THE

CHURCHMAN

JUNE, 1889.

ART. I.—DIVORCE AND RE-MARRIAGE.

Report on Divorce presented to the Upper House of Convocation by a Committee of Bishops, 1885.

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Report of Anglican Bishops at Lambeth Conference, 1880.

IN offering a few remarks on this very delicate subject, I may say that I do it from the standpoint of a clergyman of the Church of England, with his Bible and his Prayer-book for his guides, and the Acts of Parliament to refer to, which, in certain cases, may instruct him as to the civil rights of his parishioners.

I begin by affirming that the *final* authority is Holy Scripture, and it is to be remarked that the high ideal of marriage, which is sometimes spoken of as peculiar to Christianity, is to be found in the very earliest pages of Genesis. "In the image of God created He him, male and female created He them." "Therefore" (remarks the writer of Genesis) "shall a man leave his father and mother and be joined unto his wife, and they shall be one flesh"—words quoted and reasserted both by Christ Himself and by St. Paul.

There is no doubt as to the Divine institution being "one man to one woman." Neither polygamy nor polyandry are consistent therewith, neither divorce nor second marriage. The chivalry which taught a man "to love one maiden only, cleave to her and worship her by years of noble deeds until he won her," does but express not only that which is healthy and manly, but also that which is in accordance with the high ideal of marriage.

It is quite true that in regard to divorce, Moses permitted what Christ forbade. It is quite true that polygamy not being expressly forbidden, has been practised without rebuke on the one hand, or consciousness of moral wrong or impurity on the

other. "But from the beginning it was not so." Any marriage laws which tend to degrade the institution of marriage are to be looked on with suspicion, although they may have been framed in good faith and to meet cases of hardship. Any marriage customs which have the force of law, and which are inconsistent with the highest ideal, are to be dealt with with care and caution, with a view to eliminate gradually the objectionable elements, if they cannot be suddenly and at once got rid of.

Scholastics agree that the *essence* of matrimony is mutual consent. Without it there is no true matrimony. A marriage is *no* marriage if solemnized when either party is for any reason not able to express that consent, and that consent must be publicly signified and regularly accepted on behalf of the community. Statute law sometimes interposes with definite regulations as to the exact form in which the registration of this consent, before competent witnesses, shall be enforced.

The chief *object* of matrimony is the perpetuation of the human race. Hence, inability to consummate marriage is a bar to marriage. The Marriage Service, however, contemplates marriage as allowable when the woman is past child-bearing, and the "mutual society, help, and comfort, that the one ought to have of the other," may in itself be a sufficient *cause* for a perfectly valid marriage. It has been pointed out that the two psalms appointed in our marriage service are appropriate, the one to the case of the marriage of young persons and those who may expect children, the other to the case of those who marry with no such expectation. To Christians there is a further point. Their matrimony is a religious contract, *μέγα μυστήριον*, *magnum sacramentum*, having a typical meaning, and applied by St. Paul to illustrate the Divine mystery of the union of Christ with His Body collectively and with His members severally. Hence we may formally distinguish three kinds of matrimony: 1. *Legitimum*—where the contract is publicly made in accordance with the laws of the country; 2. *Ratum*—where it has been solemnized "in faciæ ecclesiæ;" 3. *Consummatum.*

The question which we have to consider especially is: Can the matrimonial bond ever be dissolved? Scripture says, "What God hath joined together let not man put asunder." "He that putteth away his wife and marrieth another" (*μοιχᾶται ἐπ' αὐτήν*) "is guilty of adultery against her," that is, to her prejudice; "and he who marrieth a divorced woman committeth adultery." In short, a divorced man or woman must not re-marry. But there is a limiting clause, *παρεκτὸς λόγου πορνείας*. What does this mean? Does it mean post-nuptial infidelity? No, argue the canonists, that would be *μοιχεία*. The word *πορνεία* signifies the misconduct of the unmarried, and the limiting clause refers to

ante-nuptial unchastity for which a man may, on discovering it, put away his wife and marry another, though he is not compelled to do so. And they further teach that if after having condoned ante-nuptial *πορνεία*, the husband finds out his wife in *μοιχεία*, he is free from her, and the marriage may be considered void, provided he has not himself so sinned.

At first sight there is something to be said in favour of this view. Under Moses' law the punishment for adultery was, if enforced, not divorce, but death.[1] In the later days there seems to have crept in a very wide interpretation of the permission to a man to give a writing of divorcement to his wife, "if she find not favour in his eyes, because he hath found some uncleanness in her," or, according to the Revised Version, "if he "hath found some unseemly thing in her" (Deut. xxiv. 1), following herein the Septuagint (*ασχημον πραγμα*). Hebrew expositors have differed as to the meaning of the term. Josephus says:

> He that desires to be divorced from his wife for *any cause whatsoever*—and *many such causes happen among men*—let him in writing give assurance that he will never use her as his wife any more, for by this means she may be at liberty to marry another husband.

The Pharisees and the School of Hillel took this lax view of divorce, while the School of Schammai restrained it to some act of unchastity. The Hebrew seems to mean "matter of nakedness;" possibly some light and immodest behaviour not amounting to adultery—or, as some have suggested, some distemper of body or mind not observed before marriage, but which unfitted a woman for the duties of a wife. Lightfoot and Michaelis support the interpretation of the Schammai School. The former considers that the Mosaic permission of divorce was granted *only* in the case of adultery, when for whatever reason a man was "willing to put his wife away privily," without subjecting her to the extreme penalty.

The Lord Himself, in answer to the Pharisees, certainly seems to affirm that Moses *permitted* divorce for more causes than one, and that "because of the hardness of their hearts;" for in a state of society in which law was weak and passion strong, rude and licentious men might have tried to get rid of their wives by poison or violence if there were no other means of release.

The regulations as to divorce for pre-nuptial fornication were very clear and precise (Deut. xxii. 15). Similar regulations are in operation among Orientals at the present time. Among ourselves "divorce by reason of nullity" can be claimed in this case under Canon law only, for if once married according to

[1] Death by stoning if of the common people, death by burning if the daughter of a priest.

legal form, a man is bound—by English law—to his wife, virgin or not. We have observed that loose notions as to divorce prevailed in our Lord's time, looser than even the permission of Moses warranted. He showed by his own act that more merciful treatment was to be accorded to the adulteress. He bade those stone her who were innocent of sin themselves, and this amounted to acquittal of the extreme penalty. He being without sin said: "Neither do *I* condemn thee."[1]

But if the sinner were not to be stoned, was there no lesser—no lighter penalty? Was the husband tied to the adulteress, from whom her death would have set him free? Could he not at least have the benefit of divorce? The report of the Committee of the Upper House of Convocation on the subject, affirms, in opposition to the Canonists, that the "majority of expositors have held that our Lord's words are to be understood as permitting divorce, *a vinculo matrimonii*, in the one case of adultery." The word μοιχεία would not include ante-nuptial unchastity; πορνεία would include sin before or after marriage. Thus in the Litany: "From *fornication* and all other deadly sin"—*i.e.*, sin of this class. Our law allows of divorce for post-nuptial infidelity on the part of either man or woman, though the conditions are simpler in the case of the woman; cruelty or desertion by the man, as well as infidelity, being also to be proved before the wife can obtain her divorce.

It is sometimes said that this inequality is due to the fact that men make the laws for their own convenience. But the reason is rather to be found in the somewhat prosaic consideration that the man is responsible for the maintenance of wife and children, and that adultery on the part of the wife presumably throws on him the support of the children of another man; whereas misconduct on the part of the man, though it may produce domestic unhappiness, does not inflict an injury of the same nature.

Divortium is often spoken of as allowable in the scholastics. But divorce "a mensa et thoro" is one thing, divorce "a vinculo" is another. I believe that I am correct in asserting that "Divortium a vinculo" is held to be impossible by strict Canonists in the case of *Christian* marriage. Yet according to Roman teaching divorce is effected by one or both of the parties "entering religion," whereby they become as if dead. We may note St. Paul's words: "Art thou bound unto a wife? seek not to be loosed," implying that to be loosed was possible, and compare them with the words: "The unbelieving husband is sanctified by the wife." Some say the "*legitimum* matri-

[1] "No reasonable critic throws doubt on the incident, but only on its present place in the sacred narrative."—ELLICOTT.

monium"—the legal marriage—is indissoluble. Some consider that it must be *ratum* too—that is, Christian—and then indissoluble on account of its sacramental character. Divorce "a thoro et mensa," according to the Canonists, does not enable the parties to marry again. The words of the 107th canon of our Church both affirm and deny this. They run thus:

> In all sentences pronounced ONLY for divorce "a thoro et mensa" there shall be a caution and restraint inserted in the act of the said sentence: That the parties so separated shall live chastely and continently; neither shall they, during each other's life, contract matrimony with any other person. And for the better observation of this last clause, the said sentence of divorce shall not be pronounced until the party or parties requiring the same have given good and sufficient caution and security into the court that they will not in any way break or transgress the said restraint (monitionem) or prohibition.

A singularly lame and impotent conclusion. It is difficult to see in what other way, except by marriage, the monition not to marry could be transgressed. It is plain that marriage is allowed to be *possible*, though forbidden; and further, it looks very much as if, by the forfeiture of the bond, a man might pay the compensation for his breach of law.

All the Canonists seem to allow that a "legitimum matrimonium" between non-Christians may be dissolved if one party becomes Christian and the other refuses to live peaceably with him or her. But by 1 Cor. vii. 12-15, it is not compulsory. On this point St. Paul is quite plain: "If the unbelieving depart, let him depart. A brother or a sister is not under bondage in such cases." Liguori holds that the apostasy of one party after a "ratum et consummatum matrimonium" entirely releases the other, if he or she desires to re-marry. All the Canonists appear to teach that matrimony must not be put on a level with mere ordinary contracts, because in these the parties can return to their previous condition, but in matrimony this is impossible.

As regards polygamy the Scholastics teach that it is not against the law of nature, and therefore a polygamous marriage between non-Christians may be *legitimum:* it can never be *ratum*, because of the typical and sacramental meaning of the union. As there is but one Christ and one Church, so there must be one spouse and one bride. And according to this teaching, a converted heathen or Mahommedan would be released from all his wives if he chose. But is he obliged to give them up, or may he, being a Christian, retain a number of wives to whom he was united as a heathen? If not, must he marry any one of them, and if so, which? Hence arises a grand practical difficulty, not yet solved by any sufficient authority. Some argue that no Christian can, under any circumstances, have more than one wife, that a polygamist cannot be admitted to

Baptism or Holy Communion. Others argue that "husband of one wife," a necessary condition of the orders of deacon and priest, implies that lay converts might be husbands of more than one wife, though such persons could not be admitted into holy orders, or, in fact, to any spiritual office. This is, I understand, the view taken by the Indian Bishops of our own Communion, while the South African Bishops follow the Roman rule.

The difference in practice I take to arise partly from the different character of the people with whom they have severally to deal, but still more because the controlling spirits have belonged to different schools of theology. Not long ago, polygamy was allowed, I am informed, in the diocese of Nelson, and forbidden in the other dioceses of New Zealand.

Nowhere is anyone allowed to marry more than one wife after baptism. In cases in which a man is allowed to retain a plurality of wives, he is advised to confine himself to one only as regards the "debitum matrimonii."

It seems to be plain that there is no prospect of the observance of a general rule in churches of the Anglican Communion, or dioceses of the same branch of the Church. If the Bishops who recently discussed the subject at the Lambeth Conference could have agreed unanimously, their resolutions would have had something like authority; but even then there are cases in which a clergyman must be guided by his own conscience, and by the law of the land, and respect for the rights and wishes of his people, rather than by a hard and fast rule agreed upon by one hundred other clergymen who happen to be in episcopal orders in different parts of the world.

The points on which they seem to have been quite unanimous are these:

That, inasmuch as our Lord's words expressly forbid divorce, except in the case of fornication or adultery, the Christian Church cannot recognise divorce in any other than the excepted case, or give any sanction to the marriage of any person who has been divorced, contrary to this law, during the life of the other party.

That under no circumstances ought the guilty party, in the case of a divorce for fornication or adultery, to be regarded, during the lifetime of the innocent party, as a fit recipient of the blessing of the Church on marriage.

That, recognising the fact that there always has been a difference of opinion in the Church on the question whether our Lord meant to forbid marriage to the innocent party in a divorce for adultery, the Conference recommends that the clergy should not be instructed to refuse the Sacraments to those who, under civil sanction, are thus married.

The points carried by a majority of votes are these:

That it is the opinion of this Conference that persons living in polygamy be not admitted to baptism, but that they be accepted as candidates and kept under Christian instruction until such time as they

shall be in a position to accept the law of Christ. (Carried by 33 votes to 21.)

That the wives of polygamists may, in the opinion of this Conference, be admitted in some cases to baptism, but that it must be left to the local authorities of the Church to decide under what circumstances they may be baptized. (Carried by 54 votes to 34.)

There is an old saying that votes should be not merely counted but weighed. This we have no means of doing. It is not improbable that the votes of the minority were cast by those who had practical knowledge of the difficulties, or by those who justified the exception, which, nevertheless, proved the rule.

It is somewhat remarkable that there seems to be no trace whatever of controversy on the subject in the early Church. The few hints we have in the New Testament seem certainly to favour the opinion that polygamy was not at once forbidden, though the polygamist laboured under disabilities. The absence of any controversy on the subject favours this opinion, as it would have been a burning question if raised. But the reason the question of polygamy did not come prominently forward was probably this, that the Romans and Greeks, though tolerating concubinage, were monogamists, and that practically the Jews had become so; at least, converts were rarely made from polygamous Israelites. It is fortunate that differences of practice disappear as Christianity prevails. Christianity presents itself to a polygamist as a system of religion different from that to which he has been accustomed. Perhaps he would gladly reduce his establishment. He has only to profess Christianity, and he is a richer and less burdened man. Or perhaps, having legally and in all good faith, and with no suspicion of wrong-doing, married several wives, to whom and to his children by them he is tied by natural affection, Christianity, as presented to him by what I will call the Roman rule, bids him literally to give up all. Yes, is the reply, "a man must give up *all* for Christ." Be it so. But what shall we say of the women thus ruined for no fault of their own? They entered on the marriage contract in good faith. Can it be called a Christian act to throw them out upon the world, without a name or prospects, possibly to starve? Or again, in many cases, who is to replace the wives, who have their duties in a large establishment, which cannot be reduced without terrible social disturbance? It must be remembered, too, that the high ideal of marriage which Christianity teaches is unknown to the men and women to whom the message of the Gospel comes. How are we to explain "mystical union" to the vast majority of the human race?

That the woman should be in any sense the equal of the man, that she should be his counterpart, his true "helpmeet for him" —this was very slowly learned by any, and we may add is even

now understood by few. Hence it is that practical legislators dealing with human nature and human society as they are, have for good or for evil interfered by statute with the theoretical and scholastic, nay, even with the religious view of marriage. Until this was done, the divorce "a vinculo" being in theory impossible, the difficulty was surmounted by "divorce by reason of nullity," which became technical at Doctor's Commons. "The omnipotence of Parliament," making divorce possible, has got rid of the scandal of perfectly valid marriages being dissolved on false pretences. Practical legislation does not concern itself much with metaphysical theories. Marriage is to be promoted, not only with a view to the increase of the population, but in the interests of morality, and because married men are the most profitable of citizens. Divorce is to be discouraged, because it is for the public good that the man and the woman should take one another for better and for worse. But if once effected, our legislators have never paid much heed to the theoretical difference between divorce "a thoro et mensa" and that "a vinculo." Judicial separation has been allowed in certain cases, but divorce has always been treated as a real and effectual severance of the marriage tie. To forbid re-marriage in this case has seemed undesirable, as tending to promote immorality, and as a hardship to all parties, especially to the innocent woman. At the same time a civil marriage *legitimum* if not *ratum* has been made possible, and the clergy are not compelled to solemnize the marriage of divorced persons, although, by the way, the parish clergyman who has any conscientious objection, is obliged to allow the use of the parish church to another who is more complaisant. The church belongs to the parishioners, not to the clergyman.

The report of the committee of the Upper House of Convocation seems to be exact in statement and sober in judgment. It agrees essentially with that of the Lambeth Conference. It asserts that it is at least highly probable that the re-marriage of the innocent is not absolutely prohibited, that on this point the teaching of Holy Scripture cannot be pronounced to be perfectly clear, while the judgments of the councils of the Catholic fathers and of our own divines have varied. It further recommends that the innocent party ought to be advised not to re-marry during the lifetime of the guilty. If, however, the innocent party shall re-marry, the charity of the Church requires that the ministrations of the Church should not be withheld from the person so re-married; on which, I venture to remark, that whatever a clergyman's private opinion as to the propriety of the re-marriage of the divorced, he has no power of excommunicating those who have contracted a perfectly legal marriage, and are not "open and notorious evil livers." The

Roman Communion at Trent, while strictly prohibiting the re-marriage of the innocent partner, deliberately abstained from anathematizing those who permit it. The Oriental Church has always allowed, but discountenanced it. In the drafts of the Parliamentary Bills to legalize divorce, a clause was inserted that the parties were not to marry again during the lifetime of the other, which clause was always struck out in committee, and for the reasons already referred to, the immoral tendency of any regulation preventing marriage, and the great hardship inflicted on the innocent party.

We cannot but deplore the facilities for divorce afforded by our courts. In my opinion too little care has often been taken to check collusion. It cannot be right that people have only to sin in order to be free, or to marry either the guilty partner in crime or any other. The promotion of a healthy public feeling in the matter is, however, more required than any alteration in the law itself. I need hardly say that to a conscientious parish priest a request to re-marry one who has been divorced will often cause the very greatest anxiety. Of course, he may take the high sacerdotal position, and utterly refuse to *re-marry a divorced person in any case.* In this he is backed by the Canon law, a law constructed for the most part by those who knew nothing of ordinary life, which in much is halting, uncertain and contradictory, which has no authority, and which, moreover, he probably knows nothing about. Some do this from rigid conscientious scruples, others possibly because human nature loves to assert itself when clothed in a little brief authority. Few would remain the guilty party, whether man or woman. There are many cases, too, in which it is plainly a duty to refuse to give the Church's blessing to that which can be a civil contract only. For myself, I have always felt such a deep pity for the woman divorced for no fault of her own, that I have been tempted to exercise the discretion conferred on me as a clergyman of the Church of England, and have preferred to perform the marriage ceremony myself rather than shift off the responsibility on another. I repeat that it is an anxious task for the parish clergyman to have the dispensing power in his own hands.[1]

There is no law without an exception, and he has been made the judge of the exception. He is but fallible, he may often make mistakes; but it is something to be thankful for that no burden is laid upon his conscience, and if he err on the side of charity, I doubt not that he will be forgiven quite as readily as if he err on the side of strictness.

"Summum jus, summa injuria."

E. K. KENDALL, D.C.L.

[1] The Church of Rome, while insisting rigidly on the sacramental character of marriage, has been scandalously lax in permitting exceptions.