

## DIVORCE

The time is fast approaching when it will be necessary for the general citizen to form definite opinions upon proposals for probably quite extensive alterations of our present divorce laws, arising out of the recommendations of the recent Royal Commission on the subject. It may not be out of place, therefore, to run through some of the chief points that are likely to be raised, and to set out the main considerations affecting these issues.

Divorce is not one of those things that stand alone, and neither divorce law nor the general principles of divorce are to be discussed without a reference to antecedent arrangements. Divorce is a sequel to marriage, and a change in the divorce law is essentially a change in the marriage law. There was a time in this country when our marriage was a practically divorceless bond, soluble only under extraordinary circumstances by people in situations of exceptional advantage for doing so. Now it is a bond under conditions, and in the event of the adultery of the wife, or of the adultery plus cruelty or plus desertion of the husband, and of one or two other rarer and more dreadful offences, it can be broken at the instance of the aggrieved party. A change in the divorce law is a change in the dissolution clauses, so to speak, of the contract for the marriage partnership. It is a change in the marriage law.

A great number of people object to divorce under any circumstances whatever. This is the case with the orthodox Catholic and with the orthodox Positivist. And many religious and orthodox people carry their assertion of the indissolubility of marriage to the grave; they demand that the widow or widower shall remain unmarried, faithful to the vows made at the altar until death comes to the release of the lonely survivor also. Re-marriage is regarded by such people as a posthumous bigamy. There is certainly a very strong and logical case to be made out for a marriage bond that is indissoluble even by death. It banishes step-parents from the world. It confers a dignity of tragic inevitability upon the association of husband and wife, and makes a love approach the gravest, most momentous thing in life. It banishes for ever any dream of escape from the presence and service of either party, or of any separation from the children of the union. It affords no alternative to "making the best of it" for either husband or wife; they have taken a step as irrevocable as suicide. And some logical minds would even go further, and have no law as between the members of a family, no rights, no private property within that limit. The family would be the social unit and the father its public representative, and though the law might intervene if he murdered or ill-used wife or children, or they him, it would do so in just the same spirit that it might prevent him from self-mutilation or attempted suicide, for the good of the State simply, and not to defend any supposed independence of the injured member. There is much, I assert, to be said for such a complete shutting up of the family from the interference of the law, and not the least among these reasons is the entire harmony of such a view with the passionate

instincts of the natural man and woman in these matters. All unsophisticated human beings appear disposed to a fierce proprietorship in their children and their sexual partners, and in no respect is the ordinary mortal so easily induced to vehemence and violence.

For my own part, I do not think the maintenance of a marriage that is indissoluble, that precludes the survivor from re-marriage, that gives neither party an external refuge from the misbehaviour of the other, and makes the children the absolute property of their parents until they grow up, would cause any very general unhappiness. Most people are reasonable enough, good-tempered enough, and adaptable enough to shake down even in a grip so rigid, and I would even go further and say that its very rigidity, the entire absence of any way out at all, would oblige innumerable people to accommodate themselves to its conditions and make a working success of unions that, under laxer conditions, would be almost certainly dissolved. We should have more people of what I may call the "broken-in" type than an easier release would create, but to many thinkers the spectacle of a human being thoroughly "broken-in" is in itself extremely satisfactory. A few more crimes of desperation perhaps might occur, to balance against an almost universal effort to achieve contentment and reconciliation. We should hear more of the "natural law" permitting murder by the jealous husband or by the jealous wife, and the traffic in poisons would need a sedulous attention--but even there the impossibility of re-marriage would operate to restrain the impatient. On the whole, I can imagine the world rubbing along very well with marriage as unaccommodating as a perfected steel trap.

Exceptional people might suffer or sin wildly--to the general amusement or indignation.

But when once we part from the idea of such a rigid and eternal marriage bond--and the law of every civilised country and the general thought and sentiment everywhere have long since done so--then the whole question changes. If marriage is not so absolutely sacred a bond, if it is not an eternal bond, but a bond we may break on this account or that, then at once we put the question on a different footing. If we may terminate it for adultery or cruelty, or any cause whatever, if we may suspend the intimacy of husband and wife by separation orders and the like, if we recognise their separate property and interfere between them and their children to ensure the health and education of the latter, then we open at once the whole question of a terminating agreement. Marriage ceases to be an unlimited union and becomes a definite contract. We raise the whole question of "What are the limits in marriage, and how and when may a marriage terminate?"

Now, many answers are being given to that question at the present time. We may take as the extremest opposite to the eternal marriage idea the proposal of Mr. Bernard Shaw, that marriage should be terminable at the instance of either party. You would give due and public notice that your marriage was at an end, and it would be at an end. This is marriage at its minimum, as the eternal indissoluble marriage is marriage at its maximum, and the only conceivable next step would be to have a marriage makeable by the oral declaration of both parties and terminable by the

oral declaration of either, which would be, indeed, no marriage at all, but an encounter. You might marry a dozen times in that way in a day... Somewhere between these extremes lies the marriage law of a civilised state. Let us, rather than working down from the eternal marriage of the religious idealists, work up from Mr. Shaw. The former course is, perhaps, inevitable for the legislator, but the latter is much more convenient for our discussion.

Now, the idea of a divorce so easy and wilful as Mr. Shaw proposes arises naturally out of an exclusive consideration of what I may call the amorous sentimentalities of marriage. If you regard marriage as merely the union of two people in love, then, clearly, it is intolerable, an outrage upon human dignity, that they should remain intimately united when either ceases to love. And in that world of Mr. Shaw's dreams, in which everybody is to have an equal income and nobody is to have children, in that culminating conversazione of humanity, his marriage law will, no doubt, work with the most admirable results. But if we make a step towards reality and consider a world in which incomes are unequal, and economic difficulties abound--for the present we will ignore the complication of offspring--we at once find it necessary to modify the first fine simplicity of divorce at either partner's request. Marriage is almost always a serious economic disturbance for both man and woman: work has to be given up and rearranged, resources have to be pooled; only in the rarest cases does it escape becoming an indefinite business partnership. Accordingly, the withdrawal of one partner raises at once all sorts of questions of financial adjustment, compensation for

physical, mental, and moral damage, division of furniture and effects and so forth. No doubt a very large part of this could be met if there existed some sort of marriage settlement providing for the dissolution of the partnership. Otherwise the petitioner for a Shaw-esque divorce must be prepared for the most exhaustive and penetrating examination before, say, a court of three assessors--representing severally the husband, the wife, and justice--to determine the distribution of the separation. This point, however, leads me to note in passing the need that does exist even to-day for a more precise business supplement to marriage as we know it in England and America. I think there ought to be a very definite and elaborate treaty of partnership drawn up by an impartial private tribunal for every couple that marries, providing for most of the eventualities of life, taking cognizance of the earning power, the property and prospects of either party, insisting upon due insurances, ensuring private incomes for each partner, securing the welfare of the children, and laying down equitable conditions in the event of a divorce or separation. Such a treaty ought to be a necessary prelude to the issue of a licence to marry. And given such a basis to go upon, then I see no reason why, in the case of couples who remain childless for five or six years, let us say, and seem likely to remain childless, the Shaw-esque divorce at the instance of either party, without reason assigned, should not be a very excellent thing indeed.

And I take up this position because I believe in the family as the justification of marriage. Marriage to me is no mystical and eternal union, but a practical affair, to be judged as all practical things are

judged--by its returns in happiness and human welfare. And directly we pass from the mists and glammers of amorous passion to the warm realities of the nursery, we pass into a new system of considerations altogether. We are no longer considering A. in relation to Mrs. A., but A. and Mrs. A. in relation to an indefinite number of little A.'s, who are the very life of the State in which they live. Into the case of Mr. A. v. Mrs. A. come Master A. and Miss A. intervening. They have the strongest claim against both their parents for love, shelter and upbringing, and the legislator and statesman, concerned as he is chiefly with the future of the community, has the strongest reasons for seeing that they get these things, even at the price of considerable vexation, boredom or indignity to Mr. and Mrs. A. And here it is that there arises the rational case against free and frequent divorce and the general unsettlement and fluctuation of homes that would ensue.

At this point we come to the verge of a jungle of questions that would demand a whole book for anything like a complete answer. Let us try as swiftly and simply as possible to form a general idea at least of the way through. Remember that we are working upward from Mr. Shaw's question of "Why not separate at the choice of either party?" We have got thus far, that no two people who do not love each other should be compelled to live together, except where the welfare of their children comes in to override their desire to separate, and now we have to consider what may or may not be for the welfare of the children. Mr. Shaw, following the late Samuel Butler, meets this difficulty by the most extravagant abuse of parents. He would have us believe that the

worst enemies a child can have are its mother and father, and that the only civilised path to citizenship is by the incubator, the crèche, and the mixed school and college. In these matters he is not only ignorant, but unfeeling and unsympathetic, extraordinarily so in view of his great capacity for pity and sweetness in other directions and of his indignant hatred of cruelty and unfairness, and it is not necessary to waste time in discussing what the common experience confutes. Neither is it necessary to fly to the other extreme, and indulge in preposterous sentimentalities about the magic of fatherhood and a mother's love. These are not magic and unlimited things, but touchingly qualified and human things. The temperate truth of the matter is that in most parents there are great stores of pride, interest, natural sympathy, passionate love and devotion which can be tapped in the interests of the children and the social future, and that it is the mere commonsense of statecraft to use their resources to the utmost. It does not follow that every parent contains these reservoirs, and that a continual close association with the parents is always beneficial to children. If it did, we should have to prosecute everyone who employed a governess or sent away a little boy to a preparatory school. And our real task is to establish a test that will gauge the desirability and benefit of a parent's continued parentage. There are certainly parents and homes from which the children might be taken with infinite benefit to themselves and to society, and whose union it is ridiculous to save from the divorce court shears.

Suppose, now, we made the willingness of a parent to give up his or her



children the measure of his beneficialness to them. There is no reason why we should restrict divorce only to the relation of husband and wife. Let us broaden the word and make it conceivable for a husband or wife to divorce not only the partner, but the children. Then it might be possible to meet the demands of the Shaw-esque extremist up to the point of permitting a married parent, who desired freedom, to petition for a divorce, not from his or her partner simply, but from his or her family, and even for a widow or widower to divorce a family. Then would come the task of the assessors. They would make arrangements for the dissolution of the relationship, erring from justice rather in the direction of liberality towards the divorced group, they would determine contributions, exact securities appoint trustees and guardians.... On the whole, I do not see why such a system should not work very well. It would break up many loveless homes, quarrelling and bickering homes, and give a safety-valve for that hate which is the sinister shadow of love. I do not think it would separate one child from one parent who was really worthy of its possession.

So far I have discussed only the possibility of divorce without offences, the sort of divorce that arises out of estrangement and incompatibilities. But divorce, as it is known in most Christian countries, has a punitive element, and is obtained through the failure of one of the parties to observe the conditions of the bond and the determination of the other to exact suffering. Divorce as it exists at present is not a readjustment but a revenge. It is the nasty exposure of a private wrong. In England a husband may divorce his wife for a single

act of infidelity, and there can be little doubt that we are on the eve of an equalisation of the law in this respect. I will confess I consider this an extreme concession to the passion of jealousy, and one likely to tear off the roof from many a family of innocent children. Only infidelity leading to supposititious children in the case of the wife, or infidelity obstinately and offensively persisted in or endangering health in the case of the husband, really injure the home sufficiently to justify a divorce on the assumptions of our present argument. If we are going to make the welfare of the children our criterion in these matters, then our divorce law does in this direction already go too far. A husband or wife may do far more injury to the home by constantly neglecting it for the companionship of some outside person with whom no "matrimonial offence" is ever committed. Of course, if our divorce law exists mainly for the gratification of the fiercer sexual resentments, well and good, but if that is so, let us abandon our pretence that marriage is an institution for the establishment and protection of homes. And while on the one hand existing divorce laws appear to be obsessed by sexual offences, other things of far more evil effect upon the home go without a remedy. There are, for example, desertion, domestic neglect, cruelty to the children drunkenness or harmful drug-taking, indecency of living and uncontrollable extravagance. I cannot conceive how any logical mind, having once admitted the principle of divorce, can hesitate at making these entirely home-wrecking things the basis of effective pleas. But in another direction, some strain of sentimentality in my nature makes me hesitate to go with the great majority of divorce law reformers. I cannot bring myself to agree that

either a long term of imprisonment or the misfortune of insanity should in itself justify a divorce. I admit the social convenience, but I wince at the thought of those tragic returns of the dispossessed. So far as insanity goes, I perceive that the cruelty of the law would but endorse the cruelty of nature. But I do not like men to endorse the cruelty of nature.

And, of course, there is no decent-minded person nowadays but wants to put an end to that ugly blot upon our civilisation, the publication of whatever is most spicy and painful in divorce court proceedings. It is an outrage which falls even more heavily on the innocent than on the guilty, and which has deterred hundreds of shy and delicate-minded people from seeking legal remedies for nearly intolerable wrongs. The sort of person who goes willingly to the divorce court to-day is the sort of person who would love a screaming quarrel in a crowded street. The emotional breach of the marriage bond is as private an affair as its consummation, and it would be nearly as righteous to subject young couples about to marry to a blustering cross-examination by some underbred bully of a barrister upon their motives, and then to publish whatever chance phrases in their answers appeared to be amusing in the press, as it is to publish contemporary divorce proceedings. The thing is a nastiness, a stream of social contagion and an extreme cruelty, and there can be no doubt that whatever other result this British Royal Commission may have, there at least will be many sweeping alterations.