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XVIII.

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THE reaſons that determined the lawgivers of Greece, and Rome, and of ſome few other ſtates, to forbid a plurality of wives, which was permitted in almoſt all countries, may have been ſuch as theſe. They ſaw that polygamy would create large families, and large families a greater expence than could be borne by men who were reduced to live in cities, and other fixed habitations, where property was diſtinguiſhed, and where no one could afford to ſpend more than his legal poſſeſſions, his labor, and his induſtry, gave him. Monogamy was a ſort of ſumptuary law, and might be thought the more reaſonable, becauſe, even in thoſe countries where polygamy was eſtabliſhed, men were not permitted to marry more women than they were able to maintain.

ANOTHER reaſon, that ſerved to confirm this inſtitution, was the part aſſigned to the prieſts in it. DIONYSIUS HALICAR.[a] having obſerved how ill women had been uſed to keep their conjugal vow, even in countries where a very ſingular magiſtrate[b], a magiſtrate to preſerve their chaſtity, was appointed, ſpeaks with great encomium of a law that ROMULUS made to attach every roman wife to her husband, by an entire participation of all his poſſeſſions and of his religious rites[c]. Theſe ſacred nuptials were celebrated by a ſolemn ſacrifice, and by the eating together of a conſecrated barley cake. The natural effect of this law and this religious ceremony was ſuch, that during five hundred and twenty years there was no inſtance of

a) Lib. ii. 24, 25. b) --- Cui mulierum caſtitas curae eſſet.
c) --- Omnium et bonorum et ſacrorum ---

a divorce at Rome; for ſo I underſtand the hiſtorian, who does not refer, according to my apprehenſion, to any expreſs prohibition of divorces, in the caſe even of theſe marriages, by the law that eſtabliſhed them, as ſome have imagined. Thus monogamy became, by the intervention of the prieſthood, a religious, as well as a civil inſtitution. I might add, not improperly, nor untruly, that this inſtitution has received at leaſt an indirect ſupport from the vices of husbands and wives, from thoſe very abuſes which it was deſigned by ROMULUS, and by other legiſlators, to reform. By entering into ſingle marriages, men ſatisfied the natural deſire of propagating their ſpecies, and acquired the means of having a legitimate iſſue; whilſt nothing hindered them, nor their wives neither, except the want of opportunity, from indulging their luſt with others, in ſpight of their ſacred bonds, and the legal property they had in one another's perſons. We may believe the more eaſily, that ſuch conſiderations helped to reconcile pagans to the ſeeming conſtraint of ſingle marriages, ſince we can make no doubt that they have the ſame effect on chriſtians, who think theſe marriages inſtituted by God himſelf immediately, as many of the former deemed them to be enjoined by the law of nature; for what authority does in one caſe, cuſtom might very well do in the other: and it is much leſs ſtrange that cuſtom, which we call a ſecond nature, ſhould paſs for the firſt and real nature, than that human authority ſhould paſs for divine.

BUT of all the reaſons, by which we may account for the prevalence of ſingle marriages, in oppoſition to polygamy, divorces conſtituted the principal and the moſt effectual. With them monogamy may be thought a reaſonable inſtitution. Without them it is an abſurd, unnatural, and cruel impoſition. It croſſes the intention of nature doubly, as it ſtands in oppoſition to the moſt effectual means of multiplying the human

man ſpecies, and as it forbids the ſole expedient, by which this evil can be leſſened in any degree, and the intention of nature can be, in many caſes, at all carried on. Altho the firſt mention of divorces be made by ISAIAH, and JEREMIAH occaſionally, ſeven or eight hundred years after the law was given, they had been always in uſe among the Iſraelites: and as the right was derived, by their doctors, both from the natural and the moſaical law, ſo they were practiſed under no very ſtrict regulations. I ſay nothing of the forms. The legal cauſes had a great latitude: a divorce was ſufficiently authoriſed when a woman did not find favor in the eyes of her huſband, becauſe of ſome turpitude in her perſon or behavior, or even becauſe he found another woman whom he thought handſomer, or whom it was more convenient to him to marry*. Thus the people of God had an advantage, in this reſpect, over other people. Plurality of wives might have made divorces leſs neceſſary. The defects in body or mind of one, would be compenſated by the perfections of the others; or if they proved all alike diſagreeable, the husband had the reſource of concubines. The caſe of the Romans, and all thoſe nations where ſingle marriages were eſtabliſhed, was very different. He who had a barren wife could not fulfil the law of nature, nor ſwear without perjury, as he was obliged to do, that he kept a wife in order to have children by her; and therefore CARVILIUS RUGA † acted very conſcientiouſly when he was the firſt, if he was the firſt, to put away his wife. The law-caſuiſts, who decide that barrenneſs is not a ſufficient cauſe of ſeparation, becauſe it may be the misfortune, but cannot be imputed as the fault of the woman, might as well decide, that no accidental infirmity, which renders a man incapable of per-

* Foeditatem perſonalem, negotium impudicum. Si invenerit aliam pulchriorem, aut ſibi commodiorem. SELD. De ux. ebraic. † DION. HAL. ubi ſupra.

forming

forming his office in the ſtate, is a ſufficient reaſon for removing him. The Romans paid no regard to ſuch caſuiſtry. They continued divorces in this, and many other caſes; ſuch, for inſtance, as ill management of family affairs, or an intolerable and incurable ill humor, which were the reaſons, I preſume, of CICERO's divorce from TERENTIA; and good reaſons ſurely, ſince the husband may be ruined by one, and the peace of his whole life be deſtroyed by the other.

THE inſtitution of divorces was of ſuch abſolute neceſſity where a plurality of wives was forbid, and of ſo much conveniency where this plurality was allowed, that it continued on the ſame foot among the Romans, till chriſtianity was eſtabliſhed fully in the empire, and that it continues ſtill among the Jews in the eaſt, if not practiſed, for prudential reaſons, in the ſame manner, and as openly, in the weſt.

SELDEN gives a very particular account, in the third book of his "Hebrew wife," of the occaſion on which divorces were reſtrained, and it amounts to this. HILLEL and SAMMAEAS were of that ſet of men, the rabbins, who pretended to have authentic traditions, and certain interpretations of their law conveyed down to them from MOSES; and who were, notwithſtanding this oral rule of faith, of doctrine, and of manners, frequently in oppoſition, and at the head of different factions in the ſchools of the Jews. Two ſuch factions had been formed, concerning the legal grounds of divorces, by HILLEL, and SAMMAEAS who had been his ſcholar, as GAMALIEL, the maſter of ſaint PAUL, is ſaid to have been his nephew and his ſucceſſor; and the diſputes ran high between them whilſt CHRIST was on earth. The Hillelians maintained the original right of repudiation, and ſuch as it was practiſed, not only in the caſe of adultery, or turpitude, but in every

other caſe, " ob omnimodam rem ſeu cauſam [a]." The Sammaeans inſiſted on a reformation of this cuſtom, and on a new interpretation of the law founded on a grammatical criticiſm. They confined the right of divorce to the caſe of turpitude, alone. CHRIST decided the queſtion in favor of the latter, and ſpecified but one kind of turpitude. This deciſion appeared ſo ſtrange to his diſciples, that they were at a loſs, as well as the phariſees, to gueſs why then MOSES had eſtabliſhed the right of divorce; for it is probable the notion had not prevailed amongſt them, that God tolerated ſuperſtitious practices, or permitted even crimes to have the ſanction of his law, as in the preſent caſe it is ſaid that he did, becauſe of the hardneſs of heart of their fathers. The diſciples therefore cried out, that, if this was the caſe, it would be better not to marry. The Jews did not ſubmit to this deciſion. The ſame diſpute continued many years; and about ſeventy from the birth of CHRIST it was decided in favor of HILLEL by that oracle from heaven, " the daughter of the voice [b]," which was heard at Jabne, not far from Jeruſalem, and the place perhaps where the ſanhedrim was then held. But the law of grace was ſuperior, in time, to the natural, and the moſaical law, among chriſtians. It had a right to be ſo; and, beſides, we may believe very probably, and very piouſly, with JUSTIN the martyr, that JOSEPH, having ſuſpected the holy virgin to have been got with child before her marriage, had entertained thoughts of ſeparating from a wife whom he could not keep according to the laws of his country [c]. We may believe too, on the foundation of this anecdote, that chriſtians were prepared to underſtand the words of JESUS in a ſenſe the moſt reſtrictive of divorces, and the leaſt favorable to that inſtitution. I ſaid, that the law of grace was ſuperior in time to the other;

a) Ib. l. iii. c. 20. b) Filia vocis. c) ---Juxta patrios mores ejiciendam.

for

for as little as we know what the practice of christians was during the first three hundred years, we know in general, that great relicts of judaism remained long amongst them; that divorces were in use, even those which wives signified to their husbands; that the meaning of the word fornication was extended from the flesh to the spirit; and that this institution was observed, admitted, denied, to the time of CONSTANTINE, without any certain rule at all; "aliter atque aliter†," says SELDEN. From that time downwards, emperors published edicts; councils made decrees; fathers, and after them schoolmen, advanced opinions; ecclesiastical and principally papal power increased; a new jurisprudence, the child of usurpation, of ignorance, and bigotry, grew up under the care of the canonists; marriage was declared a sacrament, and this tie indissoluble.

XIX.

BEFORE we leave the subject of positive laws, ecclesiastical and civil, that forbid those things arbitrarily, and by mere will, which the laws of nature permit; we may properly enough take notice of some restrictions relatively to marriages, which have not been so hard to impose as the obligation of single marriages. Polygamy had been allowed in most nations, divorces I believe in all. It required time, therefore, to abolish institutions, both of which had revelation and reason on their side, and the last of which had been confirmed by universal practice. But it required neither time nor pains to continue the prohibition of marriages within certain degrees of consanguinity and affinity. The Jews, among whom christia-

† Ib. c. 28.