

*The Rev. Dr. Dike -
from The Writer.*

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LAW OF DIVORCE

BY

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THE LAW OF DIVORCE.

A REPLY TO MR. GLADSTONE.

WHATEVER may be said in favour of divorce extension, it appears to be universally conceded that in the great Commonwealth of America, or several of its States and Territories, there is a latitudinarianism in the laws on that subject and a laxity in their administration, fatal eventually to the institution of marriage; whether we regard alone its holy character, or the mutual obligations, religious and moral, which it imposes. It is not denied that on the observance of these depend the ties which bind families together, and sustain the social fabric. The question for solution, therefore, has been for those peoples, as for Germany and other parts of Europe, and more recently has arisen in our Australian colonies, when and under what circumstances, if at all, dissolution of the marriage contract shall by law be allowed, in case of the violation, more or less gross, of these obligations. To aid in that solution, the Rev. S. W. Dike, LL.D., the energetic secretary of the Divorce Reform League of America, proposed, through the *North American Review*, four questions, to be answered by persons eminent in character and position, of known antagonistic views. In reply to this invitation, there was sent to that periodical in December last, by—among other distinguished respondents—the venerable scholar and statesman, Mr. Gladstone, a contribution eminently characteristic, upon which the writer of this article, an Australian legislator, desires to offer some comments.

The questions submitted by Dr. Dike were four—(1) Whether divorce ought to be allowed under any circumstances? (2) Whether divorced persons ought to be allowed to marry again? (3) What would probably be the effect of divorce on the integrity of the family? (4) Is the absolute prohibition of divorce favourable to personal purity, and conducive to the general welfare of society?

Mr. Gladstone commences by observing, that "The future of America, in its highest features, vitally depends upon the incidents of marriage," that "The solidity and health of the social body depends upon the soundness of its unit," and that "That unit is the family." These propositions may safely be admitted, without touching the questions proposed. For, in the first place, we have to inquire, what are not only the legal, but the actual matter-of-fact, incidents of marriage; the results flowing from or in effect traceable to them. Are the highest interests of this unit, for example, or of society, submerged or promoted, where the father is an habitual drunkard or criminal, or both criminal and drunkard, brutal in conduct and infamous in speech—one, perhaps, who has, after years of inflicted cruelty on his wife, attempted her murder—are those interests advanced by retaining the ruffian in his position in the family? And if not, are they promoted (supposing that in the cases put judicial separation would be attainable) by sentencing the innocent wife, equally with the father, to life-long temptations to vice, with the evils and crimes attendant on concubinage and illegitimacy, and the impossibility of retrieval in a second married life? The home may equally be desecrated, and family life rendered hopeless, by a drunken or dissolute wife. Is it for the interests of the children, or the welfare of the State, that she should still preside over them, or retain the wifely name? Again, there are often occurring cases of cruel, persistent, heartless desertion; either by wife or husband. Can the social body be healthy, or its units truly said to be sound, in which homes are destroyed by incidents such as these; virtually remediless by law, unless we are content to call that a remedy which Indissolubility provides? But these were in effect the questions to be answered; and except by inference from texts, themselves of controverted application and meaning, the distinguished respondent has not answered them. On those texts Mr. Gladstone relies for the conclusion that divorce is scripturally unlawful; but as to the results of the dogma, or its alternative, the separation of the parties, he is silent. He notices incidentally the subject of jactitation, or nullity of marriage; cases where there has in fact been a solemn contract of union, but where the law of the land or the Church, invoked only at the will of the parties, or one of them—and in unscrupulous times made the easy road to divorce—holds it to be invalid. But with these topics we have at present no concern.

The practical annihilation of marriage by separation of the parties merely, was invented originally by monks and canonists; but Mr. Gladstone holds that it is that alone to which the passages in St. Matthew (fifth and nineteenth chapters) respecting "putting away" apply. He observes, that in the thirty-second verse of the former, the word "divorced" in our ordinary version is changed to

the words "put away" in the Revised Version. I am unable to discover for what purpose that observation was made. The probability is, simply, that the revisers adopted in that verse the words "put away" for uniformity's sake alone. In every other place where the separation of married persons is spoken of, the words used are "put away." They are the same in the two other Gospels, in our own and in the Douay Bible. It may be added, that neither in that nor in the Revised Version is there any variation in the passages relating to the subject, except such as are mere differences of expression. Bill of divorcement occurs, for example, instead of writing of divorcement. For "they twain shall be one flesh" in the Anglican, the words are "the twain shall be in one flesh" in the Douay Version (Matt. xix.); and instead of "all men cannot receive this saying" (in our version), the words are, "all receive not this word." Mr. Gladstone, referring to the Greek particle, draws a distinction between the definite words, "The woman put away," and the indefinite, "any woman put away." But the verses in each Gospel refer not to the case of any particular woman, but speak of women (indefinitely) put away. The distinction drawn, therefore, is, as to the matter in hand (may I be pardoned for so saying), without meaning.

But on what grounds does Mr. Gladstone maintain that the words "put away," in St. Matthew, mean separation only, and not absolute divorce? He says that the word "divorced," changed in the Revised Version to "put away," was (or, as he expresses himself, was "apparently") employed in the sense of divorce from bed and board only. And then he assumes that this minor species or degree was the one proposed in the magazine for discussion. "The question now before me," he says, "appears to speak of a severance which does not annul the contract of marriage, nor release the party from its obligations, but which, conditionally, and for certain grave causes, suspends their operation in vital points." Mr. Gladstone is "not prepared to question in any manner the concession which the law of the Church makes in this respect to the necessities and infirmities of human nature." This is very good of Mr. Gladstone; but we Protestants should have been better satisfied had the so-called concession been that of the Saviour, or mentioned in Scripture. And I think it possible to demonstrate, that in adopting this limited construction, the great commentator is mistaken. The law or concession spoken of, separation from bed and board, is said by Mr. Gladstone to be "apparently with the direct authority of St. Paul." But the passages cited (1 Cor. vii. 10, 11) by no means support the suggestion. A command is there given to the wife not to depart from her husband; but if she does depart she must remain unmarried. And the husband is not to put away his wife. This is all that is said. The succeeding verses are as little to the purpose. They relate in terms (ver. 12-15)

to the departing of either wife or husband, being an unbeliever. In that case, the believing spouse is said to be "not under bondage." That can only mean that the marriage is at an end. By what process of induction these six verses, or any of them, can be converted into a recognition of the Church system of bed and board separations, with its obvious evils—the marriage still remaining—one is greatly puzzled to conjecture. Our Lord, in each of the conversations mentioned in the Gospels (Matt. xix. 7, and Mark x. 3), referred to the law in Deuteronomy (xxiv. 1, 2) announced by Moses, authorising the husband, where the wife "finds no favour in his eyes," to write her a bill of divorcement, and send her away. It is immediately added, that "when she is departed out of his house, she may go and be another man's wife." Such is the Anglican rendering. In the Douay Version the words of permission expressly given are not found; but those which follow, "And when she is departed and marrieth another husband," show equally the woman's right. Such was unquestionably the law to which the Pharisees appealed, when interrogating the Saviour as to the right supposed to be their own. And of this law Christ undoubtedly spoke, in St. Mark's Gospel and St. Matthew's alike, when he asked, What did Moses command you? But that law, as we have seen, using the words "put away" only, meant absolute release from the marriage tie; with the resulting mutual right (certainly to the wife) of re-marriage. In the face of all this, Mr. Gladstone's restriction of Our Lord's words, in the excepted case mentioned by St. Matthew, to separation merely of the man and wife from bed and board, does seem a very strange one. There is nothing to show that the Jews had ever heard of that kind of putting away. Is Mr. Gladstone's construction, with the authoritative exclusion of a divorced wife (but not her husband) from re-marriage, a dogma also of the Church?

Let us examine his contention a little further. It will hardly be maintained that the phrase "put away" in Matthew, Mark and Luke, has not in each the same meaning. But if so, since "putting away" in St. Matthew means, by the hypothesis, judicial separation only—a severance which suspends the marital obligations but does not release them—it follows that "putting away" in the other Gospels alike means a suspended operation only. That limited degree of divorce, consequently, is in them equally forbidden; and, according to those Gospels, in all cases. In other words, unless "putting away" means one thing in Matthew, but another thing in Mark and Luke, the conclusion is irresistible, Mr. Gladstone being the interpreter, that judicial separation equally with divorce proper is forbidden by our Saviour. Yet, for a score of causes, the Church of Rome, followed by that of England, has sanctioned and decreed nevertheless that same forbidden putting away. But the dilemma is

that of indissolubility alone. The natural and right interpretation is in each case the same. The "putting away" of the wife meant divorce, followed by the right of re-marriage. Separation, with the bond of marriage remaining, was unknown. As a measure of protection, or possibly of punishment, its value may perhaps not be disputed; but the evils resulting from it are too obvious to be denied; and, if sanctioned in Scripture, its advocates have hitherto failed to adduce the authority.

Mr. Gladstone, accepting that perilous invention as a substitute, maintains that "according to the laws of just interpretation" re-marriage—in effect divorce proper, so called by him—is "forbidden by the text of Holy Scripture," and therefore "not admissible under any circumstances." In support of this he observes that "the declarations of the Gospels of St. Mark and St. Luke, and of St. Paul (1 Cor. vii. 10) make no exception"—whether for the cause of fornication or any other. And then he adds, as apparently a special prohibition applied to women, that "the language of St. Matthew prohibits absolutely the re-marriage of a woman divorced or put away." He says that the laws both of the Latin and Anglican Churches "from time immemorial have never allowed re-marriage." The remarkable fact is noticed, parenthetically, that "divorce with liberty to re-marry was included in the *Reformatio Legum Ecclesiasticarum* under Edward VI." But, he observes, "that Code never received sanction—in all likelihood it was disapproved by Queen Elizabeth and her advisers." Now, what were the opinions and conclusions on this great question of the very eminent and learned men, bishops, clergy, and laymen, the most trusted of their time, who framed the Code which Mr. Gladstone so summarily disposes of; and how and for what purposes were they appointed?

By the authority of a Statute passed in Edward's third year, a Royal Commission was issued to thirty-two persons, half being clerical and half lay, by whom the whole body of Ecclesiastical Laws was to be re-arranged and revised. The Commissioners, for the purpose of more special examination, were divided into groups of eight; and the labours of the entire body when completed were finally revised and settled by one body of eight selected from among them. Among the thirty-two were Archbishop Cranmer, with Bishops Ridley and Latimer, Peter Martyr, Judge Hales,* Scory, Coverdale, and others of note; doctors of the Civil Law, and also Common Law lawyers, being included in the list. By those distinguished persons, thus acting under Parliamentary and Episcopal sanction, it was finally resolved that Scripture forbade not divorce or re-marriage, for grave and

* Sir James Hales, one of the Judges of the Court of King's Bench, ever to be revered, as the one who refused to concur in the measures taken to exclude Mary, the legal heir, from the throne.

weighty causes, equally with unfaithfulness. Especially they held that it was lawful for desertion, persisted in for years, for gross cases of hatreds (*inimicitia capitalis*), indicated by cruel actions of one spouse against the other, or by continued and probably incurable bitterness, in deeds or words, apparently unrestrainable. It has been asserted that incompatibility of temper was included as a justifiable cause of divorce; but the clause presumably referred to does not, I submit, sustain the imputation. What are termed *parvae contentiones* are excluded, unless perpetually and finally irreconcilable. But these, I apprehend, imply a degree of wretchedness, fatal to domestic peace and to the home, far more than is implied by mere incompatibility of temper.*

Mr. Gladstone would detract from the value of that code, by observing that it "never received" (I presume royal or legislative) "sanction." But the code was twice before Parliament in Elizabeth's reign, and was never rejected. It was a code of the most comprehensive character, embracing, and intending to legislate for, the entire range of ecclesiastical or canonical law and religious faith, including the sacraments, heresies, and the assembling of convocations, down to the subject of wills and tithes. It can excite no surprise, that so large a body of enactments occupied much time in discussion, and was finally dropped, if only from sheer exhaustion. Four of its principal authors had been burnt alive by Queen Mary; and Elizabeth and her Ministers had quite enough to do in detecting and meeting the conspiracies and movements which daily threatened alike her person and her throne. But the perfected work remains, and the unrefuted conclusions of its authors, the result of no self-imposed labour, are before us. Sanctioned by such authority, so invoked, and with the sacred writing in our hands given to be read by all men, we who believe in divorce for grave causes fatal to continued union may be pardoned, in spite of denunciation and anathema, for preferring the opinions of the gifted thirty-two, to dogmas which nearly every Protestant State in Europe and America rejects, and the instincts of humanity, and of mercy to the wronged and helpless, disavow.

The subject of marriage, its sacred and enduring character, not meant for time only, yet, by hatreds, vice, or abandonment, desecrated and destroyed, was doubtless among the most important of the subjects which those great men were commissioned to consider; and we may be sure that they approached it in no light spirit. They were met on the question of divorce, or putting away, by difficulties, not only in the construction, but the application of the words of prohibition to the Gospels; and they were startled by the manifest opposition in

* The invention was Dr. Lingard's—adopted apparently by Mr. Gladstone in the debate on the Matrimonial Causes Act of 1857. It is corrected by Mr. Hallam, in a note to p. 140 of the first volume of his "Constitutional History" (second edition), referring approvingly to the *Reformatio Code*.

each other of the texts, as there recorded. Literally taken, they are irreconcilable. In St. Mark and St. Luke divorce is forbidden for whatever cause. According to St. Matthew, twice recorded, it is permitted for one. Yet there must be some way of agreement, though we may not all be able to discover it. The words of a Divine law-giver cannot present a hopeless inconsistency. What, then, was the one permitted cause? In the Greek version of St. Matthew, the only one known to us, it is termed *porneia*, which our version renders as fornication, and the Douay version as adultery. But the true meaning of the word, as used, has never yet been settled by the learned; and, as I understand him, our authorised translation is not accepted by Mr. Gladstone. He says that "the reservation found in St. Matthew is reasonably to be referred only to the special law of Moses, or what is here termed *porneia*." But the justifying cause of a Jewish divorce—the wife's disfavour in her husband's eyes—was his "finding some uncleanness" (or, according to our Revised Version, "some unseemly thing") in her (Deut. xxiv.). But, again, what was that unseemly thing? It had evidently become a matter of controversy among the Jews: whence the impression, real or pretended, that a husband could put away his wife for any cause whatever, in his eyes a sufficient one. What in St. Matthew's original record was the excepted cause we know not, since that Gospel was written in Hebrew, and the entire text has been lost. May "unfaithfulness" be the equivalent rendering? But is unfaithfulness only of one kind? May not persistent drunkenness, brutality, or desertion, with the utter violation of every other marital or wifely duty, be as complete a severance of married life as adultery? May not the two narratives of Christ's colloquy with the Jews, that in Matthew and that in Mark, be in fact referable to the same one occasion? The account, as given in each, corresponds in some material particulars. The Pharisees in each come to Jesus tempting him; they quote to him Moses; the disciples in each remonstrate, or specially inquire, as to his judgment; but, although repeating it, Christ says (according to St. Matthew's version) that "all men cannot receive this saying, save they to whom it is given," adding the remarkable words, "he that is able to receive it let him receive it." Is such the language of prohibition, either absolute or qualified, intended as a law for all nations, and for all time? One remarkable variation between the two narratives will have been noticed. In Matthew the question is whether it be lawful to put away a wife for every cause, an inquiry evidently referring to the Mosaic rule, and excused possibly by doubts as to its construction. But, according to St. Mark, the question put was the lawfulness of putting away in any case—an inquiry scarcely probable, since every Israelite knew that for certain causes, or some one cause of disfavour, the law clearly gave the man

that right. With such considerations before them, would the Commissioners have been wrong in concluding that Christ's answer had reference to Jewish law alone, and was meant as a rule for the Jews only in the administering of that law, and not for all cases and other peoples? If the suggestion be not irreverent, may there not have been some error in transcription from one or the other of these narratives? We know, for example, with respect to one important passage in St. Luke (xvi. 18) occurring twice in St. Matthew also (v. and xix.), that the latter portion of the sentence in our Authorised Version is "not found in some ancient versions," notably, it seems, among others, in that called the Sinaitic (see Revised Version, in note to the passage).

How far the decisions of the Royal Commissioners may have been affected by considerations such as those here adverted to—or by reference to decrees of the early Christian Emperors, and the opinions of ancient Fathers in the Church, allowing divorce for sundry causes,—we have no means of ascertaining. But they could have had no difficulty in concluding, that our Saviour's words related only to wives or husbands still retaining, or at least claiming to retain, the position as well as the name:—not to any who, by gross violation of every marital or wifely duty, had abandoned or forfeited every such right. How, indeed, could the forbidden "putting away" apply, for example, to a man or woman already so separated—put away by his or her own act? In Scotland, such considerations were not without fruit. It was at all events declared in 1573 (one-and-twenty years after the Reformatio Code), by her Parliament and divines, that Christ's words did not preclude divorce for desertion. And the statute passed in that year, legalising divorce and re-marriage in such cases, remains the approved law of our sister kingdom, acted on to this day. Yet, since desertion is not adultery, Christ's prohibition is obviously equally violated by the one relaxation as by the other. Since, moreover, the taking of oaths—the swearing on any occasion—is, in emphatic language, in the same chapter of St. Matthew, forbidden, equally with putting away, yet nevertheless it is conceded that oaths may lawfully be taken when enjoined by the State, the thirty-two doubtless concluded that the like rule might, for grave causes, equally be applied to divorce:—causes not determined by suspicion only, or by caprice, but by a constituted and cautiously inquiring tribunal. On one subject, indeed, they felt themselves on immovable ground. They had seen in operation the system of bed and board separation; and they condemned it, on grounds dictated equally by observation and by Scripture:—"Cum a sacris literis aliena sit" (says the Code), "et maximam perversitatem habeat, et malorum sentinam in matrimonium comportaverit." Such was the conclusion of the learned referees; overborne hitherto by invented canonical law too strong alike for the

Bible and the logic of facts. In their reference here to Scripture, were they mistaken? If man and wife separation, unaccompanied by divorce, be found there, the passage surely can be produced.

The subject remains, of the alleged exclusion—in any event—of a divorced wife from the right of marriage. In the Mosaic dispensation, as we have seen, that right is specially recognised, while the divorcing husband's right, even if necessarily inferred, follows by inference only. Now, under the same law, we know that a wife could divorce her husband. She certainly, up to the time of our Saviour, as the 12th verse of Mark x. shows, claimed that right; the divorcing party being, in either case apparently, sole judge of the cause, without prescribed investigation or appeal. And that women divorced or divorcing exercised the reciprocal right sufficiently appears (St. John iv. 18) by the instance of the Samaritan woman at the well, still I assume living under Mosaic rule, who had five times been married. She could hardly have been thus often, at her probable age, a widow. No wonder that such puttings away as these were condemned. I ask, assuming that (according to St. Matthew) the offence or cause termed "porneia" is a permitted ground of divorce, authorising the man's re-marriage, what is there in Scripture denying in that case the same right to a divorced or divorcing woman? Mr. Gladstone disposes of the question by an assertion. He says that "the language of St. Matthew prohibits absolutely" her re-marriage. But his reference to the declarations in Mark and Luke (he cites also St. Paul, 1 Cor. vii. 10) is scarcely to the purpose. If putting away be forbidden alike to both wife and husband, according to those Gospels, it is of course forbidden to the wife. But, if permitted in an excepted case, as twice stated by St. Matthew, is the man alone there allowed re-marriage, and the woman excluded? If so, she would be equally excluded in every case allowed by a national law. The Anglican communion, in England and the United States alike, holding that divorce is allowed for adultery only, refuses in the latter to recognise the laws of their country, which permit divorce for other causes also. And the Anglican prelates, in their recent Lambeth Conference, while resolving to refuse the rites of the Church to a divorced adulterous offender, suggest a doubt whether our Lord did not mean to deny the right of re-marriage equally to the innocent party.

What, however, in Scripture forbids re-marriage specially in the case of a divorced woman? The exclusion is arrived at by separating the latter portion of the same one sentence from the former; and thus making the passage read, unconnectedly, as if it were two. The explanation will hardly be believed, but here is the proof. In Matthew v., the words are these: "Whosoever shall put away his wife, saving for the cause of fornication, causeth her to

commit adultery ; and whosoever shall marry her that is divorced (or 'her when she is put away') committeth adultery." The plain and natural meaning of this is, that putting away a wife for any other than the excepted cause leaves the marriage still in force. It therefore makes her (*i.e.*, on marrying again) guilty of adultery ; and, for the same reason, makes the new husband also guilty, for he allies himself to a woman still continuing married. It follows that the divorcing husband himself would by re-marriage be equally guilty of adultery. But this inevitable inference, although supplied in the same Gospel, c. xix., and in St. Mark, happens to be in the fifth omitted. Hence in part the conclusion, so strange to the unclerical mind, that re-marriage is forbidden to the divorced or divorcing woman alone. In the nineteenth chapter of Matthew the words (including in terms the divorcing man equally) are the same ; the whole in each place occupying the same one verse. In St. Mark (verses 11 and 12) the words, admitting no excepted case, speak only in terms of the re-marriage of the divorcing parties. In St. Luke xvi. 18, the words (without of course any excepted cause) are again the same as in Matthew. All of them are in one verse and one and the same sentence. Yet such is the effect of long instilled and accepted dogma, that to this day the cited passages, one portion divided unnaturally from the other, are held to forbid re-marriage to a divorced wife under all circumstances, even where she is innocent and the divorce itself is unimpeachable. Mr. Gladstone, holding that dogma, appears to have the sanction of many among the distinguished and venerable persons, eminent alike by character and position, who took part in the Conference at Lambeth. But the authority to which he appeals contradicts him. With the deepest respect for him and for them personally, I therefore reject the doctrine. Above all do I protest against the base idea that a divorced wife, cruelly wronged in her first marriage by brutality, desertion, or crime, is tempted to contract a second by passion merely. As if she could have no higher and holier as well as happier views prompting her—a desire for companionship, for communion of mind, for mutual help and comfort, realised in true marriage—for all that as declared by the Creator makes it "not good for man to be alone."

As to the passage referred to by Mr. Gladstone from St. Paul's Epistle to the Corinthians, it has, so far as I can discover, no direct reference to divorce. It enjoins husbands and wives to live together, the wife not departing from her husband, and the husband not putting away his wife ; "but if she depart" (it is added) "let her remain unmarried, or be reconciled to her husband." There is nothing as to the unlawfulness of second marriages, whether by wife or husband. If the man had not put away his wife, no question of re-marriage

could arise. Her departure merely, undivorced, could not confer the right on either.

The questions suggested in the *North American Review*, for discussion in that journal, on the subject of "Divorce with Remarriage," were based obviously on the assumption, that the right of determining them, ~~so far as not closed~~ by Christ, was in every country vested in its legislature. But in the vast North American continent there are forty-seven States and territories, each, as I collect, having on those questions independent legislative powers, exercised apparently in some instances very much at random, and entrusted in their administration to inferior tribunals and uneducated men. Because of such examples, all America with its civilised peoples, equal in intelligence and in religious and virtuous impulses to any in Europe, has been unjustly scandalised. But the work of reformation in those laws has already, with the fostering aid, searching investigation, and exposures of the Divorce Reform League, induced extensive improvement. An elaborate Report on the Marriage and Divorce Laws of the United States, with statistical returns of the most elaborate character, on an inquiry under the authority of Congress instigated by the League, has recently been presented. It shows the laws of many other countries on the subject of divorce, and is a marvel of research and industry. The number of divorces reported is appalling; but they are largely the result of a wandering, mixed, and unsettled population, and they are spread over twenty years, and comprise (it must be borne in mind) a population of nearly sixty-six millions of people. The Marriage and Divorce Laws of the United States, we may be well assured, will be thoroughly reformed; but not in the direction of indissolubility, or of sexual unfaithfulness alone. In cases of mere incompatibility of temper, or mutual distrusts and faults in the married life where concession and compromise are possible, the law will not interfere. But when by hopeless desertion, by brutality long persisted in, or habitual and aggravated crime, all the holy objects of marriage have been defeated, the laws of the United States will, we doubt not, in common with those recently passed in New South Wales and Victoria, enable the wronged wife or husband, if so desiring, to obtain relief from the broken and desecrated legal bond.

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To divorce for