DIVORCE

AND

DIVORCE LEGISLATION

ESPECIALLY IN THE

UNITED STATES

BY

THEODORE D. WOOLSEY

SECOND EDITION REVISED

NEW YORK
CHARLES SCRIBNER'S SONS
743 AND 745 BROADWAY
1882

TROW'S
PRINTING AND BOOKBINDING COMPANY
201–213 *East 12th Street*
NEW YORK

PREFACE TO THE SECOND EDITION.

In this new edition of "Divorce and Divorce Legislation," the first part is printed, with the exception of some corrections and a few notes, nearly as it appeared in 1868. The remainder, including the end of Chapter IV., and Chapters V. and VI. is rewritten. The Appendix is in part new.

When the work first appeared, many were beginning to be alarmed at the distance to which the divorce laws in this country, and especially in New England, had departed from the command of Christ, and even from the views of the early settlers of New England. After a lapse of thirteen years, the interest in the subject is greatly increased. There seems to be a firm resolve taken in all Christian denominations to do what can be done in purifying and Christianizing the law of divorce in this part of the Union; and in the course of the new movement, better knowledge has been gained of the extent to which loose opinions

and loose practices have proceeded. I have made use of the information gathered in various quarters, which was not accessible in 1868, for the present work; new researches of great value were given to the world by Mr. Carroll D. Wright, in 1880; Dr. Nathan Allen has laid the public under new obligations for his humane studies in this branch; and a number of gentlemen, with no little toil, have drawn from the records of courts statistics before unknown. I wish to express my obligations to all these gentlemen for doing what only one State for a long time took the trouble of doing; and especially to acknowledge myself largely indebted to Rev. S. W. Dike, of Royalton, Vt., for his energy and its valuable results in this field.

December, 1881.

PREFACE TO THE FIRST EDITION.

THE following Essay is a reprint of articles which appeared in the *New Englander* for 1867 and 1868, with a number of changes and additions, among which latter the notes at the end of the volume are the most considerable. The work was undertaken, not from any special interest in the subject, but from a sense of its importance; and the author had been urged for a number of years to write upon it, before he found time to give it any thing like due attention. The call which came to him was dictated by a feeling, in which multitudes share, that the Divorce Laws of the State where he resides are extremely lax, and that a commonwealth, whose morals and history in the past have been highly to its honor, is in danger of becoming a teacher and propagator of low views of the marriage relation, as far as its ex

ample can reach. The call came to him because he had studied the subject in connection with lectures on Natural Right and the State, delivered in Yale College, and was supposed to have some familiarity with the exegesis of the New Testament. How he has done his work the reader must judge.

As for the treatment of the subject the author wishes to say:—1. That the multitude of details, especially in the fourth and fifth chapters, is so great that he cannot expect to have avoided mistakes, and as all the books that were consulted were not at hand for re-examination, the errors could not be conveniently detected. 2. In the last chapter it might seem as if he was inconsistent with his own principles in allowing cases of divorce which are condemned by the greater part of Christian people; but in truth the remarks that are there made are dictated by the conviction that a strict law would not stand any chance of being passed in a number of the United States. If however a law as good as, with one exception, that of England is could be accepted in this country, no one would rejoice more than the author.

Several gentlemen have rendered valuable assistance to the author in regard, especially, to the state of Divorce Legislation in the United States. He mentions here with gratitude the help given by Henry Clark, Esq., of Rutland, Vermont; Rev. W. W. Andrews and C. J. Hoadley, Esq., State Librarian, of Hartford, Conn.; Edward D. Mansfield, Esq., lately Commissioner of Statistics in Ohio; H. W. Chase, Esq., of Lafayette, Ind.; S. B. Perry, Esq., of Chicago, Ill., and Henry Hitchcock, Esq., of St. Louis.

NEW HAVEN, *March* 31, 1869.

TABLE OF CONTENTS.

CHAPTER VI.

APPENDIX.

ESSAY ON DIVORCE.

CHAPTER I.

DIVORCE AMONG THE HEBREWS, GREEKS, AND ROMANS.

In the present chapter we shall attempt to give an account of the law and practice of divorce among the Hebrews, Greeks, and Romans, those three nations, to one or another of which we owe our religion and most of the leading elements of our civilization. The subject has an important practical bearing. It is intended as an introduction to an inquiry into the meaning of those passages in the New Testament where the matter of divorce is taken up. Christ, by a few words on this subject, has turned legislation and usage into a new channel; he has in those few words, by a higher conception of marriage than was entertained before, thrown in a very important element into Christian civilization. It is our object to answer the question why Christ acted thus in some sense as a legislator, and what the world's need was that it should be taught a higher morality in this respect. Having looked at this point as briefly

as truth and the importance of the subject will permit, we propose, in the next chapter, to discuss the passages of the New Testament touching on divorce and the questions to which they naturally give rise. Then, if it is permitted to us to continue our inquiries, we shall treat of the practice and views of the early Christians, and of the state of opinion and law in some of the principal Catholic and Protestant countries. Finally, we shall ask what ought to be the aim of legislation among us, and how the Christian Church ought to act in endeavoring to enforce the commands of Christ within its own pale. Our aim is to do good and to serve the truth. We are not indeed so conceited as to hope to produce a great effect of ourselves, but believing that an irreligious liberty is creeping even into the Church with regard to the marriage tie, believing also that nothing more helps on, and is helped on by, general laxity of morals than undue freedom in regard to divorce, we feel constrained to contribute our mite to the correction of a public opinion and practice which are threatening serious evils both to Church and to State.

DIVORCE AMONG THE HEBREWS.

The ideal of marriage, as we find it in the first records of the Hebrews, is a peculiarly beautiful one. "For this cause shall a man leave his father and his mother and cleave to his wife, and they

twain shall be one flesh." Here the union of one man with only one woman is thought of, and polygamy in fact is inconceivable, for how can so close a union as the being one flesh with a wife admit of the same union with another. It is again an indissoluble union; for if the parties are one flesh, nothing but a violent process of nature or of crime, something like amputation, can separate them. And what is deserving of equal notice is the separation of the man from his father and mother contemplated in this text. A patriarchal age would naturally regard the filial and parental as the closest of all ties. Here is a still closer tie, involving a greater "cleaving" to the wife, a formation of a new family with new rights and interests, an emancipation from parental control.

The ideal presented in these words remained in the Hebrew mind until Christ came into the world. Polygamy and freedom of divorce obscured, but could not obliterate it. Polygamy was permitted or rather endured, under some restrictions, but one wife was the rule, as is shown by various passages of Scripture. In the Psalms, and in the Prophets, only one wife is spoken of; the prophets are nowhere mentioned as having more than one; the same is true of Moses and of Isaac; even Abraham looks forward to the necessity of having a servant for an heir, until at the instigation of Sarah he takes Hagar as a kind of substitute for her; wealthy men, like Nabal and the Shunammi-

tish woman's husband, are monogamists; and perhaps the law laid down a similar rule for the high priest.* Probably a great part of the private persons among the Jews had but one wife, and polygamy was chiefly confined to the king and a few others. Even the kings were forbidden to multiply wives greatly, and Jehoiada, the high priest, must have intended to restrict King Joash, when he furnished him with only two. Still polygamy existed legally, and was not put down by the moral sense of the nation. It took, we may add, through the prevalence of slavery, the form of a looser connection with a woman of inferior condition, a form between concubinage and marriage. The woman in Judges, chapters xix., xx., is constantly called a *pillegesch* or concubine, and yet the Levite is spoken of as her husband, and her father as his father-in-law. She was a Hebrew free woman apparently, but that relation, for the most part, was entered into with a domestic or a slave.

Marriage began with the betrothal, but no covenant or formality is known to have existed. The condition of marriage, however, is spoken of as a covenant. Thus Malachi says: "Yet is she thy companion and the wife of thy covenant;" and Ezekiel: "I sware unto thee, and entered into a covenant with thee, and thou becamest mine."

* Comp. Saalschütz; Mos. Recht., p. 748, ed. 2. The priests were forbidden to marry a divorced woman (Levit. xxi. 7, 14).

In numberless instances the word *zanah*, to play the whore, is transferred to signify a breach of the covenant-relation between God and the people by the crime of idolatry. Closeness of union and tender care, conditioned by fidelity, belong to both relations, that between husband and wife, and that between God and the people. Did the notion of a covenant belong to both independently, or was it transferred from the theocracy to family life? We are unable to give a satisfactory answer, but apparently it originated in the theocratic union and passed to the conjugal. However this may be, there is a sanctity thrown around marriage by this manner of speech and thought, such as few other expressions could give forth. If adultery is on a level with apostasy from God, how great must be its guilt; and if the man is to the woman as God to the people, what but a breach of that covenant in one vital respect should dissolve the union. To which we may add that as God had but *one* people, the standing simile would be apposite only if, as a general thing, one man had but *one* wife; and that the relentless severity of the Jewish law toward the adulteress corresponds to the penalties it denounces against going away from Jehovah to the worship of a false god.

In Hebrew marriage, gifts were generally given or a price was paid by the bridegroom, and this answers to the purchase of the wife, which was practiced over a large part of the world in ancient

times, as in Greece, among the Hindoos, and among the Germans, and of which many instances are still to be met with in barbarous or half-civilized tribes. In the first case where these presents are spoken of, the largest share went to the bride, Rebekah, her mother and brother also receiving "precious things." In the case of Jacob, as he had nothing to pay, service was rendered as an equivalent. The other references to this usage are few; fewer, we conceive, than they would have been, if it had played the same important part which belonged to it in the marriage usages of other nations. A distinguished writer on Jewish antiquities tries to show that the custom among the Jews amounted to nothing more than the giving of presents for a favor received, which presents went in good measure to the bride; but the prevailing opinion is against him, and the analogy of other nations is able to show a softening down of an original purchase from the father into a portion conferred upon the bride herself.*

Hebrew marriage, thus far, appears quite informal and primitive, but yet penetrated with a religious spirit, and placed, as it were, under the especial protection of the covenant-keeping God. Nevertheless as the bad usages of polygamy, slavery, and blood revenge were endured among the people, so when it received the law, a freedom of divorce prevailed which could not be corrected

* We refer to Saalschütz (u. s.), chapter 102, § 3, and Ewald, Antiq., 11, 2, 6.

without hazarding the overthrow of the polity. It was therefore endured, and in some degree restricted.

The leading passage relating to divorce is found in Deut. xxiv. 1–4. It assumes a certain loose practice in regard to divorce, and tries to reduce it to a formal shape, precisely as the Emperor Augustus attempted to give legal form to divorce among the Romans by his legislation. Let us notice the parts of the passage in their order.

1. It is supposed, as the basis of the law now given out, that husbands who had found "some uncleanness" in their wives had been in the habit of putting them away without ceremony, or of sending them home as they would hired servants. Here two things deserve consideration. *First*, the right of divorce among the Hebrews was altogether one-sided. The wife had no right of divorce whatever. If her husband committed adultery with a married woman he might be put to death; but it does not appear what protection she had against ill-usage on his part. Probably her vindication in this case was left to her friends. In the second place, what do the words "some uncleanness" denote? This passage, as is well known, was the subject of controversy between the schools of Shammai and Hillel: the latter understanding it of any thing offensive or displeasing on the part of the wife; the former giving it an ethical sense, according to most modern writers, as if it were to

be confined to an act of immorality like adultery. Winer, however, says that the Gemara makes the view of Shammai less strict: even public violations of decorum might furnish ground for divorce according to his doctrine. Josephus interprets the law according to the views of Hillel: "He who wishes to be separated from his wife," says he (Antiq., iv., 8, 23), "for any reason whatever [St. Matthew's 'for every cause']—and many such are occurring among men—must affirm in writing his intention of no longer cohabiting with her." This is the extreme of license which an immoral age would defend by the passage. On the other hand, the opinion attributed by most modern writers to Shammai is wholly untenable, as moral uncleanness or adultery was punishable by death. Knobel, in his commentary on Deuteronomy, expresses himself as follows: "*Ervath dabar* is used of human excrement in Deut. xxiii. 13, and is properly a *shame* or *disgrace* (Is. xx. 4) *from a thing;* that is, any thing which awakens the feeling of shame and repulsion, inspires aversion and disgust, and nauseates in contact, for instance, bad breath, a secret running sore, etc." Then he adds, "in the time of Christ the expression was in controversy. The school of Shammai took it as being the same with *debar ervath* [a thing of uncleanness or disgust], and understood it of unchaste demeanor, and shameless lewd behavior. The school of Hillel, which the Rabbins follow, explained it as

something disgusting or any other cause, and thus defended a looser view . . . . . Both were wrong in this, that they built up a general principle upon the words, whilst the author only speaks of the commonest cause of divorce at his time."

2. It is required of the husband, by this statute, that he write a bill of divorcement, and give it into the hand of his wife, before sending her away from his house. The law requires no special form for this "writing of separation," and whether any form in particular was customary we have no means of knowing. The essential points which the law aims to secure are first *a formal writing*, by which any passionate haste would be prevented; and secondly, *protection for the woman*, so that it should appear to all persons that she was not an adulteress, nor a runaway from her husband's house, but was free to contract a second marriage. If the reasons for the divorce were added in the bill this would be an additional protection to the wife, as the husband would be slow to put down in a permanent form pretexts which might be false or frivolous.* It has been suggested also that at an age when writing must have been infrequent, the inability to prepare a written document would secure a greater degree of deliberation, as the husband would need the help of some Levite or other educated person, of whom he would stand in a

*In the forms given by Selden, Uxor Hebr., iii., 24, no mention is made of any reasons.

certain awe, if conscious of the frivolity of the reasons for a divorce (see note 2, Appendix).

How far this statute went into general use, we have no means of knowing. Two passages, one in Isaiah (l. 1), and one in Jeremiah (iii. 8), refer to the bill of divorcement to illustrate God's treatment of his rebellious wife, the people, and as the illustration must have been well understood, it is fair to suppose that such bills were then in common use. The passage in Jeremiah however suggests a difficulty. God put backsliding Israel away and gave her a bill of divorce on account of her adultery. May we argue from this that the penalty of death for this crime was now softened down, on account of the great corruption of manners, into repudiation? The passage in Ezekiel (xxiii. 45, 46), where judgments by righteous men in cases of adultery are spoken of, proves the contrary. Jeremiah adapts his simile to the facts of the case. The adultery of Israel was a giving up of Jehovah for the idols of the heathen, and his repudiation of her was the captivity of the northern tribes. The very verse of the prophet where these words occur shows us the freedom of his illustrations. The treacherous sister of Israel, Judah, feared not when she saw the casting out of her sister, but went and played the harlot also. Here then we have two sisters at once the wives of one husband, a thing directly against the law of Moses. The husband was not bound to get his wife punished.

3. The divorced wife may now contract marriage with another man, but if separated from him by death or divorce may not return to her first husband. As Jeremiah says the land where this should occur would be "greatly polluted." Here protection for the woman and for public morals are secured at once.

As for the woman, the great freedom of divorce which law and usage gave to the man made it all the more important that her interests should be protected. She was always the passive party, having no right of divorce on her side. If such freedom on the part of the man was right, it was right also that she should be permitted to marry again. If it was in itself an evil, endured but not encouraged, it was in a certain sense right that another similar evil should counterbalance it and deprive it of some of its baneful effects. Marriage ought to be equally sacred for both parties, and under equal sanctions for both. When there is a letting down of those strict rules which our Lord has made known for his Church, bad law cannot end, with any equity, in granting the husband certain liberties, unless it grants a compensation to the wife. This compensation was remarriage after divorce. The need of such protection was increased by the institution of polygamy, for it would often happen that the husband, when he took to himself a second wife, would become disgusted with the old one, and her feelings, when

she felt herself to be put in the background, would not contribute to domestic peace. Or he might find himself unable to support two, and thus disgust would ere long end the connection with one of them or the other.

As for the protection of public morals, it is evident that the power of return to the same husband might wholly destroy the sanctity of marriage and bring it down almost to the level of *polyandry* on which a few of the most degraded nations of the world now stand. Marriage between one man and one woman must be once for all. That is to say there is nothing in the mere act of divorce, according to this Hebrew law, to prevent reunion of the parties, and very likely such things occurred; but a practical dissolution by marriage to another man forever prevented a union with a former husband, as something polluting and almost adulterous. So enormous a transaction as that between Cato the younger and Hortensius, when the former lent his wife Marcia to the latter and took her back again after the orator's death, would have been altogether contrary to Hebrew law, and probably an abomination to Hebrew feeling in the worst times.*

It is only seldom that the law of Moses makes mention of divorce. The two other passages where

* It does not appear that Cato ever divorced his wife, which only makes the transaction more enormous. For a critique of this affair, see Drumann Gesch. Roms., iii., 107.

it is spoken of show an intention of a humane legislator to protect a woman in circumstances where she was peculiarly exposed to injury. One of these is Deut. xxii. 28, 29. The substance of it is, that a man who deflowers an unbetrothed virgin, besides paying a fine to her father, shall take her for his wife without the power to "put her away all his days." The other (vv. 13–19 of the same chapter) contemplates a newly married man's spreading an evil report concerning his wife's antenuptial chastity. If on solemn investigation it was found that his words were false, he was to be chastised, to pay a heavy fine to his father-in-law, and, as in the former instance, to have his liberty of repudiating her taken away. In these cases the interests of morality and those of his wife are both looked after. Yet it may be asked whether such a law, implying a grievous breach between the married pair, would not expose the wife to intolerable cruelties from one who could never get rid of the detested object. We can only answer that the law allowed no such cruelty, that her family friends could act as her defenders, and that on his death she could not, it is probable, be stripped of the use of some portion of his property.

We have no means of judging whether the sentiment of the Hebrews changed in the course of time on the propriety of divorce. There is, however, one memorable although very obscure passage in the last of the prophets (Malachi ii. 11, 16), which

goes to show that indiscriminate divorce was then regarded by good men as wrong and offensive to God. The prophet, after rebuking intermarriage with heathen women, and threatening the divine vengeance against those who should commit this sin, passes on to a second sin, that of "covering the altar of the Lord with tears, with weeping, and with crying out," which, as appears from the next verse, where the sense is more fully brought out, is to be understood of the complaints of injured and divorced wives—divorced perhaps for the sake of the heathen women just before spoken of—uttered in the temple to the Lord of Hosts. God no longer regards the offerings of such men, because they have dealt treacherously or unfaithfully each one against the wife of his youth, who is his companion and the wife of his covenant. The next words are among the obscurest in the Bible, and if we could make them plain, they would require too long a comment for this place. Then the prophet adds: "therefore take heed to your spirit and let none deal faithlessly against the wife of his youth. For the God of Israel saith that he hateth putting away, for one covereth violence with his garment, saith the Lord of Hosts." The marginal rendering of our version—"the Lord God of Israel saith, if he hate her put her away," which was given by Jerome and adopted in Luther's Bible, would now have, we suppose few defenders. Ewald's version (in his Prophets) follows the Septuagint in making

the sentence conditional: "when one out of hatred puts away, saith Jehovah God of Israel, he covereth his garment with violence." In this version no good sense is elicited; the rebuke against divorce in the preceding context is not confined to cases where the husband hates the wife; and the conditioning clause which this rendering assumes is strangely divorced from the conditioned. Hitzig in his commentary translates: "he hateth putting away, saith Jehovah (i. e., Jehovah saith that he hateth), etc., and him who covereth wrong with his garment." Köhler, a more recent commentator (in his Prophets after the exile, part 4), "for I hate putting away, saith Jehovah, etc., and crime covereth his garment" (who doeth this); DeWette in his version: "for I hate putting away, saith Jehovah, etc., and him who heapeth crime on his wife." Nor is Hitzig reluctant to adopt the translation *wife* instead of *garment* at the end of the passage.*

Hitzig well remarks on the passage, "that the putting away of the wife was indeed permitted (Deut. xxiv. 4), but was not on the whole a thing which God could look on with complacency, and in the case before us it had in it something hateful, not merely on account of its frequency. Perhaps we have here the beginning of the stricter doc-

* A condensed exposition of this passage is given by Keil in his Commentary on the twelve minor prophets, not long since published (1866). He adopts Köhler's views almost throughout.

trine of the New Testament." The beauty and noteworthiness of the passage consist in the deep moral and religious feeling which pervade it. The wife and husband are bound by a covenant. To put a wife away is to break that covenant, to act treacherously or faithlessly. This is what God hates. We have thought while studying this passage how our Lord must have pondered over it, and how two places of the ancient scriptures, one at the beginning, one at the end, coincide with his views of divorce, while the law and practice of the Jews spoke only of the hardness of their hearts.

It only remains to inquire what was the usage of the Jews through their history, and a very scanty answer is all that can be given. What the moral sense of the nation allowed when the law was given is gathered, as we have seen, from the law itself. This passage of Malachi goes to show that even in a reformed age, among the returned exiles, the practice of divorce was not infrequent. Examples however do not occur. In the time of Christ it must have been not uncommon, although nothing can be argued in regard to the morals of the nation from Herod the Great and his family. Josephus tells us (in his life, §§ 75, 76) that he was thrice married. The first wife and he separated. He does not tell us how or why. The second he put away, "not being pleased with her character," after she had borne him three children. Then he took a third, whom he praises highly. The prob-

ability is that multitudes of his countrymen, especially the more heathenish part of them, made no scruple of dismissing their wives at pleasure.*

DIVORCE AMONG THE GREEKS.

There is a great contrast between the destinies of the conception of marriage as it appeared in the Hebrew mind and in the Greek. In the former race, most beautiful and elevated at the outset, but long encountering inveterate oriental practice, and failing in a great measure to be realized, it is at last purified and brightened by Christ, so as thenceforth to enter into the thought and life of the world. Among the Greeks, on the other hand, simple and severe at first, as it was among the other western nations, averse to polygamy, perhaps regarding divorce with disfavor, this conception became obscured and degraded as they advanced to the acme of refinement. The mythology which was elaborated in the earliest epic period by the poets reflects already the morals of a corrupted race, for they who could listen eagerly to rhapsodists narrating the adulteries of Zeus or Hephæstus, must have been defiled themselves, and must have grown more so from famili-

* The authors whom we have principally relied upon are Saalschütz (Mosaisches Recht), Selden's Uxor Hebr. in Vol. II. of his works, Winer's Realwört., and leading commentators. Selden, from the mixture of the Rabbinical and scriptural, is very wearisome and confusing.

arity with such examples. Still a simple unsensual mode of life, and original tradition guarding the sacredness of the family union, may have in part for a long time counteracted the influences of mythology. But when we come to the historic ages of Greece, the case is widely different. At Sparta, notwithstanding the severity of the institutions, the sanctity of married life was not respected. It was reputable and customary there for men to give over their wives to their friends, and a king, for reasons of state, was allowed to have two wives in two separate establishments.* At Athens, the maid was reared in seclusion to protect her from the evil without. She thus became an unfit companion for the man who enlarged his mind by taking part in public affairs. Was it strange, when as a matron she came to have a larger liberty, that she should abuse it? Or was it strange that the *hetaera*, conversant with men and used to please men, should usurp the wife's influence? But it was strange, sadly strange, that the corruption of morals seized on youthful beauty as its instrument, that a frightful unnatural crime, punished with death in Christian lands, fastened itself on the intimacy of older with youn-

* See what Xenophon, in his Lacedemonian polity near the beginning, says of this and of a still more disgusting practice, with no reprehension, and ascribing the licenses to Lycurgus. This scholar of Socrates can have had no moral but only a political view of marriage.

ger men, and if not without rebuke, yet swept abroad so widely, as to be the greatest disgrace of the Greek civilization. The study of morals and the revival of moral feeling in the schools of the successors of Socrates could not stem the corruption.* The later Greeks of the Macedonian and Roman periods, if we judge of them correctly, were more enervated, more immoral, where they had opportunity, than before, both outside of Greece and within it. Marriage came to be regarded only as a convenience or as an evil; population fell off; whatever Greek virtue of the political sort had existed in great measure left the race.

Aristotle remarks in his politics that the old Greek laws and usages were very simple and barbaric, and gives as an illustration that they carried weapons habitually, and bought their wives from one another. This custom of purchasing the wife, of which we found traces among the Hebrews, sprang out of the view of the child as the property of the parent: the father had a right to the services of his daughter until she passed beyond his control. This usage is often alluded to in Homer. The word for the purchase-money is *hednon* or *hedna*, but inasmuch as the word may have had the wide sig-

* Beautiful passages in Plato's Laws show that he was awake to the importance of purity in the family relations. A passage in the eighth book, where he would have law attempt to secure in the new city a degree of purity which he regards as almost chimerical, is well worthy of notice (p. 841, D).

nification of a gift or present at first, and as the father would naturally give a part of this wife-money to his daughter as an outfit, it occurs also in the sense of a present from the father to the daughter, and in that of a present from the betrothed man or from other friends. Thus an epithet applied to maidens can be translated *cattle-finding*, because by the husbands whom they won they procured cattle for their fathers. So also it is said of a Trojan ally who was slain by Agamemnon, that to obtain his wife he first gave a hundred cattle, then promised a thousand head of sheep and goats besides. Sometimes the father waived his right of purchase-money for his daughter; Agamemnon is willing, if he can propitiate the angry mind of Achilles, to give him either of his three daughters without getting any *hedna* on his own part, and he will give large presents in addition. When a wife had been unfaithful to her husband, he could claim the price he had paid for her; and when for some other cause he had put her away, he was expected to pay back the amount of the gift or dower granted to her by her father. These usages may have differed little from those of many other nations.

In Sparta, after betrothal, marriage was consummated by a kind of mock robbery. At Athens betrothal was universal in legitimate marriage, and a dower regularly but not necessarily went with the bride. She might have none, and yet be

a lawful wife, whereas under Roman law the dower was so much more essential, that the civil law has been thought to entertain a presumption against marriage without dower as being no more than concubinage. That religious ceremonies attended the marriage festival is undoubted, but no public priest's services can be shown to have been thought necessary. As women and children were always minors at Athens, the wife passed from under her nearest relative, as her *kyrios*—her guardian or law representative—into the hands of her husband, who sustained the same capacity. Yet it may be added that as parental power was not so extensive at Athens as at Rome, so it was with marital power also. After the death of the husband or the divorce of the parties, the wife fell under the authority or guardianship of her next blood relative.

Divorce at Athens was easy and frequent. It took two shapes, distinguished often by different words, being called *sending away* or *out of the house* (*apopempein* or *ekpempein*), when the husband repudiated the wife; but *quitting and going away* (*apoleipein*) when the wife separated herself from her husband.* In the first case, little if any formality seems to have been required, although we may perhaps argue from the instance of a leading Athenian mentioned by the orator Lysias, that the husband usually made known his intentions before witnesses called in for that purpose.

* Other terms also occur, as ekballein, apoluein, aphienai.

There are several instances of this kind of divorce mentioned in the private orations of Demosthenes, which demonstrate what a bare matter of convenience marriage was at that time, and how destitute of a moral element. Timocrates, having found a rich heiress with whom he could connect himself, sends away his wife, who without the interval of a day is married to Aphobus, one of the guardians of the orator Demosthenes during his minority. Protomachus, a man in needy circumstances, having the same chance, persuades his friend Thucritus to take his wife from him ; her brother betroths her to this second husband, and the plaintiff for whom the oration is written is her son. In a third case, Polyeuctus adopts his wife's brother, gives him his own daughter for his wife, and then, some quarrel having arisen between the parties, takes her away and gives her to Spudias. Then a suit concerning dower was brought by the former husband against the father and the new husband. In this case, if Leocrates and his wife did not agree to separate, the latter must have initiated the steps for the divorce, for it nowhere appears that the father or previous *kyrios* of a married woman possessed this power. In all such cases, notice in writing of the divorce was probably lodged with the archon or judicial magistrate.

The other description of divorce was when the wife left her husband,—when she began the proceedings. In this case, she was required to ap-

pear in person before the archon at his office, and there present a writing in which the reasons for her separation from her husband were set down. If both parties were agreed about the divorce, that might be the end of the affair. She returned to her nearest relatives, and her husband was obliged to pay over any dower that might be in his hands. If the parties were not agreed, a suit might arise, and the same seems to have been true when the husband began the proceedings, but nothing is known of the judicial process in either case.

It was when Hipparete, wife of Alcibiades, and daughter of one of the first men at Athens, stung by the outrageous licentiousness of her husband, had gone to the archon to take the above-mentioned legal steps for a divorce, that Alcibiades collected a band of men and dragged her away from the place of justice. He may have done this for the sake of her great dower of twenty talents. At all events, according to Plutarch, he quashed the proceedings, for she lived with him until her death. The same writer adds that the law required the presence of the woman desiring a divorce at the place of public justice, in order that it might be in the husband's power to come to terms with her and keep her with him.

Suits were doubtless very frequent in regard to the wife's dower, which was either paid over to the husband before witnesses or retained by her

kyrios, subject to the stated payments of interest. If paid over, security was taken on her behalf upon her husband's property, and he was also bound personally for it. If he delayed to pay it over after the divorce, eighteen per cent. yearly interest was due for the time of the delay. More might be said on this matter, but the legal consequences of divorce do not fall within our subject. It is needless to add that she was free to marry again as soon as the divorce took effect.

We have confined ourselves chiefly to Athens, partly because it is a fair sample of the more modern civilization of Greece, and partly because the materials are exceedingly scanty, or fail altogether, for the greater number of the Greek States. Legislation, however, made various experiments. We give one example. Among the laws of Thurii in Magna Græcia, according to Diodorus of Sicily, there was one which gave leave to women to put away their husbands and to marry whom they liked. An old man, thus deserted by a young wife, proposed and carried an amendment of the import that whichever party, husband or wife, initiated the divorce, the said party should be forbidden to marry one younger than the former partner, whereupon the woman returned to his bed and board again. We put no great faith in the story, much less in the ascription of the law to Charondas. We give it only as a specimen of the legislation that was going on, wherever free

Greeks could govern themselves, and which, although in general starting from the same conceptions of marriage, and making divorce exceedingly easy, yet without doubt would exhibit, if it had been preserved, various peculiarities in different parts of the Greek world.

It is probable that after the Macedonian conquest these differences of legislation, where Greek States were autonomous—and that they were so to some extent even in Roman times is well known—were obliterated, and that a general average conception of the family relations, having almost nothing of morality in it, pervaded the whole race. The Greeks still adhered to monogamy, still allowed concubinage with scarcely a frown, still granted almost unlimited freedom to the separation of man and woman.

It is pleasant in this state of public feeling to know that a few voices were lifted up in favor of a somewhat better practice. The testimony of Plato in his Laws is worthy of mention.* He would take away from the parties interested the license of separation, and place divorce under the control of State authorities. If, says he, through infelicity of character a man and his wife cannot agree together, let the case be put into the hands of ten impartial guardians of the law, and ten of those women to whom the matter of marriages is

* Leges xi., p. 930, A.

committed. Let them reconcile the parties if they can; and if not let them act according to their best ability in providing them with new spouses. If the philosopher contemplates more than earnest persuasion, this would most probably act as a restraint on divorce and check the desire of separation, but whether it would do any other good might be reasonably doubted. This is about as far as the gospel of beauty could go. Plato's own view of marriage is certainly far from being the most elevated one, as his Republic testifies. It needed a gospel of holiness to put the Greek mind on a better track in regard to marriage and divorce.*

DIVORCE AMONG THE ROMANS.

The Romans had more of the moral and the religious in their character than the Greeks, as is manifest from that strong sense of justice and love of established form which pervades their law, and from that ancient fear and superstitious worship of the gods which ran down in the end into the merest formality. Their early institutions, more than those of any western nation, partake of patriarchal life. The closeness of the family tie,

* The principal authorities besides passages of authors, and especially of Demosthenes in his private orations, are the writers on Attic law, especially Meyer and Schömann's Attische Process, page 408, onward; Platner's Process, part 2, page 245; and the writers on archæology, especially K. F. Hermann.

the septs or *gentes* of the patricians, and the vast powers of the *housemaster* over wife, children, and slaves, which it took ages to undermine, all point in that direction; and their peculiar veneration for ancient form in all things is of the same source. In fact so essential is the early constitution of the household to the Roman State, that State life, as it first shows itself, may be said to have grown directly out of family life.

Roman marriage in its earliest forms was for the wife a passing out of her natural family, where she was under the absolute control of its head, into the family of her husband, whose control was nearly the same as that of her father or grandfather. She was now said to be in his *hand*, and the marital power was known by the name of *manus*. There were three forms known to early Roman times by which the *manus* was acquired by the husband. Of these, without entering into the province of Roman archæology, it seems necessary to say a word for the better comprehension of the subject. The oldest of them, *confarreation*, which was exclusively patrician, was celebrated with special formalities by public priests in some sacred place before witnesses, and the *manus* was acquired by the same act by which the marriage was solemnized. This may be called *religious marriage*. The two others arose, as it seems, in plebeian life. Of these, *usus* was probably the earlier, a kind of prescription, in which,

when the bride, after the regular betrothal and nuptials, had cohabited with her husband for a year without an absence of three successive nights, the *manus* or marital power was fully secured. Here the marriage and the *manus* originated in two acts widely separated in point of time. The remaining form, of originally plebeian origin,—*cöemption*—was a kind of fictitious sale, much like that used in adoption and emancipation, and here the daughter's consent was needed for the existence of the *manus* and the marriage. These may be called forms of *civil marriage*. This last form had become obsolete before Gaius wrote his institutions under M. Aurelius. The two others were in a state of decay under the earlier Roman emperors (comp. Gaius, i., 111, 112, 113).

At an early date, we have no means of knowing when, but long before Cicero's time, and before the age of the comic poets, a free kind of marriage without the *manus* came into vogue. It was preceded by betrothal and nuptials with religious ceremony. The connection was legitimate, jural, and respectable. In fact, had it not been so, there would at length have been no marriage at all, for this became in the end the universal form among the Romans. Its essence consisted chiefly in these particulars; that the union between the woman and her natural family was not sundered, and that the husband acquired no *manus* and no rights over any part of her property except the *dower*. The

motive which gave rise to this kind of marriage may have been the unwillingness of the woman's father to lose control over her and her property in favor of one who was suspected or imperfectly known. It is one, and perhaps the earliest, of a series of innovations, by which patriarchal, patrician Rome surrendered its ancient iron habits, under the humanizing and loosening influences that followed in the track of civilization and of empire.

The two kinds of Roman marriage differ greatly when the power of dissolving the marriage union is considered. In the forms by which the *manus* was acquired the wife had no rights over herself or next to none, while the husband could dismiss her from his house at his pleasure. In the free form of marriage, the husband and the person who exercised the paternal power over the married woman, or she herself, if she was *sui juris*, had concurrent right to effect the separation of the parties. Of such authority exercised by the wife's father the comic poets of Rome furnish us with instances, but in process of time, if he took this step where there was an harmonious union and perhaps a family of children, the husband had a legal remedy against him.

The husband himself, moreover, was to some extent controlled by a very remarkable Roman institution, which derived its sanction from old custom rather than from positive law,—a family court, consisting of blood-relations of both parties, to-

gether with the husband himself. Such a court was also assembled to try great crimes of children, and yet there was not the same necessity for assembling it, according to Roman feeling, as where a guilty wife was to be brought to trial. And on the other hand, where a husband had neglected to call such a court before inflicting penalty on his wife, his neglect was not punishable as a wrong, but rather as an offense against good manners. It is recorded of one Lucius Antonius (about the year of the city, 440), that he was removed from the Senate by the censors for having repudiated his wife without taking council of friends, but the same stigma might have been put upon him for expensiveness, or other conduct not exactly illegal. In the freer kind of marriage, as the husband acquired no power over his wife's person, the head of her natural family must have called such a court, if any were assembled.

Divorce, according to a tradition preserved by Dionysius, was regulated by law from the time of Romulus onward. He says that it could take place for violations of the law of chastity and for drinking wine,—sentence of the husband and the relations being necessary for its validity. Plutarch's statement is that the wife could not separate herself from her husband, but that the husband could repudiate his wife for three crimes—poisoning the children, making false keys, and adultery. Wine-bibbing on the part of the wife we know from

other sources to have been a grave offense. He adds that a man putting away his wife on other grounds forfeited his property, half of which was to be consecrated to Ceres, and half to go to the injured partner.* But these traditions can be of no historical value. They only show that divorce in the olden times was in some way restricted, and that family courts were of great antiquity.

A more reliable, yet no doubt confused, tradition declares the first divorce at Rome to have occurred about the year 520 of the city—that is eighty years after the divorce of Lucius Antonius already mentioned—and under the following circumstances: Carvilius Ruga is said to have greatly loved his wife who was barren, but inasmuch as the regular question of the Censor, at the time of the *census*, required him to declare, on oath, that he had, or would have, a wife *liberorum quærendorum gratia*, under pretense of avoiding a false oath, he terminated the marriage state by repudiation.† It is impossible to believe that no divorce occurred at Rome for more than five hundred years from its foundation, and yet there is no good reason for

* Dion. Hal., ii., 25; Plut., Romulus, § 22. Plutarch adds, that a man who sold his wife, in which plebeian marriage forms may have been practiced, was devoted to the infernal gods.

† It is preserved by A. Gell., iv., 3, xvii., 21, 13, Valer. Max., ii., 4, and by other writers. For explanation of it we refer to Rein's Röm. Privatrecht, p. 208, and to an essay in Savigny's vermischt. Schrift, vol. i., No. 4. He violated public feeling and his conscientious scruples were a mere pretext.

rejecting the story altogether. Various have been the attempts to explain it or to reconcile it with the probable state of facts. It may have been the first divorce in which a family court was not called, or the first in which no fault on the part of the wife could be alleged, and in which, without her consent, the husband terminated the union.

This was just before the second Punic war. The victories over Carthage, the extension of the Roman empire in Greece and the East, conspired with internal political changes and with the decline of religious fear, to hasten on a corruption of manners and of morals, a luxury and an avarice greater perhaps than any other nation ever reached. Rome was built on family discipline, on economy, thrift, and order, rather then on domestic affection. The Roman matron, austere by the discipline of life, was not much loved,—she was the house mistress simply. As soon as the old rigor of family life passed away, every thing in morals fell, and marriage was poisoned at its foundation. At the same time the increasing prevalence of the free form of marriage put it into the power of the wife's nearest relations to dissolve the union for her, and her own position became increasingly independent. Thus a step which only the husband could take under the old forms attended with the *manus*, could now be taken almost as freely by the wife; and a step which, in the older forms, needed a solemn formality in order to be valid, could now

be taken with almost no formalities at all.* Add to this that the dower brought by the wife became almost an essential part of marriage, and avarice added its weight to the various other motives for divorce, if the chance of a better dower were offered. The dissolution of morals began with the upper classes at Rome, but the contagion could not help reaching the lower parts of society, the needy, shiftless freeman, the supple freedman, and the profligate foreigner, who made up a large part of the free population of Rome.

Toward the end of the Republic, then, things had reached this pass in regard to divorce:—that public opinion had ceased to frown upon it, that it could be initiated by husband and wife with almost equal freedom, that there was a ready consent of both parties to the separation in the prospect of marrying again, and that this facility of divorce was open to all classes who could contract lawful marriage. It might be supposed that the crime of adultery would be diminished by the power thus furnished of entering into a new marriage

* In the *confarreatio* or religious marriage of the patricians, a form called *diffarreatio*—that is, separation with the ceremony of offering the cake of spelt, as *confarreatio* denoted union with the same ceremony—dissolved the marriage tie. In both *coemptio* and *usus*, it is probable, a form called *remancipatio*, another fictitious sale, set the wife free from her husband. In marriage without the *manus* no form was necessary, and this kind of marriage at the fall of the Republic had superseded the others almost entirely.

with an object of guilty attachment. But adultery too went along with divorce. They were both indications of a horrible corruption, and neither of them was a vent-hole large enough to let off alone the inward foul stench of family life. And if proof were wanted of this we need only refer to the legislation of Augustus, and to the continual allusions made to adultery by the poets of the imperial times, such as Juvenal and Martial.

A few particulars, however, illustrating the sunken condition of the Roman lady toward the end of the Republic, and the small degree of sanctity which the marriage tie had now come to have, will perhaps make more impression than the most emphatic general statements. Already, before the last age of the republic, there was a foreshadowing of a decline of family morals in the expensiveness and in the crimes of married women. It was not enough that the Censor could interfere by his almost unrestrained power as a conservator of public morals; sumptuary laws also, broken and disregarded to be re-enacted with new provisions, show what was felt to be an evil of family life. At an early time also poisoning of a husband by a wife is noticed by the Roman historians. The case mentioned by Livy, as occurring in the year 423 of the city (B. C. 331) wears the look of an incredible prodigy. A number of the principal men having died without known cause, a maid gave information to one of the ædiles that some of the leading matrons had pre-

pared and administered poisonous drinks. The case was looked into by order of the Senate, twenty were put to death at first, being compelled to take their own potions, and as many as one hundred and seventy were condemned afterward (Livy, viii., 18). Again about the year 572 (B. C. 182) the wife of a consul was convicted by many witnesses of having poisoned her husband; and a little later, just before the third Punic war, two of the first ladies of Rome, being convicted of the same crime by a court of relatives, were put to death.*

Nor ought we to overlook that frightful development of mingled superstition and lust, the affair of the Bacchanals, which so much alarmed the Senate on account of its political as well as its moral aspects in the year of the city 568 (B. C. 186), and which in the very circumstances of its detection gives us a dark picture of family life, and discloses to us, as it were before the time, the corruption of Roman morals. It is to the year prior to that which brought these things to light, that Livy assigns the introduction of foreign luxuries through the soldiery who had served in Asia;—the costly garments and furniture, the singing women and sumptuous feasts, the cook, "vilest of slaves in the view of the forefathers," but now regarded as an artist. Yet, adds he, what was then witnessed was but the seeds of a luxury that was to come. The corruption that grew from the time of Sulla to that of Catiline, which

* Livy, xl., 37, and Epit. xlviii.

Clodius helped to increase, at the acme of which that "strong-minded" woman, Fulvia, and then such a person as Julia, an emperor's daughter, flourished, is acknowledged and painted in glaring colors by the Roman historians. They are more apt, however, to dwell on avarice, lust of power, and luxury as the groundwork of the evil, not making enough of the decay of religion and the family, and still less aware of the deadly influence of slavery. The satirist Juvenal speaks thus of the sources of the corruption (vi., 294):

> Nullum crimen abest facinusque libidinis, ex quo
> Paupertas Romana perit.

And again (vi., 298):

> Prima peregrinos obscœna pecunia mores
> Intulit, et turpi fregerunt secula luxu
> Divitiæ molles.

But Horace goes more to the roots of things, when he says

> Fecunda culpæ secula nuptias
> Primum inquinavere et genus et domos.
> Hoc fonte derivata clades
> In patriam populumque fluxit. (Carm., iii., 6.)

We know Rome best during the last age of the republic, or at least biography and anecdote preserve more details of the private life of that period. Let us look at a few of these details which touch on divorce and domestic morals.

First we notice cases in which a slight impro-

priety on the part of the woman furnished ground for divorce. Here the ancient severity and a weakening of the family tie mingled their influences in one. A Sulpicius Gallus put away his wife because she had gone abroad with her head uncovered. An Antistius Vetus did the same, because his wife was seen by him talking in public with a freedwoman of the common sort; and a Sempronius Sophus, because his wife went to the spectacle without his knowledge. These may have been early cases: then, as morals fell and divorce grew common, mere dislike, or a fancy for some one else, caused men and women to desert their partners with a very summary notice, such as *tuas res tibi habeto.* An early instance of this occurs in the case of Æmilius Paullus, who put away Papiria, the mother of Scipio Africanus the younger, without giving any reasons for the step. Another striking instance is mentioned by a correspondent of Cicero, that of Paulla Valeria, the sister of Triarius, who divorced herself from her husband on the day that he was to return from his province, for the purpose of marrying Decimus Brutus. Innumerable must have been the cases of this kind. As numberless were divorces on the ground of adultery, provoked very frequently, where the wife committed the crime, by the intolerable dissoluteness and disregard of the husband. Only the fear of having to pay back the *dower* seems now to have restrained divorce, and this

was often counteracted, as has been remarked, by a greater advantage in prospect.

The lives of many of the most eminent Romans show how loose was the marriage tie, or how great the crimes of one of the parties.

L. Lucullus, the conqueror of Mithridates, repudiated two wives on account of their infidelity—Claudia, daughter of a consul, and then Servilia, half-sister of Cato the younger. Her sister, another Servilia, the mother of Brutus, Cæsar's murderer, was a favorite mistress of Julius Cæsar. Cæsar was married four times:—his first wife, Cossutia, he divorced in his youth, to marry the daughter of the infamous Cinna; his third wife, Pompeia, he divorced on suspicion of an intrigue between her and Clodius, who came by stealth into her husband's house, in female attire, at the celebration of the mysteries of the Bona Dea. Cæsar himself was notorious for his impurity and libertinage, so that his soldiers scoffed about it in a triumphal procession. Pompey, a less immoral but much meaner man, repudiated his first wife, Antistia, to please the dictator Sulla, and his third, Mucia, on account of her profligacy. What shall we say of Cicero, one of the best of the Romans, who dismissed Terentia without crime, after a long marriage, to unite himself with a rich young lady, Publilia, in the hope of paying his debts out of her property. This connection, also, proved unfortunate, and was dissolved in

about a year. Nor was his daughter Tullia less happy in her matrimonial affairs. Her first husband dying, she married a second, from whom ere long she divorced herself, and then became the wife of a most profligate man, Dolabella, who divorced his wife Fabia, it is said, to marry her. Cato the younger was married twice, and the second wife was worthy of him, but the first, Atilia, he divorced for adultery, after she had borne him two children. To these specimens, drawn from the families of the leading men at Rome, a rich collection might be added. If we now go down a little to Augustus, who forced the husband of Livia to repudiate her for his benefit, and took her to wife three months before the birth of a child by her first husband, or to his minister Mæcenas, who was as scandalous in his life as he was elegant in his taste, or to the profligate life of Julia, the emperor's daughter, and of so many other ladies of the house of the Cæsars, we shall find that family life grew worse instead of better, as the republic fell. There were indeed efforts made to effect a reform. Augustus, profligate himself, endeavored to alter morals by legislation—first in the year 727 (B. C. 27), then in 736 (B. C. 18), by several laws, among which the *lex Julia de adulteriis et de pudicitia* may be mentioned, and finally in 762 (A. D. 9), by the *lex Papia Poppæa*. Of these laws, so far as they related to divorce, we shall say at present but a word, although they

form an epoch in the Roman legislation concerning the family relations. Divorce was now subjected to certain formalities, not being valid unless declared before seven grown-up Roman men and a freedman of the divorcing party. The man whose wife was caught in adultery or found guilty of it was obliged to put her away, on penalty of being held privy to the crime, and it was made incumbent on him to prosecute in such a case within sixty days, after which any other person might act as her accuser. A woman convicted of this crime was punished with relegation and a loss of a certain portion of her dower and of her goods. A freedwoman marrying her patron could not take out a divorce without his consent. This legislation also settled more fully and minutely a principle already acted upon, that in suits concerning dower after divorce the fault of the wife subjected her to the husband's retention of a portion of the dower. This in the practice of Roman law seems to have been a most important matter, but its details do not belong here.

Augustus, and even that frightful wretch Tiberius, acted as legislators in the department of family morals. But morals grew worse and worse. He who is shocked by the developments of family life in the oration for Cluentius, or by such a character as Aurelia Orestilla, who, being reluctant to marry Cataline on account of a grown-up son, consummated the union when the son was made

way with,—he who is shocked by these earlier acts of wickedness will be more shocked by what Suetonius and that tragic historian Tacitus have to tell of life under the emperors. It was then that Seneca, a man better skilled in writing than in acting morally, could say that no woman was now ashamed of divorce, since certain illustrious and noble ladies counted their years not by the number of consuls but of husbands. The moral disease had reached the vitals, and was incurable. As Rome rose to her greatness by severity of family life, so she fell into ruins by laxity just at that point.

Rome is a most interesting study for us Americans, because her vices, greed for gold, prodigality, a coarse material civilization, corruption in the family, as manifested by connubial unfaithfulness and by divorce, are increasing among us. We have got rid of one of her curses, slavery, and that is a great ground of hope for the future. But whether we are to be a thoroughly Christian nation, or to decay and lose our present political forms, depends upon our ability to keep family life pure and simple.*

* For divorce among the Romans, Wächter's work on that subject (Stuttgart, 1822), Rein's Privatrecht (Leipzig, 1836), Bekker-Marquardt's Roman Antiquities, part v. (Leipzig, 1861), and Rosbach's Roman Marriage, deserve, among many others, especial mention (1869). See also Marquardt (in his and Mommsen's Handb. d. Röm. Alt.) in vol. i. of his *Privatleben der Römer* (1879).

CHAPTER II.

DOCTRINE OF DIVORCE IN THE NEW TESTAMENT.

Nothing places in a more striking light the sway of Christ over the mind of the Christian world than the fact that a few hints of his have been enough to turn the opinions and the practice of men into a new channel. This is illustrated by what he says of divorce, in giving commands concerning which he passes outside of his ordinary line of teaching, and enters into the region of positive external morality, instead of confining his precepts to the regulation of the thoughts and the affections. What he says on this subject is small in compass, it is a moral rule, and not in form a law for a state, it leaves more than one problem to be solved; yet it has to a great extent controlled Christian law in an important branch of private relations, it has directed the discipline of the Church, it has helped to purify the family, and thus has aided the spread of the Gospel. It was, moreover, eminently needed at the time when it was made known. We hope to have shown, in our first chapter, that

the great looseness and corruption, in the marriage relations, of the three nations to whom the world owes most of its progress, called for a reform, that there was need that a higher idea of marriage, a deeper sense of its sanctity should be placed among men, and a community be formed where the practice should be consonant with the idea. This has been done by Christ through his church; and they who receive him as the Lord from heaven, when they reflect that he is abstinent and reserved on most points of external morality, will admire the wisdom which led him to be outspoken on this. We propose, in the present chapter, to examine his words relating to divorce which are on record, and then to proceed to a consideration of the Apostle Paul's precepts on the same subject.

The passages in the Gospels which bear on the subject of divorce are contained in Matthew v. 31, 32; xix. 3–9; Mark x. 2–12; and Luke xvi. 18. The second and third of these passages were evidently uttered on the same occasion in reply to tempting questions put by Pharisees, and with some differences of importance they have the same strain of thought. The passage in Luke is found in company with verses, between which the connection of thought is hard to be traced, in an address or reply to the sneers of covetous Pharisees. When we compare this passage with that in the Sermon on the Mount, the disjointed thoughts in Luke have a light thrown upon them,

and appear to be fragments of the same discourse. Without the place in Matthew we could find no law of association in Luke, or at most could only guess at one. But with the help of the first gospel, verse 17 of Luke, "and it is easier for heaven and earth to pass than one tittle of the law to fail," occurring as it does in Matthew, chap. v., and being an essential part of that wonderful sermon, is seen to have a connexion with verse 18, which treats of divorce. Either then Luke gives us detached parts of the sermon, or Christ repeated his instructions in similar forms on different occasions, in the one case delivering them to the people, in the other to the Pharisees. Which of these harmonizing theories is to be chosen it is not our business here to decide. We assume that our Lord expressed himself at least twice on the subject of divorce, and not once only, for we assume that there was a connected discourse on the mount, and that the words in Matthew, v. 31, 32, fit too well into that discourse not to have belonged to it from the first.

The principal differences between these places of the gospels are the following:—1. Matthew in both his passages adds a condition under which divorce is permissible,—"except on the ground of fornication," "but for fornication,"—while Mark and Luke express a prohibition of divorce which is altogether absolute. It is easy to say with Meyer, that the condition, being understood of course, did

not require to be expressed. But we ought to notice that St. Paul also, when he refers to our Lord's teaching, inserts no condition whatever. We have, then, three witnesses to the absence of the condition against one for it, and the conjecture is not altogether improbable that it was added for the sake of greater clearness in Matthew, rather than omitted out of brevity by the others as being understood of itself.* Upon the meaning of *πορνεία* and the condition itself, we shall speak hereafter.

2. Mark has the important addition, "if a woman shall put away her husband and be married to another she committeth adultery." Now as by Jewish law a woman had no power whatever to put away her husband, this certainly looks like an addition to the original words of Christ, intended for the relations of believers in the heathen countries, where wives could procure divorce as well as husbands. But here again Paul supports Mark in 1 Cor. vii. 10: "unto the married I command, yet not I but the Lord, let not the wife be separated from her husband." What if by the law of Moses the wife could not be active in a case of divorce, we know that this occurred in the family of Herod, and it is likely that Greek or Roman custom may

* As in Romans, vii. 2, 3, where the apostle says broadly, "to the living husband," "while the husband is living," although the law allowed the wife, when put away, to marry another during the first husband's life-time.

have begun to creep in among Hellenistic Jews: at least the license of divorce allowed by the rulers of the world could not have escaped the knowledge of our Lord. Why is it incredible then that he should have contemplated the case of a woman putting away her husband?

3. In Matthew xix. our Lord says every thing in the presence of the Pharisees. In Mark x. he gives out the principle of the indissolubility of marriage, and then in the house expounds the matter further to his disciples. Some critics see a mistake or inaccuracy here. If there were any, it must be laid at Matthew's door, for the words of Mark, "and in the house the disciples asked him again of this matter," give proof of fresh clear recollection. But is there anything forced here in the supposition that our Lord discoursed again to his disciples of what he had said just before, so that there was no need on the part of either evangelist to give an account of the whole conversation. In Matthew the disciples felt perplexed by what he had said, and put him further questions. They would not readily do this before the carping Pharisees, and so Mark's statement that the subject was continued in the house is justified, and his account of what was said in the house is rendered at least probable.

Having thus discussed the form in which our Lord's words appear, let us now look at their purpose and their import. Here the *first* thing to be noticed is that our Lord acts the part not of a civil

legislator, but of a supreme moral teacher. He does not establish a law concerning divorce, but declares that the existing code permits certain things which must be condemned as wrong, as violating high ethical rules acknowledged by the law itself. Every moral teacher, not to say every moral man, must take the same position in regard to the laws of his country. These may, in fact they must, fail to forbid many things which sound morality condemns. The law is an external, general, coarse, imperfect rule, commanding often what the ethical code requires and more frequently permitting what that code prohibits. If there were any permissions of the Jewish law which ran counter to true righteousness, if it afforded any facilities for transgression which ought to be cut off, it was the business of Christ to notice them and to animadvert against them. Herein he differs in no respect from any other moral teacher. Nor are these verses touching divorce peculiar in this respect. When he cites the *lex talionis* of the Old Testament, "an eye for an eye, and a tooth for a tooth," he tells his hearers that justice as expressed in the law might permit this to be done, but there was something higher then justice; "resist not evil" was a better law of life, a law necessary for any one who would be his disciple.

Now it might happen, as it has happened, that some of these rules propounded by our Lord would reform and transform legislation. Such,

owing to the fact that marriage has most important civil, moral, and religious relations, would inevitably be the result of the utterances concerning divorce. Still they are not properly legislation, but they are principles which in lands under a Christian faith must leaven all legislation.

Secondly, the tone our Lord uses, and the ground on which he puts his restrictions of divorce, show at once a remarkable depth of thought and the consciousness of an authority such as pertains to a divine messenger. The man who beyond all others was nourished by the scriptures and reverenced the scriptures, criticises a provision of the Mosaic law, and taxes it with imperfection. In so doing he boldly lays down a principle of the utmost importance and of far-reaching consequences, —that the Mosaic ecouomy, although given by God, was rudimentary, transitory, and accommodated to the state of a nation not yet capable of the highest kind of civil polity. There is in his words even the germ of an abolition of the old economy, the beginning of a judgment pronounced against the old rites, in short against the old religion in its external shape; for if divorce was permitted on account of the hardness of the people's hearts, why might not the forms of the ceremonial law be accommodated to an early stage of their progress and be unsuitable for a more advanced stage. Thus our Lord, without seeming to do so, drove that entering wedge into the law, which

Paul and others drove further, until all men saw that the Jewish code was not obligatory on Christians.

Nor is the reason which our Lord gives for his new morality, in the matter of divorce, less remarkable. The freedom allowed by the law, he says, was inconsistent with the true primeval conception of marriage. Law, a patchwork of expedients, needs not to conform to the true conception of human relations,—that is to say, there are times, there is a state of feeling, a "hardness of hearts," which stand in the way of perfect legislation; although the nearer the law approaches to that standard, the greater the proof and the greater the security of the genuine culture of the people. But morality must conform to the true idea, and it is the highest merit of a moral teacher, if he has the idea bright in his own mind and is able to set it forth to his fellow-men. Christ had this idea. He who never drew from experience any judgments concerning the human relations of which he here speaks, whose vocation was too high for the entanglements of family life,—this man corrects the judgments of men by a reference to the essential nature of marriage; it is the state of life in which two have become one flesh, it is a state founded by God at the first creation of man, it is therefore a union made by divine authority which human authority may not sever.

Before proceeding to the special rules which our Lord lays down, we remark that he does not side

with either of the two schools which then divided opinion among the Jews on the subject of divorce. The doctrines of Hillel* of course he utterly discards, but he does not give his adhesion to those of Shammai any more than in the conversation with the Samaritan woman he pronounces altogether for the Jews against her nation. In fact it is altogether probable that his rule is far stricter than that of the school of Shammai, and he shows no interest in the explanation of Deut. xxiv. 1–5, about which the Rabbis wrangled. His interest is moral, his views are general and human, not Jewish and Mosaical, while his line of thought must have surprised the tithers of mint, anise, and cummin.

What then does he lay down? His rules may be all comprised in the following propositions:

First, that the man who in conformity with the permission or sufferance of the law puts away his wife by a bill of divorcement,—"saving for the cause of fornication"—and marries another commits adultery, or, as Mark has it, commits adultery "against her," or to her injury.

Second, that the man who thus puts away his wife causes her to commit adultery, that is, by placing it within her power to marry whom she pleases leads her to form an adulterous connection, inasmuch as she is still his wife in the eye of God Matthew alone preserves this declaration.

* See Chapter I., pages 15, 16.

Third, that the man who marries a woman, put away for no crime of her own, commits adultery. This rule is contained in ch. v. of Matt., and in Luke, but not in Mark, nor in some texts of Matt. xix.

Fourth, that the woman who puts away her husband and is married to another commits adultery. As we have already had occasion to say, Mark alone has recorded this declaration, but is sustained by the Apostle Paul.

The general principle, serving as the groundwork of all these declarations, is, that legal divorce does not in the view of God and according to the correct rule of morals authorize either husband or wife thus separated to marry again, with the single exception that when the divorce occurs on account of a sexual crime the innocent party may without guilt contract a second marriage.

In the application of these precepts for the guidance of the church of Christ, we assume for the present that whatever is said only of the husband may be said, *ceteris paribus*, of the wife also. Had the case of a woman divorcing herself from her husband never been put on record by Mark, the reason of the rule would have applied equally to her, and the fact that Jewish law never gave the woman the power to commence proceedings in a divorce would have sufficiently accounted for all silence respecting cases of that description. This case is plain enough, but there are questions of some importance and of some difficulty growing

out of our Saviour's words which need to be considered.

We notice in the first place the fact that nothing is said of the remarriage of a party—a woman for instance—divorced on account of her crime. It has been gravely argued in our country and our time, that inasmuch as the married pair are no longer one flesh after crime, the guilty one is free to marry again, yes, even to marry the tempter or seducer, and that this is no violation of the law of Christ. We admit that Christ observes silence on this point. He is not making a code, but only a special rule. He could not say that such a guilty cause of a divorce committed adultery by marrying again, for she is now free from her husband. But in the first place it had nothing to do with the immediate point on which Christ expresses an opinion, and in the second place such a person would have been punishable by old Jewish law with death. To claim for an adulterer and an adulteress the protection of law in a Christian state, so that, when free through their crime from former obligations, they may legally perpetuate a union begun in sin, is truly to put a premium on adultery. A Herod on that plan, after sinning with his brother's wife, would need only to wait for legal separation to convert incest into legitimate wedlock.

Another question of importance relates to the meaning of *πορνεία* in the two passages of Matthew. Is it synonymous with *μοιχεία* or does it embrace

unchaste acts not going to that length? Can it include acts committed before marriage, or must it be confined to sins which violate the marriage covenant? Interpreters might be named who have given latitude to the word in one or the other of these respects. In regard to the question of time, it is enough to say that our Saviour's whole strain of remark assumes that the parties have become one flesh, and that one of them by the violence of crime has been torn away from the other. He does not go back of the commencement of marriage to inquire what previous crimes, frauds, deficiencies, or closeness of relationship made the union illegitimate *ab initio*. That he leaves to the civil law. He is not giving a lecture on marriage or making canons for church discipline; he is merely answering a question in regard to the termination of a marriage already existing. How then can we conceive him to have referred in his precepts to an antenuptial condition of things. To this, which is entirely conclusive, we might add a consideration which is only corroborative and has no independent force of its own, that in corrupt states of society a most alarming license would be given to divorce by making such a precept embrace a whole life-time before marriage, especially if the rule were applied alike to both sexes.

The word then relates to what has transpired *since* marriage. We add that it must refer to some *outward* act. It can not in its proper sense

denote a mere quality, and, if ever used with a breadth of meaning to embrace sensual lust, it must be in the company of words which make its sense clear, like "in his heart," Matthew v. 28. It must intend a positive outward act which all would understand to be a violation of the obligations of marriage, a departure in essentials from its idea; for so we can best account for the omission of the condition in Mark, Luke, and St. Paul's writings, and for its appearance in Matthew alone. It must point to crime wrought by one of the married pair with a third person, not to wanton conduct in which the married pair unite, which might be called impurity, or lewdness, but never *πορνεία* in any proper sense. We have then, in assigning it a meaning, to choose between the narrowest sense, in which it is strictly synonymous with adultery, or a broader sense, including as well crimes more grave and bestial than adultery, as acts of attempted but interrupted crime. It seems hardly worth our while to decide whether the narrower or wider sense ought to prevail. Many of the best interpreters regard the word as equivalent to the more specific *μοιχεία*, and we are willing to accede to their opinion.*

* Origen seems to understand it thus, Tom. 14 of his comment. on Matthew (iii. 322, 323, ed. Lommatsch). So Greg. Naz. says (Or. 37), that Christ allows separation only from the *πόρνη*, because she *νοθεύει τὸ γένος*. Basil in his 21st canon cited by Suicer, voce *πόρνος* used that word in the same way, and Balsamon re-

But why should an exception like that in the two passages of Matthew be made, if πορνεία is the same as adultery, when the latter crime was punishable with death and thus divorce would seem to be superfluous. A conjectural answer might be drawn from the altered circumstances of the Jews in their later times, when intercourse with the more polished heathen, in whose eyes sexual crimes were not very heinous, tended to relax the strictness with which the law was enforced, and when the right of capital punishment was taken away from their courts by the Romans. But a better solution of the difficulty lies in this, that the husband was not bound, so far as appears, to denounce his guilty wife, but that it was the business of the local police to bring crimes before the local courts—the elders or presbytery of the commune—for their examination and sentence. Thus the husband, even in such cases, might give the ordinary bill of divorcement, leaving it to common fame to bring the matter before the po-

marks that he calls the adulterer a πόρνος. Enthymius in his commentary on Matthew v. 32, explains the one word by the other. All the most recent commentators of highest credit do the same. For opinions allowing a wider sense to the word, Tholuck (Bergpred, ed. 3, p. 229), who himself adheres to the sense which is here defended, and Alford in his note on Matthew v. 32, may be consulted. Grimm defines it to be in the New Testament a general expression denoting *quævis illicitæ veneri indulgens*, seu *quæstus*, seu *libidinis causa*. In the Sept. πορνεία and μοιχεία are parallel in Hosea ii. 2. Comp. Matth. xix. 9.

lice magistrates.* This view of Jewish usage gives a better explanation of Jer. iii. 8, than that which we gave in the first chapter. God is there spoken of as putting adulterous Israel away, and as giving her a bill of divorce, and if our present explanation is the right one, there was no deviation in this from the usage in actual cases of adultery. The husband put away his wife, and on the magistrates devolved the duty of bringing her to justice. With this agrees what is said of Joseph, in Matthew i. 19. He was a just man, and therefore unwilling that the supposed crime of his betrothed should go unrebuked, and yet being reluctant to expose her, he made up his mind to put her away so as not to attract public notice. Justice would be satisfied in his view, so far as he was concerned, if he should abrogate the contract by a private separation.†

But there are frightful crimes against nature, odious even to the heathen: supposing these not to be included in the term *πορνεία* will they furnish no ground for divorce? All that needs to be said here seems to be that death is the penalty for such crimes by Jewish and many other laws, so that the separation would be inevitable; that our

* Comp. Saalschütz, chapters 4 and 5, on the judges and the Shoterim.

† The notion at one time pretty common, that *δίκαιος* here means *mild, clement*, is now nearly exploded. The betrothed was treated as a wife by the law. Deut. xxii. 24.

Lord had no occasion to speak of gross crimes of very rare occurrence about which there could be no difference of opinion; and that if both he and the Pharisees admitted these crimes to be more than adultery, his exception by right reason would include them.

There ought to be, however, some reason why *πορνεία*, the generic word, is here used instead of the more specific *μοιχεία*. That reason can hardly be the rhetorical one of avoiding the repetition of the same word. Nor can it well be what Tholuck suggests, in his commentary on the Sermon on the Mount, that the generic word gives more indication of the moral category of the offense. Still less is De Wette's solution satisfactory—"that *μοιχεία* is avoided because the verb *μοιχᾶσθαι* is afterward used in a wider sense." Perhaps the explanation may be found in the consideration that as the same offense could be called by the one name in relation to the husband, and by the other in relation to the paramour, the word was naturally suggested.

The one exception made by our Saviour excludes all others, unless it can be shown that they are embraced under the same reason to an equal or greater extent. Meyer and Tholuck therefore justly rebuke De Wette for his loose assertion that in allowing one actual ground of divorce our Lord allowed more than one. The exception, when the indissoluble nature of marriage is the starting

point, is of strict interpretation, or else such as all, at the time when it was made, would admit without its being mentioned. And this remark brings us to the passages in the two other Evangelists, and in Paul where no exceptional case is stated. The reason for these unqualified statements of the sacred writers is not—as Meyer well observes—that Christ conceded somewhat at first to Jewish marriages contracted before his church was established,* but that the two Evangelists and the Apostle regard the exception as a matter of course, and pass it over in silence. This they might well do, if the exception related to so great a crime as adultery, which of itself actually caused the married pair to be no longer one flesh, which violated the idea of marriage.

There is nothing in these passages, nor in our Saviour's principle in regard to marriage, nor in other passages of the New Testament, that can fairly be regarded as forbidding the innocent party, against whom the crime of adultery has been committed, to contract a second marriage. This severe opinion arose in the early church. Augustin advocated it in his treatise *de conjugiis*

* A worthy Catholic scholar, Hug, throws this out, and it would help the absolute indissolubility of marriage according to the view of that church, but it would require us to believe that "except it be for fornication," in Matt. xix., is an interpolation. Of this, however, although the reading varies, there is no good evidence.

adulterinis, although in his retractations* this nobly honest man doubts whether he has cleared up the matter in that work. The opinion became current and passed into canonical law. The Council of Trent, in the seventh canon on matrimony, pronounces a curse on him who taxes the church with error for teaching "that he commits adultery who puts away an adulterous wife and marries another woman, and that the woman commits the same crime who puts away an adulterous husband and marries another man." But this canon, which rests on a view of marriage not entirely scriptural, receives no sanction from the New Testament. It is most clear that the words "except it be for fornication" (Matt. xix. 9) allow divorce in that particular case, and that in the divorce spoken of, liberty of remarriage is implied. The question is, what must the parties who heard our Lord have understood by putting away, as our Lord here uses the word. How could they have guessed that he meant separation *quoad torum* only, which was not known to the law? Is it not evident that they were compelled to give that sense to his words which divorce had in the law of Moses about which they were talking. The permission then to put away a wife in this one case involves a permission of remarriage to the innocent party.

After the same analogy the parallel crime of

*Lib. ii., chap. 57.

the husband separates the married pair to the same extent, and involves permission of remarriage to the innocent wife. This is generally conceded by those who do not hold with the Catholics that marriage cannot in the absolute sense be dissolved by crime. But a difficulty here arises. What sense shall we attach to the word adultery—the narrower Jewish sense, or the broader one, which the word now generally carries with it? Among the Jews the wife and the husband were not on an equality; the husband might commit whoredom with an unmarried woman without being an adulterer; the wife was an adulteress when she fell into similar transgression. What then would our Saviour have meant, had he uttered the words used by Mark (x. 12), "and if a woman put away her husband," with the qualification found in Matthew, "saving for the cause of fornication?" If πορνεία could mean any lewd conduct inconsistent with being one flesh, the case might be clear, but this is, to say the least, doubtful, and we have not been able to admit it. As far then as the use of words is concerned we cannot infer that our Lord gave the same liberty of remarriage to the wife thus injured as to the husband similarly wronged. But when we consider that he must have viewed the husband's crime with an unmarried woman as a great one, as an equal violation of the marriage covenant with the wife's, as an equal breach of the original law or declaration

that "they twain shall be one flesh," which excludes all sexual impurity of both alike with any one else, we believe that he would have placed both partners on the same ground, and given liberty of remarriage in that one case to the wronged woman. And as Meyer on Mark x. 12, says: Mark's omission of Matthew's *μὴ ἐπὶ πορνείᾳ* made no real difference, this reason for divorce being understood of itself. Perhaps, also, the woman's right of divorce may have crept in among the Jews, from intercourse with Greece and Rome (Comp. Jos., Antiq., xv., 7, 10).

But may it not be said with Augustin,* that the precept of Paul, "if she depart, let her remain unmarried," can only be reconciled with the words of our Lord, on the supposition that this departure had taken place on the ground of the adultery of her husband. She could then put him away or depart from him, but according to Christian law had no liberty of remarriage; and she might be reconciled to him so as to live with him again. The same would be true, *mutatis mutandis*, of the husband, and thus forgiveness for the highest matrimonial crime would be in accordance with the spirit of the gospel, but remarriage be opposite both to its genius and its positive rules. Or, to express the argument in a word, Christ allows putting away only on account of adultery. But Paul conceives of a separation of one member of the church from another who is a husband or wife.

* De adult. conj., near the beginning.

Therefore this separation must be on the ground of adultery. But the party leaving the other must remain unmarried. Therefore the man or woman separated from a guilty partner must remain unmarried.

The right way of meeting this argument is to deny that separation is understood by Christ and Paul in the same sense, and to take the ground that the case of adultery was not before the Apostle's mind. Christ was arguing with the Pharisees on such divorces as were attended with a license of marrying again, and denies that any such could take place except in one specific instance. It is in the highest degree improbable that he had in his mind separations *a mensa et toro*. Did Paul draw the rule tighter, and deny that remarriage was lawful even in that specific instance? Or did he not rather contemplate such separations of an informal sort, begun without even the idea of remarriage, as might have occurred within the Christian Church? To us it appears that he meant such separations by his word χωρισθῇ, and he says in effect, if separated let her not commit adultery by marrying again, which she would do if she had left her husband for a cause falling short of adultery.

We now pass on to that important passage in the first of Corinthians (vii., 12 onw.), in which Paul handles the subject of divorce. Two cases are here noticed, one for which the Lord had given

commandment, where both the parties were Christian believers, and another which had not been provided for by the Saviour's authority, where one of the parties was an unbeliever. *In regard to the first case*, the Apostle must refer to the commandment contained in the extant words of Christ, or to some other of similar import. We have already observed that he coincides with Mark in speaking of a wife divorcing herself from her husband, and with both Mark and Luke in omitting the exception which Matthew twice inserts in his Gospel. How the exception came to be omitted we have tried to explain, and the explanation will derive additional weight from a similar omission in Rom. vii. 2, where, when it broadly said that the wife is bound by the law to her husband as long as he liveth, the Apostle puts out of sight the husband's freedom of divorcing the wife which the law itself concedes to him.

The commandment of Christ is limited, as we conceive, by the Apostle to the case where both partners in the marriage are believers, because only in such a case could it be regarded as the practical law of the household, whatever might be the law of the land, and in such a case its infraction would always fall under the jurisdiction of the church. In the other case one of the parties would feel bound to submit to a commandment to which the other attached no binding force. It may be that the Apostle regarded marriage to be as indissoluble

in itself for partners of diverse faith, or even for two heathen, as for two Christian believers. The principle uttered by Christ of the "one flesh," he may have fully received as applicable to marriage in general, and yet there was need of discussing a second case, not because the principle here was different, but because it contained difficulties which needed to be considered by themselves. We must not impute to the Apostle the opinion that Christ's precept was not as broad as the reasons on which it was based, but the gospel in its spread met persons whose subjective state could not be controlled by the precept: there was need therefore of advice for those whom such persons affected by their conduct.

The Apostle's repetition of the Gospel precept, besides the prohibition there found, contains the decision of a case that may have existed at the very time in the Corinthian church. Let not the wife separate herself from her husband. But should she even have separated herself,—which seems to imply that instances of this kind had occurred and were known to the Apostle,—let her remain unmarried or be reconciled to her husband. Here the latter words imply that the separation was due not to any crime on the husband's part, but to dissensions between the married pair. And the Apostle allows the wife who has gone so far—such is the sense of *καὶ* (v. 11)—as even to withdraw from her husband and live apart, the choice between

remaining unmarried and returning, after an amicable settlement of the difficulties, to the former condition. Here the verb denoting separation is somewhat indefinite in its sense. It can denote simple withdrawal from the husband's house and society without any formal act by which remarriage would be legalized, or it can include the declaration of a purpose of divorce besides. We question whether it means so much as this, although it is used as the equivalent of ἀφίημι. For the Apostle says, "let her be reconciled," which seems to imply that mere peace between the parties and return to the husband was all that she had need of, as not having already taken the step of a legal separation. Yet, on the other hand, the expression "let her remain unmarried," involves her power of sooner or later contracting a *legal* marriage with another man. But whatever may be thought of this, it is obvious that the Apostle conceives of a state of things in which a woman, separated from her husband, and, it may be, permanently, shall have no right, according to the Lord's commandment, of marriage with another man. In other words, we have here an actual separation *a mensa et toro* without a separation *a vinculo matrimonii*. This third state between absolute divorce and the full marriage union has then the sanction of the Apostle,—not of course as something desirable, but probably as a kind of barricade against divorce and a defense

of the Saviour's commandment. It may be introduced therefore into the law of Christian lands.

From cases where both parties were Christian believers the Apostle passes on *to a new kind of cases*, doubtless frequent enough, for which Christ had not provided,—those in which one of the parties had received the Gospel, while the other still continued a heathen. In regard to all such cases the Apostle's words involve, without expressing fully, the principle, that the believing party is not to initiate any steps which will terminate the marriage union, but must remain passive, while all active proceedings are expected to emanate from the other side. Thus should the unbelieving husband or wife be content to dwell with the Christian partner, the latter may not put the other away. This is the first case that is noticed, and it was doubtless of frequent occurrence. Here Paul meets a feeling to which the new faith itself might give rise. So great was the transition from the foul worship of impure divinities to the faith in Christ and in a God of holiness, that close connection with a heathen, however ignorantly or innocently begun, might seem unclean and unhallowed. To this he replies, without mentioning the feeling itself, that the heathen partner is hallowed by the believing one, that marriage and the marriage bed preserve their sanctity because one of the parties is a consecrated person. Otherwise the children would be unclean, whereas all admit that they

are consecrated. Without stopping to discuss the Apostle's meaning here, it is enough if we say that he draws a broad line between a family where both parents are heathen and another where one is a Christian.

But the heathen, whose husband or wife had become a Christian convert, might be soured or alienated for that very reason, and might insist on terminating the union. The decision in this second case is expressed in these words: "But if the unbelieving depart let him depart." That is, if he separates himself from his Christian partner (or is in the act of separating himself, as some explain the tense), let him take his course unhindered. A believer has not by his profession been brought into slavery, is not under bondage in such cases, is not subjected to the obligation of keeping up the marriage relation and of preventing the disruption by active measures of his own. Such bondage would subject the believer to a state of warfare, but God's call to him, when he invites him into the Gospel, is in the form of peace. And moreover let not the believing party think that he ought to take on him this painful obligation in order to convert the heathen partner. For it is wholly uncertain whether by living with such a partner, when he is bent on separation, any such result will be attained.*

* The clause, "but God has called us to peace," is difficult. We have given the antithesis, represented by δέ, as pointing to

This is an important passage, as furnishing the authority, if there be any in the scripture, for divorce with remarriage on the ground of desertion. In rendering its meaning, as we have done, we have unavoidably shown a certain amount of bias on that question, because otherwise the connection of thought could not easily be presented. We will now return on our steps, glancing as briefly as possible at the leading interpretations of verses

a state of strife which Paul only hints at, for it seems to us to be implied in the word *χωρίζεται*. The expression "in peace," as the original is literally rendered, many make equivalent with *into peace*. Winer teaches us that Paul never uses *ἐν* as equivalent to *εἰς*, and explains it, "so as to be in peace," which is really admitting what he condemns. De Wette follows him. Harless and Meyer give the solution adopted in our paraphrase:—"God has called us in peace," *i. e.* God's call has come to us in the ethical form of peace. The words, "for what knowest thou—whether," were taken by nearly all the older commentators as implying the possibility that by living together with the heathen the Christian might save him or her. It would then be a dissuasive against separation. But logic will not bend to this rendering. We ought to have for it a different context. It would require *τί δέ* instead of *τί γάρ*, and the words scarcely admit of the version, "what do you know but that," or "how do you know that you will not." For an attempt of Tholuck to defend this way of understanding the interrogation, see his Bergpred. fourth edition, p. 252. Billroth, Rückert, Olshausen take it in the same way. It would strengthen our side to follow them, but this seems to us an inadmissible construction. Nor can verse 17 weigh in opposition. The condition in which the believer actually is, is one of desertion, not one of cohabitation with a husband or wife. Let him or her then remain in this state of desertion. The case is like that mentioned in verse 27.

15 and 16, then looking again at the connection, and finally, endeavoring to discover how the decisions of the Apostle can be brought into harmony with those of the Lord.

The greater part of the commentators, although by no means all, understand οὐ δεδούλωται, "is not under bondage," to deny the necessity of remaining unmarried, and infer from it the lawfulness of taking another husband or wife under the conditions specified by the Apostle. The Catholic Church, so strict in the matter of divorce, allows, and that in good part on the authority of this passage, both divorce and second marriage to a Christian separated from a heathen by the agency of the latter.* The prevailing view among the Protestants also has drawn a justification of divorce in cases of malicious desertion, whether the guilty party be a heathen or not, from this commandment of the Apostle. To some the bondage which the Apostle speaks of is that of remaining unmarried, or the alternative obligation of either remaining unmarried or being reconciled, so that the duty, where one of the parties is a heathen, is just the opposite of that prescribed in verse 11.

* We may have to revert to this again; at present it is enough to say that in passages of the Canon Law relating to this subject (Decret. Grat., ii. Caus. xxviii., Qu. 2, C. 2, and Decretals, iv., 19, de divortiis, Cap. 7), this text is cited as the authority. It should be added, however, that the opinion entertained in the ancient church concerning heathen marriage facilitated this allowance of remarriage where the parties had been heathen.

Others draw this right of remarriage as an inference from the scope of the passage, rather than rest it upon any particular expression. And the question may be asked with some force, why, if remarriage is not allowed, does the Apostle consider his commandment to be a new one. Is all the difference between the case in verse 11, and that in verse 15, that in the former the separated party must, and in the latter need not be reconciled to the other?

We will first look at the meaning of *οὐ δεδούλωται*. The verb has been compared by some with *δέδεται*, which in several places is made use of by the Apostle to denote the marriage bond (verses 27, 39; Rom. vii. 2). But in truth there is no connection between the two words. The one denotes an obligation merely, and the other a severe or painful obligation, an unfree subjection resembling that of slavery. It might without question be used on the proper occasion by an author who wished to express a harsh necessity of remaining unmarried. But the sense would lie not in the word, but in the context.

What then is the bondage which the context here points out? Meyer correctly answers that *οὐ δεδούλωται* does not deny the obligation to remain unmarried, as Grotius and others assert, but the necessity of continuing the married state; and so he remarks that the place gives no express answer to the question whether Paul concedes re-

marriage to the Christian party. Stanley on the passage remarks in the same strain, "that this is not so much a permission of separation as an assertion that, if on other grounds a separation has taken place, there is no obligation on the Christian partner to insist on a union." So, too, De Wette says, that "the positive side of this notion [*i. e.* of the notion of separation, viz.: remarriage] is certainly not brought forward by the Apostle, although it may be supplied by correct inference." Nor can we forbear to introduce a passage from Neander's commentary on Corinth. vii., for which our readers, we are sure, will thank us. "Protestant exegesis," he says, "has understood the Apostle to the effect that in such a case the Christian party would be authorized to enter into a new marriage. But this is not at all contained in the words. The Apostle simply means, that in things pertaining to religious conviction no one ought to be the slave of another, that the Christian partner cannot be forced to stay with the heathen, if the latter will not allow to the other the exercise of his religious convictions. In such circumstances a separation can be allowed, but of an allowance to contract another marriage there is not a word here said." And we close our citation of authorities with an extract from Tholuck's exposition of the Sermon on the Mount (p. 233, 3d ed.). "The words 'is not in bondage in such cases,'" says he, "have a direct reference only to

living together,—and in verses 10, 11, χωρίζεσθαι is so used that with it reconciliation is thought of as still possible." And in the greatly altered 4th edition (p. 253), he expresses his opinion that "we can not find in the case of malicious desertion so called, which the Apostle adduces, a justification of remarriage."

With this view the Apostle's reasons agree, and show most clearly that whether he regarded remarriage in such cases as lawful or not, he can here have had no thought of it in his mind. The first of these reasons is that a compulsory cohabitation with an unbeliever, who disturbs his partner's peace, is not in accordance with the call of the Gospel. Here then reluctant living with a quarrelsome heathen, not any ultimate step such as remarriage, was in the Apostle's mind. The other reason is that the probability of converting such a heathen partner, so bent on separation, is not so great as to make remaining with him against his will a Christian duty. Here again nothing but dwelling in marriage relations with the heathen husband or wife is thought of. The Apostle's mind goes no further than that point, if we have fairly represented his train of thought, as we have tried to do in harmony with the opinions of the best modern interpreters. The Apostle then says simply this: "if the heathen is bent on separation, let him take his course. You are permitted to suffer this in order to preserve

your peace. You are not bound to stay with him to secure his conversion, for this is an uncertain thing."

But, it may be asked, why did the Apostle think it worth his while to give a decision in such cases, if the decision amounts only to a license of non-cohabitation, without granting the power of re-marriage? And does not the contrast of the cases in verses 11 and 15, show that the obligation required in the former verse—either to remain unmarried or to be reconciled—had no existence in the case of which the latter verse treats; that here, in fact, the believer is neither bound to remain unmarried nor to be reconciled to the infidel partner.

To the first of these fair objections we answer that a new case of duty, unknown among the members of a believing community gathered out of the Jews, came up where a church was gathered in gentile lands. Some there were who in their abhorrence of false gods and of idolatrous worship regarded an unconverted husband or wife as unclean; the contamination spread over the family relations, and a wife, for instance, looked with inward horror on a husband who sacrificed to Zeus or to Aphrodite, although he had been kind to her, and had no thought of separation. Others there were, whose heathen husbands, after interfering with their dearest rights and hopes, determined to separate from them, but who were

morbidly conscientious lest by consenting to such separation they should hinder the conversion of the unbeliever. Was it not well worth the Apostle's while to tell persons so situated how they ought to act?

To the other objection we answer that it would be fair to infer that neither of the injunctions of the eleventh verse can be applied to the fifteenth, unless it could be shown, as we seem to ourselves to have shown, that the context proved the Apostle to have had no thought of remarriage in his mind.

To this we may add that there is a certain improbability, inherent in the case itself, that the Apostle would have given such a permission. The word χωρίζεται denotes any separation, whether attended with a formal statement of a purpose of divorce or not, in other words, it includes divorce and desertion. And the exemption from "bondage" began to exist as soon as the separation commenced. Now would the Apostle have given a license greater than any law of the loosest Christian State gives, when he must have been cognizant of instances in which husbands or wives, who had thus deserted their partners, had become converts within a few months, and were thus ready to be reconciled and to live in Christian wedlock? Would he not have added some qualification or advised some delay?

The view here presented brings the precepts of

our Lord and that of the Apostle into harmony, or at least shows that there is no necessary contradiction between them. The Christian wife or husband should accept as a fact what the unbelieving partner has done, but the marriage, so far as the Apostle lets his opinion be known, may still have been indissoluble, and the injured believer should remain in a state of desertion. All other ways of reconciliation, which proceed on the assumption that Paul permitted remarriage, are failures. Will any one say with De Wette in his Commentary, that both Christ and Paul permit remarriage, when the parties are separated in fact? But Christ, at the most, only allows it in cases of adultery, and if Paul allows it in other cases he enlarges the rule. To say with De Wette that Christ, in the words "except on account of fornication," only give a sample of exceptions which he held to be valid, is to trifle with his words, and to leave the door open for any degree of laxness. Will it be said, as Meyer says, that Christ did not have mixed marriages in his mind, but only marriages within his church? We reply that, in giving a reason of general application, he shows that his rule is universal. If those Pharisees whom he addressed in Matthew, chap. xix., admitted the force of what he said, they would be bound to take it as the rule of their life, even if they could not admit his claims to be the Messiah. Why should the Christian partner in a marriage be

released from obeying a command of his Lord, because the heathen would not submit to it? Or will it be said that Paul, and perhaps Christ, did not regard heathen marriage as marriage in the proper sense, but only as a kind of *contubernium*, to which the laws that govern Christian marriage were inapplicable. But the Apostle nowhere indicates that he holds any such opinion. Marriage with a heathen was, indeed, in his view a violation of Christian duty for one who was already a believer (2 Cor. vi. 14); but marriage contracted in a state of heathenism was a condition in which the heathen was called the husband or wife of the converted partner, in which the Christian was to remain if the heathen did not dissolve the union, in which the unbeliever himself partook of a kind of sanctity and the children were holy. To apply the rules of Ezra's time to the times of the kingdom of God, to require that the idolater must be separated from the believer in the near relations of life was not in accordance with Paul's strain of thinking. Marriage among the heathen, it is true, was far from conforming to the ideal presented to us in the earlier scriptures, where the man is conceived of as cleaving to his wife so closely as to bring her nearer to him than father or mother, and as becoming one flesh with her. But there was some purity left, there were examples of illustrious conjugal fidelity, and there were vices against marriage that "were not so much as

named among the heathen." If on the whole it fell far short of the ideal, so too in a heathen family the parental relation failed to come up to the ideal, and yet the Apostle, without doubt, regarded that as the source of important and permanent obligations; and if he bade bond-servants to treat unbelieving masters with all honor (1 Tim. vi. 1), much more would he have recognized the duties of the natural relation of the child to the unbelieving parent.

The result then to which this exposition has brought us, is that Paul advances beyond our Lord's position in a single particular,—in conceiving of, and to a certain degree, authorizing separation without license of remarriage. That he goes so far is clearly shown by verse 11; that this leads him into any departure from our Lord's principles cannot, we think, be made to appear.

It will be seen in another place that the main stream of Protestant opinion runs in a direction contrary to that which we have pursued in regard to the sense of the Pauline passage in question, although we have the support of several of the ablest modern commentators. It will be seen also, that this opinion, not confining the Apostle's words within the limits of marriages where one of the parties was a heathen, but extending his principle so as to include all cases of desertion, has opened a wide door for divorce in Protestant countries.*

* For certain passages of the New Testament having a possible bearing on divorce, see note 2, in the Appendix.

CHAPTER III.

LAW OF DIVORCE IN THE ROMAN EMPIRE, AND IN THE CHRISTIAN CHURCH.

In the last chapter we attempted to set forth and explain the declaration of Christ and of the Apostle to the Gentiles on the subject of divorce. Our present object is to give a compendious view of the law of divorce in the Roman empire down to the time of Justinian, and of Christian opinion until it became the canonical law of the Catholic Church.

In the first chapter of the present essay we were not able to do much more than to allude to the legislation of Augustus, by which an effort was made to check some of the leading social evils of Rome, and which remained on the whole, ever afterward, the groundwork of Roman legislation respecting marriage. The emperor and his advisers were, without doubt, alarmed by the wide-spread violations of the rights of marriage, but to improve morals was not the only end they had in view. Population was beginning to decline; young men and old were averse to the marriage state, rather choosing to

keep mistresses than to be encumbered with the expensive cares, and tried by the vexations of a family; and persons of the higher ranks preferred in some instances to marry freedwomen rather than the proud and costly descendants of the aristocracy. Hence it was enacted in these Julian laws that an unmarried man between twenty and sixty, and an unmarried woman or widow under fifty, should be debarred from sharing in inheritances or legacies, except where the testator was a very near relative. And, on the other hand, married men, especially those who had three children, enjoyed special privileges and honors. They had better seats than others at the public shows, they had advantages in obtaining office, and took precedence of their colleagues who had no such merit; they were exempted from certain burdens, and enjoyed certain rights of inheritance from which others were excluded; they incurred a milder penalty, when they had committed offenses calling for confiscation of property. Married women, too, who had borne three children, or, if freedwomen, four, had special privileges of their own in cases of inheritance, and were exempted from tutelage. It was enacted, also, to keep up the respectability of senatorial families, that senators and their sons should not marry freedwomen, play-actresses, or women of ambiguous character. Other men could ally themselves to freedwomen, and, as we have seen, when a patron contracted such a marriage,

his wife, being his former slave, could not separate herself from him without his consent.

A very revolting part of the legislation of Augustus concerning marriage, was the legalizing of concubinage, as a state between lawful marriage and mere sexual intercourse. This was done, it would seem, in the hope of increasing population. This condition of life began and ended without formal notice or agreement; and the children had no legal father but only a mother. They therefore were incapable of being their fathers' heirs, but it would naturally happen that bequests would be made to them. Restrictions were put on the validity of legacies of this sort by the early Christian emperors on moral grounds, but Justinian took a milder course, and the way was open for the legitimation of such children. This relation between the sexes seems to have been very common under the empire, so that even free women of the better classes were found willing to take the place of concubines.* To the man it brought,

* A startling proof of this is given in the newly discovered work of Hippolytus, ix., § 12, p. 460, ed. Duncker. He charges Callistus, bishop of Rome, not only with ordaining men who had been married twice or thrice, and with treating a clergyman who had married after ordination as though he had not sinned, but with allowing women of rank, who were believers, to have a male concubine, slave or free, as they chose. Then, adds he, women called believers, began to secure themselves against having children by medicines procuring abortion, because, owing to their family connection and great property, they did not wish to have

as being a legal relation, no loss of respectability, and it was held to be more seemly for the patron to be united to his freedwoman by this tie than by that of a wife.

The legislation of Augustus, while it imposed penalties on adultery, and developed the principle of the retention of dower, left divorce as free as it was before. It could be brought about by common consent, or by action of one of the parties. Such action could be grounded on adultery of the other party,—and indeed the husband was now bound to put away a guilty wife—on *mores leviores* or more trifling offenses against the proprieties of the marriage relation, on various kinds of physical inability to fulfil the ends of marriage, among which madness without lucid intervals may be numbered, and on captivity. Of the incapacity of a freedwoman married to her patron to divorce herself from him we have before spoken. Of the effects of divorce on the speedier restitution of the *dos* or its partial retention, and of the trial of conduct by which the pecuniary liabilities of the two parties were determined we have no room to speak.

It has been maintained, we believe, that facility of divorce is necessary to prevent infractions of

a child by a slave or a low freeman. This Callistus was bishop in A. D. 217–221. Free women of the better classes were required on entering into this condition of life to make a *testatio* or formal notice of their intentions, and were liable otherwise to the penalties pertaining to *stuprum*.

matrimonial rights, but under the empire, although neither law nor opinion set up any strong barriers against divorce, adultery was exceedingly frequent. This appears from the strong assertions of poets and historians, and it is confirmed by facts. The crime burst out like a plague in the very highest classes. The grand-niece of the Emperor Augustus, Aquilia and Claudia Pulchra, members of distinguished families, Aemilia Lepida, wife of Drusus, who killed herself before trial, the sister of Caligula, his wife Livia Orestilla, Julia, daughter of Germanicus and niece of the Emperor Claudius,—these are examples from the history of the first four emperors of ladies tried and punished for this crime.* At the end of the second century an emperor of strictness and energy—Septimius Severus—endeavored to give effect to the laws against adultery, and Dion Cassius says, that, when he himself was consul, he found on looking over the register of cases that three thousand processes for adultery were instituted in this reign, but the war against manners was ineffectual, and the emperor, getting tired of his efforts on behalf of morality, had stopped the prosecutions.†

The penalties for adultery‡ continued until the

* See Rein's Criminalrecht, 850–856.

† Dion Cass., 76, § 16. He was consul about 220 and in 229.

‡ It may need to be said that only a crime to which a married woman was a party could be called *adulterium*. The Romans held that the *jus tori* pertained to the husband. He could not commit this crime against his wife.

time of the Christian emperors, much the same as they had been constituted by the laws of Augustus. The principal penalties we have already mentioned as being relegation and a loss of property. The woman convicted of the crime lost half her dower, and a third of her goods; and from her paramour half his property was taken away. They were banished to different islands. Besides these leading penalties the woman lost her right of marrying again, although she might sink to the condition of a concubine. She could no longer wear the matron's stole nor appear as a witness in the courts. The man also lost the right of testimony, and, if a soldier, was shut out from the army. The Christian emperors increased the severity of punishment for this offense, following herein, it would seem, the example of some of their predecessors, as well as influenced by the spirit of Christian morality. Constantine the Great imposed death with confiscation of goods on the *adulterer*. His sons punished the adulteress with burning and took away from her paramour the privilege of appeal, but this seems to have been only a case of extraordinary and temporary legislation. Under Valentinian the guilty woman was again sentenced to death. Justinian's legislation shut up the woman in a cloister, making it illegal for her husband to take her back within two years. If the parties were not reconciled at the end of this term the marriage was dissolved,

and the woman's imprisonment in the cloister was perpetual. As for the offending man, he was visited with death, but not with confiscation of goods, if he had near relatives in the direct line.*

The legislation of Augustus in regard to divorce remained nearly unaltered until the times of Constantine. It was, however, a very feeble barrier against the disposition to break the marriage tie, and it read no moral lesson on the sanctity of that union. For, in the first place, it was a maxim of Roman law far down beyond the time when the emperors became Christian, that no obstacle ought to be put in the way of a dissolution of marriage caused by the free consent of the partners, liberty of marrying again being in this case equally unrestricted. The lawyer Paulus says, that it has been thought improper that marriages, whether already contracted or about to take place, should be secured by the force of penalty (*poenæ vinculo obstringi*), that is that two parties ought not to be forced by fear of penalty either to enter into a state of wedlock to which they were pledged, or to keep up such a state if they were agreed to the contrary. And it was laid down that marriage was so free, according to ancient opinion, that even agreements between the parties not to separate from one another, could have no validity,

* See Rein, u. s., 848–852, and Novell., 134, § 10, which renews Constantine's legislation.

(*pacta ne liceret divertere non valere*).* In the second place, the laws affected but a small part of the population of Rome. Slaves could contract no marriage. Concubinage became exceedingly common, it is probable, among the lower classes, and to this condition the law of divorce did not apply. The limited range of the law seems to be shown by the fact that for the legal formalities the presence of a freedman of the divorcing party was necessary. It is true that a freedman of a near relative was held to be essentially a freedman of the party giving the notice, but how many thousands of married people, or at least of Romans living together as man and wife there must have been, who could not provide a freedman for this formality. Did these classes furnish no cases of divorce, or were they overlooked by the law? We must conclude that they were never legally married, or that the law was intended to preserve a sort of decency of life in the upper classes, while the lower freemen were left to do as they pleased. Such was the freedom of divorce when it took place by the consent of both parties. It was equally free, a few cases only excepted,† where one of the parties terminated the union without the consent of the

* Paulus in Dig. xlv., 1, 134; Cod. viii., 39, l. 2, de inutil. stip.

† These were adultery,—where a man was obliged on penalty to dismiss his guilty wife;—the case of a freedwoman married to her patron who could not separate from him although he might from her; the captivity or insanity or certain bodily defects of one of the parties.

other, saving that here, if the woman had caused the divorce by her conduct, a large share of her dower was withheld from her, and if the man had caused it, he might be liable to pay over the whole of the dower, and that within a short term. The parties were subjected until the time of Justinian to a *judicium morum*, which might be instituted on a complaint of either consort. The fear, then, of losing a portion or the whole of the dower, and the dread of a loss of reputation, when the conduct of the parties in their married life should be investigated, seem to have been the only inducements to prevent one-sided divorces. But what if no misconduct could be alleged on the part of the man, what if he dismissed his wife to marry a richer woman, the law in this case had no restraining power. And where the wife brought no dower, as might happen in the lower classes, there could be no operation of the law at all.

It will not be strange if examples of the infamous freedom of divorce continued to occur through this period, until the first Christian emperor ascended the throne. Caligula sent away his wife and married another, whom he took from her husband on the wedding day, then after two months banished her from the city and united himself to a third, whom he dismissed on account of barrenness. Claudius repudiated four wives, and the fifth by taking poison escaped a similar lot. Nero and Domitian supply us with instances of divorce.

Elagabalus got rid of his first wife because she had a mole on her body, then, married a vestal virgin—an unlawful thing—and then after sending away a third, fourth, and fifth, returned to the vestal. But the doings of the miserable Carinus (about 284 A. D.), who married and divorced nine wives—*pulsis plerisque praegnantibus*, as the historian Vopiscus writes—are not easily matched, unless by the feats of those Roman ladies of whom Juvenal says, (vi. 229):

"Sic fiunt octo mariti
Quinque per auctumnos;

or that other in Martial's epigram, (vi. 7):

"Aut minus, aut certe non plus tricesima lux est
Et nubit decimo jam Thelesina viro."

Martial atones for many bad things by the words which follow:

"Quae nubit toties, non nubit, adultera lege est."

But even Christian emperors practiced divorce, either on political grounds, as Honorius, or for private reasons, as Valentinian I. and Theodosius II., the latter because his sister and his wife were at variance.

With Constantine begins a strife between the stiffness of the principles of Roman law and the propensities of corrupt society on the one hand and the interests of religion and morality on the other. The vicissitudes of the contest show how hard it is to introduce legislation founded on higher principles into a demoralized society, half

heathenish, and with unbroken precedents in favor of looseness in the marriage relations. Marriage had been a mere civil contract: the half-measures, the indirect ways of legislation, the ease with which they were overturned, from this point of time onward for more than two centuries, show that the world was still half, or more than half pagan. Christianity was doing something on behalf of humanity, something on behalf of justice, something on behalf of the sanctity of marriage throughout society, but we believe also that it could not have given new life to Rome, that when it shattered and dissolved the empire, this was a beneficent work, necessary for the greater sway of Christian ideas in future ages. It was the stone that was cut out without hands, and it smote the image upon his feet of iron and clay and brake them to pieces.

Neither Constantine, nor any of his successors before Justinian, attempted to interfere with divorces by consent of the parties. His legislation went no farther than to fix the cases in which the parties could without fault separate from one another. There were three for the woman, namely when the man was a homicide, a poisoner, or a violator of sepulchres; and three for the man, namely when the woman was an adulteress, a poisoner, or a procuress. This enactment belongs to the year 331. In 337 the wife had permission to put away her husband for the fourth reason

that he, being in the army, had given her no news of himself for four years.

If either of the married partners separated from the other without the justification furnished by the above-mentioned crimes, they were visited with penalties of a severity unknown before in similar offenses to Roman law. The wife who forsook her husband lost her dower "to the very last mite," and was banished to an island. The husband who sent away his wife without cause was bound to restore her all her dower at once, and was forbidden to marry the second time. Still further, if he thus married, his repudiated wife "could invade his house," as the law expresses it, and acquire possession of the entire dower of her successor. Of Constantine's penalties for adultery we have already spoken.

We add, as shewing the spirit of legislation under Constantine, that he struck a side blow at concubinage by granting legitimacy to children already born in that kind of union, whose parents should contract legitimate marriage, and also by forbidding fathers to give any thing to such children or to their mothers in the way of donation or testament. But this last law was overturned by Valentinian I. and was not restored afterward in its full severity until the Emperor Leo, the philosopher (in Cent. 9), abolished concubinage in the East. Justinian extended the principle of legitimation introduced by Constantine to the

children of concubinage in general. Such a tough life did this degraded caricature of marriage have, although abhorred by all the Christians in the world.

The divorce laws of Constantine were abolished by Julian (A. D. 363), who brought things back, as far as he could, into their old pagan channel. From that time for about sixty years there seems to have been no change in the law. Honorius, in A. D. 421, returned in a degree to the principles of Constantine's legislation, but united with them the old principle of Roman law, which Julian had recalled, of a one-sided separation for lighter faults, with retention of more or less of the dower. Theodosius II. in 439 abrogated earlier ordinances —probably those of Honorius—and after ten years of experiment, in which divorces had alarmingly increased, gave out another law, which laid down the causes for which one party might lawfully separate from the other. The woman was authorized to do this if the man had been guilty of certain crimes, among which are murder, poisoning, plotting against the government, fraud, and various sorts of robbery, cruelty toward or attempts on the life of his wife, intimacy with prostitutes, and adultery. The causes for which a man could without penalty put away his wife were for the most part of the same description with those just mentioned. But peculiar to her are the offenses of passing the night out of his

house, or of visiting the theatre, circus, or other public place against his will. Both the laws of Honorius and those of Theodosius had their penalties for unlawful divorce which we cannot stop to notice.

We go down to Justinian who, after tinkering on various occasions with this title of the laws, promulgated an important law in 536 (Novell. xxii.), and another in 542 (Novell. cxvii.). Of the last of these alone will our limits allow us to speak. This statute abolished for the first time divorce *ex communi consensu*, with the single exception that the married pair might give each other leave to go into a convent or take a vow of chastity. This was a most important step, and no Christian emperor had ventured to take it, although the contrary has, we believe, been asserted. As late as Anastasius, the second emperor of the East before Justinian, there seems to have been no scruple about divorces by consent of the parties, and a woman so divorced is allowed to marry after one year.* This statute of Justinian

* This in fact appears from the law itself (Novell. 117, § 10), "Since many hitherto have dissolved marriage by agreement, we allow this to take place in no case hereafter," [except on account of chastity].—Comp. Cod. v. 17, l. 9.

It is remarkable that until the Novella 134 was issued in A. D. 556, there was no penalty attached to divorce *ex communi consensu*. Now the penalty for both parties was, to be shut up in a monastery and to lose their property. But if persons attempting to separate from one another in this way recalled their act be-

again defined *the justifiable* causes of divorce, which were nearly the same as those that the law of Theodosius had laid down. In these cases the culpable party sustained a pecuniary loss by the separation, and might suffer also for his or her crime. Besides this kind of divorces, another, called divorce *bonâ gratiâ*, was allowed in special cases due to no fault of either party. The cases were impotence, captivity, and the choice of a monastic life—not by both consorts, which was provided for in another chapter of the law, but by either the wife or the husband. Lastly, there might be divorce without good reasons (*citra omnem causam*), which was visited with special punishments, especially with pecuniary loss.*

Some of the later laws prohibited remarriage to the party whose faults furnished ground for the divorce, or who dissolved the union without reason. The later legislation is also noticeable for another principle—the prohibition of marriage to a culpable party for a certain period.

This imperfect sketch is sufficient, perhaps, to present to our readers the leading features of divorce legislation under the empire. As a summing up of what has been said we remark:

fore going into the monastery, they might escape from these penalties. Agents in the transaction, such as notaries, were to be corporally punished and sent into exile.—Justin, in Novel. 140 (A. D. 566), restored divorce by common consent.

* See note 2 to chapter 3 in the Appendix.

1. That divorce *ex communi consensu* kept its ground all the way down to Justinian, and was attended with liberty of remarriage.

2. That divorce on account of adultery affected the dower and other property, and that the punishment of adultery increased in severity under the Christian emperors.

3. That divorce for greater or less fault of one of the parties was visited on the faulty party in the shape of retention of dower from the woman in whole or in part, and of payment of the dower in whole or in part by the man. At length some restrictions were put on the remarriage of the culpable partner.

4. Much the same may be said of groundless divorce in its consequences to the party which initiated it.

5. The Roman law during the empire did not to any extent prohibit divorce, but only made its consequences unpleasant; nor did it, except in a few cases, prohibit remarriage.

6. We see then that the influence of Christian views, which were already matured and vigorous in a theory of marriage, produced for a long time but little influence in changing the traditional principles of Roman law on this important department of the marriage relations.

But what were these Christian views in regard to divorce, which for a time conflicted with the principles of Roman law, and at length gained a

victory over them? To understand fully the state of Christian opinion in this respect we ought to trace the doctrine of the church on marriage in general, from its beginnings derived from the Gospel or some other source, until it grew into a vast body of canonical law. But we have no room for such an exposition. We can only mention the sources to which this doctrine is to be referred. Of these there were two, a new conviction of the sanctity and closeness of the marriage relation, and a feeling that marriage, though a good and lawful state, was not the best or highest form of life. The conviction was founded on Christ's teachings and other passages in the New Testament, and on the spirit of Christianity which harmonized entirely with express declarations. Marriage now was God's ordinance, and at length was grouped together with some other important religious transactions of life in a class not very logically coherent, to which the name of sacraments was attached. The beautiful analogy traced by the apostle Paul between Christ and the Church on the one hand and the husband and wife on the other helped to secure for marriage a place among the sacraments.

But there grew up also at an early age of the church an opinion that a single life,—a life of chastity as it was called, just as many in the United States call abstinence from spirituous drinks a life of temperance,—was best for the interests of

the soul. This opinion was partly due to Gnostic or ascetic doctrines that crept in; partly it was a reaction against the deplorable licentiousness of heathenism, and it found a degree of support in passages of Scripture. Such were our Lord's words in Matthew xix. 12, several passages of Paul in 1 Cor. vii., and the place in Revelations, xiv. 4, where "virgins," understood of men, was supposed to commend celibacy. But the Fathers, as a body, held marriage in honor, as an institution of God. A Tertullian, after he slipped into Montanism, almost deserted this position, when he inveighed against second marriage as a sin. A Jerome writing against Jovinian, who had asserted that virgins widows and wives had equal merit, might say, "Si bonum est mulierem non tangere, malum est ergo tangere. Si autem malum est et ignoscitur, ideo conceditur, ne malo quid deterius fiat." But his logic came back to him when he grew cool, and in general the doctrine that marriage was an evil was left for heretics animated by an evil spirit "forbidding to marry."

To these sources, in whole or in part, must be ascribed the encouragement given to vows of virginity, to professions of widowhood, and to a solitary or social life of abstinence from marriage. Hence too the discouragement, in the case of laymen, of a marriage subsequent to the first, toward which such dislike was sometimes felt, that a Father of the second century could call

second marriages, "specious adultery," and fourth marriages, together with third in some cases, were afterward prohibited by law in the Greek empire. Hence also the early ban put on second marriages of the clergy. Hence the long struggle against a married clergy, which in the western church was so far successful at length as to separate a married man wishing to become a priest from his wife, to make marriages after ordination void and punishable with a loss of office, and to extend the prohibition of them to all but the lowest servants of the church.* Hence, finally, the hindrances to marriage from blood and affinity, which reached in their operation to a wide circle of relations.

The doctrine of the ancient church on divorce was tolerably well established long before marriage came to be regarded as a sacrament in the more modern sense of that term. At the same time the sacramental character attached to marriage strengthened the view which Scripture authorized of its fixed and indissoluble nature. Even death was held by some, although never by the prevalent opinion, to be no dissolution of the bond. The original source of the doctrine was of course the declarations in the gospel, which were honestly and laboriously interpreted with a pretty

* Much as Jerome disparaged marriage, he freely admitted, as did most others, that any number of successive marriages was not unlawful. "Non damno bigamos, imo nec trigamos et, si dici potest, octagamos." Ad Pammach. Apologet. c. Joviu.

uniform result long before the doctrine of the sacraments was developed. This doctrine did not first teach the unlawfulness of dissolving the marriage tie, but took that view from the Scriptures and from the firm prevalent opinion already spread through the church. Afterward, however, the sacramental nature of marriage without doubt acted back to give more of rigor to marriage and to impede its dissolution. With this and before this the Christian spirit of forgiveness had an important influence on opinion in regard to divorce. The high sin of either party against the union might be repented of and God could forgive it. Why should not the parties be reconciled also? But for this it was necessary that they should remain unmarried. When forgiveness and restoration *ad integrum* became canonically lawful, there was naturally less need of relaxation in favor of a final separation with liberty of remarriage. These three then, Christ's law in the Gospel and as explained by Paul, the sacramental quality of marriage, the Christian duty of forgiveness, gave the shape to the doctrine of divorce in the ancient church. If the marriage had not been a Christian one, that is, had had no sacramental character, a complete divorce might take effect in the following cases, and in these only. In the *first* place an infidel converted to Christianity was to put away all his wives but the first. As however in this instance there was no true marriage according

to Christian doctrine with any but the first wife, there was no real divorce in ceasing to have any relation to the others, who were merely concubines. *Secondly*, a converted infidel, who had put away his wife and married another, was required to take back again the first, even if she should have contracted a second marriage. Here again there was no true divorce, for the divorce and remarriage of both the parties was regarded as unlawful. *Thirdly*, if an infidel became a convert to Christianity, and his or her married partner was unwilling to keep up the marriage relation on any terms, or at least not without blaspheming God or leading the other into mortal sin, the Christian might be separated from the infidel so as to contract a new marriage.* This decision of the church was based on an interpretation of 1 Cor. vii. 15, concerning which we refer our readers to what was said in our last chapter. And here only have we an instance of true divorce. All other cases, such as marriage to a Jew of a person already a Christian, marriage of a Catholic to a heretic, or schismatic, either rendered the marriage void *ab initio*—which is not divorce in the proper sense—or merely justified a separation *a mensa et toro*, if even that were allowable.†

* The opinion of Innocent III. in the Decretals of Gregory IX., §§ 7, 8, de divortiis iv. 19, may be consulted here in lieu of every thing else.

† In the Greek church, marriage between the orthodox and

A very early and important passage on divorce is contained in the Shepherd of Hermas (ii. Mandat. 4, § 1). We will give it in English. "And I said to him, Master, let me ask thee a few things. Say on, says he, and I said, If any one had a wife faithful in the Lord, and found her in adultery, does the man sin if he lives with her? And he said to me, As long as he is ignorant, the man is without crime, if he lives with her. But if the man had known that his wife had offended, and the woman had not repented, and if she remains in her fornication, and the man lives with her, he will be guilty of her sin and partaker of her adultery. And I said to him, What then if the woman shall persist in her vice. And he said, Let the man put her away, and stay by himself, [*i. e.* remain un-

heretics was forbidden and declared null, although in Russia since 1719 members of the established church may marry members of other confessions. In the Latin church marriage with infidels or Jews has long been considered invalid. But for Catholics and baptized Protestants to intermarry is allowed, if they pledge themselves to educate the children in the Roman faith. Otherwise the priest may not celebrate the nuptials. But in modern times, even if such guaranties should not be given by the parties, the Catholic pastor may be present and record the marriage without blessing it; a singular compromise, as if the church were uncertain whether the transaction were concubinage or not. And in the Netherlands, since the papacy of Benedict XIV. (1740–1758), as well as in the western Prussian provinces since Pius VIII. (1829 onward), mixed marriages, celebrated not according to the form prescribed by the Council of Trent, but in one sanctioned by the law of the land, are regarded as real valid unions. (Walter, Kirchenr., §§ 300, 318).

married.] But if he put away his wife and take another, he too commits adultery himself. And I said to him, What if a woman, when put away, shall repent and wish to return to her husband, shall she not be taken back by her husband? And he said to me, Verily, if her husband do not take her back, he sins, and allows himself to commit a great sin; he ought to take back the sinning woman who has repented; but ought not to do this often. For there is one repentance for the servants of God. On account of repentance therefore the man ought not to marry again. This conduct is incumbent on both man and woman. Nor is there adultery only, said he, if one pollutes his own flesh, but he also who makes an idol commits adultery. Hence, if one persists in such things also and repents not, withdraw from him and live not with him. Otherwise thou too art partaker of his sin. For this was the command given to you to remain unmarried, whether man or woman, for in things of this sort there can be repentance." *

* In the Greek texts, as restored by Tischendorf, in Dressel's edition, and lately by Hilgenfeld, for "the sinning woman who has repented," of the Latin text, appears "him who hath sinned and repented." The words *there is one repentance*, etc., seem to mean that only once and not more than once after baptism, a sinner who has committed an act of open deliberate immorality can be received back as a penitent into the church. To give a sinning wife a motive for repentance and not to drive her to despair —this is what is meant by "on account of repentance a man ought not to marry" another woman. The indulgence of Hermas in

In this passage it is distinctly asserted that a man who puts away an adulterous wife, and marries another woman, commits adultery; and another reason is given for his remaining unmarried—namely that he may be in a condition to receive her back on her repentance. But such indulgence cannot extend beyond the first transgression. Here the foundation on which the first assertion is built is, no doubt, the words of our Lord, as explained by the Apostle in 1 Cor. vii., "let her remain unmarried, or be reconciled to her husband," and Hermas conceived that the reconciliation there referred to was to follow a separation on account of the adultery of the husband. He reasons fairly, as others have done then and since, that if this be a command for the wife, it is such also for the husband. Thus his injunctions are all scriptural, according to his understanding of Scripture. He may have been weak-minded, he may have misunderstood Scripture, as we think that he did; but he represents an opinion that must have been extensively held, and at length became the ruling one, and all this long before the doctrine of the sacramental character of marriage obtained currency.

allowing that there could be any second "repentance," was exceedingly distasteful to Tertullian, after he became a Montanist. Comp. his *de pudicitia*, §§ 10, 20, where he has the words "scriptura Pastoris quæ sola mœchos amat," and thinks that the author ought to have learned the opposite from the Apostles, referring to Hebrews vi. 4–6.

In the next three centuries many other witnesses appear on the same side. Clement, of Alexandria, says (Strom. ii.., 23, § 144), that Scripture "regards marrying again to be adultery, if the other divorced partner is living;" and again, a little after (§ 145), "not only is he who puts away a woman the cause to her of this (adultery), but he who receives her also, as giving her opportunity to sin. For if he did not receive her, she would go back to her husband," where reconciliation is thought of as possible and desirable, whatever the woman had done to occasion the divorce. Origen seems to be of the same mind, where he says that some rulers of the church have permitted a woman to marry, while her husband is alive, contrary to what is written in 1 Cor. vii. 39, and Rom. vii. 3.* That Tertullian could be of another mind would be strange, when his opinion on second marriages in general is taken into account. In the fourth century, near the end, Augustin did more than any other man to establish the same opinion. He advocates it in several places. His treatise, *de conjugiis adulterinis*, to which we have already referred, was written especially to show that 1 Cor. vii. 11, "let her remain unmarried, or be reconciled to her husband," can be understood only of a wife who has withdrawn from her husband on account of his unfaithfulness, and he reasons pow-

* Origen on Matthew xix. 8, in the ed. of Lommatsch, vol. 3, p. 320. For Tertullian, see de Monogam., §§ 9, 10.

erfully, if inconclusively. His friend Pollentius had maintained that in this passage she was to remain unmarried, *quæ sine causa fornicationis discessit a viro*, thus interpreting it correctly, as Chrysostom did, of separation not amounting to formal divorce for causes short of the husband's crime.* Augustin maintains, as he had done many years before in his exposition of Matthew, that they were commanded to remain unmarried, *quæ a viris suis ea causâ recesserint, quæ sola permissa est, id est, fornicationis.* Pollentius thought also, consistently with this his opinion, that marriage is dissolved by adultery just as by death, and absurdly supported his cause by an appeal to Rom. vii. 2, "if her husband be dead she is no adulteress, though she be married to another man," on the ground that the criminal husband was to be regarded as if he were dead, and that therefore it was lawful *tanquam post mortem, ita post fornicationem conjugis, alteri copulari.* In this work Augustin comes on ground where Hermas stood. Thus he says to his friend, "what seems hard to you, that one of the married pair should be reconciled to the other after adultery, will not be hard if faith is there. For why do we still regard as adulterers those whom we believe to have

* Chrysost., Hom. xix., on 1 Cor. vii., where the causes of the separation, which the distinguished interpreter conceives of, are "continence, and other pretexts, and pettinesses," or comparatively trifling reasons.

been washed by baptism or healed by repentance?"

Jerome, a contemporary of Augustin, is also decided in his opinion on the same side, as may be seen in his commentary on Matt. xiv. 9.* A letter of his to a friend, Oceanus, is deserving of mention, as giving us the case of a divorce and remarriage of a Christian lady of high condition. Fabiola had a worthless, licentious husband. She had a right, says Jerome, to repudiate him, although not to marry again. The sexes ought to be equal in their rights. What is allowed to the man ought to be allowed to the wife. But Fabiola, young, rich, as yet not thoroughly Christian, thought, because her husband was rightfully put away, that she might marry another. She had not as yet known the "vigor of the Gospel," "*in quo nubendi universa caussatio, viventibus viris, feminis amputatur;* so while she avoided many wounds from the devil, she incautiously received one wound." The monk makes the best excuse for her that he can. "If she is blamed because when her husband was divorced she did not remain unmarried, I will readily admit her fault, while I ad-

* Ubicumque est igitur fornicatio et fornicationis suspicio libere uxor dimmittitur. Et quia poterat accidere ut aliquis calumniam faceret innocenti, et ob secundam copulam nuptiarum veteri crimen impingeret, sic priorem dimittere jubetur uxorem, ut secundam prima vivente, non haberet. Here, it would seem, if the crime was manifest and confessed, his objections against a second marriage would be nugatory.

mit her necessity." This lay in her youth, her position, her temptations. She married therefore, but after her second husband's death took such a view, as Jerome and the times demanded, of her conduct. She openly professed repentance: *sic dolebat quasi adulterium commisisset.* She abounded in good works, and died, as Jerome thought, a most holy woman.*

From this time onward the rule became more and more established, that remarriage after separation was unlawful in the Christian Church, that only separations *a mensa et toro* were possible. The proofs of this are abundant, but they are needless, as the fact of a prevailing, and at length a universal opinion in the direction named is unquestioned.† No doubt the development of the sacramental theory contributed to the consolidation of this opinion. "A true marriage," says Innocent III., "can exist between infidels (*a matrimonium verum*), but between the faithful marriage is both true and fixed (*verum et ratum*), because the sacrament of the faith which is once received is never lost." And yet the teachings of the New Testament, as they were understood by the early church, gave this shape to the sacrament of marriage, so that as far as divorce is concerned,

* Epist. 77 of the Venice ed. of 1766.

† Consult the decree of Gratian, Caus. xxvii., Quaest. vii., a number of the Canons, Walter's Kirchenrecht, § 313, and the long note of Cotelerius, Patr. Apostol. 2, 88 (ed. Amstelod., 1724).

nothing essentially new was deduced from the sacramental theory.

While in the Western Church marriage became rigidly indissoluble, and civil law was shaped in conformity with ecclesiastical judgments,* in the East the case was otherwise. Some of the Fathers looked with indulgence on the remarriage of the innocent party, and, on the other hand, the law of the Greek Church permitted separation only when the wife and not when the husband had been unfaithful. But the civil law did not conform itself to the law of the Church and of the New Testament, as understood by the Church, but in some respects to the laws of Rome under the emperors. For a time even the principle of divorce by consent of the parties, which Justinian had abandoned, was again introduced. Remarriage was allowed somewhat freely, and to this legislation the practice in the church was accommodated.†

Nor ought it to be supposed that in the Western Church opinion in regard to the lawfulness of remarriage after divorce ran altogether in one direction. The "leaders of the church," to whom Origen refers in a passage we have cited, held that an innocent party might remarry when divorced on account of the adultery of a wife or

* "The stricter rule of divorce, on the ground of adultery alone, was first introduced into Italy [*i. e.*, into state law] by Charlemagne and the Emperor Lothaire." Gans, Erbrecht iii., 180.

† Walter, u. s., § 315. Comp. Greve, Ehescheid. p. 106 (1873).

husband. Lactantius seems to have the same view where he expresses the Christian doctrine thus (Inst. vi., § 23), "that he is an adulterer who marries a woman put away by her husband, and he who, except for the crime of adultery, puts away his wife to marry another." So thought also the friend of Augustin, Pollentius, to whom we have adverted. Even Augustin had occasional doubts whether the innocent party, after putting away the adulterous one, might not marry again. In his treatise *de fide et operibus*, iv. 19, after saying that a man putting away a wife detected in adultery and marrying another ought not to be placed on a level with one who should do the same without the ground of adultery, he adds, "and in the expressions of the divine word it is so obscure whether he, who has an unquestionable right of putting away an adulterous wife, ought to be accounted an adulterer for taking another, that, as far as I can see, in this case any person may make a pardonable mistake (*venialiter ibi quisque fallatur*).* The same thing is taught so far as the innocent husband is concerned, by Ambrosiaster, as he is called, who is generally thought to be Hilary the Deacon. After citing 1 Cor. vii. 11, ending with, "and let not the husband put away the wife," he adds "except for the cause of fornication must here be

* Cited by Richter, Kirchenr., § 282.

understood. And for this reason Paul does not subjoin concerning the man what he had said before concerning the woman, because for the man it is lawful to marry another woman after putting away a sinning wife; for the man is not so bound by the law as the woman is, since the man is the head of the woman." From this reason, to say nothing of the conclusion, most of the church writers would entirely dissent. Thus Lactantius (u. s.) blames the one-sided Roman view of adultery, according to which "*sola mulier adultera est, quæ habet alium, maritus autem, etiamsi plures habeat a crimine adulterii solutus est.*" And Augustin held to the parity of the sexes in their marriage rights and obligations, saving that the sinning husband ought to be more heavily punished than the sinning woman.* To those who held the freer opinion that marriage was in one case dissolved, may be added the Council of Vermerie of the year 752, who decided that in case a woman could be proved to have plotted her husband's death, he might put her away and, if he desired, might marry another. Here the crime must have been regarded as equivalent to adultery.† But none of these opinions carried any weight with them, the stream of doctrine ran quite the other way, and at length the council of Trent only confirmed and reasserted what had

* De conjug. adult. i., 8, ii., 8.

† In the decree of Gratian, Caus. xxxi. Quaest. 1, c. 6.

then been long admitted without dissent for ages, when it enacted the seventh canon on the sacrament of marriage, of which we gave the leading part in our last chapter.* (p. 67.)

A word or two ought to be added in regard to the attitude which the church took toward the parties who had been separated from one another on account of crime. The marriage being dissolved only by death, the intention of the church was to excite repentance in the guilty partner, and after a probation to permit their reunion. The penance was a long one. In the time of Pope Stephen V. (Cent. 9) the husband could decide whether he would receive back a guilty wife after she had undergone seven years of penance or be separated from her altogether. To become thus reconciled was taught to be the duty of a Christian, according to the words of Christ, "neither do I condemn thee, go and sin no more." During their separation the pair were to have no intercourse as man and wife with one another; and for the violation of this rule a severe penance was inflicted on the innocent party. When the marriage was terminated by death and the adulterous partner was the survivor, Canon law was not so strict as Roman law. The adulteress for instance could now marry her paramour unless she had plotted against the life of her husband,

* See Appendix note 3.

or had promised marriage to the partner of her guilt during the life of her husband.*

We should now close our brief sketch of divorce, as it was looked at by the early and the mediæval church, were it not necessary to speak for a moment of another kind of transactions which are sometimes called divorces, but are quite unlike those of which we have been treating. We refer to the separation of parties who have been living together in marriage which is not really such, and who therefore, when thus disjoined by the proper authority, may be free to marry again. Such cases our Lord did not have in his mind when he gave out his law of divorce. But under every civil law there must be such cases. Under the canon law of the mediæval church there were many such cases. When they are brought before the court of the country or of the church it declares the marriage invalid; it pronounces a decree of nullity; it declares that the parties cannot lawfully live together hereafter, and possibly imposes penalties on them for so doing.

The canon law, which had marriage and divorce under its control, acted in regard to such cases as the Romans or any municipal law would. Its

* Comp. Decret. Gratian. Caus. xxxiii., Quaest. 2, c. 8, Caus. xxxi., Quaest. 1, several canons. Of course if the criminals were within certain degrees of relationship, there was another barrier in the way of their union. Caus. xxxiii., Quaest. 7, c. 19, 20.

peculiarity was the number and complication of these cases, and the snares which it laid, so to speak, for married persons by its strict rules of prohibited degrees. This again led to dispensations and to a gainful traffic in sacred things.

The impediments to marriage which went beyond putting off its solemnization, and which, without vitiating the contract, did more than to render it improper for the priest to unite the parties in wedlock, were such as fraud, force, or serious mistake as the procuring causes of the consent, impuberty, impotence, a previous marriage, the vow at ordination or in entering a monastic order, difference of religion, and a certain closeness of relationship. The most of these we pass over in silence. By difference of religion is intended marriage of a believer with a Jew or an infidel, not marriage with a heretic or schismatic baptized person; and the case where one of two Jewish or infidel married partners becomes a believer is subjected to other rules founded on 1 Cor. vii. 12–16. The impediments from nearness of relationship, making or capable of making marriage void, grew up by degrees into a most intricate and cumbrous system from comparatively small beginnings. First the degrees of consanguinity within which marriage was unlawful were greatly extended. Next, on the principle that husband and wife are one flesh, the blood relatives of each were counted as relatives of both, and from this

source might arise impediments to a second marriage of either of them. And not only this, but it became unlawful for certain blood relatives of the two parties to intermarry with one another. The rites of baptism too and confirmation introduced a spiritual relationship, as in the case of a godmother and a godson or his father, which was an obstacle in the same direction. So also adoption might present a hindrance of a similar kind.

In regard to consanguinity the canonical law went no farther at first than the Roman, which prohibited marriage between the immediate descendants of the same ancestor, as a brother and sister, and between one immediate and one more remote descendant, as an aunt and a nephew or a great-uncle and a grand-niece. In the reign of Theodosius the Great (A. D. 385), marriage between first cousins was forbidden. The church, starting from this point, gradually extended the prohibited circle until it included those who were within the seventh degree, that is, sixth cousins, according to a computation which counted the immediate descendants of a common ancestor the first degree, first cousins the second, and so on. This rule was authoritatively settled in the West in the eleventh century by Pope Alexander II. (A. D. 1065), although it had prevailed, more or less, long before. Being however not a rule of strict morality but of church practice, it could be dispensed with or suspended. Thus Gregory the

Great (A. D. 601) writes to his missionary in England, Augustin, permitting persons of the fourth and fifth degrees of relationship* to intermarry in that country, intending, as he says, that they should be, when more confirmed in the faith, bound by a stricter law. In this letter he makes the remark that Roman law allowed own cousins to marry, but says, "*experimento didicimus ex tali conjugio sobolem non posse succrescere.*" But the rule of the seventh degree having been found inconvenient and not capable, *absque gravi dispendio*, of being observed, the sound sense of the great Pope, Innocent III., led him to bring about an alteration of the rule in A. D. 1215, at the fourth Lateran council. The new rule is this: *prohibitio copulæ conjugalis quartum consanguinitatis et affinitatis gradum non excedat*, which was so modified by Gregory IX. who had the decretals compiled, that a person in the fourth and one in the fifth, or third and fourth cousins, might be united in lawful marriage.† The same decree confined the ban of affinity to the fourth remove, which before had the same sweep with consanguinity to the sev-

* I. e. second and third cousins. See the passage in Gratian's Decree, Caus. xxxv., Quaest. 5, c. 2. It is Alexander's edict. The genuineness of Gregory's letter has been doubted. Compare Richter, Kirchenr. § 168. note 3.

† A reason alleged for this was that *quatuor sunt humores in corpore, qui constant ex quatuor elementis.* Decretal. Greg. iv., 14, cap. 8.

enth degree. In the Greek Church the blood relatives of the married pair were considered to have contracted affinity with one another, but not in the Latin, except that the children of a woman's second marriage were looked on as standing toward her first husband's relatives within the prohibited circle, but this impediment again was taken away by the legislation of Innocent III. There was again an impediment from illicit intercourse which was brought within the narrowest limits by the Council of Trent. Still another from the relation of the godparent was so far removed by the same council, that it affected only the godparents, the child and its parents, and the baptizer. And the same analogy applied to the parties at a confirmation. Finally betrothal involved a ban against marriage for each party with the relatives of the other, but the Council of Trent restricted its effects to the first degree.*

In all cases, where a prohibition of marriage rested on other than fixed moral grounds, the pope, or others acting with derived authority, could dispense with the rules of the church, and this was done frequently, with or without reason. The Council of Trent makes the general order that dispensations are to be given beforehand either not

* Comp. Walter u. s. § 303–308, and Göschen in Herzog's Encycl. iii., p. 667 et seq. The leading canons may be found in the Decretals iv., 13 and 14, and in Sessio xxiv., cap. 2–4 of the Council of Trent.

at all or rarely, and, if at all, for good cause and gratuitously. There are to be no dispensations between parties standing in the second degree, *nisi inter magnos principes et ob publicam causam.* Another declaration of the council in regard to the extent of the dispensing power is worthy of notice here. "If any one shall affirm that only those degrees of consanguinity and affinity, which are expressed in Leviticus [xviii. 6, seq.] can prevent the contracting of marriage or separate it when contracted, or *that the church cannot give a dispensation in regard to some of them*, or enact that others besides shall not prevent and separate, let him be anathema." If the reader will consult the passage in Leviticus, he will find that all the cases there mentioned are beyond the precedents of dispensation, and would be regarded as obstacles of an absolute and moral nature, except that of *a brother's wife*, in verse 16. Is not this then a sort of ex post facto justification of the action in regard to the marriage of Henry VIII. with his deceased brother's wife?

When a marriage had been consummated with the proper formalities, and there appeared afterward good reason for believing that it was an unlawful one, the case was brought before an ecclesiastical court. Where the impediments were of a public character, a public authority alone could institute a process of nullity. but where the impediments affected especially the private interests of

one of the parties, the injured party could bring a complaint. If a decree of nullity was given by the judge, it had no effect on the condition of the children, nor yet on that of the parties up to the time of the sentence, if they had acted with good faith; and in any case the form of the marriage protected the children. The parties after the decree were permitted to contract marriage with other persons, but the validity of the first marriage was always an open question, and new evidence might at any time reverse the decree. In this case the second marriage would be a nullity and the first would recover its obligatory force, so that now two separations, it might be, would be demanded by canonical law. The separations by sentence of nullity were formerly called divorces as well as the separations *a mensa et toro* on account of adultery, but a modern distinction of some Catholic writers between *annullatio* and *separatio* removes all ambiguity.*

We may sum up what has been said of the separation of married partners during the early and mediæval periods of the Christian Church in the following simple statements:

1. The prevailing and at length the unanimous opinion in the church was that no crime of either of the consorts, being baptized persons or Chris-

* Comp especially Göschen in Herzog, u. s., 697–700.

tians, justified the other in marrying again during the life of the offending party.

2. When an infidel deserted his or her Christian consort, the latter was allowed to proceed to a second marriage.

3. The development of the theory of the sacrament, as far as divorce was concerned, accepted conclusions already drawn from Scripture.*

4. As no crime entirely released the married pair from their relation to one another, and as forgiveness and reconciliation, being Christian duties, could now be exercised, consorts separated on account of adultery could come together again. For a time rigid penance kept the offender from the innocent party, and penance also was inflicted on the innocent party who strove to renew intercourse before the Church was satisfied.

5. In many cases where marriage was prohibited by canonical law, a sentence of nullity left them free to unite themselves to other persons.†

* Here we may remark that the material side in marriage has been held by Catholics to be the consent of the parties. It has thus a civil side as well as a sacramental. Law can put impediments in the way of marriage only by legislating in reference to the civil contract.

† Comp. Walter u. s., §§ 303–308, and Göschen in Herzog's Encycl., iii., p. 667 et seq. The leading canons may be found in the Decretals, iv., 13 and 14, and in Sessio xxiv., of the Council of Trent, decret. de reform. matrim., Ch. 1 et seq.

CHAPTER IV.

DIVORCE AND DIVORCE LAW IN EUROPE SINCE THE REFORMATION.

The Catholic doctrine of marriage and divorce was settled long before the Reformation, and was only reaffirmed by the Council of Trent. The nations which retained their allegiance to the old church did not, so far as we are informed, make innovations in the law of divorce, but have continued until now in the main under the system handed down from the middle ages. Far different has been the history of legislation in most Protestant countries, and in that Catholic land which broke away at once from the old religion and from all faith in the Scriptures. The leaders in the changes of matrimonial law were the Protestant reformers themselves, and that, almost from the beginning of the movement. It will be our endeavor in this chapter to exhibit briefly the prevailing opinion at the Reformation in regard to divorce, and then to give a sketch of the law as it has shaped itself in some of the principal countries of Europe, especially in Prussia, France, and England.

The reformers, when they discarded the sacra-

mental view of marriage, and the celibacy of the clergy, had to make out a new doctrine of marriage and of divorce. That doctrine was honestly derived from the words of Christ and of Paul. They saw, as they thought, in the rule of celibacy the source of boundless profligacy, a clergy all over Christendom living in secret sin and hypocrisy, or under the burden of a broken heart. They observed how the strict rules of the church were neglected in the case of the great by pliant priests, and how concubinage was almost tolerated. To this the doctrine that no crime dissolved marriage, that adultery only separated the marriage pair without giving relief to the innocent party, almost forced the church. Adultery, too, as a part of the same system, seems not to have been visited with severe church censures in the later centuries; we are led to judge that it was very common in the highest and the lowest classes; and to have an unfaithful wife was a matter to call rather for ridicule than for condemnation. The old Catholic theory of marriage, in short, was practically a failure in all its parts, in its ascetic frown on marriage, in its demand from the clergy of an abstinence not required from the Christian laity, in teaching that nothing but death could release a married pair from their obligations. When it sought for impracticable virtue, and forbade to some what God had allowed to all, it opened a fountain of vice with the smallest in-

citement to piety. Besides this, it received, they thought, as far as divorce went, no countenance from the Scriptures. Christ had made a special exception allowing the innocent party to put away his wife on account of her crime and to marry another, while Paul, according to the interpretation of Chrysostom and his school, released, as they claimed, the deserted believer from all ties to his or her unbelieving partner. Thus they needed to have no fear of changing the law of divorce. Marriage, second marriage, marriage of priests had become honorable; marriage was no more a sacrament; why should its dissolution in cases provided for by the Scriptures be doubted? If to all this we add the minor considerations that the Civil law, which allowed great freedom of divorce, must have grown in its authority as Canon law became disregarded, and that the northern nations, where Protestantism spread, are probably less capable than the southern of being restrained by such rules as the church had enacted; we shall have mentioned the leading influences which affected Protestant legislation on the subject of marriage and divorce.

The opinions of the reformers it is sometimes a little difficult to ascertain, as they seem to contradict themselves in different passages of their works. Thus Luther in his sermon on marriage delivered at Wittenberg in 1525, uses the following language: "that [Matth. xix. 9] is a blunt,

clear, plain text, which says that no one, either on account of leprosy or stinking breath or other defect, shall forsake his wife, or the wife her husband, but only on account of whoredom and adultery. For only these causes separate man and wife. Yet it must be satisfactorily proved before separation, as reason demands, that adultery and whoredom have occurred." But in other places Luther's opinion is most openly expressed that malicious desertion may be followed by a divorce *a vinculo.* In an opinion of the year 1525, given to the council and clergy of Domitsch, he writes thus: "since a certain preacher's wife has dealt so dishonorably with him, I cannot make his rights longer or shorter than God has done, who through St. Paul, 1 Cor. vii. 15, in such cases pronounces the following decision: 'if the unbelieving depart, let him depart; the brother or sister is not bound in such cases.' So say I, too. Whoever will not stay, let him be off. The other party is not bound to stay unmarried, as I in a little book on that chapter have written more at large, to which I refer you. If, then, he cannot remain without a wife, let him wed another in God's name, because this woman will not be his wife." An opinion of 1535, signed by Luther, Cruciger, Major, and Melancthon, allows a woman of Nordhausen, whose husband had absconded several years before, to marry again, according to "the decision of Paul, and according to the former

practice in Christendom, as a similar case cited by Eusebius from Justin, and the example of Fabiola show."* The instances here adduced, by the way, are not in point, for they relate to adultery, and, moreover, Fabiola deeply regretted her step and is praised by Jerome for so doing.† Again, in his sermon "*von ehelichen Leben*," belonging to the year 1522, Luther mentions three causes justifying the dissolution of marriage, of which the first, existing already before marriage, is a reason for a sentence of nullity, and therefore has nothing to do with divorce proper; the second is adultery; the third is, "when one of the parties withdraws from the other, so that he or she will not perform marital duty, or lead a common life with the other." Thus, says he, "we may find an obstinate woman who stiffens her neck, and if her husband should fall ten times into unchastity, cares nothing about it. Here it is time for a man to say, 'if you won't, another can be found that will. If the wife will not, let the maid come.' Yet let it be so that the husband give her two or three warnings beforehand, and let the matter come before other people, so that her obstinacy may be known and rebuked before the congregation. If she still will not, let her be gone, and

* P. 112.

† The other instance is from Justin, *Apol.* ii. § 2, where a Christian woman divorced herself from a husband "who tried ways of pleasure against the laws of nature and against right." Nor is any thing said of her marrying again.

procure an Esther for yourself and let Vashti be off, as Ahasuerus did,"—a queer example to give to Christians. It is evident that here the refusal of connubial duty is thought of, although malicious desertion may be involved.* See Append., note 5.

The leaders of opinion in the Lutheran Church followed the first reformers in their doctrine of divorce. We cite but one,—Chemnitz—who in his examination of the Council of Trent, sums up a discussion on the sixth canon of matrimony in the following language: "We have, then, two cases in Scripture where the bond of matrimony is dissolved—not as by men, but by God himself. 1. On account of adultery a man lawfully, rightfully, and without sin, can repudiate his wife. 2. If an unbeliever will not cohabit with a believer but deserts, dismisses, and repudiates her, without charge of adultery, and only on account of her faith, the unbeliever sins indeed against God and against the law of marriage; but the innocent, deserted party is not under bondage, but is free from the law of her husband, so as not to commit adultery if lawfully wedded to another man. And these two cases Chrysostom also has noticed on 1 Cor. vii. 'Both unbelief,' says he, 'gives cause [for divorce] and so does fornication.'"†

* These passages are all found in Walch's ed. of Luther's works, vol. x. See pages 797, 886, 884, 721–727.

† *Examen Conc. Trid.*, ii. 430, of the Frankfort ed., 1615. We do not find the passage here cited in Chrysostom's Homily on this chapter.

Nor did the doctors in the reformed churches differ in their opinions or in their interpretation of Scripture from the Lutherans. Zwingli, in fact, with his characteristic audacity seems to have gone much farther than any one else. In the Zurich marriage ordinances of 1525, adultery, malicious desertion, and plotting against the life of a consort are not regarded as the only causes, but rather as the standard causes of divorce, and to the judge it is left to decide what others shall be put by their side. And not only this, but cruelty, madness, leprosy, are mentioned as causes which the judge can take into account.*

It seems to have excited some discussion in that age whether elephantiasis or leprosy—a disease then not so rare as now in Europe—could be a cause of separation from the bond of matrimony. Luther, in a passage already quoted, Calvin, in one of his epistles, and elsewhere, and Beza, in his treatise on divorce, all decide in the negative.†

The views of Calvin are somewhat obscurely expressed in his annotation on Matt. xix. 9, occurring in his commentary on the harmony. After speaking of the cause of divorce there contained in Christ's words, he condemns the opinion of those who hold elephantiasis to be another cause, "as

* Comp. *Herzog's Encycl.*, article *Ehe*, vol. iv., written by Göschen, professor of law at Halle.

† Calvin, *Epist.*, pp. 225, 226, of the Amsterdam ed. of his works, last volume.

being wiser than the heavenly master," and then speaks of the passage in 1 Corinthians in words like these: "When Paul mentions another cause, —namely that the believing brother or sister is not under bondage, where it happens that a consort is cast off by an unbeliever from a hatred of religion—he does not differ from the mind of Christ. For he does not discourse there on a justifiable cause of divorce, but only whether the woman remains bound to her husband when she has been impiously cast off from a hatred of God, and cannot return into favor but by denying God. Whence it is not strange that he prefers separation from a mortal man (dissidium cum homine mortali) to alienation from God." Here it might be said with reason that a case of desertion of a wife by an unsteady, dissipated husband, who had no objections to her religion, would not be covered by Paul's words, as Calvin interprets them. There can be, however, we conceive, no doubt that he would stretch his rule to include such cases. For the "ordonnances ecclésiastiques" of Geneva, enacted in general assembly, Nov. 20, 1541, some two months after his return from banishment, must have had his concurrence, and divorce *a vinculo* is there expressly allowed in cases of malicious desertion.* "If a man," it is there said, "being

* He returned from Strasburg, Sept. 13th, 1541, and the ordinances were passed Nov. 20th following, and went into effect Jan. 2d, 1542.

debauched, abandon his wife without the said wife's having given occasion or being culpable therefor, and this has been duly known by the testimony of neighbors and friends, and the woman has brought a complaint in demand of a remedy, let her be admonished to make diligent search in order to ascertain what has become of him, and let his nearest relations or friends be called to get news of him. Meanwhile, let the woman wait until the end of a year, if she cannot find out where he is, and let her commit herself to God. At the year's end she may come before the consistory, and if it appears that she needs to marry, let the consistory, after giving her exhortations, send her to the council to be sworn that she does not know where her husband has betaken himself, and let the same oath be taken by his nearest relatives and friends. After this, let such proclamations be made, as have been spoken of, in order to give liberty to the woman to marry again. If the absent man return afterward, let him be punished, as shall be judged reasonable."*

With Calvin, his disciple Beza agrees in his opinions concerning divorce. In his note, indeed, on 1 Cor. vii. 15, he says, "non hic conceditur divor-

* For this extract and for all other references to early Protestant church ordinances on divorce, we are indebted to a programme of Prof. Göschen of Halle, "doctrina de matrimonio ex ordinationibus ecclesiæ evangelicæ sæculi decimi sexti adumbrata." Halle, 1847. In his article, "*Ehe*" in *Herzog's Encycl.*, the same learned lawyer gives again some of the same matter.

tium, sed desertæ tantum consulitur," which might leave us in doubt how he explained Paul's words. But in his treatise, *de divortiis*, he examines the case spoken of by the Apostle, and having asked the question, Whether it is right for the deserted person, while the deserter is alive, to contract a new marriage, answers most expressly that she is entirely free to marry if she will. And in a letter to the churches of Neufchatel, in reply to the question whether leprosy is a valid ground of divorce, while he denies that it is, he reaffirms the doctrine taught in his treatise.*

The Protestant commentators of the sixteenth and seventeenth centuries, or the large majority of them, draw the liberty of remarriage after desertion from the word of Paul. Thus Paraeus: "she is free not only *a toro et mensa* but also from the marriage tie to the deserter." Aretius of Berne on Matth. xix.: "This one cause of lawful separation [viz. adultery] Christ lays down; but the Apostle on 1 Cor. vii. 15, allows another cause, arising from unequal marriage.—Other causes, besides, we have pointed out in treating of the subject of divorce, to which we refer the reader."† So in century seventeenth, Grotius: "She is not bound to remain unmarried and to wait for or to seek for reconciliation. Christ's law is of force

* Beza *de repudiis et divortiis*, Op. ii. 94, 95, Genev., 1582, and *Epist.* x., in vol. iii., 215.

† He seems to refer to his *theologiæ problemata*, or *loci communes*.

when the parties are his disciples." Calixtus: "She is not bound to cohabit or to remain unmarried." Milton's views are well known. The Puritans seem to have followed this interpretation. But the interpreters within the English church were not all of this mind. Whitby, as nearly as we can understand him, is on the other side, and Hammond, who has no commentary on Paul's verse, in his paraphrase of it condemns marrying again in the case specified. Later still, we find several annotators of the eighteenth century disagreeing with the current Protestant interpretation.* (comp. pp. 79. 80).

It is not strange that the ecclesiastical ordinances, which are platforms of discipline, and in some Protestant territories took the place of the old canonical law by sanction of the civil power, should express the reigning opinion. A few of them, it is true, permit divorce proper for a single crime only: thus the "renovation" of the church in Nordlingen speaks thus: "In the matter of divorce we follow our Lord Jesus Christ, Matth. xix, not permitting true divorce, as far as it depends on us, except for the cause of fornication, nor without the production of witnesses and before a magistrate; that we may not, by furnishing occasion for fraud, add the force of malice to evils already existing. But in other things we follow the Apostle Paul, 1

* See Wolfius, *Curæ philolog.* on the passage in Corinthians, where they are spoken of at large.

Cor. vii., and allow persons who seek a divorce to be separated by authority of the magistrate, but on condition that they remain unmarried, according to the precept of Christ, Matth. xix." So the "church-order of the Netherlanders at London" (1550): "from all these words of the Lord one may easily perceive that the marriage bond is exceedingly strong, and that it can be broken only by death and whoredom." So the "sacred liturgy of the church of the foreigners at Frankfort" (1554)* says that "they whom God has joined together, can never be separated but on account of fornication, or for a time by mutual consent, that they may give themselves to fasting and prayer."

But the great majority of the ordinances add malicious desertion to adultery as a second ground of divorce. So those of Lübeck (1531), of Goslar (same year), of Lippe (1538), of Geneva, already mentioned (1541), Calenburg-Göttingen (1542), Brunswick-Lüneberg (1543), Brandenburg (1573), Mecklenburg (1570), Brunswick-Grubenhagen (1581), and Lower Saxony (1585). The last but one of these uses the following words: "By no means shall any divorce be allowed or procured except in two cases which Christ and Paul have allowed in the gospel. As namely and in the first place, when one of the parties has been satisfactorily proved guilty and jurally convicted of adultery,

* That is, as we suppose, the church of the English, which had its difficulties in that year.

and the innocent party will not or cannot at all in the end become reconciled to him, in such case the sentence of divorce shall be pronounced according to Christ's words, Matth. xix. . . . In the second place, in cases of malicious desertion, running away and abandonment, of which St. Paul speaks, 1 Cor. vii." And the last-mentioned ordinance says that "whatever besides these two causes [adultery and desertion] has been brought in by some emperors, as Theodosius, Valentinian, Leo, Justinian, to justify divorce, cannot be sufficient for that purpose."*

One or two only of the ordinances of this period extend the permission beyond the two causes of divorce so often spoken of. Those of Zurich we have already mentioned. A Prussian consistorial ordinance, in cases of cruelty after fruitless attempts to reform the man by discipline, allowed a separation from bed and board not exceeding three years, after which the parties might be united again, on the offender's giving sufficient security that he would not repeat his misdeeds. If after this, there should be an attempt by either party on the other's life, by poison or otherwise, they might thereupon be divorced, and the guilty party be remitted from the matrimonial to the secular court.

The question was discussed among the reformers whether the adulterous party ought to be

* All these instances are from Prof. Göschen's programme.

suffered to marry again during the life-time of the other consort. Luther insists with great energy that death ought to be the penalty for adultery, but since the civil rulers are slack and indulgent in this respect, he would permit the criminal, if he must live, to go away to some remote place and there marry again. So Calvin, in several places, declares that death ought to be inflicted for this crime, as it was by the Mosaic code, but if the law of the territory stop short of this righteous penalty, the smallest evil is to grant liberty of remarriage in such cases.*

The church laws of the seventeenth and eighteenth centuries in Germany very generally concede divorce only in the two cases already named,

* Luther's words are (Walch, x. 724), "but if the civil authorities are slack and negligent, and do not kill the adulterer, he may flee to a distant land and there marry, if he cannot be continent. But it were better he were dead and gone, to prevent evil examples (aber es wäre besser todt todt mit ihm, etc.)."

So Calvin in a letter (Epist., p. 225, Amsterd. ed. of his works, last vol.) says that "because the punishment of adultery has not been as severe as it ought to be, so that they do not lose life who violate the faith of wedlock, it would be hard that [a man or woman who had thus sinned] should be prohibited from marrying during life-time. Thus it is necessary that one indulgence draw with it another. Yet it seems wisest not to let the guilty woman do as she will in regard to marrying at once. Such permission should be delayed, whether by prescribing a certain time or by waiting until the innocent party has contracted a new marriage." In his note on Matth. xix. 9, Calvin expresses the same opinion in regard to the deserts of the adulterous wife or husband, and the "perverse indulgence of magistrates."

but the Wirtemberg ordinance goes farther than this; it adds as grounds of divorce impotence supervenient on marriage through the fault of one of the parties, and obstinate refusal of matrimonial duty.

Meanwhile, a new turn was given to opinions concerning divorce toward the end of the seventeenth century. Thomasius (ob. 1728), a professor of law at Halle, an audacious but superficial thinker, gave the direction by leaving out of sight the religious and moral side of marriage, and looking at it only as a civilian.*

He had vast influence on his age and many followed in his steps. Thus Kayser, afterward a professor at Giessen, in a disputation of the year 1715, regards as good grounds for divorce, incompatibility of temper, contagious disease, cruel treatment, irreconcilable animosity, and other grounds rarely or never held to be sufficient before. Marriage is now coming to be regarded as a contract for attaining merely outward ends, as an institution to be shaped and modified by the state, according to its views of expediency and its opinions as to the best means for securing civil happiness; it is putting off its religious and moral character.

These new views, which tallied so well with the shallow spirit of the eighteenth century, found

* For Thomasius, see Tholuck's Article on him in *Herzog's Encyclop.*, vol. xvi., and his "Preliminary History of Rationalism," ii., 2, 61–76.

their expression first in the legislation of Prussia.* In 1749, 1751, part of a project of a general code for the Prussian states was published by Cocceii, the chancellor under Frederic the Great, and the divorce regulations which formed a portion of this project, although this, as a whole, never acquired a legal existence, passed by degrees into the law of a large number of the provinces composing the Prussian kingdom. In this project the innovations are chiefly the following: first, that consent of the parties can dissolve marriage, although a term of a year's separation from bed and board is required to give opportunity for reconciliation. Should they at the year's end still persist in their decision, divorce may now be granted. Secondly, divorce is allowed on account of "deadly hostility" between the parties, and is made to depend on a variety of indications, as when blows are given by one of them, or one has an infamous disease, or one plots against the life of the other, or is condemned to an infamous punishment. To this, it is added, that complaints may be made for smaller faults, as the cruelty (sævitia) of the husband, the extravagance or drunkenness of the wife. Here, too, a probation of not more than a year's separation must precede a sentence of full

* For the legislation anterior to the introduction of the Prussian Code or "*Allgemeines Landrecht*," we rely on an Essay by Savigny, entitled "Reform of the Laws concerning Divorce," in his Miscell Works (Vermischt. Schrift.), v. 222–414.

divorce. One of the provinces, a little after, did away with this probation in the case of "deadly enmity," and authorized divorces on this ground to be granted at once.

Then came a reaction. The king—still Frederic the Great—while on a journey in Pomerania, in 1782, had his attention drawn to the frequency of divorces, especially in the lower classes. He therefore issued an edict complaining of the frivolity with which divorces were sought, the readiness to contract inconsiderate marriages, the evils to families, etc.; and the chancellor was required to amend the legislation. In the edict published in consequence of this movement, divorce by consent of parties was restricted to cases where the marriage had been without children for several years, and the judge was to be satisfied that the divorce was sought by both parties freely, and after mature consideration. Divorce for fault of one of the parties is granted on account of those same crimes and differences between the parties, which the law of 1749 regarded as justifying reasons. Soon after this a project of a general code was made, out of which the code of 1791 grew. Here divorce by mutual consent is admitted only when the parties have been four years without children, or when for other reasons there is no prospect of any. Divorce for deadly hatred is still admitted, but the law adds that no marriage shall be dissolved on account of invincible disinclination avowed by

one of the parties. The proofs of hatred as they appear in former laws are now made distinct grounds of divorce from the hatred itself.

We next come to the code or "Landrecht" which is still in force for the kingdom of Prussia.* Here the grounds for divorce involving wrong of one of the parties are, first, adultery, sodomy, and other unnatural vices, and suspicious intercourse, especially after prohibition by a judge, attended with a violent suspicion of adultery (668–676). Next comes malicious desertion, of which quite a number of cases are given. For example, if a woman leave her husband without cause, the judge may require her return. If she refuses, her husband may sue for divorce. A husband is not bound to take back a wife who has left him until she proves the correctness of her life while away. If a person is away on urgent and lawful business, his act is not desertion exactly, but his consort must wait ten years, and then sue for a judicial declaration of his death (676–693.) Persistent refusal of marriage-intercourse is regarded as equivalent to malicious desertion (694–695). Plots or practices, endangering the life or health of the other party, together with gross injury to the honor or personal freedom of the same, are sufficient grounds for divorce. But persons of lower condition shall not have divorce granted to

* Preuss. Landrecht, II., part I., chiefly §§ 668–834. In 1844 a procedure, making divorce more difficult, was adopted.

them on account of threats or abuse with the tongue, nor for injurious acts and outrages, unless these are causeless and maliciously repeated. Incompatibility of temper (unverträglichkeit) and quarrelsomeness are good grounds only when the innocent party's life and health are endangered (699–703). Gross crimes, for which a disgraceful punishment is suffered, furnish ground for divorce. So, also, when one party falsely accuses the other of such crimes, or intentionally puts the other in danger of losing life, honor, office, or business (704–706), or has a base employment (707) [since abrogated]. Drunkenness, extravagance, or a loose manner of life (unordentliche wirthschaft) may be followed by divorce, if not corrected by steps which the judge takes on application from the innocent party (708–710). So also failure to support a wife, caused by crime, dissipation, or loose living, entitles her to divorce, when after arrangements made by the judge for her divorce the husband persists in his conduct (711-713). In all cases the judge must take pains to restore a good understanding between the alienated parties (714).

The causes for divorce which may be referred to accident or visitation of providence are these: incurable impotence supervenient after marriage, together with other incurable bodily defects exciting disgust or preventing the fulfillment of the ends of the marriage state (696–698), and insanity lasting over a year without prospect of cure (698).

The causes depending on the will of both or of one of the parties are these: "Marriages without children can be dissolved by mutual consent, if neither frivolity nor haste nor secret force on either side can be discovered. But mere disinclination of one party toward the other, not sustained by positive acts, is ordinarily no cause of divorce, and yet in special cases it may become such, where the alienation is deep, violent, and irreconcilable." But in such cases the party urging this plea against the other's will must be declared to be in fault, and is liable to the penalties, or disadvantages in regard to property, spoken of in a subsequent portion of the law (716–718.) Where the reasons alleged for divorce are of less weight, and hope of reconciliation exists, the judge can delay making known his sentence for a year, pending which time the parties may live separated, and the judge must decree in regard to questions of property and children. At the end of the term a new attempt at reconciliation must be made, and if this is ineffectual, sentence can then be given (723–731).

No divorce shall be granted where one party has brought the other to the commission of the misdeeds on which the complaint is based. So condonation is an estoppal to suits arising out of the crime forgiven. Cohabitation for a year after knowledge of the crime implies condonation.

No separation from bed and board is allowed if

one of the parties is a Protestant. If both are Catholics, such separation has all the civil effects of divorce. And it is left to the consciences of the parties concerned to decide what use they will make of their separation in the matter of contracting new marriages (733–735).

The *consequences* of divorce form an important branch of the Prussian law. Divorced persons may in general marry again whom they will. But a person divorced for adultery may not marry the partner of the crime. Nor may they who have been divorced on account of suspicious intercourse marry those who have been connected with them in their suspicious acts, and have produced a variance between the consorts (25–27). Divorced persons, like others, contracting a new marriage, must prove the dissolution of the old one to the clergyman who publishes and solemnizes the nuptials (17), and if there are minor children of a former marriage, must exhibit a legal composition with them in regard to property, or at least a permit of a court of wards, before the new union can be celebrated (18). As for the rest, no delay is imposed on the divorced man's remarrying, but the woman must wait according to circumstances, from three to nine months (19–23).

In the bearing of divorce upon the property of the parties, the Prussian law seems to have followed to some extent the provisions of the Roman code. At the time of the process it must be deter-

mined by the judge which party is to blame for the divorce, or which is more so, if both are in fault. Wrongs directly violating marriage duty are more blameworthy than such as do this indirectly. Intention also, and lightness of mind must be taken into account in reckoning the fault. This being ascertained, the case may be that neither party is declared guilty, or that one is or is principally so, and provisions are necessary, according as the property was held separately or in common. In the first case, where neither party is pronounced guilty, and the goods were not held in common, they follow the rules prescribed for separation by death. If there was a community of goods, each takes the part contributed by him or her to the common stock before marriage, or added since. But in the case of persons from whom a divorce is obtained on account of certain visitations of Providence, the other party—the sane party for instance —must support the unfortunate one according to their condition in life, if the latter has not the means of support in his own hands. In the other case, where one of the parties is pronounced guilty, the rules in regard to the division of property run into details too long to be described. The general principle is that the guilty party, whether husband or wife, shall suffer in property, as a sort of compensation to the other for crime or indiscretion. Thus, if no community of goods had existed, the party whose conduct caused the divorce is consid-

ered civilly dead, and all the advantages conceded by the law to a surviving consort are granted to the innocent partner. If community of goods had existed, the innocent party can choose whether to take half of them, or to demand a division. If they are divided, the portion of the guilty party is liable for the same satisfaction or compensation, as if there had been no community of goods. This satisfaction, if divorce grew out of the grosser offenses named in the law, and there had been no bargain, amounts to one-quarter of the property of the guilty party, and if the offenses were less gross, to one-sixth. Instead of this satisfaction, the innocent wife can demand alimony on a scale suitable to her condition in life. And if the innocent husband, through age, sickness, or misfortune, is not in a condition to earn his living, he can, instead of a satisfaction, choose alimony to be paid out of his wife's property. But if the guilty party can give neither compensation, nor satisfaction, nor support, he or she must for the offenses occasioning the divorce be imprisoned, or be put to penal labor, for a time varying from fourteen days to three months (745–823).

Marriage in Prussia, as in most other Christian countries, requires certain religious formalities in order to be valid. If a Catholic curate hesitates to publish and solemnize a marriage allowed by the laws, because the dispensation of his superior has not been asked for or has been refused, he must

allow another clergyman to perform these services in his place. For Protestant ministers there is, we believe, no such indulgence. And hence, those who regard the Prussian law of divorce as heathenish and unchristian, who scruple to unite a woman divorced without adultery to another husband and to say that God has joined them together, must occasionally be brought into extreme perplexity. The only way of preventing such outrageous tyranny is to put them on a level with Catholic priests, or to introduce civil marriage. (1869.)

It is natural that the complaints against the Prussian law should be great. Not only has it dissatisfied numbers of the clergy, but some also of the most eminent jurists have desired to see it modified. Savigny (u. s. 353-414) gives us two such documents, containing projects of new divorce laws framed by two commissions, the one in 1842, the other in 1844. He must have been in the counsels which originated one or both of these. We have no room to describe their provisions, except to say that they both exceedingly abridge the causes of divorce. Both pronounce against mutual consent, violent contrariety of temper, deficient proof of innocent life on the part of a woman separated before divorce from her husband, disease and defect caused after marriage by visitation of Providence, and suspected intercourse contrary to the order of a court. Besides these, the first commission of 1842 eliminates mad-

ness, refusal of connubial duty, injuries to the honor or freedom of one of the parties by the other,—unless they run into prolonged and gross outrages,—quarrelsomeness, danger to life, honor, office, or business by unpermitted actions, unless these furnish reason for divorce of another kind; together with drunkenness and other loose living, and failure to furnish support, excepting the case when through crime, drunkenness, or dissoluteness a man has taken away from himself the power to maintain his wife, in which case divorce may be allowed. It is a decisive condemnation of the law that jurists of the highest eminence were found ready to make such sweeping changes in the code. But the attempts to change the law were ineffectual, nor have others since made, unless we are deceived, been more successful.

The provisions of the Austrian code applicable to non-Catholics and the church-ordinance of Baden approach nearest in point of laxity to the Prussian law. All the other States of Germany, I believe, confine divorce to cases of guilt, although they generally go, in their enumeration of the wrong-doings which furnish ground for divorce, beyond the laws of the age of the reformers.

From Prussia we turn to France, where the experiments in divorce legislation coincide nearly with the phases of political revolution. The old system, conformable to the ecclesiastical law of divorce, was overthrown by a new divorce law passed

Sept. 20, 1792, at the opening of the National Convention. In this new law three causes of divorce are allowed, mutual consent, allegation of incompatibility of temper brought by one of the consorts, and certain specific or determinate motives derived from the condition or conduct of either of the married parties. These last are derangement of reason, condemnation by a tribunal to a painful or infamous penalty, crimes, cruelties, or grave injuries of either party toward the other, notorious licentiousness of morals, desertion for at least two years, absence for at least five without sending news, and finally emigration from France in certain cases, which was naturally a transitory measure. Separation of body, or divorce *a mensa et toro*, was to be hereafter abolished, and separations already decreed by process at law could be turned into divorces. The divorced parties could marry one another *de novo*, and could marry other persons after a year, in cases of divorce for incompatibility or with mutual consent. When the divorce was granted for a determinate cause, the wife must wait a year before marrying, except in the case of the husband's absence for five years, when she is allowed to marry immediately after obtaining her divorce.

So far the new law went back to the loose Roman practice, but the mode of procuring divorce was somewhat original. In case the steps for this purpose began in mutual consent, a family coun-

cil of at least six relations or friends was to be convened by the parties, half chosen by the husband, half by the wife. When after a month's warning the council should meet, it was to hear the reasons of the parties who had desired divorce, and to make observations on the case. If not reconciled, the parties were now to present themselves, from one to six months after the meeting of the council, before the proper public officer of the husband's domicil, who, without entering into the reasons of the case, was to grant the divorce. If the parties neglected to take this step within six months after the meeting of the council, they would need to go through the same formalities again after the same intervals. If they were minors, one or both, or had children, the delays were to be doubled.

In cases where one of the consorts demanded divorce on the ground of incompatibility of temper, the steps were the same as those already described, with this difference, that there were to be three assemblies of the family council at certain fixed intervals.

Where a specific ground for divorce was alleged by one of the parties, if it were absence without news for nine years, or judgment for crime, the public officer could grant the suit at once, unless indeed the nature or validity of the judgment were contested by the other party, in which case the tribunal of the district must first decide the

disputed point. If the specific ground were any other, as derangement, profligacy, desertion, injury of the consort, the demandant had first to bring his case before family arbitrators "in the form prescribed for suits between husband and wife." If they regarded his demand as founded in fact, the divorce could be granted by the public officer of the husband's domicil, but there might be an appeal by the defendant from the arbitrators' sentence, which appeal was to be decided within a month.

This law opened a wide door to divorce, and in so doing disregarded the feelings and habits of the devout Catholics still remaining in France, by banishing all separation *a mensa et toro* from legislation. But the door was not yet wide enough for a "wicked and adulterous generation." It needed the additional clauses passed by the National Convention on the 8th of Nivôse, An 2—Sat., Dec. 28, 1793—and on the 4th of Floréal of the same year—Wed., April 23, 1794—to become perfect of its kind. The first addition, brought forward by Merlin of Douai, who said that it was conformable to a provision of a civil code then in the hands of a revising committee, enacted that a divorced husband might marry immediately after the divorce was pronounced, and the wife after an interval of ten months. The second, a far more immoral enactment, declared that a separation in fact of a married pair for six months, even though proved by common fame only, should

be cause for pronouncing them divorced without delay, if one of them demanded it. The document certifying such common fame should be given by the council of the commune on the attestation of six citizens. The demander of the divorce, if a resident for six months in a new commune, could cite the other partner before the public officer of his actual domicil. But no citation was necessary, if one of the pair had abandoned the commune where they lived without giving news of himself afterward. The divorced woman could marry after a certified separation in fact of ten months, but an accouchement in the interval would render such delay unnecessary. Finally, divorces effected and authenticated before Sept. 20, 1792 [and therefore with no law to authorize them], on the ground that marriage is a civil contract, are confirmed in their legality.

These final strokes of the law belong to the worst times of the revolution. A reaction showed itself in the autumn of 1794, and these two last laws were suspended on the 15th of Thermidor, An 3,—Sunday, Aug. 2, 1795. The representative Mailhe, who moved the suspension, remarked that by these laws violent outbursts of passion became irreparable, and took from their unhappy victims the refuge even of reflection and repentance. He then goes on to say that the law of 4th Floréal, making separation in fact for six months a ground of divorce, was forced on the legislative

committee of the Convention by a "decemvir," meaning, we suppose, a member of the Committee of Public Safety, who had under his protection the wife of a man shut up in one of the "bastiles of terror," and wished to secure her for himself without loss of property, which would be sequestrated if her husband was condemned before her divorce.* "A decree of exemption might have unmasked this new Appius. It was thought better to propose a general law." "You know in fact," says he, "that the decemviral oppression weighed on the committees, and on the Convention generally. Into how many families have not these laws [of 8 Nivôse and 4 Floréal] brought dissolution and despair. How much at this moment do they not aggravate the condition of those who are detained for reasons of general security [who may be separated in fact six months by imprisonment, and so lose their wives by these laws]. You cannot too soon stop the flood of immorality which these disastrous laws are rolling on us."

Thus the law of Sept. 20, 1792, alone was now in force, and continued to govern in cases of divorce for some eleven years.†

The last form which the law of divorce took in

* We are not sure that we have seized the sense here.

† The laws mentioned above may be found in the "réimpression de l'ancien Moniteur," generally a few pages after the date of their enactment. The remarks of Mailhe we have extracted from the same journal. See Vol. 19, 69; 20, 297; 25, 403.

France before the restoration of the Bourbons, was that which appears in the Code Civil des Français, or as it was subsequently called the Code Napoléon. From the year eight of the Republic, corresponding with parts of 1799 and 1800, a project of a code had been sent to the superior courts for examination, and then—their observations being placed in the hands of the Council of State—the section on legislation within the council made a new project, which, after discussion in the council, resulted in the *Code Civil.* These discussions are of high interest, as indicating a reaction from the views of the revolution concerning divorce, and we should be glad to quote from them at large if we could afford the space.* The title on divorce was decreed March 21, 1803, or 30 Ventôse, An 11, and continued to be law until the fall of Napoleon, with very slight changes due to the imperial system. The differences between this law and that of Sept. 20, 1792, are chiefly these. The system of family councils is abandoned. The formalities in cases of divorce by consent of both consorts, or complaint of one, are such as to retard the decision considerably, and give time for reflection and the spirit of reconciliation. The limits within which divorce by mutual consent is confined show

* We use the "discussions" as arranged by Jouanneau and others according to subjects. Paris, An xiii. (1805). The chief speakers are Portalis, Boulay, Berlier, Emmery, Tronchet, the First Consul Bonaparte, and the Consul Cambacérès.

a feeling that the license in this respect had gone too far. In case of adultery the offending party could contract no marriage with his or her partner in guilt, and the adulterous wife was subjected to confinement in a house of correction. A divorced couple could never be united together again in marriage. Separation "*de corps*" or *a mensa et toro* is restored to legislation for the sake of the Catholics.

A long discussion took place in the Council of State on the question whether incompatibility of temper, or in other words mutual consent should be admitted at all as a ground of divorce. The distinguished lawyer Portalis was against divorce for incompatibility of temper. There was no reason for it in the nature of marriage as a contract. This was not an ordinary contract. No legislator would endure such a thing as a marriage for a limited term of years. It subsisted for society, for children; and the interests of the wife repelled divorce for indeterminate reasons. The granting of such divorces multiplied their number, and tended to demoralize France. Others agreed with him, and all the tribunals had been of the same opinion, or like that of Paris, had demanded that the incompatibility should be proved by facts. The First Consul, whose vigorous thinking is continually manifest, replied that mutual consent was a way of hiding shameful family secrets from the public gaze. Tronchet replied that the malig-

nant would say that the pretext of incompatibility had been employed to conceal more shameful reasons. Portalis, too, said that a wife would say to the legislator, "you dishonor me by concealing the true cause of the divorce; you give room to all sorts of suspicions; whilst my husband who repudiates me quits me only because he is hurried away by a shameful passion." "And what inconvenience," adds he, "would there be in accusations for adultery being made public. It is the crime which makes the shame, and not the accusation. If we look within we shall find that the only fear that agitates us is that of ridicule; for, we must confess it, in the present state of our morals we seek to save ourselves more from ridicule than from vice itself." These views did not prevail. The council, notwithstanding the arguments against mutual consent as a ground of divorce, introduced it into the law; and principally for the purpose of covering up specific causes of divorce, which it might be disgraceful to have known. Some of those who were consulted in framing the law proposed that this kind of divorce should be interdicted to consorts who had children, but the proposal was rejected—one member of the council remarked that children were thus spared the shame of having the scandalous conduct of either parent spread abroad.

To come now to the law itself (Code Civil, Tit. VI., Art. 229–311), the causes of divorce are the

following: 1. for the husband, the wife's adultery; 2. for the wife, that gross form of the husband's adultery when he has kept a concubine in the common dwelling; 3. for either consort, outrages, cruelties, or grave injuries inflicted by the other (excès, sévices, injures graves); 4. for either, the condemnation of the other to an infamous punishment (peine infamante). 5. "The mutual and persevering consent of the consorts expressed in the manner prescribed by law, under the conditions and with the proofs which it establishes, shall be sufficient evidence that a common life is insupportable to them, and that there exists in their case a peremptory reason for divorce."

These grounds for divorce are divided into determinate or specific, and indeterminate, or those which rest on no specific act or series of acts. In assigning these grounds the law stops short of the freedom of the Roman law, which it in some respects follows,—for instance, in making ordinary adultery on the part of the husband no cause for the separation of the parties. Under No. 3, the expressions may include a wide range of actions, and much was left to the discretion of the judge. Here, if anywhere in the law, must come in malicious desertion under the head of cruelties or grave injuries.

In a second chapter, the law treats of the forms of divorce for a determinate cause; of the provisory measures to which the suit for divorce for a

determinate cause can give rise; and of the pleas in bar of action in such cases. The provisions are careful and minute, such as to guard against any improper haste or advantage of the complaining party. We cite only one or two particulars from this chapter. The demandant of the divorce must always appear in person through the stages of the cause, and with counsel if he wishes; but his counsel cannot supply his place. When the plea for divorce is based on outrages, etc. (No. 3, above), the judges are not permitted, although the case may be clear, to decree the divorce directly. The woman is authorized to quit her husband's company, and entitled during the interval, until the case be decided, to receive alimony from him, if she have not herself sources of supply for her wants. Then, after a year of "trial" (épreuve), if they are not reunited, the original demandant can make a new citation of the other consort, and the case can go on. When the case has passed onward to its final stage, the demandant is obliged to present himself before the civil officer, for the purpose of having the divorce pronounced, having summoned the other party for that purpose. This must take place within two months after the final judgment, and if such party neglects to have the other summoned, the proceedings are to go for nothing, and he cannot bring a suit for divorce again except on some new ground. Other articles allow the woman, in all causes where specific grounds for di-

vorce are alleged, to quit her husband's domicil for another indicated by the judge, and to receive alimony proportionate to his means, until the case is settled.

Some of the provisions of the chapter on divorce by mutual consent are worthy of note, as showing the anxiety of the redactors of the law lest this principle should multiply divorces greatly. No mutual consent should have any force unless the husband were over twenty-five and the wife at least twenty-one, and under forty-five years of age; unless they had lived together two years, and had not lived together twenty; and unless their mutual consent were authorized by their fathers and mothers, or by other living ascendants according to the rules prescribed in the law concerning marriage.* Then the parties are required to reduce to writing their proposed arrangements in regard to alimony and the guardianship of the children, and to present themselves before the judicial officer of their *arrondissement* together and in person, in order to make before two notaries a declaration of their will. After the judge shall have made to them such representations and exhortations as he shall think fit, and shall have read the fourth chapter of the law relating to the effects of divorce, if

* That is, if no father and mother could give their consent, a grandfather and grandmother might do it, or if they, being of the same line, disagree, the grandfather's consent is enough. Code Civ. §§ 145–150.

they persist in their resolution, they are required to produce before him an inventory of their goods, their arrangements already spoken of, certificates of their birth and marriage, of the birth and death of all the children born of their union, and of the consent of the proper relative in the ascending line to their divorce. A procès-verbal is to be drawn up, into which all these acts are introduced, with a notice to the wife to reside in a house agreed upon, apart from her husband, until the case be finished. The declaration of the parties touching their mutual consent shall be renewed with the same formalities in the first half of the fourth, seventh, and tenth month after the first proceedings, at which times formal proof must be adduced that their relatives continue to give their assent. At the expiration of a year from their original declaration they are required to appear, supported each by two friends of fifty years old and upward, before the judicial officer of the arrondissement, in order to present to him the acts drawn up on the four occasions already mentioned, and to demand of him separately, yet in the presence of each other and of the four friends, a decree of divorce. Then the reports of all the proceedings hitherto are to be submitted to the "*ministère public*," who, if he finds all the formalities of the law complied with, shall give his conclusions in the form "*la loi permet*," and shall refer the matter to "the tribunal." If the tribunal is of opinion

that the parties have satisfied the law, it shall allow the divorce and send the parties to the civil officer in order to have it pronounced; otherwise the tribunal shall declare that the divorce cannot take place, and shall draw up the reasons for such a conclusion. The parties are to appear before the officer authorized to pronounce the divorce within twenty days after the decree of the tribunal, failing to do which they render the decree of the tribunal without effect.*

The next chapter on the effects of divorce will show more clearly still, by several of its provisions, the intention, already made apparent, of putting as many clogs on divorce by mutual consent as possible. This chapter prescribes that divorced parties shall never marry each other again; that when the divorce is for a determinate cause, ten months must elapse before the woman can contract a second marriage; that the guilty partner, where adultery is the cause of divorce, can never

* These provisions of the Code Civil were reproduced in a Rheinische Gesetzbuch, a code founded on the Code Civil, we believe, and controlling a part of the Rhenish provinces of Prussia. That divorce by mutual consent is there unfrequent is shown by the fact which Savigny mentions, that in thirty-six years only seventeen such divorces took place in a population of more than two millions, of whom about a fifth belonged to the Evangelical Church, (Reform of the laws on divorce, u. s., v. 282). Probably, however, the Catholic habits of a good part of this population ought to be taken into consideration in explaining this fact, and to this Savigny does not advert.

marry his or her accomplice; and that the woman, if an adulteress, shall be shut up in a house of correction for not less than three months, nor more than two years. When the divorce is by mutual consent, the parties cannot marry again during three years after the pronunciation of the divorce, and half of the property of each of them, from the day of their first declaration of their purpose to procure a divorce, shall be transferred to the offspring of their marriage in full right—they themselves having the enjoyment of the property during the minority of the children, subject, however, to the proper charges for the children's maintenance and education. In all other kinds of divorce, except for mutual consent, the party against whom the divorce has been obtained shall lose all advantages conceded by the other consort, whether by contract of marriage, or since its consummation; while, on the other hand, the party who has obtained the divorce (the innocent party) shall continue to enjoy the advantages conceded by the other party, whether originally reciprocal or not. Power, also, is given to the courts to grant to such innocent party, if not already having the means of support, an alimony from the revenues of the other party, not exceeding a third part of them, and revocable when no longer needed. Of the arrangements in relation to the children, we omit to speak.

The last chapter of this divorce law relates to separation, "*de corps*," or *a mensa et toro*. This

cannot originate in mutual consent, but only in some determinate ground. If it is obtained on account of the adultery of the wife, she shall be shut up in a house of correction for the term already mentioned, but the husband may terminate the effect of this penalty by consenting to take her back again before it has expired. A separation for any other cause except a wife's adultery, after it has lasted three years, may be converted into divorce by a court on the demand of the party who was originally the defendant, provided the original demandant does not consent to put an end to the separation at once.

Here, as we have said, the authors of the law went back upon Catholic principles, which knew no other separation of a married pair, and never dissolved marriage; it agrees, again, with the old ecclesiastical usage in shutting up for a time the woman guilty of adultery, and it thus contemplates, as the church did, a reconciliation; but its peculiarity consists in converting the separation into full divorce after a term of years. There must be a limit of time after which the party sinned against in the first instance shall decide whether he or she will receive back the other, or shall put it into the other's power to marry some other person. The law, although it runs athwart of the Catholic doctrine of the indissolubility of marriage, yet does no hurt to tender Catholic consciences. For the divorce on petition of the original defend-

ant—who might be a Protestant or of no religion —while it allows the other party to marry, does not force him or her to swerve from the strictest principles of his religion. It only says that he shall not by his bitterness of spirit put an obstacle in the way both of reconciliation and of the other party's remarriage, except in the case of his wife's adultery, when his refusal to take her back can make the separation perpetual. The guilty woman might thus be placed on worse ground by this process of separation than by divorce, for the law lays no impediment in the way of her remarriage after divorce, when her time of imprisonment is served out, except that of marrying the partner of her crime. In the draft of the chapter on the effects of divorce submitted to the council of state, it was provided that the adulterous woman could never marry again, but on the remark of M. Tronchet, that this prohibition would have a dangerous influence on morals by furnishing an excuse for the lewdness of such a woman, the clause was struck out.

This law of divorce continued in force until the fall of Napoleon, when with the Bourbons the old order of things was restored. It was natural, or rather necessary, that an attempt should now be made to alter the law by abolishing divorce altogether. Of this important change in March, 1816, a historian of the restoration, Louis de Viel-Castel, thus speaks (Hist. de la Restauration, iv., 486):

"The only proposition which did not meet with

serious opposition was that which had for its aim the abolition of divorce. On this point the Assembly was unanimous, and it represented, if not the unanimity, at least the general sentiment of France. M. Trinquelague, the organ of the committee to which the examination of the question had been referred, developed, in a carefully written report ideas similar to those set forth by M. Bonald. He showed that the proposition made no attack on the religious liberty of the Protestants, since, if their religion permitted, it did not prescribe divorce. He indicated the arrangements to be made in order to remedy by legal separation some of the inconveniences which the authors of the Code Civil thought they saw in the indissolubility of marriage, and thus to determine in case of separation the condition of wives and children. The project of a resolution, voted without being opposed, was sent to the Chamber of Peers. Two bishops spoke there in its support. Another member, although he adhered to its principle and made no formal amendment, asked whether divorce could not be allowed to non-catholics for determinate causes, but that idea was set aside, and the resolution was adopted by one hundred and thirteen votes against eight. Transmitted then to the government, and by it reduced to the project of a law, it was definitively sanctioned by the two chambers. The majority in the Chamber of Deputies was two hundred and twenty-five

against eleven. In the hurry of accomplishing what was regarded as a work of moral reparation, time enough was not taken for regulating all the difficulties to which separation substituted for divorce would give rise."

In 1831 an attempt was made without success to alter the law of divorce. Of this A. L. Von Rochau thus writes (Gesch. Frankreichs von 1814 bis 1852, 1, 329).: "Some other projects of law, accepted in the Chamber of Deputies, met in the Chamber of Peers with unexpected opposition. The first of these propositions aimed at the reintroduction of divorce, which, under the Restoration, in mockery of sound reason and sound morals, had been unconditionally prohibited in the name of the interests of Christianity, the demoralizing separation from bed and board being put into its place, which leaves behind only the name of marriage or rather a bald lie." The attempt was renewed in 1832, and was defeated both then and twice again in the next years. Nor did another movement to abolish the statute of 1816, made in 1848, fare any better. M. Naquet brought forward a similar project of a law in 1876 (see his work "Le Divorce," page 56, and Appendix).

Divorce in England has a brief record.

In the times when England was under the Roman Church, the ecclesiastical courts had cognizance of marriage and its dissolution. No separations except *a mensa et toro* were known.

The same rules in regard to annulment of marriage prevailed, which are still in force in the Catholic countries. The rupture of Henry VIII. with Rome, and the subsequent progress of the Reformation, made no change in the law of marriage and in the courts to which its execution was confided. Catharine of Aragon was set aside by sentence of an ecclesiastical court, because her relation of sister-in-law to the king was claimed to have rendered their marriage null *ab initio*. Anne of Cleves was put away after betrothal, but without consummation of marriage as it is alleged, on the ground of precontract. Anne Boleyn and Catharine Howard were executed for treason; the treason consisting in adultery, which dishonored the king's person and injured the succession. About the same time, the sister of Henry VIII., Margaret of Scotland, got from Rome a separation from her second husband, the Earl of Angus, on the pretext of a precontract between him and another lady.

There came in, however, with the Reformation and with the denial of the sacramental character of marriage, an opinion that it was right in cases of adultery for the innocent party to marry again. In 1548, Queen Catharine Parr's brother,* the Marquis of Northampton, wished to contract a

* Burnet's History of the Reformation (vol. ii., p. 56 of the 2d folio edition) gives a history of that affair, and an abstract of Cranmer's investigations into the opinions of the fathers. A number of questions were put to learned men, and their answers are given in the collections, No. 20, in the same volume.

second marriage after the decision of the ecclesiastical court separating him from his first wife, a daughter of the Earl of Essex, on account of her elopement or adultery; and a commission was issued to Cranmer and others to inquire into the conformity of such a step with the Scriptures. Cranmer, having largely examined the matter, was inclined to allow remarriage in such a case to an innocent party. A few years after, in 1552, the *reformatio legum ecclesiasticarum*, drawn up principally by Cranmer, and approved by a commission of divines and lawyers, proposed remarriage on the ground of adultery and several other offenses, but did not have the sanction of law, perhaps because the Catholic reaction came on the next year with the accession of Mary.* The Puritans in the church would have favored this change in

* Not having access either to the original edition of this code of canon law published in 1571, under the oversight of Archbishop Parker, nor to the Oxford reprint of 1850, we are compelled to resort to second hands. Lingard says that it allowed divorces on account of adultery, desertion, long absence, cruel treatment, and danger to health and life; and separation without liberty of remarriage on account of incompatibility of temper (iv., chap. v., p. 284). Hallam (Const. Hist., i., p. 140) affirms that Lingard turns *capitales inimicitiæ* into incompatibility, which it certainly is not. The code also punished adultery with imprisonment or transportation for life, and in the case of the offending wife with forfeiture of her jointure and of all advantages which she might have derived from the marriage, while the offending husband was to return to her her dower, adding to it one-half of his fortune. The clergyman guilty of this crime was to lose his benefice and his estate

the laws both then and afterward. Meanwhile, Northampton, having actually taken a second wife, was at first parted from her, then was allowed by sentence of a court to live with her, and finally had his union legalized by act of Parliament. From this time on, we believe, the received doctrine was that a sentence of an ecclesiastical court could only separate from bed and board, and that a special act of Parliament was needed to authorize remarriage.

But for a number of years, although remarriage after divorce was null and void, so that the issue would not be legitimate, no civil penalties were attached to it, and it was punishable only by ecclesiastical censures. Accordingly, many without scruple married again, after obtaining divorce, in the reign of Elizabeth. In the first year of James a statute made remarrying, while a former husband or wife was living, a felony, and yet a provision of this act declared that it was not to extend to any, who, at the time of such remarriage, had been or should be divorced by sentence of an ecclesiastical court. At the same time several canons touching this matter were enacted by royal authority, one of which provided that no persons separated *a toro et mensa* should, during their joint lives, contract matrimony with other persons, and that the parties requiring the sentence

Hallam thinks that it was laid aside because public feeling was against it.

of divorce should give sufficient caution and security into the court that they would not transgress this restraint. Another canon required the judge who should grant divorce, without observing these rules, to be suspended for one year by the archbishop or bishop, and declared his sentence utterly void.*

A very remarkable case of remarriage, in defiance of these laws, occurred in 1605, between Penelope Devereux, Lady Rich, and the Earl of Devonshire, before known as Lord Montjoy. She had had an adulterous connection with Montjoy, and had borne him several children while the lawful wife of Lord Rich. Then, by an amicable arrangement between the parties, an ecclesiastical court separated her from her husband, and she immediately married her paramour. William Laud, then the Earl's chaplain, solemnized the marriage. Laud must have done this against his own convictions of duty, and he kept the day as a time of fasting afterward.†

The special acts of Parliament enabling a party to marry again, while a former husband or wife was living, were generally preceded by the decree of an ecclesiastical court, but this was not always

* See "The Romance of the Peerage," by Prof. Craik, vol. i., Appendix, which rectifies several mistakes on this matter, and from which we have drawn freely. For the case of Lady Rich and the Earl of Devonshire, see the same work, vol. i., 273. The same work notices the absurd plea made for Laud by Heylyn.

† For Foljambe's case see note on Chapter 4, in the Appendix.

the case. The Duke of Norfolk, without any such prejudgment in Doctors' Commons, was, in 1700, by act of Parliament, after evidence had been submitted, released from all connection with his wife, having vainly endeavored to effect the same thing eight years before, when his case seems to have been made a party question. This adulterous wife, after the dissolution of marriage, was married to her paramour. There had been but one act before this enabling an innocent husband to marry again. The case was that of Lord Ross or Roos, afterward Earl and Duke of Rutland. Here the sentence of the ecclesiastical court had preceded the divorce by act, the proceedings on which, begun in 1666, were not dispatched until four years afterward.* Bishop Cosin seems to have aided the passage of this act by speeches in the House of Lords, the substance of which is given in the State Trials.†

It may be added that the House of Lords, in trials before it, has not necessarily respected the decisions of the ecclesiastical court. In the noted trial of the Duchess of Kingston in 1770, she was found guilty of bigamy, after her marriage to the duke wearing that title. This decision of the Lords invalidated or overrode a decree of an ecclesiastical court, which, in a process of jactitation

* Comp. Evelyn's Diary, under March 22, 1670.

† Vol. xiii., pp. 1332–1338, where the proceedings in the Duke of Norfolk's case are given on his last attempt to get an act for his divorce. The proceedings in 1692 are found in vol. xii.

of marriage, had long before restrained Augustus John Hervey, afterward Earl of Bristol, from giving himself out as her husband; for only on the fact of a marriage with him her bigamy depended. And in truth the decrees of the ecclesiastical courts, being often made on mere *ex parte* evidence, or procured by collusion, were deserving of no great respect.

For a long time the Parliament was called on merely to declare children born of an adulteress illegitimate,* or far more frequently to dissolve marriage on account of a decision in the court; until in 1857 the law was remodeled and the jurisdiction in cases of divorce was changed. The law is quoted as 20 and 21 Vict., cap. 85, and was amended, but not essentially, in 1858 and 1860 (21 and 22 Vict., cap. 108, and 23 and 24 Vict., cap. 144). We have these laws before us, and their leading provisions in regard to divorce are as follows:

1. All jurisdiction of ecclesiastical courts in regard to matters matrimonial is henceforth to cease, except so far as relates to marriage licenses, and a new court is created, consisting of the Lord Chancellor, the Chief Judge, and Senior Puisne Judge of the three Common Law Courts, and the

* A case of an early date, where the injured husband asked only this, is mentioned in State Trials, xiii., 1348. Also Lord Ross got such an act, before he obtained the other dissolving his marriage.—Ibid

Judge of the Probate Court, called Judge Ordinary of the Court of Divorce. Three or more of these judges, of whom the Probate Judge is to be one, shall hear and determine all petitions for the dissolution of marriage, and applications for new trials of questions or issues before a jury. This court is to be called the court for divorce and matrimonial causes.

2. A sentence of judicial separation, superseding but equivalent to the former divorce *a mensa et toro*, may be obtained by husband or wife on the ground of adultery, or cruelty, or desertion without cause, for two years and upwards. Then follow provisions in regard to the way of obtaining such a sentence; to the court, its rules and principles, which are to conform to those of the ecclesiastical courts; to the alimony of the wife, and her status during separation; to the reversal of a sentence obtained during the absence of the other party, etc.

3. Dissolution of marriage may be obtained by the husband for the adultery of his wife, and by the wife not for simple adultery, but for "incestuous adultery, bigamy with adultery, rape, sodomy or bestiality, or for adultery coupled with such cruelty as without adultery would have entitled the wife to a divorce *a mensa et toro*, or for adultery coupled with desertion without reasonable excuse for two years and upward."* The case is

* Incestuous adultery is defined in the act to mean "adultery with a woman with whom, if his wife were dead, the husband

to come before the court on petition of the innocent party, with statement of facts; the alleged adulterer is to be a co-respondent to the petition, if presented by the husband, and the alleged partaker of the husband's crime is to be made a respondent to the petition, if presented by the wife, unless in such case the court order otherwise. If the facts are contested, either party may have a right to a jury-trial.

4. The court being satisfied of the facts, and that there has been no condonation, collusion, or connivance at the crime on the part of the petitioner, and no collusion with a respondent, shall decree a dissolution unless it finds the petitioner to have been guilty of adultery during the marriage, or of unreasonable delay in presenting the petition, or of cruelty, or of desertion before the adultery, or of misconduct conducing to such crime. The decree was not to become absolute until after three—subsequently until after six months.

5. Appeal may be made from the Judge Ordinary to a full court, and from such court to the House of Lords, each within three months, unless the recess of the house make a short extension of the term for the final appeal necessary. When no

could not lawfully contract marriage, by reason of her being within the prohibited degrees of consanguinity or affinity." Bigamy is marriage to any other person during the life of the former husband or wife, wherever that marriage shall have taken place

appeal is made within the prescribed term, or, if made, effects no change in the original decree, the parties may marry again, that is the innocent and the adulterous party both; but no clergyman of the Church of England and Ireland shall be compelled to solemnize the marriage of persons so divorced.

6. Several other provisions of the act are worthy of mention. We have room only for the following: The old action of a husband for criminal conversation is declared to be no longer maintainable, but the husband may claim damages from the alleged adulterer; and the damages, or a part of the damages recovered by verdict of a jury, may be applied by the court for the benefit of the children of the marriage, or for the maintenance of the wife. When such an adulterer shall have been made a co-respondent, and the guilt shall have been established, the court may make him pay the whole or any part of the costs. When the wife is the guilty party and is entitled to property in possession or in reversion, the court, at its discretion, may settle such property, or any part of it, on the innocent party, or on the children of the marriage.

This law it will be observed, grants separation for a small number of specific acts, and dissolution of marriage for all adultery of the wife, but only for adultery attended with aggravating circumstances on the part of the husband. In cases of

separation it allows the possibility of renewed cohabitation by mutual agreement, although of this nothing, we believe, is said. In cases of dissolution of marriage it allows both parties to marry again at once, and the guilty one to marry his or her paramour, putting a premium thus on adultery, unless the injured party is determined not to sue for a divorce. In allowing the court to settle a guilty wife's property on her husband or children, it approaches a principle of the Roman law concerning dower. But it falls below the Roman law in making adultery no civil crime, but only a private injury. It respects the consciences of clergymen in not requiring them to solemnize marriages regarded by them as unlawful. On the whole, with serious defects, it seems to us to be an excellent law; it does honor to the Christian country where it is in force, and it is certainly a great improvement on the former mode of regulating divorce in England. May the door never open wider in England for the more censurable kinds of divorce, nor the sanctities of domestic life lose that reverence which they now possess! *

We annex here brief statements of the laws of divorce, as they stand at present in the principal

* For the laws bearing on marriage now in force, see George Browne's 'Law and Practice of Divorce, etc.,' ed. 4, Appendix 1, and Ernst Browning, 'An Exposition of the Laws of Marriage and Divorce, as Administered in the Court for Divorce and Matrimonial Causes, with the Method of Procedure in each Suit.' London, 1872.

countries of Europe. With some of them we unite brief tables of divorces or separations. At the end more extensive tables are given showing the state of divorce in recent times.

Divorce for adultery of either husband or wife, and for malicious desertion, are granted by Scottish courts, the first being introduced without statute, the other by a statute of 1573. Judicial separation or separation *a mensa et toro*, may be granted for cruelty and adultery. A divorced person could not marry her paramour, if named in the decree of the court. The conjugal rights amendment act of 1861 contained provisions like those of the law of 1857 in England, for which see Encycl. Brit., vol. vii., Art. Divorce.

Divorce can be obtained in Holland on account of adultery, malicious desertion, and the causes allowed in the old title six of the French Code Civil. But *sévices* or cruelty, in order to be a cause of divorce, must be such in degree as to involve danger of life or cause dangerous wounds.

Also absence of one of the consorts for ten years and them arriage of the other; as well as an unopposed demand, five years after a decree of separation has been pronounced, can be followed by full dissolution of marriage.

Causes of divorce in Denmark are adultery, ante-nuptial impotence or contagious disease, desertion for three years with the avowed purpose of not returning, or for seven years with satisfactory

proof of intended permanent absence. Condemnation for an infamous crime can be followed in three years by divorce, and in seven when the crime is not infamous.

The Government can, through the minister of justice, grant divorce for intolerable cruelty and for insanity; and can sanction separations by mutual consent. These are said to be quite numerous.

In Norway the causes for divorce are nearly the same as in Denmark. The king can authorize divorce in the case of the parties' mutual consent. Separation for three years, allowed by the civil authorities, may be turned into divorce after the end of that term, by authority from the king. Each of the parties thus divorced needs a special leave to remarry.

In Sweden, ante-nuptial lewdness, or impotence or contagious disease vitiates marriage. Divorce can be had for adultery or for desertion, but reconciliation or equal guilt prevents divorce for the first cause, and certain rights of the culpable party to property are taken away. The party guilty of adultery cannot marry unless the innocent one has married or gives consent. As for desertion, the injured party summons back the culpable party, and can obtain divorce at the end of a year, in case he or she does not return. Even a person absent in the discharge of public functions can be thus dealt with, if the absence is unreasonably long, unless the wife's dissolute life can be pleaded in excuse.

Divorces are few in Sweden. In 1846–49, among a population of over 4,000,000 (there were 4,341,549 in 1874), the divorces were in 1846, 115; 1847, 121; 1848, 99; 1849, 127; while in the kingdom of Saxony there were in the same years, 398, 435, 384, 363, in a population of 2,500,000, or 115 per annum in Sweden, and 377 in Saxony.*

In 1862, when the tribunals of the Swiss Confederation began to take cognizance of divorce instead of the cantons, it was made a law that a Catholic could procure divorce only by changing his religion. In 1874 the federal law of divorce assigned the initial steps in the process to the tribunal of the canton which was the husband's domicil, the federal tribunal being the court of appeal. The following were the principles of the new law of that year, which took effect in 1876:

1. If the married parties both demanded divorce, it could be granted in case the court found that a common life was incompatible with the nature of marriage.

2. If only one of them demanded it, it could be granted for adultery, cruelty ("sévices et injures, attentat à la vie"), condemnation to an infamous punishment, malicious desertion, and incurable mental malady.

3. Apart from these causes for divorce, the court can pronounce a decree of *séparation de corps*, if the marriage tie is *profondément atteint*. This separation can be pronounced for not more than two

* V. Oettingen: Moralstatistik, p. 140.

years; but if after this time there is no reconciliation, the petition for divorce can be renewed, and the court may grant it according to its discretion.

4. In divorce for determinate grounds the culpable party cannot marry until a year after the decree is past. The court can extend the delay to three years.

5. Marriages now unlawful on account of the age of the parties (eighteen for the man, sixteen for the woman), or where one at least had not reached the marriageable year, can be declared null under certain circumstances, by a parent or guardian.

6. Separations, for a time or without limit, decreed before the existing law, can be converted into full divorces, if the causes for which they were granted would, by the new law, authorize divorce.

The number of divorces granted in 1877 was 1,102; in 1878, 1,036; in 1879, 938. In the last of these years the petitions or demands for divorce were 1,185, of which 115 were denied, 132 had temporary separations accorded to them, and 938 were granted in full.

Of these cases 695 pertained to persons both of whom were Protestants, 86 to Catholics, 48 to mixed marriages, where the husband was a Protestant, and 36 to those where the husband was a Catholic.

This sum total makes the ratio of divorces to marriages 4.82 to 100, or 1 to 20, while in Saxony the mean number is 1 to 31.

In 1879 there were 343 remarriages of men and

347 of women who had been divorced, of whom 85 men and 68 women were remarried within a year after the dissolution of the first marriage.*

In Austria the law accommodates itself to the various forms of faith in the empire. For Catholics marriage is indissoluble; but separations may be accorded for certain causes, or by the mutual consent of the parties. For non-Catholics and persons professing no faith divorce can be granted on the ground of adultery, five years' imprisonment for crime, desertion and absence in the legal sense, plots endangering life or health, repeated maltreatment, and insurmountable aversion on both sides. In this last case delays may intervene, as the circumstances may seem to demand. For Jews, adultery of the woman and mutual consent, with special formalities drawn from Jewish law. In mixed marriages the law for each party is applied. Thus, a Catholic husband can obtain on his complaint a *separation* from his wife; and she, being a Protestant, can obtain a *divorce* on the ground of the judgment given in his favor.

Belgium, although a Catholic country, grants divorces dissolving marriages and *séparation de corps*. It was separated from France in 1815, and, says M. Naquet, "the title six of our old civil code continues in force, just as it would have force here, if the restoration had not taken place," with no important changes. Naquet gives the annexed table:

* Journal du Protestantisme Français, February 19, 1881.

Years.	Marriages.	Divorces.	Separations.	Ratios of divorces to marriages.	Ratios of separations to marriages.
1840...	30,551	28	25	1:1,092	1:1,222
1841–50	28,967 av.	28.1 av.	22.2 av.	1:1,031 av.	1:1,205 av.
1851–60	33,486 av.	38.6 av.	43.6 av.	1:867 av.	1:768 av.
1861–70	36,309 av.	46.1 av.	59	1:787 av.	1:608
1871...	37,533	75	44	1:501	1:853
1872...	40,084	112	49	1:354	1:838
1873...	40,598	125	58	1:353	1:699
1874...	40,328	144	57	1:272	1:707

While the ratio of separations to marriages have remained nearly the same since 1851, that of divorces to marriages is three times as large within the same period.

Russia.—Divorce in this empire can be pronounced by an ecclesiastical tribunal in cases of adultery or ante-nuptial impotence, provided that in this latter case three years have expired since the marriage took place; or for conviction of crime involving loss of civil and political rights. Marriage can be dissolved on account of absence of one of the parties for at least five years in parts unknown. But if a husband is captured in war, the wife must wait ten years before she can obtain a divorce.

All processes for annulling marriage and for divorce are regulated by canonical law and tried by courts ecclesiastical. Divorces are by no means infrequent.

Germany.—It is not our purpose to enter into an

extended account of the divorce laws of the German territories. It is enough to say that they may be divided (as Strippelmann, a Superior Judge in Electoral Hesse divided them*) into such as have in the main followed the views of divorce adopted by the early Protestant jurists and theologians, and such as enlarge considerably the causes for divorce originally admitted. To the first class belonged especially Bavaria, so far as its Protestant population was concerned, Hanover, the kingdom of Saxony, and Schleswig-Holstein; to the second belonged Prussia, Austria for its Protestant population, and Baden in its marriage ordinance since 1807. The great changes in the law of divorce pertain to the latter part of the eighteenth and the present centuries, so that now, says Richter (Kirchenrecht, ed. 6, 1867, p. 853): "In most German territories, not only cruelties and dangerous threatenings are recognized as valid causes for divorce, but also shorter imprisonment affecting freedom, crimes affecting honor, incurable quarrelling, and charges known to be false" of one party against the other.

Since the new German empire was established no general divorce-law has been passed, and in the law of February 6, 1875, relating to registration of civil condition and celebration of marriage, divorce is touched only in a few points, one of which is noticed below. Of the Prussian divorce regula-

* Ehescheidungsrecht. Cassel, 1854.

tions we have already spoken. At present the causes for divorce are, in brief: adultery, malicious desertion, refusal of connubial duty (called of old quasi-malicious desertion), impotence, caused before or after marriage, madness and delirium, plots against the life of a married partner, great crimes, including false charges against husband or wife of such crime, dissoluteness of life, withholding support, unalterable dislike.*

Here are subjoined a very few brief statements of divorce in Prussia, Saxony, and elsewhere in Germany, which are by no means complete, but may serve as data for comparison with the statistics of some of the United States, which will soon follow. The first statements, from Strippelmann's Ehescheidungsrecht (§ 13), are intended to show the contrast between territories which have adhered to the older Protestant view, and those, like Prussia, which have increased the number of causes for separation. The time is 1838–40.

1. The divorces granted in the district of the Supreme Court at Berlin were, on the average, for these three years, 570 to about a million of inhabitants, or 57 to 100,000. But in the judicial districts of Frankfurt (on the Oder), Magdeburg, Königsburg, and Stettin, where the Prussian divorce-law was not then applied, the average number

* Comp. Die Ehescheidung, etc., in territory where the Prussian law is in force, by W. Peters, a Landesgerichtrath. Berlin, 1881.

of divorces was 30, 35, 34, and 36 to 100,000 inhabitants. In the Rhenish province the divorces were 24 yearly among 600,000 Protestants, or 4 to 100,000. And in the court district of Greifswald, in New Pomerania, there were 16 divorces to 100,000.

In the kingdom of Saxony, for the five years 1836–40, the courts of appeal of Leipzig and Zwickau granted 169 divorces annually in a population of 900,000, or about 18.8 to 100,000.

In Electoral Hesse, among a Protestant population of between 6 and 700,000 inhabitants, there were, in 1835, 24 divorces; in 1841, 23; in 1851, 16; in 1852, 17; in 1853, 18; that is, from nearly four to a little over two per annum to 100,000. This principality became Prussian in 1866.

2. Some tables relating to divorce in the kingdom of Prussia follow, which I regret to say, are neither full enough, nor give the ratio to marriages.

Divorces in 1839	2,524	Divorces in 1851	2,501
" " 1840	2,312	" " 1852	2,309
" " 1841	2,341	" " 1853	2,315

The suits for divorces were:

In 1863	5,343	In 1868	5,387
" 1864	5,329	" 1869	5,515
" 1865	5,377	" 1870	5,531
" 1866	5,352	" 1871	4,947
" 1867	5,372		

This list does not include applications from the new provinces, nor from Rhenish Prussia. Important changes in the law gave the courts, in 1844, greater freedom of judgment than they had before.

3. In the kingdom of Saxony, with a population of not far from 2,000,000, there were, in 1862, 470 divorces, and of divorce-suits and divorces:

In 1863	1,011	459	In 1866	911	362
" 1864	963	446	" 1867	1,009	396
" 1865	972	372	" 1868	1,022	440

At this place we subjoin some statistical tables of separation or of divorces in France and England. In France the causes for *séparation de corps* are those enumerated on page 159 *supra*, viz., adultery for the woman, and for the man that adultery in which he keeps a concubine in the "*maison conjugale*," "excès, sévices, ou injures graves," the condemnation of the other consort to an infamous punishment. Lists may be found in Naquet's "Divorce," Cadet's "Marriage," and in v. Oettingen's "Moralstatistik," Append., Table 12–15.

The tables commencing from 1840 and ending in 1874 include demands for separations brought by the husband and the wife, the separations granted, the marriages, and the ratios of separations to marriages. V. Oettingen gives also the numbers of marriages separated in which there had been no issue:

Years.	Suits for separation.			Separations granted.	Marriages (Naquet), in thousands.
	By husband.	By wife.	Total.		
1840..	....	....	940	642	288,000
1841..	....	....	987	693	282,000
1842..	....	....	962	684	280,000
1843..	80	997	1,077	808	285,000
1844..	80	981	1,061	794	279,000
1845..	85	1,042	1,127	817	283,000
1846..	80	1,048	1,128	813	268,000
1847..	94	1,074	1,168	824	249,000
1848..	95	884	939	655	293,000
1849..	79	995	1,034	755	278,000
1850..	68	1,065	1,134	834	297,000
1851..	91	1,100	1,191	864	286,000
1852..	104	1,373	1,477	1,105	281,000
1853..	160	1,562	1,722	1,260	280,000
1854..	171	1,510	1,681	1,242	270,000
1855..	143	1,430	1,573	1,165	283,000
1856..	182	1,481	1,663	1,242	284,000
1857..	168	1,559	1,727	1,252	295,000
1858..	200	1,777	1,977	1,493	307,000
1859..	193	1,856	2,049	1,588	298,000
1860..	179	1,972	2,151	1,624	288,000
1861..	220	1,963	2,186	1,652	305,000
1862..	247	2,113	2,360	1,784	303,000
1863..	258	2,161	2,419	1,856	301,000
1864..	280	2,160	2,440	1,822	289,000
1865..	297	2,274	2,571	1,939	299,000
1866..	284	2,529	2,813	2,153	303,000
1867..	275	2,544	2,819	2,181	300,000
1868..	319	2,680	2,999	2,272	301,000
1869..	445	2,611	3.056	2,332	303,000
1870..	....	....	2,478	1,893	223,000
1871..	....	....	1,711	1,171	262,000
1872..	....	....	2,793	2,150	352,000
1873..	....	....	2,850	2,166	321,000
1874..	....	....	2,884	2,242	303,000

From 1843 to 1869 the sum of suits for divorce brought by husbands was 4,113, by wives 39,373—

in all 43,486, and the separations granted 32,532. The ratio of applications from wives, which is tolerably constant to that of husbands, is 1 to 9.8, and to all the separations, as 10 to 11 nearly. Of the cases thus brought before the courts for separation, 16,368 were those of persons without children, or 1 out of 2.7.

The number of applications not granted was 10,954. But of this vast number not granted many were withdrawn, in others reconciliations took place. The ratio of the divorce suits in all to those which were not granted was, for 25 years (1843–1867), about 100 to 25, or 1 to 4.

In a series of 25 years (1843–1867), the lengths of the marriages of divorced persons are distributed between the following numbers:

For one year or under	677
" one year and under five	9,662
" five and under ten	10,811
" ten and under twenty	13,939
" over twenty	7,291
Unknown	1,076
	43,486

The average of divorces to marriages for 35 years, in three periods of ten years and one of five, is:

	Divorces.	Marriages.	Ratios of divorces to marriages.
1840–49	7,495	2,785,252	1 : 371.6
1850–59	12,045	2,866,268	1 : 239.6
1860–69	19,615	2,996,222	1 : 152.7
1870–74	9,622	1,463,686	1 : 151.7

It will be observed that the ratios of divorces to marriages, after increasing to 2.45 times as much in the last five years as it was in 1840–49, is approaching to a maximum, and shows almost no increase in 1870–74 over what it was in 1860–69. But this may be owing to the Franco-German war and its consequences. In 1871 there were fewer divorces than there had been in any year since 1855; and, as usually happens after war, more marriages occurred in 1872 than ever before. In 1874 the marriage tendency fell back to what it was in 1869.

For the same period the causes or motives were:

For "sévices, excès, injures graves,"	39,978
" adultery of the wife	2,573
" adultery of the husband	2,020
" condemnation for crime	755
Total	45,326
The sum total should be	43,486

according to the number of demands or suits. The excess is owing to the fact that in some instances two grounds or motives were put into the same suit.

The callings or employments of the persons bringing the demands or complained of were the following:

Propriétaires, rentiers	10,136
Persons in commerce and trade	9,177
Cultivators of the soil	6,631
Workmen of all kinds	14,969
Unknown	2,573
	43,486

These numbers show the agricultural class to very great advantage, as being the largest class with the fewest divorces; and the liberal professions, as a small class comparatively, with a disproportionately large number. V. Oettingen speaks of this looseness of the marriage tie in the liberal professions in France as "wahrhaft Erschreckend." But the same canker appears in Saxony. There is there one suit for divorce—

To 346 marriages among domestic servants.
" 309 " " day laborers.
" 298 " " officials
" 283 " " manufacturers and tradesmen.
" 485 " " persons engaged in art and science.

The statistics of divorce for England find a beginning here after 1866, and include lists of petitions for divorce, and for separation, decrees for divorce absolute, for divorce *nisi*, and for separation. Decrees *in formâ pauperis* being few in number (6, 9, 7, 7, 7, 12, for 1873–78, in due order), and having no significance except so far as the poverty of the person and the costs of suit are concerned, are counted in with divorce absolute. Other matter coming before the divorce and matrimonial causes' court we pass by unnoticed. (Comp. the authors cited, p. 178, note.) As the decrees for divorce *nisi* must either become divorces absolute or be reversed, they need not be counted.

Years.	Marriages.	Petitions for divorce.	Petitions for separation.	Decrees for divorce absolute.	Decrees for divorce *nisi*.	Decrees for separation.	Ratios of divorces to marriages.
1867.	179,154	224	71	119(?)	....	11	....
1868.	176,962	236	68	23	137	22	1 : 7964
1869.	176,970	265	86	159	193	25	1 : 1113
1870.	181,655	264	87	154	230	22	1 : 1475
1871.	191,112	298	86	221(?)	191	22	1 : 864
1872.	201,267	308	71	133	107	22	1 : 1513
1873.	205,615	336	80	215	272	23	1 : 956
1874.	202,010	379	88	194	284	36	1 : 1041
1875.	201,212	362	89	173	194	19	1 : 1163
1876	201,874	400	136	208	332	27	1 : 970
1877.	194,352	423	128	249	301	49	1 : 780
1878.	189,657	516	116	292	496	57	1 : 649
Sums 1868–72		4,011	1,106	2,041	2,737	335	

The increase of the ratio of divorce to marriage after 1868 is very perceptible and constant. The separations are much fewer and move forward by a slower increase. The petitions for divorce as compared with the divorces finally granted, so far as the table discovers the latter, are as 10 to 5.1. Of the petitions for separation, about one-third are granted. The divorces represent adultery and more aggravated crimes; and as no harm attends a proof of adultery, but rather it enables the guilty parties to marry one another, we ought to expect that divorce will increase very much more rapidly where the standard of morals is lowered, as it must be by such a liberty conceded by law.

CHAPTER V.

DIVORCE AND LAW OF DIVORCE IN THE UNITED STATES.

It is our endeavor, in the present chapter, to give some account of the state of divorce in our own country. But to do this fully is impossible, and would be an unprofitable collection of details in a work like this, since the law-making power over marriage and divorce is vested in every separate State of the Union. Only over the District of Columbia, and temporarily over the Territories until they become States, can Congress exercise the same power in regard to family rights which the States have within their borders.* Almost two-thirds, then, of the existing States acquired

* Thus, Congress, in 1850, chap. 158, passed an act regulating divorces in the District of Columbia, and in 1826 annulled acts of the Governor and Legislative Council of Florida, then a Territory, for granting divorces. In 1862, an act was passed by Congress punishing polygamy "in any territory or other place where the United States have exclusive jurisdiction." (See Bishop, § 88, vol. 1.)

power, at the moment of their admission into the Union, of overthrowing all laws in this department of law which might have been enacted before. Of course, every new State is a place for experiments in legislation, following in main points older law, but differing in a multitude of particulars as well from the earlier Commonwealths which constructed the Union as from each other. It would be idle to make a full collection from statutes, or revised statutes even, of all the causes for divorce alone; and the most that is feasible—perhaps more than is profitable—is to exhibit, as briefly as may be, the course of legislation in some of the older States, with any remarkable changes and new experiments of such States, or of younger communities. In the preparation of the first edition of this work we examined over twenty States' codes, to find out how marriage and divorce were disposed of in them; but this is more than seems to be demanded in a work like this: it rather belongs to comparative digests of the laws of different States of the Union. All we attempt will be to look at some points touching the origin of divorce laws in the United States; the remarkable peculiarities which are found in some States or groups of States; and the progress of change in these laws, indicating or tending toward the increase or diminution of applications for divorce. And for this extensive tables ought to be at hand; but, unhappily, no such have been prepared or attempted,

except in a very few States—nearly all of them of the New England group. It would be highly interesting, also, to know what are the main characteristics of divorce procedure in the several States; what part the judges take in it; what proportion of libels or petitions are rejected or withdrawn; what provisions are made against collusions and the like. But these are, in a great measure, mysteries upon which even a large part of the most respectable lawyers can throw little light. Hence, in some points pertaining to our subject, one can reach little more than opinion on the actual condition of divorce procedure in the country as a whole—not to say that in the best known parts of it much is hard to be found out.

At first, divorces were mainly, if not quite exclusively, granted by an act of a colonial legislature, in accordance, perhaps, with the practice then, and until recently, existing in England, for the House of Peers to take cases of dissolution of marriage into their hands. Quite a number of States, in fact nearly all the old ones, used this way of dissolving marriage for a long time; but special legislation in matters of divorce is by the constitutions of thirty States now prohibited. The States which have made no such restrictions on legislative power are the six New England States, New York, and Delaware. The earliest instance of prohibiting legislative divorce that I

have found is in the Constitution of Tennessee of 1834 (Art. xi., § 4, renewed in the new Constitution of 1870). We cite this clause: "The Legislature shall have no power to grant divorces, but may authorize the courts of justice to grant them for such causes as may be specified by law, provided that such laws shall be equal and uniform throughout the State." In the Constitution of Mississippi, framed in 1832, a somewhat similar provision existed (Art. vii., § 15), to the effect that "divorces from the bonds of matrimony shall not be granted but in cases provided for by law, by suit in chancery." And in the Constitution of 1868, framed after the secession times, we find a similar restriction (Art. iv., § 22). In the six States which have engrafted no such prohibition on legislative power in their constitutions, the granting of divorce by special legislative act is now hardly known. In Massachusetts, it was provided by the Constitution of 1780 that all causes of marriage, divorce, and alimony shall be heard and determined by the Governor and Council until the Legislature shall, by law, make other provision. A law in 1792 transferred divorces to the courts; and accordingly, when a special divorce was granted by the Legislature afterward, the Governor vetoed it as being against the Constitution. No special law of this kind has been passed since, and Mr. Bishop (Mar. and Div., ed. 6, § 689) thinks that "a legislative divorce would not now be sustained by the

courts."* By a somewhat similar pathway, the Constitution of Pennsylvania, framed in 1838, denied the Legislature "the power to enact laws annulling the contract of marriage in any cases where, by law, the courts of [the] Commonwealth are, or may hereafter be, empowered to decree a divorce." But the Constitution of 1873 expressly forbids the Legislature to pass any local or special law "for granting divorces." In New York, no restriction on the power of the Legislature to pass a law of divorce for a special case seems to exist, although local legislation is prohibited for less reason in a constitutional amendment of 1874. In Connecticut, the Legislature can still vote divorce in special cases, and petitions were unsuccessfully presented for this end in 1878, after an obnoxious part of the divorce laws had been repealed; but nothing has been done for many years except by the courts to dissolve matrimony.† In Maine, if

* In 1874, the Legislature of Massachusetts provided that divorces *nisi*, already granted under an act of 1870, should have the force of divorces absolute from the bonds of matrimony. Soon after this the Supreme Court declared this provision to be unconstitutional, on the ground that it was an interference with the judicial power by the Legislature, the court holding that the terms of the Constitution showed an intent of the people to commit the hearing and determination of all cases of divorce to the judiciary only. (From Mr. C. D. Wright's Eleventh Report of the Bureau of Statistics and Labor for 1880, p. 221.)

† The general statutes, as edited and revised under act of the Legislature, and approved by that body in 1874, contains

I am not in an error, a legislative divorce was granted in 1867; but an amendment to the Constitution in 1876 authorized the Legislature, "from time to time, to provide, as far as practicable, by general laws, for all matters usually appertaining to special or private legislation." And finally, New Hampshire, having provided by the Constitution of 1784, as well as by that of 1792, that "all causes of marriage, divorce, and alimony should be heard and judged by judges of the Superior Court, until the Legislature, by law, shall make further provision," the matter of legislative divorces stands nearly as it does in Massachusetts.

Thus the States are giving up legislative divorce, and there will soon be uniformity in this respect, if for no other reason, for this, that as States increase in population the load of business thrown on legislatures and committees by petitions for dissolving marriages would become intolerable. But if we turn to the general laws affecting divorce or separation, we find the case to be very different. There are now thirty-eight law-making powers continually in action within the United States; some of them busy at readjusting the old laws to a somewhat altered condition of society; others, in

the following heading of the chapter on divorce: "The Superior Court shall have exclusive jurisdiction of all petitions for divorce," etc. If the word exclusive does not mean to the exclusion of any other court, as it probably does, petitions could only be considered by the Legislature in regard to causes not provided for by existing law.

newly settled States, called upon to make new codes after old ones with which the law-makers are familiar, or trying fresh experiments in legislation, or correcting the errors and even follies of earlier experimenters. Thus there is a wearisome amount of laws on divorce at any one time existing, and it is no easy task to run through the frequent changes in the law. Mr. Bishop, in his standard work on marriage and divorce (fourth edition, 1864) declined setting out "*in extenso* the statute laws of the several States relating to marriage or relating to divorce." "Should this be done," says he, "a great number of our pages would be occupied with the work, while very little benefit indeed would result to the reader." "It is observable," he continues, "that the statutory laws of this country relating to this subject, seem in general to have been drawn up by men who either did not possess much knowledge of the unwritten law which governs it, or did not regard such unwritten law as worthy to be considered by them in framing the statute; and who, moreover, gave but little thought to the practical working of the statutes." One of his proofs of the truth of these remarks is taken from the general statutes of his own State of Massachusetts, where there was a provision that a divorce from the bond of matrimony might be decreed for *adultery* or *impotency* of either party. But "impotency of either party," to justify divorce, must be, according to common

law, an impediment at the commencement of marriage, while *adultery* anterior to marriage is no cause of divorce at all. And again, a sentence of divorce on the former ground declares that the marriage was originally void, but one on the latter assumes that the marriage was originally valid. Here there is a jumbling together of causes annulling and causes dissolving marriage; and the same is true of the laws of many other of the States, which speak of impotency barely, while others are careful in their laws to define it as existing before marriage. How could such a provision be interpreted without a knowledge of common law? For under some codes *impotentia superveniens* may dissolve marriage, and more frequently a previous adultery renders remarriage unlawful, or at least during the life of the innocent party.*

The States of the Union may be divided into those which provide both for absolute divorce and for separation, and those which know nothing of the last-mentioned proceeding. They may also be loosely divided into those which have followed

* It may be worth remarking here, that the Prussian Landrecht neglects this, as it seems to us proper, distinction: "Entire and incurable impotence (unvermögen), whether originated before or after marriage, furnishes ground for a suit to dissolve the marriage." (Landr., §§ 696, 697.) It is indifferent whether this was at its origin innocent or criminal; but this does not apply to a defect resulting from old age. (W. Peters, Die Ehescheidung, etc., or Divorce in the Territory under the Prussian General Landrecht, 1881.)

English law and those which followed the opinions of the reformed churches in Germany, Holland, and Scotland—opinions which were more or less current among the Puritans of Old England in the seventeenth century. In one State—Louisiana—a marked influence of French law appears, which is shaped to suit its peculiar condition. The newer States in the Northwest seem to have followed the prevailing views among the first settlers, especially those from New England. All the new States in the Northwest, to the north of the former zone of servitude, adopt the plan of multiplying causes of divorce freely, after the manner of the age, and in this, without question, the settlers from European Protestant countries would freely concur.

There is one State which knows nothing of divorce, and where a divorce was never granted since the first emigration. We refer to South Carolina, where the earliest mention made of dissolution of marriage appears in the Constitution of 1868 (Art. xiv., § 5), in these words: "Divorces from the bonds of matrimony shall not be allowed but by the judgment of a court, as shall be prescribed by law." An act was subsequently passed under the power so granted, but by an act approved December 20, 1878, it was provided that all acts and parts of acts relating to the subject of granting divorces be, and the same are hereby, repealed. Only the power, then, remained, under the new Constitution, of passing such laws at some future time.

The attitude taken by South Carolina in regard to divorce is due, not to any attachment to supposed commands of Christ in the New Testament, but to its State pride and the old oligarchical feelings of the original colony. As a slave State it has winked at concubinage, and the white wife had often to endure the infidelity of her husband, as something inevitable which no law could remedy and public opinion did not severely rebuke. "Not only is adultery not indictable there," says Mr. Bishop, "but the Legislature has found it necessary to regulate by statute how large a proportion a married man may give of his property to a concubine" (ed. 6, vol. i., § 38). From the same author we cite the following words of Judge Nott, of the State Court, which show that the jurists do not regard the system as wholly good, and as deserving of all the boasts which have been made in its favor: "In this country, where divorces have not been allowed for any cause whatever, we sometimes see men of excellent character unfortunate in their marriages, and virtuous women abandoned or driven away homeless by their husbands, who would be doomed to celibacy and solitude if they did not form connections which the law does not allow." The law of 1 James I., making marriage a felony while a husband or wife is living, is practically disregarded. When the divorce law of 1868 was repealed in 1878, there was passed a law making the living together of men and women in

adultery a crime. How far it is executed we do not know.

In the colony, called New York after the peace of Breda in 1671, so long as it was a Dutch possession, a court composed of the governor and councillors had jurisdiction in cases of divorce; but, according to Chancellor Kent, "for more than one hundred years preceding the revolution, no divorce took place in the colony of New York, and for many years after New York became an independent State there was not any lawful mode of dissolving a marriage in the lifetime of a person but by a special act of the Legislature. This strictness often forced the parties, in cases which rendered a separation fit and necessary, to another State, to avail themselves of a more easy and certain remedy. At last the Legislature, in 1787, authorized the Court of Chancery to pronounce divorces *a vinculo* in the single case of adultery. This is now still the only offence for which divorce *a vinculo* may be granted. Separation may be granted for cruelty to a wife, conduct rendering cohabitation unsafe and improper for the wife, and for abandonment or neglect to provide for her. To sustain the suits for divorce or for separation, certain conditions of residence, etc., are necessary.

It was forbidden, since 1813, to the party guilty of adultery to marry again until the death of the innocent party. But in 1879 special permission was given to the court to grant such power of re-

marriage after five years from the divorce, "provided that proof of good conduct was furnished, and that the defendant (the innocent party) had contracted marriage." *

New York, to some extent, followed England or English feeling in its divorce laws. Louisiana, on the other hand, to some extent, follows France in this respect. The Civil Code (ed. of 1857) declares that "the law considers marriage in no other light than as a civil contract," meaning by this, we suppose, that it has nothing to do with the moral and religious aspects of the institution. But when it goes on to say that marriage is a contract intended at its origin to endure until the death of the contracting parties, it seems a little inconsistent with itself, for whence can this indissolubility be derived but from moral and religious considerations. The truth is that marriage is not a contract properly speaking, the terms of which can be settled at the pleasure of the parties, but is a natural

* Kent, p. 96, and Hoffmann's Law of Divorce, in Church Rev. for 1873. Mr. Murray Hoffman, an eminent lawyer of the city of New York (Assistant Vice-Chancellor and Judge of the Supreme Court of the State), says that "while the law of New York deserves all commendation for its inhibition, it is imperfect and censurable for not absolutely prohibiting the marriage after, as well as before, the death of the innocent party. . . . The reasons which have induced us to regard the marriage of the adulterer with the paramour as abhorrent and unwise apply, with nearly equal force, to a marriage with any other." "There are, however, special reasons for prohibition of marriage in the case named."

state or condition fixed by the God of nature, the entrance into which must be by the consent or contract of those who are able to give their consent. The law of marriage in this code has these peculiarities: that any offence for which divorce may be granted may also be the cause of separation from bed and board, and that for every offence, excepting two, this separation must precede divorce proper by a length of time. These two causes of immediate divorce are adultery and sentence of infamous punishment; by the former of which causes, in the husband's case, is understood, I believe, as in the French code, his keeping a concubine in the common house, or openly and publicly elsewhere. In other cases, two years must elapse after the separation, without reconciliation of the parties, before divorce can be pronounced. The remaining causes mentioned in the code are cruel conduct, making life insupportable, abandonment, defamation, and attempt of either party on the life of the other. A statute of 1827 ordained that no divorce shall be granted except for adultery, infamous punishment, cruel conduct as above, and abandonment for five years, in which case a summons to return must be made before application for the divorce. In regard to the party guilty of adultery, it is provided that he or she can never marry the partner in crime without incurring the penalty of bigamy, and having the marriage pronounced null.

The earliest colonists who laid the foundations of New England brought with them views of divorce which they held in common with their reformed brethren in Scotland and Holland, and indeed with the reformed churches generally, as well as with the Lutheran. They held that the New Testament recognized adultery and desertion as the only sufficient grounds for dissolution of marriage, including the enormous and rare unnatural crimes more heinous than adultery. At that time desertion was a very different thing from that which is so called now. To go to some remote colony, or to the West Indies or the old country from disaffection of mind, or with the spirit of a vagabond, implied life-long severance of family ties, and the probabilities were great that it involved adultery also. To these two causes were added absence in parts unknown for seven years without being heard from, which, in a law of the Massachusetts Colony, passed in the 5th of William and Mary, is modified to suit certain hard cases into "three years' absence for one gone to sea, the ship not being heard of for three years, when a voyage is usually made in three months." But this is hardly a third cause of divorce, but rather a declaration that the probabilities of death were so strong that a new marriage after that lapse of time ought not to be regarded as bigamy. And, indeed, a law of the first year of James the First, which lays down this same principle, and fixed on this

very term of years in applying it, must have furnished a model and an authority to the colonists.

The New England States passed together, like the Protestant States on the European Continent, from strict observance of what they regarded as scriptural grounds for divorce, into the loose practice of the Protestants on the Continent in the eighteenth century. The first enlargement of the causes of divorce after the Revolution, came from Massachusetts in 1786, when divorce from bed and board could be granted for extreme cruelty. In Connecticut divorce could be granted in 1843 for habitual intemperance and intolerable cruelty. From these beginnings, by a kind of logical necessity, the law was made to include other causes, of which we shall mention those which still exist when we come to speak of the statistics of divorce in New England and elsewhere in the United States.

There is a general agreement, yet with marked peculiarities in special cases, among the divorce laws of the States which we have examined. Among the causes we notice

First.—Impotentia. In ten States this is properly qualified as existing before marriage. In one (Iowa, Code of 1873), it is spoken of as a cause of annulment, and probably in a number of others.

Second.—Adultery is followed by divorce absolute, and the definition, when given, is the same, we believe, through the Union. It is, as the stat-

utes of Rhode Island have defined it, illicit intercourse of two persons, one of whom is married.

Third.—Desertion. This offence is called by several names—as abandonment, as utter, wilful, malicious, continued, and obstinate desertion, as absence without good cause. The sense in all the forms of expression must be the same. Absence from the common dwelling, not for the purpose of business, but with the evil or "malicious" intent of not fulfilling conjugal obligations, and that absence not interrupted by occasional visits, but continued long enough to test the offender's disposition, may be said to constitute the offence thus described in different words. The statutes generally state what specific time shall constitute desertion. In Indiana, it was once one year "or less" if the court find that reconciliation is improbable, but in 1859 "or less" and what follows was stricken out. In Missouri, two years without good cause is the shortest limit. In five or six other States (Peunsylvania, Michigan, Illinois, Alabama, Maine, Iowa) it is two years; in seven or more, three years (New Jersey, Ohio, Connecticut, New Hampshire, Delaware, Oregon, West Virginia, Massachusetts); in Virginia and Louisiana five years, and in Rhode Island the same term or a shorter, according to the discretion of the court. In some laws the penalty is divorce *a vinculo*, in others separation.

Fourth.—Imprisonment for crime is made by

most of the States a cause for divorce, or, it may be, for separation. The time of the imprisonment varies in different States; and it is sometimes described as being infamous punishment, or for felony, or in a penitentiary.

Fifth.—In the statutes of a few States, as New Hampshire, Massachusetts, and Kentucky, to join a religious society which holds marriage to be unlawful—together with refusal to cohabit with the married partner for six months, as the law of one State adds—is made a ground for divorce. The statutes of Massachusetts require that membership in such a sect shall have lasted three years before a libel for divorce can be presented by the complaining wife or husband.

Sixth.—Neglect to provide for a wife's maintenance and support lies between desertion and cruelty. Hence this is added in a number of statutes as a reason for divorce or for separation. This is at one time described as neglect or refusal of the husband to support the wife when he has ability; at another, as neglect to provide for his family, or the refusal suitably to maintain a wife, or gross and wanton neglect so to do. This wrong of the husband may be visited with divorce or separation.

Seventh.—Habitual drunkenness appears in quite a number of statutes. It is spoken of variously as habitual drunkenness, or as gross and confirmed habits of drunkenness; and sometimes is defined

by the length of time during which it has continued—by two years' continuance in Missouri and three years in New Hampshire.

Eighth.—In all, or nearly all, the statutes of the several States, cruelty is made a cause of separation or of divorce. It is described by such phrases as intolerable severity (Vermont), whether proceeding from either party; as extreme cruelty (as in New Hampshire, Maine, and elsewhere); as intolerable cruelty (Connecticut); as cruelty and conduct rendering cohabitation unsafe for the wife (New York); as cruelties endangering life, and indignities making life burdensome (Pennsylvania), which the laws of North Carolina and Tennessee substantially repeat, the first adding to it turning the wife out of doors, the other calling it ejection. Louisiana defines it excess, cruel treatment, or outrages, if they are such as to render life insupportable, which somewhat follows the French 'excés, sévices, injures graves.' Tennessee, in its code, added attempts on life by poison or other malicious means, which are made a cause of divorce, while cruelties, indignities, and ejection are the cause of separation. In Kentucky, the cruelty or gross cruelty is measured by its continuance: it must have continued six months, but another specification is added—cruel beating or injury—to which no such continuance is attached, so that a single act for anything that appears may be a sufficient cause for dissolving a marriage.

In some statutes it is seemingly assumed that the husband only will be guilty of cruelty, as being the stronger party; in others the expressions are indefinite, and may apply to both. "Yet the law (says Mr. Bishop, I., § 761, ed. 6) equally in England and in most of our States, gives the same relief to a complaining husband as to a complaining wife." In a few statutes of the States, the wife only can complain; in most of them it is so left that the same remedy is granted to both alike; and in one or two, extreme cruelty *of either* is spoken of as a cause, as in the laws of Indiana (1876). Mr. Bishop states (note 2, *u. s.*) that in New York, an act of 1824 authorized a divorce from bed and board on prayer of the husband, but that in the Revised Statues of 1830, this remedy was only given to the wife. But as the earlier statute was not expressly repealed, it was held to remain in force. In quite a number of States, separation is made the appropriate remedy as a protection and security for the future to the feebler party.

Ninth.—A few of the States have somewhat remarkable provisions in their laws of divorce, which either put the whole subject within the discretion of the courts, or open a wide door for divorce or separation. In the statutes of Maine (1870) after specific causes had been mentioned, we find that divorce *a vinculo* may be granted by any justice of the Supreme Court . . . "whenever, in the exercise of a sound discretion, he deems it reasonable

and proper, conducive to domestic harmony, and consistent with the peace and morality of society— if the parties were married in [the] State, or cohabited there after marriage." In North Carolina, the statute (1855), after providing for certain special cases, adds that "if any other just cause of divorce exists," the injured party may obtain divorce *a vinculo* or *a mensa et toro*, at the court's discretion, or a decree of alimony only if no more is demanded. The law of Indiana provided in 1862 that divorce might be decreed by Circuit Courts on petition of a *bona fide* resident in the county for certain causes, and then adds, "and for any other cause for which the court shall deem it proper that a divorce shall be granted." But this action of the Circuit Court could be revised by the Supreme Court. The interpretation of the higher court has taken away from the judges, if I am rightly informed, what seems on the face of the statute to be a great latitude of discretionary power. Besides the statute causes for divorce, which are five: adultery, cruelty, extreme and repeated cruelty, two years' habitual drunkenness, and conviction of felony or other infamous crime, the statute empowers the courts to hear and determine all causes of divorce not authorized by any law of the State, and to decree a dissolution of the marriage, if judged expedient. But the Supreme Court has decided that the discretion given must be limited to common law causes, omitted in the enumeration of the statute, viz.: pre-contract

and relation by blood and marriage, on which grounds applications are rarely made.* Similar discretion was given to the court in Rhode Island, in the statutes where divorce may be granted not only for sundry specific causes, but for any gross misbehavior and wicked conduct, repugnant to or in violation of the marriage covenant. So, too, divorce from bed and board may be decreed, until reconciliation, for any cause for which divorce absolute may be granted, and for any such other causes as may seem to require them. And in Connecticut, from 1849 until 1878, a statute allowed divorce for "any such misconduct as permanently destroys the happiness of the petitioner and defeats the purposes of the marriage union." The discretion given by some of the laws just mentioned must be very embarrassing to the judge, and may result in very dissimilar decisions, according as he has loose or strict notions of the sacredness of marriage. The looseness of others of these laws will almost, of course, stretch the facility of granting divorce to its extreme limit.

Tenth.—As the causes for divorce differ greatly in the laws of different States, there is a danger lest a party wishing for an easier remedy than his own State allows, will change his domicile for this

* The information contained in the last few lines, beginninging with the words "the interpretation," etc., I owe to a highly respectable lawyer of Chicago. It appeared in the first edition of this work, in 1868.

purpose. Laws, therefore, exist in many, if not all, of the States of the Union to prevent dishonest acquisition of domicile. "The doctrine," says Judge Story, in his "Conflict of Laws," § 230, "which is now firmly established in America, is that the law of the place of the actual *bona fide* domicile of the parties, gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law, without any reference to the law of the place of the original marriage, or the place where the offence for which the law is allowed was committed."

The relations of domicile to divorce, and the question what is a *bona fide* domicile, must be ascertained from treatises on divorce and on conflict of laws, such as Mr. Bishop's and Judge Story's.* If a party removes *animo manendi*, for the purpose of dissolving marriage, from a State, for instance, where certain causes have separation as their sole remedy, to another State where the remedy is divorce, and remains for the prescribed time, there is no preventing his making use of the law in his favor; and there may easily be an understanding between a wife and husband to do this for the procurement of a dissolution of marriage.

Again, the States of our Union differ considerably in regard to the point of granting divorce *a vinculo* and separation in particular cases, and as to the expediency of granting separation at all.

* Compare Bishop, ed. 6, ii., §§ 149–199. I have borrowed from him the citation from Story.

The earlier colonies knew nothing of separation *a mensâ*. After the States became independent, limited divorce might be granted on account of extreme cruelty, by a statute of Massachusetts in 1786, and another in 1810, to a wife utterly deserted, or for whose maintenance the husband refused or failed to provide. In 1860, gross and confirmed habits of intoxication, with cruel and abusive treatment, became two new causes for this kind of severance of the marriage tie; but in 1870, divorces from bed and board were prohibited, and have not been allowed by any new statute since. In Rhode Island, a divorce from bed and board, until reconciliation, may be granted for any cause for which divorce absolute is granted, and for such other causes as may seem to require them. New York has steadily confined the granting of divorce to the single offence of adultery, and granted separation for other causes. New Jersey grants it for the offence of cruelty, either for a time or permanently. Delaware empowers the court having cognizance of divorce to decree separation at discretion in several cases. In Louisiana, separation is the first step in all cases, except charges of adultery, before divorce can be obtained. The laws of quite a number of other States allow separation in certain cases.

We need here do no more than allude only to the obstacles put, almost universally, in the way of divorce, where some previous conduct of the petitioner furnishes a good reason for the denial of his peti-

tion. Thus, the petitioner's similar infidelity, if the alleged cause for the petition is adultery, or his condonation, or indulgence shown by cohabiting with the defendant after knowledge of the offence, or long and needless delay to notice it, or putting temptations in the way of the other party in order to be able to bring a charge, or the connivance or collusion of both parties, would render a petition or complaint worthless. The principles of natural justice would probably govern the decisions of courts were there no especial statutes of such an import.

More important is it for our especial object to look at the results of divorce to the parties, the liabilities or disabilities, and the penal consequences which may follow the offence of the guilty party. Here, *first* and especially, the way in which the different States view the sin of adultery is deserving of notice. Some, as New York and South Carolina, have followed England in not holding it to be a subject of criminal punishment, although the reason which existed for this in England had no force in the colonies or the States. Nor have we noticed it in the statutes of Kentucky, Tennessee, or of Louisiana. In Mr. Livingston's code, the guilty woman forfeits all matrimonial gains and certain leading civil rights. Her partner in guilt is liable to a fine of between one hundred and two thousand dollars, or to imprisonment for not more than six months. A husband keeping a concubine in the house is subject to the same

fines, and loses the right, for a certain time, of being a tutor or curator to his children. In some other codes the penalty is very small. In Maryland it is a fine of ten dollars; in Virginia of not less than twenty. In most of the States it is an offence subjecting the parties guilty of it to fine and imprisonment, or both; but the amount varies greatly. The fine generally falls between one hundred and five hundred dollars. The imprisonment runs up from confinement in a common jail for not more than sixty days, as in Georgia; or not exceeding six months, as in Missouri; and in several other States, to a year, which is the maximum in most of the codes; or up to five years, as in Vermont, Maine, and Connecticut. In a few States, a repetition of the offence increases the penalty. In Alabama, formerly, if not now, the first commission of adultery had a fine of not less than a hundred dollars imposed on it, with imprisonment in a county jail, or confinement with hard labor for not more than a year; while a renewed offence trebled the fine and doubled the punishment, and a third was visited with two years' hard labor in the penitentiary. The laws of Illinois, again, which impose on each party a fine of two hundred dollars, or six months' imprisonment, for the first offence, double and treble it for successive new ones.

The feelings of the early settlers in some of the older colonies was in striking contrast with the

tender, the immorally lenient treatment which adultery receives from the existing laws of most of the United States. The first laws of Massachusetts made it, after the manner of the Jews, a capital crime. In 1699, persons convicted of this crime were to be set on a gallows with a rope round the neck, one end of which was cast over the gallows, and then they were whipped on the way to the jail, not exceeding forty stripes, and were to have a capital A, two inches long, "of color contrary to their clothes," sewed on the sleeve or back of the outer garment, so as to be in open view. And, if such persons were found without the mark they were to be whipped, not exceeding fifteen stripes, for every neglect to wear it. The Connecticut laws of 1673, required the same brand to be burnt in on the forehead, to which penalty wearing of a halter and public whipping were added. In Rhode Island, in 1655, a wife confessing her guilt was sentenced by the General Assembly to pay ten pounds fine and receive thirty stripes in two instalments.* Even Vermont, although settled so long after the other colonies, follows them in the penalties contained in its original laws, which are thirty-nine stripes, or an A branded on the forehead, and the same on the clothes, with a liability of receiving ten stripes if the convicted person is found without it. In the statutes of 1787, the brand on the forehead is omitted, but the guilty persons are set on the gal-

* Arnold's History of Rhode Island, i., 320.

lows and are to wear the marks on their clothing. So also in Pennsylvania, a law of 1705 exposed such persons to twenty-one lashes for the first conviction of adultery, for the second to seven years of hard labor or one hundred pounds fine, and for a third to a repetition of the same penalties besides the brand of the letter A. In Virginia, again, by a law of 1691, a fine of twenty pounds sterling was imposed after every conviction; but if the offender was unable to pay the fine, thirty lashes on the back, or three months' imprisonment, could take its place. In 1696, the money fine disappears, one thousand pounds of tobacco, with a cask, or twenty-five lashes, or two months' imprisonment, being now the penalties. In 1705, the statute omits the imprisonment, but retains the tobacco and cask, and the twenty-five lashes. Thus the Puritan, the Quaker, and the Royalist colonies agree in the severity with which they punish this crime. But they agree also in softening down their penal legislation. In Pennsylvauia, imprisonment for a year, or a fine not to exceed five hundred dollars, now expresses the indignation of the community on this point. In Virginia, a fine of not less than twenty dollars seems to be the entire penalty. In Massachusetts, the crime is visited with a mulct of five hundred dollars, or imprisonment in the State's prison for three years, or in a jail for not more than two. In Vermont, the limits are five years' confinement or a thousand dollars' fine; while in Connecticut, confinement for not more

than five years is the only penalty. It were well if these penalties were not in some parts almost obsolete. In the reports of the commissioner of the State prison in one State we find, in the course of twenty-eight years, only one person imprisoned for this crime. A gentleman writes from one State where the penalty for adultery was a fine not exceeding one thousand dollars or imprisonment not exceeding twelve months, that "this offence is sometimes, but not often, punished by a *nominal fine*, and that in the case of negroes he has known imprisonment to be added." And the statistics will inform us that, when adultery is the cause for obtaining divorce, it is very seldom followed up by a public prosecution. The result of this sleep of justice in regard to one of the higher social offences must be that private vengeance will awake to wreak itself on the wrong-doers, or the morals of society will become blunted toward one of its chief evils.

Second.—Other disadvantages affect the previous rights of property of the divorced party, especially if the crime is adultery. Thus we find laws like the following: That the husband may hold the property of the guilty wife, her personal estate forever, and the real estate of which she was seized during coverture, if they had a living child during its minority, and if not, during life as long as he survives her; or that his rights to her property shall be the same as if the marriage had not been dissolved. So, also, if the husband is guilty, the wife

is to have dower in his real estate the same as if he were dead, and to have her own restored to her. Other laws leave the whole matter of alimony to the judge's discretion, or fix a limit beyond which it shall not reach—which limit, if the husband is guilty, must not, in Rhode Island, exceed half his real and half his personal property. In Connecticut, the Court may assign to any woman divorced for her husband's fault, a part of his estate, not exceeding one-third, and may change her name. And if a woman be divorced for her own misconduct, who has received any estate from her husband, such estate, if personal, may be retained by her, but, if real, shall revert to him. These are examples from a copious title of laws for the adjustment of property relations between married parties after dissolution of marriage; and another provision of equal importance for the maintenance of children after the separation of their parents, is found in all the statutes.

Third.—With regard to liberty of remarriage after divorce, the State laws differ greatly. Some lay no restrictions whatever on the liberty of divorced persons, so that, whether complainants or defendants, they are entirely free to marry one another again the next day, and the adulteress is free to marry anybody, even the partaker of her sin. Others forbid the guilty party, whatever be the cause for divorce, to marry during the life of the innocent one; and a marriage so contracted, during

the life of the other, is, by the laws of Massachusetts, "void, and such party shall be guilty of polygamy." But it is just within the power of the Supreme Judicial Court to allow such a person to marry again. Such discretion is given to the courts in a number of States. In Kentucky, it can (or could) not be legally exercised within five years after divorce; in Virginia, the prohibition could be revoked for sufficient cause. In some States the offending party, or, it may be, the offending party where adultery is the ground for divorce, cannot marry during the lifetime of the other party; and the breach of this law in divorce for adultery in Louisiana subjects the person concerned to the penalty of bigamy, and annuls the new marriage. A somewhat similar law has existed in New York, but in 1879, a permission to marry could be granted by the court five years after divorce for adultery, on certificate of good behavior in the interval. In 1880, however, the old law was revived again in the Code of Civil Procedure.

In looking back on the ground over which we have travelled in this chapter, and, indeed, on the whole history of divorce in Christian lands, especially where the law of the State has undertaken to control it, we find divorce to be a very troublesome problem for legislation. We find the causes for it to be more numerous since the Reformation took the care of it out of ecclesiastical hands, or made ecclesiastical courts dependent on the State.

We find all over Protestant Europe new causes allowed for divorce, and an increasing want of reverence for the sacred institution of marriage. We find in the United States numberless experiments and alterations in this branch of the law, so that it is evident that marriage does not sit easy on the people; new and hard cases continually arise, and new laws are made which do not help society out of its perplexities. We find, or think we find, such looseness of procedure in the courts, such facility in granting divorces and despatching cases, unknown elsewhere, that it seems as if laws and courts multiplied the evils they were meant to relieve. And it is certain that, in some States, the increase in number of causes for divorce, by increasing the number of petitions for this privilege, has made it necessary for the courts to become more hasty and summary in their judgments.

But to what extent has there been an increase of divorces in the United States? The answer to this question must be given by statistics, and unhappily there has been, except in one quarter of the Union, and in one State besides, no report of these made to the Legislature; or, if made, published. Only in New England, which is generally believed to be the most intelligent, moral, and religious portion of the country, and in Ohio, has this been done; and the data thus furnished to the public are far from complete, being obtained in two of the States by private search of the records of the county courts,

and in the others not going back, at the farthest, more than about thirty years. We begin with Connecticut, because the number and increase of divorces there first became notorious, and because this was the first State, I believe, to give its tables of divorces, compared with the marriages, to the world. In fact, attention had been, at an early period, called to the alarming number and increase of divorces in that commonwealth, which, when compared with the state of things since then, would seem to have called for no cause for alarm.

Dr. Trumbull, the historian of the State, says that 439 divorces had been granted in a century preceding 1785, all of which, except 50, had been petitioned for within fifty years. But, if he had said within thirty years, that is, between 1755 and 1785, 389 divorces, or 14.6 per annum, would not be a very large number within a period the first year of which showed a population of 133,000, and the last, of 219,000. Dr. Dwight, in his sermon on divorce, preached, if I err not, before the Legislature, and probably between 1810 and 1815, says "that in the town of New Haven, within five years more than fifty divorces had been granted; at an average calculation, more than four hundred in the State during this period—that is, one out of every hundred married pairs." ("Theology," vol. iv., 374). That is, at the county seat of New Haven county, ten divorces were granted annually, or eighty in all the counties of the State,

which last estimate is probably too large. If the expression denotes "one out of every hundred marriages per annum," the statement would be too large for a population of about two hundred and sixty thousand; if it denotes one divorce per annum to every one hundred families in which both husband and wife are living, this again would be a great error; it would require more than four hundred divorces per annum. But the statement assigning ten divorces to one-eighth of the State, or eighty to the entire State, may not have been very much out of the way.

The demand for larger liberty of unloosing the marriage tie went on growing for a number of years, until the existing legislation did not satisfy the wants of the people. In 1843, habitual intemperance and intolerable cruelty were added to the earlier causes of divorce, and in 1849 there were three additional ones: sentence to imprisonment for life; any infamous crime involving a violation of conjugal duty; and any such misconduct as permanently destroys the happiness of the petitioner and defeats the purpose of the marriage relation. This last cause, as we have already had occasion to say, was stricken out of the law in 1878, having had twenty-nine years of trial in which it clearly showed its baneful influence.

In an article of the *New Englander* for July, 1866, Rev. Henry Loomis sets forth the working of these additions to the law, especially of the last

clause, in these words: "During a period of fifteen years nearly four thousand divorces have been granted, a number equal to one-twentieth of all the families in the State." And, again, he says that in the evidence presented to a committee appointed by the Legislature in 1865, to take into consideration a recommendation of the Governor for the reform of the divorce laws, an opinion is given to the effect that "of the four thousand divorces granted in this State during the last fifteen years, more than half have been secured through the influence direct or indirect of this general misconduct clause. In a vast number of cases," the writer adds, "in which the evidence would have been insufficient which related to the particular offence alleged in the suit, the additional claim urged by the counsel, that the 'happiness of the petitioner had been destroyed, and the end of the marriage relation defeated,' had been sufficient to secure a decree of divorce." We refer for other important considerations to a passage from the article of Mr. Loomis, inserted in our appendix.

The same writer gives tables of divorce in the State for eleven years—taken, as we understand, from the records of the counties:

Years.	Divorces.	Years.	Divorces.
1849	91	1855	208
1850	129	1856	215
1851	165	1857	232
1852	159	1858	256
1853	186	1859	299
1854	216		

The rapid increase in these years tells its own story. The "incompatibility of temper clause," or *omnibus* clause, as it was called, passed in 1849, began to operate speedily after.

In 1865 the clerks of the Superior Court were required, at the end of each term, to return the number and causes of divorces granted at such term, to the State Librarian, whose duty it was made to tabulate and publish them in his annual report (with marriages, births, and deaths). We here give the returns for divorces, marriages, and the ratios for each year of divorces to marriages for twenty-one years from 1860:

Year.	Divorces.	Marriages.	Ratios.
1860	310	3,978	1 to 12.83
1861	275	3,757	1 : 13.70
1862	257	3,701	1 : 14.44
1863	291	3,467	1 : 11.90
1864	426	4,107	1 : 9 64
1865	404	4,460	1 : 11.04
1866	488	4,978	1 : 10.19
1867	459	4,779	1 : 10.09
1868	478	4,734	1 : 9.9
1869	491	4,754	1 : 9.5
1870	408	4,871	1 : 11.9
1871	409	4,882	1 : 11.93
1872	464	5,203	1 : 11.20
1873	457	4,841	1 : 10.06
1874	492	4,694	1 : 9.54
1875	476	4,385	1 : 9.21
1876	396	4,320	1 : 10.9
1877	427	4,319	1 : 11.11
1878	401	4,315	1 : 10.76
1879	316	4,345	1 : 13.74
1880	332	4,641	1 : 13.98
Total	8,457	93,511	1 : 11.06

On these statements we may remark: (*a*) that the increase caused by the incompatibility clause of 1849 continued on the whole until 1879, when this part of the law was repealed; (*b*) that divorces decreased in the years of war 1861–1863; (*c*) that marriages ran up after the war ended in 1865, as was to be expected; and that in the last years marriages fell in number below their former ratio to population. The influence on marriage of the disastrous financial year, 1873, may have been considerable on marriages for several years afterward.

The petitions for divorce, granted to the husband and the wife from 1869 to 1879, were as follows:

Year.	Husband.	Wife.	Year.	Husband.	Wife.
1869.....	160	318	1875.....	148	328
1870.....	164	327	1876.....	99	297
1871.....	131	278	1877.....	120	307
1872.....	141	323	1878.....	115	286
1873.....	183	273	1879.....	94	222
1874.....	123	363			

That is, one thousand five hundred and seventy-eight divorces were granted on petitions of husbands, and three thousand three hundred and twenty-two on petitions of wives; those of the latter being almost twice as many as of the former.

The causes for the petitions, given in the reports submitted to the Legislature, are so little worthy of reliance, that I shall not trouble my readers by repeating them here. The State Librarian, whose duty it was until quite recently to report on divor-

ces and marriages, remarked in the report for 1869, that "the tables for alleged causes of divorce are unworthy of trust, because the true cause and that only is not always to be discovered by the record." And he adds that in the counties of Hartford and New Haven the records show an average of 2.47 causes for each divorce. Sometimes, if not often, adultery is made one of the auxiliary causes, so to speak. In one case I myself happened to know that the lawyer inserted this crime in the petition without the petitioner's knowledge.

The ratio of divorces to marriages in the several counties of the State is as follows for the years 1868 to 1879 inclusive:

Hartford	1 : 12.46	Windham	1 : 8.47
New Haven	1 : 8.28	Litchfield	1 : 8.55
New London	1 : 8.40	Middlesex	1 : 10.75
Fairfield	1 : 8.60	Tolland	1 : 6.50

Second.—Divorce in Massachusetts. In the first edition of this work, published in 1868, we were able to give tables for two or three years only in relation to divorce, which turned out also to be inaccurate. In 1880 this deficiency was made up by the excellent report on divorces in Massachusetts for the years 1860–1878, prepared under the direction of the Chief of the Bureau of Statistics of Labor, Carroll D. Wright, Esq., and published as Part IV. of his report for 1880.

It seems desirable to bring together the more important changes or additions in the laws relating to the causes of divorce. In 1786 separation *a*

mensâ was introduced, and in 1867 was thenceforth prohibited. At first separation was allowed for extreme cruelty; in 1810 it was allowed for the husband's desertion, his extreme cruelty as before, and his neglect to provide for the wife's maintenance. In 1836 imprisonment became a cause of divorce, and the wife's desertion a cause for separation. In 1838 desertion for five consecutive years became a cause admitting of full divorce; and in 1850 full divorce could be had, when a husband or wife separated from the other party to join a religious society which held the matrimonial relation to be unlawful. By 1860 the two original causes for full divorce had grown to five, and there were two causes for separation open to both parties, and one cause besides open only to the wife. In 1860, habits of intoxication, and cruel or abusive treatment were added to the causes for separation. In 1867 the judges were authorized to enter decrees of divorce at first as decrees *nisi*, to be made absolute after six months. In 1870, as we have said before, separation was prohibited and divorce put into its place. There were also important changes touching decrees *nisi* which we omit to mention. In 1874 decrees *nisi*, were in part omitted and other legislation took place in regard to this procedure of the courts. In 1877 a provision authorizing jury trials in divorce suits was repealed. (Comp. C. D. Wright, *u. s.*, 222–225.)

The causes for divorce, as they now exist, are adultery, impotency [without respect to the time of

its beginning], extreme cruelty, utter desertion for three consecutive years next prior to the filing of the libel, gross or confirmed habits of intoxication, cruel and abusive treatment, the husband's refusal or neglect to provide suitably for his wife; also joining a religious society which denies the lawfulness of the marriage relation, and remaining a member of the same for three years—in all, eight causes. Remarriage after divorce may be allowed by the Supreme Court if the divorce had been granted in the United States.

The marriages and divorces, and the ratios between them, are given in the following table:

Years.	Marriages.	Divorces.	Ratios.
1860	12,404	243	1 : 51.0
1861	10,972	234	1 : 46.8
1862	11,014	196	1 : 56.2
1863	10,873	207	1 : 52.5
1864	12,513	270	1 : 46.3
1865	13,051	333	1 : 39.2
1866	14,428	392	1 : 36.8
1867	14,451	282	1 : 51.2
1868	13,856	339	1 : 40.8
1869	14,826	339	1 : 43.7
1870	14,721	379	1 : 38.8
1871	15,746	325	1 : 48.4
1872	16,142	343	1 : 47.1
1873	16,437	449	1 : 36.6
1874	15,564	647	1 : 24.1
1875	13,663	577	1 : 23.6
1876	12,749	525	1 : 24.2
1877	12,758	553	1 : 23.1
1878	12,893	600	1 : 21.4
Total	259,061	7,233	1 : 35.8

The Massachusetts tables differ from those of Connecticut in this—that the former show an increase of divorces from 1860; while the latter, in the ratio of divorce to marriage, had nearly reached their maximum before that year. In other respects the two agree. In both the war shows its working in the few marriages during, and their increase after the war; and in both their decrease in the years after the financial difficulties of 1873. But in both also the decrease of the marriages must be due to wider and more lasting causes.

The divorces for the counties of Massachusetts, in the order of their infrequency, are thus exhibited by Mr. Wright:

Norfolk	1 : 42.6	Hampden	1 : 21.5
Franklin	1 : 30.1	Essex	1 : 21.0
Worcester	1 : 27.4	Plymouth	1 : 20.9
Berkshire	1 : 25.4	Barnstable	1 : 20.8
Middlesex	1 : 24.6	Hampshire	1 : 20.5
Bristol	1 : 22.5	Suffolk	1 : 19.6

The lowest in the average contains the large city of Boston.

It is remarkable as showing how local many of the sources of evil are, or how fashions in applying for divorce prevail, that the counties differ decidedly in the causes for which divorce is granted. "The granting of an unusual number of applications for divorce on the ground of cruel treatment made 1877 the leading year in the counties of

Essex and Bristol; while an unaccountable predominance of decrees for desertion gave 1878 the lead in the counties of Hampshire, Hampden and Plymouth." The two years after the war brought adultery forward as a prominent cause of divorce in many of the counties. Essex has a population less by 60,000 than Middlesex, yet it led the latter largely in separations for intoxication and extreme cruelty. "Worcester, fourth in rank among the counties in population, surpasses all in divorce for the husbands' refusal to support the wife."

Of the 7,233 divorces granted in the nineteen years included in Mr. Wright's tables, 4,833 were granted on the wife's complaint, and 2,400 on the husband's, following the same ratio of 2 to 1 which we found to exist in Connecticut. The causes are often more than one in the same libel. Mr. Wright reduces them thus:

3,013 for desertion.
2,949 for cruelty.
452 for intoxication.
375 for extreme cruelty.
223 for cruel and abusive treatment.
154 for neglect to provide.
50 for imprisonment at hard labor.
17 for impotency.

"Only 3,016 of these 7,233 were granted for causes that would have been valid half a century ago." The effect of law on divorce is strikingly

shown by the following particular especially: "Desertion was not admitted as a cause for divorce until 1838, and not until after 1857 could it be used to any considerable extent. Now it is the cause in the libels of 1,950 women and 1,063 husbands, or on the whole constitutes $\frac{10}{24}$ of all causes alleged in the libels. It may be regarded, however, as probable that suits by the husband for the desertion of the wife often find their origin in the character of cruel or shiftless husbands, and that desertion is increased in frequency by the fact of removing to remote parts of the Union.

The causes for divorce on the libels are thus divided between the sexes:

	On husband's complaint.	On wife's.
Adultery	1,295	1,654
Desertion	1,063	1,950
Intoxication	35	417
Extreme cruelty	00	375
Cruel and abusive treatment	00	223
Neglect to provide	00	154
Imprisonment	49	1
Impotentia	6	11
As before	2,400	4,833

Mr. Wright mentions the fact that "wives, of late, are using the opportunities afforded by the law much more freely than in earlier years;" so that "in the first five years covered by the figures,

about 64 per cent. of the divorces were granted to women, while in the last five years the percentage in their favor is very nearly 71. Of late they are getting nearly half the divorces granted at their instance on charges that practically the courts could not receive until since 1873."

"The sum of divorces for adultery and desertion, for which practically the sexes are "on equal footing, is 5,962, of which a trifle more than sixty per cent. were granted on the wife's complaint, and a trifle less than forty per cent. on the husband's complaint." "For all other causes of divorce 1,271 decrees were decreed, of which 33 per cent. were on the libel of husbands."

The increase of divorces is accompanied in Massachusetts by an increase in the number of the leading crimes against chastity and infant life. Mr. Wright's report for 1880 contains the following table of such crimes:

	1860–1864.	1875–1879.
Adultery	135	367
Abortion	3	18
Polygamy	18	50
Fornication	243	934
Rape	16	28
Indecent exposure	31	118

The very considerable increase of this class of

crimes is far beyond the increase of proportion. This may be apparent only, and be really due to increase of vigilance of officers of the law. One of these crimes—abortion—is difficult of detection, and is probably far more frequent than formerly.

Third.—Rhode Island. The causes for granting divorce in this State are impotency; extreme cruelty; wilful desertion for five years, or for a shorter time, at the court's discretion; continued drunkenness; neglect to provide for a wife; any gross misdemeanor or wickedness repugnant to, or in violation of, the marriage contract.

Divorce from bed and board may be granted for any cause for which absolute divorce may be granted, until reconciliation, and for such other causes as may seem to require them.

We have returns for 1869–1872 of divorces and marriages only; but for 1873–1879, of applications for divorce, whether refused continued or withdrawn, or granted:

	Marriages.	Divorces.	Ratio to Marriage.
1869	2,289	162	1 : 14
1870	2,362	200	1 : 18
1871	2,537	161	1 : 14.5
1872	2,366	200	1 : 12.7

1873–1879.

	Marriages.	Application for divorce.	Refused, continued or withdrawn.	Granted.	Ratio.
1873.....	2,630	261	88	173	1 : 15.2
1874.....	2,541	276	34	242	1 : 10.8
1875.....	2,485	227	69	158	1 : 15.7
1876.....	2,253	254	58	196	1 : 11.5
1877.....	2,282	257	79	178	1 : 12 8
1878.....	2,324	258	62	196	1 : 11.9
1879.....	....	255	9	246	1 : 9.7

The population in 1870 was 212,219. Thus, the mean ratio of divorce to population would be about 1 to 1,220. In 1880, when the population was 270,528, it would be, including also 1869–1871, 1 to 1,313.

Rhode Island is the only State, so far as I am informed, which publishes the complete action of its courts in applications for divorce—knowledge most important for enabling the public to pass a judgment on the thoroughness of the decrees of the judges.

Fourth.—Vermont. The causes of divorce here are adultery; confinement to hard labor in the State Prison for life, or for three years or more, the person being actually confined at the time, and no pardon can restore such person to conjugal rights; intolerable severity in either party; wilful desertion for three consecutive years, or absence for seven

years without being heard from; the husband's wanton neglect or refusal, when he has the pecuniary ability, to provide for his wife.

No divorce can be decreed for any cause, if the parties never lived together as husband and wife in the State, nor for a cause which accrued, in another State or country, unless the parties had, before such cause accrued, lived together as husband and wife in this State; nor for a cause which accrued in another State or country, unless one of the parties then lived in this State.

The ensuing table embraces marriages and divorces for the years 1860–1878 inclusive:

Years.	Divorces.	Marriages.	Ratio.
1860	94	2,179	1 : 23.2
1861	65	2,188	1 : 33.7
1862	94	1,964	1 : 20.89
1863	102	2,007	1 : 19.67
1864	98	1,804	1 : 18.41
1865	122	2,569	1 : 21.06
1866	155	3,001	1 : 19.36
1867	159	2,857	1 : 17.96
1868	167	2,961	1 : 17.77
1869	148	2,621	1 : 17.57
1870	164	2,928	1 : 17.85
1871	203	2,742	1 : 13.50
1872	146	2,749	1 : 18.83
1873	175	2,714	1 : 15.51
1874	170	2,724	1 : 16.12
1875	171	2,709	1 : 15.84
1876	168	2,602	1 : 15.73
1877	175	2,615	1 : 14.93
1878	197	2,766	1 : 14.0
	2,775	48,698	1 : 17.6

The ratio for the first seven years is 1 : 21.5 ; for the last seven, is 1 : 15.6.

In seventeen years the husband is libellant in 791 cases, the wife in 1,447, or nearly as in Massachusetts. The principal causes are adultery (632 cases), desertion (931 cases), intolerable severity, (683), refusal to support, (137).

Fifth.—New Hampshire. The cause for which divorce may be decreed in this State are impotency ; adultery ; extreme cruelty ; imprisonment for crime for more than one year ; injury to health, or endangering reason of complaining party by the other party ; three years' absence ; habitual drunkenness ; joining a sect holding marriage to be unlawful, and refusal to cohabit ; desertion and refusal to cohabit, without consent of the other party, for three years ; absence of a husband, or of a wife of a citizen, for three years ; departure of a wife from the State without consent of her husband, or claim on his part of marital rights for two years ; absence of an alien or citizen of another State from his wife residing here for three years, he intending to become a citizen of another country, and having made no provision for his wife's support.

No changes have been introduced into the divorce legislation of N. Hampshire, except an unimportant one in 1867, since 1854.

New Hampshire has published no statistics of divorce ; but Rev. Dr. Leeds, of Hanover, who with others has made examinations of county registers,

has kindly furnished me particulars which may help to form a judgment of the number of divorces in the entire State.

In seven out of ten of the counties comprising the State, which contain eighty-four per cent. of the population, the divorces were, in 1870, 138; and in 1878, 201. In six counties, comprising 71 per cent. of the population, they were, in 1860, 72; in 1870, 128; and in 1878, 184. In four counties, containing 55 per cent. of the population in 1840, the divorces were 24, 108, and 127, in 1840, 1870, and 1878 respectively. Assuming that 1878 was not an exceptional year, and calculating for the State from these partial data, we should, for the whole State, reach the number of nearly 278 divorces, on the basis of the seven counties; on that of the six counties, 259; on that of the four, 231; or, on an average, 256, a large number, and even larger than that of Connecticut.

An important result from our scanty data is that neither changes in legislation nor growth of population has caused the decided increase in divorce. The State has grown but little since 1870, only about 28,000. It is evident that an immoral habit is here growing rapidly as in Massachusetts.

Sixth.—Maine. The causes for divorce here are adultery and wilful desertion lasting three years, and for separation, extreme cruelty of either party, and a husband's refusal to provide for his wife. The law also adds—as we have stated before—that the

Supreme Court may decree dissolution of marriage when the judge deems it reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society. But this power is qualified by certain conditions of residence, etc.

According to Mr. Dike, who secured an examination of fifteen out of the sixteen counties, there were 437 divorces in 1878. He adds that four counties increased their divorces as they then stood by more than a third in 1881. Another statement, of a writer unknown to me, makes the entire number of divorces in 1878 to be 478, and adds that they were in thirteen counties much more numerous in 1880 than they were two years before. If this be so, Maine may have the unenviable distinction of going beyond all the other New England States in its looseness in this particular.

Seventh.—The only remaining State of which statistics of divorce have been published is Ohio. The causes for which divorce can here be granted are bigamy, three years' wilful absence, adultery, impotency, extreme cruelty, fraudulent contract, any gross neglect of duty, habitual drunkenness for three years, imprisonment in a penitentiary if the petition is filed at the time of the imprisonment, and divorce elsewhere.

In the first edition of this work, the tables for three years, communicated by the accomplished statistician of the State, Mr. Edward D. Mansfield recently deceased, included the years from 1865 to 1867 inclusive, that is from July 1st of each year.

The lists do not entirely tally with those which I here publish for 1865–1874, and I give both lists.

Year.	Marriages.	Divorces.	Ratio.
1865	22,198	*837	1 : 26.0
1866	30,479	*1,169	1 : 26.0
1867	[29,230]	975	1 : 30.0
1868	28,231	847	1 : 33.2
1869	28,910	1,003	1 : 23.38
1870	25,459	1,008	1 : 25.2
1871	24,627	1,007	1 : 22.9
1872	26,303	1,026	25.6
1873	26,460	1,024	23.5
1874	26,678	1,159	23.0
Average, (10 years)..	268,575	10,055	26.7

I am informed that the ratio of divorces to marriages in the year from July 1, 1878, to July 1, 1879, is 1 to 18, which would imply a considerable increase since 1874. Another very interesting fact is brought out by the differences between the counties. Mr. Mansfield in his report for 1865–66, says that there are thirteen counties of the northeastern quarter of the State, containing 410,000 inhabitants, where there were 208 divorces, being one-fourth of the whole number (837). This can hardly be from the better administration of the law, since those only can be divorced who voluntarily apply for it. The reason can only be conjectured, but if this class of statistics be continued through some years, the prime cause of such inequalities will be discovered.

* 939—1,169 second list.

The tables of 1878–9, supplied to me by Mr. Dike, will aid in ascertaining the cause thus sought for. In the twelve western counties settled by New Englanders, especially from Connecticut, the ratio of divorce to marriage is as 1 to 11; it is in Cuyahoga County, 1 to 9.9; in Ashtabula, 1 to 8.5; and in Lake County, 1 to 7. But in certain counties, where there is little or nothing of the New England element, there is a very different state of things. Thus, in Gallia County, where Welshmen and Southerners form the bulk of the population, the ratio is 1 to 50; and in Coshocton County 1 to 47. In counties where Catholics abound, this difference would be readily accounted for. Can it be doubted that in this case the habits of the race causes the difference?

We have a few particulars to add touching some of the western towns.

First.—In Chicago or Cook County, Ill., the marriage licenses and divorce suits stand as follows, according to the examination of the Rev. Charles Cavarno, Lombard, Ill.:

	Divorce suits.	Marriage licenses.
1875	526	5,006
1876	444	4,625
1877	474	4,569
1878	487	4,829
1879	607	5,466
1880	831	6,603

Population in 1870, 298,977; in 1880, 503,304. The ratio of divorces to population is 1 to 606, nearly—a greater ratio than is elsewhere known in the United States.

Second.—In St. Louis, there were 490 divorces granted in 1879, a great increase on the numbers up to 1876. The ratio to population is as 1 to 700 nearly, a truly enormous number, the population being 350,522.

Third.—San Francisco. The divorces here, in 1880, were 333, and the population, by the census of the same year, 233,956. The rate to population is 1 to 702.

Before dismissing the subject of the actual condition of divorce and the divorce legislation in the United States, we desire to make two or three remarks. The *first* of these is that the story of divorce told by the tables is too good a one, for the reason that many of the marriages are made between members of a church which allows no divorce within its pale. We must therefore deduct the marriages of Catholics before we can say with tolerable accuracy what ratio divorces and marriages bear to one another in sects and classes of people which do not condemn the dissolution of marriage altogether. This Dr. N. Allen, of Lowell, Mass., has sought to do in the June number of the *North American* for 1880, by obtaining from Catholic bishops the number of marriages among

their flocks, and deducting them from the State tables. He finds the Catholic marriages in Massachusetts to be about one-third of the whole; in Rhode Island to be more than a fourth; in Connecticut a fourth; and in Vermont an eighth. Those in Massachusetts were, in 1878, 3,978; in Connecticut, 1,019; in Rhode Island, 646; and in Vermont, 325. A table will present the effect of these deductions more clearly to the eye:

1878.	Massachusetts.	Connecticut.	Vermont.	Rhode Island.
Marriages	12,893	4,315	2,766	2,324
Catholic marriages	3,978	1,019	325	646
Differences	8,915	3,296	2,441	1,678
Divorces	600	401	197	196
First ratio	1 to 21.4	1 to 10.76	1 to 14	1 to 11.8
Final ratio	1 to 14.86	1 to 8.22	1 to 12.4	1 to 8.5*

Second.—We find, from comparing the tables, that the ratios of divorces to marriages in European countries are far less numerous than those in any of the United States, the tables of which have been published. Thus, in France these ratios are, for ten years, from 1860 to 1869, inclusive, 1 to 152.7, and for the next five years, 1 to 151.9; while in

* The results reached by these deductions of Catholic marriages are, however, a little unfair, as not taking into account the divorces of persons once Catholics, who have thrown away their religion, and others, especially emigrants from certain countries of Europe, that never had any.

Massachusetts, the ratio for all the years from 1860 to 1878 inclusive, is 35.81, more than four times as great. The smallest rate in the same State is 51, in 1860, or nearly three times as great. The divorces in the kingdom of Saxony for 1862–68 were 2,945, or 421 per annum—that is, in a country containing, perhaps, 2,500,000 inhabitants; while the average for the same years for Connecticut is 400 for not more than one-fifth of the same population. Comparisons might be greatly extended, but we refrain.

Third.—The changes of legislation in the United States are more rapid, and every change increases the number of divorces. If there is any principle in our legislation, it is not a moral one of reverence for the most sacred institution of the family and of married life, but it is a desire to afford relief for cases that are nearly as pressing as those that have relief afforded already. In France, the divorce law has remained in force since 1816, while among us there is no certainty, unless it arises from vexation with the changes of the past, that they may not be added to or repealed within ten years.

Fourth.—The courts in some, at least, of the States are chargeable with despatch and carelessness of procedure. I may speak of this matter again. I only say here that it is such in some States at least as to admit of collusion, and that few cases are withdrawn. In France, our tables tell us that out of 43,486 demands for divorce in twenty-five

years, 32,532 only were granted, or 75 out of 100. We have no tables of these rejected petitions, or libels, for the United States, except for Rhode Island, when about 89 per cent. were granted.

Fifth.—What is the cause of the condition of things here as far as it can be ascertained? Here one thing stands out prominently, and that is that the commonwealths founded by the Puritans, and the parts of other States settled by their descendants, seem to be the chief abodes of divorces. That portion of the country which was settled by the most moral and intelligent of all the settlers from the Old World, which is at the head of all religious and educational enterprises now, where it is very rare to see or know of divorced persons remarried in respectable society, so that to a great extent they are the lowest class in the community—that portion of the country, I say, which ought to set the brightest example, is now cited to reveal its shame, as being in this respect the most sinning and the loosest. What shall we say then? Shall we say that they could not govern the classes of society most liable to make light of the marriage tie, when society became mixed? Or shall we say that their ecclesiastical polity broke them up into independent churches, and encouraged unduly freedom of thought and disregard for a common standard of action; that this freedom begat individualism, and this, again, weakened the family principle, and made marriage less sacred than it had been before? Shall

we say that to regard marriage as a contract, and the State as a contract, and nothing else, those precious doctrines of a shallow philosophy, have injured the power of growth of the most sacred and holiest sentiments? But we need not pursue our course of thought further. It is more important and closer to our subject if we consider, in the remaining chapter of this essay, what is the duty of Christian churches in regard to divorce, and to suggest some hints on divorce legislation.

In closing our examination of statistical tables of divorce in the United States, so far as they are accessible, we desire to express our hope that when new tables of moral statistics for other States of the Union shall be published, they may be more full and comprehensive than any that now exist. Besides comparisons of divorces and marriages, the causes of the former, their increase or decrease, their local peculiarities, their connection with crime, the procedure and usages of courts, as tempting to application for divorce or deterring from them; let us have, if possible, some tabulated information on points such as the following: relation of divorce to illegitimacy, its prevalence in town and country, and among different callings; remarriage of divorced persons; average number of years of married life before divorce takes place; ratio of divorces where there are no children to

their number where there are children; causes for divorce in different countries compared; influence of national peculiarities on frequency of divorces; religious or confessional differences and national traits, and whatever else is calculated to throw light on the influence of divorce and divorce laws upon the interests of society.

CHAPTER VI.

DUTY OF THE CHURCH TOWARD DIVORCE—SOME HINTS ON DIVORCE LEGISLATION

MARRIAGE, as the origin of the family and of organized society, would naturally have close relations to religion, morality, and law if there were no revealed religion. But religion alone, even when its precepts are clear and admitted by all, is not competent to settle all the questions that grow out of marriage, the family, and the kindred: the State also, when it becomes strong and centralized, will inevitably claim to itself the determination of many questions touching property and succession, and must have a definite opinion expressed in custom or in positive law, in regard to the lawfulness of marriage in particular cases, the legitimacy of children, and the right of terminating marriage by divorce. There was a time since the Christian era when ecclesiastical power wrested the right of determining these questions from the State. When marriage became one of the sacraments, with which only the religious order had to do, questions touch-

ing the lawfulness of marriage or of separation between a lawful husband and wife, the legitimacy of children and others involved in them came to a great extent into the clergy's hands. Hence it was not strange that the important part of law relating to testaments, intestate estates, legacies, and the like, came also extensively under their control. In Protestant countries the Reformation in the end restored these powers to the State. In Catholic countries, the growth of executive power, the effort after consistent and logical legislation, with the increase of intelligence among the laity and the influence of lay lawyers, contributed, together with other causes, to the same end.

In these conditions of things there could not fail to be collisions between lay power and ecclesiastical power, between Church and State, and often between conscience enlightened or unenlightened and law righteous or tyrannical. The disputes on the matter of civil marriage which have been going on for many years in nearly every European country, and have hardly ceased as yet, will give an example. It was naturally a grievance for dissenters from an established church to be obliged to have their marriages solemnized by others than their own ministers; the necessity also of legal authentication of marriages induced the State to require official registration of them by its own officers, and when the age of free thinking arose, numbers wished to avoid the ecclesiastical solemnities necessary for

conforming to acts allowing civil marriage. Thus there might be religious marriage, preceded or followed by civil marriage, or even the latter without the former. A law of the new German empire in 1875 requires such civil marriage, with answers to certain questions showing the consent of the parties, and proofs of their parents' consent also if they are not legally capable to decide for themselves. After this the State considers them man and wife; and they are themselves of course free to have their nuptials celebrated by a minister of religion. But as the civil marriage is a necessity in this form of it, prior to the religious, many religious Germans are greatly opposed to such civil marriage, as tending to make the religious celebration superfluous. This certainly would be exceedingly undesirable, but the State has a right to require proof that every connection of this kind shall have some legal sanction; and those who are averse to being united in marriage by a minister of religion ought not to be shut out from the right of marriage because they are not Christian believers; not to say that such a measure might tend in some instances to put concubinage into the place of honest wedlock.

The strife in this instance touches a point about which religion has nothing decisive to say, and can afford to let the State have its own course; being well able, if civil marriage takes away sacredness from the institution, to make the greater efforts to

uphold it according to the idea in the New Testament. But there are other points of high importance connected with marriage, where State Laws and the teachings of the New Testament may come into collision; or where, if they do not actually conflict, State law may tend to produce such a disrespect for religious opinion, as will do injury to the church and to general morality. Here we remark, *first*, that in regard to the entrance into the marriage union—setting aside for the present the case of remarriage after divorce—the two authorities will generally agree in Protestant countries; or, if they do not, the disagreement will be comparatively unimportant, as relating to doubtful matters of rare occurrence. In Catholic countries the prohibited degrees, including those of consanguinity and those of affinity, may cause a conflict between the two powers, as the State will naturally open a wider door than church law allows. By reducing the number of classes of prohibited degrees the State gives permission to marry in all cases not expressly mentioned, leaving the question of right to each conscience, and this may be a cause of great complaint.* But in Protestant countries little

* In France aunts and nephews, uncles and nieces, brothers and sisters-in-law, and cousins German may marry. There were, according to M. Cadet, in 1861–1865, marriages of aunts and nephews, 284; of uncles and nieces, 849; of brothers-in-law and sisters-in-law, 4,342; of cousins-german, 16,805. Under the last heading, however, since 1863 the marriages between children of cousins-german are included. The num-

trouble of this kind is likely to occur, unless the law requires an established clergy to marry every one legally entitled to demand their services. In some Protestant countries, a marriage between a man and his wife's sister is still forbidden by law. But the general opinion seems to be that this connection—which owes its prohibition only to a feeling handed down from Catholic times, and to the fact that such a relative is often an inmate in the family of her sister—may be the best possible for the deceased mother's children. Yet in a corrupt age law might be needed to prevent such a union.

We come now to the very important subject of the termination of marriage lawful originally by the law of the State. If no such law existed, marriage, being lawful at its beginning, would be indissoluble. The church could not terminate it, because civil obligations in regard to property and children would still subsist. The Catholic church would not wish to have it terminated, nor would the great majority of Protestants differ from them, unless

ber of these marriages is 1.48 out of a hundred of all marriages.

By the law of the German empire of February 5, 1875, marriage is forbidden between relations in the ascending and descending line, full and half brothers and sisters, step-parents and step-children, parents-in-law and children-in-law, between parents and children by adoption, so long as the relation subsists, and between a person divorced on account of his or her adultery and the partaker of the crime, except that in the latter case dispensation to marry is allowable.

the termination were due to the commission of a particular crime committed by one of the marriage-partners, and complained of by the other. But nearly all modern Protestant States have been obliged to provide for terminating this close union, and in so doing have gone to the extreme of allowing divorce and separation for reasons which most Christians condemn. And from this position of condemning the State, when it allows the marriage tie to be dissolved on slight grounds, *the Christian church cannot in any of its forms recede*, because just here it believes that its judgment is based on the words of Christ.

Let us consider here first where the points of conflict between religious adherence to Christ's words and the practice of the State in granting divorces and separations will principally arise. And first such conflicts will have little or nothing to do with laws and judgments which declare marriages in certain cases void *ab initio;* and indeed, the process by which a legal end is put to such marriages is called divorce by misnomer. The cases referred to comprise marriages contracted against express laws of the State, such as those within forbidden degrees of relationship, as well as those contracted through the fraud or violence of one of the contracting parties, or in ignorance of an existing disability to fulfil one of the principal ends of marriage. In the first of these cases there is no option within the reach of the parties: the marriage can

never become a lawful or a moral one. In the others the marriage is only voidable, and the party imposed upon or deceived can waive objections, in which case the essential point of mutual consent is secured.

Besides these difficulties at the stage of entering into the marriage relation there may be a religious one, such as formerly existed, when mixed marriages (between Catholics and Protestants) were forbidden by the Catholic Church, or allowed only under severe restrictions. These marriages are now very numerous where persons of different religious confessions live promiscuously in the same territory; and there is no absolute conflict in such cases between Church and State. It is left for the most part to the parties or their religious advisers to make their agreements in regard to the religious training of the children.

There have been also denominations which prohibited their members from allying themselves in marriage with persons who have made no profession of religion. When this occurs, it calls for discipline from the Church holding such opinions of duty, but no great difficulty can arise; the cases are sporadic, and the person who is not a church-member will generally be blessed by the union. But marriage between a believer and an unbeliever or heathen is forbidden in the New Testament.

We come, then, to the dissolution of marriage, which can only be effected by the State, on the

complaint of the injured party or by common consent of husband and wife. Here the agency of the State is simply *permissive*. It does not separate a couple joined in legal marriage without the application and desire of at least one of them. They can forgive one another after the commission of the gravest offences, and such condonation is accepted by the courts as a bar to all future prosecution for the same offence. Hence a divorce suit is not a public process for a crime committed against the State—although the cause for it may involve crime against the State—but an inquiry whether a husband or wife has so departed from the law of connubial fidelity or duty as to allow their separation from one another, in consistency with laws which were intended either to secure the great interests of society, or to grant the request of one or both to be freed from all legal bonds of wedlock. Thus there are in form two kinds of divorce, one in which either of the parties makes a petition to be divorced from the other, and a second kind in which both unite in a petition on the ground of mutual aversion, or incompatibility of temper, as it is called. All the pleas for divorce may be reduced to one of these two.

But are the two essentially different? We think not, and for these reasons: first, because the special cause is often derived from some general estrangement, and again, because the general estrangement may be traced back to a special cause. Thus

jealousy, or niggardliness as the wife thinks, or love of dress or of company or undue expensiveness, as the husband thinks, may begin a variance which may not soon terminate. It would seem to be very dangerous for the interests of society to allow causes like incompatibility of temper to have weight in determining questions relating to the difficulties of married life, at least if they are allowed by law to break asunder nuptial ties with no hope of reconciliation. And if they could furnish causes for divorce absolute, would they not furnish also a temptation to make life uncomfortable to wife or to husband through a desire of forming a new connection.

As for specific causes, where they are of some continuance, such as lasting drunkenness or cruelty, or neglect to provide support, they may furnish reasons for separation, but not for remarriage. The temptation might be strong to make no efforts to reclaim a husband now become unwelcome, if not odious, in the hope or prospect of a new and more fortunate marriage.

In view of considerations like these, may we not affirm, with safety, that the welfare of a petitioner applying for full divorce is by no means the exclusive point at which law is to aim. If marriage is more than a contract, if it is a state or condition of life in which the welfare of the whole of society is involved, can we at all act on the principle that general rules ought never to press hardly

in particular cases. If partnerships in business, by the rash judgments of one member, may make another utterly bankrupt, may not other unions of two persons be attended with a like result. But may there not be in general more evil done than good if society intervenes to prevent the evil of mistakes and misjudgments in particular cases? May not laws, holding out the hope of a new marriage, multiply the evil of divorce at the great cost of increasing the desire by the hope held out?

As to the fact itself, that petitions for divorce become more numerous with the ease of obtaining them and the number of causes for which they can be obtained, there can be, I think, no difference of opinion, so long as leave to marry again is given in the decree of the judge. We speak of divorce absolute by itself, intending to consider separation afterward. The tendency referred to is proved by all the tables of statistics which are printed in this essay, and by all the experience of courts and legislatures which have been made known to the world. It is found by the history of legislation that, if the principle is admitted of specifying particular causes, there is effort after effort made to increase the number of them, and with logical consistency; for the new causes differ too little from the old ones to be shut out from legislation. The new causes arise with the new habits, the new relaxations of morals, the decay of religion, the depreciation of family institutions in a society that is grow-

ing worse. The facility of getting divorces increases the number; the number gives to divorced persons a respectability which they had not before; new cases, without the privilege of being on the list of evils which courts can cure, make appeals to have the doors open for them; until, finally, the only consistent end is to come to mutual consent as a vague cause, but one which may be as tempting to many married couples in some new state of feeling, as desertion or drunkenness was before. We refer to the causes of divorce in Connecticut, which went on *crescendo* for many years; to those in Massachusetts, where, in 1860, there were five causes for divorce and a ratio of one divorce to 51 marriages, and in 1878, nine causes and a ratio of one divorce to 21.4 marriages. It is certain that the same tendencies and results show themselves in several Protestant countries of Europe, although the ratio does not increase so fast as it does among us. I grant, however, that there may also be a tendency to a maximum, whether it be owing to judicial stringency, or to legislation on points accessory to divorce, or to an awakening of the moral feelings of society. And in countries where only separations, temporary or complete, are allowed, the same increase, although not as rapid, is perceived—witness France and Belgium, as our fifth chapter shows. In France where separation alone is granted and for adultery alone, the ratio of separations to marriages in 1840 was about

1 to 440, but in 1874 and four previous years was 1 to 151.9. In Massachusetts, divorces *for adultery alone* in 19 years, 1860–1878, are to marriages as 1 to about 88.

The modern divorce legislation of nearly all Protestant countries is *unchristian*, by which I mean that it is for causes which derive no sanction from the New Testament, and are not intended to be conformed to the New Testament. I must except from this charge that of England, of the State of New York in a great degree, and that of a few small territories. I am aware that such legislation can be defended, on the ground that the State only provides laws, and individuals avail themselves of the power or legal right thus afforded. It is something like the relation between the private person and the license laws: you may drink whiskey every day, and the law will not touch you until you are drunk. You may get a divorce every year, and the law will protect you, if you are innocent, by dissolving your marriage contract with the offending party. I will not contend that the State is obliged to do more than to protect the church or religious communities in their legal rights, although it goes actually beyond this to some extent; but all who believe that Christian faith and morals are necessary for the well-being of a State must feel that the purity of marriage demands every protection. Suppose that morals were so loose and divorce so easy, that one marriage out of three was dissolved

on the ground of connubial infidelity, what would become of the State? Would not a large part of the community say that they have learned by experience the inefficiency of law without religion and desire to have religion protected by a new code of laws, so that, if possible, the State might be saved from ruin? Looked at from the Christian stand-point, marriage is in its nature and idea indissoluble. Looked at from a heathenish or atheistic stand-point, it is a contract which persons badly joined together ought to be able to break and enter into a new relation with other persons with whom they can be satisfied.

This conception of marriage, as being in its nature *indissoluble*, and not *to be broken but for one specific cause*, is not confined to the teaching of Christ. Roman lawyers define it as "consortium omnis vitæ; divini et humani juris communicatio;" and as "viri et mulieris conjunctio, individuam vitæ consuetudinem continens." Philosophers and historians add their testimony also in favor of marriage as being all but indissoluble. Thus Hegel (§ 161 of his "Grundlinien d. Philos. d. Rechts"), after condemning the exclusively physical view of marriage, says "equally crude is it to conceive of marriage as merely a civil contract, a conception which occurs even in Kant, in which case the arbitrary will of the two parties exerts its control over individuals [instead of being confined to things], and marriage is degraded into the form of the

mutual use of one another according to contract. The third conception, which is equally to be rejected, is that which makes marriage consist in mere love; for love which is feeling, continually gives room to the accidental, a form which the moral cannot take. Marriage, therefore, when accurately defined, is rightfully more than love; and, in this view of it, the freakish and merely subjective which is in it, disappears."

So also Mr. Hume expresses himself on the evil of legalizing divorce as follows ("Philos. Works," iii., 208, Amer. ed.): "We need not be afraid of drawing the marriage knot the closest possible. The amity between the persons, where it is solid and sincere, will rather gain by it, and where it is wavering and uncertain, it will be the best expedient for fixing it. How many frivolous quarrels and disgusts are there, which people of common prudence endeavor to forget when they lie under the necessity of passing their lives together, but which would soon be inflamed into the most deadly hatred, were they pursued to the utmost, under the prospect of an easy separation. We must consider that nothing is more dangerous than to unite two persons so closely in all their interests and concerns as husband and wife, without rendering the union entire and total. The least possibility of a separate interest must be the source of endless quarrels and suspicions. The wife, not secure of her establishment, will still be driving some separate end or

project, and the husband's selfishness, being accompanied with more power, may be still more dangerous."

Mr. Gibbon is of the same way of thinking (vol. v., chap. xliv., p. 55, Bohn's ed.) "A specious theory is confuted by this free and perfect experiment [at Rome], which demonstrates that the liberty of divorce does not contribute to happiness and virtue. The facility of separation would destroy all mutual confidence, and inflame every trifling dispute; the minute difference between a husband and a stranger, which might so easily be removed, might still more easily be forgotten; and the matron, who in five years can submit to the embraces of eight husbands, must cease to reverence the chastity of her own person."

M. Paul Janet (in a work on the family, p. 60 et seq.) writes thus, from the stand-point of a moral philosopher: "In binding love by the bonds of duty, in making it promise eternal fidelity, the family does not act in contradiction to the nature of love, but obeys rather its own nature. Eternity so truly enters into the nature of love, that love would not venture to ask anything or to give anything without promising eternity. Its first acts are always oaths of fidelity without end, and even when it practises deception, it is obliged to use feigned words, or it would obtain nothing. It is urged that the heart has rights, and that the vows of eternity are impossible. I acknowledge that

love has rights, even for the forming of the conjugal union, but it has none at all for dissolving it. To the principle of the heart's liberty, we must oppose that of the heart's fidelity; and herein we assign to it an office more beautiful, and a glory more pure, than if we claimed for it the privilege of giving itself up to chance, and of changing its object without ceasing. I confess that to require of the heart an attachment which cannot be given up, demands grave reasons. I discern two such, which appear to me to be irrefutable: the dignity of the wife, and the interest of the children."

Another Frenchman, M. Troplong, a president of the court of cassation, and learned in Roman law, notices, in the following words, the objection against the indissolubility of marriage, that engagements from which there is no release are rash and ought not to be taken. "An engagement ought not to be called rash which contains fidelity to an oath which is authorized by the law, and is binding to the fulfilment of duty. The aversion of modern society to religious vows is explained in the eye of reason only by their being contrary to nature; but the promise of unchangeable fidelity in marriage is not contrary to nature. Very far from that—the engagement not to break the chain is inherent in marriage; it is one of its natural conditions; it is that by which marriage is distinguished from concubinage, and rises to the height of a sacred public institution. Let no one then reason from the

ordinary principles of public and private law, according to which liberty is inalienable and imprescriptible. The nature of marriage repels such reasons as being inapplicable. Marriage by itself—by virtue of its destination, avowed, accepted and acknowledged; by virtue of its legitimate ends; by its influence on the family and the children—marriage in its legal-political natural definition, is a bond which binds the whole of life, *consortium omnis vitæ*. It is marriage, because it is not a temporary tie, and because the two consorts give themselves indissolubly to one another. Such is its nature. And it is to show one's self opposed to nature, when one claims for marriage that revocable quality which belongs to rash vows. There are no rash vows, save those which give the lie to nature, but the vows which enter into nature's ends are sacred."

I venture to make another extract touching the indissolubility of marriage, as looked at on the practical side. It is from a decision of Sir W. Scott (Lord Stowell afterward) in the case of Evans v. Evans, as cited by "Coleridge on Blackstone," 1,440. He says: "It must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off. They

become good husbands and good wives; for necessity is a powerful matter in teaching the duties it imposes. If it were once understood, that upon mutual disgust married persons might become legally separated, many couples who now pass through the world with mutual comfort, with attention to their offspring, and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good."

From these opinions in favor of the indissolubility of marriage, we return to the precepts of Christ, which have given the law to usage in the Christian church. His words, "what God has joined together, let not man put asunder," are built on and explain the early passage of the ancient scriptures, "therefore shall a man leave his father and mother, and shall cleave unto his wife, and they shall be one flesh." These words are full of meaning. They imply, first, that a man is to seek his wife not among his very nearest of kindred, but away from home; then, that he is to have one wife, *and no more*, for how can a man be one flesh with two or a dozen women at the same time? Next, in the word *cleave*, that the two are indissolubly one and not to be separated; which Christ qualifies by the exception,

"saving for the case of fornication," "except for fornication." These words, and the passages in which they are contained, we have already considered in an earlier chapter of this essay. We make here one or two additional remarks. The first is that the exception involves the rightfulness of marrying another woman (see Alford on Matt. xix. 9). Another is, that the words *let not man*, or *let not a man*, put asunder, clearly denote that persons so united according to the ordinance of God, are not to be put asunder by a man—that is by human ordinance. I refer to this, in order to mention the surprising interpretation given by Luther, who held that by *a man*, a private man, acting in his own case, was intended. He was not to put away his wife, but the prince, or law-making power, was invested with that authority. It is enough to say of this strange explanation, that it is set aside entirely by the contrast between God, in "what God has joined together," and man, in "let not a man put asunder," where a man must clearly be understood as a human being. Any man, not as a private person, but as a man, whether magistrate or law-maker, or any one who separates husband and wife from one another, does so in contrast to God. And so, I suppose, it is now understood by all respectable interpreters.

Equally exceptionable are Zwingli's remarks on Matthew xix. 1–9, the passage before us. He says: "Christ's words here are so arid ('*sic arida*') that

it seems as if consorts can be separated for no cause whatever. But here the Lord condemns the reckless divorce of the Jews, and not all divorce. 'Neque unam duntaxat causam excipit, tametsi unius tantum meminerit.' As if a law, declaring that only murder should be visited with capital punishment, could mean murder as a sample of a number of other enormous crimes." This opinion of the Swiss reformer is met by the consideration to which we may advert again, that adultery and gross crimes of unchastity practically destroy the unity of a married pair, and the oneness of the flesh on which Christ insists, in such a sort as no other wrongs can. The relation is unique, and different from any simultaneous lawful relation, and hence it is protected by a special commandment. Other crimes may be greater, but the existence of the family, and the general welfare of society, demands that this should have a place by itself.

And yet we do not deny that the breach of this commandment, although the same in kind, is a greater crime for a woman than for a man. When she is the offender, it is an evil within the family, it may be attended with *confusio sanguinis*, it destroys confidence and disgraces the household. Hence the definition of adultery has been made such in a number of codes as to include only those crimes of unchastity in which a married woman is a partaker. But although the evils differ in magnitude, they are not unlike in kind, and, so far as

the point of destroying the joy and confidence of family life is concerned, the man's crime may often be the most serious and tragic of the two. It may be fairly made an objection against any code, that it thus, in a certain sort, protects the man in his breach of fidelity. By French law a husband must be convicted on complaint of the wife of having entertained a concubine in the 'maison conjugale.' "Hors de là," says M. Cadet, "impunité complète;" and the same writer contends against the inequality of punishment for wife and husband, when convicted of this crime ("Mariage," pp. 197–199*). By Prussian law (Landrecht, §§ 670–677), while the husband guilty of adultery can successfully oppose a complaint made by his wife, on the ground of her committing the same offence, she cannot, to shield herself, draw a plea from his guilt. This, we think, is not an objectionable disparity. The inequality already spoken of, as established by the English statute (p. 174 *v. s.*), is more reprehensible. Kent remarks (Com., vol. iii., § 27) that Montesquieu, Pothier, and Dr. Taylor ("El. of Civil Law," p. 254) insist that the cause of husband and wife ought to be distinguished.

To return to the simple command given by Christ, we need only say that as he permits, for one

* We are happy to be able to say that M. Naquet—see our appendix and text, p. 168—corrected this injustice of the law in favor of the husband, in his project of a new divorce law in 1876.

cause and for one only, a separation with leave to marry again, no Christian believer can hesitate to take the steps which are justified by laws made in conformity with Christ's authority. What personal conviction, from evidence, ought to be enough for the innocent party to avail himself of the right of separation, we need not stop to inquire. It is needless to say more than that if the court and his own belief coincide, he may do what he thinks right and proper in the case. *He* may forgive and save, or may wait for the future to decide whether by remarriage he would not ruin one who may not hopelessly and incurably have passed beyond the line of love and self-respect. But the *Church* is bound to take cognizance according to its rules of discipline founded on the word of God. "I wrote unto you in my epistle," says the Apostle Paul, "to have no company with fornicators—but I now write unto you not to keep company, if any man that is named a brother be a fornicator, or covetous, or an idolater, or a reviler, or a drunkard, or an extortioner; with such an one no not to eat." The separation of the classes here spoken of until repentance is not merely what the believers were to do, if they thought it best for the interests of the church; but it is commanded, without exception, if guilt is established, and until repentance is complete. Nor are such considerations as courts would have a right to use, such as similar guilt, nor a husband's drunkenness and cruelty—driving a wife into a

positive act of guilt—to have any weight in the case. The rule of suspending from the sacrament is imperative.

Another question still remains to be discussed: How ought a church to act, in cases of which there may be in a course of years a large number, if the law allows absolute divorce for offences for which the New Testament does not allow it. Shall the church comply with the view of the civil law, or of the New Testament? We have no hesitation in answering with that of the New Testament. But we can touch that point better when we have considered the subject of separation for other causes besides adultery. We have remarked that the tendency of much of the legislation of modern times in Protestant countries is *demoralizing*. As long as the causes of divorce were confined to adultery and desertion, the harm done to society, and especially to the church, was small. The churches erroneously believed that desertion was a cause for divorce justified by 1 Cor. vii. 15; and the man who deserted his wife for three years, would be likely to be unfaithful also; while the wife who forsook her husband, unless it were in guilty understanding with another man, would generally find a justification for her act in his cruelty. But State law began to corrupt and demoralize the church in regard to divorce. Everywhere in Protestant countries, except in England, and under a few other codes of law, divorce for all offences which once

had only separation granted to them, or were not provided with a remedy, was introduced: a multitude of new causes for it came in to relieve wives and husbands, and the old laws and opinions gave way to new ones. Nothing is more startling than to pass from the first part of the eighteenth to this latter part of the nineteenth century, and to observe how law has changed and opinion has altered in regard to marriage, the great foundations of society, and to divorce; and how, almost *pari passu*, various offences against chastity, such as concubinage, prostitution, illegitimate births, abortion, disinclination to family life, have increased also—not indeed at the same pace everywhere, or all of them equally in all countries, yet have decidedly increased on the whole. In some Catholic countries, as France and Italy, this kind of immoral habits had an easier growth, restrained though they were by the influence of the church. In some Protestant countries the evil grew slowly; they were happy in living out of the stream of demoralizing influences, voluptuousness and unbelief. In this western world, where there was a steady and honest race of settlers, society was comparatively pure, and laws did not for a time show any great signs of change; but our turn has come also, and with a rapidity, within the last half-century, that shows that we are quick to learn what is evil, and likely, in all appearance, to learn at a faster rate in the future. The nature of our institutions renders this

the more to be feared, since changes in law are easier than in older countries, and civil procedure does not to the same extent prevent groundless petitions for divorce from gaining a favorable hearing from the courts, and collusions from being successful.

We need not repeat in this place the proofs gathered together in the fifth chapter, from the statistics of recent years, of the increases of divorce in this country within a generation. The same laws which open the remedy of full divorce so freely, are not stopped by the barriers of church discipline; and especially where the censures of the church proceed from the members themselves there is danger of making within the church the law of the land, and not the rules of the New Testament, the standard of discipline. From some evidence which the author has in his possession, he is satisfied that few, if any, Congregational churches would knowingly vote to receive into their communion "a person who has been divorced on account of his or her adultery, and has remarried." But I am constrained to say that, to some extent, churches of this order do receive—partly in ignorance perhaps—"a person who has obtained a divorce on other grounds than that named in the law of Christ, and has remarried." This is probably the point where divorce laws, allowing full divorce for a variety of causes of which the New Testament says nothing, give the greatest anxiety to churches, and offer the most insinuating temptations. Having no definite

opinion themselves as to the right in the matter, and seeing an opportunity to exchange a drunken or cruel for a promising husband, not a few women who are church members get divorces on legal grounds, with the second marriage, we fear, even before their eyes, and it makes no scandal. They are the innocent, legally justified parties, and they go to the Lord's table without scruple as before.

One or two instances of considerable notoriety have occurred within the writer's knowledge, where ministers of the gospel were involved in suits for divorce which Christian views of marriage could not justify. One of them was very seriously tried by the bad temper and repeated desertions of his wife, and had taken the first steps for a judicial divorce, when he applied for admission into an association of ministers. Objection was made to his admission, on the ground of his having sought this divorce contrary to the laws of the New Testament, since, in the State where he lived, absolute divorce only was known. He was received into the body only after giving his assurance that he had no intention of marrying again. The legal steps, however, were not further prosecuted. Another case, much more widely known, was that of a professor in a theological seminary, who procured a divorce from his second wife for a family difficulty which lay far beyond the reach of any but very lax divorce laws, and certainly was not pro-

vided for by any rules in the New Testament. As might be expected, he resigned his professorship.

The law respecting divorce is thus injuring the opinion of society, by opening the door of exit out of marriage on very easy terms; it corrupts the sentiments of very many who are not educated for a pure and holy life; it brings divorce within the church, sometimes almost stealthily, so that it is not at once found out; it throws the church into perplexity in regard to its duty toward those whom the law has led astray. Probably many marry now among the humbler classes with the thought in their hearts that, if they do not find it for their happiness, they may break it off, and buy a new ticket in the lottery. Indeed, I have been informed by a minister that such language has been used to him by young people in his parish. And what if things should go further among us, as they have gone in some other parts of the Christian world? What if the current literature—novels founded on the fatality of passion; comedies, such as in France are said to make game of deceived husbands—; what if adulteries in high places, the man and woman agreeing to live together, reciprocally winking at each other's sins, unrepenting and in horrible caricature of Christian forgiveness; what if such things should occur in this land which are said to occur in some other countries, that have to a good degree shaken off law and gospel, fear and true love? Is there any cure? None within man's law; and we may

sink still lower than others, the greater liberty we have to do good or do evil.

Christian feeling and principle have long felt this growing evil of divorce to be one full of menace to religion, to morality, and to the family. Within the last few years, the Christian churches have taken it up, and acted against it either in separate or united movement. In 1868, the Episcopal Convention of Connecticut, and, in the same year, the triennial convention of the whole Protestant Episcopal Church discussed, and the latter passed, the following canon:

"No minister [of this church] knowingly, after due inquiry, shall solemnize the marriage of any person who has a divorced husband or wife still living, if such husband or wife has been put away for any cause arising after marriage. But this canon shall not be held to apply to the innocent party in a divorce for the cause of adultery, or to parties once divorced and seeking to be united again."

Another canon, passed several years afterward, ordains that if any minister shall reasonably doubt whether a person desirous of being admitted to baptism, confirmation, or the communion, has been married otherwise than as God's word and the discipline of the church allows, he shall refer the case to the Bishop for his judgment; provided that the sacraments shall in no case be refused to a penitent person in imminent danger of death.

Here, perhaps, is the place to mention briefly certain movements which have taken place in the last

two years respecting divorce. In 1879, a committee of ministers and laymen was appointed by the association of Congregational ministers of Connecticut to procure a reform in the divorce laws, and power was given them to co-operate with committees that might be raised by other Christian bodies within the State. These cheerfully responded, including the Catholic, and a small change was effected in the laws in that year at their suggestion. The united committees are still acting together, and were followed in several other New England States by organizations founded for the same purpose. More lately, in 1880, a general league was organized for all those States in which all the bodies constituted in the several States were represented. If success meets the efforts of these bodies to modify the laws, some compromises will be necessary. Thus the Catholic, who cannot accept divorce absolute even for adultery, would need a provision suiting his case, to the effect that the party calling on the court for a remedy shall have the option to choose whether he will petition for divorce or only for separation, temporary or permanent. And, perhaps, others here and there would wish to make use of the same kind of remedy. Such option is given in the laws of Rhode Island: there, as we have seen, separation from bed and board may be granted for any cause for which divorce may be granted, and for such others as may seem to require them.

We here reach a very important, in fact, as far as union of Christians is concerned, a vital question: Can there be an agreement, in accepting general principles of divorce among Christians, so decided, that the law shall be modified to suit their views? In answer, we would say that the Catholics and the Protestant Episcopal Church regard divorce, for any other causes except adultery, as forbidden by the founder of Christianity. In a large number of States, again, separation is the legal remedy for many, or most, grievances of one consort against another, and divorce is reserved for the cause of adultery alone, or for malicious desertion and adultery. No union can be expected among Christians which shall bring them to concede that full divorce is lawful on Christian grounds for any and every cause of separation now allowed by State law. We must, then, aim at securing that point, or must give up the contest; unless, indeed, in despair we consent to do as Moses did, who, for the "hardness of the hearts" of the Jews gave them the best regulations that could be enforced, not looking at the moral nature of the law, but at the stubborn nature of the people for which the law was given. This, however, is a confession that the world is too bad, and always will be too bad, for law and gospel ever to agree; and so law must always be a thorn in the flesh, an irritant opposing the cure and healing of the gospel, so far as to weaken its power greatly. When such a really Christian

man as Stahl, in his "Philosophie des Rechts (ii., p. 363, ed. 2) teaches us that marriage, in its end or destination as an entire personal union, is indissoluble, and can only be broken in twain by adultery, and yet adds, p. 364, that "the existing state of morals, which does not endure such strictness, justifies analogous extensions of this case for divorce to other deep-reaching wrongs of the other party, which relate to the marriage tie," he talks, we must say, as a half-Christian. Christ says "let no man (no law of human origin) put asunder." Such teachers say "in an evil and adulterous generation" bad laws are necessary for a corrupt society, and they appeal to Moses. But since Christ has expressly aimed at thrusting such law and such practice out of his church as Moses allowed, why should his church be content that these should continue against his express will. We are not Catholics, but we admire their firmness in standing by an express precept of Christ, which governs all the separated portions of his church, and in seeking to change law rather than to let things go down the stream.

We are not without some cheering indications that the Protestants of Germany are aware of the evil that lies in their divorce laws, and even in the doctrine of the Lutheran Church touching divorce, and are anxious to reform them. A change of opinion is evidently going on in the minds of some of the ministers of the Evangelical Lutheran Church

of Prussia. Propositions were made in 1868 to be considered at the next Synod in 1873, of which the first two were to this effect: "1. In accordance with the Lord's word, no one shall cause himself to be separated from his consort, except on account of fornication (*i.e.*, fleshly intercourse with another). 2. If, therefore, any one for other reasons makes arrangements to obtain divorce by judicial sentence, he shall be seriously dissuaded from this, as from a wicked assault on the state of matrimony, which is hallowed by God himself as being indissoluble, and is protected against the arbitrary will of man—whereby also he brings the other party into temptation of adultery—and the further process of church discipline shall be pursued with him until he abandons his suit for a divorce. If, however, he persists in refusing to give up his measures to obtain a divorce, he must be at length excluded from the communion. But if it should so happen that a judicial sentence had been pronounced before his exclusion, the bond of matrimony is not thereby broken before God and his Church; and if either party seeks to marry again, except after reconciliation to the divorced consort —in which case a new solemnization of marriage would be required—he must not be permitted so to do; and if still, he in some way obtain a legal solemnization of marriage [to another person] he is to be treated as in a state of continued adultery." In a remark contained in the proposed act, or re-

solution, we find added the following passage: "It is understood, of course, that the other party, who has by unchristian conduct given occasion to take steps for a divorce, is liable to be dealt with for the soul's good, and, if need be, to come under further churchly discipline. And it has been already mentioned that, in certain circumstances, it can be a salutary thing if, in the way of spiritual help for the soul, a temporary severance from board and bed take place and be maintained." To urge such a project before a general synod of a State church, where all reforms must be more difficult than in an independent ecclesiastical body, shows that the advocates of it are in real earnest.*

We are authorized, I think, in holding that the great body of Christian communities through the world are at one in these points: *first*, that Christ has confined the procurement of divorce, with the power to marry again, only to those innocent parties against whom adultery has been committed; and *second*, that separation from bed and board, or the liberty to live apart from a wife or husband, is lawful to those who have been deserted by their consort. Some hold that a deserted consort may go farther, and contract a second marriage. The better opinion is, that the apostle Paul had in view only their living apart, and that this can be understood

* Comp. Greve d. Ehescheid, etc., p. 333. Two other proposals were made, relating to persons one of whom belongs to another church or comes from it, which we omit.

only of Christian wives or husbands deserted by unbelieving or heathen consorts, and to them alone. The history of divorce since the reformation, shows that abandonment of this interpretation of his word opens the door to all complaints looking toward divorce, even to the most remote from Christ's rule. And there is no reason why this harmonizing view may not enter into the practice of Protestant churches as a norm of discipline and admission to the communion. Still there may be rare cases in Christian countries, as no doubt there will be many in newly converted heathen communities, of a description like the following: two persons living an irreligious life, according to the course and law of this world, have married one another in spite of the usage of churches and the word of scripture. They have children, perhaps, and lead a decent life. After a time they become impressed with the truth of Christ, and desire to sit down at his table. If a gambler, or a swindler, or a drunkard, or an impure person should seek this blessing, giving evidence of altered character and lives, no true disciple of a forgiving Saviour could hesitate to welcome them to the table. But there arises in the first case supposed a difficulty which does not exist in the others. The connection, although legally allowed, is scripturally forbidden, and no statute of limitations can alter its quality. Shall these penitents separate from one another, perhaps dissolve their families, before they can be recognized as Christians. Such

cases must have been numerous among the first converts to Christianity from among the heathen; and although there was no principle at first, such as that Christian marriage was the only true marriage, there probably would have been no difficulty in the matter. The new law of forgiveness and love did not ask questions as to the nature of the former relations, unless they were contrary to the very law of nature. It seems to the writer that similar exceptions among the heathenish inhabitants of Christian lands would not need to be rebuked by church discipline, seeing that the parties had already repented, and no separation could meet the original evil.

Leaving such exceptional cases out of the account, we may confidently say that no deviation from Christ's law can be winked at in the exercise of church discipline, which becomes a form when it does not support the essence of purity among church members. Thus divorce is shut out altogether, except for cases expressly mentioned in the New Testament, and we claim that for the peace and good of society, separation ought to be the resort for all other matrimonial difficulties which need any legal remedy.

But there are various objections against separation which cannot be passed over. In the first place, they who, as the author of this essay, do not believe separation to be expressly authorized beyond desertion, and even beyond desertion on the part of

a heathen or unbelieving consort, have a right to ask: "What authority then have you to introduce separation on your principles into Christian law at all. Accept the inevitable desertion, and what are we to do afterward—unless rights of property and relations of children may be controlled by the law of the State—to relieve the suffering family, more than if the parent were removed from the family by the stroke of God!"

The simple answer which I am content to make to such an objection is, that adultery (including those crimes against chastity which are more monstrous still in their character) is unique in its nature and generically different from all other wrongs commissible by one married partner against the other. Other injuries which the wife, for instance, suffers, not as a wife, but as the principal member of the family. The father might be cruel toward his son or daughter, but *this* wrong is directly inflicted against her.

Separation thus pertains to a different class of wrongs, and really needs no express sanction from the New Testament. It removes a wife from the control for a time, or indefinitely, of one who cannot or will not rightfully exercise the duties of a head of a family. He deserts his family as well as his wife, and, in justice, her claims on him are for neglect of herself and of them. If he will not discharge them, separation, as a relief or a penalty, or both, can be made the subjects of complaint.

But calamities caused without any wrong-doing of either party, furnish no ground for separation. Such are barrenness, accidents deforming or injuring the body, insanity, incurable or disgusting sickness, loss of property; and it is a shame that in some Protestant countries some of these, first as causes of separation and then of divorce, should stand among the statutes, as if the petitioning party was expected to stay with the other only so long as convenience and comfort dictated.

We may add that no change of religious faith can justify separation, for the duties of a husband or a wife may be discharged with fidelity as well as before. Thus nothing whatever occurring after marriage ought to be a cause of separation, unless it involve confirmed moral obliquity or acquired immoral habits.

At one time separation was used as a kind of penalty for grossly improper conduct, in the hope of leading the party separated to a better life. The length of time might be limited, after which divorce was granted, say at the end of two years; but it was found that the party complained of really wanted a full divorce, and so was willing to hold out until the term of probation expired. The two remedies do not seem to go well together.

The use of separation in the mediæval church was to lead the injuring party to compunction, and to peaceable settlement of family quarrels, and the time might vary with the efficacy of the remedy.

In Protestant countries it is generally within the power of the court to declare the parties, on the consent of both, to be restored to their original condition again; but there seems to have been little or no effort to reconcile the parties by religious motives, and so separation, like divorce, must be pronounced in this respect a failure.*

In summing up what we have to say on the right of separation, we repeat that is to be classed with the other cures for family difficulties which it is the part of the State to remedy. As the children may be exposed to lasting evil by the wrong conduct of one or of both parents, or the wife and children may suffer by the husband; so the wife may need a remedy, if she is the only direct sufferer. Unless something essentially evil, and worse than the evils of divorce, can be shown to arise from this source, it ought to remain among the remedies which we can make use of on the proper occasion.

But another important objection against separation is that the parties, the innocent party as well as the cause of the evil, being taken away by law from the family union to which they belong, are tempted to lead a dissolute life,—a life, in short, of concubinage or of prostitution. There is also a motive held out to them by the full divorce allowed in cases of adultery, while separation only is granted in all other cases of connubial variance, to commit the greater crime, in order to secure the

* Comp. Strippelm, p. 338, esp. note 81.

greater advantage. And again, when, as in France since 1816, there can be no suits except for separation, it will be naturally urged that the causes being all attended by the same decree of separation, it will not much weigh with the culpable party what offences they commit against connubial duty.

The earliest objections of this sort to separation, known to the writer to have been made on this side of the water, are found in the "System of the Laws of the State of Connecticut," by the chief justice of the State, Zephaniah Swift, published in 1795. The same author's larger and more important work (pub. in 1822-23) contains no such opinion. The remarks on this subject in the System are as follows (i., 193): "The statute warrants no divorce from bed and board, but all must be in total and from the bonds of matrimony. The Legislature, however, in one instance, under the special circumstances of the case, have granted a divorce from bed and board. This precedent ought not to be imitated, for it is placing them in a situation where there is an irresistible temptation to the commission of adultery, unless they possess more frigidity or more virtue than usually falls to the lot of human beings." This is apparently a mere expression of opinion on the part of one who had no opportunity in his own State or elsewhere to observe the effect of separation *a mensâ et toro.*

M. Naquet, who has been for a good while concerned in attempting to introduce divorce into

legislation in France, makes the remark in his "Divorce" (1877), that the legislation of Belgium is of all countries the fittest to convince the French of the necessity of abandoning their rule of separation, in other words, of returning to the French law as it existed before 1816. He says that "the Belgians get along admirably well with divorce;" that, "although it exists there and does not exist in France, the number of judiciary dissolutions of marriage is greater in France than in Belgium"; and, further, "if we add that the institution of divorce, by giving to the consorts the hope of a new legal union, must tend to diminish the ratio of '*separations amiables*' to judicial separations, we must conclude that marriage is more respected there than in France; and that, consequently, divorce there does not exercise the disorganizing influence on the family which some apprehend."

We are unable to see how M. Naquet's case justifies him in arguing from Belgium to France. In the former country, out of five and a half millions, one half of that number speak Flemish, and considerably more must belong to that stock which is less mobile than the French people. The nation is almost exclusively Catholic, and, probably, as a whole, considerably more under control of Catholic traditions. And, again, although they move slower, they are making no inconsiderable advances in the direction which M. Naquet desires. From the ratio of 1 divorce to 1,092 marriages in 1840, they have

gone forward to that of 1 to 277 in 1874, in which year France had the ratio of 1 to 131 separations; and, putting divorces and separations together, Belgium had that of a little over 1 to 200. The question is at least *adhuc sub judice;* but it seems as if Belgium was catching up to France, which itself, on the other hand, is moving in later years somewhat more slowly than formerly. This, however, is certain, that the increase of separations is far slower in Belgium than of divorces, and probably this would be so everywhere in Protestant countries if an option were given by the law. In the short experience of England, this is decidedly the case, as the tables in Chapter V. show.

The subject may have a little light shed upon it by comparing the three kinds of divorce laws—those which know of separations only, those where there are only divorces, and those which are mixed, reserving divorce for adultery only and separation for other marriage wrongs, or putting adultery and desertion on one side and all other offences on the other.

Here a difficulty arises. In the United States the statistics are published thus far almost entirely by States where separation is almost unknown. If now we compare tables of France with tables of Massachusetts, Connecticut, or Vermont, we shall find those of France to show a far smaller ratio than that of any of our New England States or of Ohio. In France the worst showing was 1 separa-

tion to 151.9 marriages in 1870–74. In Massachusetts there were in 19 years 1 to 35.8, more than four times, in Connecticut more than thirteen times, as many divorces. And, again, looking at divorces for adultery, we find them to be in Massachusetts 155 per annum for 19 years, or, compared with all causes for divorce, as 2.940 to 7.233, or as 10 to 24 yearly; while in France, in 25 years, adultery, as a cause for separation was to all other causes as 4.593 to 45.326, or 10 to over 98, showing that among the causes adultery figures much more largely in New England than in France. We might go on with our imperfect statistics, but these are enough to show that here, where there are no separations, both the ratio of divorces to marriages, and that of adultery to other causes for separation, are greater than they are in France. In Belgium the ratio of divorces and separations to marriages is as 1 to 367, but we are not informed of the number of divorces granted for adulteries alone in that country.

An objection of some weight is made against a mingled system of divorces and separations, that persons desiring to get rid of their marriage connection, will commit the highest crime in the hope of obtaining legal right to marry again. Is not this a fault of law, rather than of the mingled system.* Let the law stand as it stands in many

* Chancellor Kent (Com. ii., 106), says, "I have had occasion to believe in the exercise of a judicial cognizance over various

codes, that the guilty party cannot marry again, nor marry at all the *particeps criminis*, and this objection will in a great degree cease.

Another bad working of separation is said to be that there is great temptation both to the innocent and the offending party from their suspended relations: each is in the way of the domestic life of the other. Or if the one deserts the other totally, what a helpless and hopeless life must the innocent wife lead; worse than bereavement by death; not widowhood but loneliness, with a soulless husband destroying the possibility of a new marriage while he lives. This is a serious objection, but not so great as to lead us to wish the law to continue as it is, where every divorced party can marry again. Where remarriage is possible only for the innocent party, separated for the adultery of an unworthy wife or husband, the average of the happiness of the institution will be at least as great, and its sanctity be as well maintained. Society is the gainer, although individuals may suffer.

But if a mixed system of divorces and separations may be attended with serious difficulties, and if separation by itself stands no chance and perhaps ought to stand no chance of being intro-

cases of divorce, that the sin of adultery was sometimes committed on the part of the husband for the very purpose of divorce." But on the same page he adds, "it is very questionable whether the facility with which divorces can be procured in some of the States, be not productive of more harm than good."

duced into legislation by itself, there is a third plan which can be easily adopted, and may have the happiest results. I refer to the option between divorce, if the law of a State at present sanction it, and separation. This has been briefly spoken of in another part of the present chapter, where it was said that the Catholics might have permission to avail themselves of a choice consistent with the rules of their church. I go farther now, and say that such option, exercised by a complaining party, would remove the danger of a conflict between the State and the Church, and to a great degree the danger that a church member may be tempted to go aside from the rules of the New Testament in regard to divorce. There will be room for those who have separated from one another to come together again in mutual forgiveness, under the proper legal and religious solemnities. As the law, so far as adultery was concerned, would remain such as before, the Protestant and the Catholic might each take the course which their convictions required. In short, as the whole change would consist in the option, there would need to be no dispute, as far as I can see, in regard to the working of the law. It violates no rule of justice; it must suit a greater number of persons than any law could suit without such a provision.

We shall handle very briefly the only remaining point of our subject of which we propose to speak, which we will call some hints touching reforms in

divorce legislation and practice. And, *first*, it is important to ask how far the divorce suit ought to be regarded as a relief to an aggrieved party, and how far the general interests of justice and the preservation of the sanctity of marriage ought to have weight in legislation. It is evident enough, from the changes of divorce legislation in modern times, that the sacredness of the marriage tie has faded to a degree out of law and public feeling. This is to be ascribed perhaps to a reaction against the evils that grew up under the administration of ecclesiastical courts. A noteworthy result of the jurisdiction of spiritual courts was that the remedy, even on account of adultery, as it was granted by these bodies, was only separation, with the husband's right to sue the adulterer for his private wrongs in a temporal court.* There was no jury known to the procedure of the ecclesiastical courts, and this usage came over into this country, where "it is believed," says Mr. Bishop, "to be the unvarying course, except where a statute directly or by implication provides for a jury trial. In most of our States, not all, the trial by jury is by statute directed, either absolutely or at the election of a party" ("Mar. and Div.," ii., 256, *b*). In the new English system, since 1857, either party can ask that the question of facts may be tried by the court or by a jury, special or common. But where damages are claimed there must be a jury. As

* Comp. Blackst., i., 441; iv., 65.

publicity in many divorce suits would be against good morals, free entrance into the court-room is not desirable.

It is neither easy nor fair to pronounce an opinion in regard to the way in which such suits are managed, yet in some States there appear to be these defects.

First.—There is no one whose duty it is to give good heed that the interests of the State and of general justice are maintained. Governor Andrews of Connecticut, in his message to the legislature of June 7, 1880, says that "every person who is at all familiar with the business of our courts has observed that at least eight out of ten divorces are granted upon uncontested hearings. Many of them, it is believed, have been obtained by persons colluding with one another." The Governor recommended that the attorneys for the State in the counties should be required to defend in all such contested cases, but the legislature did not carry out his views.

Second.—There is in some States, it is believed, great haste in despatching cases of this sort. A story is told of a New England judge that, on one occasion, when a clergyman came to speak with him in court, he begged to be excused for a moment on account of judicial business. He returned after a few moments and said, "Do you know what I have done? I have divorced a couple in less time than it takes for you to marry them!"

Third.—The number of petitions or libels rejected is exceedingly small, so far as I can learn, since no statistics of such rejection are published, except by the one State of Rhode Island. In another State I have a lawyer's opinion that there are probably not five finally rejected out of one hundred presented.

Fourth.—There is need of great care against collusion. The States with loose divorce laws are exposed to frauds from beyond their borders. They have laws to prevent this, but it is not easy of prevention. A friend of mine was told by two lawyers that they regarded all the libels brought forward at a certain term of a court as collusive.

More might be recommended by one familiar with the procedure in our courts, but what has been said is enough, it is hoped, to bring this subject into greater prominence of discussion and to get the opinions of experienced persons. And here we close our essay with some hints in regard to certain changes in the law of divorce relating to adultery. *First*, on satisfactory proof that adultery has been committed, the guilty party ought to be prohibited from marrying his or her partner in guilt. This has more than once been spoken of in these pages, as a not infrequent provision of various divorce laws, and its omission, as a thing to be greatly regretted in the English law of 1857. Why should tenderness be used toward one who commits the most enormous of all crimes against the obligations

of marriage? And what a premium is held out to sin in this hope of impunity and possibly of respectable marriage! I do not advocate this as a part of Christ's law in the New Testament, for he had, it would seem, no occasion to mention it, but as a demoralizing permission. It is like pardoning a traitor and putting him into a high office of state.

Again, I would go so far as to make an adulteress incapable of a new marriage at any time—as men convicted of bribery are excluded in some places from the right of suffrage and of office—or at least to take this right away for a long period.

And here we may ask, Why are States so careless in regard to the punishment of adultery as many Christian States are, as if it was no crime against society? If, as Prof. Roscher says, "ein Ehebruch wiegt in sittlicher Beziehung schwerer als zehn Strupra," why should we depart so far from the feeling of the early Puritans as to give an adulterer or an adulteress a practical impunity? It is true such a criminal is rarely, if ever, known in good society; but why should the lower strata of society be corrupted by perceiving that he or she seems to have lost very little by the crime as far as this world goes. And how corrupting at times of trial and fall it is for such a person to know that he or she needs neither to lose anything nor to get the bad name of a criminal.

A change in the opinions of society or in the laws of divorce is not shown by the experience of

history to be very easy or rapid, except toward the worse. In this country it cannot be effected unless under the influence of moral, patriotic and religious sentiments. Should any change come over this country for the better, it would not probably come by a general agreement of the States or some new constitutional provision—for it is to be apprehended that a law so established would rather express the average of existing laws or something below them—but by the enlightened convictions of reforming and philanthropic statesmen. This is too good almost to be hoped for. Meanwhile, may the zeal of those not slacken who are now endeavoring, as representatives of the various Christian denominations in New England, to bring back a better way of thinking on a point where the descendants of the Puritans have degenerated. As one who has labored in this movement, and at an advanced age does not expect to live into a time of large reform, I here, in closing, express my belief that on the whole the present system of divorce legislation, as it is set forth in the statutes of New York, and, with a few exceptions, in those of England, is worthy to be followed within our borders, unless something still better and wiser and more accordant with the teaching of Christ and the dictates of the purest morals be found out.

APPENDIX.

NOTE 1 TO CHAPTER I.

THE explanation of Deut. xxiv. 1–4, I must retract, and must regard the protasis as including vv. 1–3, while v. 4 is the apodosis. The leading clauses then are: "If a man taketh a wife, and writeth for her a bill of divorcement, and she goeth out of his house and becometh another man's wife, and the second husband giveth her a bill of divorcement and sendeth her away, or if the latter husband die, her former husband may not take her again to be his wife," etc.

So the Septuagint, J. D. Michaelis, and Saalschutz on Mosaic law, Ewald, Antiquities, apparently (p. 204, English translation), Rosenmüller, Knobel, Keil, Delitzsch, De Wette in his translation. The only difference this makes is that the passage does not command, but assumes that in putting away a wife it was an old custom to have a written formula of divorce. To the question of the Apostles "why then did Moses command to give a bill of divorcement?" Christ replies that it was not a command, but a permission. This permission is involved in the words, however they are taken. The feeling that to marry again a divorced wife after her divorce and her marriage to another, was an abomination, appears in Jer. iii. 1, where the first words in our translation, "they say," are difficult.

NOTE 2 TO CHAPTER II.

On Certain Passages in the Epistles to Timothy and Titus.

THERE are certain passages in the first of Timothy and in Titus which have a possible bearing on divorce, and therefore may have a few words devoted to them in the present work. These passages are 1 Tim. iii. 2, 12; v. 9; Titus i. 6. The two first require the bishop or the deacon to be the husband of one wife; and the third makes it necessary, in order that a widow may receive the aid of the church, that she shall have been the wife of one husband. The expressions are precisely similar. It has been said, we are aware, that in 1 Tim. v. 9 the participle γεγονυῖα is to be joined with "one man's wife," and accordingly some editions of the Greek Testament put a comma after "sixty," which our version seems to favor by its rendering "having been the wife of one man." But such rendering violates the sense of γεγονυῖα, which could only mean "having become the wife of one man," which is nonsense. The participle is taken with the clause "not less than threescore years," and the sense is having come to be threescore years old. Exactly so Luke writes ii. 42, "When he came to be (ἐγένετο) twelve years old," where we have the genitives again. And so in classical Greek. Plato says of his "master of education" (de leg. vi. 765 D.), "Let him have reached the age of not less than fifty years," ἐτῶν γεγονὼς μὴ ἔλαττον ἢ πεντήκοντα.

The passage in 1 Tim. v. 9, then, is like the others, and may be used to explain them. Two senses can be given to it. The first is that the widow must not have had more than one husband at a time. Now, as bald polyandry is not a thing to be conceived of, if such were the sense, it could only mean that there must not have been more than one person living at the same time, whose wife, according to the point of view of the author, or of Christians generally, she could have been called. In other words, she must not have been married to one husband while another was living. And so, after this

analogy, we must explain "one woman's husband" to mean a man who could not be said, applying the Christian rule of marriage to him, to have more than one wife (that is, one person who can be called his wife) living. No one was to be allowed to say, that widow had two husbands at once, one a divorced and one an actual husband; that elder has two wives, one dismissed and one living with him. But there is in our view a serious objection to this interpretation. We fall back, therefore, upon the second. The widow must be a *univira*, the elder or deacon a *monogamus*, in the sense in which that word (like *bigamus, digamus*) frequently occurs in the Christian Fathers, *i.e.*, one who never married the second time.

Now, why this rule of monogamy for the officers and widows? It was not given because the writer of the epistle thought second marriages unlawful, for he wishes to have the younger widows marry. Nor, secondly, was it given because he thought celibacy better than marriage for elders and deacons, for one must admit, as it seems to us, that the strain of his argument leads toward married elders rather than unmarried. For, if an elder had governed his house well, it was a qualification for the eldership, but if he had not had any household, how could his power of governing be known? Nor, thirdly, was it given because the pagans respected those who had married once, more than those who had married more frequently. It is true that a *univira*, a chaste widow, was held in honor as an example of virtue, but we do not find that the same rule was applied to men. Nor, finally, could the writer have had any ascetical tendency in giving out this rule. For this asceticism, in its forms of prohibition of marriage and abstinence from certain meats, is pointedly condemned in the fourth chapter of Timothy.

We can find no reason, except one of these two, either that the *monogamy* and *monandry* gave *prima facie* evidence of restraint, or that a man or woman who had married twice or thrice would be less likely to have avoided those alliances which the Christian rule condemned, or, in other words, would

be less likely to have put away a married partner, or to have taken one put away by another.

However we understand the passage, simultaneous polygamy cannot have been thought of.*

NOTE 3 TO CHAPTER III.

THE twenty-second novell of Justinian was repeated for the most part in the 117th, only in the latter the divorce *ex communi consensu* was expressly prohibited, as stated in the text. It served, with that succeeding novell, as the basis of subsequent legislation. The Basilicæ, says Walter, u. s., § 315, repeat literally the causes of divorce given in the novells of Justinian. We have no copy of this code in our hands, but have noticed in the manual or Hexabiblus of Harmenopuius, which has still authority in Greece, that the title on divorce is almost entirely borrowed from the source above mentioned. The freedom or rather laxity of divorce held its ground almost unchecked in the Eastern Church. It is remarkable, says Walter (u. s.), to see how Balsamon and other Greek canonists slip over the conflict of these laws with Scripture and tradition.

The twenty-second novell first made a discrimination between various kinds of divorce. The general statement (in chap. iv.) is this: "some marriages are dissolved during the life of the contractants *by the consent of the parties*, about which there is nothing that needs here to be said, since the parties arrange the affair as seems to them best, *others on a reasonable pretext* (κατὰ πρόφασιν εὔλογον, per occasionem rationabilem), those mainly which are called *bonâ gratiâ*, others again *without any cause*, and others still for a *reasonable cause*."

The *bonâ gratiâ* divorce is so named according to Wächter

* Most recent interpreters and some of the Fathers explain these texts as we have done. Mathies, and Huther in Meyer's series give a little different turn to them. The latter, on 1 Tim. iii. 2, makes the sense to be that the bishop has lived, or lives, with no woman in sexual intercourse except with his lawful wife.

("Die Ehescheid. bei den Röm.," 223, u. s. w.), whose remarks we here to some extent adopt, for the first time in this novell. It stands between divorce by common consent and divorce on account of fault of one of the parties. It agrees with the first in this, that a certain sort of agreement of the parties is necessary, and with the other, that it is for determinate reasons. Its essential characters are the following: 1. No libellus repudii, it is probable, was necessary. 2. The divorced party was content, *i.e.*, did not oppose the transaction. 3. It was not obtained for crime, but for certain misfortunes of the divorced party. These were *impotence* for three years, from the time of marriage, instead of two years, as an earlier law had it (cap. 6); *captivity*, which according to the old jus postliminii dissolved marriage of course, even if the captive returned, but now was to continue for five years ere divorce could take place (cap. 7); *reduction to the state of slavery* by sentence of a judge, which could only happen in the case of a freedman (cap. 9); absence of the husband in the army for ten years without sending any word to his wife or reply to her letters (cap. 14); which may be compared with a law of Constantine mentioned in our text; and the choice by either partner of a monastic life. In all the cases here mentioned, except the last, each party takes back what property was brought by him or her into the partnership—the husband the antenuptial donation, the wife the *dos*. In the last case the party remaining in the world was to have whatever, according to the marriage contract, he or she would have in the event of the death of the other (cap. v.). To these cases of *bonâ gratiâ* divorce Wächter adds sterility, not mentioned, but in force before and not set aside by the novell.

The divorce for a good reason contains the same causes of divorce as the law of Theodosius II. referred to in the text, to which this novell adds three others against the woman: procurement of abortion, bathing with men wantonly, and taking steps to contract another marriage while living with her husband. In all these cases the innocent party has the *dos* and the antenuptial donation both. In no case where the woman

is the innocent party is she permitted to marry again within a year (cap. 15, 16).

The only other feature of this law which we notice is the sanction given to marriages which were without *dos* or donation. If a man, having married a woman on such terms, expels her afterward from his house, he is required to pay over to her a fourth part of his substance—up to a hundred pounds of gold. Such marriages, being begun with no contract, would be regarded as unions with concubines, and so needed protection (cap. 18). The dissolution of such marriages, however, *in fact* dissolved them *in jure*, so that the woman, if in fault, could yet marry after five years; while, if her husband was in fault for the divorce, she needed to wait only one year *propter seminis confusionem.*

In examining Roman legislation touching divorce, one cannot but be struck with the toughness of the old legislation, how hard it was to get it out of the old ruts, and what an uphill work it was for Christianity to convert and remodel law. Probably the difficulty was far greater than to infuse Christian ideas into a semi-barbarous people, and for this reason, among others, that the Roman looked on his system of law as something majestic and imperial. Yet a mean idea lay at the bottom of marriage. Money was its soul. *Dos* and *donatio ante* or *propter nuptias* play their part until one gets disgusted.

The late distinguished Frenchman, Troplong, in his excellent essay on the "Influence of Christianity on Manners in the Roman Empire," devotes a number of pages to the subject of divorce. Prof. C. Schmidt, of Strasburg, takes up the same subject in his admirable essay, which won a prize from the French Academy. But the results are not very satisfactory. Beyond all question, Christianity purified the conception of marriage among Christian believers, and the influence of the idea extended somewhat through society and naturally influenced legislation. But in the matter of divorce it encountered old habits which resisted it with an immense obstinacy, and so from Constantine onward we see divorce legislation

swinging to and fro as if the two forces could never consent to any stable equilibrium. The most striking instance of this—we believe that we have not mentioned it elsewhere—is furnished by a novell of Justin II.—the 140th. After Justinian had abolished and made penal divorce by joint consent—divorce, *bonâ gratiâ*, as this novell by an abuse of terms calls it—this foolish emperor brings it back again, basing his alteration of the law of his predecessor on the quarrels which grew up between husband and wife. "For if," it is there said, "the state of feeling of the parties creates marriage, with reason the contrary disposition dissolves it by consent of the parties." Which proves too much, for the loss of love of one only ought, on these premises, to bring it to an end. This novell of A.D. 566 was set aside by the subsequent divorce laws of the Basilicæ.

NOTE 4 TO CHAPTER III.

Some Notices of Divorce Laws in the Middle Ages.

THERE are numerous proofs that the strict rule of the indissolubility of marriage met with obstacles in its way toward universal recognition. The laws of the Germanic and Scandinavian nations were, as might be expected, at first willing to grant absolute divorce on a variety of grounds; Roman law had some influence on barbarian law in this direction, after the breaking up of the empire; and in some countries the ecclesiastical synods were willing to tolerate departures from the church rule already well established.

We propose, in this note, to give a few brief illustrations of the state of things in regard to divorce, while the Church of the West was undertaking to bring about a uniformity of practice.

In the strictly heathen state of these nations, divorce would have been allowed for a variety of reasons besides the wife's adultery. The causes might be, by Icelandic usage, such as the husband's cowardice, unseemly demeanor of either, or discord or maltreatment of the parents of either party by the

other, or impotence, or, it would seem, even poverty. Discord and malicious desertion continued to justify divorce after Christianity was known, but the bishop alone could dissolve the connection. (See Gans, "Erbrecht," iv., 489 ff.)

In the laws of Aethelbirht, of Kent (A.D. 560–616), it is said that "if a free man lieth with a freeman's wife, he shall purchase her with her (or his) wergild, and get another wife out of his own property and bring her home to the other man." (R. Schmid, "Gesetz. d. Angelsächs." 2d ed., p. 5, No. 31). In another law, No. 79, it is said that if "she will depart with children, she shall have half the property," from which Gans (iv., 299) argues that separation was tolerably free.

In the Burgundian laws it is said of a woman putting away her husband *necetur in luto.* A man is authorized to dismiss his wife for adultery, poisoning, and robbing of graves only, where we trace the influence of Roman law. If he does this for other reasons, he must either pay "alterum tantum quantum pro pretio ipsius dederat" (*i.e.*, the wife-price or morgengabe), besides a mulct of twelve solidi, or must leave his house and property to his children and move away. (Gans, iv., 36.)

Among the Lombards the stricter law of divorce was fully introduced by Charlemagne and Lothair. Before the conquest by the Franks fines for divorce appear. King Grimoald ordained, that if a married man took another wife he should pay five hundred solidi, and lose the guardianship over his first.* (Gans, iii., 180.)

In the formulas in use among the Franks there are signs of divorces quite contrary to the rules of the church. In a formula of Marculf (ii., 30; Walter's "Corpus," iii.), it is said that the marriage is dissolved because there is no love according to God's will between the parties, but discord. And they are free either to go into a convent or to marry again. (Gans, iv., 83.)

In the Westgothic laws, divorce is permitted only in the case of adultery—indeed it was the consequence of this offence, as

* Grimoaldi leges, vi., in Walter's Corpus, i., 756.

the adulterer and the guilty wife ceased to be free, and became the property of the injured party. Earlier usages permitted divorce by consent. "Let no one presume," a law had it, "to join in marriage to himself a free woman divorced from her husband, unless either by writings or before witness the fact shall be evident that a divorce took place." But such divorces were afterward forbidden by King Chindasuintha, and adultery now constituted the only ground of divorce. (See Gans, u. a., iii., 341–344.)

As we have seen that the church temporized among the Scandinavians, so it did more or less elsewhere. Among the Anglo-Saxons the "Pœnitentiale" of Egbert, of York (?), belonging to the middle of the eighth century, shows that the wife's—but not the husband's—adultery, impotence, desertion, and captivity furnished grounds for divorce, with remarriage, of which the church in England admitted the validity. (Phillips, "Angelsächs., Recht.," 243.) The old British church seems to have had stricter rules. In France, during the eighth century, things were, if anything, still looser. Richter affirms ("Kirchenr.," § 282, note 7), that *mutual-consent* was there a reason for divorce, and at least in two cases remarriage of one or both parties could follow, namely, when a vow of chastity was taken by one of the parties, and when one became leprous. Furthermore, the following reasons, emanating *from one of the parties*, justified divorce: adultery, desertion of a wife, a husband's crime punished with servitude, captivity of either party, plotting against the other's life, change of rank from slavery to freedom, refusal of connubial duty, impotence, and even supervenient impotence. The decree of Gratian has the following sentence of Greg. III. (A.D. 731–740): "Si mulier infirmitate correpta non valuerit debitum viro reddere—ille qui se non poterit continere nubat magis," etc. Of the capitulum of the synod of Vermerie under Pippin (A.D., 752), permitting divorce with marriage to a man, against whose life his wife has conspired with others, we have spoken before (p. 116). Another article of the capitulary of the same assembly agrees with the above-mentioned sentence of Gre-

gory III. Five years afterward, in the meeting at Compiègne ("Compendium"), it was enacted (capit. 16), that either husband or wife might separate from the other, being leprous, and marry whom he or she would.*

All this shows the conflict of expiring Roman with ecclesiastical law. We have noticed a still later instance in the *assises des bourgeois* of the kingdom of Jerusalem (§ 155, p. 322, ed. Foucher): "Sometimes it happens"—it is there said—"that a man takes a wife, and this woman then becomes leprous, or has the falling sickness badly (ou chiet de mauvais mal trop laidement), or her mouth or nose sends forth a very offensive odor (ou il put trop dure la bouche ou le nés)," etc. In such cases, reason requires that the church ought to separate them, and accordingly, after proof of the fact, the unfortunate woman is to be put into a convent (soit rendus en religion), and the husband can then take another wife. The wife can do the same when similar misfortunes befall the husband. Then follows a rule for the paying over of her dower to the abbess of the convent, etc. This is remarkable, considering that it contradicts the canon law in the thirteenth century, and yet the less remarkable when we consider the rule of Gregory above cited, which furnishes a precedent.

Our limits forbid us to speak of the penalties which the laws of the Germanic and earlier barbarous kingdoms attach to adultery. We must refer for that subject to Wilda's "Strafrecht d. Germanen," pp. 821–829.

NOTE 5 TO CHAPTER IV., p. 17.

Foljambe's Case.

In the present note we shall follow, for the most part, the late Prof. Craik, of Belfast, Ireland, who, in the Appendix to the "Romance of the Peerage," Vol. I., cited in our text, has submitted this case to an accurate examination, and has shown the mistakes of previous writers.

* Some of these statements Catholic writers seek to explain away.

Mr. Bishop, in his work on marriage and divorce (i., § 661, 4th ed), says that "anciently, judicial divorces were probably from the bond of matrimony. But, in 1601, a contrary rule was, in the Court of Star Chamber, established by Whitgift, Archbishop of Canterbury, assisted by other eminent divines and civilians." His authority is Foljambe's case, reported in 3 Salkeld, 137. And, again, in § 705, he reaffirms the same thing, but without proof, saying only that the fact is now generally admitted.

That sentence of nullity in ecclesiastical courts dissolved marriage, or, more properly, declared it never to have existed, is known to all. But there is not the slightest evidence that these courts gave a license to marry another person in any other case. They could not have done it in the old Catholic times, and no other courts had jurisdiction over marriage and divorce. Nor has any evidence been produced that after the Reformation—however, some may have married a second wife while the first was living, feeling no dread of the censures which were only ecclesiastical—the case was altered.

The note in Salkeld's Reports, which has misled the author of the article on divorce in the "Penny Cyclopædia" and a number of others, including Mr. Bishop, is as follows: "A divorce for adultery was anciently *a vinculo matrimonii*, and therefore, in the beginning of the reign of Queen Elizabeth, the opinion of the Church of England was, that after a divorce for adultery, the parties might marry again; but in Foljambe's case, *Anno* 44 Eliz., in the Star Chamber, that opinion was changed; and Archbishop Bancroft, upon the advice of divines, held that adultery was only a cause of divorce *a mensa et toro*."

Salkeld wrote in the early part of the eighteenth century, and, as Prof. Craik shows, makes two errors, besides mistaking the main fact. One of these is that Bancroft was primate in 44 Eliz., or 1601, whereas Whitgift lived until 1604; and the other, that the Star Chamber, a court which had no jurisdiction in such cases, and where "the archbishop neither sat alone nor presided," should have rendered such a decision.

But we may go back to Moore's Reports of the seventeenth century, in which, as indeed in Noy's Reports (1656), the matter of Foljambe is thus stated. We translate from the law French. "Feb. 13, *anno* 44 Eliz. In the Star Chamber it was declared by all the court, that whereas (?) Foljambe was divorced from his first wife for the incontinence of the woman, and afterward had married Sarah Page, daughter of Rye, in his former wife's life-time, this was a void marriage, the divorce being *a mensâ et thoro*, and not *a vinculo matrimonii*. And John Whitgift, then archbishop of Canterbury, said that he had called to himself at Lambeth the most sage divines and civilians, and that they had all agreed therein."

Here the darkness begins to clear up. It is Whitgift, not Bancroft, who was concerned in the affair, and the primate had held a council, not a court, at his palace. But there remains the fact that, somehow or other, Foljambe's marriage had come before the Star Chamber, of which Whitgift was a member. A natural explanation might be this, that this point was only incidental to the main issue before the court.

The registers of this court perished with it, or at least are not now to be found, but Mr. Craik hunted up in the Chapter House some of the depositions taken in this case. From these it appears that Hercules Foljambe, Esq., *defendant* in the case, had been divorced for his own adultery from two wives, and while they were alive had married a third, Mrs. Sarah Page, a widow, the daughter of the complainant, Edward Rye, of Misterton. The complaint was that Foljambe, in right of his so-called wife, had seized the manor-house at Misterton, held by lease of the Chapter of York Cathedral, and had by force kept out Rye, on the claim that not Rye but Rye's daughter was the lessee. The wrong charged against Foljambe was this illegal exclusion of Rye, claiming to be the rightful tenant, and the disturbance which he had thus excited. On this alone, says Mr. Craik, could the court give judgment, but, "it is likely enough that, in so aggravated a case, the illegality of the defendant's pretended marriage with the daughter of the complainant, his only plea, may have been strongly

pointed ont and denounced. But to quote this case as establishing anything new is absurd, and almost equally so whether the decision be taken to have been that of the archbishop (as seems to be not an uncommon notion) or that of the court of the Star Chamber. No judgment of either the one or the other upon such a question could have carried with it any authority whatever."

The facts, then, when sifted, seem to be these: 1. Foljambe, like many others in Elizabeth's reign, feared no penalties of the common or statute law for his audacious marriage, for there were none, and cared nothing for those of the law ecclesiastical. 2. The validity of his marriage came up incidentally. 3. The primate, in consequence of the loose state of opinion, thought it best to take the *consilia prudentum* touching divorce, and submit them to the court. 4. The law of England had remained unaltered. 5. It is not improbable that this gross case, belonging to February, 1602, may have led to the new canons and new statute of the first year of James I., a little more than a year after.

NOTE 6 TO CHAPTER IV.

M. Naquet's project of a law on divorce submitted to the French Chamber, June 6, 1876, corresponding nearly with the law of March 21, 1803. Comp. p. 156 *supra*.

"Marriage is dissolved (1) by the death of one of the marriage partners; (2) by divorce. Divorce has effect by the mutual consent of the two united in marriage or by the will of a single consort (1) for a specific cause, (2) on the express and persistent demand of one of the consorts, affirming his or her will to dissolve the marriage, without, however, appealing to any specific cause.

"The determinate causes which the party bringing the suit for divorce can appeal to are:

"1. The adultery of the wife, if the husband is the demandant, and the husband's adultery, if the wife is the demandant. The law of 1803 required, in order that the husband's adul-

tery should become a cause of divorce, that he should have kept his concubine in the common or family dwelling. "This distinction to the prejudice of the wife," says M. Dumas, most justly, "is an inequality between the parties which nothing justifies." M. Naquet struck it out in his project of a law.

"2. The condemnation of either consort to a bodily or infamous penalty.

"3. Crimes, cruelties, or grave injuries of one consort toward the other.

"4. The derangement, lunacy, or madness of one of the two.

"5. Notorious dissoluteness of morals.

"6. The husband's desertion of the wife, or the wife's of the husband, for at least a year.

"7. The husband's refusal to maintain the wife, though he has the means.

"8. The absence of either of them, during two years at least, without being heard from.

"9. Impotence, either antenuptial or supervenient.

"10. Infirmities, disgusting or incurable, whether following after marriage or anterior to it, but unknown to the other party before the marriage was concluded.

"11. False denunciations or calumnies of one of the parties against the other.

"12. The acquisition of gain by dishonesty (d'un gain déshonnête).

"13. Insobriety, habitual drunkenness, continued during two years.

"14. Religious differences of opinion succeeding marriage, and proved either by a change of religion of one of the parties, or by the religion prescribed to the children at birth, or in subsequent years, or avowed by the two parties.

"15. And, in general, every cause not foreseen, which shall appear to the court to be calculated to inflict a heavy blow on the marriage union."

Comp. Naquet, "Divorce," Chap. vii., p. 113, and for the law of March 21, 1803, p. 314. See also Alex. Dumas fils, "Question du Divorce," pp. 6–8.

The articles 23–93 of Naquet's law related to procedure and the consequences of divorce. The project was rejected by the Chamber.

NOTE 7 TO CHAPTER V.

Extract from Rev. H. Loomis' article on "Divorce Legislation in Connecticut." New Englander *for July*, 1866.

"DURING a period of fifteen years nearly four thousand divorces have been granted: a number equal to one-twentieth of all the families in the State. Are we not justified in the conclusion that the laws of 1849 effected not merely a change, but a revolution in the legislation of the State in the matter of divorce? How then has this revolution been accomplished? If we turn again to the terms of that law, we find that three new causes of divorce were added by it—imprisonment for life, infamous crime, and general misconduct. Applications for divorce, for the first two of these causes, occur but seldom in the records of the courts, and cannot, from the nature of the case, have affected materially the whole number granted. It is to the third cause, therefore, that we must look for the multiplication fivefold of the decrees of divorce by our courts, and yet by reference to a classified table subjoined, in which the decrees of divorce for the year 1864, and two months of 1865, are given in connection with their causes, it appears that only one-sixth of the whole were granted expressly for general misconduct alone. It is, indeed, exceedingly curious to notice the effect which this so-called general misconduct clause has had upon the construction of the entire enactment, of which it forms apparently so subordinate a part. It is noticed sometimes in musical instruments that an attachment directly connected with but a portion of the scale, and designed primarily to affect but the notes of a single octave, is found in practice to give a new tone and character to the whole instrument throughout its entire range. Something analogous to this would seem to have been the effect of this general misconduct attachment to our divorce law. Its influence has been felt, not only in the suits brought specifically in

its name, but in extending the loose, vague, and indefinite character of its own terms over the language and administration of the entire enactment. In addition to the tables carefully prepared for that purpose, it may not be improper to introduce in this connection other parts of the evidence laid before the special committee appointed by the Legislature of 1865 to take into consideration and report upon the recommendation of the Governor in relation to a reform in our laws of divorce. In the evidence presented to that committee, from which are drawn almost all the facts quoted in this article in regard to the present administration of our divorce law, was the opinion of two of our judges who have recently retired from the bench, that of the four thousand divorces granted in this State during the past fifteen years, more than half have been secured through the influence, direct or indirect, of this general misconduct clause.

"In a vast number of cases, in which the evidence in reference to the particular offence alleged in the suit must have been rejected as insufficient, the additional claim urged by counsel, that 'the happiness of the petitioner had been destroyed, and the end of the marriage relations defeated,' has been sufficient to secure a decree of divorce. In fact, it may be said that the indirect influence of this clause has been far greater than any it could independently have secured; and where upon this issue alone a decree could not have been obtained, yet, coupled with the charge of adultery, though amounting to only a suspicion—or with desertion for a shorter period than provided for in the statute, or with evidence of intemperance and cruelty, which would be held wholly insufficient in itself as a ground of divorce—this plea of general misconduct has, in innumerable instances, been pressed to an actual decree. Indeed, when we consider the indefinite terms of this provision, it is difficult to set any limit to the amount of pressure which may be brought, by interested friends, to bear upon the mind even of the most conscientious judge, to induce a dissolution of the relationship. The whole matter is, in effect, placed under his almost absolute discretion; and

where the State has intrusted such almost unlimited power over the most sacred relation of life, with few and slight limitations or barriers of any kind to preserve it from abuse, it need not surprise us to find at least equal laxity in its practical exercise. Apart, however, from the loose language of the statute, and the large discretion allowed to the judge, it would be difficult to conceive of anything called a court constituted with more inevitable tendency to dangerous laxity of practice than the Superior Court, extemporized, during the few minutes just before or after one of its ordinary sessions, into a Court of Divorce.

"But whatever may be said of the constitution of the court, its usages are certainly such as are known to no other court, civil or criminal, high or low, within the jurisdiction of the State. Not only is it true in nine cases out of ten, or more exactly, as our second table shows, in ten cases out of eleven, that there is no appearance whatever for the respondent, and consequently all the evidence presented is *ex parte*, but it is a notorious fact that, ordinarily, no sufficient measures are complied with to secure notice to the respondent. It is true the law provides that certain parties may issue an order of notice, but what the order shall be, and what the evidence of its service, are left again to the discretion of the officer who issues it; and practically the duty is fulfilled, as shown in the evidence before the committee, by the discharge of a letter through the post-office to the last address which the petitioner who brings the suit may choose to furnish.

"Whether, in the etiquette of a Court of Divorce, it be considered discourteous or otherwise to the lawyer prosecuting a divorce suit, for the judge to submit the witnesses provided to any very close examination, direct or indirect; and whether in a Court of Divorce the assurance of a lawyer as to what he *can* prove is equivalent to the actual proof itself or not, it is certain that the hearing of quite a batch of divorce suits in the half-hour between the closing of the morning session of the court and the time for dinner does not ordinarily involve any risk of a cold repast on the part either of the court or the witnesses."

INDEX.

The Emotions.

BY

JAMES McCOSH, D.D., LL.D.,

President of Princeton College.

One Volume, crown 8vo., - - - $2.00.

In this little volume of two hundred and fifty clearly printed pages Dr. McCosh treats first of the elements of emotion, and, secondly, of the classification and description of the emotions. He has been led to the consideration of his theme, as he says in his preface, by the vagueness and ambiguity in common thought and literature in connection with the subject, and by "the tendency on the part of the prevailing physiological psychology of the day to resolve all feeling and our very emotions into nervous action, and thus gain an important province of our nature to materialism." The work is characterized by that "peculiarly animated and commanding style which seems to be a part of the author."

CRITICAL NOTICES.

"Dr. McCosh's style is as lucid, vigorous, and often beautiful as of old. There is never any doubt as to his meaning, nor any hesitation in his utterance."—*London Academy.*

"It would be well if all who have it as their business to influence the character of men would study such a work as this on the Emotions."—*Examiner and Chronicle.*

"We recommend it to all students as a perspicuous and graceful contribution to what has always proved to be the most popular part of mental philosophy."—*The N. Y. Evangelist.*

"The work is marked by great clearness of statement and profound scholarship—two things which are not always combined. . . . It will prove attractive and instructive to any intelligent reader."—*Albany Evening Journal.*

"The analysis is clear and the style of crystalline clearness. We are inclined to think it will be the most popular of the author's works. We have read it from beginning to end with intense enjoyment—with as much interest, indeed, as could attach to any work of fiction."—*The Presbyterian.*

"The whole subject of the volume is treated by Dr. McCosh in a common sense way, with large reference to its practical applications, aiming at clearness of expression and antness of illustration, rather than with any show of metaphysical acuteness or technical nicety, and often with uncommon beauty and force of diction."—*N. Y. Tribune.*

"Apart from the comprehension of the entire argument, any chapter and almost every section will prove a quickening and nourishing portion to many who will ponder it It will be a liberal feeder of pastors and preachers who turn to it. The almost prodigal outlay of illustrations to be found from first to finis, will fascinate the reader if nothing else does."—*Christian Intelligencer.*

*** *For sale by all booksellers, or sent, postpaid, upon receipt of price, by*

CHARLES SCRIBNER'S SONS, PUBLISHERS,

743 AND 745 BROADWAY, NEW YORK.