the framing of any Divorce Act whatever.

The reasons and objects of matrimony as laid down in the Prayer Book are:—

1. The procreation of children.

2. The avoidance of sin.

3. The enjoyment of mutual society, help, and comfort, both in prosperity and adversity.

The two positions it is necessary to maintain in the framing of any Divorce Act are :—

1. No divorce law must be so wide as to militate by its laxity against the great principle of marriage.

2. No divorce law must be so harsh as to bring the principle of marriage into indifference or disrepute, or sexual offence into widespread toleration, by an unreasonable severity or by a general unsuitability to human needs.

An endeavour has already been made to demonstrate clearly that those offences and conditions which destroy the primary objects of matrimony as laid down should be the ones, other things being equal, for which divorce should be given and power of remarriage granted. For, by their destruction, the object of the original marriage ceases ; and prudent marriage is a status to be encouraged by every means in our power.

The conditions and offences, then, which necessarily destroy every one of the con-

ditions permanently are four in number; namely, Death, Separation, Wilful desertion, and Insanity.

The conditions and offences, other than these four, that necessarily destroy one or more of these objects permanently are also four in number; viz. Refusal, Impotency, Habitual drunkenness, and Unconquerable aversion.

And the conditions and offences that probably, but not necessarily, destroy one or more of these objects permanently are five in number, and are: Adultery, Continued cruelty, Murderous attempts, Incurable disease, and Penal servitude.

For the conditions and offences which are in the most destructive class—excluding death—the law at present allows no divorce to either man or woman. Separation, however, may be converted into divorce under certain rare conditions. For those in the next most destructive class the same is the case, except, of course, that a marriage may be annulled for impotency, consanguinity, and so forth.

For one of those in the least destructive class the law at present allows a wife to be divorced and either party to remarry; and for a combination of two offences in this class (adultery and cruelty), or for a combination of one offence in this class and one of the first class (wilful desertion), it allows divorce and remarriage to both parties.

There seems to be no very adequate reason that can be offered for the choice that the Legislature has exercised in the matter, except it be assumed that it has considered the procreation of children to be the dominant reason of matrimony; for it seems to have made no effort to consider the question of the avoidance of sin, or of the absence of mutual society and comfort. Yet, if that has been the object of the Legislature, it has gone far to defeat its own ends by refusing divorce for either wilful desertion, insanity, habitual drunkenness, penal servitude, and incurable disease, every one of which conditions are almost sure to produce

sterile marriages, and would seem to amount rather to nullity of marriage than to causes for divorce. Indeed, every one of the conditions mentioned in all the classes are reasonably certain to result in this way. And, too, if this has been the base principle of the Act of 1857, a culmination of inadequacy has been reached when permanent separation between parties, but not remarriage, has been allowed.

Perhaps it would not be very far from the truth if we came to the conclusion that the authorities of 1857 aimed rather at doing what they could, in face of an opposition bent upon upholding the indissolubility of marriage in any event, than at what was desirable. In these days, however, when the impossibility of sustaining the contention of the indissolubility of marriage is axiomatic, we can afford to proceed to the remodelling of our laws of divorce in a different spirit to that which necessity imposed on our forefathers.

No doubt there are difficulties in the way of proceeding to formulate a series of offences and of asserting that divorce is advisable in every one of them. But most of these difficulties will vanish if we bear in mind that divorce can never be compulsory, and that it must almost always be in the mouth of the injured party to say whether he will avail himself of it or not.

Of the conditions and offences, then, that have been tabulated as impassable breaches of the objects of matrimony, two may at once be disregarded, namely, Death—by reason of the fact—and Separation—because, *ex hypothesi,* separation as a process of law will have been abolished.

There remain, then, as causes for which divorce seems permissible :—

1. Wilful desertion. This offence is a breach of every one of the objects of marriage, and the consensus of opinion of civilised nations is that it is good cause for divorce.

2. Insanity. This condition is also fatal

to all of the objects of marriage. Any fears—at one time well-grounded fears—that the condition of our lunacy laws might readily cause a misuse of this condition are now, happily, inconsiderable. Other nations deem it good cause for divorce.

3. Refusal. If impotency on the part of the man is to be deemed good cause for nullity of marriage, as it is at present, refusal on the part of the woman should be equally so. At present it is almost incapable of proof, and thus may be productive of very gross injury to the man. The abolition of the separation laws, however, would tend to facilitate the solution of the question for obvious reasons.

4. Habitual drunkenness. This offence is certainly destructive of the third reason and object of matrimony, and frequently also of the first and second. It is now cause for a wife to obtain separation from her husband, but not cause for the husband to obtain it from his wife. Other nations allow it as good cause for divorce.

5. Unconquerable aversion. This is dealt with presently as being a new departure in our law.

6. Adultery. Although this offence is but a probable breach of the reasons and objects of matrimony, it is so probable and so evidently injurious to the interests of the State that it is justly made good cause for divorce at present as against the wife. Combined with desertion or cruelty it is now good cause against the husband. This offence should be made good cause for either party. Other nations do so invariably.

7. Continued cruelty and murderous assaults. Like adultery, these are probably, but not of necessity, complete breaches of the objects of matrimony; and like it, are not only such very probably complete breaches, but also offences of so revolting a character that they should be good cause. At present a wife may obtain separation from her husband for these offences, but a husband cannot from his wife. Other nations admit it.

8. Incurable disease. This condition speaks for itself. On the one hand, it is far from likely that any partner would divorce the other, if that other were suffering from mortal disease of an ordinary character. On the other hand, no one should be asked to submit to the obligations of matrimony if the incurable disease were of a disgusting character, though not necessarily mortal. Probably the inclusion of it as a good cause for divorce would not be attended by much risk of abuse, as the situations are so comparatively rare. But it might be excluded in the event of the inclusion of some plea equivalent to unconquerable aversion, and come under the provisions of that plea. Some other nations allow it, especially those countries where such diseases as leprosy are not uncommon.

9. Penal servitude. Apart from the criminal character of the partner subjected to this condition, the condition itself amounts to prolonged desertion. This seems good and reasonable cause for

divorce, and is allowed as such by other nations.

The question of the inclusion of unconquerable aversion as good cause for divorce now demands attention.

Readers of the Prayer Book will notice that the third of the causes given as those for which matrimony was ordained runs as follows :—

"It was ordained for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity."

It is probably a just assumption that the Church itself does not consider any one of the three causes given in the Prayer Book as more important than another. It truly declares that the essence of marriage is spiritual, and therefore it would not urge that the physical side of matrimony is, in truth, of more importance than the spiritual. Certainly few laymen would be prepared to accept the dictum that the really important intentions

of marriage are only the begetting of children and the avoidance of sin.

The very able and profoundly religious author of the article "Christianity" in the *Encyclopædia Britannica* makes the following weighty observation in the course of that article: "The Christian," he says, "is moved by moral impulses and guided by moral principles which are peculiar to himself. He cannot look on marriage, for example, from either the purely economic or the purely sensuous point of view. He cannot help reorganising the scheme of virtues, and giving to the principle of love a pre-eminence which it has not in pagan ethics."

There can be but few who will not subscribe to every word of this sentence. But it seems to be far from meaning that, though we ourselves should practise love individually, we are to allow our laws to preclude that chief virtue from their enactments. Surely it does not mean that a phase of acute human suffering, that is perfectly capable of relief, and that is relieved

almost everywhere except in England, must not be relieved, except the sufferer choose to commit an offence that is contrary to Christianity, contrary to law, and very often contrary to the true inclinations of his character. Rather it would seem to mean that it is fitting that some honourable and blameless means should exist for the lightening of a burden that is too heavy to be borne; not that the bearers of it should be compelled to struggle painfully on as long as they can till they sink at last to a moral death, or, at least, to a welcome end of life.

A moment's thought will convince us that, except perhaps among the most sensual class of men and women, the true origin of every matrimonial trouble and offence is divergence of thought, and the consequent destruction of companionship. Companionship, of course, by no means implies that to be companions two persons must think identically; it merely means that no companionship is possible unless thoughts run on an equal plane, so to say, of sympathy. It matters but little that a

wife does not understand her husband's business matters, though it were better if she did. It is of minor importance that a husband lays less stress upon a beautiful piece of scenery than does his wife, though it were better if he did not. But what does matter, and what is quite certain to destroy companionship, is that the one should progress in thought and that the other should not; for then communication becomes impossible. For presently, in such a case, the one partner lays blame on the other, and that other, perhaps, eagerly tries to remedy his fault. But however much he try, the artificiality of his exertions is manifest, and merely causes a yet greater annoyance to one who is still his friend. The pressure insensibly increases; mutual absence becomes a mutual relief; and former joys become present disgusts. But the manifold divergencies of temperament are so well known to everyone, and their development is so entirely out of the control of the individual, that it is useless to labour the point of the unwilling destruc-

tion of companionship. How in such cases can there be society, help, or comfort? And why, inasmuch as their absence most frequently causes the utter destruction of the remaining reasons for marriage, should not their absence be estimated by the law at its true importance?

We ought not to forget that mental suffering is as acute, to put it no higher, as bodily suffering; or that there are very many sufferers who long for relief, and who yet shrink from committing the physical offences for which our law stipulates before it will give them relief. We ought not to forget that we teach, and that the Church teaches, that violence and sin are utterly indefensible; and yet that, nevertheless, neither we nor the Church offer any present remedy to those who find themselves in the most impossible situation in human life, except the alternative of committing an extreme violence, or a sin. Nor ought we to forget that to compel continuance in a wedlock in which there is neither society, nor help, nor comfort, is little, if

anything, less than to offer temptation to a breach of the bond of matrimony.

Hindrance in the way of undue hastiness of decision on such a point by all means let there be. But we must no longer continue to imagine that we afford any real relief to moral persons by telling them that they are at liberty to escape from an insufferable position if they will perpetrate acts that their education and refinement condemn to them as revolting.

Surely it need not be necessary that the law should bestow relief more freely upon the immoral man than upon the moral.

It is true that we cannot make morality by Act of Parliament, and that we can make it by teaching self-respect and self-control. But we are unwise to suppose that human beings can be taught their lesson in the manner in which wild animals in captivity used cruelly to be taught theirs; that is, by their first being reduced to a condition of passive despair. In human beings that plan most usually produces a revolt against

both morality and law; and signs are not wanting that that revolt has already begun.

People are far more likely to submit even to indefinite suffering, if they know that they have a remedy for it in their own hands that is at once blameless and effectual; for what was merely compulsion before the remedy existed becomes self-sacrifice when the remedy is optional.

It would be objected at once, no doubt, that any such enactment would open the door to every kind of immorality. It would be said, perhaps, that everyone who then wished to get rid of his partner would have no restraining check left upon him. Yet Austria-Hungary, Bavaria, Wurtemburg, Belgium, France, Germany, Luxembourg, Roumania, Sweden, Russia, Saxony, Servia, Norway, Switzerland, and many of the American States, to mention no others, have found no evil result attendant upon allowing divorce after a few years of desertion or separation; which is, of

course, equivalent to allowing divorce for unconquerable aversion under proper and legal conditions. And surely, too, the inhabitants of these countries cannot really be considered as less governed by Christian considerations than we are.

In the meantime, it seems most likely that the more Public Opinion is instructed and educated, the less it will be disposed to condemn as effectively as it can, and as it should, an offence that the present state of the law makes excusable in many cases, and even reasonable in not a few.

But, it may be asked, what is the usual course of events in the case of unconquerable aversion obtaining at the present time between any couple? The result that is usually hoped for is that the persons concerned will continue to live under the same roof, and will suppress, so far as they are able, their own perpetual misery. Their intercourse will have ceased; their companionship will have gone; their interests will lie in different directions; their conversation

will be brief and insipid; all as a matter of course. If there be children, it may be that a common interest will grow up; but as soon as it has even commenced to grow, the old mental divergencies will appear, and their very children will be witnesses of the gulf that is fixed between their parents. In such a case it will be indeed fortunate if the children themselves grow up from the situation unscathed, and with a full appreciation of the vital importance of the principle of matrimony. Another result that is unquestionably common is that both the parties, though continuing to live under the same roof, will go on their own way through life, both in their sexual relations and otherwise. They will, perhaps, be unwilling to create the scandal of a separation, and certainly unwilling to entrap each other in such offence as might be good cause for divorce; and they will see that separation, even if the scandal were to be faced, can better them in no way, for even under their

own roof they seldom meet. So, through little fault of their own, they go through life, maybe cynics and scoffers, and almost certainly indifferent to the principles of morality either in themselves or in others.

A third result is that they sometimes separate by mutual agreement; and the disadvantages to the State of this course have already been touched upon.

It appears difficult to find any useful reason that can be urged in favour of compelling by law such unhappy couples to keep up the semblance of a tie that has long been actually shattered if they do not deliberately choose to do so.

If it be urged that such a facility would render frequent and repeated divorce and remarriage a common occurrence, it may be answered that other nations have not found any such result; that even if they had, immorality is not to be prevented by causing it to be concealed; and that, in any case, Public Opinion would very soon impose an effectual check upon any such

tendency, if, contrary to all experience, it did occur.

If it be said that to enable such a couple to part finally would be to encourage their immorality, it is to be remembered that they may already so part by separation, and that the only thing denied them is facility to lead a moral life in the future. Further, it seems permissible to ask what immorality would be encouraged in such a case that the situation has not already rendered common; and how the avoidance of sin is less likely to be encouraged by permitting remarriage than by enforcing celibacy.

If it be said that so the consideration of the sanctity in which marriage should be held would be lessened, it may be asked why that is thought more likely to be the case if divorce be granted for a cause that plainly destroys all the objects of matrimony, at least as effectually, and probably more effectually, than the cause for which divorce is now granted; and if, under our present laws, the consideration of that

sanctity is an increasing, or even a stationary, factor.

If it be said that cases such as these are so numerous that it would be impossible to grant greater leniency to them, it is but a tacit acknowledgment that the present laws have failed; and is also a refusal to consider the experience of almost every other Protestant nation.

If it be said that these cases are but few, and that the unhappy must suffer in the interests of the contented, the fallacy is evident; for the position of the contents is theirs, not because of the law, but in spite of it. Moreover, no laws of divorce are ever compulsory.

If it be argued that, before all else, consideration must be given to the future of the children of such marriages, the answer seems fivefold.

In the first place this consideration has not been allowed even in our present system to interfere with the permanent separation of parties, either judicially or by mutual consent. It cannot, therefore,

be an obstacle in the way of allowing re-marriage to those permanently separated.

In the second place, not all of such couples have children; yet childless parents are subject to the same disabilities of divorce as those that have children.

In the third place, it would seem certain that the best interests of the children would usually be advanced in a far greater degree if they were under the care of one or other of the disagreeing parties—as they are at present in all cases of divorce and separation — than if the children themselves were forced to be witnesses of the divergencies of thought and action of their parents.

In the fourth place, other Protestant nations have found no insuperable difficulty to lie in the way of overcoming this difficulty.

And in the fifth place, we ourselves have already overcome it both in our laws of separation and in those of divorce.

Lastly, and as positive political arguments for admitting the equivalent of a

plea of unconquerable aversion as good cause, it must be recalled that one of the great blots upon our divorce system is that it takes no account of mental differences existing between parties, but insists on the commission of physical acts and sin before it will grant relief. It is, perhaps, not too much to say that every person who has studied the question of divorce and of morals generally, admits that this is an untenable position.

And it must also be recalled that so long as these immoderate conditions obtain it cannot be possible to impose proper punishment upon adulterous persons; whilst, under more lenient conditions of divorce, such punishment might not only be feasible in practice, but be welcome to the sense of the community at large.

Theoretically and practically, therefore, there seems to be little doubt but that the plea of unconquerable aversion or its equivalent should be considered as good cause for divorce.

It remains to consider how such a plea is to be made workable. Certainly it cannot be allowed, so to say, on demand. It must not, that is, be competent for persons to approach the Legislature and demand the dissolution of their marriage on the ground of unconquerable aversion without proper safeguards for the preservation of the general good. If we look at the procedure of other European countries upon the point, we find that the safeguard usually introduced is to demand proof that a reasonable period of separation has been unsuccessfully tried, or that wilful desertion has taken place. The period most usually selected seems to be one of two or three years, and there appears no cause to doubt that this lapse of time is reasonable and sufficient.

This method of making separation or desertion good cause for divorce seems, perhaps, as satisfactory a mode as can be devised of giving real relief to persons whose aversion or enmity to each other has become unconquerable. In other

words, it would enable cognisance to be taken of breaches of the psychological side of matrimony as well as of the physical. It would, moreover, not only be a system that is sanctioned by the experience of almost every Protestant legislature in the world, but would be a middle course between the rules laid down that no divorce law must be so lenient as to endanger the sanctity of the principle of marriage, or so harsh as to bring marriage into disrepute.

It may be objected to this course that it is but reintroducing the immoral policy of separation in a different form. To a slight extent the objection is true, but only to a slight extent. The impossibility of retaining permanent separation in any form as a useful factor of our social system depends, as has been said, upon the fact that human nature as a whole will not tolerate celibacy that is permanently enforced. Our legal efforts to enforce it permanently are, it is true, combined with conditions which create still other injustices. But the

broad, underlying fact of the whole is that permanent celibacy is as impossible of enforcement as it is undesirable in principle.

On the other hand, it is reasonable to argue that some period of mutual absence should elapse before a final pronouncement of divorce is made, and that with the certainty of relief accruing in the near future there would be a very considerable likelihood of moral conduct obtaining in the interval before divorce. At the worst, it would be far more likely to obtain than if, as is now the case, relief cannot accrue except by the intervention of death.

No doubt it is a flaw in the system that under such conditions it would be as impossible as it is now to prevent immorality taking place during the period of separation without doing an injustice to the partner who has not offended during that time. But, at whatever importance this fact may be estimated, it is plainly one of a much less degree than exists in the present method of depriving separated

persons of every material inducement to lead a moral life except they become celibates.

There is also another objection to this course, and it lies in the fact that it might not always be possible for a wife to separate from her husband for the stipulated period from financial reasons, supposing that she found her married life intolerable. Such a case would probably be very rare, for it would presuppose the real reluctance of her husband to dissolve his marriage; moreover, any malicious refusal of his to support his wife might be met by giving her power to apply to the Court to compel her husband to support her during separation for cause shown.

There does, indeed, seem to be another way of effecting the object of recognising mental divergencies as being good cause for divorce without so much risk of the disadvantages that have been pointed out as attendant on the plan of granting divorce after a stated period of absence

—comparatively slight though those disadvantages are. But the writer would plainly say that he knows of no country in which it has ever been carried into operation, or even seriously discussed.

The plan is based upon the hypothesis that it is impolitic to recognise the principle of separation at all.

An effort has already been made to demonstrate why permanent separation cannot but be detrimental to the best interests of the State, and the same arguments apply in a scarcely less degree to any form of separation whatever. It is, however, a common supposition that a brief period of separation between dissentient parties tends to their eventual reconciliation and reunion. As has been already stated, no statistics exist which show the number of couples who have rejoined after they have obtained a judicial or a voluntary separation; though even if they did exist they could never demonstrate how many of such so-called reconciliations were due to the necessity

caused by the law of making choice between two evils. But that the number is exceedingly small may, perhaps, be asserted with confidence; and, indeed, the very nature of the case would argue the unlikelihood of frequent reconciliation ensuing. Separations are very seldom undertaken hastily; they are almost always led up to by prolonged periods of dissension and mutual unhappiness. And although this statement is not susceptible of direct proof other than by an appeal to individual experience, some proof would seem to be afforded by the statisical fact that far the greatest number of divorces take place between persons who have been married for some eight or ten years or more; who are therefore presumably thirty years of age or upwards; and who may be assumed consequently to be capable of appreciating definitely the whole circumstances of their case. Moreover, the very nature of the case of separation makes it probable that both parties to it will be far more likely to form fresh interests

and ties than to revert even in thought to one that has been attended with so many unhappy experiences in the past.

It is unquestionably very desirable indeed that reconciliation—honest reconciliation—should ensue upon almost all matrimonial differences, and that every opportunity should be created to enhance the probability of such an occurrence. But it certainly seems open to doubt if the reunion that is compelled upon opposing persons who do not prefer to condemn themselves to lifelong celibacy or immorality is one that is likely to be very sincere or very effectual. Rather, it seems likely that having suffered the experiences both of the position of insufferable union and of celibate separation, they will, if they reunite, adopt the very course of marital infidelity that it is the object of such brief separations to prevent.

If, however, all separation of whatever kind were discouraged to the utmost, there would be nothing standing in the way of persons who had availed themselves of a

not dishonourable plea of divorce from subsequently remarrying if they chose, and when they were in the position of being free agents in the matter. If it be answered that persons so situated would in fact very seldom remarry their partner, the reply finally disposes of the plea that a brief separation under the present laws is usually any inducement, other than compulsory, to reunion. And, indeed, it admits of but little doubt that separated persons are now scarcely free to exercise their own judgment on the question of reunion. For the choice that is offered to them amounts, practically, to compulsion.

Such a system, then, as would not recognise the principle of separation at all seems to present as many, and perhaps more, advantages to us as it did to Archbishop Cranmer and the Royal Commission under his presidency at the time of the Reformation.

Broadly, such a system would recognise the validity, *inter alia*, of the plea of wilful desertion; for not only is this a serious

offence in itself, but it also depends upon other matters than the mere separation of parties. The scheme would also abolish all process of separation where it is, at present, a form of our divorce law; and it would discourage separation by mutual consent by some such means as granting permissive power to the Court to admit, under proper proof, the validity of the plea of unconquerable aversion as good cause for divorce, provided that (*a*) it had continued over a period of (say) two years precedent to the application, and (*b*) that the Court was debarred from exercising its permissive power if the parties had openly lived apart at any time during their marriage and after the date of the enactment, except in the case of such absence having been unavoidable from cause within the reasonable control of the parties; and if separation has not been undertaken by either party with a view of traversing the discretionary power of the Court.

A fuller sketch of this plan is given hereafter, but the apparent advantages

of it may be stated at once. They seem to be :—

1. That it would provide a real remedy for persons whose marriages have resulted in extreme unhappiness, but who are unwilling to contravene the laws by committing the grave offences for which alone divorces may be granted at present.

2. That it would abolish all legal recognition of the immoral principle of separation, and would much discourage, if not entirely prevent, separation between parties by mutual consent.

3. That it would lessen the chances of immorality taking place, as is often now the case, during separation.

4. That it would render almost unnecessary the suit offensively termed restitution of conjugal rights, for it could be to the advantage of no one to leave his partner.

The disadvantages seem to be :—

1. That there may conceivably be a very few cases the differences of which are honestly reconciled by a period of mutual

absence, and that to abolish separation entirely might be to subject these few to the inconvenience of divorce and remarriage.

2. That such provisions against separation are new and untried in practice.

One last point remains to be dealt with. Supposing, it may be said, that the law is so altered as to take direct cognizance of the psychological differences of parties, how would it be possible to grant divorce in such cases without occasional injustice to one of the parties? For, it might be, that the common life, which was insupportable to the one, might not be so to the other. In other words, must the aversion be declared to be mutual, or should it be sufficient that one party alone should declare it? The extreme unlikelihood of the feeling being other than mutual, however, might be sufficient answer to the objection; for, although it is perhaps possible, it is extremely improbable, that any consideration, other than a mischievous one, would affect the real

sentiments of a person who knew that he was found insupportable by his partner. Moreover, to exact that the declaration of unconquerable aversion must invariably be mutually declared, would be to destroy much of the benefits that the altered law would give. For it would render it possible for the one partner, in the hope of personal pecuniary gain, or in the pursuit of personal malice or ill-will, or otherwise, to refuse to become a party to the declaration, and thus to force the other to choose between the commission of a grave offence or of lifelong toleration of an insupportable position.

To this opinion the systems of other countries give practical adhesion.

On the other hand, it may be argued that to grant to any one married person the power of successfully pleading his or her unconquerable aversion to the partner of the marriage as good cause for divorce would be to give far too great power to the individual.

To answer this weighty argument it has been suggested already that the power of the Court to grant divorce on the whole plea of unconquerable aversion should be permissive to it only, and not compulsory on it; and those who are acquainted with the very convincing arguments and proofs that must now be produced before our Courts, to induce them to make use of any permissive powers they possess, will probably be satisfied as to the effectiveness of this proviso. Certainly it would seem far wiser to rely on the unbiassed judgment of an impartial judge in such a case than to rely (as must be done if mutual consent were obligatory) on the sense of justice of one of the parties to the suit.

In any case, however, the situation would seem likely to be one of extremely rare occurrence.

Conclusion

In order to condense the whole subject-matter of discussion, a few words are ventured upon in conclusion.

The original proposition to be solved

was based upon the fact that frequent immorality exists among married couples at the present time, and that such infidelity is injurious to the State. The proposition itself was how to lessen, or entirely to suppress, this injurious condition of things.

It was first of all shown that the condition itself could not be satisfactorily accounted for either by (*a*) a decline in the religious feelings of the country, or (*b*) by an increase in the standard of luxury.

It was next pointed out that the only other cause that could reasonably account for its existence was the state of Public Opinion upon the point; and it was shown that as the general tendency of Public Opinion is towards greater morality, therefore some special cause must almost certainly exist for its laxity in this case.

In the absence of other reason, and in the light of the past history of cases more or less closely allied to morality, that special cause was assumed to exist in the too harsh condition of the law of

divorce. The Acts of 1857 and of 1895 were examined, and it was found that, in principle, they were framed with a total neglect of the great underlying cause of all matrimonial offence--impassable divergence of temperament, that is; and that, in detail, they traversed the six most important conditions of equity and justice. The principle of separation was also drawn attention to as a dominant feature of those Acts; and its necessarily immoral tendencies were pointed out, as well as some of the subsidiary injustices that its inclusion in the English system of divorce creates.

Finally, the practical experience of Protestant foreign countries was detailed, with the result of showing that no single one of them (except a few of our colonies) either has adopted anything like so harsh a system of divorce as our own, or has experienced any disastrous results from a more lenient system.

The conclusion was thus arrived at that the state of the law as affecting divorce in

England was, in fact, answerable for much of the marital infidelity existing.

Attention was then devoted to the various methods that could be adopted with safety to remedy the legal defects in our system that had thus become apparent; and the main arguments for and against such alterations were briefly dealt with.

Now, and in the last place, an attempt will be made to formulate the main features of an amended divorce system; and this system will be based upon the principles:—

(*a*) That no divorce laws must be so wide as to militate by their laxity against the great principle of marriage.

(*b*) That no divorce laws must be so harsh as to bring the principle of marriage into disrepute, or sexual offence into widespread toleration, either by an unreasonable severity or by a general unsuitability to human needs.

In order to achieve this end it will be taken as proved, both by common sense,

and by the example of other countries, that extreme mental divergencies are not only as worthy of relief, but are as necessary of relief, in the interests of the State, of the Church, and of the individual, as are physical divergencies.

Below, then, are given the main features of two alternative enactments, the adoption of either of which would seem to go far towards a solution of the question.

Scheme I.

1. The husband and wife to be placed on an equal footing of offence and relief in every case, whether of divorce or of separation.

2. Divorce to be granted to either party upon proof against the other of adultery; wilful desertion for two years or more; incurable insanity; habitual drunkenness; continued cruelty or murderous assault; condemnation to penal servitude; and judicial or voluntary separation for two years or more.

3. The power now given to the King's Proctor to intervene in cases of collusion only to be extended to a general authority of intervention to show cause against rule absolute.

4. Damages against a co-respondent to be no longer permissible.

5. All married persons found guilty of adultery during their own cohabitation to

be liable to a term of imprisonment not exceeding three months in such class of misdemeanants as the Court shall, at the time, ordain.

6. The financial relations of parties obtaining divorce to be based upon the income of either the husband or the wife, due regard being taken of the incidence of the offence and of any settlements made at marriage; and such allowances made to either party to be capable of increase, decrease, or total suspension accordingly as the income of the supporting party increases, decreases, or is suspended. The Court to have the discretionary power to order an allowance sufficient for reasonable subsistence to be made even to the guilty party. The Court to have power to order an allowance, in cases of nullity of marriage, sufficient for the reasonable subsistence of the injured party in the mode of life to which he or she was accustomed before marriage.

7. The custody of any children of the marriage to be determinable as at present.

Scheme II.

1. All process of separation to be abolished where it is, at present, a form of our divorce law, and to be discouraged where it is not such a form.

2. The husband and wife to be placed on an equal footing of offence and relief in every case.

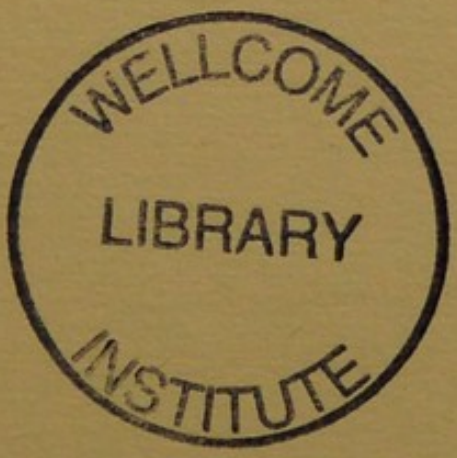
3. Divorce to be granted to either party upon proof against the other of adultery; wilful desertion for two years or more; incurable insanity; habitual drunkenness; continued cruelty or murderous assault; and condemnation to penal servitude.

4. Discretionary power to be given to the Court to grant divorce upon reasonable proof being shown it by either or both parties to a marriage that their union has resulted in unconquerable aversion, and has exhibited no likelihood of reconciliation over a period of two years precedent.

Provided that this power alone be not

exercised by the Court if the parties have openly lived apart at any time during their marriage and after the date of the passing of this enactment; except in the case of such absence having been unavoidable from any cause out of the reasonable control of the parties, and if separation has not been undertaken by either party with a view of traversing the discretionary power of the Court.

5. As para. 3 in Scheme I.
6. ,, 4 ,,
7. ,, 5 ,,
8. ,, 6 ,,
9. ,, 7 ,,



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