MARRIAGE AND DIVORCE.

THE marital relation is the normal condition of adult mankind. Whoever of either sex voluntarily lives out of that relation is at war with nature and her laws, and consequently with the best order of society. The rebellion may not be heinous enough to call for any punishment, beyond what it carries as its own consequence; nevertheless it fights incessantly against the true interest of organized communities. This is proven by the fact that marriage alone is the mother of the family; and the family is the organic unit of civil society, and the sheet-anchor of its good order. Without marriage, there can be no family in the sense in which I am using that term. Think for one moment what society would be without the family. Blot out the relation of marriage. Annul its obligations and duties. Conceive, if possible, of all women forever husbandless, of all men forever wifeless, of all offspring forever bastardized. Imagine the home, the hearthstone, the family circle with all their loves, their tender friendships, their lifelong sympathies, their parental, filial, and fraternal ties, their hopes, fears, and cares of infancy and youth, in joy, health, and life, in sorrow, sickness, and death; their rights of heritage and heirship, of lineage and name, all shattered and gone forever, and the race turned loose in a pandemonium of selfish and indiscriminate lusts and crimes. No Dante could paint such a hell; nor could its fires be extinguished, save by the slow expiring ashes of universal dissolution. He studies man and his origin, nature, and history to little purpose who fails to see that the family and marriage, its creator and preserver, are of all things foremost in importance to the peace, happiness, and progress of the race.

Polygamous marriages, while they impair, do not destroy, the force of this truth. A plurality of wives, when lawful (I have

never observed that civilized man was ever sufficiently altruistic to tolerate a plurality of husbands), may possibly conserve some of the advantages of the family; but that state of barbaric life is not fairly under our discussion. We treat only of the union of one husband with one wife, in the Hebraic-Christianized idea of that union.

The subject of marriage is so deeply inwoven with the public interest that the State, whatever be its form of government, must, as a matter of self-preservation, take the institution into its charge by provision of laws enacted for its control and protection. The question at once suggests itself, whether it should be treated as a religious or as a secular institution, or as one combining both of those qualities. For my own part, I confess to a leaning toward the religious side of the question. Not that I am a religionist in any narrow sense of that term; but because I like the ceremony of religious solemnities in marrying and giving in marriage, and the better provisions they usually afford for preserving proper evidences of the transaction. This latter reason is not of trifling significance, but of serious importance, especially to the wife, and the children that may be born of the marriage. But in our country, where no State religion does or can exist, it is doubtless wiser that the State should recognize marriage as a simple contract which may be entered into by persons who are free from all legal, mental, and physical disabilities.

The State should, therefore, recognize the validity of all marriages between competent persons, made in any mode or form that indicates the making of a civil contract. It should prescribe, by statute or by common law, the disabilities and incompetencies that prevent the exercise of the general right to marry—such as infancy, consanguinity, mental or physical incapacity, and previous marriage,—but subject to them and in consonance with public policy, accord the largest possible freedom to matrimony. It should neither prescribe nor require any particular ceremony; nor, on the other hand, should it interdict or disfavor any. It should permit and recognize the validity of all forms of religious ceremonial, and leave both the conscience and the judgment free to select their own form, and the place and manner of its administration. In short, it should require nothing but the one essential element; and that is, the consent to the matrimonial contract of parties capable in law of making it. It is only when

parties desire the registration of the evidence of the marriage in some manner provided by statute, that the ceremony should be performed by certain specified persons and officials and in specified ways. All marriages solemnized by such persons or officers could be authenticated and made matter of public record, and be capable of proof by such record.

It ought also to be provided that all valid contracts of marriage, when reduced to writing, and subscribed to and acknowledged by the parties, or proved by a subscribing witness, may be registered and made evidence like those solemnized by the persons or officers. Restrictions ought also to be imposed upon the marriage of infants. The common-law rule of twelve years for females and fourteen for males is not a fit or decent one for this country. The age should be at least fifteen and eighteen years.

Again, in all suits between parties in the life-time of both, in which the issue presented is the fact of the making of a contract of marriage between them *de verbis in præsenti* and without witness thereto, such contract should not be provable without the testimony of one or both of such parties to the fact of making the contract. Where either party is legally competent to testify to the making of the contract, the necessity of inferring it from circumstances alone is in large degree taken away. In most litigations of that kind the alleged matrimonial contract springs out of meretricious and illicit relations between the parties, which the law should in every way discourage and condemn. It is only where the rights of issue, or the claims of one party after the death of the other, or the rights of third persons, are in controversy, that the present rule of inferring marriage from circumstances alone should prevail. Clergymen and all official persons should be prohibited by law from marrying persons unknown to them, children and youth without consent of parents or guardians, intoxicated persons, and all persons apparently unfit or incapacitated.

With these modifications the marriage laws would conserve the nuptial relation, the interests of the public, and the demands of morality, without regard to the question whether the solemnization of marriage ought to be deemed a sacrament, a religious ceremony, or a simple contract, thus leaving every person to the free exercise of his or her own conscience on that question.

But the question of the manner of forming the relation is of little significance when compared with that of the nature of the relation when formed. That is not a mere copartnership of individualities created to intensify individual advantages and enjoyments, but a God-ordained union of bodies, hearts, minds and souls consecrated to the perpetuation of the race by the creation of the family, through which organized society obtains its surest and holiest guarantees of happiness and progress. Whether created by simple contract or the most solemn religious ceremonies, it is an institution public as well as private in its nature, because of its intimate relations to society and posterity. In this light only, I insist, can the marriage relation be rightly viewed.

But there seems to be no great good in this world without some great antagonizing evil. Every Eden has its serpent. Marriage is no exception, for over against it stands its antipodal foe, Divorce. The State, society, good government, good order, and all their attendant blessings are, from the necessities of their nature, hostile to divorce. A few words may demonstrate this, for divorce disintegrates and destroys the condition of things out of which these spring and grow to their supremest beauty and strength. If a state of society could be found in which no present recognized ground of divorce did or could exist, the folly and crime of inventing a ground would be monstrous. All the conditions of perpetuity through the family, by growth, prosperity, and power, other things being equal, would be guaranteed to such a state; and the introduction of divorce would be, like the dynamite of modern Irish warfare, a devil's ingenuity. As it is the State — society — that is most deeply interested in the existence and continuance of the family, and marriage its founder, so it is society that is most deeply wounded when divorce disrupts and terminates those conditions of life; because it invades the home, defiles its sanctities, lays open its privacy, dishonors its parentage, shames its childhood, and arrests the only pure revenues of human life.

Therefore, in considering the subject of divorce, the interests of society are first and paramount; those of individuals are subordinate and secondary. In entering upon the marriage relation, the parties contract with society to respect and perform all the functions and duties of that relation for the welfare of society: to set up the family, to create a lineage and rear it to good citi-

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zenship for service in war, and in peace, in order to maintain the State. This contract they have no power or right to annul without the consent of the State.

Herein lies the fallacy of the notions of some of the modern advocates of free-and-easy divorce. They ignore the supreme conditions and purposes of marriage, and elevate the individuality of the parties above the supremacy of society and the State. They treat marriage as a simple contract, affecting them only who make it, and who, they say, can therefore unmake it at pleasure. They wholly discard the idea of the life-unity of one man and one woman in a relation sacredly consecrated to any high, or holy, or other purposes than those of caprice or passion. They ignore the family and exaggerate the individual, and wholly discard the claims of the State. This is no new idea. It has always been a central idea of barbarism. It has prevailed through the most licentious eras of all peoples. It is the culminating thought of the harem. It has been the curse and degradation of woman, making her the slave and man the master, a creature for the shambles, bought and sold at the price of lust — higher in her bloom, lower in her decay, than "the dumb driven cattle."

But you will say: "Do you argue, then, for no divorce?" Better, infinitely better, that than the result to which we are madly hastening in this country. But no: I do not take that stern and stronger ground. I know that the weakness and wickedness of human nature are such that some system of divorce must be tolerated by society to protect injured innocence; but it should greatly differ from those systems that now prevail. Our present systems are barbarous and degrading. They have led to a large increase of divorces in proportion to marriages. In some States the ratio has advanced from, say, one in thirty-five to one in ten; in some to one in six, and in some cities the proportion is even greater.

It is safe to say, says one writer, that divorces have doubled in proportion to marriages in most of the Northern States, and present figures indicate a greater increase. There are remarkable contrasts between the States, attributable to the difference of statutes and modes of procedure; the percentages of increase being largest in States furnishing the readiest facilities as to grounds of divorce, and the ease and cheapness of obtaining decrees.

One great evil of this state of things is that the public mind is becoming habituated to look upon divorces without shock, and without a thought of their injury to public morals. The press teems with scandalous reports of such suits, often giving prurient and disgusting details, which the youth of neither sex can safely read; and thus our conception of the marital relation and its duties is becoming alarmingly debased. It is even doubtful if marriage is not often entered upon now with much preliminary consideration of the chances of easy divorce.

Another and by no means a less evil is found in the effect the general looseness of marital obligation has on the growth of families. A large family of children is a safeguard against divorce. Parental love, with all the mutual and tender affections with which it surrounds and hallows the family circle, hovers like a guardian angel over the sanctity of conjugal love. Seldom, indeed, does Satan's device—the dissolution of the ties of marriage—invade such a home. But I have no doubt its possibility often goes far to prevent the existence of such homes. Children have come to be considered obstacles to the freedom of separation; and whenever that is the case, the malaria of divorce is fatal to maternity. All right preceptions of Nature's law, which is God's law, and of that righteous patriotism which seeks to make our own virtuous and well-trained posterity the strong hope of a nation's purity and greatness, are in danger of being sacrificed to our petty conceptions of individual ease, to an extent which, by the laws of sociology, prefigures barrenness. And so we Americans by descent are fast handing over our country with all its mighty interests to the races of immigration and their descendants who are happily taught obedience to the laws of nature as a religious duty.

I cannot dwell upon these evils, yet I will denounce them as fatally injurious, not only to the morality but also to every good interest of society. Doubtless, the evils I have named prevail most largely wherever the grounds of divorce are most numerous. We have one State, South Carolina, where no divorce, either legislative or judicial, can be or has ever been granted, though by strange political perversion that State has never been over-attached or faithful to another union. I am greatly misinformed if in that State the peace, purity, and felicity of families do not maintain a far higher standard than in States where divorces are the chronic mischief and misery of

domestic life. In the Colonial history of the State of New York for more than a century divorces were unknown. Who asserts that conjugal unhappiness was greater in that period than after divorce became the law and rule speaks without proof.

All precedent shows that human life, and especially woman's life, is happier as a rule in countries where divorce is not lawful and not permitted than in those where it is most common and free. For divorce is an evil that alway's grows by what it feeds upon. It feeds upon the baser vices of our nature, and they propagate and increase as the demand enlarges to meet an inordinate and depraved appetite. A striking illustration of this fact has just been disclosed by the discovery of a manufactory of forged divorces in the city of Brooklyn, from which it is said two hundred decrees have lately issued with the apparent formalities of judicial procedure; the parties obtaining them looking and caring for nothing but expedition, cheapness, and secrecy. Such a state of things could not exist, but for the appalling moral laxity bred by the frequency of divorces. Both physically and morally, men accommodate themselves to the rule and necessity of conditions. So, if the condition of life and law be such that the marriage tie may be easily disrupted, men speedily come to think of its disruption as a process of relief, proper and defensible. This fact speedily operates to change the harmonies of wedded life into discords; and conjugal jars, which otherwise might only be considered as new starting-points for closer and tenderer affiliations, are nursed into irreconcilable and fatal quarrels. But when the rule and necessity are the opposite, both husband and wife are taught by that condition to adhere to the true nature of marriage by turning discords out-of-doors and studying the conciliations due to mutual happiness.

While this is more true and apparent where no divorce can be obtained, it is proportionately so where the grounds of divorce are strictly limited. Hence it is true policy, if the evil of divorce must exist, to confine it, so far as absolute divorces are concerned, to the single ground of infidelity. Some writers would limit this to the infidelity of the wife alone, because of the shadow that her wrong may cast upon the paternity of offspring. But to this theory I say emphatically, No! Both sexes enter the relation on equal terms. For both the vow of chastity is the same, and the guilt of its breach lies not in a possible conse-

quence, but in a wrongful act. And so the law, to be just, must be equal and equally enforced.

Accepting the remedy of divorce on the ground of infidelity as a necessary, if not justifiable, evil, the question arises, how shall it be used and applied? On this question our laws are altogether at fault. They are as well guarded in New York, perhaps, as anywhere. But even in that State there is positively less danger of fraud in the procedure to collect a promissory note than in one to annul the most sacred civil contract men can make. It is possible under our present laws that a husband and wife may rise from their lawful bed in the morning bound by the bonds of matrimony to each other, and each lie down at night of the same day the lawfully wedded husband or wife of another party. Accordant desires are all that are necessary to produce this result, if there has been guilty infidelity on the part of either. For a summons and complaint may be served at one hour; an appearance and answer by attorney and consent to refer in another; an order of reference forthwith; a hearing, report, and motion for judgment a few hours afterward; and a marriage by the injured party here, while the guilty party slips across to New Jersey and returns the wife or husband, perhaps, of a paramour. This is true, and yet it seems almost as ludicrous as the imaginary announcement to passengers by the conductors of trains approaching Chicago: "Twenty minutes for divorce."

But if this can be done by willing parties, what cannot be done by fraudulent ones? The frauds are mostly perpetrated on wives; but Eve's adroitness is not always at a loss to commend the fruit to the lips of Adam. The courts strive earnestly to guard against such wrongs; but their very safeguards are sometimes made the weapons of fraud; and this especially where, as in many cases, the proceeding is instigated by a strong desire to marry somebody else. This was shown in the forged divorces I have already referred to. I recall some special instances in which I have had occasion to set aside decrees for fraud. In one case the husband, a farmer, astonished his aging wife, broken down with hard work, by insisting on her making a visit of rest to her relatives in Massachusetts. She gladly went, and remained at his request some two or three months. Meanwhile he began his suit for divorce by publication, and by false testimony obtained it; and when the wondering wife, after weeks

of silence, reached her home, she found another woman installed in her place, and she was driven ruthlessly away. In another case the summons was served "personally" by a tool of the husband, by placing it between the leaves of a book and carelessly handing the book to the wife. In each of these cases the fraud was discovered and the decree annulled, but not until the villainous husband had entrapped another innocent woman into marriage with him by displaying his ill-gotten decree. I refer to these cases to strengthen my position that the laws of procedure in actions for divorce ought to be changed.

First. So that no judgment could be entered until it appeared clearly that the suit had been actually pending at least six months after service of the process. This not only to prevent frauds, but to give the parties a breathing spell for possible reconciliation, and to prevent immediate and shameful remarriages.

Second. In all cases the defendant should have the right to insist that the alleged paramour be brought in and made a party to the action, so that an unjust accusation could be met and confuted by both of the accused who are interested in maintaining innocence.

Third, and above all, inasmuch as society is deeply interested in all such actions, the State should be made a party so that it shall be able to prevent the wrongs that are inflicted upon the public, and upon children and innocent persons; and no judgment should be allowed until it appears that some lawful representative of the State has been served with process and has had opportunity to appear and resist the divorce. This mode of conserving the rights of society ought to be carefully secured, and over the question of the cost of securing such protection the courts should have adequate power. Now it often occurs that by such actions helpless children are bastardized or made homeless and thrown upon the public for support by the destruction of family relations, with no one to speak a word in their behalf or for the public.

These, with the jurisdictional provisions of our statutes, strictly observed, would bring actions of divorce within the bounds of actual guilt and necessity, and not leave them so completely to the caprice of parties, or their frauds or perjuries.

But the greatest evil in this country grows out of the differing laws of the several States touching the grounds and effect of divorce. I need not point out these differences. They run the

gamut of conjugal infelicities, ranging from adultery down to incompatibility of temper, including the discretion of the courts, sometimes defined to be "the measure of the Chancellor's foot."

All who think upon the subject will agree that uniformity of the grounds of divorce ought to exist throughout all the States. This alone will prevent the incessant hegira from State to State of persons seeking to escape the bonds of matrimony, and that vast procession of evils that follows such efforts. It is a monstrous truth that a person can quit the State of his residence, and, leaving his wife and children behind, in a brief time obtain in the courts of another State a decree of divorce entirely valid in that State, but absolutely void in the courts of other States. His remarriage is lawful there. It is felony elsewhere; and his guilt or innocence depends upon which side of an imaginary State line he happens to stand. This would be less important if the status of his wife and children, past, present, and future, were not to be seriously affected by the decree. Let me illustrate.

A is married in New York, where he has resided for years, and has a family and is the owner of real and other estate. He desires divorce and goes to Indiana, where that thing is cheap and easy. Upon complying with some local rule, and with no actual notice to his wife, he gets a decree of divorce, and presently is married in that State to another wife who brings him other children. He again acquires new estates; but, tiring of his second wife, he deserts her and goes to California, where in a brief space he is again divorced, and then marries again, forming a new family and acquiring new real and personal estates. In a few years his fickle taste changes again, and he returns to New York, where he finds his first wife has obtained a valid divorce for his adulterous marriage in Indiana, which sets her free and forbids his marrying again during her lifetime. He then slips into an Eastern State, takes a residence, acquires real property there, and after a period gets judicially freed from his California bonds. He returns to New York, takes some new affinity, crosses the New Jersey line, and in an hour is back in New York, enjoying so much of his estate as the courts have not adjudged to his first wife, and gives new children to the world. At length his Master takes him. He dies intestate. Now, what is the legal status and the condition of the various citizens he has given to our common country? And what can the States of their birth or domicile do for them

A few words will show how difficult and important these questions are. The first wife's children are doubtless legitimate and heirs to his estate everywhere. The Indiana wife's children are legitimate there, but probably illegitimate everywhere else. The California children are legitimate there and in New York (that marriage having taken place after his first wife had obtained her divorce), but illegitimate in Indiana and elsewhere, while the second crop of New Yorkers are legitimate in the Eastern States and New York, and illegitimate in Indiana and California. There is real and personal property in each of these States. There are four widows, each entitled to dower and distribution somewhere, and to some extent, and a large number of surely innocent children, whose legitimacy and property are at stake. All these legal embarrassments spring from want of uniformity of laws, on a subject which should admit of no more diversity than the question of citizenship itself.

The only direct and effective way is to authorize the establishment of uniformity by the only power that can have universality of jurisdiction. It needs but two words added to the fourth subdivision of section 8 of the Constitution of the United States, so that it shall read: "Congress shall have power to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies *and divorce* throughout the United States." But we are told that this would produce "centralization," whatever that may mean, and ought not to be done. But it is one of the very subjects on which centralization ought to exist; because, while it would leave the State courts free to act in their respective spheres, Congress could so define the grounds of divorce and the jurisdiction of the subject that judgments would be universally binding and uniform; and that was one of the things in contemplation in framing the Constitution. That would free us from the wickedness and crimes which now shame our administration of laws; and would elevate divorce from a system of strategic deceptions and frauds, disgraceful to savages, to one of law and order. No questions of illegitimacy could arise, and citizens of the several States having the same father or mother, if legitimate at home, would be legitimate everywhere. I must conclude with this brief summary:

Marriage is an institution divine in nature and origin; established by God, whether by the fiat of his supreme wisdom or through the operation of natural laws evolving, by survival, the fittest wisdom; and designed and best adapted, by its union and

unification of the sexes, to confer and preserve individual happiness, to create the family, and thereby to perpetuate the race, the people, and the State in the highest orders of civil government. This institution is the same, in whatever form created or solemnized, and as such is to be recognized and supported by the wise laws of all civilized peoples, and when created by the contract of competent parties is something superior to their volition, and indestructible by their separate or voluntary action. Whatever impairs or destroys its unity, and the fruits of its unity, is injurious to personal and public morality and the general well-being and good order of society; and is therefore to be repressed and restrained by law, and subordinated to the general good. Divorce is such an evil, and is therefore justly obnoxious to every repression, restraint, and limitation consistent with the administration of that justice which looks to the common safety and happiness of man.

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