

THE LAW OF MARRIAGE AND DIVORCE.

Marriage.—In ancient time daughters could be disposed of by their fathers, who had unlimited power over them. Nature enjoins monogamy and all cultured nations practice it. Christianity requires its observance as a moral duty. The Orientals recognized polygamy, and hence despotism exists there.

In the middle ages morganatic, or left-handed marriages, prevailed, an intermediate state between concubinage and matrimony. It was the lawful union of a single man of noble birth with a woman of inferior station. The children and the wife had no claim to the title or property of the father and husband, but merely received a small allowance. Such union was indisputable, and the offspring was legitimate. This connection was common.

A concubine in the Civil Law did not mean a harlot. She possessed the character of a wife, but without the sanction of a legal marriage. It was confined in Europe to a single person, and was a perpetual obligation, and was generally entered into by men who were forbidden by the State to marry one who lacked quality or fortune. The concubine could be accused of adultery. Her station was above the infamy of a prostitute, and below the honors of a wife.

The Canon Law, which consisted of the decretals of the popes, and the utterances of Church Councils, is the basis of the law of marriage in Europe, except where altered by municipal law. The Council of Trent demanded the presence of a parish priest and two witnesses at the ceremony. In England the authority of the Canon Law was greatly restricted when repugnant to the Common Law. No ceremony was essential, until the Marriage Act of George II. Quakers and Jews were exempted from the provisions of that act.

Under the Common Law up to 1836, and always in Scotland, cohabitation after consent constituted marriage. At present the parties may select either a religious or civil ceremony. If the former, there must be a publication of banns. It was felony to celebrate a marriage in a private house, except by license from the archbishop.

Marriage in most of the states may be proved by evidence that the parties lived together as man and wife, after a contract in the present tense, and introduced each other as such. *Verba de futuro* followed by *copula* and cohabitation constituted marriage in such states, and in Scotland. In England cohabitation and repute merely constitute a presumption of marriage, and are received as evidence in all civil personal actions. If, however, the connection was originally illicit, it is presumed to continue so. Continuous cohabitation is essential. Repute alone cannot make a marriage. A man may occasionally allow a woman to take his name, without her being his wife.

The Canonical disabilities to marriage are consanguinity, affinity, impotence, force, and fraud. These make marriage voidable only. The civil disabilities are lunacy at the date of marriage, bigamy, and nonage.

As a rule the law of the place of the marriage determines its validity, except in cases of polygamy and incest. The law of nations has so decided. The Catholics hold marriage a sacrament, and enjoin a religious ceremony. The civil contract of marriage is valid, if the parties at the time were willing and able to contract, and actually did contract. In Maryland alone a religious ceremony is required. Tennessee requires a ceremony for whites, but not for negroes. In most states no ceremony is required, but a mere interchange of consent. This is termed the Scotch law of marriage, by cohabitation and repute, *per verba de praesenti*. A promise of marriage with subsequent *copula* constitutes marriage.

The contract may be implied from the conduct of the parties. Their intention, rather than their language, determines the relationship. The contract must be mutual. A compulsory marriage is illegal, unless ratified by subsequent acts of the parties. Many clandestine marriages of English people were performed by the notorious blacksmith of Gretna Green in the Scotch Border. Consensual marriages are good in Scotland, under the Canon Law—*Consensus, non concubitus facit matrimonium*. Where a man introduces a woman to the world as his wife, he shall not be permitted afterwards to discard her as his mistress.

Divorce—Ethics in Divorce.—Divorce, from *divertere*, to turn away, means separation of husband and wife by a competent court for sufficient cause. It breaks up the family, and shakes the foundation of social order. Only the sternest necessity demands it; yet it is often the only deliverance from family ruin. Cruelty may make the marriage relation intolerable; abandonment, the

fulfillment of its duties impossible; intemperance, its intercourse revolting, and crime may cause a prolonged separation. The innocent party in such cases may be subjected to inexpressible suffering.

Divorce has always been allowed, but never encouraged, as it endangers the foundations of society. The sceptic and the Christian alike favor the permanence of the marriage relation. The Romish Church declares marriage indissoluble, yet reserves to the pope power to grant divorces. Nature sometimes demands it, and the Bible in some cases permits it. Milton wrote that strong and abiding antipathy should suffice for a divorce. Rev. Dr. Wentworth took the same view, and favored divorce for incompatibility of temper, asserting that "the bonds of matrimony may become more binding than the manacles of a slave." Lloyd in his Law of Divorce says, that judicious divorce laws encourage matrimony.

Lord Stowell took the opposite view, and wrote, "When people understand that they must live together, except for a few legal reasons, they learn to soften the yoke they cannot shake off, and become good husbands and wives from the necessity of remaining married."

Kinds of Divorce.—1. *A vinculo matrimonii*: from the bond of matrimony; and 2. *A mensa et thoro*, from board and bed, which latter is a mere legal separation. Impediments existing before marriage, entitle to a decree of nullity. The distinction between absolute and partial divorces were unknown to the early Church. It was devised by the Canonists at the Council of Trent. South Carolina alone among the states never granted a divorce.* Presi-

*NOTE.—South Carolina once ignorantly adopted the entire New York code under singular circumstances. A few years after the Civil War, under the carpet-bag régime, at the instance of two scheming negro legislators, the legislature of that state passed an act to abrogate the entire state code of law, which savored of negro slavery, and construct a new code on a more liberal basis. Three members of the Assembly were appointed to do this work, viz., the two negro originators of the scheme, and a Vermont carpet-bagger, whom his comrades selected to do the work. \$30,000 were allowed them for their trouble.

The Vermonter sent to New York, and obtained a large number of copies of the digest of the statutes of that state. He tore these volumes apart, and distributed the leaves among the negro scholars in the public schools on the coast of South Carolina, and had the pupils copy them *verbatim*, except to write South Carolina, wherever New York appeared on the respective pages. This was done, and this mongrel manuscript was expressed from different

dent Woolsey attributed this to state pride, rather than to religious feeling.

In England, absolute divorces were formerly only granted by Acts of Parliament, entailing heavy expense. They are now granted by the Court of Divorce and Matrimonial Causes. In a few states legislative divorces are granted for causes not within the jurisdiction of the courts. Such special legislation occasions corruption in our law givers. They include no collateral matters, such as alimony. In such states both absolute and qualified divorces are allowed; and in some states a partial divorce may be followed in time by a total one on application. As the states are guaranteed by the Federal Constitution the right to control their domestic relations, the United States courts have no jurisdiction to grant divorces. Nothing but an amendment to the Constitution could confer such power.

In a few states partial divorces are not granted. Whether they serve any useful purpose is a disputed question, as suits for alimony or support serve the same end. Law writers on divorce universally oppose them as conducive to immorality. Lloyd terms them, "A hollow pretense of judicial relief. It deprives the parties of the rights of cohabitation, companionship, and the procreation of children, while it does not relieve them from the blunders of matrimony. They are still legally tied as man and wife, though isolated. It punishes equally the innocent and the guilty." Bishop says, "Such a divorce is one of the most corrupting devices ever imposed on blindness and credulity. This monster of divorce *a mensa et thoro* is made up of pious doctrine and worldly stupidity." Rev.

quarters to Columbia. It was brought to the capital in a wagon the last day of the session of the legislature, and stored away in a closet, after the legislature had accepted it, and repealed all former laws.

The Attorney-General left that night for the North on a visit, and on his return to Columbia months later, proceeded to examine it before sending it to the printers. To his consternation, he read about the navigation of Long Island Sound, and paragraphs relating to the Canadian border, but never found the term New York therein. *He* apprised the governor of the fraud, who at once reconvened the legislature, who took prompt action in bringing about the present code, which somewhat resembles that of New York. It is needless to say that the three conspirators never returned to the state. These facts were narrated to the writer of the present article by a prominent lawyer in Columbia, to whom he had written in 1871, in relation to South Carolina law, in the preparation of his earlier work on divorce, published in Philadelphia in 1872, and to his knowledge has never before appeared in print. It will therefore be new to the readers of the JOURNAL.

Dr. Wentworth writes, "This kind of divorce is characterized by cruelty and crime and is productive of great evil. It is a disgrace to the statute book of any enlightened people." Such partial divorces were unknown to the Common Law. This judicial separation gives a maintenance to the wife out of the husband's property. Neither party can marry again during the lifetime of the other. Dower and curtesy rights are not affected by it.

Our divorce codes vary from the severity of New York laws to the laxity of those of Rhode Island. Divorce is termed the woman's remedy, as about twice the number of divorces are granted to wives than to husbands.

There is a conflict of laws in this country in regard to divorce. Some divorces are good in one state and worthless in others. Utah granted divorces upon the oath of the plaintiff as to the facts, and as to his intention sometime to live there. In New Jersey, a man divorced for adultery may marry again, while in New York and Pennsylvania he becomes a criminal when he marries the paramour during the life of the innocent party.

Theory of Divorce.—A. J. Davis writes, "Divorce is an outburst of liberation, a step to something better." Dean Smith said, "The reason why so few marriages are happy, is because lassies spend their time in weaving nets, not in making cages." An Italian proverb reads, "In buying houses and taking a wife, shut your eyes and commend yourself to God." Another writer has asserted that, "Two opposite opinions should not lie on the same bolster." Shakespeare wrote, "For what is wedlock forced but a hell, an age of discord and perpetual strife." A law writer assigns as a reason for the increase of divorce the throwing open of all avocations to women, also, living in boarding houses, a tendency of woman to idleness and late hours, and to the perusal of trashy novels.

History of Divorce.—The Jews. A Jewish husband had formerly merely to affirm in writing his intention of no longer cohabiting with his wife, to obtain a legal divorce. Josephus the historian, divorced his first wife without assigning any cause. He divorced his second wife because he disliked her character. Moses in Deuteronomy wrote, "When a wife finds no favor in her husband's eyes, because he has found some uncleanness in her, let him write her a bill of divorcement, and give it to her hand, and send her out of his house. Then may she become another man's wife." A writer has said that this uncleanness meant anything that was repellant, as a foul breath, or a running sore. Polygamy occasionally existed among the Jews. The wife had no right to

apply for a divorce, and had no protection from the cruelty of her husband.

New Testament Doctrine.—The Gospels sanction divorce for adultery, giving the woman an equal right with the man. President Woolsey said that the New Testament indicates a stricter doctrine on the subject of divorce than the Old, and the right of the innocent party to remarry is clearly allowed by our Lord. Paul, in his letter to the Corinthians, justified divorce on the ground of desertion, in the words, "If the unbelieving depart, a brother or sister is not under bondage." Wicklif, Luther, Calvin and Melancthon adopted his view, and Protestants generally sanction a divorce for desertion, whether the party be a heathen or not.

Early Christian Church.—The early Christians advocated a single life of chastity as good for the soul. This was the result of a reaction against heathenism, and the advent of Gnostic or ascetic doctrines. A long struggle occurred as to allowing the clergy to marry. The table of consanguinity was extended. A converted infidel must put away all his wives except the first.

From Jerome's time, only a divorce *a mensa* was allowed by the Church. The Greek Church permitted separation only when the wife was unfaithful. The husband's adultery was no ground for divorce. Marriage between infidels and believers was forbidden. This was also the case in the Latin Church. But for Catholics and baptized Protestants to marry is allowed by the former Church, if the parties agree to educate their children in the Catholic faith. The Catholic priest may be present, and record the marriage, without blessing it. The Fathers of the Church asserted that the Bible regarded the marrying again of a divorced party during the lifetime of the other to be adultery.

The Protestant Reformers introduced new ideas of marriage and divorce. Enforced celibacy of the clergy was deemed the source of profligacy and concubinage. The Catholic theory that nothing but death will release a married party from his obligations was a failure, as it sought for impracticable results, and led to vice. Roman law, which freely allowed divorce, took the place of the Canon law with them. The Puritans adopted similar views, and the Church ordinances on the Continent added desertion to adultery, as a cause for divorce. Luther and Calvin advocated the death penalty for adultery. The Ecclesiastical Courts of England enforced the rules of the Canon law. No absolute divorces were granted there until after the Reformation. In all Protestant countries various causes for divorce have been recognized, where grave reasons exist.

Rome.—The Romans had more of the moral and religious element in their character than the Greeks. During the first few centuries of Roman history, no divorces were applied for, it is said, though the Twelve Law Tables allowed divorce to the husband for several causes. In the earlier years of Rome the husband purchased his wife from her parents, and held over her the power of life and death. She could bring no action for divorce. Subsequently the women became the equals of the men, and the causes of divorce became identical. Marriage could be dissolved, like any other mutual contract, by consent. Augustus vainly sought to restrict divorce by legitimating concubinage. The later emperors enacted that divorce could be obtained for seventeen causes. Three of them were divorced, Honorius, Valentinian I. and Theodosius. Justinian abolished divorce by mutual consent, but permitted a mutual agreement, that one party should enter a convent, or take a vow of chastity. The consequences of divorce became unpleasant under the empire. If the wife's conduct caused the divorce, she forfeited most of her dower. Caligula, Claudius, Nero and Domitian were divorced. Julian abolished concubinage. In the latter years of the republic, divorces were granted for trifling causes. Julius Caesar was divorced three times, as also was Pompey. Cicero dismissed his wife without cause, in order to marry an heiress, whose fortune paid his debts. Augustus compelled Livia's husband to repudiate his wife in order that he might marry her. Seneca asserted that many Roman ladies counted their years by the number of their husbands. Laxity of morals led to the fall of Rome.

In the Augustan age every effort was made to encourage marriage. Unmarried persons between certain ages were debarred from legacies and inheritances, unless the testator was a near relative. Married men with children received special privileges. Concubinage was legalized, in order to raise children. Yet divorce could be brought about by mutual consent, or by the action of one of the parties. Heavy penalties were inflicted for adultery.

Greece.—The Greek idea of marriage became degraded as the nation advanced in refinement. The Greek mind had a different conception of marriage from that of the Hebrew. The influence of heathen mythology produced this corruption. Even in Sparta, with its severe laws, the marriage tie was not respected. It was customary for husbands to transfer their wives to their friends. The *hetaira* usurped the wife's influence. Wives were often purchased, and if they proved unfaithful, the purchase money could be recovered from their fathers. Divorce in Athens was easy and

frequent. The husband, in the presence of witnesses, sent away his wife, without any formality. But where the wife sought divorce, she must present written reasons to the archon. The Greeks allowed concubinage. Plato urged that some of the judges should be women, who should, on failure to reconcile the parties, aid in the selection of new spouses. President Woolsey said that, "it needed the gospel of holiness to put the Greek minds in a better track in regard to marriage and divorce."

Prussia.—The law of divorce is quite liberal in Prussia. Under Frederick the Great, marriage could be dissolved by consent of the parties after one year. Persistent refusal of marital intercourse is a ground of divorce in that country; also, gross injury to the honor or personal freedom of either party. Threats or verbal abuse is not a ground of divorce among the lower orders, nor is a single act of violence. Gross crimes, false accusations, engaging in a disgraceful employment, continual drunkenness, and extravagance, and wilful neglect to support, are causes for divorce. Marriage without issue for a long time can be dissolved by mutual consent. Irreconcilable alienation of feeling is also a cause. The guilty party shall suffer in property.

France.—Here divorce legislation coincides with political revolutions. The adultery of the wife is a cause for divorce; but the adultery of the husband is only punishable where he has kept his mistress in the common dwelling, or added excessive cruelty to the crime. The mutual written petition of the parties with proof that a united life is insupportable, and that there exists a cause for divorce, will support an action. The party guilty of adultery can never marry the paramour. If the divorce is by mutual consent, neither party can marry within three years.

England.—When England was under the Romish Church, the Ecclesiastical Courts had cognizance of divorce. Absolute divorce was then unknown. The Reformation produced a change in the divorce law, and the sacramental character of marriage was denied. A special Act of Parliament was required to dissolve a marriage. The present Court of Divorce and Matrimonial Causes was instituted in 1887. Separations may be obtained for adultery, cruelty, and desertion. The *particeps criminis* should be named as co-respondent in the action. An appeal lies to the House of Lords.

Scotland.—Here the remedy of divorce is open to both parties. Clandestine and consensual marriages are allowed in Scotland. Such marriages are either *per verba praesenti*, or by promise *de futuro* with *copula*. Marriages may exist by cohabitation and repute. A Scotch divorce is invalid against a party domiciled in England.

United States.—Divorce in this country is entirely the offspring of statutes. Legislative divorces are held to be constitutional, and the reasons of the legislature in granting divorces cannot be questioned. Where the parties have submitted to the decision of the courts, the legislature cannot intervene. The practice of granting such divorces by *ex parte* proceedings worked great injustice. Decrees *nisi* are required in some states, to afford the parties a chance for reconciliation. A vacated decree renews the matrimonial relation.

Practice.—In some states the Prosecuting Attorney should oppose all undefended suits in divorce. In many states the proceedings are in equity. Either party may demand a jury trial; otherwise the testimony is taken before a master or referee, who reports to the court thereon. If the bill or libel be not explicit, a bill of particulars may be demanded. A discontinuance can only be entered by leave of the court. The decree may be vacated, on proof of fraud. It cannot be obtained by mutual consent, or by a waiver of legal rights; Cross bills may be filed. Collusion should be denied in the bill. If service of process cannot be made on the defendant in the state, it may be obtained by publication. Costs and counsel fees for the wife should be applied for before the final decree of divorce. It is optional for the divorced wife to retain her married name.

Evidence.—Except in Pennsylvania, no divorce is granted on the uncorroborated testimony of the libellant. Confessions imply collusion, unless they are full, confidential, and reluctant. Even if there be no defense, the plaintiff must furnish satisfactory evidence, as the Commonwealth is a third party to every suit for divorce. Allowance should be made for the prejudices of children and servants in their testimony. The evidence of prostitutes and detectives is regarded as suspicious. In New York the plaintiff can only testify as to the marriage, but may disprove counter charges of adultery. The depositions should be read to the witnesses before they are signed by them.

Jurisdiction and Domicil.—The plaintiff must reside in the county in which the action for divorce is brought. The question of jurisdiction depends upon the domicil of the parties. A decree of divorce has no extraterritorial effect, where granted against a non-resident defendant over whom the court has no jurisdiction. Notice, or even process, served personally on such defendant in such other state, cannot give validity to the decree. When, however, such defendant appears and defends by attorney, he or she is bound by such decree.

No subjects connected with divorce are so perplexing as those of jurisdiction and domicil, as the decisions of the various states are at variance, causing a conflict of laws.

A person can have but one domicil at one time. The proof of the domicil may consist of the declarations and acts of the party. The law of the place of the domicil governs, no matter where the marriage or the acts complained of took place; except that in a few states the statutory term of residence is dispensed with where such acts occurred within the state.

Although *prima facie* the husband's domicil is that of the wife, this is not the case in applications for divorce, where his fault occasioned the separation. In such cases, the law recognizes the wife's right to separate domicil. Such domicil must have the element of permanence, and be acquired in good faith. She, however, may sue in the state of the former common domicil, if she still resides there.

A domicil once acquired, *animo manendi*, is not lost by temporary absence. A merely nominal removal is a fraud. Jurisdiction is not obtained by the temporary sojourn of both parties in another state. It must continue for the full statutory period. A Pennsylvania local court has decided that a fraudulent marriage may be annulled at the domicil of the plaintiff, even if the defendant has never lived in the state. Federal courts have no jurisdiction in case of divorce, although they may enforce a judgment elsewhere for permanent alimony.

The Wife's Rights.—Divorces in favor of the wife are only granted in civilized countries. Modern civilization has given the wife equal if not greater rights to divorce than the husband. Yet mere wounded feelings will not suffice. If a divorce be allowed her on merely psychical grounds, feminine impulsiveness would be tempted to exaggerate injuries to feelings.

Statutory Causes for Divorce.—The omnibus clause, as it is called, which formerly disgraced Indiana and Illinois, now exists only in Rhode Island and Washington. It reads: "For any other cause, the court, in its discretion, may deem sufficient." In addition to the usual causes for divorce: Vagrancy is a cause in Missouri; Ungovernable temper in Florida; Attempted murder of the other party in Tennessee and Illinois; Gross neglect of duty in Ohio and Kansas; Lewd behavior and loathsome disease in Louisiana and Virginia; Ante-nuptial unchastity in Virginia, West Virginia and Maryland; Refusal of the wife to allow sexual intercourse for one year in North Carolina; Gross behavior repugnant to the marriage contract in Rhode Island; Personal abuse in Pennsylvania. Union with a religious sect prohibiting marriage, such as the Shakers, is a cause for divorce in four states. Conviction of crime and sentence is a cause in twenty states, as is also habitual drunkenness. Miscegenation is prohibited in twenty states.

Canadian courts do not grant divorces. They must be applied for in the Senate at Ottawa.

Adultery.—In England the alleged paramour is made co-respondent in a divorce suit. The Code Napoleon followed the Roman law in discriminating in favor of the husband. Louisiana adopted that law. The time, place and circumstances of the adultery should be stated in the bill, as far as possible. It is prudent to add, "And with parties unknown to the plaintiff." But one of the acts alleged in the bill need be proved to gain a divorce.

Antenuptial unchastity cannot be proved unless with the paramour mentioned in the bill. Marriage operates as an oblivion of the past. Acts of adultery committed after the filing of the bill cannot be shown, unless a supplemental petition has been filed. Confessions obtained by force or fraud are void. The temptation to collusion is great where both parties desire the divorce. The strongest confession is that of a husband acknowledging the paternity of bastard offspring. Declarations of the alleged paramour are not evidence, and are inadmissible, unless made in the presence of the defendant. Positive or direct evidence of adultery is not essential, but the crime may be presumed from circumstances which lead to that conclusion. No party need incriminate himself or herself. A preponderance of evidence is all that is required. If it were necessary to have ocular proof of the act, few divorces could be obtained for this cause. Mere scandal, however, will not suffice. Witnesses after stating acts can give their opinion, but Lord Eldon held that the wife's crime was much greater than that of the husband, as it might entail spurious offspring. Where incest is charged, the evidence should be most convincing. So in the case of physician and patient.

But character cannot be shown, except to rebut evidence of good repute. Evidence of prior or subsequent adulterous intent cannot be shown, unless evinced about the time of the alleged act. Suspicious circumstances may be shown, as also alienation of feeling, absence, cruelty, expressions of dislike, and domestic dissensions. Courts usually do not reject relevant testimony because it is indecent, but the master or referee should check vulgar and obscene language in the witness. Under the New York rules, the officers of the court shall not permit copies of the testimony in adultery cases to be taken from the court office, unless by the counsel of the parties, or by order of the court. The judges may impound the testimony.

The mere existence of erotomania or nymphomania is no defense. Nor that the defendant became insane after the act. The Pennsylvania Supreme Court decided that a husband might obtain a divorce

for adultery committed while the defendant wife was insane, as it might result in spurious offspring.

A judgment of acquittal of adultery in a criminal court will not bind the libellant, as the Commonwealth was the prosecutor.

It is improper to call young children to testify against their parents, as it tends to destroy their purity of thought. Their testimony is early perverted, and always displays bias. Visiting hotels, secret intercourse, clandestine correspondence, expressions of attachment, gifts, assumption of false names, unexplained absences, consorting with prostitutes or rakes, disordered dress, being alone often with the alleged paramour, and venereal disease, are proofs.

The bars to the action are condonation, collusion, connivance, and recrimination. Condonation is conditional forgiveness. Forgiveness of one act is not forgiveness of another. Imprudence or error is not connivance, but *voluntati non fit injuria*. Mere inattention or negligence is not connivance, which is *περικοψειν*, to wink at the crime. Frequent forgiveness implies condonation. Recrimination is based upon proof that the plaintiff has committed a similar crime. This latter plea is not admitted in France or Scotland, on the ground that if both parties are guilty, a divorce should be granted them. Remarriage of the guilty party with the *particeps criminis* is prohibited in New York and Pennsylvania during the lifetime of the innocent one. In Louisiana and Delaware such party can never marry the paramour. The divorced parties themselves may remarry. Such prohibition may be ended by a marriage of the guilty parties in another state. The Code Napoleon forbids the remarriage of the divorced parties.

Bigamy.—The second marriage is void, even if the former partner has been absent several years, and there is a belief in his death.

Consanguinity.—This is a relationship by blood, while *affinity* is by marriage. Such incestuous marriage is a crime by the Levitical Law. It is necessary to cross the breed in order to continue the species. A suit to dissolve them must be brought during the lives of the parties. In Rhode Island a distinction is made in favor of the Jews.

Cruelty.—Is a question of intent. It must as a rule be repeated, and must affect the health. It may consist of threats, or occasion mental suffering, which will intend to impair the health. It must tend to render cohabitation unsafe or insupportable. It must endanger life, limb or health. The injury must be wilful. Between persons of refinement, the slightest blow or harsh language may be cruelty, while among the rougher classes blows do not usually mar conjugal intercourse. Hence the social condition of the parties, their

age, habits, and mode of life are factors. False accusations of adultery are legal cruelty. The court interferes *quia timet* future injury. Excessive sexual intercourse and intoxication are only elements of cruelty. It is not cruelty where there was sufficient provocation.

In several states the husband's wilful neglect to support his wife is a cause for divorce, but it will not alone maintain an action for cruelty. The court will not interfere in ordinary domestic quarrels.

Indignities to the wife constitute a cause for divorce in Pennsylvania. They may consist of insulting and abusive language. In such cases alimony is always allowed the wife. In Michigan, the wife may obtain a divorce where her husband habitually uses obscene and harsh language in her presence, or allows a third party to threaten her. Marks of recent violence on her person are *res gestae*. Slight additional acts of cruelty revive condoned acts. Condonation is less readily presumed of the wife on account of her defenceless condition, and the risk of being deprived of her children. Her husband's subsequent adultery revives condoned cruelty.

Desertion.—Later decisions disapprove the idea that in order to justify abandonment, the cause of leaving must justify a divorce. The desertion must be wilful and malicious, without justifiable cause, and must continue, the statutory time. Meanwhile there is a *locus poenitentiae*, and the deserter may return. If the husband makes home unendurable, and thereby forces his wife to leave him, he deserts her. Indifference, neglect to support, and even unfaithfulness, is not desertion.

Refusal of sexual intercourse, or neglect to support, does not justify desertion, nor does separation by mutual consent.

Fraud or Force, invalidates a marriage. False statements as to the fortune or health of the party do not; and an allegation of being pregnant by a party who has had sexual intercourse with the woman, is not legal fraud, though the infant prove to be black, and the man was white.

Impotence.—In England triennial cohabitation must take place before an action for divorce for impotence can be commenced. The impotence must have existed before marriage, and be incurable. Suit should be promptly brought by the healthy party. Sterility is no ground for divorce. The petition of the wife should allege that she is *virgo intacta, apta viro*. If the woman be too old to bear children, the man takes her *tanquam soror*.

Insanity after marriage is a cause for divorce in Florida, Idaho, and Washington.

Alimony is the allowance given the wife out of the husband's estate for the wife's support, and he may be attached for contempt for not paying it. It is granted the wife whether she be plaintiff or defendant, and is proportioned to her husband's means, or capacity to earn. It is either awarded her *pendente lite*, or granted permanently at the conclusion of the suit. It is usually payable in installments, and ceases at the man's death. It is affected by the joint condition of the parties, and also by the amount of the wife's estate. Where the husband, plaintiff, does not pay it, his suit may be stopped. Temporary alimony is granted before the merits of the case be inquired into, and is granted even if the wife does not deny the adultery charged. The amount may be adjusted by the parties. In Georgia the husband's wages may be seized to pay alimony due. *Ne exeat* writs and injunctions are seldom allowed. A deed of separation or an antenuptial settlement usually bars permanent alimony. Security may be required, or it may be made a lien upon the husband's property. Bankruptcy or insolvency does not discharge the husband from its payment. In most states the wife's marriage to another man does. If the minor children remain with their mother, the alimony is increased. The legislature cannot award alimony. A judgment for permanent alimony can be sued upon in another state. In some states the alimony ceases when the wife's adultery is proven, while in others, a small sum is awarded her.

Children born in wedlock are presumed legitimate. The subsequent marriage of the parties legitimates their children. In awarding their custody, the court looks solely to their interests. The father is liable for their support, while their custody may be awarded to their mother. An infant is always given to the mother even though she be a criminal. "A child at the breast needs a mother's milk more than her virtuous example." The English courts have decided that a woman guilty of adultery shall not have access to her children. Sometimes girls are awarded to their mothers, and boys to their fathers.

Counsel Fees.—The court always compels the husband to pay the wife's counsel fees in the divorce action.

Property.—Dower and curtesy rights end with an absolute divorce, and the liberated wife may acquire exclusive control of her separate estate. The trust estate of the husband is liable for alimony. Fraudulent transfers of the husband's property to defeat his wife's claim for alimony, may involve third parties in the divorce action.

Wm. Hardcastle Browne.

Philadelphia, February, 1902.