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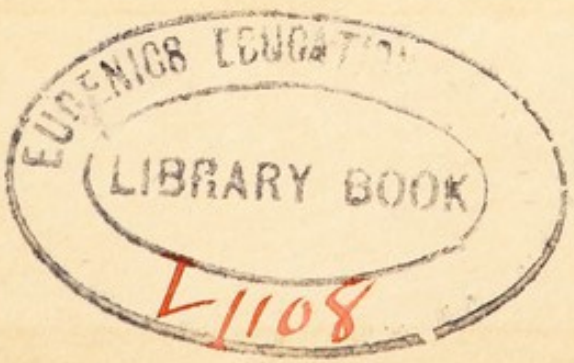
DIVORCE

(TO-DAY AND TO-MORROW)



DIVORCE
(TO-DAY AND TO-MORROW)

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(TO-DAY AND TO-MORROW)

BY

C. GASQUOINE HARTLEY

LONDON

LEONARD PARSONS

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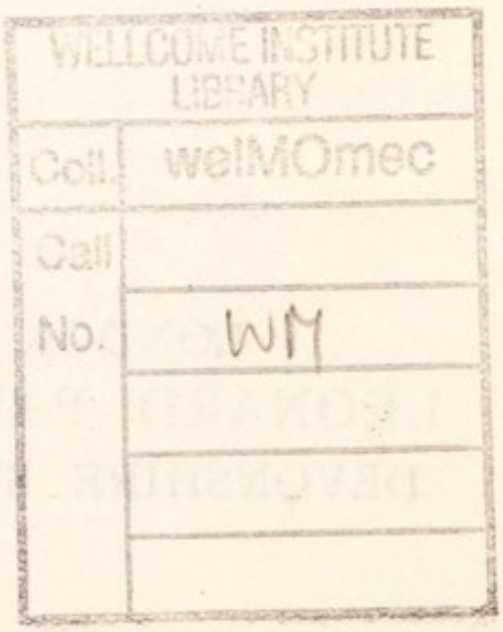

LEONARD PARSONS, LTD.

TO MY HUSBAND
AND MY FRIEND, GOLDFINCH BATE

I would wish to express my sincere thanks to Mrs Seaton Tiedeman, the Secretary of the Divorce Law Reform Union, for the kind and generous assistance she afforded me; also to record my indebtedness to all those writers whose works have helped me, and, in particular, to S. B. Kitchen, B.A., LL.B., whose valuable book, "A History of Divorce," provides a store of information most admirably dealt with.

LONDON, 1921.

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DIVORCE

(TO-DAY AND TO-MORROW)

CHAPTER I

INTRODUCTION—BRIEF HISTORY OF DIVORCE LAW

I

THE trivial attention given to the history of the law in this country is largely responsible for much misunderstanding of the present demand for divorce reform. It is felt passionately that something sacred is being tampered with, so that at once a panic of timidity clouds the intelligence and whips the consciences of many sincere people, who, without inquiry and without proof, take it for granted that as our marriage laws now are, so were they in the beginning, and, therefore, must be held to be sacred and unalterable, and ought to go on without interference from the sacrilegious hand of the reformer.

There is, of course, a reason for this. Not only is there prejudice to encounter, which on no question, perhaps, is so obstinate as it is on this one; but we have to deal with many different, and often opposed, feelings and desires—threads that get crossed and

twisted and at best can be straightened only roughly, so that the pattern becomes utterly confused.

An even greater difficulty arises from the want of frankness in our thoughts. We fail so hopelessly to be truthful to ourselves. A vast amount of stupid controversy and hindering fear would be saved by even a little honesty. Our fears are born within ourselves; they are independent of the reality of what we fear. We create terrors; the terrors are not there.

This is the first truth I wish to drive home.

Study of the facts should serve to dispel many of our extravagances of apprehension. But can we study the facts? I do not know. We are distressed with timidities within us. We do not even wish to know the reason causing this reaction of fear against changing the marriage law; for these fears are deeply hidden in the most secret part of ourselves; even if we did understand their origin, we should not have sufficient courage to confess it to ourselves.

Self-honesty may sound a simple thing. It is not. It will call for the greatest possible courage to tear away the new, as well as the old, bandages, with which we have blinded our eyes in connection with this question of divorce—judging others because we fail in judging ourselves, walking in the shadows of delusion so complete that some of us have lost the very power of sight, like the small ponies that live in the gloom of the coal mines.

II

The laws of marriage and divorce were not written by the finger of God on tables of stone, but they were

made and altered again and again by men, for their own convenience; moved by separate and changing prejudices, in the clash of conflicting views and warring creeds, and under the stress of expediency.

Now, I submit that it is time we learnt the truth about these laws. Surely if we are going to deal with them in any honest or business-like way we ought to know on what their authority really depends. Their sanctity will not be real unless it stands the test of our investigation.

I have to ask you to go back over the history of divorce; to begin with early Christian times, when asceticism and the faith that marriage and, indeed, the woman, were evil came into conflict with the earlier, more joyous, classical ideas which frankly glorified human love, marriage, and the beauty of woman.

It would appear that disagreements on the question of divorce began about the time of St Augustine, who tried, but failed to abolish divorce on the ground that the parties in an unhappy marriage ought to be condemned to celibacy or to become reconciled.

I would ask you to note that, even at this distant period, the real ground of controversy was the same as it is to-day, based on the ecclesiastical attempt to establish the indissoluble nature of marriage, *a doctrine which always has been upheld in theory but was never practised.*

Let there be no mistake here. There has always, in all countries and all times, been some form of divorce practised. The theory of the indissoluble nature of marriage is a fiction that finds no founda-

tion in the past history of marriage. For it is obvious that where marriages are made, marriages will also be broken. Those who oppose all divorce need to remember this. The question is really the question of the legalising of divorce, not the preventing of it. That is something outside the power of men.

It is difficult to have patience with the muddled thinking, which even at the far back start of the quarrel seems to have clouded the intelligence of the opposers of divorce. On the one hand, the sacramental nature of marriage was insisted upon, and for this reason the bond must not be severed—those whom God hath joined man may not put asunder. But mark this; at the same time, and by the same teachers, marriage was called a " defilement." Not only was it considered as a state inferior to celibacy, but, if we may believe what was written, it was really regarded as a kind of permitted fornication; a view which logically gave to a second marriage, whether entered into after death or divorce, the stamp of adultery.[1]

It is necessary to force home to your intelligence this hideous origin of the early connection of divorce with adultery. It arose directly out of the most degraded view of the relations of the husband to the wife, and had nothing to do with preserving the sanctity of the tie between them. I would wish to underline this in the most emphatic way.

Let us acknowledge frankly the evil that grew from

[1] See S. B. Kitchen, " History of Divorce," Chapters I, II, and III. Most of the information given in this chapter is drawn from this invaluable work. I state this here to obviate continual references. See also Archdeacon Watkin, " Holy Matrimony."

this havoc-working fear of love and of woman. Whenever we find it acting, there also do we find opposition to divorce.

This is the second fact I must ask you to accept.

Fear has been the hot-bed, wherein have been forced rank plants of shame, of persecution, of punishments—plants of persistent, but unhealthy growth, that even to-day spring up to hinder the workers who strive to clear the soil of the fair garden of marriage from the rank and choking growth.

III

But I diverge a little in making these remarks.

Marriage under the liberal Roman law was a private contract, of which the basis was consent, with no shame attached to the dissolution, provided it was carried out with the due legal form, in the presence of competent witnesses. Both husband and wife had equal liberty of divorce, only with certain pecuniary disadvantages connected with the forfeiting of the wife's dowry, for the husband whose fault led to the divorce. It was expressly stated that the husband had no right to demand fidelity from his wife unless he had practised the same himself. "Such a system," says Havelock Ellis,[1] "is obviously more in harmony with modern civilised feeling than any system that has ever been set up in Christendom." "In the last days of the Republic," he writes further, "women already began to attain the same legal level as men, and later the great Antonine jurisconsults, guided by the theory of

[1] Psychology of Sex," Vol. vi., p. 395 ff.

natural law, reached the conception of the equality of the sexes as the principle of the code of equity. The patriarchal subordination of women fell into complete discredit, and this continued until the days of Justinian, when under the influence of Christianity the position of women began to suffer."

I must ask you to note that this conception of consent as the right basis of divorce, as well as the legal equality of husband and wife, was in force prior to the introduction of Christianity. It was under its influence that the ideal of marriage was lowered and the position of women began to suffer. I cannot follow this question, and can say only how entirely mistaken is the belief that Christianity was beneficial to either marriage or to the liberty of women. Sir Henry Maine, in his valuable " Ancient Law " (whose chapter on this subject should be read by everyone) says, " The latest Roman law, so far as it is touched by the Constitution of the Christian Emperors, bears some mark of reaction against the liberal doctrines of the great Antonine jurisconsults." This he attributes to the prevalent state of religious feeling that went to " fatal excesses " under the influence of its " passion for asceticism."[1]

We find St Augustine countenancing polygamy and prostitution side by side with marriage, as being " as necessary to men as a sewer is to a palace," a position of dishonesty following logically from his attitude to the marriage state, which he held was to be tolerated only as " a remedy against sin." " It

[1] For a further account of Roman law, the freedom of marriage, and the position of woman see my " Truth about Woman," Chapter VII, pp. 217-24.

is better to marry than to burn." (I wonder if St Paul ever imagined that these hideous words contained more poisonous defilement than any other utterance on marriage!)

A married woman was expected by St Augustine to look upon her marriage lines as " indentures of perpetual service," and " to endure joyfully the debaucheries and ill-treatment of her lord."

Such are the views of the man who must be regarded as the originator of the view of the indissoluble nature of marriage. I am tempted to comment, but it is, perhaps, unnecessary. Such unclean passages extend in an almost unbroken series through all the writings of the early Fathers. St Jerome execrated the woman who remarried, likening her to a " dog returning to its vomit " or " a sow seeking again its wallowing place."

Human affections were held in poor account: marriage was regarded as a mutual prison, more binding on the wife than on the husband, but from which there was no escape for either, except by the commission of a crime.

May I digress and linger a moment to point out the inordinate driving of sexual passion which is revealed hidden beneath these views. To me they offer the most horrible example of the unconscious betrayal by men of themselves. One turns away, almost in terror, from all that is signified of horrors of uncleanness within. What would have happened if Freud had known these men and taught them to know themselves? One does not like to think.

We owe to this cause the idea of crime and disgrace as inevitable accompaniments of divorce, the

unholy view which has worked such appalling evils, and is still so active with its poison in our minds to-day. We do not seem to have any power to escape from it. Always it pursues our thought and kills our judgment. Truly it is the obstacle to all reform. Divorce cannot be separated in our minds from the idea of sin.

If a marriage is to be broken a crime must first have been committed. And what is the result? As we shall see later, often a simulated crime—a pretence of sin when there is no sin—is committed, in order that relief may be gained.

It is to this degradation that dishonesty has brought us.

IV

We find the Emperor Constantine, A.D. 331, first interfering with the civil practice of free divorce, and applying ecclesiastical opinion, by restricting the rights of the wife, and fixing grounds for divorce. Controversy among the Fathers as to what the grounds should be on which divorce could be allowed was continuous, and changes were frequent. The one ground universally accepted was adultery on the part of the wife. Thus Basil, while allowing divorce for adultery, held that Christ spoke only of the right of the husband, and that the Church ordained that the same right did not apply to the wife. From the very beginning scripture was interpreted by the Fathers of the Church in this way, not by truth, but by their own desire. Jerome held that whenever there was adultery, or suspicion of adultery, the wife might be

divorced without scruple. No similar freedom was acceded to his wife.

His famous, but infamous, dictum is worth recording: "So long as the husband lives, whether he be an adulterer, or a sodomist, or be steeped in all manner of crime, and the wife has left him on account of those crimes, he is still to be regarded as her husband, and she is not allowed to marry again."

This, it has been justly said, marks the nadir of the matrimonial degradation of woman.[1] It was this view (whose origin, as I have just now ventured to suggest, must be sought in repressed and hidden passions) which later formed the basis of the treatment of women under Canon law, and offers the real explanation of the inequality of the wife as compared with the husband, which is one great wrong in our divorce laws which to-day we are fighting to end.

But bitter is the struggle to free ourselves from these grave-clothes of the past, used for so long by men as coverings to the corpses of buried and unacknowledged sins—sins that might well have caused less evil had they been allowed to escape in expression from the dark places of the mind.

Punishments and penalties for divorce were instituted at about this period. The most violent opposition was raised by the people against every attempt to curtail their right to dissolve an unhappy marriage. For it must never be forgotten, that free divorce continued to be practised for long in direct opposition to the ecclesiastical view of the indissoluble nature of the marriage tie.

[1] See S. B. Kitchen, "A History of Divorce."

Theodosius and Valentinian, A.D. 449, codified the grounds for divorce, which had been laid down by previous emperors. And it is well to note (as I shall have to refer to this much later) that they apologise "for the restrictions on the rights of divorce on the pretext that the interest of the children should be protected." Nevertheless, they state their wish "to set free by the necessary assistance of the law, however unfortunate the occasion might be, those who were oppressed by necessity."[1]

Long and unending was the struggle between liberty and dogma.

An attempt was made by the Emperor Justinian, A.D. 483-565, to regulate disorder, and establish restricted divorce, by fixing the grounds on which it might be granted. Thus the wife, under the Justinian code, was permitted to divorce her husband without blame or penalty, if he committed adultery *in contempt of the home* (i.e., in the house or in the same town, after warning), such an offence being held to be "the cause of the greatest exasperation to good women." Other grounds on which divorce was allowed to the wife were, "the commission by the husband of certain crimes, such as murder, fraud, sacrilege or treason." Cruelty, for long allowed, for the reason that "beating was unfit for free women," was done away with.

The grounds on which the husband might divorce his wife were different and certainly instructive: the first cause was abortion, the second adultery, or suspicion of adultery; adultery being presumed

[1] See *Ency. Brit.* IX, Ed. VIII, p. 335, also Muirhead, "History of Roman Law."

" whenever the wife, without the permission of the husband, went to the theatre or the circus, dined out with another man, spent a night away from home, or indulged in mixed bathing." (What a comment on the men whose minds drew up such a law! In truth we have a further illustration of the effect of the poisonous view of the sinful nature of woman. I ask myself sometimes if any other thing has wrecked human happiness as completely and as needlessly as this has done.)

The grounds common to both the husband and wife were (1) impotence (this cause, used afterwards as a ground for nullity of marriage, appears to have been introduced by Justinian); (2) an attempt upon the life of either partner in the marriage by the other; (3) captivity or absence for ten years without being heard of; (4) the taking of vows of chastity by entering a monastery (an example of the low views of marriage which placed the celibate life higher than the married life). At a later time, when divorce was not permitted, this plan was used as a way of escape from an unhappy marriage. The husband and wife entered different religious houses. Afterwards they came out and remarried.

The innocent party in the divorce was entitled to the custody of any children of the marriage, but both parents were bound to contribute to their support according to their means. If, however, the husband married again, he, though he might be the guilty party, was allowed the custody of the children. Intermarriage between adulterers was forbidden, with a further injunction against the wife, who, if the guilty partner, might marry no one for five years,

being condemned to celibacy for that period "because she had shown herself unworthy of marriage."

"Such restrictions," writes a commentator on these laws, "are witness to the pious austerity of Justinian."[1] This is true. But I would say rather that they show how the Christian doctrine of chastity worked against liberal and practical law making. To form good laws you must accept human nature as it is, not set up a theory of what you would like it to be. You can help men and women best by making right conduct as little difficult as is compatible with the social good.

It is no wonder, then, to find that the people, remembering still the earlier helpful laws of pre-Christian times, resisted these enactments. Indeed so violent was their opposition that Justinian restored the older custom of divorce by mutual consent.

It is worth while to record his statement: "The present sacred law by which we lay down that, as formerly, marriage can be dissolved by mutual consent. For if mutual affection is the basis of marriage, it is right that when the partners have changed their minds they should be allowed to dissolve it by mutual consent."

We find here, at this far back time, an expression of the most advanced views of our own day. How true it is that things which seem most new are really very old! We might be less timid of reform if we remembered this fact.

[1] See S. B. Kitchen, "History of Divorce," pp. 33-38, who quotes Brouwer, "De Jure Connubrorum" (2nd ed., 1714), and the "Novels," 22, 117, 134, 140.

Justinian relates how many married people had come to him who hated one another and yet had no legal grounds for divorce. He states with charming truthfulness that persuasions, threats, and postponement of divorce for a time so that there might be opportunity for reconciliation almost always had failed, " for it had been found extremely difficult to reconcile those who hated one another."

It was found, too, that the withdrawal of the right to remarry from divorced people did not improve their morality or peace.[1]

We find throughout the entire legislation of the Roman Emperors a humane desire to regard the wishes and welfare of the partners in the marriage. But always pressing against this liberty were the restrictions of the Church. And in such an irreconcilable controversy compromise continuously was resorted to. No settlement was possible or was one ever found. But from time to time new grounds for divorce—exits for escape from marriage were formulated and tried.

Thus, the Emperor Leo—to give one instance out of many as it seems to me of rather special interest to us to-day—laid down insanity as a valid ground for divorce, giving the wise eugenic reason that " not only was there grave danger of the transmission of insanity to the children, but the spouse, who desired to marry again and have children, ought not to be prevented from doing so."[2]

These wise words were the last pronouncement of a Roman Emperor on divorce.

[1] Gibbon, " Decline and Fall," Ed. J. A. Bury, IV, pp. 476-83.
[2] Leo, " Novels," 111, 112.

CHAPTER II

INTRODUCTION—BRIEF HISTORY OF DIVORCE LAW (*continued*)

I

"To pass from the civil law of Rome to the ecclesiastical law of the Dark and Middle Ages is like quitting an open country, intersected by good roads, for a track of mountain and forest where rough and tortuous paths furnish the only means of transit."

No other statement than this well-known one made by Bryce could, I think, give you a more vivid picture of the contrast between the practical and beneficent Roman law and the Canon law which followed it.

What wonder, indeed, that we have lost our way so that still we are wandering in the jungle, unable to steer a straight course through the rough and tortuous paths left to us as a legacy from the Canon law. It is this confusion that is hindering reform to-day. And our real task is to cut through the jungle, force a clear path, so that again we may have good roads in an open country in which we may walk, gladly and fearlessly.

II

At the dissolution of the Roman Empire, the

enlightened Roman law remained as a precious legacy to western civilisation. But, as Maine points out, its humane and civilising influence was injured by its fusion with other systems of law, based on different and less efficient ideals, and, in particular, harm was done by the Catholic view of marriage as a state inferior to the celibate life. The Pope gained jurisdiction over marriage and divorce, and his power was expressed and enforced by the Canon law, which now "formed the *jus commune* of Christendom. It consisted of canons, papal letters, and the decrees of the Fathers." In this way the legislature of Europe absorbed laws concerning marriage and divorce, which belong peculiarly to an ascetic ideal of life. The freedom of the wife in particular was curtailed. The law relating to married women was for the most part read in the light, not of Roman, but of Christian Canon law, which in no one particular departs more widely from the enlightened spirit of the Roman jurisprudence than in the view it takes of the relations of the sexes in marriage.[1]

"This was in part inevitable," Sir Henry Maine continues, "since no society which preserves any tincture of Christian institution is likely to restore to married women the personal liberty conferred on them by the middle Roman law."

It is not possible for me to follow this question further. One thing is incontrovertibly certain, that

[1] See Lacey, T. A., "Marriage in Church and State," Maitland, F. W., "Roman Canon Law in the Church of England." Reference may be made also to a very interesting pamphlet on "Marriage and Divorce," issued by the Parish Council of the Church of St Ethelburga and the Virgin, Bishopsgate, price 1s. 3d.

the dignity of marriage and the woman's position under it can best be judged by the equity of the moral code in its bearing on the two sexes. Wherever a different standard of moral conduct in marriage is set up and required by the law from the wife than from the husband, there is something fundamentally wrong in the ideas on which the laws are founded. Laws are necessary and, I think, helpful, but to achieve this they need to be framed to assist good conduct, much more than to punish bad conduct.

The laws which regulate the relationships of men and women ought to be formulated, first in the interests of the social body, and next in the interests of the individual. It is the institution of marriage that secures the first end, and the remedy of divorce that secures the second. Each is absolutely necessary : marriage cannot be maintained without divorce in some form. Again I must insist upon this. Even under the strictest rules of the Roman Catholic Church, when no divorce was allowed, a way of escape was found. It was laid down that a marriage was indissoluble *when it had been " validly " contracted and consummated.* Everything depended on the interpretation of that word " validly." Thus though divorce was not allowed the right to annul the marriage was allowed. And the practice was so universal and so frequent that we find as many as sixteen causes specified for which marriage could be dissolved, while at the same time every care was taken to maintain the fiction of its indissolubility. It is worth while, I think, to record these sixteen causes for annulment. (1) When the parties, or either of them, had not reached the age of puberty the marriage

became valid only by renewal of consent when the age had been attained; (2) impotency; (3) abduction, when one of the parties was carried away by force, and presumably without consent; (4) vows, i.e., solemn vows taken by persons in Holy Orders or nuns in solemn profession; (5) disparity of worship, i.e., if one of the parties had been baptised and the other unbaptised; (6) bond of previous marriage, if either had been validly married to a person still living; (7) crime, murder of a partner to marry another or adultery under promise of marriage; (8) consanguinity; (9) affinity; (10) clandestinely; (11) public decorum; (12) spiritual relationship; (13) defect of liberty; (14) error as to person or servile conditions; (15) insanity; (16) when for sufficient reasons marriage had not been consummated (matriomium ratum sed non consummatum).[1]

It does not require much power of imagination to see how easy under these rules it was to prove a marriage invalid. We may say indeed, and, I think, with no exaggeration, that dissolubility was easier when hidden beneath the wide ecclesiastical cloak of indissolubility than it ever has been under open divorce.

But to go back to the matter we were considering.

It is the great question for each civilisation to decide how best to provide these two needs of laws for preserving marriage, and, where that is impossible, the least harmful laws for providing divorce, and the measure of their success may well be judged by the

[1] Article on "Roman Catholic Church and Divorce," by F. Brinsley Harper, J.P., in the *Journal of the Divorce Law Reform Union*, July, 1919.

position of the sexes in relation to these two necessary institutions. In Rome an unusually enlightened public feeling decided for the equality of woman with man in the whole conduct of sexual morality. The legist Ulpian expresses this view when he writes: "It seems to me very unjust that man demands chastity from his wife while he himself shows no example of it."[1] Such deep understanding of the unity of the sexes assuredly furnishes the first testimony to the high ideal of marriage under the Roman law.

III

Jurisdiction over marriage and divorce now fell into the hard grasp of the Church. We find the Imperial laws of the Emperors gradually being replaced by the Decretals of the Popes. The papal lawyers used Roman laws to adorn the Decretals, and all that is of excellence in Canon law is borrowed from them.

An authoritative collection of the Decretals was prepared by Gratian, a monk and lawyer, and was published at Bologna in the twelfth century. Later collections of the Decretals were made by the authority of various Popes, as, for instance, Innocent III., Boniface VIII., and Clement V. This body of law became known as Canon law.

"Kings, strong and weak alike," says S. B. Kitchen in his admirable "History of Divorce,"[2]

[1] Digest xlviii, 13, 5. See also "The Truth about Woman," chapter on "Divorce."

[2] "History of Divorce," pp. 60-61. Also the whole of Chap. V, "The Canon Law in Western Europe in the Middle Ages."

the work from which I have already quoted so freely, " handed divorce over to the exclusive jurisdiction of the Church, in exchange for its blessing, with all the rights and liberties of their subjects in the most intimate concerns of their daily lives."

Bishops acted in the local courts, a fact to which I would draw attention, as this long authority over divorce explains, I think, much of their opposition to reform. None of us easily relinquishes power. The ecclesiastical sentences were enforced by the severest penalties and punishments. The Inquisition in a great measure was responsible for the grip of Canon law. It was put into force in the Holy Roman Empire, early in the eighth century, by Frederick II., who was himself an agnostic and the arch enemy of the Church, although he wished to gain its favour. The same Emperor declared the Canon law to be binding over the whole of the Empire.[1]

And it must never be forgotten that the ecclesiastical trickery and subterfuges, of which I have just spoken, continued to be active, so that the Church lawyers, at all times, made it possible to obtain annulment of a marriage by proving " invalidity." The one necessity was to pay heavily for freedom. " The Church, especially at Rome, had swarms of hungry lawyers, and the feebler the evidence the larger the fee."[2] Consanguinity and affinity

[1] Lea, H. C., " History of the Inquisition."

[2] Taken from one of a series of articles by Mr Joseph McCabe on " The Evil Influence of the Church on Marriage," in *The Journal of the Divorce Law Reform Union*, November, 1919.

(numbers 8 and 9 in the list I have given of the annulment causes) were the chief and the most widely used impediments to a " valid " marriage. The theologians and Church lawyers brooded over these relationships until they created a formidable network of impediments.

" And this," writes Mr Joseph McCabe, whose able statements I am glad to bring forward in support of what I am trying to establish, " is only one of the ingenious traps devised for the marrying couple by the clerics who are supposed to have consulted the social interest of Europe. The classical case of Napoleon and Josephine illustrates another. If a man could bring himself, when he tired of the marriage, to say that he had not *internally* consented at the time of the ceremony, the marriage could be declared null and void. Another fruitful source of evasion was the question of impotence. Some very curious cases were submitted to Rome under this heading. A fourth count which lent itself to unscrupulous conduct was that the marriage could be dissolved if it had not been consummated. Convenient medical men abounded in the courts of princes."

He goes on to say that " Popes, even Popes of high personal character, used their power freely to secure the docility of princes who wanted their marriages annulled. If the prince were not docile to his prelates or to Rome, the papal microscope refused to discover the alleged flaw in his marriage. When he submitted, the slenderest evidence of a hidden relationship or a defect in the bride was gravely endorsed. Pope Innocent III. himself, the most

powerful and most religious of mediaeval Popes, was guilty of this trickery repeatedly."

Afterwards he refers to the marriage of Margaret Tudor, the daughter of Henry VIII., which he describes as " one of the last and most amusing cases in British history." But I will not spoil the story by telling it myself, but will give Mr McCabe's vivid account: " She " (Margaret Tudor) " married James IV. of Scotland, who was killed at Flodden in 1513. She then married the Earl of Angus, but she tired of the union and cast an eye on the handsome Henry Stewart, her chief courtier. There was a legend circulating among the ignorant peasantry of Scotland (much like the recent legend of Lord Kitchener's escape from the wreck) that James was not dead, and Margaret cynically informed Rome that her marriage with Angus was on that account invalid. Pope Clement VII. sent a cardinal to investigate this ludicrous story, and he actually endorsed it and enabled Margaret to marry Stewart! The Reformation—which was sadly needed—put an end to her adventures, for she grew weary of Stewart and asked the annulment of her marriage on the ground that her sexual intercourse with the Earl of Angus, who was related to him, made it invalid. I have no doubt that she would have got her nullity decree if the Reformers had not now begun to put an end to the comedy of ' indissoluble ' marriage."

Did I not say at the start of this inquiry that the laws were made by men for their own convenience, and had nothing to do with God? And what is significant (and ought to teach us if we can be taught) is that these restrictions and reliefs were drawn up

by monks and priests, bound in theory to a celibate life, which was but rarely carried out in practice.

Could anything, I ask you, be more absurd than that the laws to hold marriage binding should be fixed by the unmarried, who yet practised every licence in sexual misconduct? I would urge you to put to yourself two questions and answer them in honesty. Could such men understand the human needs of children and of husbands and wives, theoretically bound for their lives in the marriage state, barred, as they were, from entering it themselves, and having to find other and illegal relationships " as a remedy for sin," which could be broken at desire; and further, is it any wonder that we find in our laws their persistent and curious obsession with sexual offences? Second, can decisions of such men with any justice be considered sacred, and therefore binding, on men and women to-day?

I shall not write more about this at present.

IV

Marriage, under ecclesiastical guidance, was declared a sacrament, *though it was formed by consent alone*, no vows or religious ceremony being requisite or customary for its celebration during the whole of the Middle Ages.[1]

I would like to wait for a moment once again to insist on the dishonesty of the view which declared marriage a sacrament, and at the same time regarded it as " a remedy for sin." I must not, however, labour this point; though, indeed, I find it hard to

[1] See " The History of Marriage," p. 63.

exercise patience, whenever I remember the nonsense that is talked upon this subject and the harm that this text has done.

Always from the very beginning this dishonesty—the separation between what was stated in theory and what was practised in fact—acted as a source of rottenness, necessitating coercive legislation and directly encouraging sin.

Following the scriptural texts, especially those of St Matthew (the texts of whose unfair use by the opposers of divorce reform we are so wearied),[1] the marriage tie usually, as time went on, was allowed to be broken on the ground of adultery, but neither the husband nor the wife were permitted to marry again, indeed, if either partner did so it was considered as bigamy and punished as a crime. A remedy to replace divorce was introduced some time quite early under the Church jurisdiction in the form of ecclesiastical separation, *a mensa et toro* (from table and bed), which was allowed on the grounds of cruelty or desertion. This was the start of judicial separation. From the first it acted harmfully, leading inevitably to illegal union and the birth of illegitimately born children.

Divorce was pronounced to be criminal, and under the Canon law marriage *in theory* was indissoluble. I have again underlined the words " in theory " of set purpose, for I cannot drive this fact home too often or too strongly. Never, at any time, as I have tried to show you, do we find what was upheld as a theory ever carried out in practice. In the various ways we have seen, as well as in many others, the

[1] See Chapter XI.

rich were always able to secure the relief they found desirable. It is instructive to find that Charlemagne, who was the first temporal ruler to enforce widely the doctrine of indissolubility, did not dare to oppose the popular will by making divorce penal, though he declared it criminal, while, with a rather grotesque inconsistency, he *practised it himself*.[1]

Now, this severance between theory and practice reveals the fundamental dishonesty of the position right through the centuries. No sooner was the indissoluble nature of marriage proclaimed than ingenuous expedients for dissolving it were devised. Relief, as we have found already, was sold to the rich though denied to the poor. The ecclesiastical separation orders, *a mensa et toro*, came to be used as a preliminary step to divorce: and for this reason we find a continuous widening of the grounds for separation; adultery, for instance, was interpreted as being equivalent to idolatry, which again was regarded as "spiritual fornication," and even worse than physical adultery. Religious differences between wife and husband came to be recognised as valid ground for separation. Marriage would be dissolved by both partners retiring to separate monasteries. The taking of formal and short-lasting vows of chastity by one or both partners became a recognised and convenient manner of obtaining divorce. The Church connived at what happened afterwards, especially if the partners were rich and powerful.

Divorce was always practised; indeed, in England, even perhaps more than elsewhere, we find it "mightily encouraged." Litigation always was

[1] Lecky, quoted by Kitchen, pp. 62-63, 65 ff.

very profitable to the Church, and, for this reason, the attempts at amicable settlements outside the Ecclesiastical Courts were suppressed and treated as collusion or fraud:[1] I would ask you to notice especially this fact. It is of the utmost importance. As we shall see in the second part of our inquiry, the fear of collusion is still the most actively harmful force to-day preventing the reform of divorce. It affords an illuminating explanation when we know how it first arose, as to why it is still regarded as an absolute bar to obtaining relief under our law. This is a question with which I shall deal fully in later chapters.

To Canon law we owe also the detestable invention of the "restitution of conjugal rights." Instituted, in the first instance, to compel the wife to return to the embraces of an unloved husband, it was not foreseen that this expedient would be used by the wife, in after years, to establish the husband's desertion, and provide a way of escape for herself from the inequality she suffers under our law.[2]

It is from such examples as these that we may come to realise the tortuous paths of trickery and detestable contrivances by which men and women have had to find a way out from the dishonesties, cruelties, and absurdities of the Canon law. I am well aware, however, that there are people who will not allow themselves thus to be convinced. It is impossible, they will say, that the Christian theory of marriage, and laws made by Churchmen and founded on Christian texts, can have acted harmfully. I have

[1] See "History of Marriage," p. 81.

[2] See Chapter VIII.

no hope of changing such a view,[1] nor do I much desire to give knowledge to those who prefer ignorance. Rather am I tempted to envy them their comfortable capacity for ignoring truth.

V

Canon law was introduced into England by William the Conqueror, thereby displacing the ancient laws, which, founded on the liberal Roman ideals, were formulated to meet the needs and desires of the people: a fact it were very salutary to remember, when, in fear of change, we extol the sanctity of the marriage law. These laws of ecclesiastical origin are not really native to our country, but were introduced by a foreign invader. Moreover, they were strongly disliked and resisted by the people. I recommend the study of these early laws to everyone opposed to divorce reform. They will find many things to compel them to reverse their judgments.

In the Penitentials of Theodore, Archbishop of Canterbury, 668-690, we read that the bond of an unhappy marriage might be severed, either by mutual consent, or on the grounds of desertion, impotence, long absence, and captivity. An even stronger injunction commands the dissolution of the marriage where there is adultery or desertion. This is very

[1] I do, however, attempt this in one of the last chapters of my book. See pp. 159-166.

remarkable, and is the one instance I know of divorce being commanded.[1]

Here indeed is something to give us food for thought. Divorce for desertion once was compulsory in our land. To-day we tremble at the idea of its inclusion as a ground for divorce. Did I not tell you that in the course of our inquiry we should discover much that would bring us surprise?

VI

In 1517, Luther began the Reformation upon Canon law, burning a copy of the hated enactments at Wittenberg, saying, " Because thou hast vexed the Holy One of God, let the everlasting fire consume thee."

The Reformers decided that Canon law was anti-Christian, and declared that marriage was a civil contract. Divorce on the grounds of adultery and malicious desertion was allowed. As their authority for permitting these two grounds for divorce, they relied in the case of the first cause—adultery—on the well-known sayings of Christ (Matthew v. 31, 32); while justification for the second cause—malicious desertion—was found in the rather ambiguous utterance of St Paul, when, after speaking of marriage and enunciating the hateful doctrine, that it " is better to marry than to burn," he goes on and says,

[1] Under the law of Mohammed the husband must divorce the wife for various causes, of which the most important is impotence. Reference should be made to the " Ancient Laws and Institutes of England." See also Holdsworth, " History of English Law," Vol. ii. Both quoted by Kitchen, Chapter IX, " England."

" But if the unbelieving depart, let him depart. A brother or a sister is not under bondage in such cases " (1 Corinthians vii. 15).

Malicious desertion was the " special invention of the Reformers " as a ground of divorce, and I must ask you to remember that this cause as well as adultery was based by its originators on scriptural authority. We hear so much about St Matthew, and the permission of Jesus to divorce for adultery—while desertion, from what is said, might have the authority of the devil. Please remember that as a ground for divorce it is backed by the wholly respectable and ascetically minded apostle, St Paul, whose view of marriage has assuredly been accepted more widely than any utterance of Jesus Christ.

Brouwer, the most famous Dutch lawyer in the seventeenth century, went so far, and was sufficiently wise, as to state that the husband who deserted his wife is worse than an adulterer, because while the latter is " only carried away by the temporary allurements of strange women, and usually returns to his wife and family, the former leaves his wife and family unprovided for." He further held that " even where the parties were living under the same roof if one refuses to pay the carnal debt " he, or she, " is guilty of malicious desertion."[1]

I shall have occasion in a later chapter,[2] when we examine the existing divorce laws in other countries, to refer to this again; it is still " good Roman-Dutch law." In all Protestant countries except our own we

[1] Quoted by S. B. Kitchen, " History of Divorce," p. 98. See also the whole of Chapter VI, " The Reformation."

[2] See pp. 111-113.

shall find malicious desertion allowed as a ground for divorce.

I must pass over much that I would wish to record; already this historical chapter is outrunning the space allotted to it. Contentious jurisdiction was continuous. Very jealously did the theologians fight to maintain their power over divorce. The spiritual courts, though at first condemned, were practically continued everywhere, while in England they always had power. And in the year 1547, the Seventh Session of the Council of Trent re-established Canon law. The indissoluble nature of marriage was not insisted upon, but " distinct damnations were formulated for those who controverted this and other Church doctrines." Thus a further step was taken in the hateful association of divorce with punishments and penalties. The Canonistic doctrines of collusion, connivance, and condonation were fully adopted. And the people, crushed with the Reformation, were less active in resistance, less strong in maintaining their ancient rights.

CHAPTER III

INTRODUCTION—BRIEF HISTORY OF DIVORCE LAW (*continued*)

I

In England the struggle for liberty was long and severe. In spite of ecclesiastical restrictions divorce continued to be practised, under one expedient or another, with great frequency, so that at the time just before the Reformation we read of it "mightily prevailing";[1] a fact which probably accounts for the easy tolerance by his subjects of the matrimonial eccentricities of Henry VIII.

The hindering forces of ecclesiasticism were, however, too persistent and too powerful. Thus, when England separated from the Roman Church, in 1540, the rule of the Canon law over marriage, under the urgency of the clergy, was allowed to remain, though its authority was, to some extent, restricted, while the study of the hated law at the Universities was forbidden.

The Canonistic abominations of collusion, connivance, and condonation—the three offensive C's—

[1] Strype, J., "Memorials of Cranmer." Quoted by Kitchen, p. 174.

were all retained. Adultery remained the one ground on which divorce was granted, and, at the same time, we find that this crime came to be regarded as a minor offence. Polygamy also was considered less sinful than divorce. Irregular unions and illegitimate births were the commonest occurrence. Nobody heeded—certainly the Church did not—what immorality was done outside of marriage, so that the theory of indissolubility was not lost. And as the imposition of celibacy on the clergy had driven these also to immorality, the state of affairs was a remarkable monument to Canonistic legislation. Nor were matters greatly improved, at any rate at first, when clerical marriages were permitted. It was an easy matter for the clergy to escape from the irksomeness of a too-lasting bond. As Mr Joseph McCabe asserts, in the article from which I quoted in the last chapter, " The centuries of comprehensive clerical power over marriage form as bad a chapter as one will find in the chronicle of civilised life."

I would ask you to consider the fundamental vileness of these views of what constitutes moral conduct, both within marriage and outside of it, which grew up under the unpractical and prohibiting teaching of Canon law. And a result, specially important to our inquiry, was that more firmly than ever divorce was associated with crime.

We find Erasmus ridiculing Canon law. " Shame on a law," he writes, " which says that a vow taken when the down is on the cheek is of perpetual obligation."[1]

The great and good Sir Thomas More, in his

[1] Froude, A., " Life and Letters of Erasmus," p. 177 ff.

well-known "Utopia,"[1] pleaded for divorce by mutual consent, as well as in cases where one of the parties was guilty of adultery or of "intolerable wayward manners." Here is the simple form by which he would have a broken marriage ended. "Whereas," he writes, "the man and the woman cannot well agree between themselves, both of them finding other with whom they hope to live more quietly and merrily, they, with the full consent of them both, are divorced asunder and married again to other."

Here, we have exactly the proposals for which the most advanced reformers are wishing to-day. I ask your attention to this; for the one truth which, above all else, I am anxious to make plain is the universal demand, as men and women advance in the refinement and understanding of love, for divorce unconnected with crime, and dependent on mutual desire. I wish the limits of my space permitted me to digress to write further on this beautiful passage from the "Utopia." But I must not. I would, however, ask you to remember those charming words, "hope to live more quietly and merrily." Let these sink deep into your hearts. Take them as your standard in deciding the vexed questions of divorce—whether divorce is right?—the purpose of God or the purpose of the devil. Here is the answer, that men and women may live "quietly and merrily," and therefore be joined to one another in peace and love, and be saved from misery and sin.

Sir Thomas More did not stand alone. Latimer and Cranmer, as also other eminent lawyers and

[1] More's "Utopia: Cambridge Modern History," Vol. ii., p. 492.

laymen, advocated the granting of divorce in the Ecclesiastical Courts whenever "there was deadly enmity between husband and wife."[1]

Somewhat later, John Milton, in his famous treatise on "The Doctrine and Discipline of Divorce," advocated divorce by mutual consent, or at the will of either party, and without the hideous and unnecessary judicial inquiry. The wife he regards as the "helpmeet" of her husband, therefore, how can she fulfil the purpose of God "if there is deadly disagreement." But I must give his opinion in his own words, as I fear to spoil the firm purpose by my halting interpretation. Milton answers one of the strongest objections brought against divorce. "Children born in those unhappy and unhallowed connections are, in the most solemn sense, of unlawful birth, the fruit of lust, but not of love, and so not of God. Next to the calamity of such a birth to the child is the misfortune of being trained in the atmosphere of a household where love is not the law, but where discord and bitterness abound, and stamping their demoniac features in the moral nature with all their odious peculiarities, thus continuing the race in a weakness and depravity that must be a sure precursor of its ruin as a just penalty of long violated law."[2]

Of almost equal interest is what he says in regard to the trial of divorce cases. No court, whether ecclesiastical or civil, in his wise opinion, is capable

[1] See Kitchen, p. 131.

[2] I am not certain that I am in entire agreement here, and would refer the reader to the last chapter. The quotations are taken from "The Doctrine and Discipline of Divorce," quoted by Kitchen, p. 131 ff.

of making inquiry into " the secret dissatisfaction between husband and wife." To pry and probe into the causes that have brought the marriage to disaster; " to bandy up and down " the secret unhappiness of husband and wife, by means of " horrid masters of tongue fence," is needlessly to increase the sufferings of the parties. When, through no fault of their own, the husband and wife hate each other and " mourne " to be separated, the " burning," of which St Paul speaks, remains and is even intensified. Then he goes on to say how the enforced outward holding fast a bond, which exists without the spiritual sanction of love, encourages deceit, augments the hatred of the parties and directly conduces to immorality. Useless to attempt " to glue an error together," which " God and Nature would not join."

It has seemed worth while to quote the views of these wise men. It is not too much to say that in their attitude to this question they stand far in advance of the position we have reached to-day. Their wisdom affords a bright light of guidance to us. It were well for us to remember this when we come to decide, as soon we must, on the amendment of our law. What are we going to do? Are we content to go on in the muddle that for so long we have accepted without much consideration? Are we satisfied to allow all the evil to continue, because we are too lazy and too dishonest to understand the truth and demand a clearance? We are all responsible; you, my readers, and I. If we demand a humane, liberal, and practical divorce law we shall get it. But do we care—I mean care sufficiently to seek and

find the way of escape? Ah, that is the question. Yet, we cannot rid ourselves of our responsibility with regard to what is done, or is not done. The happiness of our children and the future sanctity of marriage is in our hands.

II

We come now to a time when England almost reformed her divorce law. Henry VIII., in the year 1549, appointed a commission to inquire into divorce and to draw up *a new body of law more in conformity with a Christian Kingdom which had emerged from the vale of darkness*. Archbishop Cranmer, Latimer, and other eminent divines and lawyers met together and inquired and discussed in the way usual to Royal Commissioners. Their deliberations brought them to conclusions that divorce should be granted, not only on the ground of adultery, but also for desertion, savage temper, long abuse, an attempt on life, or deadly hatred between the partners; further, they disfavoured separation, without the liberty of remarriage, as being bad for both parties and the State. (One likes to remember that our Royal Commissioners were as honest and as practical as were these men.) There was no Minority Report of ecclesiastical obstructionists to cause dissensions. The findings of the commission for divorce reform were unanimous. Their head was the Archbishop of Canterbury.

These wise recommendations were embodied in the famous *Reformatio Legum*, 1558, and would almost certainly have become law if Henry had not

died.[1] His successor, Edward VI., ratified it, but Parliament refused to make it law. Not at all because its proposals went too far in the direction of freedom or from any doubt of their utility (no suggestion was brought forward of the sanctity of marriage being in danger). No, the cause of obstruction was far different, and objection was raised solely because the Commons wished to do away with *spiritual jurisdiction of any kind over marriage and divorce.*

In this way England, by the accident of a king's death and dislike of ecclesiastical interference on the part of a strongly Protestant Parliament, was left without any established divorce law at all. Later, *and because nobody decided what ought to be done*, the hated Canon law of the Roman Catholic Church was allowed to resume its authority in our Protestant country.[2]

I must underline this fact. Do you not see what it implies? Our divorce laws, which we are asked to regard as sacred and the enactments of God, do not belong to our country! They were foisted on us by a series of accidents and mischances. They are enactments made by celibate priests, belonging to a religion that is now held by a small minority in this country. Our supine acceptance of their sacredness ought to arouse us to shame. Really it is ridiculous. I must not, however, write more upon this; I may be tempted to say things I should regret about the sheep-like qualities of my race.

[1] See Strype op. cit., pp. 132-4.

[2] Compare Kitchen, "History of Divorce," p. 176. Also "Cambridge Modern History," Vol ii., Chapter XV.

III

But to return to our inquiry.

Again we find practised the same dishonest and shuffling compromise. Marriage once more was declared indissoluble, but, at the same time, expedients were always found, whenever occasion arose and money was forthcoming, to dissolve it. So frequent, indeed, did divorce become that "an act was proposed to punish adultery by death."[1]

When Mary came to the throne the Inquisition was used to enforce the ecclesiastical restrictions exercised in granting divorce. Yet we find "all married clergymen" ordered "to bring their wives within a fortnight that they might be divorced from them." In this way "many thousands of married clergymen all over the country were divorced." And, it is hardly to be wondered, that with this taking place, the people resisted any further curtailment of their right to divorce.[2]

In Elizabeth's reign relief from an unhappy marriage, with the right to remarry, was allowed in the Ecclesiastical Courts to all who were powerful enough to demand it and rich enough to pay sufficiently for it.

No one questioned this right of the rich to divorce until the year 1631, when the Star Chamber (a Court, as I must ask you to note, which was revived and

[1] See Lea, "Sacerdotal Celibacy," pp. 48 ff.
[2] *Ibid.*, p. 177.

made active to provide a dissolute king with money) declared, yet once more, that " marriage by English law was indissoluble, and that no Court had the power to dissolve a validly subsisting marriage." For a time the Courts granted only judicial separation. But the custom of declaring a marriage null and void, and the children, consequently, illegitimate, again became common on such pretexts as impotence, the old ground of relationship, or, sometimes, religious vows, pretended crimes, or one of the many other fictions of Canon law.

A position of extreme difficulty soon arose. For divorce never ceased to be claimed though no Court could grant it. A way out of this dishonest and impossible position was found at last by instituting civil divorce by a Private Act of Parliament in the House of Lords, where the Bishops retained all practical control over the Bills.[1] This last fact is important.

Such clumsy and expensive procedure lasted until 1857. Divorce became the privilege of the very rich, and all relief was denied to the poor. The certain results are too obvious for it to be necessary to want to point them out.

I will, however, if you will allow me, recall to your memories the often-quoted speech, made by the celebrated Mr Justice Maule, to an agricultural labourer, accused of bigamy. It is, I think, the finest speech ever made in a Court of Law. He pointed out the course the labourer should have taken, and, in so doing, furnished the most graphic

[1] See Bishop Burnet, " History of his own Time." Also Lacey, T. A., op. cit.

picture possible of the divorce procedure as it stood, in 1845.

" Prisoner at the bar, you have been convicted of the offence of bigamy, that is to say, of marrying a woman while you have a wife still alive, though it is true she has deserted you, and is living with another man. You have, therefore, committed a crime against the law of your country, and you have also acted under very serious misapprehension of the course you ought to have pursued. You should have gone to the Ecclesiastical Court and there obtained, against your wife, a decree, called *a mensa et toro.* You should then have brought an action in the courts of common law, and recovered, as no doubt you would have recovered, damages against the man who injured you. Armed with these decrees, you should have approached the legislature and obtained an Act of Parliament, which would have rendered you free to marry the person you have taken upon yourself to marry with no such sanction. It is quite true that these proceedings would have cost you perhaps five or six hundred, or a thousand pounds, whereas you probably have not as many pence. But the law knows no distinction between rich and poor. The sentence of the Court upon you, therefore, is that you be imprisoned for one day, which period has already been exceeded, as you have already been in custody since the commencement of the assizes.

Is there need for me to make any comment? I think not.

IV

I would ask you to consider these conditions under which alone divorce could be obtained in 1845, a situation of absurdity, described so beautifully by Mr Justice Maule. The party deserving divorce had first to obtain a decree of separation *a mensa et toro* —from table and bed—from the Ecclesiastical Courts;

secondly, to institute an action in the civil courts, and obtain damages from the one who had wronged him —the co-respondent (a hideous procedure I would ask you to note and remember), and thirdly, to obtain an Act of Parliament to sever the marriage bond.

Never has divorce been so difficult in any country. For it is obvious that this clumsy and expensive procedure, with its multiplication of suits, rendered relief impossible except to the few and the very rich. And the result? Did the limitation of divorce facilities help men and women in right conduct, and lead to a high moral standard in marriage? I shall answer this question almost at once. But first I would ask your attention to the statement of a contemporary writer, which is more important than anything I can say, as being the record of facts by an eye witness. He says: "Second marriages without divorce, misconduct, and illegitimate children were of everyday occurrence, while polygamy was winked at, though a felony on the statute books."[1]

Such statements abound in all the records of the period. There are recorded four cases[2] only of divorces in favour of women, a fact that should be noted, as illustrating the hard bearing upon the wife, which follows as an inescapable result whenever divorce is difficult. Another result equally inevitable is the debasing of the relationships of the sexes by lowering the moral standard of conduct. This is my unhesitating answer to the question in the last

[1] Quoted in "Marriage Making and Marriage Breaking," by Charles Tibbits.

[2] "History of Divorce," p. 182.

paragraph. There is no more evil-working fiction than that hindrances to divorce are conducive to a higher standard of marriage and to the purity of the family life. The exact opposite is true. "The purity of family life!" "The sanctity of marriage!" "The inviolability of the home!" These high-sounding phrases! What tragedies of misery has their seeming fairness been used to cover? What sins against women and against little children have been committed in their name? "For ye are like unto whited sepulchres, which indeed appear beautiful without, but within are full of dead men's bones and all uncleanness."

It is one of the deepest and healthiest instincts of men and women that always they have fought for liberty in marriage; so that they have rebelled whenever the yoke of ecclesiastical restrictions and penalties has become unduly heavy. There is first a period of dull acquiescence, followed certainly by a reaction towards pleasure and sin—the grabbing to take what has been withheld by any means and in any form; but afterwards comes rebellion—the true movement towards purity; the deep desire for a return to health, necessitating always the breaking through from all hindering barriers, so that the intolerable burden of sin may be cast, in an imperative effort to gain liberty to live rightly and joyously.

We find, then, that the movement for greater freedom of divorce by an extension of the grounds for which relief may be granted—an extension which frees us from the one horrible necessity of adultery, when seen in its right value, is a reaction in favour of truth, of purity and decency of feeling; assuredly it will act

against the older ascetic degradation of marriage and the horrible connection of divorce with sin. That was the spreading ulcer of disease which surely accounts for the uncleanness of our laws to-day.

But we must shake off every symptom of the prevalent and contagious anæmia of fear before we can formulate and carry through any really constructive work of reform. We must learn to distinguish again between cause and effect, the means and the end. At present we place the horse after the cart and mistake the power for the product. We suppose conduct and feelings are the outcome of laws. They are not; they are the origin of them. When we have all got the desire for right conduct and honest feelings again about marriage and divorce, we shall get living and helpful laws. What is the use of tinkering with what is moribund? A great teacher has said, " Let the dead bury their dead; come and preach the good and the new thing."

V

Let no one make a mistake. It is those who work for divorce reform, not those who oppose reform, who are the apostles of purity, the saviours of marriage, and the upholders of Christ's teaching. I am very certain of the truth here. Those who aim at regulating marriage and divorce according to the interpretation of certain texts and go on stretching passages of scripture to meet this view, or oppose that liberty, are alien to truth in their spirit, causing evil, not to men only, but to the Master they think they

follow. All really true movements of reform are revivals, as the word itself shows; inrushes of life; fights towards the liberty of healthy restorations of feeling. Death is destruction. Such a civilisation as ours has become dead, but now it is clamorous for some reassertion of feeling that will give the impetus to fight for liberty.

It is the young who to-day have a new consciousness of the right of freedom. They will never again accept the ancient restrictions. And it is well. We, who are older, whose steps are faltering and whose eyes grow dim with age, look to them to gain liberty to re-establish the sanctity of love, which we have tried to do and failed.

I must hasten over what remains to be told.

Mr Justice Maule's indictment was uttered in 1845. Time passed. Two Bills to amend the laws and simplify divorce proceedings were introduced in Parliament in 1854 and 1856. They met with such bitter opposition that nothing was done. (How history does repeat itself.)

But the demand for reform became increasingly urgent. Already in 1853 a commission had been appointed to make inquiries and report on the many abuses of the Ecclesiastical Courts. On the findings of this committee the Government, under the Premiership of Lord Palmerston, took the matter in hand, and the now famous Divorce Act of 1857 was passed, which placed divorce under civil jurisdiction. "The Right to Divorce" for the first time since the introduction of Canon law was openly acknowledged against stern opposition on the part of the Bishops, which was of so violent a nature as to be

explained only by the fact that their privileges were about to come to an end.[1]

The history of the debate during the passing of the Bill is interesting and illuminative of human conduct. Never, I think, has unconscious dishonesty found more naïve expression. While unable to deny the existence of divorce in England, every effort was made to explain it away. The old fiction of the indissoluble nature of marriage was brought forward, and was clung to with the tenacity of a drowning man gripping at a drifting spar.

Mr Gladstone was the most able supporter of the opponents of reform. When the Act was passed an outburst of apprehension swept over England.

I can recall quite well hearing, as a child, this matter discussed by my mother and my aunts (I was a quiet child and had learnt ways of getting out of notice when I wanted to listen to the talk of grown-ups). They were Liberals and Nonconformists, and the speeches of Mr Gladstone, whom they adored, passionately roused their opposition against the new Act.[2] I can recall my young perplexity. I made efforts to gain information from my mother as to why marriage was being destroyed, but I met with nothing but stern reproof. I remember my mother caring so much that one day the tears were in her dear eyes as she spoke about the Bill passing. This moved me intensely. I did not understand, but in a queer uncomfortable way it made me feel. That is why I remember it all so clearly.

And what I want to establish here is that exactly

[1] "History of Modern English," by H. Powel.

[2] A later Act than the Act of 1857, passed as an amendment to it.

the same opposition was raised against changing the law in 1857 as is being voiced to-day. The Act that then was held to be destroying marriage, to-day, we are told, is the safeguard to maintain its sanctity. This, of course, is inevitable. Yet we need to remember it. There will always be those who passionately seek to hold fast to the past—and it is well. They are a necessary check to those who passionately go on, driven forward either by hope or by despair.

CHAPTER IV

THE PRESENT POSITION

I

LET me summarise now what we have learnt in the preceding chapters, so as to establish the lessons that seem to me may be taken from the past history of divorce. The wide diversity in the laws of marriage must first be grasped. What is said to be a divine law, yet varies from country to country, and also at different periods in the same country. We have to give up quite the ecclesiastical doctrine of the unchangeable, indissoluble nature of marriage.

This doctrine has been upheld in theory, but never carried out in practice. Wherever there is marriage making, there also is marriage breaking.

Throughout our inquiry we have been met with trickeries and subterfuge as the inevitable accompaniment of this Canonistic theory of indissolubility. These ecclesiastical tricks baffle any attempts to explain them away. What is it, for instance, that can account for the view of marriage as a remedy ordained for the avoidance (or rather concentration) of sexual appetite? And what is it that can reconcile this degraded view with the other view, insisted upon, at the same time, that marriage must be regarded as

a sacrament, for ever unbreakable, because made by God? Again, what can explain the conduct which attests the indissoluble nature of marriage and proclaims divorce ungrantable, and, at the same time, invents sixteen ways in which marriage may be annulled?

Are not these discrepancies sufficient witness to the fundamental dishonesty of the position? Can any kind of excuses (even the excuses made by Bishops) explain this dishonesty away? It faces us in every direction. Why, for instance, if the sanctity and stability of the married state are the objects to be maintained, is prostitution accepted as its necessary accompaniment? and concubinage declared to be no sin? Why, if thus sacred, is such insistence placed on the " carnal tie between husband and wife "? And why is adultery, though made the one crime for which (under scriptural teaching) divorce can be allowed, yet regarded as a " minor sin "?

Again, why if divorce was wrong and against the will of God, were private settlements of matrimonial quarrels always repressed and severely punished? Why was divorce litigation so mightily encouraged? We may say (as I suppose was said by the clever framers of Canon law) that these inconsistencies were necessary to maintain the ideal of indissolubility. But can we, in truth, accept this? Is such shuffling for oneself more righteous than a square facing of the facts? The sanctified indissolubility of marriage! Think how it has been degraded! how used to cover inexpressible vileness!

Let us acknowledge at once our utter and scornful rejection of such a position. We want to help people

to live sacredly in marriage, not to uphold an empty theory of its sacredness.

We must accept, then, that indissoluble marriage failed from the beginning in practice; and that any society which tries to enforce such a doctrine to-day commits self-injury, by setting up a standard of conduct impossible to maintain. It is not healthy for an individual, or for a nation, to find itself in such a position of hypocrisy. Moral degradation cannot fail to follow. We have seen this happen in the past wherever the unjust and cruel Canon law was enforced. Rules of conduct were set up that were not, and could not be, followed. That is why the Church's attitude to marriage became false, the enactments of the clergy so entangled with falsity that the moral life of the people was corrupt, and the sanctity of marriage was joined with the concealments of vice.

Now, are we content to continue with this compromise, which sanctions every form of sexual sin, outside of marriage, so long as the convention of the inviolable permanence of the bond is respected and the sin hidden—all the rottenness that we know goes on beneath the respectable cloak of indissoluble marriage?

This is the question that waits to be answered by every churchman, who is honest, and by all who are opposing to-day the reform of our infamous divorce laws. I, as one passionately anxious to change the law, can give an unhesitating answer: I want, as far as is practicable, to emancipate marriage from such uncleanness, to make less easy the hidden sins which the law and custom sanction—to gain freedom from a sham morality and the pretence of a righteousness

that we do not maintain. I hold that laws should be based on reason and the needs and experience of mankind. I detest hypocrisy. I want to make a clean path through the jungle of Canonistic shuffling compromises. It is a first necessary step for me on the way to any kind of improvement in the relationships of men and women. It is this truth that I wish to establish.

II

And what we have learnt shows further the interdependence, which certainly does exist, among all civilised races between the laws of divorce and the position of women.

A wise man, out of his knowledge and as a result of his experience, said once, " Wherever divorce is difficult there woman's lot is hard." We have seen woman under the Canon law branded as a temptress. We may follow the dreary story of her enslavement in marriage, wherever she is regarded only as an instrument to give pleasure to her lord and save him from sin. She is denied, for this cause, even the same right to divorce for adultery as is granted to him. Milton points out the results on the home of the denial of the right to divorce. I would refer you back to his wise words.[1]

This is the second idea I ask you to accept. I think you will have to acknowledge its truth.

I may not stay here to point the immense importance of these suggestions to the problem we have to face to-day of extending facilities of divorce; nor shall

[1] See page 41.

I pause to indicate further the many lessons that everywhere await us as we come, as now we must, to consider the present position of divorce in relation to what we have learnt of its past history. These questions must wait for notice until they arise in reference to the special problems of to-day; as we go on with our inquiry, we shall learn more.

III

We have, I trust, extended very much, as well as rendered more exact, our knowledge of this complex and difficult question of divorce. In this and the following chapters I shall endeavour to extend it still further by a brief summary of our present divorce laws, by a consideration of the present position, and by the record of certain striking divorce cases, which will, I believe, show more forcibly than any words of mine can do, how destructively the law acts to drive righteous people into sin and to help immorality.

One objection that will be raised against my argument in this introductory section of my book is this: How is it (this is what will be objected), if our divorce law is so irrational and is the result of accidents, collisions between a king and a pope and other historical incidents of little social significance, that it has continued for so long in existence and still has the support and respect of many earnest persons? It must surely correspond to some deep impulse, some inner need?

Now this sounds well, but is it true?

Our opinions, I am certain, cannot be taken as

affording proof that what we believe in is really good for society. Much more are our opinions the result of inert acceptance. And if we inquire more deeply, their origin must be sought in irrational rebellion against the person in authority, or blind acceptance of a loved person's authority, rather than in reason and in general rules, derived from observation and consideration of results on human life.

Most people adopt the broader views of a sect, of a party or a leader, but afterwards dish the facts to fit their own unconscious inclinations.

Quiet acceptance of ideas we learnt in our homes, or (what is just as inadequate for social judgments) an equally blind rebellion from the home influence, with an assertion of a counter-will opposed to the will of our early guardians—these narrow personal influences, dependent on our feelings, form the unsure foundations of our social views. Some among us can no more question the message of a Church or the authority of a law than they can free themselves from respect for a parent. Others—acting, of course, equally unconsciously—transfer the feeling of rebellion felt against a father to rebellion against social laws and institution. This is evidently no proof or disproof of the correctness of any social views. I bring it forward merely as giving a partial explanation of hidden feelings, which, without our knowledge and without recognition by our conscious intelligence, cause some people to support movements to reform and others to resist them and maintain social institutions. We all act in the direction which was decided for us already by our conduct in the nursery and in the schoolroom.

There is a further matter I wish to try and make plainer.

It may well seem remarkable that the law of England is to this day more influenced by the vindictive spirit of Canon law than are the laws of some ostensibly Catholic countries, as, for instance, France, Belgium, or Portugal. Yet the explanation is beautifully clear. As a people and as individuals we act instinctively. We think less and do more than any other nation. A childlike quality, which makes it very easy for us to accept theoretical standards of what is right and what is wrong. We are practical when we act, but very unpractical when we think, or, to be more truthful, pretend that we think. And what I am coming to is this: we can be, and often are, hypocrites, quite unconsciously. This, I believe, is why we are able to go on supporting the Canon law of divorce.

It affords such a perfect opportunity, with its stringent ascetic penalties against sexual mistakes and unhappiness, for liberation to ourselves; an opportunity we seize and use, just because our motive for doing so is so splendidly hidden—clothed in a dress so respectable as easily to deceive our censor. You will see what I mean. In penalising the sexual misconduct of others we are really passing, though we do not know it, judgment on ourselves; in blaming them we gain a curious kind of vicarious salvation, which brings the peace of self-forgiveness, for in devising punishments for them, we are fixing our own would-be self-inflicted punishments, for our deeply buried wishes, which, never having found relief, either in direct expression or by sublimation,

remain to torment us with ceaseless conflicts in our unconscious life.

Anyone with knowledge of the new psychology will understand what I mean. I have thought it worth while to bring this suggestion forward of possible vicarious redemption by means of our harsh and inhumane laws. I have sought so much to find an explanation of why we accept them, and this is the only one I am able to suggest. Otherwise the persistence of the Canonistic doctrine of divorce seems to me quite inexplicable, as, still more, the support it gains amongst us. Perhaps the idea I have thrown out, I know inadequately, may be taken up and followed by someone more capable, and with more knowledge, than I possess. It is, I venture to suggest, a new field that opens up land very fruitful for investigation.

IV

Consider now the position to-day.

From the passing of the Matrimonial Causes Act in 1857, the divorce law has remained practically the same; the Act (amended in several important particulars by later Acts) is therefore in force to-day. It will be convenient to state here as clearly and briefly as possible, its chief provisions.

It should be noted first that ecclesiastical jurisdiction over matrimonial cases was now done away with and the right to divorce openly established for the

first time since the introduction of Canon law. This was a great step in advance towards honesty. I think it is all that can be said in favour of the Act.[1]

1. Cases were to be heard in a civil court of divorce, and by a single judge, with or without a jury. The judge is empowered to grant a decree *nisi*, that is a decree to dissolve the marriage bond which takes effect, *unless cause be shown to the contrary* at the end of six months. After this waiting period the decree is made absolute. The probationary months were at first fixed as "not less than three months," afterwards extended to six months by the Matrimonial Causes Act 1866, and re-affirmed by the Act of 1873.

2. By a supplementary Act known as an *Act to Amend the Matrimonial Causes Act* 1860 the office of Queen's Proctor was created. His duty is to inquire into the present conduct and past history of the parties, in particular of the supposed innocent partner. At any time during the six months' waiting period, he may intervene, upon information supplied to him, and may show cause why a decree *nisi* should not be made a decree absolute.

Until this detestable office is abolished it is far preferable to be the guilty one rather than the innocent partner in a divorce suit. (I offer this advice in absolute seriousness to all who are contemplating divorce.)

3. An appeal for divorce may be rejected, or the decree *nisi* may at any time within the six months

[1] See Browne, "Law and Practice in Divorce and Matrimonial Causes."

be rescinded, on the grounds that there has been collusion or connivance between the parties, or condonation by the one partner of the other. (Note the persistence of the three detestable C's.)

The one absolute bar to ending an unhappy marriage under our absurd laws is that both parties desire it to be ended. Neither is one partner permitted to help or to forgive the other partner. Such qualities of mercy and helpfulness are unrecognised by our Christian [sic] law. Even decent behaviour of wife to husband, of husband to wife, may endanger —unless trickery is resorted to—the gaining of freedom.[1]

4. The ground on which the husband may obtain divorce against his wife is that of adultery, and *he is permitted to secure damages against the co-respondent.*

5. *A wife cannot secure her freedom on the same grounds for adultery alone,* except in certain specified cases of aggravated immorality; she has also to prove cruelty or desertion. She is not allowed, as is the man, to sue for damages for the loss of her husband; but in place of this right, she can claim and secure maintenance from her divorced spouse. Any settlement made by the Court may, however, be varied, if afterwards she misconducts herself. Alimony is also granted for the children whenever they stay with their mother.

6. *Divorce is not granted for desertion without adultery* (it is a ground in Scotland where an Act

[1] See cases recorded in Chapter VIII.

allowing divorce *a vinculo*, for this cause, was passed in the year 1573. Desertion is also allowed in all other Protestant countries except England).

7. *A suit for the restitution of conjugal rights may be brought on the ground of desertion.* By the *Matrimonial Causes Act* 1884 a husband or a wife (though such suits against wives are rare), failing to comply with a decree of the Court for restitution of conjugal rights, is deemed guilty of malicious desertion (i.e., desertion without reasonable cause); either a suit for judicial separation may then be applied for or, what is more frequent, *the wife uses this "legal fiction" to establish the husband's desertion and provide her with the second necessary ground for divorce, saving in this way the hateful necessity of proving cruelty against her husband.* [Please notice very carefully this way of legal trickery (really I can call it nothing else) by which women have found a path of escape out of the position of inequality with their husbands, which they have always suffered under Canon law. I have referred to it before, and I shall have occasion to refer to it again.]

8. Both the innocent and the guilty parties, whether the husband or the wife, are allowed the right of remarriage as soon as the final decree was granted. A "conscience" clause was, however, introduced into the Act on the suggestion of Mr Gladstone, by which no clergyman of the Church of England can be compelled to marry a divorced person.

9. Nullity of a marriage was allowed on some of the same grounds as were allowed formerly under Canon law.

10. A remedy to help those cases that divorce would not cover and to take the place of the ecclesiastical separation *a mensa et toro,* was introduced into the Act, in the form of separation orders, still to be obtained on the grounds of misconduct, cruelty, or desertion for two years. The separated husband and wife are not allowed to marry again; *the tie is held though the marriage itself is broken.* The wife's position under a separation order was further safeguarded by three subsequent Acts. (1) *The Matrimonial Causes Act* 1877 provided that a husband being convicted of an aggravated assault upon his wife the magistrate might, "if satisfied that the future safety of the wife is in peril," issue an order to have the effect of judicial separation for cruelty, by which the wife would be liberated from cohabitation. (2) *The Summary Jurisdiction Married Women's Act* 1895, by which a woman might apply to a Court of Summary Jurisdiction and obtain an order having the force of a judicial separation, on the following grounds: persistent cruelty, assault, desertion, and failing to provide proper maintenance for her and her infant children, forcing her to leave the house and live apart on account of such neglect. (3) The Licensing Act 1902 states (under Section 5) that if the husband is an habitual drunkard the wife may apply for a separation order under the Summary Jurisdiction Act of 1895.

It is evident that the framers of the Act of 1857 were unable to free themselves from the Canonistic view of divorce as a crime and a disgrace. The thought of compassion was neglected, the idea of misfortune not accepted. Thus we find them hedging round the

obtaining relief with as many arbitrary rules, delays and hindrances as could be invented.

Inevitably this led into a maze of difficulties. Women suffered more than men. Adultery was made a legalised act on the part of the husband, from whom the wife could claim no escape even for the most persistent infidelities. I do not, however, wish to labour this point, as women found, as they always will, a way to outwit the laws, and the lawyers, better than the laws they administered, helped them and allowed the establishing of the fiction of legal desertion.

There is another anomaly to which, in passing, I would call your attention. Though the crime of the adultery of one partner is necessary to obtain the dissolution of a marriage, if both partners commit the same crime the marriage becomes for ever indissoluble. No thought is taken that, in many cases, these are the very marriages that ought to be ended. This essential consideration is overlooked. For the guilty one must be punished—as if that mattered. Men and women are not children to be penalised and rewarded.

One fact calls for special attention.

The Act of 1857 made no attempt finally to settle the conditions of divorce, as was made plain by the Attorney-General in proposing the Bill.

He said, " It was not intended to be the end-all of legislation on divorce," but by the Act " a civil tribunal would be created, which hereafter would be able to administer laws made under happier auspices." He admitted that the wife's position under an act, which legalised the husband's adultery, was " opprobrious and wicked." Even at its start the

Act of 1857 was condemned by those who formulated it; and such condemnation was almost unanimous before the Act " became a blot on the statute book of England."[1]

Yet this is the divorce law whose inviolable sanctity we are asked to accept to-day.

[1] See Hansard's " Parliamentary Debates."

CHAPTER V

THE PRESENT POSITION (*continued*)

The Minority and Majority Report of the Divorce Commission 1910

I

No one was satisfied with the Act of 1857, which organised adultery for men and established injustice for women. And, I would remark in passing, that such discontent is the unavoidable accompaniment, whenever ineffective laws are passed—framed in a timid spirit of shuffling compromise. To try to please everyone always displeases everyone.

Under the persistent influence of Canonistic restriction, the problem of formulating a divorce law was then as difficult and the same as always it has been considered to be in this country. To regulate marriage, to prevent divorce, and (as this is found impossible) to make the obtaining of it as disgraceful, as difficult, and as degrading as possible—this was the aim.

It is always feared that easier divorce will cause a great increase in the numbers of those who claim relief; open the closed and barred doors of marriage

and everyone will rush out; I shall not wait to answer this now,[1] and will say only that I can never understand this poverty of faith. Why should it be thought that the bond of affection which holds together the great majority of marriages will be weakened or destroyed simply because the legal bond is relaxed. No marriage that should be maintained ever was, or ever will be, broken by making divorce easy. It is ourselves, what we are—our human nature that makes the law and not the laws which make us and decide our nature; and marriage was a human relationship long before it was a legal relationship. The timid-hearted need to remember this. Personally I have no fear of divorce. For I do most firmly believe that the great majority of men and women really desire to live faithfully and for ever with one another.

Thus I am glad to find that the panic cries of moral evils which would happen that were raised against the Divorce Act of 1857 were proved quite unfounded. Nothing happened. We read of one Member of Parliament opposing the Bill, who in an ecstasy of terror pictured unhappy couples rushing to the newly created Divorce Courts at the rate of ten for every day in the year.[2]

One marvels at such want of faith. It is much harder to break a marriage than most people suppose. But on this question I shall have more to say in the last chapter of my book.

[1] See p. 175 ff.

[2] See "Marriage Making and Marriage Breaking," by Charles Tibbits, which gives a good short account of the debate, p. 34 ff.

So, turning now to the facts, we find that in 1858, one year after the Act of 1857 was passed, there were 326 divorces granted; the next year the number dropped to 303. Then in ten years the numbers had about doubled, and afterwards stayed between 600 and 700. The demand for divorce has not been overwhelming and it has remained fairly steady and without any great rise up to the period of the war, and this in spite of the steady increase in the population. There is no kind of evidence (except ecclesiastical statements) that facilities of divorce had any lowering effect upon sexual conduct. If marriage has deteriorated, it is due, as I shall soon show, to other and quite different causes, and has no connection with the increased divorce facilities.

This is another error of which we have disposed. I have no facts at hand as to the early working of the Divorce Act of 1857. We find a growing tendency towards a more favourable interpretation of the law, in particular, a tendency to give relief to women. Always men are better than the laws they make.

II

But the problems of divorce were not settled, could not be settled by a compromising Act of such great injustice. Discontent continued to grow and became more insistent. Time, however, passed and nothing was done. So slow and timid are we as a people, that, in spite of an increasing consciousness of the need for reform, it was not before the year 1910 that we began to act. Then Parliament did what it usually does do, and appointed a Royal Commission

to inquire into the matter. The Commission was most fortunate in being presided over by the late Lord Gorell, to whose splendid courage divorce reform owes most of the advance that it has yet gained. The now famous Majority and Minority Reports were presented to Parliament in a Blue book of over two hundred pages. It will be convenient briefly to summarise here the fearless and far-reaching recommendations of the Majority Report.

(1) In addition to adultery, five new grounds were recommended for divorce: desertion, persistent and aggravated cruelty, insanity, habitual drunkenness, and imprisonment under a commuted death-sentence; all causes which are generally recognised as in fact putting an end to married life.

(2) The placing of men and women on an equal footing with regard to the grounds for divorce.

(3) The abolition of permanent separation orders in Police Courts.

(4) The establishment of local Divorce Courts presided over by Commissioners with High Court Powers.

(5) The introduction of amendments of law and procedure, including the abolition of juries and reduction of expense.

(6) The addition of grounds for obtaining nullity in certain cases of unfitness for marriage.

(7) The making of provision with regard to the publication of reports of matrimonial cases, giving judges power to hear cases *in camera,* and prohibiting

the publication of reports of cases until concluded, or sketches or photographs of the parties.

(8) The extension of protecting clauses with regard to the position of clergy of the Church of England.

The Minority Report, which was signed, will you please take note, by three Commissioners representing the Church of England, *opposed any extension* of the grounds for divorce.[1]

I shall not wait to consider here the proposals made by the Majority, for, though they aroused a storm of contention throughout England, they were soon thrust aside by the coming of war.

III

For a time, divorce reform, like everything else, became a thing that did not matter, and to many of us it seemed that all the great gain forward towards honesty and liberty was to be lost.

But war has a curiously effective way of dealing not only with men, but with their problems. New and sharp lessons have had to be learnt by many of us on this question of divorce. Many who had never cared have been made to care. All of us, in the fierce war-light, have seen more plainly the ineffectiveness of our laws. No longer could we cover our eyes with the ancient ecclesiastical handkerchiefs. The war has ended for ever our blind-man's-bluff game with truth. We are caught: and it is well. The doctrine of the indissolubility of marriage can never, I think,

[1] See page 141.

again be believed in—except by Bishops, whose entire lack of humour makes them able to believe anything.

As all of us know, amazing marriages were made during the war years, reckless marriages, entered into by those who had known each other for a few days only before marrying for life. Normal control, conventional standards, old careful habits of conduct, were broken through at a time of excessive emotion.

An organised freedom and independence for women had certainly startling moral results. It was shown as manifestly true that for all ordinary young women intimate association with men, fellowship in the workshops and factories and in play, turns them with extreme readiness to love making. Now, I am very far from wishing to apportion blame, rather am I glad that what I have asserted for so long, and often against so much opposition, has been vindicated as right.

The many marriages made in haste and under the pressure of national necessity were a sign of the nervous condition of the times. The customary criticism of reason were not heard, or not until the emotional storm had subsided. This is, of course, a condition not infrequent in marriage; but in the war period and the early months following the excitements of peace, it was greatly exaggerated; such marriages may not, unfortunately, bear the scrutiny of minds restored to reason.[1]

And this has led to the unprecedented increase in

[1] See "Women's Wild Oats." Second essay, "The Covenant of God."

the demand for divorce, which should cause no surprise and no fear, but should urge us forward to the reform of our laws, like spurs in the flesh of a tired horse.

IV

On the subject of marriage I have written again and again in my other books. I would, however, wish to say here, and with all the power that I have, that in England marriage is made too easy. If some of the restrictions which are placed on divorce were transferred to marriage it would be well. Always, we run to shut the stable door after the horse is stolen. I shall have occasion, very soon, to speak of a divorce suit brought by minors, whose guardians sued for them. Now the disgrace is, not that this marriage should end, but that it should ever have begun.

We English are too afraid of preventative interference: we wait until something is very wrong and then we punish. It would be salutary for us to consider the more careful rules of other lands. In France, for instance, and also in Belgium, no encouragement is given for hurried marriages such as we permit. Official inquiries and the consent of parents or guardians are considered necessary. Engagements are regarded as serious affairs to the two families concerned as well as to the young people themselves; there are months of testing of suitability for life-partnership, during which the future husband and wife get to know one another

before being tied by marriage. I shall have occasion to notice again these careful laws of marriage, so will not wait to say more upon the matter here.[1]

It would prevent endless unhappiness and many divorces if some more fixed inquiries, with—in the case of anyone, shall I say under twenty-five?—the consent of one parent of either party, if living, if not, of a guardian, were obligatory before the marriage could be entered into. I would recommend this reform to all opposers of divorce. Also betrothal should be regarded as a much more important ceremony than is common with us: possibly the marriage might be made conditional on the length of the betrothal months: at least inquiry should be made as to the amount of knowledge the partners have gained of one another.

We appoint a King's Proctor to inquire into domestic details to prevent unsuitable marriages being broken. Why not change his duties to prevent unsuitable marriages being made? Here is a way in which we might wisely copy older civilisation whose customs were more practically planned to help the young in right living.

V

I have lying upon my study table, on the chairs and even spreading over upon the floor, a heaped-up litter of papers. Parliamentary Bills, law reports, cuttings from the newspapers, articles from the reviews and more serious weeklies, recent books—

[1] See pp. 107-108.

all dealing, in one manner or another, with divorce and the urgent need for the reform of the law. Everyone agrees that something must be done; the question which no one seems able to decide is what to do.

Here are some of the head-lines which catch my notice as I turn to examine these papers. "Hustle in the Divorce Courts," "Race with Unhappiness," "The Church that Unmarries," "Divorce while you Wait," "The Grinding of the Divorce Mill." Do they not point to a vile condition of disgrace and confusion and witness that it is time we spring-cleaned our Augean stable?

I do not like all this talk about divorce. I am afraid of it. Possibly it is more healthy than our older habits of silence and covering up the filth of life. And yet, I fear sometimes that talking is being used unconsciously as relief from the pressure of acting to face and end the evil. I feel, indeed, that discussion about these questions is a substitute —a kind of vicarious scapegoat—for dealing with them.

The need for action to be taken is urgent, for the evils arising from our delays are continuous and increasing.

In the latter half of the first year of the war the number of cases heard in the Divorce Court was 520, the highest figures for one session then on record: the figures for the session before the war being 289. Cases continued to grow, 775 in one session, 800 in another, then rather above that number, and a steady, though not great, increase went on through the war years. Then came peace, and the return of

husbands and the taking up again of family life. The result as seen by the divorce lists may well cause alarm.

The following table gives the exact figures of divorce during the period 1913-1920, and should be studied carefully. I would draw special attention to the enormous increase in the number of husbands' petitions in the last two years since the war as compared with the much smaller increase in number of the wives' petitions:

	Dissolution of Marriage.		Nullity of Marriage.	
Year.	Husband's Petition.	Wife's Petition.	Husband's Petition.	Wife's Petition.
1913	312	234	13	18
1914	436	397	7	16
1915	348	320	6	6
1916	515	421	11	7
1917	641	305	12	20
1918	727	355	15	24
1919	1,216	413	10	15
1920	2,351	690	22	27

An unprecedented demand has arisen from thousands of couples—men in greater numbers than women—all claiming freedom from marriages that have come to disaster. And I would ask you to note first that these alarming conditions have arisen *before any change in the law*, so that the enormously increased demand for divorce must be regarded as being quite independent of legal conditions. It has come, indeed, as a very certain result from too-easy marriage-making, not to any extent whatever from too-easy marriage-breaking. A large percentage of the

marriages which have been dissolved by the Courts in the last two years were contracted between August, 1914, and November, 1918. Petition after petition has been filed praying for the dissolution of hastily-entered-into war marriages that should never have been made.

This is very important. Never can it be said, in the future, that the granting of wider grounds for divorce was the cause of this sudden and alarming increase in the demand for it. It is just the other way round—the demand is urging forward our laggard politicians to supply the relief for which so many are clamouring. Nor can it ever be said that the sanctity of marriage has been endangered. That also has been done already.

Now, what lessons are we to learn from this? The chief lesson would be, one would think, that it is a very bad thing to delay any longer the reform of our laws, and that it is a very vile thing for the holiness of marriage to be dragged to scorn by countenancing the continuance of so many unholy unions. But actually the only thing it suggests to the Archbishop of Canterbury, for instance, or again to the Bishop of St Albans, is wailings about texts and making passionate efforts to stop anything being done.

The spiritual upheaval of life seems to have taught no lessons. Still, anything done in the name of the *tabu* of indissoluble marriage is beautiful! This easy gospel will give rich fruits of sin.

There can be no gain of purity from laws which sanction impurity. And to maintain purity in marriage the husband and the wife must give love

the one to the other. The human heart in loneliness eats itself, causes its own emptiness, creates its own sin. Let us settle this mistake once and for all. For we have come to understand as we never understood before, the terrible results of unhappy mating, and the shifts to which men and women are driven by unpractical and bad laws. A cinematograph of misery, of avoidable trickery and deceit, has been passing before our eyes. We have all been forced to look and to think.

VI

Let me recall the facts.

In the overcrowded Divorce Courts five judges (or was it six?) were working continuously hearing the accumulated divorce cases. The undefended suits were taken at the rate of one every seven and a half minutes. Think of it—a marriage ended in a few minutes in a rush of indecent haste.

The official figures for the last session of 1921 are as follow:—

Undefended petitions	2,473
Defended petitions	459
Common juries	4
Special juries	6
	2,942

It should be noted that 600 only of these cases were new, 2,300 suits having accumulated from previous sessions.

We may note, too, that the King's Proctor has been more than unusually occupied with his hindering investigations. So greatly has his work grown—he has seven times as much to do as in pre-war days—that his staff of helpers has been greatly increased and the work moved to larger premises.

Here are the comparative figures of his interventions:

1917	... ...	29 cases
1918	... ...	31 ,,
1919	... ...	41 ,,
1920 (four months only)	... ...	70 ,,

I will make no comment, except to record my hope that such increased activity on the part of this unnecessary official will help to rouse us to a sense of sufficient dignity to demand his dismissal. Why should he intervene to snatch away a freedom that already has been granted? But I have answered this question; and I shall be tempted to say things that are best not said do I write about the King's Proctor.

The Police Courts have also been inundated with petitions from wives to be separated from their husbands. In some Courts queues of women are to be seen waiting to apply for summonses. These wives show a quite new independence. "A number say they don't want their husbands to maintain them. They only want them to keep the children; for themselves they can work."[1]

This is instructive and should teach us much of the change that has taken place, in particular, in the attitude of wives, a change that, whether we

[1] The statement of a magistrate taken from the *Daily News*.

approve or disapprove, we cannot alter and shall have to meet.

To-day in the great majority of divorce cases the hearing is merely formal. It occupies, as we have seen, less than ten minutes. Here is an account taken from the *Daily Express* of what takes place in the usual undefended suit. I cannot refrain from quoting it as an object lesson to those who continue to uphold our divorce laws and oppose any reform as likely to be destructive to marriage. Could anything, I ask, possibly be worse or more harmful to the dignity of marriage than such a way of registering the breaking of the tie?

The Divorce Courts, in undefended suits, work like an automatic machine with labour-saving devices. When the doors open those at the head of the queue file inside and take their seats behind the bewigged barristers. Dozens, lower down in the day's queue, wait in the hall outside.

There is not much to be said in seven and a half minutes. It is often like this:—

Mr So-and-So, called "the Petitioner," is ushered into the witness-box.

"Your name is Edward Thomas So-and-So?" queries the barrister, looking over the top of spectacles and brief.

"It is."

"You are a chemist's assistant, and you live at Tinker's Green?"

"Yes."

"You married Mary Smith at the Parish Church on April 11th, 1912, and lived happily until 1914, when William Robinson came to lodge in the house?"

"Yes."

"Some time later you complained of the attention that Robinson was paying to your wife?"

"I did."

"And eventually you told your wife he would have to leave?"

"I did."

"What did she say?"

" That if he went she would go too."

" Next day you found they had both gone? "

" Yes."

Then comes an hotel register, with the names of " Mr and Mrs Robinson " on one of its pages, and Mr So-and-So identifies the signatures as those of Robinson and Mrs So-and-So.

The " Petitioner's " solicitor goes into the witness-box and states that he " served " the petition on Mrs So-and-So on a certain date, and that she said that she did not intend to " defend " it.

" That is the case, m'lud," says the barrister.

" Decree *nisi*, with costs, and the custody of the child," says the judge.

" Thank you, m'lud," says the barrister, and Mr So-and-So leaves the Court with a sad smile, and makes room for the next in the queue. And so on, every seven and a half minutes. It is, as a rule, intolerably dismal and dull. The Lord Chancellor yawned openly, and before all, yesterday, while listening to one of the score of petitions in his list. Rows of men and women, " parties " and friends of " parties," fill the Divorce Courts every day. Some look cynical, some merely bored, some broken-hearted, and some look hopeful. When they are unmarried they are free to marry again.

CHAPTER VI

THE DIVORCE LAWS OF OTHER LANDS: HOLLAND, NORWAY, AUSTRALIA, NEW ZEALAND, THE UNITED STATES OF AMERICA[1]

I

We closed the last chapter with an account, taken from the daily press, of a supposed undefended divorce suit as tried in a rush of seven and a half minutes in our Courts; I would ask you now to consider the law of divorce as it is carried out in Holland, the country whose wise regulations I wish specially to bring before your notice.

There is no trial, for here divorce is regarded as a misfortune and is happily unconnected with crime. The welfare of the parties seeking relief is the main consideration; they are treated as adults, who may be advised, but not coerced. There is an entire absence of our childish view of punishing the guilty and rewarding the innocent party. The sanctity of marriage is perfectly preserved—one union has come to disaster; but no kind of raking in the cesspool is

[1] The facts in this and the next chapter are taken from articles in *The Journal of the Divorce Law Reform Union*, or were given to me personally in an interview granted me by the kindness of the Secretary of the Union.

sanctioned; the institution of marriage is too sacred, and the rights of human beings—yes, even of sinners, too much respected for this to be permitted.

The present Dutch Code dates from 1838 and owes much of the liberality of its views to the Code Napoleon, which law it superseded.

Either the husband or the wife, wishing to sever the bond, goes before a judge and in the open Court asks for a deed of separation. The judge is not permitted to ask any questions as to the reasons for the request. He is bound to place before the applicant the seriousness of the step that is being taken, and to urge as earnestly as possible that a reconciliation should be attempted. If, however, this course is refused, nothing more is done and the separation deed is granted. There is no kind of trial nor is such needed. Crime does not come into the matter at all. For free separation takes away all need for adultery, desertion, or any form of cruelty. There is now a period of five years during which remarriage is not allowed. An effort is being made, led, I am told, by women, to reduce the number of waiting years. But when these have passed the separation order is converted into a decree of divorce at the request either of the husband or wife. Arrangements, which are careful and practical, for the care of the children, if there are any, and for the division of property are made apart.[1]

[1] Since writing the above on the divorce laws of Holland I have received information that it is proposed to introduce a Marriage Law Amendment Bill, in which the main feature will be freedom of choice as to whether the marriage ceremony shall be civil or ecclesiastical. Parties seeking divorce will also be allowed to choose whether the divorce shall be by the

II

The same understanding of divorce as a misfortune and not as crime marks the enlightened Norwegian legislation on divorce. The present laws were formulated in the year 1910. Good as certainly they are, in my opinion, these laws are not quite so admirable as those of Holland, as they are less simple in the carrying out and therefore necessitate inquiries being made into the causes for which divorce is claimed, which is, I am certain, a mistake.

A separation decree is granted by a magistrate *where both parties wish for it*, which dissolves the marriage, and gives the right to marry again after one year of waiting. *If the parties do not agree* (i.e., one of them only wants the separation) *either of them* can apply for a decree. But in this case some crime must have been committed by the offending partner, and it becomes necessary for the partner who claims release to prove adultery; bigamy; unnatural offences; cruelty; cruelty to children; drunkenness; confinement in an inebriates' home; refusal of conjugal rights for two years; insanity for three years, when recovery is unlikely, and after a waiting period of two years instead of one year—for all these causes the marriage bond is dissolved and remarriage permitted.

Divorce may also be obtained without a decree, and

Law Courts, or, as at present, by the Minister of Justice. Divorces on the ground of temperamental differences will be continued, and the period to elapse before remarriage will be reduced from the present period to eighteen months. It is also proposed to require certificates of health before marriage.

a separation which has lasted for three years automatically dissolves a marriage. Another excellent feature of the Norwegian law is that access to the Courts has been made as inexpensive as possible. The poorest are able to apply for, and to obtain, divorce.

This is as it ought to be. While a further excellent provision rules that all Divorce Court proceedings are heard with "closed doors." It is forbidden by the criminal law to give any report to the Press.

It should be noted that it is claimed for the new law that its effects have been proved beneficial to moral conditions and to the home especially in lessening drunkenness. This view was strongly corroborated in the evidence given in England, by Fru Anker, the great Norwegian woman, before the Royal Divorce Commission in 1910. I am glad to record her statement.

"I think that the divorce law and practice of the last twenty years has been all to the good. The admission to divorce is beneficial to the morality of marriage. *It is only good that both parties know that they do not possess each other as property* (the italics are mine).

"Separation and divorce are generally regarded as a most serious and distressful event, *but the divorce in itself is not considered a shame*, as in many other countries. *The real causes of an unhappy marriage are so complicated and individual that no outsider dare to judge it* (again I cannot refrain from underlining these true words). When such deep incompatibility between husband and wife arises that they seek separation we do not think it right that the law shall make the burdens of an unhappy marriage heavier than they already are by forcing the marriage to be continued, or making the case a public scandal by the publicity of the Press. . . . Especially in regard to the children the publicity is very unjust and injurious; *nay, we think it almost barbarous that the most intimate affairs of family life and*

personal distress shall be laid open to public sensation (will you please note this well — also all of the paragraph that follows).

"*Through the easy divorce, release has beën given from many whited sepulchres of sorrow and immorality, and many men and women have been saved to use their abilities and find happiness in other marriages. If the number of divorces has somewhat increased in the later years in Norway, it is a natural result of the women's increased feeling of self-respect, and represents a higher standard of morality, and a stronger feeling of responsibiiity to the coming race. They begin more and more to think that their first duty in marriage is to give birth to healthy children, born in love. They do not think it moral to bear children to an immoral father, or to a drunkard, or to a man whom for a thousand individual reasons they no longer honour or love.*"

This practical and beautiful speech should reveal to us, if, indeed, anything can pierce through our national blindness, the indecency, the cruelty, the immorality, and the sins against the unborn, that we are encouraging by our treatment of divorce; legalising adultery, if committed by the husband; encouraging perjury to prove the husband's desertion; regarding the wife as so completely his property that he can claim damages from her lover; shutting doors on uncounted "whited sepulchres of immorality"; refusing freedom even when a decree is already granted, at the intervention of the King's Proctor; disgustingly prying into intimate secrets with inquiries and investigations so indelicate that a mother had to listen in Court to letters she had written to the co-respondent, which were stolen by her own little daughter and read with a servant-maid, as happened in a recent case reported in the Press.

We allow every divorce case to be turned into a "public scandal" by a Capitalist Press eager to

supply the sexual filth for which our buried passions unconsciously hunger.

Fru Anker speaks of the duty of divorce in order to prevent the birth of children, who are "verily conceived in sin," because they are born without love.

You will remember how in an early chapter we found the last statement uttered by a Roman Emperor on divorce devoted to this eugenic view of the breaking of marriage as sometimes a duty. I would ask now, a question I have asked before,[1] of all those who, believing that marriages are made by God, hold that divorce in all cases is wrong. I would ask these to make sure that they really believe that the partners in the marriages that come to the Divorce Courts *were joined by God* and if so, are they willing to follow the argument to its logical conclusion? Are they willing, for instance, to say that a woman or a man may not put aside the marriage if one of the two is a lunatic, or a hopeless drunkard, or an habitual criminal, or a degenerate, or the victim of a disease, which can be communicated to the offspring? Are they willing to go with our ecclesiastical advisers, who seek to maintain marriages, which may be, and often are, the cause of perpetuating disease and crime; the bringing into the world of the children of drunkards, of epileptics, of syphilitics, and of lunatics?

Stop a moment and think what this must mean to the society in which we live. Can it be considered seriously that the continuance of a marriage in such cases as these can by any juggling with texts be made right—anything except the most blind-eyed folly and sin?

[1] See "Women's Wild Oats," Essay on Divorce.

III

The Eastern Orthodox Church, with its married clergy, has always taken a different view of divorce from that of the Western Catholic Church. It has from the first regarded marriage as dissoluble.

The laws vary in different countries, but, speaking broadly, they are practical and liberal and in advance of the laws of many Western countries—far, far in advance of the English laws. Public opinion is also much more founded on realities. It is always understood, in a way very rarely recognised by us, that the real divorce is independent of the law: the breaking of the marriage of necessity going before seeking the divorce decree. The decree records in a judicial way what has really taken place; just as the ceremony of the marriage attests a contract already made. And, when once this truth is grasped, there is greater liberty in granting divorce. For it is understood that the disaster which has fallen upon a marriage is unaltered either by the giving or withholding of the divorce decree. It is remembered, further, that human passions remain the same before divorce and after it and are unaffected by decisions of the laws. Therefore, to hold together husbands and wives in hatred by refusing divorce, or to prevent remarriage by denying the right to marry after granting separation is to give excuse for vice. The indissoluble theory of marriage has always provided a shield for sin. Never did the Eastern Church suffer beneath its dark shadow, so for them always it has been easy to free their thoughts from the idea of crime, that haunting

demon of the Western Church, as a necessary adjunct to divorce; thus laws could be framed with the object of assisting men and women to new lives of happiness and virtue, and not with the object of punishing them for past lives of misery and failure.

These liberal principles may be seen in the laws of pre-war Russia, where the grounds for which divorce could be obtained were unusually comprehensive; including the usual sexual offences; and also the committing of various crimes; desertion for five years; insanity and other severe diseases; different specified forms of cruelty; "invincible repugnance" and certain religious grounds.

Rumania and Bulgaria, two other Eastern countries, both have a most liberal divorce law; the former allowing the severance of the marriage bond by mutual consent, and the latter allowing it on the grounds of desertion for four years on the part of the husband and three years on the part of the wife. In addition there are many other specified grounds for divorce, some of which seem to me to be wise and good. Thus in Rumania we find "acts of ill-treatment," which allows a very wide interpretation. In Bulgaria epilepsy is added to insanity and idiocy as a ground for divorce, while other causes allowed are "restraint on religious liberty" and a "disorderly or dissolute life."

IV

The laws in our colonies are generally far in advance of England, and may be studied with

particular interest as showing how those who are allied to us by stock are moving towards liberty; we see what they approve and do when freed somewhat from the weight of custom, the inertia of ancient practice, and the difficulties inseparable from vested interests and the professional prejudices of ecclesiastical and legal establishments. In these countries too, women have taken a larger share in framing new, and altering old, laws. This I regard as very important. Women will go farther than men. They are more managing, more practical, less content with compromise. They are younger in political work and they are more used to spring-cleaning the dirty places of life. Also they care more for marriage and for the welfare of children. And for these reasons they know, when they come to think about it, the necessity of practical divorce laws.

In South Australia alone the law is the same as in England, except that in the case of adultery, coupled with desertion in a wife's suit, one year's desertion is sufficient instead of the two years necessary with us. In New South Wales and Western Australia divorce is allowed for *wilful desertion* for three years, and in Victoria for the same period for *plain desertion,* without the limiting and harmful restriction of " wilful." (I shall refer to this important matter fully in another section of this chapter.)

Other additional grounds laid down by the laws are habitual drunkenness; cruelty (in Victoria the wife's neglect of domestic duties owing to drunkenness is counted as cruelty); sentence to imprisonment for a lengthy period (also in New South Wales for frequent convictions); and insanity. Very careful and

practical provisions are laid down in connection with each separate ground, and generally the laws show a real desire to help the parties in an unhappy marriage and at the same time to preserve the sanctity of the marriage state.

In Canada the divorce law is based on that of England, but in some States relief can be obtained only by special Act of Parliament as it was here before 1857. The Canadian Council of Women are, however, urging the adoption of a uniform marriage law throughout the country, and advocating raising the legal age for marriage from eighteen to twenty-one years. The legal age in England is fourteen and twelve. (See *Journal of the Divorce Law Reform Union*, June, 1921.)

But for the most enlightened legislative advances we have to look to New Zealand, a land where women's influence is strong.

Before 1899 the law was practically the same as in England, but in that year a *Divorce and Matrimonial Act* was passed, breaking entirely away from the English view that divorce must be restricted to the narrowest possible limits. New and very liberal grounds of divorce were allowed based on the lines of modern constructive legislation. And what I wish you specially to note is that this Act (which was passed against the bitter opposition and gloomy foreboding of the party who regarded divorce, save for adultery, as opposed to Christ's teaching) has been found in every way to work well. It is claimed for it that it has lessened drunkenness, increased responsibility in married life, and improved morality.

So strongly has this been felt that a new Act, known

as the *Divorce and Matrimonial Amendment Act*, was passed last year, 1920, which is far in advance of anything that as yet has been attempted in recent times elsewhere.

I wish it were possible for me to give in detail all the Bill's wise enactments. Briefly it allows a magistrate to grant a deed of separation *by mutual consent*, which at the end of three years, if the separation continues, entitles either partner to a divorce, with the right of both to remarry. Divorce can be obtained also for desertion, which can be established at any time by bringing a decree for the restitution of conjugal rights, and this, if the decree is not complied with, carries the right of divorce. Other specified grounds on which divorce can be obtained are insanity (defined with particular care), where recovery is unlikely; imprisonment for seven years and upwards; attempt to commit murder; wounding or doing actual bodily harm to the petitioner, or any child of the petitioner or respondent.

This is a very admirable Act. I am told that the women of New Zealand are largely responsible for its being passed.

V

A few words must be written on the divorce laws of America, though, as I am fully aware, the subject is too wide and too difficult to treat adequately in a few rough notes.

Each of the forty-six States and four Territories has its own divorce laws; the causes for which divorce is granted vary very much, from "adultery," the sole

cause in New York, to "causes deemed sufficient by the Court" allowed in Washington. This wide discretion left to the judges is a peculiarity of the American law.

The grounds set down in the preponderating number of States are: adultery, desertion, cruelty, and imprisonment for crime. Adultery is a ground in all the States and Territories of the Union, except South Carolina, in which State divorce is not granted for any cause. Desertion is also an almost universal ground and is allowed in all the States except New York, the District of Columbia, and North and South Carolina. Imprisonment is a ground in forty-one States, and extreme cruelty endangering life and health in thirty-six States and Territories.

We find in many States special insistence on serious defects and incapacities—such, for instance, as impotence, refusal to fulfil marital duties, violent temper, and habitual drunkenness—all causes that act strongly in breaking marriages and are symptomatic of irreconcilable divergences and incompatibilities between the partners. Cases are heard by the Supreme Court sitting in each department of every State and Territory.

An attempt was made at a conference held in Washington, in 1906, to draw up a uniform divorce law. Forty-one States were represented and a draft Act was drawn up and agreed to, accepting as grounds for divorce—adultery, wilful desertion for two years, bigamy, conviction of crime followed by imprisonment for two years, drunkenness for the same period, cruelty involving injury to life or health or making mutual living together unsafe.

It has to be acknowledged that the number of divorces in the United States is the highest of any civilised country, with the exception of Japan. Much has been said on this matter, therefore, I shall say little, for it cannot be treated properly in a paragraph. I shall not attempt, as I should like to do, and could do, to show that this prevalence of divorce is due to too easy marriage at least as much as to too easy divorce. Already I have spoken about this question of the harm of too easy marriage in a former chapter; I shall refer to it again in the following chapter in connection with the French and Belgium divorce laws. I will, therefore, say only that marriage is easier to enter in America even than it is in England. In many of the States no ceremony of any kind is needed. Always if marriage is too easy, divorce will be too frequent. It ought also to be noted that America is a country of mixed races. In the Southern States ninety per cent of the divorces are those of negroes. Again, many aliens seek refuge in this free land, moving from State to State in search of a livelihood. In such circumstances desertion is frequent.

And there is another fact I would bring before your notice. In South Carolina, where divorce is not allowed, a law has been passed quite recently to prevent a man leaving more than one quarter of his possessions to any mistress or illegitimate child. Does not this fact speak for itself? Let us be honest and inquire into all the many and complex facts before we bring forward America as a terrible example, flashing a red danger-light, to warn us against advance in our divorce legislation. We

really must try to cease these ignorant parrot-cries, which are so easy to utter, but mean so little if we inquire into their truth.

It will be convenient to add a few words about Spain, the land I know and love so well. Spain is a Catholic country, and permits no divorce, and what I wish to illustrate is how harmfully, in some ways, this acts. True it prevents hasty marriage. In Spain marriage is regarded as the gravest and most momentous step in life; but this caution does not altogether work out for good in the way one might expect.

I recall a conversation with a Spanish friend, on this question. We were speaking of the great numbers of young Spaniards who did not marry. I asked my friend the reason of this. He answered, " You see we have no divorce in this land as you have in England; that makes us afraid now we have begun to think; we hesitate and hesitate, then we take a mistress while we are deciding, but it is easier and less binding to live like that, and we keep going on and put off marrying—sometimes put it off until it is too late." Another Spaniard said to me once, " I love all women so much, I dare not bind myself to love only one, from whom I could never escape even if I grew to hate her." Is there any wonder that in Spain the illegitimate birth-rate is one of the highest of any country in Europe?

We must accept it, then, that indissoluble marriage fails in practice, and the country which enforces it commits self-injury, by setting up a standard of conduct that is not maintained, and further, one that not only encourages illicit love and illegitimate

births, but acts in deterring the more thoughtful from marriage and leaves the protected institution to the more reckless, who do not consider consequences.[1]

[1] The facts in this chapter and the next have been taken mainly from a leaflet on "The Divorce Laws of Other Lands," issued by the Divorce Law Reform Union, and from articles in the *Journal* of the Society, especially an unsigned article on "The Laws of the Colonies," which appeared June, 1921, and "Norwegian Women and Divorce," by Fru Anker, August, 1919.

CHAPTER VII

THE DIVORCE LAWS OF OTHER LANDS: FRANCE, BELGIUM, AND OTHER EUROPEAN COUNTRIES

I

"NAPOLEON," states S. B. Kitchen, in his "History of Divorce," "made a genuine attempt to codify the popular will on the question of divorce." And, if we turn now to the laws of France and Belgium, we shall find many features of interest to our inquiry. These are Roman Catholic countries, but divorce is regarded as a civil, and not a religious question.

In France, though the Canon law with its theory of indissoluble marriage was brought back for over half a century, after the fall of Napoleon and the return of the Catholic Bourbons, in 1816, the liberal laws of the Revolution, drawn up at a time when "the thunder of the people's voice" had spoken, were re-enacted in the divorce laws of the Civil Code. The one difference was that divorce by mutual consent was no longer permitted. But in Belgium, where the Napoleonic Code remained almost unchanged, divorce by consent has always been, and is still in force.

"The interest of the family and the respect of the legal rights and the legal obligations of marriage are

the basis of the marriage law according to the Civil Code. Should those rights and obligations be no more respected, the family ties are broken and *divorce is the remedy in order that the family may be reconstructed with more suitable partners.*"[1]

The italics in the passage are mine, for it makes so abundantly clear the separation of this liberal view from the falseness of the English ideas, and shows how much our laws need changing towards this common-sense standpoint of reconstruction. We find in the French law, not a theoretical, but a genuine care for the sanctity of marriage; and their wisely thought out measures are, indeed, full of surprise and instruction to us who are accustomed to our ineffective regulations.

In France to have family ties broken—in fact, but not in law, as is so often the case in England, is regarded as encouraging immorality and corrupting society. Accordingly, if both partners are guilty of a breach of the rights and obligations of marriage, in particular, if both have committed adultery, it is held as a double cause for the granting of the divorce.

It hardly needs pointing out that these principles are entirely different from those of the English law.

Marriage is a civil contract quite independent of the religious service. The ceremony takes place at the town hall or " Maison Communale " before the

[1] This passage and others that are quoted in this section, as well as the facts with regard to the French and Belgian Civil Codes, are taken from a series of most interesting articles on " The Divorce Law in France and Belgium," by M. Alb. Fabry, which appeared in the *Journal of the Divorce Reform Union*, in May, June, July, August, and September, 1919.

" Officer of Public Status " (Registrar) who reads to the couple before the marriage the commandments of marriage (the term is my own), as they are laid down in the Civil Code.

The principal of these are:

(1) Husband and wife owe to each other fidelity, help, and assistance.

(2) The husband owes protection to his wife, the wife obedience to her husband.

(3) The wife is obliged to live with her husband and to follow him wherever he thinks fit to reside; the husband is obliged to receive her and to supply her with all that is necessary for the needs of her life according to his capacities and station of life.

There are many other articles referring to property and to the natural rights and obligations of marriage.

Should a husband or wife commit a serious breach of the obligations imposed upon them by the marriage articles or infringe those rights which may be classified as natural law, a case for divorce has been established. This is what the Civil Code terms an *injure grave* (serious wrong or breach). We find certain special breaches of matrimonial obligations specified in the Civil Code as sufficient grounds for divorce. They are (1) adultery, (2) a penalty for a criminal offence, (3) *les excès* (cruelties or violences endangering the life of the wife or husband), (4) *les sévices* (cruelties not endangering his or her life).

If an act of cruelty be dangerous to life, it is called an *excès;* if dangerous to health or limb only it is called *sévice.* An *injure grave* signifies more

usually a moral injury than bodily harm. These acts of cruelty must, however, be inflicted with the will to be cruel and to treat badly; if committed without conscious intention, they do not furnish grounds for divorce. Thus, in a divorce case heard at Brussels in the year 1885, it was stated that *injure grave* meant "any moral suffering voluntarily and wrongly inflicted by one of the spouses on the other, and so intense that it renders the common life of the spouses unbearable to the latter."

Under the general term *injure grave* may be included, according to the circumstances of the case, an ordinary act of adultery, desertion, drunkenness, neglect, cruelty, or any kind of offensive conduct, but not insanity, which is not a ground for divorce under the Civil Code. And further, as is said by Laurent ("Principes de Droit Civil"), "to appreciate the gravity of the *injure* one has to take into consideration the personality of the spouses, their education, even their social standing." It is for the Court to decide the gravity of the *injure* committed, and to say if it is sufficient for the granting of a decree of divorce.

Divorce, like marriage, is a purely civil matter, entirely outside the authority of the Church.

It should be noted that there is no decree *nisi* as in England, all decrees are absolute, once made by the Court. An appeal to a higher Court is allowed. Also the decree has to be registered by the partner who obtains it within two months. The hateful six-month probationary period is not needed, for no inquiries have to be made as in England, to establish the irreproachable conduct of the innocent party.

Also collusion is not regarded in the same way as

it is in England. The Public Proctor is always a party to any divorce proceedings and has to give his opinion on the pending case. But he does this publicly and at the time of the examination. Never has he to take dark and secret ways as is the case among us, and to pry to obtain evidence, tracking down servants and other witnesses, so as possibly to command a recision of the granted decree.

II

I have still to point out the great, I may even say the essential difference, in regard to the punishment of the guilty which exists between the French and Belgian and the English law. For under the practically thought-out laws of these two countries the guilty are punished. And, if you believe in punishment, and those who support our divorce laws must believe in punishment, then I do not see how you can escape feelings of hot shame at the ineffective way in which we accomplish what we make such a pretence of doing in comparison with what we find really done under the Civil Code of France and Belgium.

Again we must remember that the promoters of the Civil Code held as their guiding principle that the family is the basis of society and that marriage had to be protected; that is why adultery is considered a criminal offence (always on the part of the wife, and on the husband's part, under aggravating circumstances, in France, and in both partners in Belgium since 1906); also, why the partner in the marriage who is guilty is not allowed to marry his or

her accomplice; and why, when once divorced, the ex-husband and wife may not remarry each other.

It should be noted, too, that the co-respondent may be prosecuted before a Criminal Court for adultery, if the act can be clearly established. He is not permitted to be a party in the case as defendant, and is not a valid witness. Nor is it allowed for the husband to claim damages from him, for in France or Belgium "it would be considered immoral for a man to make money out of the dishonour of his wife."

So you see clearly how the French and Belgian laws are much more severe than the English law, for those who commit adultery. They really punish the guilty, we pretend to do so. But on this question I would wish to quote directly the opinion of M. Alb. Fabry, from whose admirable articles on the French and Belgian law I have taken my information, as it may well be, if I express his views in my own words, I shall be thought to be showing prejudice. This is what the French writer says about the English law:

"According to the Matrimonial Causes Act, 1857, the sole ground for divorce is the adultery of the wife or husband, but for the latter there must be an aggravation of some sort, such as bigamy, rape, cruelty, long desertion, sodomy, etc.

"The divorce is not granted merely because there is a breach of the family ties, *but more specially as a sort of civil penalty inflicted on the guilty party.* That is proved by the fact that if the plaintiff is himself found guilty he cannot be granted a divorce except in quite exceptional circumstances, and the object of the decree *nisi* is precisely to find out if the plaintiff is irreproachable.

"That fact, and also the fact that adultery is not considered a criminal offence, proves that *the English Divorce is not established really in the public interest, which undoubtedly must demand the dissolution of unhappy marriages,* but simply in *order to satisfy the private wishes and interests of the plaintiff.*"

I have underlined these passages for they seem to me of immense importance.

In Belgium the witnesses in a divorce case are heard *in camera* before a judge, and should the particulars of the case be dangerous to morality the Court hears the evidence within closed doors. The scandalous publicity which we permit is never allowed in either France or Belgium.

It must be mentioned, too, that in both countries all legal action is greatly facilitated to poor people, by what is called the "Judicial PRO DEO," which provides the services of an *avoué* (solicitor) and also gratuitous expenses of all judicial procedure, where it is needed and poverty is proved. Even without assistance the legal costs of an action are much lower than in England. But on this question of the heavy cost of divorce among us I shall write in a subsequent chapter.

III

The conditions which meet us when we come to consider divorce by mutual agreement, which was instituted by Napoleon, and has always been allowed in Belgium, are explained by the fundamental principle of the Civil Code that the family is the basis of society. And it followed from this that, "divorce was considered as a remedy for a social evil, it does not break the marriage ties, it simply confirms the regrettable and actual fact of such existing breach. But the remedy has to be used only with great care, and even with some reluctance. Portales, one of the

principal promoters of the Civil Code, said at the *Conseil d'Etât*, ' The laws must prevent that the most sacred of all agreements should be the plaything of fickleness and caprice.' "

All the restrictions required before the granting of divorce by agreement under the Civil Code were formulated in that spirit. The statement of the terms under which it is granted in itself is instructive: " mutual unwavering and legal expression that common life is insupportable."

No divorce hustle here! No severing of the sacred marriage bond in a few minutes by hurried formalities! And we really claim to be the upholders of marriage sanctity! But you cannot be virtuous without being practical. And our divorce laws totter on a sinking foundation of theories.

In Belgium there are very strict rules to observe, and many and lengthy formalities to be gone through before the decree is granted. Even then neither party can remarry until a period of three years has passed.

Most significant of all is the care that is taken by the Court in safeguarding the interests of any children in such divorces. One of the first formalities to be fulfilled by the husband and wife is to sign a special deed, in which they state what settlement they have agreed upon in regard to their estates and income, and what provision they propose to make for their children, if they have any. Moreover, under this form of divorce, half the estate and income of both the father and the mother is legally vested on the children of the marriage, though the parents are allowed the use of it until the children come of age, on the condition that they sufficiently provide for them.

Such wise conditions as these ought, in my opinion, to be extended to all kinds of divorce;[1] it would serve the double purpose of giving justice to the children, and at the same time would often act as a check against the hasty breaking of marriage.

Is a divorce law of such clear justice and morality as this one impossible for us in England? I fear that at present it is.

Many other careful provisions are made under the Civil Code for the children of divorced people. As a rule they are committed to the care of the parent who gains the divorce. This is the same as in England. But in France or Belgium much greater inquiry and supervision is customary. The Court may, at the request of the family or of the Public Proctor, commit the children to the care of the other parent if, even though guilty, he or she is a more suitable guardian; or they may be taken from both parents and placed under the care of a third party appointed by the Court as guardian. The interests of the children is the sole thing the Court has to consider. In all cases the father and the mother have the right, unless otherwise ordered by the Court, to look after the well-being and education of the children, and they are obliged to contribute to their maintenance according to their means. Moreover the children retain all benefits stipulated in their favour either by law or by the marriage settlement of their parents.

The Napoleonic Code also decides that the partner who gains the divorce shall keep all the benefits made to her or him in the marriage settlement; if none have been made or they are not sufficient, he or she may

[1] See Chapter XII, where I advocate a similar plan.

obtain alimony from the other partner, to an amount not exceeding one third of the income. On the other hand the guilty partner loses any benefits made in his or her favour by the marriage settlements. (I bring forward a similar proposal in the last chapter when I write of divorce as I myself would wish it to be.)

IV

All the regulations under the Civil Code have been made with this view of preserving the family. And it is the same spirit which accounts for "all the formalities required before the marriage from the future husband and wife."

No hasty or secret marriages can take place in France or in Belgium. There the preservation of marriage is considered as a practical proposition and thought is given to stop, as far as it is possible, harm, before it is done, and not afterwards. *Fiancailles* (engagements) are regarded as more binding and more sacred than anything to which we are accustomed. Both the engagement and the marriage are affairs of the utmost importance in the families of the young couples. The crime of bigamy is very rare; and there is no such thing known as cases for breach of promise of marriage.

The great facilities given for hurried marriages in England, and the absence of all official inquiry from young couples, is largely responsible for the greater number of the cases which come to the disaster of the Divorce Courts. This I have proved already. It is responsible also for many cases of bigamy, a crime

which has increased alarmingly in the last years. Our law of breaches of marriage promises, with its frequent misuse and exhortation of hush-money, is another cause dependent on our stupid neglect to regulate marriage. It leads to many unsuitable marriages being made, which very often have their fatal sequel of divorce or separation.

I must press home this question of the dangers of too easy marriage, though I risk wearying my readers by repetition. Our present careless laws are certainly acting to bring marriage to discredit. We hurry young people within its bonds, freeing them from all obligations to their families and to society, and then later, when disaster overtakes them, with callous irony we say "you have made your bed and must lie upon it."

If we desire really to preserve marriage, let us treat marriage with seriousness. We do not do this. As I have said elsewhere *Marriage is not a religion to us, it is a sport.*[1] Again I would urge practical and prompt action. We are, I think, bound to realise that if we are to succeed in freeing our society from the evils which all of us are deploring, our attention must shift from attempts to hinder the granting of divorce, to removing the causes that lead certainly to the claiming of divorce. In other words we have to formulate more practical and helpful marriage laws.

Nothing else, in my opinion, can avert even greater disasters of licence in the future than those conditions we are now facing.

[1] "Women's Wild Oats." Second Essay, "The Covenant of God." See also my "Sex Education and National Health," on this question.

V

The laws of other European countries show considerable divergence in the number and character of specified grounds on which divorce may be obtained. Many of these are instructive. Thus in Austria, before the war, we find (as well as the common grounds of adultery and immoral acts and malicious desertion) "threats or serious vexations"; in Germany, "incurable extravagance coupled with drunkenness, and refusal to support"; in Portugal, "inveterate gambling habits"; in Switzerland, "ill usage and incurable incompatability of temper rendering married life unbearable." Insanity is allowed in most countries and also imprisonment for crime; other common grounds are infecting with sexual diseases, attempts upon life, and any other gross offence.

In the last chapter, when I have finished my inquiry and am free to state my own views, I shall have more to say on this question of fixing the precise grounds for which divorce may be granted. Personally I feel convinced that an enlightened system of divorce must go further than providing ways of escape from marriage. Such exits tend to destroy much that I would wish to preserve. They make an inquiry and a trial necessary and connect divorce with crime. That is why I so much like the Code of Holland; it does preserve the sanctity of marriage and recognise the liberty of love. Also such exits are unable to meet the needs of all classes, no matter how wide and how numerous the causes allowed. They

can never, I am certain, form the ultimate solution. They tend to lower marriage and may even make it ridiculous, and there are real grounds for the objections raised against them.

There must, in my opinion, be no special exits; the door of marriage, with certain safeguards, must be left as open to go out of as it is open to enter. Rather would I make it harder to go in than difficult to go out. The best argument I ever heard for divorce was a remark once made to me in conversation with a working man. He said: "When two people are fighting it is not very safe to lock the door." After all what you do is this: you give occasion for the locks to be broken. I do not believe there need be any fear of open doors. People will not hurry out too quickly: then marriage itself will be sanctified and purity will make glad the home. Nor need there be fear then of "hustle in the Divorce Courts." I must not, however, write more on this question. I will record only my firm conviction that this liberty will come. When racial responsibility in marriage is once more understood among us, when all the duties and joys of marriage are carried out in a religious spirit, and our laws are founded on the needs of little children and on the recognition of the equality of the mother with the father—the woman with the man—then will come divorce by mutual consent.

VI

Already it has come in other lands.

In addition to Holland and Norway we find it

allowed in Portugal, a Catholic country with a most liberal and practical divorce law, introduced at the time of the establishment of the Portuguese Republic. Divorce is now permitted without restriction by mutual consent. This is the case also in Rumania, and in Austria and Russia, before the war, for the Jews, where divorce is granted by mutual consent or for the adultery of the wife.

Russia,[1] as we have seen, and Switzerland also allow divorce, without restrictions, after a separation order lasting in Switzerland for three years and in Russia for five years, which practically means divorce by mutual consent. In Scotland, for upwards of three hundred years, in Hungary, Denmark, Germany, Sweden, Cape Provence, Natal, as well as in the countries I have noticed already, desertion has been considered by law as equally harmful to marriage as adultery, and, therefore, is allowed as a ground for divorce. In most of these countries, however, the desertion must be *malicious*, that is, not arranged between the partners. This is a question which we must now investigate: it is very important.[2]

VII

The law of Denmark in regard to desertion is of special interest to this inquiry we are now making. In common with all Protestant countries, except England, divorce was granted on the ground of malicious desertion at the time of the Reformation:

[1] In pre-war times. I do not know the law now.

[2] See article by Mrs Seaton-Tiedeman, in the *Journal of the Divorce Law Reform Union*, August, 1919.

but since 1839 three years actual living apart, in accordance with a decree of separation, gives the right to divorce. The marriage is dissolved without formalities and both partners are able to marry.

Now, it is this change from the usual malicious desertion to desertion following automatically from separation *and without restriction* that I ask you to notice. Malicious desertion, as we saw in an earlier chapter, was the special invention of the Reformation. It was allowed as a ground for divorce as well as adultery on account of its home-breaking character. This was well done. The Reformers would seem, however, to have been quite unable to dissociate the idea of divorce from crime. Therefore the hindering condition must be added that the desertion is "malicious," i.e., wilful—the result of sinful intention on the part of either the husband or the wife.

I must follow this further. So great is the power for evil and for directly encouraging immorality and misery that is hidden in that word "malicious." I wish I had the power to strike it out of the statute books of the laws of every country in the world. Do you not see what it implies?—this hateful legacy of priests. It is added really to hinder relief being given when both husband and wife desire it; preventing divorce in the very marriages where most certainly it ought to be granted. I say "preventing," but not always does it do that, for very often what it does do is to drive husbands and wives into using mean weapons of deceit, into lying and dangerous soul-destroying concealments, which do not give moral conduct a chance. A pretension of enmity and wish to persecute has to be maintained, often when it is not

felt. What can decent men and women do who want to help one another? As long as collusion—which put into plain words means the *desire of both partners acting together and helping one another*—is held to be the one absolute bar to divorce there will be perjury in the Divorce Courts; for men and women are more honourable than the law, and they will not accept as right the mandate of rapacious priests that *the desire of one partner should act against the other, persecuting one another.* Indeed collusion will be used as a detested, but necessary, evil by the most honourable men and women. Do not make any mistake here. Collusion was an invention of priests to prevent peaceable matrimonial settlements taking place outside of the Ecclesiastical Courts,[1] a course of action, which, of course, would have robbed the Church of its large profits from divorce litigation. There is nothing sacred about collusion—it was a commercial contrivance to gather wealth. Does this, indeed, explain the strength of its persistence? I do not like to think so. Yet it remains a detested legacy, driving honourable, kindly people into positions of intolerable and quite unnecessary humiliation.

VIII

I have before me the admirable but rather distressing account of Hazlitt's divorce as it is recorded in his life by Augustine Birrell.[2] Nothing could illustrate better what I am trying to make plain about the hid-

[1] See p. 27 ff., and p. 32.

[2] Page 160.

eous necessity of collusion in connection with divorce. Hazlitt's relations with his wife, as Mr Birrell tells us, were "uncomfortable." "They did not hate each other and were both attached to the boy, but they were quite willing to part company. Hazlitt's habits as a husband had become bad; he also made complaints about her (his wife). In 1819 they had given up joint housekeeping and were living apart."

Hazlitt now became infatuated with the unfortunate passion which inspired *Liber Amoris*. He appealed to his wife, and she was willing to help him to gain his liberty to remarry. It was, however, before 1857, when there was no Divorce Court in England; the only possible procedure was an appeal by special Act of Parliament, a course clearly beyond Hazlitt's means or, it might be added, his patience.

Some way to gain freedom Hazlitt had to find. A friend recommended Scotland. At that time (1823) any defendant resident for forty days in the country was amenable to the jurisdiction of the Scottish Court. Hazlitt does not seem to have cared that this extension of the benefits of the Scottish divorce law to strangers (afterwards repealed) was never recognised in England.

The Scottish law was practical and simple. Following the doctrines laid down by the Reformation, wilful desertion was confirmed by statute in the year 1573 as a ground for divorce, four years being then the period fixed, which has not been shortened since. The other course was that either the husband or the wife could "on the proof of unfaithfulness obtain in the proper Court a decree annulling the marriage and restoring to both parties the freedom to marry again."

It was this course that Hazlitt followed. He had no delicacy in having misconduct proved against him; and his wife, as I have said, still cared for him sufficiently to wish to help him. A difficulty, however, arose through law forbidding collusion, which forced upon Mrs Hazlitt the distressful necessity of perjury. She hated lying and did not know what to do. But let me quote the story as it is told by Mr Birrell:

"The whole scheme was nearly wrecked and Hazlitt driven distracted by this good woman's scruples. She was confronted with the oath *de calumnia*, which, as it required her to swear on her knees with her right hand on the Gospels that there had been no concert between her and her husband in order to obtain a divorce, might well occasion her some uneasiness, for no other business had brought them both to Edinburgh. In her distress, for she was not a dishonest woman, she consulted a member of the Scottish Bar, who assured her that the oath was only meant to hit cases where no real matrimonial offence had ever been committed, and as in her case Hazlitt had committed such offences both in London and Edinburgh, she might fairly take it, which accordingly she did.

"Hazlitt, I need not say, put in no substantial defence to his wife's plaint; formal proof was tendered of a matrimonial offence in Edinburgh, and the desired decree pronounced."

I shall continue our inquiry into this question of collusion in the next chapter. I have to convince you that it is one of the evils that must be got rid of from our laws.

CHAPTER VIII

DIVORCE SUITS I HAVE KNOWN

In previous chapters I have dealt with the harmful way in which the necessity for adultery and the unwise attitude of the law in regard to collusive actions, force honourable people to commit perjury and obtain their freedom by pretending misconduct. To establish this and make the facts plainer, I will now tell in detail six cases of divorce from my own knowledge. These are " arranged suits " in which the partners are acting together, with a real desire to do what is right and to help one another. Afterwards I shall give six cases of a different character, where the adultery is not arranged and the ruling motives are jealousy and vindictiveness; cases taken from the accounts given in the law reports of *The Times* or in other daily papers. I shall ask you to contrast the first group of cases with the last group. You will then, I think, see exactly what I mean, and how dangerously and disgracefully the law works in helping immoral conduct and in penalising good conduct. The facts of these twelve cases will, I hope, speak more emotionally, and therefore more forcibly, than any further statements of my own opinions.

Case 1.—A husband and wife, childless, desired to part; there

was no physical infidelity on either side, but love had died. Both partners desired to remarry. The wife proved desertion against the husband (arranged between them beforehand by the help of a lawyer). She had to write and urgently entreat the man she desired to leave her to return. A decree for the restitution of conjugal rights was granted to her petition. Afterwards the husband had to commit adultery (again arranged by the help of the lawyer). He took the woman he wished to make his second wife for one night to an hotel. The decree *nisi* was granted. Then there was the six months waiting for the decree to be made absolute. The King's Proctor made inquiries as someone turned informant and made a communication to him. It was found that the wife also desired her freedom and had also committed misconduct. The divorce was refused on the ground of collusion. Four people were rendered desperately unhappy, compelled either to part or to live together without marriage. This, as was to be expected, they did, and children were born, of necessity, illegitimately.

CASE 2.—In this case the husband loved his wife, but she had been unfaithful to him and desired freedom to remarry her lover. There were no children. Because it was better for her, this wronged husband arranged for his wife to divorce him, prove desertion and adultery. There was a slight difficulty because it was the wife who had run away from home. However, this was easily got over. The wife wrote begging the husband to allow her to return home, representing that he had sent her away. He then had to reply refusing her request, and, while desiring nothing on earth so much as her return to him, had to state he would never live with her again. An act of adultery was then necessary, and as this good and chivalrous husband was also an exceptionally moral man, he took his sister to an hotel, and the divorce was granted on this, they, of course, signing their names in the hotel register as Mr and Mrs X.

CASE 3.—In this case the action of the parties is reversed.

The husband had committed adultery and wished his freedom to remarry, but he held a public position, and to be the guilty party in a divorce suit meant social and financial ruin. The wife was innocent, and still loved her husband, but because she felt it right to free him, an act of adultery for her (not committed) was arranged. Both the decree *nisi* and the decree absolute were granted. Complications arose from the fact that there were two children. As the innocent party custody was granted to the father, but he did not want the children. So for the six probationary months between the two decrees the children were placed with friends. Afterwards they were given back by the father to the mother.

CASE 4.—This case was even more curious than the three I have given. A very bad but beautiful woman had married a man younger than herself, an idealist, chivalrous, and quite unusually moral. After a few years of hell the marriage had to be ended. In kindness, and because she was a woman, the man said she had better divorce him. Desertion was proved, though it had not taken place. Trouble arose from the necessary act of adultery, as it was against the principles of the husband even to appear to commit it. The difficulty had, however, to be got over or the divorce given up. It was done in this way: the man got his married sister to go with her husband to an hotel, personating him and a woman, and signing the hotel book with his name as Mr and Mrs ——. Now the strange fact is that though there was no kind of similarity of appearance between the brother-in-law and the husband, one being very dark and the other very fair, one being short and the other tall, identity was established and sworn to by the servant in the hotel where the night had been spent. How this was arranged I do not know, but the decree *nisi* and the decree absolute were granted without any difficulties arising.

CASE 5.—A wife and husband in a love marriage, after some years drifted apart. There were two children, and

the husband felt himself left outside the circle of their love. After easing his loneliness for some years with the modern intellectual friendships with women, he fell genuinely in love. He told his wife, and asked her to free him. She was a just woman, and agreed to do this. The usual steps were taken. An order for restitution of conjugal rights was granted and disobeyed; the necessary act of adultery was committed, and the decree *nisi* was granted without difficulty. All would have been well, had not a girl (with whom the husband had had one of his intellectual friendships), heard of his coming remarriage. It is probable that she had cared for him, but at any rate she seems to have been jealous, as was learnt afterwards. She wrote to the King's Proctor with a quite unfounded story of long-past misconduct on the part of the wife. The situation was made more difficult by the death of this girl quite suddenly from influenza. It was almost the end of the six months' waiting time, the remarriage was arranged, when the King's Proctor entered a demand for delay, in order to make investigation. A period of the utmost anxiety happened for everyone concerned—no one then knowing why there was delay, or what had caused it. Nothing happened except a great deal of very horrible, and quite unwarrantable, prying by the agents of the King's Proctor into the blameless past life of the wife. Then at the end of the month's delay the decree was made absolute.

CASE 6 (I give this case because, though it offers no special features of interest, it is rather disturbing in its somewhat callous arrangements, and it shows very clearly how the law is circumvented in these arranged suits).—A childless husband and wife both fell in love with someone else. They were unnaturally unemotional and modern people. All four of them—the husband and wife and the lover of each, met to discuss the situation. One of the lovers was married, and his wife also came to the conference. It was decided that two divorces were necessary. All the needful steps were taken, with the secrecy and falsity necessary to prevent the

suspicion of collusion. Everything went as was desired (they were very clever people), and after the two decrees were made absolute there were three remarriages, for the odd wife found a partner during the months that elapsed before they all obtained their freedom.

Now, none of these cases are unusual, with the possible exception of No. 4; similar divorce suits are heard each session. I have personally chosen a few only out of many such cases that are known to me. In one instance a man took his mother to an hotel for the required adultery act, and I have heard frequently of friends, both men and women, undertaking the empty form of this unpleasant duty. A room is taken for the purpose at some quiet hotel, and the one who seeks divorce and the friend go there together and spend the night in talking. This is done, as a rule, to save the one (usually the woman) with whom remarriage is desired being placed in an uncomfortable position; her place is taken by an older, trustworthy relative or friend. Of course, these things are not made public; they are not told as a rule even to friends. Almost always the way in which the details have been arranged is most carefully hidden; at first to prevent the losing of the case on the charge of collusion, while afterwards the silence is maintained out of dislike in acknowledging what had to be done. Honest people do not like to remember deceit made unavoidable under our disgraceful laws in order both to obtain freedom and to give freedom. For I would ask you to notice that often, as in case No. 5, divorce proceedings are instituted by *the innocent partner at the request and for the benefit of the guilty partner;* an act of generosity and unselfish helpfulness, but

considered by our law (which fails always to distinguish between moral and immoral conduct—between right and wrong) as connivance and an absolute hindrance to divorce.

It is obvious to you surely now, and without further arguments, after reading these cases, with their painful details of contrived situations, that laws making perjury necessary, which demand the committing of acts of, often pretended, infidelity, are immoral and can never preserve or aid the social well-being of life and the sanctity of marriage; nor is their immorality lessened by the fact that through the rather heavy costs of these " arranged suits " only the richer and more fortunate classes, as a rule, are able to bring them.

I must press home, too, the fact, not usually recognised, that in cases such as these, where both partners are of the same mind, it is not difficult, if you have a clever lawyer, to obtain divorce; all that it is, is very expensive. Probably in no other country is it equally easy to have an " arranged divorce." But the costs are heavy.

I ask if this state of things is to be allowed to go on. Are decent people to be driven by the law to make use of such vile trickeries? I say decent people advisedly, for those who bring this kind of suit *are decent*, wishing to act honourably and kindly, and carrying out the always difficult severing of the marriage bond with as little pain as possible. These undefended and arranged suits, more or less on the lines of those I have given, are becoming more and more frequent. Each law season their number is increasing.

There are, of course, other divorce suits of a different character, in which vindictiveness and jealousy and anger are the ruling motives. I shall ask you now to consider four of these defended suits, and two cases in which divorce, under our laws, is impossible. Again, I believe, these cases will speak more forcibly to you than any words of mine.

CASE 1 (Account taken from *The Times*).—A boy and girl married in 1918; both were minors—the husband being twenty and the girl only fifteen years of age. Next year the husband, by his guardian, presented a petition for divorce, on the ground of his wife's adultery. Then the wife, by her guardian, filed an answer, denying adultery, and alleging cruelty and adultery by the husband, and prayed that his petition might be dismissed and that her marriage might be dissolved. Each accused the other of having communicated a venereal disease. In the evidence given during the hearing of the case the whole pitiful story of marriage was given. The boy's meeting with the girl, a short friendship, the intervention of the girl's mother, the boy's offer of marriage. The sympathy of the Court, as so often happens in these cases, went to the girl. The judge found that she had not been guilty of adultery, and that the husband had been guilty of adultery and cruelty. Accordingly the husband's petition was dismissed, while the wife was granted a decree *nisi* with costs. This was in May, 1920, and the interval for making the decree absolute expired on November, 1920. The wife failed to appeal, and has now (July, 1921) entered an application to have the decree *nisi* rescinded, on the grounds of affection for her husband, and desire to return to him. In the interval she had applied to the husband's guardian for costs and a petition for maintenance. Also, as stated in an affidavit made by the husband, she had been bringing all manner of pressure upon his father to settle a sum upon her as hush-money, in which case she

> offered to make the decree absolute. The statement of the husband is a very heart-moving appeal for the severing of the bond of this disastrous marriage. He says: "I cannot understand, and do not believe, the statement of the respondent that she is very fond of me and desires to forget the past and to lead a happy married life with me, in view of a letter I received from her, dated the 3rd June, 1920, and her subsequent conduct. At any rate, I have no affection whatever for her left, and it would be quite impossible for me to maintain my self-respect and acknowledge her as my wife and resume marital relations with her, for, notwithstanding the said decree, I look upon her as having ruined my life entirely, and the only possible happiness that either the respondent or myself can attain hereafter is for the said decree to be made absolute. . . . I look upon the whole of her conduct, since she obtained the decree *nisi*, as a persecution of myself, and her presentation of the petition for maintenance, and her present procedure as an abuse of the process of this honourable Court, and I pray that the honourable Court will extend its sympathy and consideration to myself, and pronounce the decree absolute, annulling my marriage with the respondent." Yet nothing was able to be done. As the guilty party this unhappy husband, still little more than a boy, cannot have the decree made absolute; while the Court, it seems, has no power to compel the wife to do this.

I can make no comment—there are some things so tragic that to speak of them is an impertinence. Do you recall what Erasmus said, four hundred years ago? "Shame on a law which says that a vow taken when the down is on the cheek is of perpetual obligation." It was this saying I remembered as I read this story, which is true. A sense of passionate indignation and shame rose within me that we went on standing these laws. For we could alter them did we care enough. The responsibility is mine and yours.

No one among us can escape; we are our brother's keeper in this matter.

Here is another story, which, though it never came to the Divorce Courts, I cannot refrain from noticing and give without details. This young husband sought the simpler and more certain remedy of death. Only eighteen years old he was married unhappily. As was testified by the boy's brother in the evidence at the inquest he did not care to live, and he was found drowned in the Thames. The coroner said "it was a very deplorable and unhappy case."

CASE 2 (Taken from the *Daily Express*).—"One of those fantastic stories only met with in real life. If anyone had written it in fiction it would have been dubbed ridiculous." Such was the comment of the judge on this case when the cross divorce suits of both husband and wife were dismissed, and a separation on the grounds of cruelty was granted to the wife. The case was widely reported (it is the kind of public scandal that is widely reported), and there is fortunately no need for me to do more than outline the unpleasant story. The wife filed her petition first, claiming the dissolution of the marriage on the grounds of the husband's adultery and cruelty. Statements were made proving the unhappiness of the home, especially in connection with the co-respondent—a girl who had been a servant in the house. This girl had become secretary to the husband, and given a position of unusual power in the household. An account was given of a visit of the husband and the girl together to London, where they stayed in a flat lent by a friend, but this incident was explained to the satisfaction of the Court; the husband, who was a medical man, having taken the girl to town on account of illness and an operation that had to be performed. It was judged that misconduct, which was denied, had not taken place. The wife complained also of the husband's attention to another

lady, a married woman, and especially of expensive presents that were given to her. The husband on the other hand accused the wife of misconduct with another medical man, but his suit was dismissed.

Such in outline are the very painful details. I give them because I wish to make plain to you the kind of marriage which is being maintained by our divorce laws. You will remember the attitude of the French law to this question, and how it held that the ending of certain marriages was necessary to society. Now this is surely a marriage, if ever there was one, where it would seem to the outside observer that divorce was necessary for any happiness for both the husband and the wife. Separation cannot meet the need in such a case.

CASE 3 (Taken from *The Times*).—The husband, a Major who had served in the South African War, been twice wounded in the late war, at Gallipoli (where he was reported missing) and on the Somme, and had won the D.S.O., petitioned for the dissolution of his marriage on the grounds of his wife's adultery, covering a considerable period of time, with the co-respondent. The account is a particularly disagreeable one, and into the details I have no wish to enter. Some of the facts must, however, be given. The supposed adultery took place during the husband's absence at the war. By his evidence, and that of the witnesses he called, the wife's conduct would seem difficult to understand. On his return from the war in 1920, he found that his wife had left home and gone to stay at an hotel, where, so the evidence stated, the co-respondent constantly visited her. The husband saw her, and he told the Court that she asked him to "let her divorce him," saying (according to the husband's statement), "I want to marry again—Love is everything. You can stay at an hotel with a woman."

The husband suggested a separation, to which

he states she answered: "That would not suit me, for I would soon kick over the traces." The husband objected to the company she kept in a letter sent to her solicitors, in which he speaks of "hotel servants being bribed to deceive him." There were also complaints made of the wife's great extravagance, and reference was made to her "having bought motor-cars for other men out of my (the husband's) money." He stated he had allowed her £100 a month, but that she had overdrawn her account, and in addition, and without his authority, she had, between December, 1919, and April, 1920, drawn three cheques for £50 on her husband's private account. One painful feature of the examination was the calling of the son to give evidence against his mother. The evidence brought by the husband was held to be insufficient to prove misconduct, and when the wife was called she declared her innocence, as did also the co-respondent. She said also that the statements of the husband were untrue. Therefore the judge acquitted the wife, stating that he accepted her statement and that of the co-respondent that adultery was not committed, and he dismissed the petition of the husband with costs.

I want you to notice especially that the wife's statement with regard to her innocence was accepted by the judge, and to contrast this with the decision in the next case I shall give.

CASE 4 (Taken from the *Daily Telegraph*).—"That a wife's unsupported evidence of her own misconduct was insufficient to secure her husband a divorce decree," was the verdict of the judge in this suit. The husband stated that he and his wife had not lived happily together, and she left him in August, 1919. In May, 1920, he received a letter from her informing him she had been staying with a man at a popular seaside resort. Counsel explained that, owing to illness, the woman in whose house they stayed was not able to attend to corroborate the wife's statement. It was then the judge delivered

his opinion with regard to his being unable to accept the wife's evidence of her own adultery. It was at this point that counsel, acting for the wife, rose to state she was *enceinte*, and wished to give evidence in order, if possible, to expedite the decree, so that she might marry the father of the child before it was born. The answer of the judge should be specially noted. "I quite understand that, but I do not think I can grant a decree on the unsupported evidence of the wife. I doubt if such evidence is admissible." To which counsel answered: "It is often done, my Lord. I was present yesterday before the Lord Chancellor when he allowed a wife to give evidence." His Lordship: "That is very recent. I have an older authority here—the Registrar—and he tells me this decree would not be usual." (Laughter.) The wife then entered the witness-box and recounted the story for the sake of her unborn child—of her own misconduct, giving all the necessary details. It was of no avail. There was some meaningless, and under the serious circumstances, rather indecent joking as to the distinction of the apartments at which the wife and co-respondent had stayed, then the case was adjourned for further evidence.

Thus it would seem that a wife may establish her own innocence, but not her guilt, that her evidence to the latter will not be accepted even under the urgent need of speeding remarriage to save an innocent child from being born and branded illegitimate. Of course, the reason for this inconsistency is plain. It is nothing except the persistence of the ancient fear of collusion; the acknowledgment of guilt on the part of the guilty implies a desire for freedom, and according to the law, the guilty partner must be punished and the innocent party rewarded, which cannot be done if both desire the same result.

CASE 5 (Separation case taken from *The Times*).—This was

> the petition of a wife for a judicial separation from her husband, a member of the R.A.M.C., on the ground of two years' desertion. The charge of desertion was denied, but the husband did not appear. In the evidence of the wife it was shown that she had met her husband in Salonika, where she was acting as a nurse with the Canadian Forces in 1916. They were married in July of the same year in London. In 1917 the husband was ordered to Mesopotamia, but the wife did not accompany him, but returned to her home in Canada. In the next year her husband sent her a letter in which he said, "He would not return to her, but would stay in Mesopotamia until he got his freedom or until the climate 'finished' him." He also said that he had been unfaithful to her. The decree of judicial separation was granted, with costs.

Here a fictitious liberty is gained, which yet leaves the parted husband and wife joined by an unbreakable bond. This cannot fail to cause harm. Do you remember the prisoners in Dostoieffsky's wonderful novel "The House of the Dead"? They all wear fetters, hidden beneath their garments, so they can walk but are quite powerless to escape. You have a picture of the exact position in which countless partners find themselves to-day, separated but without any right to remarry, bound in marriages, broken in fact, that were made in the years of unusual stress during the war period.

And I would ask your permission to digress here for a moment to bring before your attention a fact too often neglected. It is in the very worst of these marriages, where the guilt of the guilty is indeed guilt and ought to be punished, that divorce is most difficult to obtain, so that escape for the innocent partner often is rendered impossible. This is

especially the case when the husband seeks freedom for the misconduct of the wife.

Let me explain. There have been any number of young men in the last years who (either when home on leave or, even more frequently, during periods of convalescence from wounds and shell-shock) have entered into relations with girls of loose character. The best and most conscientious among these young men—those from the strictest homes—married the girls, usually because a child was to be born. After marriage, a few months, a year, or possibly two years of unspeakably unhappy living together was endured; then came a parting, the husband returning usually to the home of his mother (often taking with him the child of the marriage), and making the wife an allowance. But what is the position afterwards, when the young husband wishes, as he usually does come to wish, for freedom, to re-establish his life and perhaps remarry? It is about as bad as it can be. The very fact of the wife's loose conduct before marriage and during the time of living together, if afterwards he leaves her, acts against him. For our law lays down that a husband must protect his wife, and especially must he do this when her character is such as to make protection necessary to her good conduct. To leave her " without the comfort of his presence " is considered by the law as connivance at her guilt. (Another of the terrible C's.) Thus even when adultery can be proved against the wife, and the necessary evidence, always very difficult to obtain in these cases, has been collected, usually with great trouble and much expense on the part of the unhappy and wronged husband, he can be in no wise certain of

obtaining his freedom. The sympathy of the Court goes very easily with the woman. The man—often still having hardly attained full manhood—finds himself bound for life to a guilty wife for whom he can have neither affection or respect. Is it possible, I ask you, to think of anything more immoral than the maintaining of such a marriage? Is it not a perpetual crime? No wonder, while so many people in England are absolutely unable to remarry, they so often, as a direct consequence, live an immoral life. For how long is this sort of thing to go on? Let us sweep away for ever these hated ecclesiastical C's—survivals of clerical greed. They are a very certain hindrance to moral living.

CASE 6 (Taken from *The Times*).—In this case the petitioner (the husband) had obtained a decree *nisi* in April, 1920, dissolving his marriage on the grounds of his wife's adultery with the co-respondent. In September, the King's Proctor intervened, stating that the husband himself had committed adultery in November, 1918. This the husband admitted, but pleaded that the Court should exercise its discretion in his favour. The following details were given by the petitioner during his examination. He was married in April, 1911, and lived happily with his wife until he joined the army in 1916. He returned home in the spring, 1918, and found his home broken up and his wife gone. He searched for her and found her living with the co-respondent. He wrote offering to forgive her and take her back, but she refused to leave the co-respondent. A short time after he met the girl with whom he committed adultery, and she had a child and obtained an affiliation order against him. He was not able to marry this girl as she had since married. There was no prospect of his wife's returning to him, and he wished now to be able to marry and lead a respectable life. He

> explained why he had omitted to relate this incident in applying to the Poor Persons' Department, as he thought the question as to whether he had committed any matrimonial offence applied to the time when he was living with his wife, and before she left him. His counsel asked for the discretion of the Court on grounds that the petitioner had been ready to forgive his wife, but she refused to return to him, and there was no prospect of her doing so, and that in these circumstances it was *in the interests of morality that he should be freè to marry*. Yet such wisdom was ignored. The judge declared " that the case was not one in which he could exercise his discretion . . . and though the Court was more lenient now than it was formerly, people must understand that it was still the rule that petitioners should come to the Court with clean hands, and could not commit adultery with impunity." The intervention must therefore be allowed, with costs, the decree rescinded, and the petition dismissed.

Really it is difficult to have patience. Do not the facts of this case cry out to us to put an end to this indecent and utterly harm-working interference on the part of the King's Proctor. I try to understand the honest objections of those who fear any alteration in our laws. I would, however, implore them to think over this grave problem with an open mind. Consider well the case I have just recorded. What good can possibly be served by holding this man chained to a woman who deserted him and still refuses to live with him, because at a time of terrible stress he committed adultery with a woman who now is married?

And this man is one only among hundreds of sufferers, who fought for England—for your safety and for mine. I would quote here from an article on " Divorce for the Separated," in the *Journal of the*

Divorce Law Reform Union, February, 1920, in which the writer, a Captain Brisco, pleads, on the grounds of the needs of soldiers, for a change in our laws. He says:

"An appalling war, won by us at an unthinkable cost, in tears, horror, and ruinous expense, will have been of no avail twenty years hence, if the great number of young people who have augmented the evils of separation, unfortunate people who have made a bad mistake, are to have no redress, except by the way of adultery. We shall have outwardly respectable lives; inwardly unsound; prostitution and disease fostered; selfish personal indulgence; national carelessness; few and undesired children." He speaks of the freer laws of our Colonies. Then he goes on: "You who are happy yourselves surely cannot refuse the sufferers another chance to live. Some of these have met one who would make them forget the awful past, with whom the happy future would result in a splendid harvest of love and usefulness to others—a thank-offering of unspeakable joy. They have run straight, waiting patiently for the long overdue reform of the law. They have 'played the game'—must they go down into the dirt to get their freedom?"

CHAPTER IX

DISCUSSIONS IN PARLIAMENT

Lord Buckmaster's and Lord Gorell's Matrimonial Causes Bills

I

I HOPE I have now sufficiently proved that our ridiculous and immoral system of divorce (I really must use those terms) can do nothing to preserve the sanctity of marriage or help the morals of men and women. Indeed, they act in just the opposite way, as must all laws which do not meet the needs of those who claim their relief.

Some people may be disposed to believe that this very absurdity and unfairness of the law acts to prevent divorce. I tell you it does not; what it does do is to render decent and honest conduct impossible. I know this, and for that reason I have tried to make these facts plain. I have done this because the evil that is going on ought to be known.

A stage has now been reached when the cry for reform must be listened to. Something has got to be done. I plead for a greater breadth of toleration, with a more honest facing of the facts, because I have known in my own experience the degradations, the

falsities and the absurdities that are going on to-day. I have tried to show you a little of the deceptions into which almost everyone is driven who is unfortunate enough to have to seek relief, under the present disgraceful laws, from a marriage that has failed. There are conditions which degrade and embitter and make honourable conduct very difficult. It is only when we realise how horrible and how unnecessary all this is, that we come to understand the barbarism of our laws.

But unfortunately the probability of the law being reformed does not depend on the need for reform. Much stronger is the measure of our desires. What we want badly enough is done, which explains why public houses are being opened for longer hours and cheap railway fares given, while, in spite of all the agitation and terrible need, nothing is done about divorce. The truth is that most of us are not concerned about divorce reform because it does not touch us personally. It is rather like toothache, you begin to think about it only when you have it yourself. Then, indeed, it grips you, but at other times it appears rather ridiculous of people to make a fuss about it.

And the trouble is even deeper, for not only is there indifference to encounter, but actual delight is felt and has to be overcome. You know how you smile and are inclined to laugh when you see anyone with their face distorted with toothache? Well, it is like that. Your emotion, though you do not know it, is delight in the contrast between your freedom from pain with the other's suffering. Thus the happily married—and the majority of people are happily married—not

only have no sympathy with the unhappy, whose marriages come to the disaster of seeking the relief of the law, but they actually experience a very deep, though unconscious pleasure, in their trouble.

I am not very hopeful that this can be changed. And there are other troubles, perhaps, of even greater power that come into force and hinder reform as soon as people become roused to think and to care upon the question. For at once, as we have seen again and again in the course of our inquiry, there are deep prejudices aroused and to be encountered which on no question are so obstinate and so difficult to quiet as they must be on this one of the changing of the marriage laws. I say, this must be, for I am certain there is no help for this opposition—no easy way out. You see we are almost all of us touched too deeply emotionally to think calmly.

Thus the greatest possible trouble arises when any proposal of change in the marriage laws is brought forward. And as soon as we begin to consider reform we come at once into such a tangle of fears, prejudices, and questions that almost always we lose the way, so that nothing gets changed and the old controversies go on and on.

While it is widely recognised that something needs to be done to meet the present urgent demand, we are nervously anxious as to the right course to take. There is much doubt in our thought and uncertainty in our action. For the trouble with this matter of our divorce law, as, indeed, with most other reforms, is to decide just what ought to be done, how far are we prepared to go? Where must the marriage bond be held tight? Where may it be loosened?

Now, this confusion and failure to establish any kind of united will has been painfully manifest in the difficult situation that has arisen since the war. We read periodically in our morning papers an announcement to the effect that a Bill is to be introduced into Parliament for the reform of the divorce law. We follow with hope its perilous journey through the readings in the Upper and Lower Houses and difficult Committee stage; but the matter goes no further. There is a discussion and an enormous expenditure of unbelievable opposition; a good and advanced Bill changes into a timid Bill of almost useless compromise. But nothing gets done. No one, indeed, seems certain of *what ought to be done*; the only agreement seems to be on *what ought not to be done*. A marked timidity is shown even by those who are the strongest supporters of reform. They appear to be in fear of asking too much, always the sure way to get nothing done.

II

As far back as 1918, Lord Sydenham drafted a Bill making judicial separation for five years and desertion a ground for divorce; lunacy was also accepted as a ground, but was afterwards dropped for the reason that " marriage was for better or worse and lunacy was an accident." This Bill, however, did not even enjoy a full Parliamentary life.

Then, after a period of two years waiting, there followed in 1920 Lord Buckmaster's now famous Bill, based on the recommendation of the Majority

Report of the Royal Commission on Divorce. It proposed that six grounds for divorce should be valid (instead of one ground of adultery). Divorce was to be granted if one of the partners was (1) unfaithful; (2) guilty of desertion for three years; (3) cruel to the other; (4) incurably insane or had been confined for lunacy for five years; (5) an habitual drunkard or had been separated for three years as a drunkard, or (6) was imprisoned for manslaughter under a commuted death sentence; in all these cases a decree *nisi* should be granted by the Court.

New and very carefully formulated conditions were laid down under which the decree was to be granted.

1. The decree *must be refused:* (1) In all cases of collusion (though it is permitted for the parties to come to an agreement as to the method of taking legal proceedings, when there has been no collusion in the act on which the divorce is claimed); (2) where there is connivance or condonation of adultery; (3) neglect or action conducive where insanity or drunkenness are the grounds for divorce; senile insanity is also barred, i.e., divorce cannot be obtained when the wife is over sixty or the husband over fifty. It is to be noted that the King's Proctor was to be retained. His duties remain unchanged. Still his work is to pry into intimate secrets and find grounds why the decree *nisi* should not be made absolute, where there has been collusion or concealment of material facts.

2. The decree *may be refused* at the discretion of the Court: (1) For misconduct on the part of the applicant, either in regard to acts of adultery, cruelty,

or desertion; (2) for undue delay in instituting proceedings.

Other suggestions for important changes were as follow:

(1) The probationary period of six months may at the discretion of the Court be reduced to three months, the period originally fixed in the Act of 1860 but changed to six months in the Acts of 1866.

(2) The decree *nisi* was to be made absolute automatically without application from the innocent partner (see Case No. 1, p. 122 to understand the advantage of this measure).

Provisions were made to cheapen divorce. This reform is long overdue. The proposal made was that local Courts should try cases where the joint assets of the parties do not exceed £250, and the joint income £300.

Fresh regulations were also introduced concerning judicial separations. These made it possible to obtain permanent judicial separation on the same grounds as divorce: the defences against separation would likewise be the same as in divorce proceedings. If the defendant urges that divorce should be granted and not separation the Court may refuse judicial separation and grant divorce.

This was in many respects an admirable Bill. Its provisions were carefully considered and if they had passed into law would have given to our divorce code a sanity to which it has not approached since the proposals for reform which were drawn up at the time of the Reformation. It would have placed our legislation on a level with that of other progressive countries.

From my point of view, the worst defects of the Bill were the retention of the three detestable C's, the ecclesiastical bugbears, Collusion, Connivance, and Condonation. Then the King's Proctor was to remain.

III

As was to be expected, there was the most determined ecclesiastical opposition to this Bill, though even here there was dissension in opinion, and Lord Buckmaster's far-reaching recommendations for extensions of the grounds of divorce gained the support of the Bishop of Durham, always so forward in every reform, who fearlessly stood sponsor to the Bill.

But the ecclesiastical antagonism was very strong and very active. The story of the debate among the Bishops in the House of Lords is not pleasant reading. They refused to discuss the merits of other and cleaner grounds than adultery for divorce; they failed to consider the present great need for reform; they did not try to learn any lessons from the progressive legislation of other countries—these realities were swept aside, while instead there was a desire only to protect their own position. Thus an amendment was brought forward by the Archbishop of Canterbury by which, if the Bill passed, Christian marriage in any Church was to be refused to all divorced people, the innocent partner being included with the guilty partner. The amendment was lost, but by a majority of only one vote.

Is there any justice here? Can anyone conceive

why a wife, obtaining divorce without fault on her part, should be deprived, if she wishes for it, of Christian marriage, and be punished for the unfaithfulness and brutality of another? Why should a man who faithfully keeps his marriage vows likewise be deprived of the Church's blessing? be punished for the fault of a faithless and deserting wife? Why should the Church desire to deprive him of its offices if he does not wish to live without a home? And there is another view, ignored by the Church, whose duty surely is that of helping the conduct of men. We must remember that passions are the same after as before divorce. For the Church to withdraw sanction from remarriage is to give the Church's excuse to vice.[1]

Such an exhibition of profound and unimaginable prejudice can be understood only if we refer it back to the hidden motives that are its cause. But this is a question into which I may not enter now. It really does remind one of the act of a petulant child, who throws down and tries to break the toy train, when unable to control its running. Some such motive of thwarted power surely explains this retrogressive action. It is very hard for Bishops to give up power. "If we cannot hold on—and by this Bill it seems we cannot—with our firm ecclesiastical grip to control the conditions of divorce, then we will have nothing to do with it." Yes, it is the child's attitude of unreasoned emotion, not the adult attitude of thought and judgment.

It was not, however, I think, due to any ecclesi-

[1] See article in the *Journal of the Divorce Law Reform Union*, "Marriage and Divorce," June, 1921.

astical obstruction, though the opposition of the Bishops was active and insistent, that this good and comprehensive Bill of Lord Buckmaster did not pass into law. Unfortunately, the working of Parliament under war conditions has placed the making of laws more and more in the hands of a few men. I am writing at a time when the Government has announced that many even of its own Bills are to be abandoned. Therefore it need cause no surprise that a Bill, on a subject where feelings differ so widely and prejudice is so strong, was dropped, in spite of the courage and vigour shown by Lord Buckmaster in piloting its progress through Parliament.

In the spring of this year a new Conservative Bill was introduced by Lord Gorell, the son of the Lord Gorell to whose devoted work the country owes the Royal Commission on Divorce of 1910. The father supported the fearless Majority recommendations for extending the grounds of divorce, which, as we have seen, were embodied in the first Bill by Lord Buckmaster. The son is more conservative. His Bill was founded on the recommendations of the Minority which was signed only by the three ecclesiastical commissioners, the Archbishop of York, Sir William Anson, Bart., M.P. for Oxford University, and Sir Lewis Dibdin, Judge of the ecclesiastical Arches Court of Canterbury.

No extension of the grounds of divorce would have been granted under this Bill. Adultery remained the sole cause for which marriage could be dissolved. The one good feature of the Bill was that it placed men and women in the same position, allowing the adultery of the husband without desertion or cruelty,

to provide sufficient cause for the wife to obtain divorce. Certainly this was a great gain for women. It would put an end to the flagrant injustice of the Act of 1857, which legalised the husband's adultery.

But apart from this reform, this timid-hearted Bill of compromise could have pleased only the very few—even the Archbishops supported it.

Lord Buckmaster held (as he stated in the House of Lords on March 10th, 1921) that such a measure did not go nearly far enough. He moved amendments, which, though they did not provide as many grounds for divorce as his earlier Bill, yet so greatly altered this Bill that Lord Gorell declined any further responsibility for it, and Lord Buckmaster himself made it his charge.

IV

This second Bill of Lord Buckmaster, which was brought from the House of Lords and read for the second time in the House of Commons on May 31st, 1921, must now be examined.

The old ground of adultery is retained, but the husband and wife are put in an equal position, as proposed by Lord Gorell's Bill. So far we are on familiar and accepted grounds.

The great change in the Bill is the addition of desertion as a ground for divorce, after separation for three years and under the same conditions for both partners.

The clauses to guard against collusion, connivance, and condonation which Lord Buckmaster introduced

into his first Bill unfortunately reappear. With regard to collusion it is again stated that "an agreement honestly and properly made as to the course to be taken in any proceedings shall not be treated as conclusive proof of collusion, if there existed previously to such agreement any adequate and good ground for divorce." In popular language this would seem to mean that adultery or desertion, when arranged between husband and wife as a means of obtaining a divorce, will be a bar to divorce, but, contrary to the present law, agreement as to the legal method of procedure will not be prohibited, if the adultery or desertion have already taken place.

As we saw in the case of Lord Buckmaster's first Bill, these three causes, collusion, connivance, and condonation are to be absolute defences against divorce being granted. There are also discretionary defences, which the Court may, or may not, accept. A few further words about these may be given. The first discretionary cause is not, I think, in itself a very sensible defence: once again it is laid down that if both parties have committed adultery no divorce *need* be granted. But in relation to the discretionary defences, great powers are given to the High Court. It need not accept the defences; it is to consider all the circumstances of the case. Conducing is now a discretionary defence. Thus if the applicant has been guilty of cruelty towards the defendant, has deserted the defendant, has unreasonably delayed in taking action, has conduced to the adultery or desertion—these may or may not be considered by the Court as sufficient grounds for refusing a divorce in spite

of the defendant's adultery or desertion. The clause would appear to be one which gives extraordinary powers to the judge, but it would appear that it is necessary.

Another change of importance is proposed in Clause 32: "Non-compliance with a decree of restitution of conjugal rights shall not be deemed to be desertion." This repeals an old Act of 1884, which is no longer needed for establishing "fictitious desertion" in order that the wife who can afford to do so may obtain divorce without proving desertion for two years. Under this Bill husband and wife will be in the same position and this subterfuge to aid the rich wife becomes unnecessary.

In Clause 34, it is stated that "wilful and persistent refusal without reasonable cause to permit marital intercourse shall be treated as equivalent to "desertion." (In this connection I would suggest a comparison with the new divorce law passed last year in New Zealand and mentioned on page 93.)

V

Such are the proposals that have been brought forward to effect the reform of our divorce law, for which we have been waiting since the issue of the Report of the Royal Commission in 1910.

We are too patient. The question we have to ask now is: What is going to be done? Words and ingenious discussions have done all that words can do. Now is the time to act. The measures of reform embodied in these Bills must become law. It is for

us to see that this is done. For you and for me, my readers. If we care enough, we can demand that our divorce law shall be freed from its ancient abuses and re-fashioned to meet the needs of men and women to-day.

CHAPTER X

THE COST OF DIVORCE TO THE POOR

I

ONE of the injustices of divorce in English law has been its expense, which has left the door of divorce open for the rich but closed it for the poor. Before 1857, when freedom could not be gained except by a special Act of Parliament, only the very wealthy or the powerful could make use of the clumsy and expensive procedure. Moreover, even after the passing of the Matrimonial Causes Act of 1857, the position of the poorer suitor for divorce had not really been changed, owing to the heavy cost of the law and the additional expenses entailed to provincial suitors by the fact that all cases are heard in London. It is as impossible for a really poor man to find £100 as to find £1,000. The undefended divorce suit without complications may cost from £60 to £250; a defended case may cost anything from £250 to £5,000.

Very real difficulties not infrequently arise in connection with this matter of costs. I recall an incident which happened on one occasion, when I was present in the Divorce Court listening to the hearing

of the cases. A suit was being brought by a wife against her husband for restitution of conjugal rights. I can see her still as she stood facing the Court, a small sharp-faced plain woman, dressed in black, not young, with a quick voice and very sad eyes. She was a teacher. Several years—I forget how many—had passed between the desertion of her husband and her instituting proceedings. The judge turned, his eyes fastened upon her, as he asked her why there had been this lapse of time. She faced him without visible fear, leaning a little forward over the edge of the desk; her voice rang true and hard. "If you were a teacher, my lord, and had had to save out of your salary the costs of this suit you might have had to wait longer than I have done." I am glad to record that she gained her decree.

These unnecessarily heavy costs would seem to be a further burden left from Canon law. In Scotland, for instance, where the cumbrous ecclesiastical cloak was truly cast aside at the time of the Reformation the expenses of divorce are low. Hazlitt's divorce in Edinburgh, in 1823, to which I referred earlier in my book, seems to us to have been very cheap. The costs came to £26, 10s. 9d.

It will be readily seen from these figures and facts that the ordinary costs of divorce suits are beyond the reach of the poor. This difficulty was met to some extent by the Poor Persons' Department, which was set up in 1914 before the war, as an official branch of the Law Courts. It is interesting to find that nine-tenths of the work of the Department is occupied with divorce; a fact which, I may note in passing, furnishes an emphatic affirmative answer to those who deny the

demand on the part of the poor for divorce. The exact figures may be given:—In 1918 there were 4,000 applications in matrimonial cases and 300 in non-matrimonial cases. It should be noted further that "out of the applications granted less than a quarter come to trial." The figures for 1918 are: applications granted, 2,215; petitions, 1,014; successful cases, 471.[1]

Now, how is this to be explained? Why do so few applicants gain the relief for which they crave? The report, issued by the Poor Person's Department, gives a clear answer to this question. "The discrepancy between the applications granted and the petitions entered and cases tried is that *poor persons cannot find the sum required for out-of-pocket expenses* to start or proceed with their cases."

The "poor person" has first to establish the right to benefit by the services of the Department. To do this he has to prove that he or she is necessitous, which is defined as not worth £50 (clothes, tools, and the subject of the litigation excepted), and that he or she has a good cause of action or a good defence to an action. If this can be done, a barrister and solicitor are assigned to the applicant to conduct the case. The Department works without payment; there are no Court fees, and the barrister works gratuitously. Now, this sounds quite right, but in actual practice the solicitor assigned to the applicant "at once demands a lump sum, cash down in

[1] The facts and also the passages quoted in this section are taken from an article in the *Journal of the Divorce Law Reform Union*, January, 1920, on "Free Divorce for the Poor," by Sir W. Nevill Geary.

advance, of *at least ten pounds minimum on account of out-of-pocket expenses.*"

This sum the solicitor is legally entitled to claim, and unless it is paid down he is under no obligation to go further, a fact which explains why rather less than half the applications granted in 1918 actually became " petitions filed." And this is not all. For " the solicitor can and does sometimes say subsequently to the poor person *that the money paid down has been expended, and that unless a further sum is found the case cannot go on.*" If witnesses have to be brought to London, as is often necessary, and inquiries of any kind made, the costs easily may, and do, mount up to £20, £30, or even £40.

Really we English are ridiculous. It is essentially like what we do to insist that a poor person shall prove that he or she is necessitous, and then immediately to call upon them to pay £10 or more. In other countries, where, as I have had occasion to point out continuously in our inquiry, the laws of marriage and divorce are practically formulated to meet the needs of men and women, instead of being theoretically based on controversial texts to meet the needs of no one, these absurdities are not found. Under the " l'assistance judiciaire," for instance, introduced in 1851 in France, and in most other countries which have adopted the Code Napoleon, the State provides all cost of litigation : no payment of any kind is claimed from the " poor person."

These difficulties led to an inquiry and the whole working of the Department was examined. A report (White Paper, Cmd. 430) was issued December,

1919, and after some delay new rules were formulated which came into operation in the early part of 1920. Some improvement has been gained, but not so much as was needed. As usual, instead of doing the simple and right thing and freeing the " poor person " from all costs, a compromise was made. How much we English do delight in compromise, a course of action which we forget must almost inevitably result in muddle. The poor person must be helped, but must not be helped too much: that would be wrong, for it would make divorce too attractive and too easy.

God forgive the hinderers of reform their want of faith in men and women, and also for their low view of marriage! It is well that, on the whole, their opinions mean very little to us. But it helps us to understand our divorce laws if we can grasp their point of view, and that is most lucidly and naïvely shown in the dribblets of help that are offered for the relief of the unhappily mated, who are unfortunate enough to be poor.

A new set of rules were laid down: £5 instead of £10 is to be paid by the " poor person " as an inclusive fee. Out of this sum the Department will pay the solicitor for his out-of-pocket costs, who will not be entitled to ask for any further payment. A further income test is imposed on the applicant that he or she should not be earning more than £2 a week.

Such concessions are palliative only, with the practical working probably no one will remain satisfied. For instance, the result of granting the solicitor £5 only (the sum needed for actual cash

disbursements), with no allowance for office expenses, will almost certainly, as time advances, be to make solicitors unwilling to undertake the work, and if they do undertake it, it will be scamped and neglected. Again, £2 a week wages is much too small a limit in these days of low money value, although this is met to some extent, as the judge, " by special favour," may sanction an application where the weekly wage is above this sum. Yet I do not like this granting relief " by special favour." If the assisting of the poor is not to remain a sham the means must be provided whereby, when once the applicant has proved his or her right to be helped and shown that he or she has good cause of action, the case shall proceed to trial as a matter of certainty. The obvious thing to do is that the Department shall undertake all the necessary work, acting in the same way as the police investigate and bring to trial a robbery.

II

In order to see the real difficulties facing the " poor person " who wishes for a divorce certain facts must be taken into account. If the applicant lives in Liverpool or Plymouth he or she must bring the witnesses to London. The expense of long railway journeys in itself must be prohibitive for wage-earners in the north and west. Then there is the cost, always heavy in London, of food and lodgings. Further, the witnesses may, and indeed must, fear that the waste of time entailed, often several days waiting for the

case to be heard, may lead to the loss of their work. The applicant has also to fear this possible losing of his job. He has also to submit in many cases to the criticism and advice of his masters; unless he can rely on their moral support, he is in a difficult position. The circumstances are even much worse if the applicant is a woman, or if the witnesses are women; not only is the woman applicant almost always without the necessary money or any hope of getting it, but all women have to ask, " Who is to look after the home and the children while we are away? "

These difficulties are all dependent, to a great extent, on divorce cases having to be heard in London. Again we may turn in shame to contrast our hindering laws with the helpful provisions made in other countries. For instance, in France and Belgium, where all divorce suits not only may, but must be heard before the *Tribunal civil* of the judicial *arrondissement*, where the spouses have their domicile. This arrangement obviously facilitates the hearing of the case and greatly reduces all the expenses.

And our stupidity is greater and our culpability more flagrant, because this necessary change of decentralisation could be carried out at once.[1] The authority for so doing is in existence already; all that is needed is the sense to use it. This fact usually is not known. " The original Divorce Act of 1857, passed to remove the reproach that there was one

[1] See an article " Divorce Delays and Shop Window Acceleration," in the *Journal of the Divorce Law Reform Union* June, 1921.

law for the rich and another for the poor, contained a section providing that the necessary evidence might be taken at the Assizes." The Divorce Court practice has, however, made this useful provision a dead letter. Last year the Government, realising the need, "inserted sections in the Administration of Justice Act so that rules could be made for hearing of divorce cases at Assizes. If such rules were in force not only would weeks of wages be saved to the poorer litigants whose cases are already launched, in saving unnecessary journeys of witnesses to London, but others might have relief which now appears impossible, by reason of expense."

The Act was passed before last Christmas, but it remains still-born. Nothing has been done, though the congested state of the London Courts has been such that in spite of the continuous work of five judges in place of the customary two judges and the relinquishing of the Saturday afternoon holiday to arrears of work many applicants have had to endure months of unnecessary and harmful delay in the hearing of their suits.

It is forgotten that delay of justice to the poor means increase of cost. It would seem, indeed, that the framers and administrators of our laws lack the imagination necessary to understand the conditions of the poor. This want of imagination is the sin that prevents reform. It brings not only personal disaster, but it is treachery against life, and the sanctity of marriage which should safeguard conduct.

The expense of divorce is such that large numbers of people still regard it as a class privilege. This is damnable injustice. And what I want to find out is

the reason for this. Why place all these hindrances in the way of the poor? They serve no good purpose that I can find: they do not help morality. To pretend that they do is ridiculous. For what do we find? Always the law is very lenient to those who can pay for the best arrangements for circumventing its restrictions, while it is uniformly hard on the poor, the ignorant and the low class. The law is a snob as well as a pedantic pompous ass.

Do let us try to be honest. For what does the position mean when stated in plain words. The poor litigant must have a wage under £2 a week and out of this wage he must save £5; then he must bear all the costs of coming to London and bringing witnesses there; if not, then he must be content to remain in bondage at home with a drunkard, or uncontrolled sex-maniac, a cruel brute, and a reckless home-breaker.

Why is this? I had thought the great opposition to divorce reform came from professed Christians. But where are the texts in favour of righting Dives at the expense of Lazarus?

III

But, say the opponents of any extension of the facilities for divorce, the poor do not ask for it; separation orders supply all the relief they need. Now this sounds well, but is it true?

Separated persons are condemned to celibacy

against their wills. What evil is there that divorce can be supposed to work, which legal separation will not also produce? Morality and the home cannot be guarded by preventing men, who may well have several children on their hands, from marrying a woman, who must be found if the children are to be looked after. The woman will be looked for in any case, and found. Living in a small house where often the sleeping accommodation is inadequate the result, in most cases, is certain.

The law will not allow separated persons lawful marriage—what, therefore, happens? "Human nature being what it is and the houses of the poor what they are, the results of these separations are little edifying," dryly observed a leading article in *The Times* of 14th April, 1921.

This is not merely a theoretical *a priori* argument: those with experience are nearly all of the same opinion; separation orders lead to immorality and are the direct cause of illegitimate births. Miss Eleanor Morton, for some seven years a Church worker and Police Court Missionary at Woolwich, gave evidence before the Royal Commission in 1910. She said she often found in practice that those permanently separated formed other connections. She also pointed out that separation places a woman in a position of grave moral danger to which she succumbs sometimes for the sake of the child. Imagine the position of a working class woman, without a husband and yet no widow, with a child or children to keep, the husband's weekly payments fail to come or do not come regularly, and you will at once see what is meant.

The *Journal of the Divorce Reform Union* for August, 1919, contains a summary of evidence on the effect of separation orders put forward by the Mothers' Union. The officials of the Union were asked: "What have you found to be the moral effect of separation orders (*a*) in the case of the husbands, (*b*) in the case of wives." The united summary of the answers, almost without exception, was: "Bad in both cases, though more invariably so as regards the husband." Mrs Seaton-Tiedeman, the secretary of the Divorce Law Reform Union, in a debate with the Law Students' Debating Society on the question of converting separation orders after three years into divorce decrees, spoke strongly on the harm which resulted from leaving husbands and wives separated yet permanently bound to each other. The prevention of remarriage led to immorality. Her position, which brings her into communication with countless unhappy couples, gives special importance to her opinion.

Moreover, if we need further corroboration we have only to look at the laws of other lands.

"So well are the dangers of separation recognised in nearly all civilised countries that it has been discouraged as far as possible, and though separation orders are obtainable in various European countries, these orders are convertible into decrees of absolute divorce after a varying number of years, ranging from two to five."

The evidence is overwhelming, and can be denied only by the prejudiced, whom no facts could convince. I shall not, therefore, try. And I shall bring this chapter to an end with two quotations, the first taken

from the *Daily Telegraph,* and quoted in an admirable pamphlet, "Divorce or Separation: Which?" written by Richard T. Gates with a preface by Dr C. W. Saleeby, F.R.S.E., and published by the Divorce Law Reform Union. The second quotation gives the opinion of the eminent German jurist, Leyser, who wrote in 1752 on the harm of indissoluble marriage. Both passages show the results of unpractical laws, which keep legally bound those whose marriage has been broken in fact.

"We have often commented upon the open scandal and injustice caused by the defective state of the law with regard to the most sacred of all human relations. It is difficult to believe that in a Christian and civilised country there is permitted to exist by statute an intermediate condition, neither that of matrimony nor divorce, which leaves to the woman nothing of marriage but its harshest fetters, and yet leaves the man free in everything but name. The situation created by the rapid increase of separation arrangements is not even remotely realised by the average person. But a profound moral evil is there. It has been created by artificial and irresolute legislation. The abuse has been maintained and and is increasing, not only in despite but in direct defiance, of all that is sound in public opinion. . . . Human nature being what we know it to be, it is futility, and worse, to blind our eyes to the practical consequences following in a very large number of instances from the artificial and perilous condition of judicial separation."—*Daily Telegraph, August 6th,* 1908.

This was written, as you see, in 1908. It is now 1921 and yet nothing has been done. And the evils have vastly increased. And this is what was written by Leyser in 1752, in his "Meditations and Pandectus."[1]

"The so-called indissoluble bond of marriage which

[1] The passage is quoted by Kitchen in "History of Divorce," pp. 108-109, from where I take it.

is said to bind for ever persons who differ in their whole minds and characters, has been the cause of more banishments than the criminal laws of Charles V., has dissipated more property than theft and robbery, and has rendered more citizens unfit for fulfilling their duty as citizens than luxury itself."

CHAPTER XI

AN ATTEMPT TO ANSWER THE CHRISTIAN OBJECTIONS TO DIVORCE

I

I DESIRE to be fair. I would, therefore, wish now to examine with all the honesty I can, the position of those who, basing their opinions on the teaching of Christ, oppose all divorce.

The view of the extreme Churchman is that marriage must be for life, and, therefore, divorce followed by an alleged remarriage involves adultery. Divorce, it is said, is not merely inconsistent with perfection but with marriage. That is why, it is argued, the State, which desires to distinguish between marriage and adultery, must uphold the Christian standard of marriage with a stringency and exactness unnecessary in other directions. For, it is said, the State must regulate marriage for its own preservation, and, for this reason, it must uphold the Christian ideal, though it does not, and indeed cannot, uphold the highest Christian doctrine of economics, which would involve voluntary poverty for the individual.

The commands to give the cloak to the thief who stole the coat, instead of having him punished, or to

take no thought for the morrow, instead of investing your savings, cannot be encouraged by the State (which, indeed, with its prisons, Police Courts, income tax, State loans, and imprisonment of conscientious objectors and debtors comes near to a directly opposite course). But the State can refuse, and must, to divorce, except perhaps for adultery, as even here there is uncertainty, for the text in Matthew may be corrupt.

Now, as I have just said, I desire to be fair. Yet is there not a blight at the very root of the tree of faith? Is there proof in fact—not in theory, please—that any extension of the grounds of divorce (which must mean any other grounds than that of adultery—a sex crime, remember, for I shall have to return to this again) is contrary to the will of God as revealed in the New Testament and testified to by the general teaching of the Church?[1] We must examine the position more carefully.

It seems to me clear that the whole of the teachings of Christ are against legality and in favour of emotional rightness. Thus in this chapter of Matthew (v. 28 *et seq.*) anger is emphasised as *the sin*—not the legally punishable act of murder; next the lustful thought is characterised as the essence of adultery. It is the looking at the woman—the evil desire within, that is the adultery, not the lying with her.

These are the thoughts of One who is against the

[1] The reader is referred to the report of a discussion on "Divorce and the Church," between Lord Hugh Cecil and Sir Conan Doyle, published by the Divorce Law Reform Union.

laws and indifferent to the State: of One whose concern is with the most inward self, who knows it is that which cometh from within a man which defileth him. How could a teacher such as this be concerned with the letter of the law? It could not be. He is not so much against the law, rather He understands its comparative unimportance; One who is indifferent, for instance, on a question, then hotly debated, whether the Jew should pay the Roman taxes, at a time when the Roman in Judæa was to some Jews like the German when in occupation of Belgium. Jesus said vaguely, "Give to Cæsar that which is Cæsar's." Everywhere in the Gospels it is the same; the great Reformer was unconcerned with the law and institutions which, like the Sabbath, were made for man. Whatever He says is directed against the laws of the period; He swept away the Pharisaical belief in outward obedience to the law as being sufficient. "Have ye never heard," He asked them, accusing them on their own grounds, "what David did when he had need . . . how he did 'that' which is not lawful." We reach this conclusion, then. Christ is hostile to the State and to its laws, and consequently to any too rigid interpretation of the laws of marriage.

II

In Mark (x. 2) the Pharisees are said to have come to Him and asked Him a question: "Is it lawful for a man to put away his wife?" Where these arguments occur in the Gospels, Jesus seldom

states His views as clearly and seriously as when He is speaking unperplexed by His opponents. He replied by asking a question: "What did Moses command you?" On hearing that Moses suffered them to write a bill of divorcement and put the wife away, Jesus answered: "For the hardness of your heart he wrote this precept: but from the beginning of creation God made them male and female . . . they twain shall be one flesh. What God hath joined together let no man put asunder."

Now, note this. Jesus argues like Montesquieu. Law is dependent on time and place, on the customary ideas and moral possibilities of the people. Moses is surely not condemned: he acted with due consideration of the hardness of the hearts of the people. To-day the reformers of the law ask for a similar right. And secondly, and even of stronger importance, Jesus, as usual, attacks the law *as He finds it*. It was a law which made divorce singularly easy: The man could divorce his wife "at his pleasure." It is against this excessive and entirely one-sided right of divorce that Jesus is arguing. The New Testament can be understood only, if we first examine the conditions of the times when it was written.

The Old Testament affords a help towards this end, as it shows the basis of some of the laws and ideas which had contributed to the life of the Jews. See, therefore, Deuteronomy xxii. 13 *et seq.*, and xxiv. 1 *et seq.*, to understand the older ideas as to the *only limitations* to the man's *one-sided right to divorce his wife*. He might not divorce her, if he hated her when he went in unto her and falsely accused her of premarital unchastity, or if he

had seduced her before marriage, or he might not take her again if he had divorced her, and she had been married to another. The whole conception is so Oriental as to be quite inapprehensible to ourselves. Probably the ancient Hebrews, like the Arabs, never saw their wives before they were in the nuptial chamber; hence this strange idea of the husband hating the wife when he comes in to her and at once wishing for a divorce.

We may notice, too, that remarriage is the right of the guilty wife. There is also a very beautiful and wise command with regard to the first year of marriage, which I cannot refrain from quoting though it does not bear directly on the question we are inquiring into. "When a man hath taken a new wife he shall not go out to war, neither shall he be charged with any business, but he shall be free at home one year and shall cheer up his wife which he hath taken."[1] Were such wise counsel allowed to be followed by husbands and wives to-day, there would be less cause for divorce.

But to return. You see the position to which inevitably we are led.

It is because the attitude of Jesus always is that of the protester against law and the rigid rules of the Pharisees, that it is peculiarly grotesque to place Him as the authority against those who are protesting about the law to-day. Really the reformers are following after Him. If Christ limited the right of divorce, available, at that time, at the caprice of the man alone, but not available at the will of the wife, He did so because of the evils of the day. He knew

[1] Deuteronomy xxiv. 5.

of the hidden sin cloaked beneath the law. Do you not see that the position is the same to-day? The evils among us are different, but no less hindering to the spiritual and physical health of our society. The reformer must ever be eager to arrest evil. And, in all sincerity, I declare that did Christ return to England to-day He would protest against our law which allows adultery as the one ground for divorce. He could not uphold this unclean injustice.

III

And, as is so often the case with texts in the Bible, a saying taken away from its context—I mean interpreted without any regard to the conditions under which it was uttered—contradicts its own meaning; so that, after a time, we easily become uncertain of the intention of the speaker and substitute for it our own meaning, though we do not know that we are doing this.

The prejudices of pseudo-Christianity block the way. And here let me digress one moment to give some account of pseudo-Christianity. It is only after they have been corrupted that the ideas of an idealist are in any way realised. The great religious reformers, Christ, Buddha, Mahomet, sought to remove evil customs and to free from them the essential truths of religion, which satisfy the just needs of the human heart. These leaders were opposers of the law, critics of their neighbours as well as friends. Every critic is unpopular. Christianity and Buddhism had to leave their native countries in order to find acceptance.

The world adopted what the lands of their origin rejected. But what did it adopt? It adopted all that was nearest to its already accepted ideas. It replaced a call for spirituality and character by a formally affirmed faith in a magic birth. It doctored the new wine with the old flavourings.

It must be remembered further that we often seek fruitlessly to find Christian teaching in the general teaching of the Church. Tradition is of varying values in various religions. And the Christian Church has travelled far, indeed, from Christ. For the Church became spoilt by too much prosperity and began to worry about matters contrary to the spirit of its Founder, and, when it became infested with Puritanism, it returned to savagery. For henceforth it did not regulate marriage according to the needs and the happiness of men and women, but according to its various *tabus*. So reality left us and our laws, to shine only in broken reflections from the utterances of the reformers.

The Christianity of Jesus of Nazareth is essentially intuitional and spiritual in expression; being based on that ideal of joy, which sits in the chamber of every man's heart, immovable and unchanged, however used or abused, credited or discredited. But it may not be found in the scattered utterances of the Teacher, many of them being reported as being delivered in unpremeditated conversations with individuals. Sayings and parables of the spirit must be distorted when turned into theologies and codes.

It is the essential error of Westernised Christianity. The idea of Christ is the only inheritance that the Church has not stolen from the world. Crude line is

substituted for vague clouds and streaks of golden or azure sky, form replaces feeling, righteousness represses joy, earth takes the place of heaven, until at last the desire to condemn in others the faults that cannot wholly be eradicated in ourselves replaces the desire to help and to forgive.

CHAPTER XII

AN ATTEMPT TO FORMULATE A NEW DIVORCE LAW AS I WOULD WISH IT TO BE

I

Now, up to the present it might be said of me, as it has been said of others, that I have no standard of morals of my own; no religious test by which I would judge the question of divorce and the grounds for which it should be granted. What, it may be asked, would for you divide marriage from unpermissible fornication? How would you decide the conditions under which, when the marriage bond has been broken in fact, the breakage may be registered by the law? What principle determines for you the test of the rightness of conduct?

Hitherto it has seemed better for me to confine myself to the practical proposals of reform that are likely (or, if that is too hopeful, at least stand a chance) to become law, rather than to explain in detail my own position. There has been no dishonesty in this. For it is plain to me that provisional reforms must be the steps that will lead to greater liberty. Even deficiencies are of value sometimes. For instance, we have the example of New Zealand, where the divorce laws have been reformed twice in

a very short period. It is rarely that one turns back when once a start has been made on the right road. Thus I am able to have patience to wait, and to know that the long path often is quicker than the short cut. I can give my whole-hearted support to many suggested plans of reform, even when in themselves they are in some ways opposed to my views of what needs to be done.

I would, however, wish now to make plain, if I can, the principle which would regulate my own ideas of what reforms should be made, if I had the necessary power to alter the law. And let me say at once that I do this for my own pleasure rather than in hope of converting others. I am too old to be sanguine and to think that the simple and right thing can be done easily. Reforms are really rather like bad ornament; it is much easier to have them ornate and over-worried with detail than it is to have them beautifully simple.

II

This is not a time favourable to the idealist reformer. The war has widely enthroned, as it was compelled to do, the idea of force, even if it has by reaction given popularity to the ideal of a tribunal of justice. It has brutalised manners, enriched the wartime speculator, and impoverished the artist and thinker. Yet we are caring more for reforms. We want more certainly to help the young. And this moral reawakening is expressing itself in many directions. Take one instance out of many; the diseases

connected with certain sides of sexual life are now, perhaps, nearer to being cured than ever they were before. Prevalence of disease has led to fevered search for medicine and more widely applied treatment. The routine of health is more valued now that war-marriages are followed by war-divorces. Let us benefit here by the great and terrible disasters of the war, and reap a harvest of long-needed divorce legislature, while the spurring desire for a higher standard of sexual behaviour is still passionately felt.

III

So many calamities and so much sin that could be prevented are listlessly accepted by us as a result of our own self-blindness. It is this inward blindness that first we have to break through. There is in regard to this question of divorce in so many of us a theoretical obsession with sanctity, covering a practical obsession with sexual crimes. This explains, I am certain, the terrible dishonesty which enables us to go on maintaining adultery as the one sin for which divorce may be granted while, at the same time, we allow it to be regarded in the law as so light a fault that the partner in the marriage, who most frequently commits it, has been permitted for more than half a century to do so under the cover of the law. There you see set down in plain words—and you cannot, I think, see it without disgust—the measure of the slough of deceit into which we have fallen.

We have, in these last years, become responsible

in a new and sterner way. We have come to a time of urgency; we have to unite in our search to find new right paths. Can we do this? I dare not be certain of the answer. But if we can make nothing of the opportunity that is ours, then, it seems to me, we must for ever stand condemned.

We, the people of England, for so long have been content to go on in the sleep of dreamers; in the irresponsible fantasy-weaving of the child—longer, I think, than the people of any other nation. But all the fine things that grow out of life, like love, or beauty, or courage, demand that we arise and cast off our garments of sloth and awake to adult responsibilities.

Five years of war have created hideous abuses. We have to fight to end them, and it matters not to our doing this, whether we are to succeed or whether we are to fail. With our wider vision and more knowledge; with the lessons we have learned; with the pain of our suffering and the suffering of our brothers and our sisters; with the sacrifice and endurance still branded on our hearts; it is we who know the iniquity of the old laws and have suffered under them—we have to unite together to renew and justify love. We have to remake marriage.

IV

Another point of view leading to opposition to my wishes needs consideration. It may be thought that the real objection to divorce facilities is different from what is most often and most glibly assented. It is

an objection based on a somewhat gloomy view of marriage. All marriage is uncomfortable; two human beings cannot attempt close intimacy without grave inconveniences: society must therefore make the doors of marriage easy to open from the outside, but difficult to open from within. Divorce is granted, it will be argued, in cases of peculiar hardship when the misfortune of marriage is increased by the possibility of the wife burdening the husband with another man's child, or by the husband's desertion or shortening the wife's life by cruelty.

What shall I say in answer? It is not true that divorce is rapidly resorted to by ordinary persons who find marriage merely uncomfortable. Whatever the law, any two decent persons will find it hard to sever a bond so essentially personal as the marriage tie. But, you will ask, what about the people who are *not* decent: people not necessarily bad, but weak, thoughtless, and without responsibility for themselves and for others—will not these people rush heedlessly out of marriage if allowed an open door? I do not think so. And, in any case, I cannot allow marriage, which to me is the most sacred institution in life, to be used as a shelter by the careless and the unhealthy for unspeakable sins—sins which result only in promiscuity and all filthiness, which create disease and are the cause of cruelties to little children. For me this is immoral and degrading to the sanctity of marriage. We must find some other way to teach the careless the high responsibilities of love.[1]

A man and a woman who have sacrificed and

[1] I would refer the reader to my book, "Sex Education and National Health."

suffered for each other cannot easily part. The habit of living together forges bonds you do not feel until you try to break them. The intimacy of marriage creates a thousand and one little every-day interests and ties, habits, preoccupations, and memories in common; when they are torn it is like tearing thousands of little nerves that are far more painful than the one big hurt that caused them to be broken. That is why most marriages are dissolved in anger, through jealous passion, and because lovers are found out. And when a marriage is an intolerable misfortune that may not be borne, there is no need to seek proofs of the offences committed. Divorce needs to be more private as well as more honourable.

I claim now to have established a general truth, which it seems to me, though it is very simple, is of the utmost importance in this question of divorce. I think it is because it is so simple that usually it is overlooked. I would state it in this way:

(1) It is not nearly so easy to break a marriage that has lasted for any time as is usually thought by those who have never tried to do it.

(2) It needs immense courage to sever a marriage *if you have time to think about it and are acting without the spur of anger.*

V

Let me begin my proposals with a simple statement of my faith. But first there is an explanation I must give. The laws of divorce and marriage, as we have them, grew up in days when, in one important way,

the circumstances of marriage were quite different from what now they are. The use of preventatives to conception was hardly known. Bernard Shaw has spoken in one of his Prefaces—I forget which one—of the revolution this has caused in marriage. It has also changed entirely the condition of divorce. For the law, then, took it for granted that in all divorces the factors to be considered were the same.

This is precisely what I deny in regard to the marriages of to-day. And for this reason it is clear that a stereotyped divorce law cannot meet our modern needs and afford the practical help that we have the right to claim.

Let me try to make this plainer.

If there are no children to be considered when the marriage tie is severed the main consideration is that each of the partners should behave honourably to each other.

If there are children when the marriage tie is severed the main consideration is that each of the partners should behave honourably to the child or children.

You will see what this implies. The regulations that will fit one case will not fit the other. Plainly, if we are to have justice, we must claim a different and freer form of divorce for the sterile marriage than could be right for the marriage with children.

VI

About no subject, perhaps, are prejudices so rampant as they are about this question of divorce by

the mutual consent of husband and wife. It seems impossible for the ordinary mind to separate the idea of the divorce decree from the idea of crime. I marvel at this stupidity. For it is stupidity, arising from a muddle-headed placing of the cart before the horse. You will notice I said "the divorce decree," not the divorce itself. For over that—the real calamity of a marriage broken—the law is powerless. I must once more force this upon your minds. It cannot be reiterated too often or too strongly that the marriage is broken *before the divorce decree is applied for:* all that the law can ever do is to register the breakage that has been made.

Now, when once this is grasped, the whole position changes. What we have to decide is not *the mending of the broken marriage*—that, as I say, can never be done by law; but what has to be decided is the most decent and most helpful means of registration.

I believe, too, we have to give up the pleasant idea (for it is pleasant to our unconscious selves, even if unrecognised in our consciousness) of punishing the guilty. For one thing we cannot do it. Restrictive legislation must be practical and most carefully drawn up, if the sinner is to be punished. Mind, I am saying nothing as to whether this ought or ought not to be done. That is altogether another question. I shall not attempt to make a decision. But what I do affirm is the impossibility of *our divorce laws restricting sin.* Under such a system as we permit, it is the innocent and the unhappy who suffer, while the guilty escape. I claim to have proved this already in the middle chapters of my book.

VII

I am very certain that I am right about this matter. Nothing but good would follow from a clearage of ecclesiastical lumber from our statute books, and its replacement by workable and helpful laws. There would be fewer divorces, not more, if divorce was freed from its ancient, unholy connection with sexual offences, and was made a question of quiet and careful consideration and mutual thought and decision.

This plan of divorce by simple agreement is, in my view, a far more permanent settlement than laying down new grounds for divorce, which necessitates an inquiry and connects divorce with guilt. This customary, but always harmful, prying into a relationship so intimate as marriage is to be avoided only by regarding divorce, as I do, as a registration of a disaster that has taken place. It records the bankruptcy of the marriage partnership.

I would most carefully provide every practical safeguard that I could to prevent any hasty or unthinking breaking of marriage. Indeed, what I insist upon is that, in every case, the obtaining relief should be dependent upon thought and careful deliberation. I claim that my proposals would ensure this far more certainly than our present system.

There ought assuredly to be a period of waiting after the application for divorce, which should be signed by both the partners of the marriage. No reasons

ought to be required if the husband and wife alike desire release. I would, however, suggest that the first application should be made to lapse of itself unless a further application is made after a period of —say one year.[1] Many people will go on with what they have begun from mistaken pride, even if they don't want to do so, because they are not brave enough publicly to say they have made a mistake. Thus, I regard this detail, seemingly trifling, of allowing the order to lapse unless re-applied for *after a period of a year's thought* as being of considerable importance. At the time of the second application it would be necessary to show that no reconciliation had taken place during the year; not to prevent collusion (which under my scheme would be encouraged) or even necessarily to bar all meeting between the partners, but to establish the steadfastness of their desire and to prove they were not acting in haste of temper or out of caprice.

The year of waiting before any irrevocable step was taken, spent by husband and wife separated from each other (with absolute secrecy preserved in regard to their preliminary application), could not fail, I am certain, as a means of hindering thoughtless divorces; it would, I claim, prove more effective, and much more decent, than the hindrances set up by the Church—collusion, connivance, and condonation—the three hateful C's. These, it is hardly necessary for me to state, would be swept with all other ecclesiastical obstructions into my dust-bin, where I destroy all filthy things.

[1] In "Women's Wild Oats," I said two years. I think now it is too long.

It would be well, too, as a further safeguard, for some responsible person to meet the husband and wife to place before them the gravity and irrevocability of the step they were taking. I do, however, most earnestly believe that any undue urging towards reconciliation must be avoided and advice only given. The decision must be left entirely to the husband and wife. A further period of waiting, not, I think, more than a year, might well be required before the decree for the dissolution of the marriage was finally granted and made absolute. There must, however, be no interfering, no information given by busy-bodies, no prying inquiries during the waiting period. The King's Proctor must go; unless, indeed, another position, with new, decent duties, is found for him.

I cannot understand how any honest mind can fail to see the advantages of this, or some similar plan of divorce by mutual desire and arrangement, over the present law which requires adultery, and often forces the committal of perjury; nor can I find any reason why freedom should not be granted when the marriage is childless and both partners, after sufficient deliberation, desire its dissolution. Probably it would be wiser, as a further necessary safeguard against too hasty parting, to require the marriage to have lasted for five years before application for its dissolution could be made. I think, however, in urgent cases, and wherever it could be shown that the marriage had been entered into under a mistake and had been continuously unhappy, it should be possible to remit this requirement.

VIII

The case where one partner only of the marriage desires its dissolution is much more difficult, and cannot, I think, be settled with the same justice. I would, however, point out that the same situation is common before marriage when an engagement is broken by one or other of the lovers, though, of course, the pain and injury (if the latter word can be used in this connection?) must be much greater after marriage. The law allows in these cases compensation to be claimed by the injured partner for the harm suffered, and, though no one can uphold these breach of promise cases (which have increased so unfortunately in the war period), it should be possible to avoid a similar sordidness in relation to breaches of marriage.

The right to compensation is not new in divorce laws; it would, I believe, act as a further effective hindrance against too precipitate escape from marriage. It also seems just that the partner who wishes to break the marriage contract should compensate, as fully as his or her means and working capacity allow, the partner who is desirous of the continuance of the marriage.

If no agreement has been made as to marriage settlements, the partner who applies for divorce should state in his or her order of application how much compensation is offered. This offer must be submitted to the other partner to be accepted or rejected. If such partner asks for it, the reason for seeking divorce should be stated, but only in this case. These

questions should be settled before further proceedings are allowed. The required periods of waiting would, of course, be enforced.

There are other restrictions that wisely might be made. A husband should not be allowed to divorce a wife after she has reached fifty years, except with her uncoerced consent. Also a young wife ought not to divorce an old husband, or a husband a wife much older than himself; though, in these cases, I would advocate a law preventing such marriages being entered into, except under very special circumstances, rather than a law to prevent their being escaped from. I would suggest here that commandments of marriage are formulated to be read to every couple at their betrothal and before the wedding ceremony takes place, as we saw is done in France and Belgium.[1] Possibly this is another duty which might be undertaken by the department of the King's Proctor.

IX

I believe that this guarded and regulated divorce of marriage ought to be granted in childless unions, where one or both partners is firmly desirous of obtaining freedom. And I believe further that this ought to be done, not only as an act of justice to the partners concerned: it is called for equally in the interests of society. The childless wife or husband who is unhappily married often wants to be a parent. This may be, and, indeed, often is, at any rate on the

[1] See page 100.

woman's part, the reason for seeking divorce. Such mother-women should be free to marry again and have the children they desire. And we must remember that divorce cannot be considered on the physical side alone; there is a psychological divorce, which is far deeper and does more harm, and is also far more frequent. The woman or man who, for any reason, is unhappy in marriage is unfitted to be a parent in that marriage; and the way should be opened to them, if they desire it, to have another union and children born in love with a more fitting mate.

X

So far I have ignored almost entirely the real difficulty of divorce—the child or children of the marriage. I have left to the end what matters to me most, as I wish to give it a more careful consideration.

At once the situation alters; when children are born both the practical needs and moral values are different. A marriage that becomes creative cannot be broken without grave disaster; for all creative things are eternal. What then must be done? For me the answer is plain, as here I come to the bed-rock of all I believe to be right. *In every case the welfare of the child or children of the marriage should be taken as the standard to which the desire of the parents must be subordinate.*

You will see that if you accept this standard of mine of the child's good as the one thing of importance, we shall have great changes to make in our

thought and in our action. I must follow this a little, though it takes me away from the main line of my argument, but I want to make quite plain the failure in our attitude. Perhaps on no other aspect of this question is greater nonsense talked than on this one of the effect of divorce on children. It is said so universally that it is better for the marriage to be broken than for children to live in a home in which the parents have ceased to love each other. I am not sure that this is true; the child's values are often very different from our adult values.

I cannot treat the matter fully, as to do so would need the writing of another book much longer than this one.[1] All I can do is to throw out a few suggestions. I think, but I am not certain, that the danger to the child from a broken home and a lost parent is greatest in the middle years of childhood, and is less when the child is older and more able to understand, or when he or she is quite young. No hard and fast rules can, however, be laid down; everything depends on the temperament of the child and the wisdom and character of the old and the new parent.

Much misunderstanding is shown and much nonsense is talked about children by those who know very little about them. The change of a father or a mother is a tremendous fact to a child, quite independent of whether the new parent is better or worse than the parent who has left. We know, as yet, very little of the results probable upon such a change, but we do know that confusion and jealousy are very likely to

[1] I hope to write of this in my next book, which I think will be called "Mother and Son."

be stirred in the childish soul, and that these may work tremendous and lasting harm.

There is no easy way out, and the protection of the child's interests mean much more than provision for its bringing up and the satisfying of its physical needs. Only the parents who are sure that they are not claiming their own right to freedom at the expense of the stronger home-rights of their child or children, can, in my faith, be held blameless in dissolving their marriage.

There are, of course, cases in which marriages ought to be broken and children taken out of homes, which are no homes. I may go further and say that the man or woman from whom a divorce ought to be obtained is, in almost all cases, the woman or man who is unfit to be a parent. The biologist and the psychologist will agree in relation to many such marriages. The habitual drunkard, the insane, the epileptic, the syphilitic—should they remain bound in marriage? Ought the law to promote the birth of diseased children? There can be no doubt as to the answer. It is the business of the State, as I believe, to regulate the law to prevent, as far as possible, the bringing into the world of all such children; at least we may demand that Church and State cease to grant them sanction and encouragement to this flagrant sin of unfit parenthood.

We talk a great deal to-day about children and their welfare, but very few of us realise at all practically the change of attitude, the increased care over birth, the restrictions of the adult liberty, and the sacrifice that are likely to be necessary, if, under all circumstances, our theories as to children are to be expressed in our

daily conduct. The whole question is very difficult; and, as I said just now, there is no easy way out.

We have to remember, however, that this matter of serving children will not be helped by doing nothing and opposing the reform of our laws.

For the divorce law, at present, very certainly does not make the child of chief importance. All that the law does is to provide for guardianship. It is much earlier than this that children ought to be considered. Has anyone amongst our law-givers asked what grounds laid down for divorce arise out of acts that hurt children most? The main ground for divorce is adultery—allowed everywhere where divorce is allowed at all. Yet obviously an act of adultery done, as easily it can be, without the child being able to suspect anything, does not deprive the child of his position in his home and the love of his parents which he needs. Neglect, desertion, drunkenness—and, indeed, any kind of daily unkindness of living injure the child far more. And, in my opinion, it is these home-destroying and love-killing acts, with their power of inflicting pain and lasting hurt on the tender consciousness of little children that makes divorce not only permissible, but necessary, in a marriage when there are children. Fully admitting then, all the difficulties of framing in a law the needs of the child, I yet refuse to admit that nothing can be done—no attempt made to give protection and to show that the child's claims are paramount and must be settled before the wish of the parents for relief is considered. What, then, would I propose to do? Let the claimant to divorce—the father or mother, as the case may be, or both parents acting together—give answers

in the application for divorce to some such questions as these : in all cases where there is a child or children in the home which it is proposed to break :

(1) Why is divorce desired?

(2) Who will look after and provide for the future maintenance, education and settlement in life of the child or children?

(3) What amount does each parent propose to invest as a fund for the child, or what allowance will be made and for how many years?

(4) What guarantees can be given that these provisions for the child or children will be observed?

(5) In what way is the child or children suffering from the existing marriage?

These questions ought certainly to be answered to the full satisfaction of the Court and every detail of the provisions for the future of the child or children settled before the question of the granting divorce is considered. In urgent cases, when, through some unfortunate circumstance, prompt action is rendered necessary, temporary provisions for guardianship should be made.

A further important duty would be the appointment of permanent guardians either in addition to the one parent, or in substitution for both parents. Some such plan as that existing in Belgium could be adopted. The guardian should replace, and be of the same sex, as the parent who is to lose control over the child. I would have the welfare of the child made the guiding principle in deciding which parent shall have custody, and not, as at present, the guilt or innocence of the parent. The ages of the children, and the wishes and characters of the parents, should be

considered by the Court. If neither mother or father is fit for the duty of a parent, foster-parents to act under the guardian would need to be provided.

And in the interests of the child I venture to suggest a severe restriction of the present parental powers. I would not allow a parent who had lost control of a child the right of visitation. Such visits, even under the happiest circumstances, cause disturbance, remind the child of the troubles of the past, and arouse confusion and jealousy with comparisons between the old home and the present home—conflicts between the feeling for the new parent and the very possible stronger affection felt for the old parent.

Perhaps you will object that such regulations as these I am suggesting would limit too much the rights and liberty of the parents. I acknowledge this, and I think such limitation is right. You see, I do not believe in the kind of liberty that makes it easy for any father or any mother to do wrong to the child they have brought for their own pleasure into the world.

In my gospel there is one commandment which may not be broken: Ye shall not hurt a little child.

Science has shown us how terribly the future of the child depends on its early relationships in the home; its relation to its mother, on whom it depends for the first childish satisfactions, its relation to its father, to its brothers and sisters. We see now more clearly the jealousy that is too often felt when these others draw away from it the attention of its mother; therefore, we realise better the disturbing comparisons likely to be suggested if one parent is lost and, perhaps, later replaced by another. These early home relationships

assume a much deeper aspect in the light of the new knowledge we have gained about them, and become, indeed, the most important influence in the life of any human being. Parenthood is far more eternal than we knew. Any disturbance in these early relationships is bound to bring confusion and conflict to the child. There is no escape. Here is a first scaffolding which remains, however elaborately we build or rebuild above or around it. Hence the responsibility and seriousness of all that concerns parental action. The child is helpless. Let this be remembered. A righteous divorce law must guard children, so far as this can be done, so that the failure, the folly and the recklessness of their parents does not fall too heavily upon them.

The problems of better and juster social arrangements are full of terrifying enigmas. The relief of divorce is granted to-day only in connection with cruelty and adultery; and it is, indeed, in itself, such a scoffing of all justice and purity and righteousness that it lies beyond the power of irony to mock it. It mocks itself.

I must assert once more that the ecclesiastical defenders of the present law misunderstand the spirit of the Founder of Christianity. They quote His words, but they make them serve the opponent which He always fought: for that opponent is none other than the spirit of external legality as opposed to the spirit of life, extending its claims beyond the individual and embracing the whole world.

The task of amending these divorce laws, which have become a byword of absurdity in the mouths of all men, cannot now for long be delayed. Some steps

on the way towards greater happiness and justice must be taken.

Yet I realise I cannot gain much of what I desire. Men are ruled by customary ideas. No nation has been able to cast from its laws the ancient theory of retaliation and fully replace revenge by forgiveness and protection.

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