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DIVORCE-REFORM.

IT is extraordinary progress in the movement for reform in divorce legislation that it has so soon reached the stage where its chief danger is from its friends. According to precedent in the history of such movements, there should be, first, a period of active resistance; then a period of negative opposition, resting upon vested interest and the *vis inertiæ* of society; and later, when the ultimate success of the reform begins to be assured, a period when the most important and vital contest has to be with partisans of reform compromising their cause by demanding exorbitant measures and asserting untenable doctrines. The divorce-reform seems already to be passing out of the second stage into the third. Very few are the decent people who venture nowadays openly to defend the existing condition of divorce-law in the United States. More numerous, and more dangerous, are those adversaries who have nothing to say in answer to the demands for reform except in terms of faint sympathy, while hinting that the case has been very much overstated, and who, while assenting to general principles, are averse to any practical application of them; whatever improvement of legislation is proposed, they may be counted on to object to "this particular measure;" they deprecate the agitation of the subject as likely to disturb social, political, or ecclesiastical harmony; and they reinforce with their dead-weight the *inertia* of the public, the passions of the lewd, and the vested interests of the lower strata of the legal profession. With such as these, no other argument is half so convincing and converting as the manifest set of the current of public opinion. If they lack "the courage of their convictions," they are capable of no small valor in the courage of

other people's convictions. And there is serious danger from this very class of people that, in the progress of reform, it will furnish more than its quota of those who will by-and-by endanger and perhaps for a time defeat it, by unintelligent assumptions and extravagant demands.

An article on prevalent abuses of divorce, published in the PRINCETON REVIEW in July of last year, under the title "Polygamy in New England," gave occasion to extensive comment in all parts of the country, and among all sects and parties, such as to indicate the various currents of public opinion on this subject. Only here and there is any journal found that has the impudence openly to justify the existing facility and prevalence of divorce—to claim that "when an error has been committed in case of a marriage without thorough mutual acquaintance, it is humane and just to rectify it lawfully;" —that "every time the legislature repeals one of the causes embraced in our laws as a rule for granting a divorce, it inflicts an injury upon society generally." But this is the doctrine of a leading newspaper in the capital of a New England State. More frequent are those which refer to the statistics of marriage and divorce in New England—figures derived from public record, and as trustworthy as such figures can possibly be—as "probably very much exaggerated," and belonging to "what may be called the fluxions of statistics" (as pretty a phrase as ever was devised by a hopeless disputant to parry the force of incontestable facts), and which lament the use of sarcasm on such a subject, and deprecate holding up to public ridicule three reputable citizens who had really done nothing but advocate easy divorce before a legislative committee. It is needless to say that the newspapers of this class are of eminent respectability, that they sincerely regret the existence of abuses and would be overjoyed to see them opposed, in a proper spirit; also, that they regard the facts concerning divorce among the native population of New England and its colonies to be well answered by the fact that foreigners and Roman Catholics in New England sometimes desert their wives.

But it is gratifying to testify that the greatest number, and by far the greatest weight, of the journals which have discussed the matter "brought into court" by the article in question

have dealt with it frankly, earnestly, indignantly even, recognizing the flagrancy of the abuse, and demanding reformation. The great current of opinion sets in the right direction.

The only class of comments that gives serious cause for anxiety concerning the future of divorce-reform consists of those which express enthusiastic approval, and demand that legislation shall be conformed to the eternal standard of right and wrong set forth in the Gospel, as the only right standard of legislation—a demand with which neither the article nor its author has a particle of sympathy, as he will presently make manifest.

But before coming to this practical subject of what ought to be the reforms of existing divorce-law, one more class of comments on the article "Polygamy in New England" deserves a measure of attention. The article has had the effect of drawing a certain class of critics into the study of that most seductive and fascinating question, How is our own superiority in virtue to be accounted for? How is it that we in New York have maintained so respectable a statute, while all our neighbors to the east and to the west have fallen so low? How can it be explained (so the New York *Churchman* asks, with the unfeigned humility of a grateful soul) that Puritanism should have come to "legalize polygamy and authorize adultery,"—and finds an explanation of it in the influence of John Milton. It is perhaps not the most magnanimous aspect of humanity, but still it is human, to find in the earnest and painful efforts of a community for the reform of a frightful abuse the food for a comfortable complacency in the spectators, or the opportunity for a little sectarian bounce and swagger. But it is prudent for such lookers-on to be quite sure of their position before giving public expression to their feelings. It is by no means certain that New York law concerning the sanctions of marriage is so much more respectable than New England law. It is the Puritan States, whose legislation is formed on the basis of the Mosaic code, that write adultery in the list of felonies, and punish it with imprisonment and disfranchisement. It is the States which, like New York, have received their traditions of law from England, as English law was left by the English Church Reformation, that have

virtuously purified themselves of the crime of adultery, by making adultery to be no crime, but only (if one is disposed so to consider it) a personal grievance, for which damages may be recovered by civil suit for "loss of service." Is it altogether surprising that the demand for larger divorce facilities should not be clamorous in a State which has inherited the worst opprobrium of English law, so that its penal code is a general permit of adultery to all men and all women? The cause of this anomaly is to be found in the character of the English Church Reformation, which conserved the sacramental idea of marriage so far as to hold that offences against it should be punished only by church-discipline. And since the Reformed Church of England has no discipline, it follows that adultery is not punishable at all within "the ecclesiastical realm," except by the "cruel and unusual" process of reading the Commination Service once a year in church to so many of the adulterers and adulteresses of her communion as are pleased to go and hear it.

It is well to give unstinted honor to everything that is honorable in the long record of the Roman Catholics on the subject of marriage and the family; and to recognize with the praise which it justly deserves the new-born interest of the American Episcopalians in questions of public morals. But on the whole it is hardly necessary for either of these parties to perplex their minds or exhaust their historical information in search for the causes which have made them so superior to the rest of us in their regard for the sanctity of marriage. It is perfectly demonstrable that where the Reformation was instituted and carried forward on Puritan principles, one of the constant incidents of it was the severe punishment of crimes against marriage, as contrasted with their impunity previously or elsewhere.[1] It must doubtless be a pleasing study to the readers of *The Churchman* to grope for an explanation of the revival of virtue in English society, and the rehabilitation of the sanctity of marriage, consequent on the overthrow of the Commonwealth and the restoration of the Stuarts, and to find it, at last, in the prevalence of "Church principles" and the

[1] See Bayle's Dictionary, article *Saint Cyr;* Blackstone, iv. 64.

temporary extinction of John Milton. But for real edification and the cultivation of the meeker virtues, it would be far more profitable to them to ask (for instance) whether the fact that the most shameful laws in Christendom, on this subject, are the laws of England, stands in any relation to the influence of those eminent Reformers, Henry Tudor, Defender of the Faith, and the Right Reverend Dr. Cranmer; or whether there is any significance in the fact that the prevalence of divorce in New England does not begin until the exclusive supremacy of Puritanism is impaired and the Episcopalians begin to grow to a certain measure of influence.

Coming back, now, to the writers in various quarters who have welcomed the author of "Polygamy in New England" to the ranks of those who demand that public legislation on the subject of divorce shall be conformed to the morality of the Sermon on the Mount, he begs them distinctly to understand that he does not ride in their troop; that he regards their canon of legislation as false, unscriptural, and mischievous. It is held by those who (whatever their theories of inspiration) have so little real respect for the Scriptures that they find in them two moralities—an Old Testament morality, and a New Testament morality that superseded it. There is no such duplicity in the Scriptures. That one of the prophets who is eminent among them all for his devotion to the law of Moses to its last details of ritual—Malachi—enunciates the exact morality of the Gospels, and sustains it by the identical argument used again, after so long a time, by Jesus Christ—the argument from the creation of one woman for one man. "Putting away" did not *begin* to be an abominable thing in God's sight about two thousand years ago. He always hated it, even when Moses, in His name, was giving a "law that was not good"—a law forbidding this hateful thing to be done without a notarial act. We have not two moralities here, but two different things,—one of them morality, the other jurisprudence.

There is no principle more distinctly taught in the Scriptures, none better worth pondering by American citizens, (and all the more as it is so commonly perverted by men that ought to know better,) than this—that the standard of personal duty is not the criterion of right legislation; and conversely, that pub-

lic law, even good law, is not the standard of duty for one's conscience. Blind to this principle, the scribes and Pharisees of Christ's day took that solid maxim laid down in the Mosaic code for the assessment of penalty and damages—"eye for eye, tooth for tooth"—for the gauge of personal duty; precisely as nowadays people will take up some clear maxim of morals, and demand that because this or that is morally wrong, therefore it must be made a penal offence by statute.

This is a very common and sometimes an effective line of argument in urging reforms in legislation. We never fail to hear it in a "prohibition" speech, and almost never in a speech for the Sunday laws. If it were sound it would be conclusive on the question now pending. But it is a mischievous fallacy. The movement for divorce-reform had better fail than succeed by means of it. There must be a hard fight, any way, against a growing shame that is intrenched in the statute-books, is a vested interest of the legal profession, is infecting the churches, and finds much timid acquiescence and now and then an unblushing advocacy among persons not otherwise disreputable; but a persistent fight will overthrow it, unless frustrated by the superserviceable assistance of fools and fanatics who "assume that all laws which allow divorce for lesser grounds than adultery are contrary to the law of God," and insist on engrossing the Sermon on the Mount into the penal code.

One demoralizing effect of this fallacious notion that personal duty is the standard of public law is seen when men turn it end for end (as they did two thousand years ago, and do today) into the maxim that public law is the criterion of individual duty. It is high time—no! it is long past the time—for Christian churches to give the State to understand that whatever acts are entered on the statute-book, the law which the Church administers is the law of Christ; and that when the State declares that to be lawful marriage which Christ declares to be adultery, it must count on finding the Church taking sides with her Master. It is long, long past the time for this. Churches and ministers have shamefully surrendered to Cæsar the things that are God's. The disgraceful laws of the New England States, that fall so far below the standard of good secular legislation, are become the canons of church fellowship.

Adulterers and adulteresses, the only mitigation of whose crime is that it is licensed by the State which ought to punish it, sit down together unrebuked at the table of the Lord's Supper. And in one notorious instance, at least, a man who has put away his wife, giving her a writing of divorcement, is maintained, without so much as the institution of an inquiry, in the fellowship of the Congregationalist ministry.[1]

It does not appear that there is often any serious difficulty, either in New England or out of it, in finding reputable ministers of any desired Protestant denomination, who, for a ten-dollar bill, will stand up before an adulterous couple and declare them, in the name of the Lord Jesus Christ, to be husband and wife. If there has ever been an instance in which this transaction has brought the culprit under any formal censure from his brethren or his superiors, the fact is not generally known to the public. That Christian communion which will not only pass canons and resolutions and appoint committees, but will depose and excommunicate somebody for this business, will thereby reinforce its credit with the public for sincerity and earnestness in its belief of the New Testament.

It is easy to imagine the sense of assured victory with which the advocates of facile divorce will welcome the abandonment of the unscriptural argument from Scripture, and the putting of the subject on its proper basis of expediency. On the question whether, as a matter of expediency, an uncongenial couple should be allowed to separate and remarry there is so little room for hesitation! Here is a man who finds that he does not love his own wife, and does love his neighbor's wife. His own wife is willing to be rid of him, or if she is not, he knows a short and easy method to make her willing. His neighbor's wife shows a pleasing reciprocity, and has also at her command a large variety of arguments which can hardly fail (with due encouragement from the State) to bring her husband to a like con-

[1] Let me do this respectable sect the justice to say that if, on the one hand, it is more distinctly implicated than others in fellowship with this iniquity, on the other hand, it has the honor of having in its clergy the first "confessor" of righteousness—the Rev. Mr. Cutler of Hebron, Conn., who is sued at the law for having told a certain Mr. Fillmore "it is not lawful for thee to have her." "Wherefore he had a quarrel against him."

sent. Here then is a case in which all parties in interest are agreed. *Volentibus non fit injuria.* Is it expedient—we appeal to you now as practical and humane men—is it not wrong and cruel—to compel uncongenial and alienated couples to remain under the intolerable bondage of a legal union, when one little whisper across the assignation end of the judge's desk of the Superior Court will set it all right, and instead of two wretched families you have at least one happy one, and perhaps more? Is it not better for the interests of all concerned to have this accomplished readily, quietly, and in an orderly and strictly legal way, and the new union cheered with the countenance of society and hallowed by the prayers and benedictions of a Christian minister, than to have the almost inevitable alternative? Could anything but a cruel fanatic austerity be guilty of refusing it? Such, not always in so frank and lucid a statement, is the case on which the advocates of easy divorce make their *naïf* appeal to the charity of a Christian public.

The worst thing about this appeal is the sincerity of it. The people who talk this stuff do in many cases actually believe it. They really understand by *the interests* of men the removal of restraints upon their passions. And their idea of *love*, instead of the Christian, the human, idea which allies it with duty, which ennobles it with the element of will, conscience, responsibility to the law of God,—Thou shalt, and Thou shalt not,—is simply and baldly the bestial idea which recognizes in human love no more of reason, choice, responsibility, than in the amours of bulls and stallions. "He cannot love his wife. He cannot help loving his neighbor's wife. Shall nothing be done for his relief?" Pah! There is no odor of "Puritanism" about this. It smells of "the sty of Epicurus," of the monkey-cage of Darwin, of the primeval slime of Haeckel.

But perhaps the most mischievous fallacy in an argument which is compact of nothing but fallacies is the one covered under the expression "all parties concerned." It is absolutely amazing to see how far the discussion of this subject is sometimes carried on, on both sides, under the easy assumption that there are no parties in interest in a suit for divorce but the parties to the marriage-covenant, unless the children, if any there be, or at furthest the family connections of the parties to

the suit, are to be counted as having a nearer or remoter concern in it. It was an instructive thing to observe the jocular gayety with which the Honorable Mr. Sumner, of Hartford, pleading in the name of humanity, before a legislative committee, against any limitation of divorce facilities, delineated the miseries of uncongenial marriage, in contrast with the Elysian delights of what, but for this humane expedient, would be illicit love, and described the beneficent working of his law-practice in effecting the transition from anguish to bliss in a given case, with apparently no conception that this case could stand in any more relation to the interests of society than if the parties to it were the sole inhabitants of a coral reef. But at the right hand of Mr. Sumner's beneficiaries there lives another couple between whom arise some foolish bickerings such as under the influence of right conscience, sustained by decent public opinion and righteous law, are suppressed with mutual forbearance and forgiveness, and love revives again. But Mr. Sumner's doctrine and the "humane" practice with which he adorns it are not in vain. That which he has preached at the Capitol, and illustrated in actual life before the eyes of these tempted ones, is not preached and illustrated without effect. Business makes business, and there is a new run of custom at Mr. Sumner's office.

And at the left hand of Mr. Sumner's beneficiaries lives another couple to whom Satan has come near with the more awful temptation of libidinous and adulterous solicitation. Time was when the solemn word of God, Thou shalt and Thou shalt not, would have made itself heard in their hearts, when the conscience of Christian society would have confirmed their own, when the terror of public law would have pointed to the State's prison to warn them from the beginnings of crime. But that is all changed now. They have been taught about "incompatibility." They have been charmed with Mr. Sumner's little speech. They have learned from their next neighbors how quietly and respectably the whole matter was managed, and at what a trifling expense. They know where to go for a minister of the Gospel to bless their purposed adultery "with the word of God and with prayer." They know it must be all right, for Mr. Sumner is such a respectable gentleman. In short, the consequence is a timid knock at Mr. Sumner's office

door—and who will dare allege that philanthropy does not pay?[1]

Oh, a very dignified position indeed does the ancient and austere Puritan commonwealth occupy in this business! It creeps into the meditations of those who would not lightly or unadvisedly enter into the solemn covenant of marriage, and suggests "not so very solemn—there is an easy way out of it if you don't agree." It crawls up the church aisle with the wedding procession, and in response to the solemn words "until death shall part you," chuckles out "death, or the Superior Court." It finds its way into the bridal chamber, and sits, "squat like a toad close at the ear" of innocent love, to encourage evil thoughts by tendering facile opportunities. It intervenes in family alienations to insinuate propositions that are becoming to the fomenter of discord and the pander to adultery. A very noble institution is the Puritan commonwealth! God save the commonwealth!

"The parties concerned," forsooth! As if any man who likes to be able to write after his name the State of his citizenship on a hotel register, without being ashamed of it, were not a party in interest here! As if the State itself were not the party chiefly interested in maintaining the sanctions of marriage! As if this whole "humane" scheme were not a systematic sacrifice of the interests of the many virtuous families to the libidinous passions or the wicked quarrels of the criminal few!

1. Approaching now, the question what change in the laws is desirable, it would be wrong not to say that the first improvement to be demanded is a better administration of the bad laws as they now stand. Some one has got to say, what lawyers do not dare to say aloud, that the course of divorce business through the courts is a personal disgrace to the judges, one and all. In a proceeding which is commonly either collusive or *ex parte* as to the main point, and in which the judge is the only representative of the vast interests of morality, society, and the State, the court habitually acts not only

[1] I have taken Mr. Sumner as a representative man in this matter, because he has volunteered in this capacity, and because he undoubtedly is a highly respectable man—for a divorce-lawyer—no worse than the rest of his class, and a good deal better than some of them.

with reckless haste, and slovenly inattention to the awfully imperilled interests of individuals, which are supposed sometimes to be represented by counsel, but in dereliction and apparent unconsciousness of any responsibility for the interests of society and the State, which have no representative but the court itself.

2. On the low, base theory on which the present laws are framed and administered,—that divorce is an affair between the two parties, so that if they are content it is nobody's business else,—on this vile theory even, there is need of provision against those scandalous malpractices resulting in irremediable damage to the innocent, and in the unpunishable triumph of the guilty, with which the newspapers teem from week to week. Let the statute at least be so constructed as not to effect any more evil than the evil which it aims at and that which is necessarily incidental thereto.[1]

[1] No description or digest of the laws can give so good an idea of what they are and how they work as the following curious and genuine documents sent to a lawyer in Connecticut who answered the advertisement of a New York firm by an inquiry about their terms. The name and address of the firm are of course suppressed.

"NEW YORK, April 26, 1881.

"DEAR SIR: We enclose to you one of our circulars on Divorces. Shall be pleased to tender you our services in a legal way. We have, and are even now obtaining divorces for attorneys in all parts of the country. Our rates to the profession for an ordinary case is only $40; to others they vary from $50 to $250. In all cases $10.50 must be paid when the suit is entered for court fees—the remainder when the decree is granted. Shall be pleased to hear from you at any time. We are very truly yours,

"PANDER & PIMP,
"Main Office, No.— —— Street."

The following is a copy of the circular:

"PANDER & PIMP,
"Attorneys-at-Law,
"No.— —— St. and No.— —— St.,
"New York City.
"Office Hours from 10 to 3.

"Having made divorce suits a specialty, we are familiar with all the laws relating to them in the District of Columbia and different States and Territories. Our suits are brought under laws best adapted to the case. They differ so much that persons wanting divorce should not be influenced by the opinions of attorneys or even judges, in ordinary practice, because *they* may have been unable to obtain a divorce under the laws of their *own* State.

"We are constantly procuring divorces for persons in *all parts of the Union*

3. Instead of a procedure which is prompt, rapid, cheap, and "without publicity," the process for divorce should be so open and so deliberate as to give ample "cooling time" to irritated temper, sufficient opportunity for a hearing to interested parties having a right to be heard, and some chance for personal per-

who could not or did not wish to bring suits in their own courts, and that we do so legally and successfully is evidenced by the fact that we guarantee to refund all money paid in any case where decree is not obtained.

"Your personal appearance at court is unnecessary, as we represent you as attorney, and proof made by your own or other affidavits; no unpleasant notoriety or *public exposure of charges* need attend the suit. We prefer personal interview with clients, as we can much better explain matters than by correspondence, but can in nearly all cases prepare the necessary papers without, and send to you to sign and return to us—no fee charged for consultation in person or by letter. Applicants can marry again in any State or Territory, as the decree places their relations to each other as they were before marriage. When property, etc., is involved, special correspondence is solicited.

"We guarantee to procure a full and absolute divorce with custody of children, if desired, under the latest laws, in about sixty days from beginning of suit, by legal proceedings in a duly qualified Court of Record, for *Incompatibility of Temper*, or where parties cannot live in peace and union together, *Adultery*, *Desertion*, *Bigamy*, *Cruelty*, *Impotency*, *Refusal to provide for Family or neglect of Home Duties and Children*, *Conviction of Felony*, *Fraud in Consummating the Marriage Contract*, and *Marriage under Age*.

"The cost including all court fees and costs will be $—. If you wish us to prosecute your case, fill up the enclosed blank carefully and return to us with $—, which amount is for actual and immediate court fees, which must always be paid in advance. Then we will prepare your petition and send to you for your signature. The balance to be paid upon delivery of decree of Divorce.

Send check or postal money order to

"Yours most respectfully,

"PANDER & PIMP, Attorneys-at-Law."

"*General Decisions by the United States Supreme Court, and other State Courts.*

"The laws of divorce differ essentially from those relating to property and personal rights, and it has been repeatedly decided by the United States Supreme Court and the various State courts, that a divorce once granted by any legally constituted court of record having jurisdiction in such causes, and according to the provisions of the law where such court is situated, cannot be revoked or annulled by any court of another State within the United States, no matter upon what grounds or pretexts it may be obtained, provided the statutory provisions of that State or Territory are satisfied.

"*Decisions of the United States Supreme Court.*

"Both parties to a cause for divorce and alimony which has been given by any of our State courts are bound by the decree. The decree is a judgment of and will be received as such by any other court, and such judgment or decree,

suasion, moral and religious influence, and any other salutary forces of society to bear upon the case; and a better hope of detecting some of the wicked frauds and collusions which seem peculiarly to infest this department of law practice. The indecent haste and secrecy with which the petulance of an hour

rendered in any court within the United States, will be carried into judgment in any other State, and have the same binding force as it had in the State in which it was originally given.

"If the decree had become a matter of Record in the court granting it, it is binding on all the other States and courts in the Union. It is not in the power of any State Legislature, or of courts by judicial decision, proceeding under a statute or not, to reject the record, or give to it an effect less than it has in the State or court where made, and any State law to the contrary is simply unconstitutional. If it dissolves the marriage, all other courts would be compelled to hold such person afterwards to be unmarried.

"A decree of divorce dissolving a marriage is legal throughout all the world.

"A decree of divorce once granted cannot be set aside or annulled for any cause, even if the court granting the divorce was not fully advised of all the facts in the case.

"A decree in cases of divorce and alimony is not subject to judicial revision.

"Courts cannot interfere in a divorce granted in another State.

"Even a review of a judgment of divorce cannot be had in Indiana.

"Fill this circular carefully, and enclose to us money order for $—, and a full and explicit statement of your case.

"PANDER & PIMP, Attorneys,
"No.— —— St., New York.

"Your name in full.
"P. O. Address.
"Where married?
"When married?
"Name of Partner.
"His or her Address.
"By whom married?
"Did you leave him or her?
"How long since?
"Issue, how many?
"Male, age and name.
"Female, age and name.
"Who wishes possession?
"Any real property involved?
"Cause of application for divorce."

Of course one does not look in a document of this kind, either for good law or for good faith. But that actual practice does not differ from what is here described can be proved by many and many a "Modern Instance" more tragical than the "leading case" reported by Mr. Howells.

can be made, in the hands of a "humane" lawyer, to work the speedy and total wreck of a family, is one of the worst characteristics of the American laws.

Naturally enough, it is this very quietness and secrecy of divorce proceedings that is most dear to the heart of that eminent ethical teacher, Mr. Adirondack Murray. In the interests of a pure morality, which he has so tenderly at heart, and out of the depths of an unpleasant experience of his own, he deprecates the publication of the grounds of a divorce petition as painful to the parties and insalubrious reading to the public. But it is not at all for the public interest that the way of the divorce court should be made secret, facile, and delightful; and the public interest must be consulted rather than the convenience or the fine feelings of litigants.

4. The one main defect in our divorce legislation, as it is the characteristic defect in the common way of considering the subject, is the absence of any recognition of the public—society—the State—as being an interested party in the matter. The main desideratum in the way of legislative reform is to provide that the State, with its immense interest to maintain the sanctions of marriage, should be adequately represented in every divorce suit—whether, as in the English practice (which suggests so many good points for our study), by a special functionary like the "Queen's Proctor," or whether, according to a proposal lately made in Connecticut, by charging the prosecuting officer with the defence of all otherwise undefended divorce suits; or whether by allowing citizens, either individually or in associations, to intervene in the interest of decency and morality.[1]

5. Another requirement is for some provision that crimes

[1] The working of the English system is illustrated in the account, in a London paper, of a recent divorce suit, where the woman was sued by her husband for divorce on the charge of adultery with two men. According to the English law, all the alleged guilty parties to a divorce suit are summoned into court. After the hearing a decree was granted the husband on the grounds he had claimed. By the English law the decree is conditional for the first six months, and during that time the Queen's Proctor has the right to come into the case, and if he suspects that there has been any collusion or fraud, to open the decree and contest the case. In the above case the Queen's Proctor opened the decree, brought in his witnesses to prove fraud and collusion, thereby having the husband's decree for a divorce revoked.

disclosed as the ground of divorce proceedings shall be tried and punished. Under the present system, the nominal respondent may be, in multitudes of cases is, the real petitioner for the divorce. He comes into court virtually alleging his own crimes—adultery, cruelty, abandonment, and the like—as the ground of his petition, and goes out again in triumphant impunity, carrying with him papers under the seal of the court which exempt him further from all pains and penalties, when he proceeds to add to his past crimes one more act which but for these papers would be the crime of bigamy.

It is said to be required, in the English system, that the evidence of the malfeasances relied on as the ground of a suit for divorce shall come into the divorce court in the form of a judgment or conviction in some civil or criminal court. If this reasonable requirement were in use with us, or if when crime was alleged in a divorce suit, proceedings should be stayed until the prosecuting officer could take that allegation into the criminal court and try it before a jury, collusive charges of adultery would be found far less amusing to play with in divorce proceedings than they now are; at least this would be true in the Puritan States, in which adultery is recognized as a crime. And one good result of this rigor would be to bring clearly into view an ancient inequality in the law of marriage, according to which the man's unfaithfulness to his marriage vow is less hardly dealt with than the woman's. If the women's-rights agitators were inclined to make themselves really useful, here is their opportunity. With the law equalized at this point, so that "civil adultery" and "criminal adultery" should both be covered by the same definition, this one provision, that crimes alleged in divorce proceedings should be dealt with as crimes, would of itself go far toward being a practically effective reform of the divorce laws.

6. The peculiarly base but notoriously frequent crime of conspiring to procure divorce by fraudulent charges or procedures ought to be punishable as felony. If, instead of the ordinary futile recourse to a cross-bill, there were ready recourse to a criminal process by which the divorce-suitor should be compelled under grave penalties to make good his allegations to the satisfaction of a jury, some of the villanies now practised with

impunity would be attempted only at the peril of the criminal. Such a provision would, in many cases, enable a State to protect its own families from foreign interference, recovering the matter to its own jurisdiction; and would have the additional merit of involving the profession of divorce-solicitor in a share of his client's peril.[1]

7. It is of high public importance to insist, in face of the general opinion of the legal profession, on the restoration of the twofold form of divorce—of the distinction between the divorce *à mensâ et toro* and the divorce *à vinculo matrimonii*. The *naïveté* of the common objection to this measure is impressive. It is held to be dangerous to morality to have a class of persons separated from their consorts but interdicted from marriage, and therefore tempted to fall into immoral relations. And the expedient by which to prevent these immoralities is to constitute the immoral relations moral, by act of legislature. The most obvious objection to this expedient is that it does not go half far enough. Applied boldly and consistently, it is the shortest cross-cut to the Millennium ever yet devised. By this course the crime of adultery has already been completely extirpated from England and from several of the United States; and in like manner all crime might be abolished, and mankind brought back to a paradisaical state of innocence, by so simple a measure as the repeal of the penal code. But until our moral reformers rise to the courage of their convictions, and are prepared to apply their invention on the large scale, it is hardly worth while to continue the petty experiment of refusing to recognize the distinction between legal separation and complete divorce, and of insisting that wherever there is legal separation there shall be complete freedom of remarriage for both parties.

The value of this distinction is not that it would satisfy the demand for easy divorce by a less offensive substitute. That it would not do this in any appreciable degree is demonstrated by the experiment in the State of Michigan, where there is ade-

[1] There is much reason in that application of the *lex talionis* which made the instigator of a false prosecution liable to the evil he had tried to inflict. See Blackstone, Comm. iv. 14. In the notable case of Michael Servetus, the prisoner asked that John Calvin should also be put in prison to await the result of the trial, and in case of acquittal, to suffer the penalty proposed for his antagonist.

quate provision for either separation or divorce, and where the applications for full divorce with liberty of remarriage are multitudinous, and the applications for legal separation are only an inconsiderable percentage. It would not satisfy the demand for easy divorce, but it would answer all the decent and publishable reasons for this demand—the claims of humanity in behalf of the miserable victims of connubial cruelty; it would strip off the disguise of "moral earnestness" from Mr. Murray and his nasty new gospel; it would make distinctly manifest (as it now does in Michigan) the object of the queues of applicants that wait their turn at the divorce-court—that what they are after is not escape from the old partner, but adultery with a new one; it would give the friends of decency and society an effective leverage upon the conscience and sense of shame of all but the conscienceless and shameless, and from these would remove the covert under which they now shelter themselves—that innocent and blameless people are now sometimes driven to make use of the same procedure which is the common resort of the lewd, and to accept from the State, with the protection and alimony which they demand, a permit for adultery which is forced into their hands.

Withal it is of some consequence that the distinction between divorce and declaration of nullity of marriage should be recognized in the language of the law. The confusion of mind implied in divorcing a man because he never was married, as in pardoning a man because he never was guilty, is a demoralizing confusion.

8. Finally: An indispensable part, and probably the most difficult part, of divorce-reform is that which relates to the abuses growing out of the diverse and discordant laws of the different States. How great and mischievous are these abuses is at least vividly suggested by the congratulatory assurances of Messrs. Pander & Pimp, in their circular already transcribed. How real they are, the people of the State of New York seem to be only beginning to find out. The federal system seems to put it into the power of the pettiest of the States to make itself, like Monaco or San Marino among the States of Europe, a nuisance to all its neighbors—a nidus for the breeding of infectious social disease, the spread of which is not checked by political boun-

daries. But it can hardly be charged that any one of our States has actually assumed such an exceptional relation to the rest. Rather, as the New York shysters assure their customers, each State has its special points of weakness and laxity, which these ingenious and "humane" gentlemen are able to combine into a complete system, under which any imaginable demand for divorce can be satisfied, however groundless, inexcusable, and atrocious. What cannot be done in one State can be done in another, and divorce in any is divorce in all. The specialty of one State is a rich variety of lawful causes for divorce; of another, facility in acquiring residence; of another (as in New York), secrecy of procedure and opportunity of fraud. The combination is complete, and leaves to the vilest adulterer or his viler attorney absolutely nothing to desire.

It is natural enough that the first thought of recourse, in such a confederation of abuses, should be to the power of the Federal Government. Since the successful experiments at the close of the civil war, there has been a strong tendency to invoke the federal power to aid in moral or social reforms in the several States. So Congress engaged in the temperance reformation by means of an exorbitant whiskey-tax; and nothing dismayed by the result of this adventure, that sanguine statesman, Senator Blair of New Hampshire, now calls for a national Maine Law and a prohibitory amendment to the federal Constitution, and finds a number of enthusiastic ladies to sustain him. Another movement, which does actually seem to be moving, with a considerable momentum of influence in it and behind it, is the demand for federal subsidies to common-schools in the States, whether with federal supervision of the schools or without such supervision does not appear, nor is it clear in which form the scheme would be the more objectionable. Of course, and *à fortiori*, in the midst of the universally prevalent and most formidable divorce abuses, growing partly out of the sovereignty of the States and partly out of their federation, the minds of reformers, with perilous unanimity, are turning for redress to an amendment of the National Constitution that shall put the law of marriage and the family into the control of the national legislature.

Well: supposing the matter to have been made an issue in national elections, alongside of free trade and protection, and

the question of the civil service, and whatever other federal questions may emerge; supposing that reform to have been carried simultaneously in the States together which has never yet been achieved in one of them by itself; supposing thus that the nation collectively shows itself so much more wise and virtuous than the sum of its constituent parts; and supposing the enormous jurisprudential difficulty of devising all at once a new code of law for the family relations to have been overcome, and the dangerous transition over so vast a gulf of difference between the old system and the new to have been accomplished in safety —then, no doubt, we shall have gained the great advantage of a uniform and a better system of law on marriage and divorce.

But at cost of what a sacrifice! Nothing less than the sacrifice of the Constitution of the United States in its most distinguishing and vital characteristic!—the open abandonment as impracticable of that system of national government by confederation of sovereign States—the system described in the motto *E pluribus unum*—which was the glory of our fathers, as it has been the boast of their descendants, the admiration of political philosophers, and the envy of the nations! Once let the law of the family be taken away from the jurisdiction of the State, and absorbed by Congress and the federal courts as a department of the central government, and how much of the sovereignty or even the authority of the States will then remain? and of what does remain, how much is likely to remain much longer after the establishing of such a monstrous precedent?

It ought to be recognized as one of the gravest of the mischiefs attendant on the intolerable existing abuses of divorce, that they constitute at present the most formidable danger to the perpetuity of the American Constitution. The Union, which could not be destroyed by the most gigantic rebellion in history, may not very improbably succumb to the irritation of multitudes of individual and local annoyances. Within the last few years, before our own eyes, and yet without fixing our attention or teaching us, apparently, any warning lesson, the most ancient confederated republic in the world has practically ceased to exist, giving place to a consolidated nation. By peaceful and orderly but none the less revolutionary measures,

the Swiss federal legislature has been vested with the control of local affairs in the cantons until the rights and powers remaining in the once sovereign cantons are now so meagre that there is an open demand for the extinction of the cantonal governments—a demand to which it is no longer easy to frame an adequate reply. One may go into the Federal Congress at Berne and hear a polyglot debate on a bill prescribing to the village sextons the order in which they shall dig the graves in the churchyards. The lack of comity of legislation between the cantons resulted in so many practical inconveniences, even in such a matter as this of funerals, that it has at last, by a silent revolution, destroyed the cantons, and so destroyed the confederation of them. In like manner the lack of comity between our States in matters of such vital and practical moment as the marriage law must drive us toward consolidation; and in the case of a people covering the breadth of a continent, consolidation (as we need no De Tocqueville to teach us) means disintegration and decomposition.

LEONARD WOOLSEY BACON.