

AN EXP

THE LAWS.

RELATING TO

THE WOMEN OF ENGLAND ;

SHOWING THEIR

Rights, Remedies, and Responsibilities,

IN EVERY POSITION OF LIFE.

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"I will, in this treaty, with as little tediousness as I can, handle that part of the English Law, which containeth the immunities, advantages, interests, and duties of women, not regarding so much to satisfy the deep learned, or searchers for subtilty, as woman-kind, to whom I am a thankfull debtor by nature."—*The Lawe's Resolutions of Women's Rights*, A. D., 1632.

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TO  
THE WOMEN OF ENGLAND,  
WHO,  
BY THEIR VIRTUES AND SYMPATHIES,  
HAVE JUSTLY ACQUIRED AND WORTHILY RETAIN  
THE HOMAGE OF THE CIVILIZED WORLD ;

**This Book,**

BEING AN HUMBLE ATTEMPT TO EXPLAIN THEIR  
LEGAL RIGHTS AND WRONGS,  
IS MOST RESPECTFULLY INSCRIBED.

# THE ARRANGEMENT.

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*N.B.—For the subjects debated in each Chapter, consult the Analytical Headings of each of them.*

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## TO THE READER.

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My purposed aim in commenting on the several laws which peculiarly affect the gentler sex, is to exhibit, in a connected and continuous whole, apart from every extraneous and foreign subject, the principles and doctrines which have been laid down and expounded, concerning this most interesting portion of the community. Without expatiating on the wisdom or imperfection of our laws in this respect,—without assuming the language and latitude of a fault-finding censor, full of suggestions for progress, destruction, and change,—I have been content to give the law, according to the present state of authority, with as much brevity and perspicuousness as the subject and my own poor skill were susceptible of.

The book is arranged according to the revolving phases of human existence through which a woman may possibly pass in her journey through life ; her successes and her failures, her sufferings and her joys, her wrongs and her griefs, so far as they are influenced or recognised, affected or redressed by the laws, are the matters discussed and explained. It is obvious that these expositions involve subjects of great delicacy, yes, and sometimes of painful depravity ; yet, while a strain of phraseology is adopted, in describing the details necessary to their discussion, which accords as much as possible with the polished and decorous language of educated amenity, it is not attempted to debate them with a mysterious obscurity or an affected modesty, which is far worse than even a blunt and rude speech, at least in scientific investigations. Every event and every possible incident connected with the immediate subject of my work is fearlessly treated of, so as to exhibit the grounds and the reasons for the method and course of judicial administration. Not to have dealt with them would have been an omission, and, consequently, so much added to the many imperfections, with which I am quite conscious the

book abounds. Since then Humanity is made up of the good and the bad, the weak and the mistaken; so the topics of the work comprehend both virtue and vice, endurance and oppression, frailty and crime.

J. J. S. WHARTON,

36, Lincoln's-Inn-Fields,  
*Christmas Vacation, 1852-53.*



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## BOOK I.

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### INFANCY.

“ Infants are not able to govern themselves; and therefore the law takes upon itself the protection of their rights, and ordains, that they shall be favoured in all things which are for their benefit, and not prejudiced by any thing to their disadvantage.”—*Fonblanque on Equity*, Book i., Chapter ii., § 4.

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# THE LAWS

RELATING TO

## THE WOMEN OF ENGLAND.

### BOOK I.

#### INFANCY.

#### CHAPTER I.

##### PERIOD OF INFANCY, AND RIGHTS OF AN UNBORN CHILD.

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I. THE period of human life, which is denominated, Duration of infancy.  
Legal-Infancy (*a*), or Nonage, begins at the moment  
of a child's conception, and determines at the first in-

(a) We say *legal*, to distinguish it from *natural*-infancy, which ends at the seventh year of a person's age. The word "infancy" is derived from the Latin "*infans*," which properly means *Qui fari non potest* (one who cannot speak). The person of whom could be predicated *fari potest*, was not *infans*, and was capable of doing certain legal acts. The phrase *Qui fari potest* is itself ambiguous; but the Romans, in a legal sense, did not limit it to the mere capacity of uttering words, which a child of two or three years generally possesses, but they understood by it a certain degree of intellectual development; and, accordingly, the term *Qui fari potest* indica-

stant of the day (b) next before the day of such child's twenty-first birth-anniversary, — the time of majority (c). Before this time a person is called an Infant, or Minor, and enjoys many privileges, as well as labours under several disqualifications, and may incur divers liabilities: these we will at once proceed to detail.

General incapacity of an infant.

II. The law, as a general rule, deems an infant to be incapable of acting or speaking advisedly, so as to be bound thereby, — a rule rendered necessary, in its contemplation, by the want of that judgment and understanding, (consequent upon tender years and inexperience,) which are held to be indispensable in order to constitute legal responsibility.

Hence the civil or the old Roman law maxim, “*Infans non multum à furioso distat (d)*,” — (An infant is not

ted not only that degree of intellectual development which is shewn by the use of intelligible speech, but also a capacity for legal acts in which speech is required. Thus the period of *Infantia* was extended beyond that which the strict etymological meaning of the word signifies, and its termination, among them, was fixed by a positive rule at the end of the seventh year. We attach a similar meaning to the word, but differ as to the period, which the text explains. — *Smith's Dict. of Greek and Rom. Antiq.*, tit. *Infans*.

(b) Thus a child born during any hour of the first of January 1831, would be of full age, and cease to be an infant, at the first moment of the 31st December 1851; *Herbert v. Tarbol*, 2 Mod. 281. So that legal-infancy may cease before the infant has actually attained the full age, by nearly forty-eight hours.

(c) But as to what are called gavelkind-lands in Kent, infancy determines at the age of fifteen. The Sovereign has no minority or infancy, but it is usual to appoint a regent until the monarch attains eighteen, for the purpose of more properly discharging the functions of the office. With regard to the present royal family, Prince Albert, who is the husband of the Queen Victoria, is appointed the guardian to the heir apparent, so long as he neither marries a Roman Catholic, nor professes the tenets of the papists. 3 & 4 Vict., c. 52.

(d) Just. Inst., lib. iii., tit. 20, § 10.

much removed from one who is mentally incapable). Hence, also, our laws extend to infants many privileges, securing them against imposition, and aiding them by special immunities, so as to cope with the wiles and stratagems of mankind.

III. A child *en ventre sa mère* is considered an infant in being and actually born (*e*), or, as the technical term expresses it, *in esse*. It possesses many rights (*f*), its enjoyment and transmission of which to its collateral heirs or next of kin, depend, of course, upon the survival of its birth, how long or short soever that may be; for a still-born child can not acquire any civil rights whatever.

Rights of an unborn child:—

(a) An unborn child is capable of having landed property left to it by way of executory or postponed devise; but the testator should be very careful clearly to prescribe, in his will, the mode in which such property is to be held, in the meantime, for its benefit, in order to avoid mistakes and litigation (*g*).

It may be a devisee;

(b) It is entitled to its share under a power or authority in a marriage settlement (*h*), will, or other document for raising portions to maintain younger children (*i*).

A portionist;

(c) The realty, or land, of an intestate deceased ancestor will devolve upon it as heir-at-law, provided there be no person alive who is in a nearer degree of relationship to such deceased ancestor, but, till such child's birth,

Heir-at-law;

(*e*) 4 Ves. 334; and see *Palmer v. Cracroft*, Cas. 522; 2 Vern. part ii., 578, and note (*i*), 580.

(*f*) *Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur.*—Inst., lib. v., 26.

(*g*) Fearn's Cont. Rem. 535; 1 Bos. & Pull. N. R. 243.

(*h*) See as to marriage settlements, Book III, c. II, *post*.

(*i*) *Thellusson v. Woodford*, 4 Ves. 322.

the presumptive heir, *i. e.*, the person who would have been entitled to the property but for such child, may enter upon the estate, and receive, for his own benefit, all the rents and profits derivable thereout, as a posthumous heir can only claim the rents and profits of the property, which accrue from and after its birth (*j*). This is the only prejudice it sustains,—a prejudice naturally arising from its wantless predicament.

A surren-  
derec of a  
copyhold  
estate;

(d) A copyhold estate may be surrendered to the lord of the manor for its benefit (*k*), for a surrender by a present tenant to the lord, is executory, or imperfect, and nothing vests in the person for whose benefit such surrender has been made, until his admittance into the estate by the lord.

A legatee;

(e) An unborn child may become a legatee of personalty under a will; and should twins happen to be born, the both of them will be joint legatees, each being entitled to a half of the legacy. In this case it sustains a trifling prejudice, for interest on a legacy will not be allowed to it, if the father be the testator bequeathing the legacy, from such parent's decease, as in the case of children then actually born, but only from its birth. And a direction in the will, that interest on such a legacy shall be computed from the testator-father's death will not be permitted to supersede this principle (*l*).

A grantee  
under the  
Statute of  
Uses;

(f) From the fictitious technicality of our law, a very refined distinction exists between deeds operating under the old common law, and those by virtue of the Statute of Uses (28 Hen. VIII., c. 10), called the *Magna Charta* of Conveyancing. Without attempting a detail of this

(*j*) *Goodtitle v. Newman*, 3 Wils. 526.

(*k*) See 1 Watk. on Cop. 199, and Fearn's Cont. Rem. 416. *Quare*,

whether a copyhold can be devised by will to it.

(*l*) 1 Sim. & Stu 187. *Rawlinson v. Rawlinson*, 2 Cox, 425. — It is very

abstruse subject, it will be only necessary to mention, that while an unborn child cannot take the first or immediate estate under a deed at the common law, because such person must be actually living (*in esse*) (*m*) at the date of such deed, yet, under a deed to uses pursuant to the just-named statute, such an infant may take it, for the above reason does not here apply (*n*), and the legal estate may be vested, in the meantime, in a trustee for its benefit.

(*g*) The legislature passed the Act of Parliament (10 & 11 W. III., c. 16) to set at rest the following controversy:—

Benefitted  
by a con-  
tingent re-  
mainder;

An uncle (*o*) devised a landed estate to his nephew Henry, for his life, and after Henry's death, he entailed the estate upon his sons, and should he not have any sons, then he gave the estate over to another nephew, Richard. Henry married, and died without children actually living, but left his widow *enceinte*, and Richard entered into possession of the estate. After this, Henry's widow was delivered of a son. The question was then started, whether Richard or Henry's son should enjoy the property. The Courts of Queen's Bench and Common Pleas ruled that Henry's son could not possibly take the estate, upon the ground that a person, to whom an estate is contingently limited in remainder after a life-estate, must be actually born at the time of the decease of the life-tenant, otherwise the contingent remainder becomes defeated and entirely lost, and the vested or ascertained estate next following such defeated contingent remainder, is immediately possessed and enjoyed by the person entitled thereto, who cannot be displaced by the

(*m*) 2 Sheppard's Touchstone, 235.

(*n*) 2 Preston's Conv. 475.

(*o*) *Reeve v. Long*, 1 Salk. 227.

subsequent birth of a person claiming a previous estate. Upon an appeal to the House of Lords, it was there determined that Henry's son should take his estate, and oust or turn out his uncle Richard; thus reversing the decision of the Courts of Queen's Bench and Common Pleas. This difficulty created great uncertainty and dissatisfaction, which was set at rest by the Act of Parliament just mentioned. It enacts "that where any estate is by marriage or other settlement limited in remainder to, or to the use of, the first or other sons of the body of any person, with remainder over to, or to the use of any other person, or in remainder to, or to the use of, daughters, with remainder to any other persons; any son or daughter of such person *born after the decease of the father*, may take such estate in the same manner as if born in the life-time of the father, although no estate be limited to trustees to preserve the contingent remainders."

The object of this Act of Parliament was not to affirm the decision of the Appellate Court—for that would have been to question the propriety of its judgment—but to make the ruling of the Peers a general principle uniformly applicable to such peculiar circumstances (*p*).

The enactment does not mention limitations *by will*, although its language fairly comprehends testamentary settlements; neither does it specifically apply to a post-humous child entitled to an estate in remainder or expectancy upon the death of a stranger tenant-for-life; yet the statute evidently extends to all unborn children, whether they are the issue of the tenant-for-life or any other person (*q*). It must be noted that an expectant estate cannot be given to the issue of a person who is not himself in being, for this would be too remote.

(*p*) 4 Ves. 342.

(*q*) 2 Saund. 387, note 7.

The principle thus established appears to be perfectly accordant with justice and natural feeling (*r*).

(h) A suit or proceeding in Chancery is sustainable in A suitor ; favour of an unborn child, and the court will grant a special injunction to protect its property from waste and detriment by the presumptive heir, to whom the land may have descended until its birth, and may also appoint a guardian to look after such property. "This shows," remarked Lord Hardwicke (*s*), "that the law considers such infant as a living creature: in *all* cases relating to his advantage, he must be considered as *in esse*, [living], according to the rule of the civil law (*t*); so, on the Statute of Distributions (*u*), he shall be considered as living, the intention being to provide for all the [intestate's] children; and if that be so, the same reasoning will hold in a marriage settlement, where the intention was to provide for all the children of the marriage. On a marriage agreement, where a provision is making for the issue of that marriage, it is impossible they should intend to exclude any child on the accident of his not being born till after his father's death."

A posthumous child, claiming a remainder or expectancy under a settlement, is entitled to the profits of the estate intermediately accruing between the father's death and his birth, as well as to the estate itself. Lord Hardwicke (*v*) decreed, that the rents and profits which had become due at a day preceding his birth, be paid to a

(*r*) *Bindet v. Hopegood*, 1 P. W. 487; *Thellusson v. Woodford*, 11 Ves., jun. 139; *Blackburn v. Stables*, 2 Ves. & B. 369; and *Roe v. Quarterly*, 1 T. R. 634.

(*s*) *Millar v. Turner*, Case 50, 1 Ves. sen. 85 and 555; *Robinson v. Litton*, 3 Atk. 211.

(*t*) See note (*f*), *ante* p. 5.

(*u*) 22 & 23 Car. II., c. 10; 29 Car. II., c. 30, and 1 Jac. 2, c. 17.

(*v*) *Basset v. Basset*, 1 P. Wms: 244; 11 Ves. 139.



posthumous child ; because such a child is deemed to be living at his father's death, although not born till after his decease (*x*).

If a decree in Chancery be pronounced in a suit, and afterwards an infant is born, who, if born before the decree, would have been a necessary party to such suit, and would have had, perhaps, a day given it after majority to show cause against it, such an infant would, nevertheless, be bound by the decree ; and, if an infant be born during the progress of a suit, it is bound by all the proceedings which have taken place before its birth. If this were not so, when is a Chancery suit ever likely to be concluded ?

Entitled as half-blood in the distribution of personalty ;

(i) We have just seen indirectly that a posthumous child of the whole blood, will take his or her share of his or her deceased father's intestate-personalty ; so will a posthumous child of the half-blood, *i. e.* a child not born of the same father and mother as the other children, who are to share equally in the distribution, (*y*), but has only one of such parents, as his or her father or mother.

Provided with a guardian appointed by its father ;

(j) By 12 Car. II., c. 24, a father, though an infant, in exclusion of the mother by nature, and the next of kin by socage, may appoint a guardian to his children, to protect them after his decease, though not then actually born, until they attain majority, or during any other proper period (*z*).

An executor.

(k) An unborn child may be appointed an executor of a will, but such a one cannot discharge the duties of the office until after majority. In the meantime, the other executors (if any) act in the matter of the will ; but

(*x*) We have seen (*ante*, p. 6), that it is otherwise in the case of a descent to the presumptive heir-at-law.

(*y*) *Burnet v. Maim*, Case 81, 1 Ves. 156.

(*z*) See more upon this subject, Book I, c. IV, *post*,

should the infant be the sole executor, an administration with the will annexed, is, during such executor's minority, granted to its guardian, or to such other person as the Ecclesiastical Court thinks proper (*a*).

A mother will be justified in detaining title-deeds and documents relating to property, to which her unborn offspring has a right or claim (*b*).

IV. Our courts have administered the law very narrowly, and we think, very severely in cases of unborn illegitimate children. Towards these usually friendless creatures, *strictum jus* has been hitherto pursued, which operates like *strictissima injuria*, too often frustrating a clear intent in their favour, and making them the sufferers of technical and distorted constructions of plain and unmistakeable language. Let us illustrate what we have asserted by some cases.

Gifts to unborn illegitimate children.

A testator (*c*), called Kempe, made a codicil or addition to his will in these terms:—

“ I moreover (*d*) give to the said Mary Mackarel the sum of 50*l.* per annum, to be paid half-yearly in equal portions so long as she superintends my children, and afterwards during her life, to be paid and commence the second quarter day after my death; *Item*, as I had so long resolved to marry her for the goodness she has shewn my children: so it being doubtful whether I may

(*a*) 38 Geo. III., c. 87, § 6. If an infant be named an executor, together with adults, no administration is then required, as the adult executor's acts. *Foxwit v. Tremaine*, 1 Mod. 47. If administration be granted during the minority of several infants, it determines upon the first's majority, who may forthwith act in the office.

(*b*) See Chambers's *Infancy*, p. 14.

(*c*) *Earle v. Wilson*, 17 Ves. 528.

(*d*) He had directed the trustees under his will to allow her a competent yearly sum, for her trouble in attending his legitimate children, to whom she was an aunt.

recover of a wound which I received some time ago, I give and bequeath to such child and children, if there be more than one, as she may happen to be *enceinte* of by me the sum or sums, if more than one, by way of portion, as my other children will be entitled to under my will: and if he, she, or they, being males, die before twenty-five years of age, such portions to go over to my executors for the purposes of the trusts of my will, and such child or children, if two, be females, the said portion or portions of such child or children dying before marriage, shall go to my said executors for the trusts of my will."

Shortly after the testator's death, Mary Mackarel had a daughter, who was named Mary Ann Kempe. The mother died a few days after the birth of her child, who claimed through her next friend, Wilson, (the defendant in the suit in Chancery), the same interest as the testator's legitimate children.

The judgment of Sir William Grant, the then Master of the Rolls, was this:—

"Whether the case referred to by Lord Coke (*d*) does or does not fully warrant the rule laid down by him; yet his own great authority, and the adoption of it by Lord Macclesfield, are sufficient to induce me to adhere to it, without examining the reasons upon which it stands. The rule is in substance, that a bastard cannot take as the issue of a particular person, until it has acquired the reputation of being the child of that person, which cannot be before its birth.

"If the bequest had been to the natural child of which a particular woman is *enceinte*, without reference to any person as the father, there would be no uncertainty in that bequest, and, probably, it would be held good;

(*d*) Co. Litt. (36).

but here there is no gift to the child of which Mary Mackarel might be *enceinte*, except as the child of the testator. It was not a matter of indifference to him whether that child should have been begotten by him or by another man, therefore I cannot do what is required; that is, reject the words "by me" as superfluous. Supposing the words "as she may happen to be *enceinte* of by me" could be taken to mean "as she is now *enceinte* of by me," in which there is considerable difficulty; yet, if the rule of law does not acknowledge a natural child to have any father before its birth, that mere change of phrase could not have the effect of making the bequest good. He means to give to an unborn bastard by a description which the law says such person cannot answer; and, if you take away that part of the description, *non constat* that the gift would ever have been made.

"Therefore, without breaking in upon the rule laid down by Lord Coke, and considered by Lord Macclesfield as established, I cannot hold that there is sufficient certainty in the description of this legatee" (*e*).

A bequest to an unmarried woman's unborn children will be taken to mean her legitimate children, unless it appear expressly or by necessary implication that the testator intended the bequest for her illegitimate children (*f*).

So that a man dying before the birth of his natural child, and honestly admitting such child to be his own in a solemn instrument which can have no efficacy until after his death, and is consequently, then, beyond his

(*e*) See also *Gordon v. Gordon*, 1 Mer. 153; and *Evans v. Massey*, 8 Price, 33.

(*f*) *Mortimer v. West*, 3 Russ. 375. See *Dawson v. Dawson*, 6 Mad. 292, showing that an unborn illegitimate child may take property by a particular description.

amendment, has his righteous intents towards his helpless and unprotected offspring set at naught by the withering authority of a cruel and absurd rule, which, laughing at the atoning justice, and deriding the dying voice of a solicitous parent, positively makes him, contrary to his plainly recorded intention, to sin against his own flesh and blood in the cold silence of his grave. Yes! the iron fiction of a barbarous and senseless principle requires him to stifle the feelings, otherwise it—the law—will defeat the decent and latest reparation of an erring father.

CHAPTER II.

THE QUESTION OF LEGITIMACY.

I. Two classes of children.	so long, that the husband cannot be the father.
II. When a foreign law is to be regarded.	(5) Natural incapacity, either
III. Who is legitimate?	(a) Impotence in the husband, or
IV. Presumption of law, how to be rebutted.	(b) Impotence or sterility in the wife.
V. Grounds of abuttal :—	VI. Paternity.
(1) A void or illegal marriage.	VII. Survivorship.
(2) A divorce.	VIII. Sex.
(3) Impossibility of access.	IX. Registration of births and deaths.
(4) Gestation, either so short or	

I. It will be collected from what has been said in the preceding chapter, that the Law of England divides children into two classes, viz., (1) legitimate, and (2) illegitimate. Two classes of children.

Upon the question of legitimacy depends the legal rights of an infant, and frequently the chaste reputation of its mother. We will then consider the law of this delicate and often very difficult enquiry.

II. Before, however, we detail our own law upon legitimacy, let us state the international rule in regard to it, which is this :— When a foreign law is to be regarded.

The law of the place of the parents' marriage will generally govern the enquiry touching the legitimacy of their children. The character which such law attaches to offspring will be generally recognised and adopted by the tribunals of every other country (a).

III. Our own law has laid down this description of a legitimate child :—One actually born after the parents have been lawfully married. It may be conceived before matrimony, but, at the time of its birth, wedlock must Who is legitimate?

(a) Story's Conflict of Laws, c. iv. § 105, p. 167.

either actually subsist between its father and mother, or a competent time only must have elapsed from the husband-father's death; for a child born out of wedlock is illegitimate, and no act or proceeding of the parents, afterwards, can legitimate it in this country.

Presump-  
tion of law,  
how to be  
rebutted.

IV. The presumption of law is, that a child born in wedlock, or during a proper time after a husband's death, is legitimate, and has the mother's husband for its father (*b*); the proofs of its illegitimacy—rebutting this legal doctrine, and showing that the *reputed* is not the *actual* father,—must be satisfactory and conclusive, beyond all ordinary and rational doubt. Such proofs must be produced by the person denying the legitimacy, and consequently asserting the illegitimacy of the child (*c*); but declarations of a person as to his own illegitimacy are admissible evidence against himself and those who claim under him (*d*). A register of baptism, setting forth the illegitimacy of the child baptised, is admissible; yet it is not worth much, as it is merely a reputation which is not conclusive (*e*). On the other hand, the declarations of deceased parents are evidence to prove the legitimacy of their own children (*f*).

Grounds of  
rebuttal:—

V. The following are the grounds upon which the illegitimacy of a child may be established, and the legal presumption in its favour rebutted:—

A void or  
illegal  
marriage;

(1) A void or illegal marriage (*g*). Where it is sought to

(*b*) Marriage is the proof of paternity,—*Pater est quem nuptiæ demonstrant*.

(*c*) *Banbury Peerage Case*, 2 Selwyn's N. P. 709; and 1 Sim. & Stu. 153.

(*d*) *Reg. v. Rishworth*, 2 Q. B. 476.

(*e*) *Cope v. Cope*, 1 Moo. & Rob. 269.

(*f*) *Sacheverell's Case*, Buller's N. P. 241.

(*g*) This subject will be fully discussed in Book III, chap. V, *post*.

illegitimatize a child, on account of the invalidity of its parents' marriage, the trial is had upon the certificate of the bishop, since it is a matter of ecclesiastical law ; but when this point is not directly involved, then the trial is in the ordinary way, by presenting evidence to a jury, as materials for their decision (a).

(2) A divorce (b). Where there has been a divorce *à vinculo matrimonii* between husband and wife, then, of course, their children (if any) are illegitimate ; and if the divorce be merely *à mensâ et thoro*, then, unless access be proved, the presumption is that children born during the period of separation, are not legitimate ; for it will be assumed that the parties obeyed the sentence of the Ecclesiastical Court pronouncing the divorce, and kept aloof from each other accordingly. In this case, the party asserting the legitimacy must prove the access of the husband. If, however, a separation between a married couple be effected by their mutual consent, and without the judgment of a court, then the presumption of law is in favour of legitimacy, and must be rebutted by the person alleging the illegitimacy.

(3). Impossibility of access of the husband to the wife. The proof of this, establishing, as it does, a wife's adultery, must be very conclusive. Impossibility of access ;

The House of Lords in the *Banbury Peerage Case*, already quoted, put the following questions to the Judges, upon the proofs necessary to sustain the assertion of non-access.

First, whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father

(a) 2 Starkie on Evidence, 196 (e).

(b) See the whole subject of divorce, Book III, c. vii, *post*.



of such child, the husband not being impotent, except such proof as goes to negative the fact of generating access?

Secondly, whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact?

The Lord Chief Justice of the Common Pleas delivered on the 4th of July, 1811, the following unanimous answers:—

First, that in every case where a child was born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse was presumed to have taken place between the husband and wife, until that presumption was encountered by such evidence as proved to the satisfaction of those who were to decide the question, that such sexual intercourse did not take place at any time, where by such intercourse the husband could, according to the laws of nature, be the father of such a child.

Secondly, that the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, could only be legally resisted by evidence of such facts, or circumstances, as were sufficient to prove to the satisfaction of those who were to decide the question, that no sexual intercourse did take place between the husband and wife at any time, when by such intercourse the husband could by the laws of nature be the father of such child. That where the legitimacy of a child in such a case was disputed, on the ground that the husband was not the father of such a child, the question to be left to the jury was, whether the husband was the father of such child: and the evidence to prove that he was not the father, must be of such facts and circumstances as were sufficient to prove, to the satisfaction of the jury, that no sexual in-

tercourse took place between the husband and wife, at any time, when by such intercourse, the husband could by the laws of nature be the father of such child.

It is not then necessary to prove non-access, by direct evidence; it may be shewn by circumstantial testimony. Even if a husband have opportunities of access to his wife, still the presumption of sexual intercourse may be rebutted; as where a wife is living in notorious adultery, and the husband, on one occasion only, had an opportunity of access to her, under circumstances extremely improbable that he availed himself of it, there may be reasonable cause for concluding that sexual intercourse did not take place, and that, consequently, the issue is illegitimate. Cogent proof of circumstantiality should be placed before a jury, who should carefully examine it, before they conclude that a husband did not avail himself of the opportunity of intercourse, so as to set aside the general doctrine of legitimacy. A wife's living in adultery is not alone sufficient to prove that her husband is not the father of her child (*a*); but all possibility of the husband's access to his wife need not be negatived (*b*), for that would frequently be impossible.

Where the marriage itself is not impeached, neither the husband nor the wife is permitted to prove either access or non-access under any circumstances; "a rule," Lord *Mansfield* observed, "which is founded on decency, morality, and policy, that the parties should not be permitted, after marriage, to say that they had had no connection (*c*); or otherwise. Nor can

(*a*) See *Queen v. Mansfield*, 1 Q. B. 449; *Morris v. Davies*, 5 Cl. & Fin. 163; *Cope v. Cope*, 1 Moo. & Rob. 275, differently reported 5 Car. & P. 604.

(*b*) *Goodtitle v. Saul*, 4 T. R. 356.

(*c*) *Goodright v. Moss*, Cowp. 591; *Patchett v. Holgate*, 15 Jur. 308.

their declarations be received, after their deaths, to prove it, so as to render their children, born during the marriage, illegitimate, for they would thus be made witnesses from the tomb, to establish that which they could not effect when living. But husband or wife may give evidence of other facts establishing the illegitimacy; thus, the wife may prove her own adultery (*a*).

After the death of the parents, their marriage cannot be impeached, for the purpose of bastardizing their issue, in the case of bastard *ignè* and *mulier puiné* (*b*).

(*a*) *Rex v. Sourton*, 5 Ad. & El. 180, 186; *Rex v. Reading*, 1 Bott, 439; *Rex v. Luffe*, 8 East, 193; 1 Q. B. 447; *Hargrave v. Hargrave*, 2 C. & K. 701.

(*b*) *Pride v. The Earls of Bath and Montague*, Hill. 6 Will. 3, B. R.—Ejectment by Pride against the Earls of Bath and Montague; Pride, the plaintiff, made title as heir to George, duke of Albemarle, proving himself the son of one who was brother to the Duke, and that the Duke died without issue. The defendants gave evidence that Duke George had issue Duke Christopher, who conveyed to him. Plaintiff gave evidence that Duke Christopher was a bastard, begotten of such a woman, who, at the time of her marriage with the said George, Duke of Albemarle, was married to another man, who was then and yet living. Upon this it was objected, that since Duke George and this woman lived together as man and wife, and were now dead, the plaintiff could not be admitted to bastardize the issue, who was dead also; and who during his whole life was reputed and taken to be the legitimate son of the Duke, and styled by the Duke himself in his deed of settlement, and his last will and testament, his son and heir; *et quod justum non est aliquem post mortem facere bastardum*. The Court held this true of such a bastard as is meant by Litt. in his case of *bastard ignè* and *mulier puiné*, *i. e.*, such a bastard as is born before the espousals of a father and mother who marry afterwards; and said the rule extended only to that case. If H. marries a woman, and that woman marries again living H., the last marriage is void without any divorce; and the jury shall try the fact which proves it no marriage. And the reason why the spiritual court cannot give sentence to annul a marriage after the death of the parties, is because the sentence is only *pro salute animæ*, and then 'tis too late. 1 Salk. 120; S. C., 3 Lev. 411; Holt, 236; 3 Lev. 340; 1 Brownl. 42; 7 Co. 44*b*; Co. Litt. 33*a*, 244*a*; 5 Co. 98*b*; 2 Salk. 548; Fitz Bastardy, 18 Br. Raft. 43; 1 Roll Abr. 340.

(4.) Gestation either so short or so long that the husband cannot be the father. Gestation, either so short or so long that the husband cannot be the father.

The period of gestation frequently becomes a critical question in our courts of law, to the settlement of which, obstetric science is resorted to, although moral evidence is, as it ought to be, greatly relied upon.

Medical men are generally agreed, that the natural period of gestation is nine calendar months, ten lunar months, forty weeks, or two hundred and eighty days (*a*); but from accidental or other causes, this period is variable, and may be either hastened or retarded (*b*).

The duration of the time of gestation is a question of no very infrequent occurrence in our courts, and, in respect of the legitimacy of children and the honor of parents, of the utmost practical importance. There are well-attested instances of women whose pregnancy has continued ten, eleven, or even twelve months. In the case of a pregnancy protracted for the term of ten months, a rash judge, too decided to suffer the exhibition of scientific evidence on this point, might do a cruel injustice (*c*).

A birth which takes place before the thirty-eighth week from conception is premature; while one which occurs after the fortieth week is deemed protracted.

(*a*) See Guy's Forensic Medicine, 165; Beck's Medical Jurisprudence, 356; and Taylor's Medical Jurisprudence, 533.

(*b*) The great point, to which medical science and investigation should be directed is, whether the character presented by a child correspond to that which it should present, supposing it to be legitimately conceived. In premature births, this sort of corroborative evidence may be obtained, but not in protracted births, since it is never found that a child is more developed in a protracted case than it is when its birth happens at the regular period; and, of course, the nearer a supposed case of premature birth approaches to the full term of gestation, the more difficult will be the formation of any opinion founded on the marks of the child's development.

(*c*) 3 Bentham's Evidence, 295.

Our law does not now recognize any fixed rule on this subject, a blind adhesion to which is characteristical of ignorant obstinacy, and has worked many an injustice; but every case involving this question is decided by the tribunals on its own particular merits, after weighing the opinions of experienced medical practitioners, and the testimony as to the conduct, reputation, and habits of the parties implicated.

And since medical men are not agreed amongst themselves, as their books and advised opinions plainly indicate; since exceptional instances are so prevalent, thus manifesting the variable caprice of nature, let our judges and juries be duly impressed with the caution, not hastily to assume the impossibility of a fact, in despite of scientific controversy, or to act upon any supposed infallibility, so as to decide upon a course, the consequence of which may be the ruin of innocence, the success of villainy, and the destruction of priceless virtue. There is not a more serious question in judicial ethics than this: Why, and how far, ought a court of justice to reject certain facts, supported by direct testimony to any amount and of every degree of strength, merely on account of the improbability or pretended impossibility of the facts themselves? The common opinion is, that a fact acknowledged to be contrary to the known course of nature, ought not to weigh with a court of justice, merely on the faith of any human testimony, that is, of testimony which is opposed by a preponderating mass of counter-testimony.

Now the credibility or incredibility of a fact does not depend on its own nature;—it is not a quality existing in the fact itself; but it arises from the state of our knowledge concerning such facts, and has relation to our own intelligence and actual information at a given period.

The impossibility of a fact is simply a word for one's persuasion of its non-existence. Sagacity and experience are developed and enlarged by time, skilful research, and a constantly increasing accumulation of analogous facts. The notions of an earlier, are corrected or confuted by the enquiries of a later, age. Hence, at no one time can it be affirmed of a given fact, that all men are agreed to regard it as impossible. The scale of credibility or incredibility is graduated according to the state of one's own knowledge; and, therefore, in judicial investigation, the improbability of an alleged fact will depend on the relative information of the judge, and, consequently, on the state of knowledge and civilization in the country where he sits to administer justice.

The nature of the argument drawn from the impossible or improbable, is that of counter-testimony, or of the ordinary course of nature, which may be established by the evidence of an indefinite number of witnesses. A fact, then, is assumed to be impossible by the consideration of other facts, which not appearing in the shape of direct, must be classed with circumstantial, evidence; and this can be opposed or rebutted by special testimony, and invalidating suppositions, and, therefore, cannot be received as conclusive.

The word "impossibility" should be discarded; for where is the criterion by which it can be judged? What is its distinguishing and indisputable mark? Who can define its nature? Humanity can only reach moral certainty, and assert that a fact is in the highest degree improbable; to go beyond this, and to assume that a fact, supported as we have said, must be absolutely impossible, is to usurp the attribute of God *alone*, and inflict, by such an audacious usurpation, a palpable injustice.

Certainty,—absolute certainty,—is a satisfaction which

on every ground of enquiry, we are continually grasping at, but which the inexorable nature of things has placed for ever out of our reach. Practical certainty, a degree of assurance sufficient for practice, is a blessing, the attainment of which, as often as it lies in our way to compass, may be sufficient to console us under the want of any such impossible acquisitions (*a*).

When the legitimacy of a child is contested on account of its premature birth, the question is, what is the very earliest period at which a child may be born so as to live (*b*)? or, in other words, whether a child with all the characters of maturity can be born before the ordinary term of gestation, and whether the characters presented by such child correspond to that which it should present, supposing it to be legitimately born?

It is now generally admitted that a child born at the seventh month of gestation is viable; but as to children born before this period, there exists, amongst medical men, a great discrepancy of opinions.

• One of the most interesting cases, involving this enquiry, took place in Scotland, in the year 1837. The particulars are these:—

A common report having been circulated, reflecting on the moral character of a presbyterian clergyman, the Rev. Fergus Jardine, an investigation of the circumstances attending his marriage with Miss Janet Martin took place before the General Assembly, at the instance of the town clerk and nine of the parishioners of Kinghorn, in May, 1837, for the purpose of sifting the truth of the report, and of giving to the two principal persons implicated an opportunity of vindicating their characters.

(*r*) Bentham's Evidence, vol. iii., book v., c. xvi., § 8.

(*s*) The technical word to express the phrase "capable of living," is *viability*.

The accusation was, that the reverend gentleman had committed fornication with his wife before their marriage. The defendant was married on the 3rd of March, 1835, to his wife Janet, who, on the succeeding 24th of August gave birth to a girl, that died on the 20th of March 1836, being then about seven months old. Now, assuming that this child was the result of lawful intercourse between the defendant and his wife on their bridal night, it was only one hundred and seventy four days, or five calendar months and twenty one days old. Witnesses deposed to the possibility of illicit connexion before marriage. They testified that the defendant had slept at the house of his wife's parents when they were absent from home, his intended wife being at the same time under the same roof; that he had frequent opportunities of being alone with her; that the child, though small and feeble, was not so immature as the date of the marriage would make it; and, that it was *impossible* or *improbable* that such a child could survive.

No less than fourteen medical men gave evidence of a very conflicting character. The chief medical witness in favor of the alleged ante-nuptial intercourse, admitted that he had himself seen the case of a six month's child, who survived for *several days*. He was thereupon asked, in cross-examination on behalf of the defendant, whether he could assign any reason why, seeing that, according to his own shewing, it is possible after such a period of gestation to prolong life for *days*, it should not be possible to extend it to *months*. Of course the witness could give no reason, and thus his evidence was neutralized. The accoucheur who attended Mrs. Jardine proved that the child was decidedly immature. Several other medical men also gave evidence, and the majority of them were strongly of opinion, that it was a legitimate, but



premature birth. Two cases were quoted, where children born under similar circumstances had lived for some time ; one was born within twenty weeks after the marriage ; the other was born within nineteen weeks after conception, and lived eighteen months. Now, when the moral evidence is added to these scientific experiences, (for it was shewn that the character of both of them was beyond all suspicion ; that neither of them attempted any the slightest concealment ; and that no preparation whatever had been made by the lady anticipating her early confinement)—the conclusion appears irresistible that the complaint was utterly groundless, and that a cruel injustice would be perpetrated if immorality were to be imputed under such circumstances to this unfortunate woman. The Presbytery on Nov. 7, 1838, found, that, “ in so far as the said libel charges Mr. Jardine with having committed fornication in the manse of Kirkaldy, is not proven ; but that the testimony of the several witnesses, both with respect to matters of fact, *viz.* the appearance of the child at birth, &c., and also with respect to the opinions of medical men regarding the viability of such a premature child, as the child in question is said to be, is of such an opposite and contradictory nature, that the Presbytery, with their present light, have great difficulty in coming to any decision on these points. The Presbytery, therefore, agreeably to a common maxim of law, *Satius est impunitum relinqui facinus nocentis quam innocentem damnari*, find the libel not proven.” (a)

The question of retarded or protracted birth presents many various opinions amongst experienced accoucheurs,

(a) Medical Gazette, vol. 17, p. 92 ; and see Beck, Guy, and Taylor's works (already quoted), for further cases on this subject.

but the great weight of medical authority is in favour of the occasional extension of the ordinary period of utero-gestation or pregnancy, and our courts of law have constantly adjudicated upon this ground (a).

The leading case on protracted delivery is the *Gardner Peerage Claim* (b). The following are the facts :

Two petitioners came before the House of Lords in 1825 as claimants to this peerage ; one was Alan Legge Gardner, the son of Lord Gardner by his second wife ; the other, Henry Fenton Gardner, the (alleged) son of Lord Gardner by his first wife, whom his Lordship subsequently divorced.

It appeared that Lord Gardner was married, when a naval captain in active service, in 1796, to Miss Adderley. During the latter part of January 1802, his Lordship took leave of his wife, and went on a voyage to the West Indies ; he returned to England on the 10th of July following, and lived with his wife until the month of June 1803, when he discovered that in the fall of the year 1801, while he was temporarily absent, his wife had conversed criminally with Mr. Henry Jadis, and that on the 8th of December 1802, she was clandestinely delivered of a boy, who was baptized Henry Fenton Gardner. An action for criminal conversation was thereupon brought, in 1804, against Mr. Jadis, who was cast in a verdict for 1000*l.* damages. His Lordship then obtained a sentence of divorce in the Consistory Court of London,

(a) Although Lord Coke [Co, Litt, p, 123 *b*, and the notes] lays it down as a peremptory rule that forty weeks is the longest time to be allowed for gestation, yet that it may be retarded beyond the fortieth week is now no longer disputed by obstetric writers of reputation. The question is left entirely open by the law, and decisions should be founded on opinions of experienced practitioners selected for the occasion, each case, however, being adjudged on its own merits.

(b) See Le Marchant's full report of this trial.

and his marriage was subsequently dissolved by Act of Parliament. The defendant Jadis married the adulteress in 1805, and the petitioner Henry Fenton Gardiner lived with them as their son, taking the name of Henry Fenton Jadis, which he bore until his claim was presented to the Peers, when he reassumed the name of Henry Fenton Gardner. On the 10th of April, 1809, Lord Gardner married his second wife, the Honorable Miss Smith, a daughter of Lord Carrington, and she bore to him an only son, on the 29th of January, 1810, who was the other claimant to the peerage and estates. Lord Gardner died in December 1815. The evidence establishing the illegitimacy of Henry Fenton Gardner was, for the most part, moral; but the three following questions were propounded to the medical witnesses, who were no fewer than seventeen:—(1) Could a child born on the 8th of December have been the result of sexual intercourse on the 30th of January, or anterior to it, being three hundred and eleven days? or (2) could such a child have been the result of sexual intercourse on the 7th of February, or anterior to it, being three hundred and four days? or (3), lastly, could such a child, living to manhood, have been the result of sexual intercourse on or after the 11th of July, a period of one hundred and fifty days, or two or three days short of five calendar months? The alternative, then, was this:—If Henry Fenton Gardner were legitimate, he must have been either an hundred and fifty day's child, or a three hundred and four or three hundred and eleven day's child. It was the latter alternative that was principally relied upon in his behalf. Twelve of the medical men who were examined were in favour of the protracted gestation; while five insisted on a fixed period.

The moral proof was the notorious adultery of the first

wife, upon which the court obviously rested its decision, that Henry Fenton Gardner was illegitimate, and that, therefore, the title should be enjoyed by the other claimant, Alan Legge Gardner. Medical evidence and scientific experience were set at nought, and the principle upon which our courts usually act—that even though the wife may be living in adultery, the husband shall be presumed to be the father of her children, unless there is clear proof of his non-access, or an absolute or physical impossibility of such a presumption, arising from extended gestation,—entirely lost sight of; for the House positively pronounced that to be impossible, which had actually happened within the knowledge of competent accoucheurs; and Dr. Beck (*a*)—an undeniable authority—reports an instance, in which gestation was retarded for a day longer than the period insisted upon in this investigation.

It is to be regretted that legal opinions upon this important point are quite unsettled, and that our courts frequently decide upon assumed impossibilities and improbabilities, in profound ignorance of properly tested obstetric doctrines, medical evidence being too often either unattended to, or even unproduced.

When the legitimacy of a child, born after the husband's death, is contested, it is a question of fact to be decided by a jury, unless it be shewn to be manifestly impossible, according to the course of nature, that the child can be legitimate.

(5.) Natural incapacity: which is either—

(a) Impotence in the husband: classed by some writers into absolute, curable, and accidental or temporary, and

Natural incapacity,  
either—  
Impotence in the husband;

(w) Medical Chirurgical Review, vol. xxxiv., p. 556.

these again subdivided into physical and moral, or mental (*a*).

The illegitimacy of a child born during a second marriage cannot be established by proving that the husband was divorced from his first wife on account of impotency; for it is obvious that a man may be incapable at one time, and quite capable at another: he may be *habilis et inhabilis diversis temporibus*.

The *Banbury Peerage Case*, decided by the House of Lords in 1813, involved the question—at what age do the powers of procreation cease?—and the principle of our law was then fully admitted, that it recognises no age, after seven, at which a man is denied the privilege of having children, and that there exists no statute of limitations on his powers and faculties,—a principle which is founded as well on sound policy as medical experience.

The particulars of this enquiry were these: Lord Banbury died at the age of eighty-five, having been married for twenty-one years, without issue. Lord and Lady Banbury had both lived at the house of Lord Vaux, with whom it was very generally understood her Ladyship was on criminally intimate terms. After the death of his Lordship, the peerage was claimed by a person calling himself the son of Lord Banbury. The evidence against him was, that his Lordship never knew the existence of such a person as the claimant, who had always, up to the time of his claim, been known by another name. Indeed it was alleged that he was the son of her Ladyship by Lord Vaux during her husband's life. His claim was dismissed, not upon the ground of the alleged impotency of the father, on account of his great age,—for that, we

(*a*) We do not intend to go into detail on these subjects, and, therefore, the reader is referred, for more elaborate notices of them, to the writings of Beck, Taylor, and Guy, already quoted.

have seen, is not tenable in law,—but on account of the concealment of the claimant's birth, which left no reasonable doubt that her Ladyship's adultery was the cause of it.

(b). Impotence or sterility in the wife :—both divided into curable and incurable.

Impotence  
or sterility  
in the  
wife.

The question of sterility can never be contested apart from that of impotence.

The succeeding subjects, though not perhaps connected with the question of legitimacy (*a*), may, however, be conveniently noticed in this place, before bringing the present chapter to a conclusion.

VI. The first is the subject of paternity. To establish the fact of fathership, evidence of likeness is frequently admitted, for the purpose of corroboration merely ; but, of course, it does not follow, that a child is not his reputed father's, simply because he has not the least resemblance or general bearing to him. Such proof was admitted in the *Townsend Peerage Case* (*b*), and also in the *Douglas Peerage Case* (*c*). In the latter inquiry, Lord Mansfield made these remarks : “ I have always

Paternity.

(*a*) A curious and very obscure question may, peradventure, occur in cases of contested legitimacy, and it is, whether *superfatation* be possible. *Superfatation* means the conception of a second child, during the gestation of one already conceived, so that the two children may be born at the same or at different times. This phenomenon is generally thought by the faculty to be impossible. It has been suggested, that one conception may follow another within a short period, and that twins may be the result of two distinct conceptions ; and this has been denominated *super-conception* ; but it is hardly probable, say the opponents of this doctrine, that a second conception should take place when a prior conception has already arrived at the second month. It is not uncommon in the case of twins, that one should be born prematurely, and the other go on to its full period. See further on this subject, Beck's Med. Jurisp. 158 ; Taylor's Med. Jurisp., c. 50 ; and Guy's Forensic Med., 87.

(*b*) Decided in the House of Lords in 1843.

(*c*) 2 Coll. Jurid. 386.

considered likeness as an argument of a child being the son of a parent, and the rather, as the distinction between individuals in the human species is more discernable than between other animals. A man may survey 10,000 people before he sees two faces exactly alike; and in an army of a 100,000 men, every man may be known from another. If there should be a likeness of feature, there may be a difference in the voice, gesture, or other characters; whereas a family likeness runs generally through all of these; for in everything there is a resemblance, as of feature, voice, attitude, and action."

Questions of paternity are involved in cases of affiliation, whereby the responsibilities of a father are sought to be attached to a man; and also in the rare occurrence of a widow, who marries again so soon after the decease of her prior husband, and has a child within such a period, as to raise the uncertainty, which of her two husbands is the real father. This question is to be decided by a jury, the circumstances of the particular case, and not the child's choice, (as Lord Coke and Sir William Blackstone assert) ruling the decision (*a*).

Our law contains no provision against these precipitate marriages, leaving their propriety to the delicacy of the parties themselves, and the advice of their friends (*b*)

Survivor-  
ship.

VIII. The presumption of survivorship between mother and child, where they both die during delivery, is in favour of the mother. In such a melancholy case, presumption is

(*a*) See Butler's edition of Coke, § 188, and the Notes, and Brooke's Abridgment, tit. "Bastardy," § 18.

(*b*) The old Saxon and Danish laws forbid a widow marrying again until after the expiration of twelve months from her previous husband's death; *Laws of Ethelred*, A. D. 1008; and *Laws of Canute*, c. 71.

usually rendered unnecessary by the direct testimony of those present at the time of the calamity (*a*).

VIII. The sex of a child who lives but a short time after birth, is sometimes very material to the interests of its parents: connected with this point, the science of teratology is sometimes applicable. In the case of doubtful sex, the child will be legally treated as a male or female, according to the predominance of either sex, and should be baptised and brought up accordingly. If, however, the production have not the human shape externally, it cannot be an heir, neither will it possess any inheritable blood. It may be remarked, that Hermaphroditism, in the ordinary acceptation of the term, is a vulgar error; for empiric science has shown that it is physiologically impossible (*b*).

IX. We will now address ourselves to the statutory regulations for the registry of births and deaths.

Registra-  
tion of  
births and  
deaths.

Since 1837 an improved system of registering births and deaths has been established, whereby the means of proving these facts are much simplified and better secured. Prior to the 6 & 7 Wm. IV., c. 86, there did not exist in this country any authorized legal registry of the date and place of births and deaths; for the church-registers only record the simple fact of a baptism or a burial, and cannot, therefore, be evidence of these important circumstances. This statute made the following regulations as to the registration of births (*c*):—

(*a*) Guy's Forensic Medicine, 309; Beck's Medical Jurisp. 387.

(*b*) Beck's Medical Jurisprudence, 75; Taylor's Medical Jurisp. 529; Guy's For. Med. 34.

(*c*) See ss. 19, 20, 22, 23, 24, 28, 41.



The father or mother of any child born, or the occupier of the house where the birth may happen, or the overseers of the poor, in case any new-born child shall be exposed, or the master or keeper of every gaol, prison, or house of correction, or workhouse, hospital, or lunatic asylum, or public or charitable institution, where a birth may occur, should, within forty-two days next after the day of such birth, give notice of it to the registrar (*a*) of the district, either voluntarily or at such registrar's request, who thereupon enters the particulars of the birth in the proper books, without the payment of any fee, the person affording the information signing his name, description, and place of abode in the register. The refusal to give this information is an indictable offence (*b*).

If a birth be not registered within forty-two days, any person present at the birth, or the father or mother may, within six calendar months next after the birth, make a

(*a*) On the questions, whether it be the duty of a registrar of births and deaths to go to any house where a death may have occurred within his district, upon receiving information thereof, and being requested so to do, in order to register the said death, or whether he has the power of requiring some person who was present at the death to come to him for that purpose?—and whether a registrar is authorized to fix certain hours for the performance of his duties, and can refuse to register any death, or to deliver a certificate that he has done so to the undertaker, or other person, having charge of the funeral, at any hour of the day at which he may be applied to? the registrar-general answered, that it is the duty of the registrar to go to any house within his district, in which a *birth or death* has occurred, and there register the same, on the information of some qualified informant, but he is not authorized to summon parties to his own residence, or any other specified place for the purpose, nor to fix certain hours for the performance of his duties. If applied to, he is bound to register a death at all reasonable times in the day-time, and to give a certificate of registry thereof immediately afterwards, if required, pursuant to section 27 of the Registration Act. The registrars are uniformly very obliging and respectable officials.

(*b*) *Reg. v. Price*, 4 Jur. 291.

solemn declaration of the requisite particulars, whereupon the registrar, in the presence of the superintendent registrar, registers the birth, and the superintendent registrar, before whom the declaration is made, signs the entry of the birth, as well as the register.

The fee for registry is, in this case, seven shillings and sixpence. A wilful disobedience to this regulation will incur a penalty of 50*l.*

A birth cannot be registered after six calendar months, except the child be born at sea, and any attempt to register it will incur a penalty of 50*l.*

If a birth be registered either within forty-two days or six calendar months, and another name be given to the child at its baptism, within six calendar months of registration, then there should be delivered either to the registrar, or the superintendent registrar, (in whose custody the registrar of the birth may happen to be), within seven days of the baptism, a certificate of baptism signed by the officiating minister, (for which he is to have one shilling) ; upon which any addition will be made to the registry accordingly, on payment of one shilling, and the same is duly transmitted through the post office to the registrar-general (*a*).

When a child is baptized *before* its registration, the registrar does not require a certificate of the christening, for registration and baptism are perfectly distinct transactions ; a certificate is only necessary, when the child is baptized *after* registration, and the child has been registered by a different name, or the name has been left in blank, the parents desiring that the baptismal name may be afterwards inserted in the register, so that the church entry and the register may agree.

(*a*) This officer publishes weekly reports of births, deaths, and marriages, in the public newspapers, which afford valuable statistical information.

With regard to the registration of deaths (*b*), it may be observed, that a death can be registered at any time, without the payment of any fee; but, in practice, it is registered before burial, and a certificate of registry obtained for the minister officiating at the funeral.

The occupier of a house, or the master or keeper of every gaol, &c., in which a death occurs may, within five days of the occurrence, give notice of it to the registrar: when a corpse is found exposed, the coroner gives the notice.

The particulars of the death, such as the cause of death, together with the sex, age, and calling of the deceased, must be given, on request, to the registrar, within eight days after the death, by some person present at the death, *or* by an attendant, *or*, in case of the death, illness, inability, or default of such persons, by the occupier of the house, *or* if the occupier be the dead person, by some other inmate, who must sign his name, adding his description and place of abode, in the register. Persons wilfully making false statements, incur the penalty of perjury.

After the registration, the registrar must, without fee or reward, deliver a certificate of it forthwith to the undertaker, or person, having charge of the funeral; which certificate must be delivered to the minister officiating at the funeral. If no certificate be delivered, the officiating minister must, within seven days of the funeral, give notice of it to the registrar, on pain of forfeiting ten pounds. The coroner may order a burial before the registry of the death, which order he delivers to the undertaker.

If a child of an English parent be born at sea, on

(*a*) See 6 & 7 W. IV., c. 86, §§ 19, 25, 27, 28, and 41.

board of a British vessel, the commanding officer must forthwith make a minute of the several particulars of it, so far as known, with the name of the vessel; and on arriving at home, or by any other sooner opportunity, he must send a certificate of such minute, through the post office, to the registrar general, who will duly enter the same in the "Marine Register Book." The same regulation must be observed touching the death of any person at sea in a British vessel (*a*).

All persons, having the custody of register-books, shall allow them to be searched at all reasonable times, and give a proper certificate of any entry in the same. The following fees are payable:—For every search extending over a lesser period than a year, one shilling, and sixpence for every additional year, and two shillings and sixpence for a single certificate.

Every person is entitled to search the indexes, (which are made up from the quarterly returns of the registrars and superintendent registrars, by the registrar-general, and kept at Somerset House), between the hours of ten in the morning and four in the afternoon of every day, except Sundays, Christmas-day, and Good-Friday, and to obtain a certificate of any entry, paying for a general search twenty shillings, for a particular search one shilling, and for a certified copy two shillings and sixpence.

Any person may, at all reasonable hours, search the registers in the custody of the superintendent registrar, and have a certificate of any entry in them, upon payment of five shillings for a general, and one shilling for a particular, search, and two shillings and six pence for a certificate.

(*a*) See 6 & 7 W. IV., c. 86, ss. 21 and 26, and 7 Will. IV. and 1 Vict., c. 22, s. 6.

The non-parochial registers lodged with the registrar-general, may be searched during the same hours as the other registers in his custody, upon payment of one shilling for every search, and two shillings and sixpence for every certified extract (*a*).

Thus, searches have been rendered easier and surer. Instead of now searching the registers of churches and chapels, many of which have been disgracefully mutilated and destroyed, a search will be instituted for any registry made more than three months ago, at the superintendent registrar's office, where can be seen the register-books of the whole district. Should the district be unknown, a search can be instituted at the office of the registrar-general at Somerset House, where can be obtained the necessary information concerning any birth or death in England or Wales.

Accidental errors, in form or substance, may be corrected, by entry in the margin by the registrar, within one calendar month of the discovery, in the presence of the parents of the child, whose birth may have been erroneously registered; or of two persons attending upon a person whose death may have been incorrectly registered; or in case of the death of these parties, then in the presence of the superintendent registrar and two other credible witnesses, who attest the same.

Certified copies of registers are exempt from stamp duties, and if given by the registrar-general, they must bear the seal of office, when they become evidence of the particulars contained in them (*b*), the identity of the person named being proved or corroborated by other circumstances.

(*a*) See 6 & 7 W. 4, c. 86, §§ 34, 35, and 36, and 3 & 4 Vict., c. 92, § 5.

(*b*) 6 & 7 W. 4, c. 86, §§ 13 and 38, and 7 W. 4 and 1 V., c. 22, § 5.

CHAPTER III.

THE LAW RELATING TO NATURAL CHILDREN.

<p>I. Descriptions of natural children.</p> <p>II. Hard principle of the common law.</p> <p>III. Maintenance:—</p> <p>(a) Mode of obtaining an order of filiation;</p> <p>(b) The order;</p> <p>(c) Adjournments,—time within which to apply for order;</p> <p>(d) Appeal;</p> <p>(e) To whom the money under an order is payable;</p>	<p>(f) Parish officers are in no wise to interfere;</p> <p>(g) Their misconduct punished;</p> <p>(h) Punishment for neglect or desertion;</p> <p>(i) Proceedings when the mother is dead or incapacitated;</p> <p>(j) Maintenance by the mother;</p> <p>(k) Her husband's liability;</p> <p>(l) The child's settlement.</p> <p>IV. Disabilities of a natural child.</p> <p>V. Marriage of a natural child.</p> <p>VI. Its custody and guardianship.</p>
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I. A NATURAL or illegitimate child is one who comes under any of the five following categories:—(1) a child born of a woman, not actually married at the time of its birth; or, (2) of a wife under such circumstances that prove her husband cannot be its father, (which we have treated of in the previous chapter); or, (3) of a husband and wife, who have since been divorced *à vinculo matrimonii*, which illegitimizes their previously lawful issue; or, (4) of a widow, so long after her husband's decease, as to render it absolutely impossible for it to be a child begotten by him; or, (5) of a husband or wife, who has married during the life of his or her former wife or husband, for the second marriage is utterly void (a).

Descriptions of natural children.

Any person coming into the world under any of these circumstances, is not a legitimate child, but is, in the coarse denomination of the law, a bastard.

(a) See, as to the crime of bigamy, Book III., c. V., *post*.

Hard principle of the common law:

II. There exists a very ancient principle of the Common Law, which is diametrically opposite to the more benign doctrine of the civil law, that obtains in Scotland. The continuance of this ancient principle we owe to the much-lauded, but blindly obstinate declaration, of the warrior-barons in the reign of the third Henry,—a declaration which strongly contrasts with the present rife practice of attacking and overturning the hoary institutions of our ancestors, and is, even in these degenerate and disrespectful times, treated with a veneration strange and capricious. The principle is, that a man and woman having given birth to children, shall not, by their subsequent marriage, legitimize and make them legally recognised issue (*b*) ; but the civil law affording to parents an opportunity, so long as they live, of doing justice to their unoffending offspring, and amending their fault, declares that the subsequently legal-marriage of parents shall give to their previously-born issue, the character, rights, and privileges of legitimate children,—a doctrine in perfect accordance with natural justice and wholesome reparation. But the principle of our Common Law, denying to parents the opportunity of redressing a wrong, and thus visiting, in spite of everything, the sins of the fathers upon the children unto the third and fourth generations, has been extolled by Sir Wm. Blackstone, who was notoriously an indiscriminating eulogist of all our laws,—good or bad, imperfect or cruel,—and has been, to the surprise of all reflecting persons, blindly repeated, parrot-like, by the whole of the goodly fellowship of his editors and copyists. True, our law allows a man, who has begotten a child, to marry the mother before its birth, and thus render the child legitimate by

(*b*) 20 Hen. III., c. 9, called “ the Statute of Merton.”

its delivery during actual wedlock; a privilege which, while it is narrow and brief, shews that the ancient doctrine was based upon no very strict rule of morality, but rather upon a distorted and cramped idea of legal rectitude; its perpetuation being altogether and entirely attributable to our ancestors' perverse and unjustifiable inveteracy of everything emanating from Rome, whether political, religious, or jurisprudential; an inveteracy which is even now entertained with too much intemperance, and too little discrimination. Thus national hatred begets national injustice!

A special Act of Parliament legitimatizes a natural child, but this expensive proceeding has not been resorted to, but for state political purposes only.

III. The only natural obligation, which the law imposes upon the parents of natural children, is their maintenance; upon this subject the following provisions have been embodied in Acts of Parliament:—

(a) Any single (c) woman, who may be with child, or who may be delivered of a bastard-child after the 9th August, 1844, or who had been delivered of such a child within the period of *six calendar months* before that date, may, either before its birth, or at any time *within twelve* [lunar] *months* from its birth, or at any time thereafter, upon proof that the man alleged to be the father of the child has, *within* the twelve months next after the birth of such child, paid money for its maintenance, make application to any one justice of the peace acting for the

(c) An order may be made upon the putative father for maintenance of an illegitimate child born of a married woman, though this section only speaks of "any single woman." And such order is good, though it describe the woman as "wife of G. R., single woman," or, "wife of G. R." simply; and though it do not find the non-access of the husband, and



*petty sessional* division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of such child.

If, however, such application be made *before* the birth of the child, the woman must make a deposition upon oath, stating who is the father of such child, and such justice of the peace will thereupon issue his summons to the person alleged to be the father of such child, to appear at a petty session to be holden after the expiration of *six days*, at least, for the petty sessional division, city, borough, or other place in which such justice usually acts (*d*).

The justice, to whom any application is made by any such woman, *being pregnant*, will summon the man to appear at some petty session at which he usually acts, to be held on a day after the time when the said mother shall expect the child to be born, provided that if, on such day, the woman shall not have been delivered, or the justices shall be satisfied that she has been delivered at so short a period before such day that she cannot appear at the said session, it shall be lawful for the justices thereat to *adjourn the hearing* of the case until some other day, and so from time to time, *until* the child shall have been born, and the woman shall be able to attend at the said session, and it shall be lawful for the justices, at their petty session, to make an order in respect of any such application so made by

though it appoint the payment to be made till the child shall attain the age of thirteen or die, "or the said G. R. shall again live and cohabit with his said wife, the said M., or the said M. shall marry again after the decease of her said husband." *Reg. v. Collingwood*, 12 Q. B. 681. A conspiracy to affiliate a child upon a man, is an indictable offence; *Rex v. Armstrong*, 1 Vent. 304.

(*d*) 7 & 8 Vict., c. 101, § 2.

such woman, so pregnant, to a justice as aforesaid, IF she apply at such petty session *within the space of two calendar months* from the birth of the child, though more than *forty days* shall have elapsed from the time when the summons was served on the alleged father, or was left at his last place of abode (e).

(b) After the birth of such child, on the appearance of The order. the person so summoned, *or* on proof that the summons was duly served on such person, or left at his last place of abode, *six days at least before* the petty session, the justices in such petty session (f) will hear the evidence of such woman, AND such other evidence as she may produce, *and* will also hear any evidence tendered by or on behalf of the person alleged to be the father; and *if the evidence of the mother be corroborated in some material particular by other testimony, to the satisfaction of the said justices*, they may adjudge the man to be the putative father of such child; and may also, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment *to the mother* of the child, *or to any person* who may be *appointed* to have the custody of such child under the provisions of this act, *of a sum of money weekly and of the costs* incurred in obtaining such order, including, if they think proper, ten shillings for the midwife, and ten shillings towards the funeral expenses of the child, provided it have died before the making of such order; and if the application be made *before* the birth of the child, or *within two calendar months after its birth*, such weekly sum may, if the said justices think fit, be calculated from the birth of the child,

(e) 8 Vict., c. 10, § 4.

(f) One magistrate in a metropolitan police court can act; 8 Vict., c. 10, § 9. •

at a rate not exceeding *five shillings per week* for the *first six weeks* after its birth; and in other cases such sum shall not exceed *two shillings and sixpence per week*, from the time of the making of the application; and if at any time after the expiration of *one calendar month* from the making of such order, it be made to appear to any one justice, upon oath or affirmation, that any sum to be paid in pursuance of such order, has not been paid, such justice may, by warrant, cause such putative father to be brought before any two justices, (or one metropolitan magistrate); and in case such putative father neglect or refuse to make payment of the sums due from him under such order, or since any commitment for disobedience to such order as in this act is provided, together with the costs attending such warrant, apprehension, and bringing up of such putative father, such two justices, (or one magistrate,) may, by warrant, direct the sum so appearing to be due, together with such costs, to be recovered by distress and sale of the goods and chattels of such putative father, and may order such putative father to be detained and kept in safe custody until return can be conveniently made to such warrant of distress, unless he give sufficient security, by way of recognizance or otherwise, to the satisfaction of such justices, (or magistrate), for his appearance before two justices, (or one metropolitan magistrate), on the day which may be appointed for the return of such warrant of distress, such day not being *more than seven days* from the time of taking any such security; but if, upon the return of such warrant, or if, by the admission of such putative father, it appear that no sufficient distress can be had, then any such two justices, (or one magistrate), may, if they or he see fit, by warrant, cause such putative to be committed to the common gaol or house of correction of the county, city, borough, or

place of their or his jurisdiction, there to remain without bail or mainprize for any term *not exceeding three calendar months*, unless such sum and costs, and all reasonable charges attending the said distress, together with the costs and charges attending the commitment and conveying to gaol or to the house of correction, and of the persons employed to convey him thither, be sooner paid and satisfied: *Provided always*, that if the woman have allowed the weekly payment to be in arrear for *more than thirteen successive weeks*, without application to a justice, the man shall not be called upon to pay *more than the amount due for thirteen weeks, in discharge of the whole debt*, and no warrant of distress shall be issued for more than the amount of arrears for thirteen weeks' payment, in discharge of the whole arrears\* or debt (*f*).

Both the woman-complainant and the man-defendant may retain a counsel or an attorney, to conduct the case (*g*).

(*c*) The hearing of the case may be adjourned (*h*) by the court, but the application for the order of affiliation must be made *within forty days from the service of the summons, after the birth of the child, on the person alleged to be its father.* Adjournments,—time within which to apply for order.

(*d*) If *within twenty-four hours* after the adjudication and making of any order on the putative father, such putative father give notice of appeal (*i*) to the mother of the child, *and also within seven days* give sufficient security, by recognizance or otherwise, for the payment of costs, to the satisfaction of some one justice of the peace; such putative father may appeal to the general Appeal.

(*f*) 7 & 8 Vict., c. 101, § 3; and see 8 Vict., c. 10, § 8; and as to the power of justices to summon witnesses, 2 & 3 Vict., c. 85, § 2.

(*g*) 8 Vict., c. 10, § 7.

(*h*) *Rex v. Heath*, 5 Ad. & E. 343.

(*i*) A verbal notice is sufficient; *Reg. v. (Justices) Huntingdonshire*, 4 New Sess. Cas. 101.

quarter sessions of the peace, to be holden *after the period of fourteen days* next after the making of the said order, for the county, city, borough, or place for which such petty session may have been held; and the justices in such quarter sessions assembled, or the recorder, as the case may be, will thereupon hear and determine such appeal, and will order such costs to be paid by either party, as to them or him may seem fit (*j*).

The condition of any such recognizance must be for the appearance of the putative father, at such general quarter session of the peace as is required by the act, and his trial of the appeal thereat, and the payment of such costs as he shall be then and there ordered to pay; and in respect of any order to be made after the 8th May, 1845, the party entering into any such recognizance must forthwith give or send, a notice in writing of his having so entered into such recognizance, *to* the woman in whose favour the said order shall have been made; and, unless he enter into the recognizance before one of the justices who shall have made the order, also *to* one at least of such justices, and in default of his giving or sending such notices, the appeal will not be allowed, provided that the sending such notice by the post shall be taken to be sufficient (*k*).

(*j*) 7 & 8 Vict., c. 101, § 4.

(*k*) 8 Vict., c. 10, § 3. Upon an appeal against an order in bastardy being called for hearing, and proof required of the appellant's having complied with the requisitions of the 8 & 9 Vict., c. 10, s. 3, it appeared that the necessary recognizance had been entered into by the appellant, and notice thereof sent, by the post, to the mother of the bastard-child, addressed to the place at which she resided when the order was made; but on the part of the respondents it was proved, that when the notice was so sent by the post, the mother was dead. The sessions having refused to hear the appeal, on the ground that the statute had not been sufficiently complied with, in respect of the sending such notice: Held by the Queen's

If at any time *before* the hearing of the appeal, such putative father shall give notice in writing of his abandonment of the appeal *to* the mother of the child in whose favor the order shall have been made, and *to* the justice before whom his recognizance shall have been taken, and shall pay or tender *to* the said mother all sums then due under the said order, and such costs and expenses as she shall have incurred by reason of such notice of appeal, the said recognizance so entered into by him shall not be estreated, nor in any manner put in force, or otherwise proceeded with (*l*).

On the trial of an appeal, the justices, or the recorder, will hear the evidence of the mother, and such other evidence as she may produce, and any evidence tendered on behalf of the appellant, and proceed to hear and determine the appeal in other respects, according to law, but will not confirm the order so appealed against, *unless* the evidence of the mother shall have been corroborated in some material particular by other testimony, to the satisfaction of the justices in quarter sessions assembled, or the recorder. (*m*)

(e) All money payable under any order shall be payable *to the mother* of the child so long as she lives and is of sound mind, and is not in any gaol or prison, or under sentence of transportation; and after her death, or whilst she is of unsound mind, or confined in any gaol or prison, or under sentence of transportation, any two justices (or one metropolitan magistrate), may, by order

To whom  
the money  
under an  
order is  
payable;

Bench, that the appellant was to be excused for the default occasioned by the death, the duty of sending the notice being one cast upon him by law, and its performance becoming impossible by the act of God, and, therefore, that the sessions were bound to hear the appeal; *Reg. v. (Justices) Leicestershire*, 4 New Sess. Cas. 124.

(*l*) Section 5.

(*m*) Section 6.

duly signed and sealed, from time to time appoint some person who, with his own consent, shall have the custody of such child, so long as such child is not chargeable to any parish or union; and the appointment of such person may be révoked, and another person appointed in his stead; and every person so appointed to have the custody of such child shall, so long as such child is not chargeable to any parish or union, be empowered to make application for the recovering of all payments becoming due under the order of the court of petty session, in the same manner as the mother of such child might have done; and the clerk to the justices making any order on the putative father, or appointing any person to have the custody of such child, shall, as soon as may be, send by post or otherwise, a duplicate of such order or appointment, signed by such clerk, to the clerk to the guardians of the union or parish, in which the mother of such child resided, at the time of making such order or appointment. But it is provided that no order for the maintenance or support of any such child, made in pursuance of this act (7 & 8 Vict., c. 101) shall, except for the purpose of recovering money previously due under such order, be of any force or validity after the child in respect of whom it was made, has attained the age of *thirteen years*, or after the marriage of the mother of such child, or after the death of such child (*n*).

Parish officers are in nowise to interfere.

(f) It shall *not* be lawful for any justice of the peace to appoint any officer of any parish or union to have the custody of any such child, or for any officer of any parish or union, clerk of justices, or constable, to receive any money in respect of any such child, under an order of petty session, or as such officer, to conduct any applica-

(*n*) Section 5.

tion to make or enforce such order, or in any way to interfere, as such officer, in causing such application to be made, or in procuring evidence in support of such application, *under a penalty of forty shillings*, to be levied on proper conviction (*o*).

(g) If any officer of a union, parish, or place endeavour to induce any person to contract a marriage by threat or promise, respecting any application to be made, or any order to be enforced, as to the maintenance of any such child, such officer will be guilty of a misdemeanor; and every person having the proper custody of the child, who may misapply monies paid by the putative father for its support, or may withhold proper nourishment from such child, or otherwise abuse and maltreat it, will, on conviction, forfeit and pay a sum not exceeding ten pounds (*p*).

Their misconduct punished;

(h) Every woman neglecting to maintain her natural child, being able, wholly or in part, so to do, whereby such child becomes chargeable to any parish or union, is punishable as an idle and disorderly person, under 5 Geo. IV., c. 83, and every woman so neglecting to maintain such child, after having been once before convicted of such offence, and every woman deserting such child, whereby it becomes chargeable to any parish or union, is punishable as a rogue and vagabond under that act (*q*).

Punishment for neglect or desertion;

(i) After the death of such mother, or if such mother be incapacitated as just stated (*r*), so often as any child, for whose maintenance such order of petty sessions has been made, becomes chargeable to any parish or union, by the neglect of the putative father to make the pay-

Proceedings when the mother is dead or incapacitated;

(*o*) Section 7.

(*p*) Section 8:

(*q*) Section 6.

(*r*) *Ante*, p. 47.



ments ordered, then any board of guardians of any union or parish, or if there be no such board of guardians, the overseers of any parish or place, may make such application for the enforcement of the order as might have been made by the mother of such child, if alive; but all payments for the maintenance of such child, made in pursuance of such application, shall be made to some person to be from time to time appointed by the justices as already provided, and on condition that such child shall cease to be chargeable to such parish or union (*t*).

Maintenance by the mother;

(j) Such mother, so long as she shall be unmarried or a widow, is bound to maintain such child as a part of her family, until such child attain the age of sixteen; and all relief granted to such child, while under the age of sixteen, shall be considered as granted to such mother. But this liability will cease on the marriage of such child, if a female (*u*).

A mother refusing to maintain such her offspring, is liable to be punished by a month's hard labour in the House of Correction, pursuant to 5 Geo. IV., c. 83, § 3.

Where the reputed father of a natural child promises to pay it's mother an annuity, in consideration of her maintaining such child, this consideration is a sufficient inducement to validate the annuity, and he will be liable to be sued for it, if not regularly paid (*v*).

Her husband's liability;

(k) Every man, marrying a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, is liable

(*t*) Section 7.

(*u*) 4 & 5 W. IV., c. 76, § 71.

(*v*) *Jennings v. Brown*, 9 M. & W. 496. The reputed father of an illegitimate child, wrote to the mother thus:—"As I have always promised that you and your child should never want, I will allow you 100*l.* a-year, for your life and little Gunna's, to be paid quarterly into the bank wherever you live, &c. Of course, if I hear of your behaving ill, or bringing up the child improperly, I will stop the allowance to you." Held, by

to maintain (*v*) such child or children as part of his family, and is chargeable with all relief, or the cost price thereof, granted to or on account of such child or children, *until* such child or children shall respectively attain the age of sixteen, *or until* the death of the mother of such child or children; and such child or children shall, for the purposes of this act, be deemed a part of such husband's family accordingly (*w*).

(1) Every such child shall have and follow the settlement of its mother, *until* it shall attain the age of sixteen, *or* shall acquire a settlement in its own right (*x*). The child's settlement.

Should the mother not have any parish settlement, and remain unmarried, the place of the child's birth will be it's settlement, unless it be born in any pauper or criminal lunatic asylum, or in any prison, lying-in-hospital, or house of industry, since the parishes in which such institutions are situated are protected from such children being thrown upon them (*y*); under these circumstances, if the mother have no settlement, the child is

Wilde, C. J. and Maule, J. (*diss.*, Williams, J.), that the annuity of 100*l.* was promised in respect of an executory consideration,—the future bringing up of the child properly,—which was sufficient to support an action, and that the promisee having executed her part of the contract, the promise to pay was binding on the defendant (*Hicks v. Gregory*, 19 L. J., C. P. 81).

(*v*) 4 & 5 W. IV., c. 76, § 57.

(*w*) Perhaps in accordance with the maxim. "*Qui sentit commodum sentire debet et onus.*"

(*x*) 4 & 5 W. IV., c. 76, § 71. A doubt has been started, whether there is any cessation of liability in this case, when the bastard, if a girl, marries before sixteen. The birth-place of an illegitimate child, born on or before the 14th August, 1834, is its place of settlement; but if it have been born in any extra-parochial place, it has no place of settlement until acquired in its own right.

(*y*) 13 Geo. III., c. 82; 51 Geo. III., c. 79, § 7, and 54 Geo. III., c. 170, §§ 2 & 3.

without even a birth settlement, yet it cannot be taken from its mother during nurture.

Disabilities of a natural child.

IV. The rights of a natural child are *original or acquired*, and not *derivative or inherited*. For civil purposes it is held to be the child of nobody (*a*), and has no legal surname until one is acquired by reputation or baptism. It has no relations, but can be the first of a family, which must, however, spring from it by marriage. Such a child is indeed the *terminus à quo* his own lawful descendants or lineal heirs date their extraction,—the founder of a new race,—the beginner of a future progeny. The only incapacity under which an illegitimate child labours as such, is that it can neither be heir-at-law (*b*) nor next of

(*a*) *Qui ex damnato coitu nascuntur inter liberos non computentur.*  
Co. Litt. 8 a.

(*b*) An heir-at-law, in the legal understanding of the common law, implies that he is *ex nuptiis procreatus*, and so *hæres legitimus est quem nuptiæ demonstrant*. There is indeed one instance in which our law has shewn an illegitimate child a little regard, and that is in the case of *bastard eignè* and *mulier puisné*. This happens when a man has a natural son, and afterwards marries the mother, and then has by her a legitimate son, who, in the language of the law, is called a *mulier*, or, as Glanville expresses it in his Latin, *filius mulieratus*, the woman before marriage being *concupina*, and afterwards *mulier*. Now here, the elder son is an illegitimate, or *bastard eignè*; and the younger son is a legitimate, or *mulier puisné*. If then, the father die, and the *bastard eignè* enter upon his land, and enjoy it to his death, and die seised or possessed thereof, whereby the inheritance descends to his lawful issue; in this case the *mulier puisné*, and all other heirs (though minors, *femmes covert*, or under any incapacity whatsoever), are totally barred of their right, and this, (1), as a punishment on the *mulier* for his negligence in not entering during his natural brother's life, and evicting him; (2), because the law will not suffer a man to be bastardized after his death, who entered as heir and died seised, and so passed for legitimate in his lifetime; (3), because the canon law (following the civil) did allow such *bastard eignè* to be legitimate on the subsequent marriage of his parents, and, therefore

kin of any person, nor can it have collateral heirs, but only lineal descendants, *i. e.* legitimate children; so that if an illegitimate child purchase property and die intestate, such property will go to the crown; but upon a petition, the crown will generally waive this right in favor of those, who would have been his near relations, had he been legitimate.

The law takes notice of a bastard's natural parents and

the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his lawful issue, they would not unravel the matter, and suffer his estate to be shaken. But this indulgence was shewn to no other kind of bastard; for, if the mother were never married to the father, such bastard could have no colorable title at all; \*2 Bla. Com. 243.

As to *bastard eigné* and *mulier puisné*, we may further observe, that in order to bar the *mulier* and his issue, there must not only be a dying seised (either by a natural or civil death, and that as to lands in fee simple) by the bastard, but also a descent-cast, and, consequently, where these two requisites do not concur, the *mulier* or his issue may enter; and, therefore, if the bastard die seised without issue, and the lord enter by escheat, the *mulier* is not barred, there being no descent. But if the bastard had entered, and the *mulier* died without issue, but leaving his wife *enciente*, and then the bastard had issue and died seised, after whose death the posthumous issue of the *mulier* was born, his right was barred, and he was not permitted to enter; as there were both a dying seised and a descent-cast, and, consequently, the right of the bastard established. But, had the bastard died seised without issue, but leaving his wife *enciente*, and then the *mulier* had entered, and afterwards the son of the bastard had been born, such son could not have entered on the *mulier*, and dispossessed him, there being no descent-cast when the *mulier* entered. For though the law gave the estate to the issue of the bastard, when both these requisites concurred, as a punishment for the *mulier's* negligence, &c, yet, when both these requisites did *not* concur, the issue of the bastard had no title at all; besides, the descent must be immediate on the father's death, and this could not take place when the heir was then but *in posse*; Watk. on Descents, c. v., p. 219; Co. Litt. 224. It would appear that the effect of this peculiar descent-cast is now abolished by 3 & 4 W. IV., c. 27, § 39.

relations for two purposes only ; one, to prevent any incestuous marriage with those who are morally within the inhibited degrees of kindred and affinity (*d*); the other, that where, such a child has deposited money in a savings' bank, and afterwards dies intestate without wife or children, such money is to be paid to those persons who would have been legally entitled to it, had the depositor been legitimate (*e*).

Marriage  
of a natu-  
ral child.

V. It is not at all necessary, that the consent of the father or mother be given to validate the marriage of a natural-born infant, and such consent will have no efficacy whatever, even if it were given ; but the Court of Chancery may appoint a guardian to consent thereto, or a license to marry can be obtained upon oath that there is not any person entitled to give such consent (*f*).

Its custody

VI. The father of an illegitimate child has no right to it's

(*d*) *Hains v. Jessell*, S. C. Comb. 356 ; 5 Mod. 168, Com. 2. A day was appointed to hear counsel, why a prohibition should not be granted to the Spiritual Court of Worcester, to stay a suit against Hains for marrying with the bastard daughter of his sister. And Sir *Bartholomew Shower*, for the prohibition, argued, that it was not prohibited by any law, for there was neither affinity nor consanguinity, for a bastard is *nullius filius* ; Co. Litt. 123 a, 157 a ; Co. Litt. 123 a, and 13th edit., n. 8 ; 2 Roll. Abr. 785. It is no consideration to raise a use ; 41 *Ed. III.* 19 ; *Old Bendl.* 102 ; *Dobbius è contra* that the original is, *ad proximam sanguinis non accedat*, that the *Jews* made no difference as to marriage between bastards and others ; *Seld. de jure, Hebr.* l. 5, c. 10, col. 591 ; *Pussend.* l. 6, c. 1, par. 32 ; *Zepper.* l. 4, c. 19, p. 502. It seemed to the Court, that no prohibition should be granted ; for though bastards are deprived of privileges by particular laws, the same reason prohibits them from marrying as others. And it has been always held accordingly, especially where it is the child of a female relation. And by Sir *Bartholomew Shower's* rule, *Hains* might marry his own bastard, which doubtless could not be allowed. 1 *Ld. Raym.* 68.

(*e*) 7 & 8 Vic. c. 83, § 11.

(*f*) 4 Geo. IV., c. 76, § 14, and 6 & 7 W. IV., c. 5, § 12.

custody within the age of nurture, for this privilege and guardianship belongs to the mother, who is, in fact, the only certain parent, and will be secured to her, even though the father may be better able to educate it (*b*).

There cannot be any legal guardian of a natural child,

(*g*) *Ex parte Ann Knee*, C. P. 1804; 1 N. R. 148. This was an application for an *habeas corpus*, to bring up the body of an infant illegitimate child, in order to restore it to the mother. The child had been placed, by consent of the father and mother, under the care of a nurse; and it was afterwards removed by the father to another woman; the father then went abroad, having intrusted a Mr. Brandon, a friend, with the superintendence of the child; Mr. Brandon wished to have the child placed with some person, where the mother could have access to the child, and under those circumstances he was willing to pay for its maintenance, but the mother insisted upon having it delivered up to her. The child being brought into court, and the mother being present, cause was shewn, and it was urged, that it would be for the benefit of the child that it should be placed with some person, whom the father might approve of, as the father, from his situation in life, was better able to maintain the child than the mother. For the mother it was insisted, that she had the right to the custody of her own child (*King v. De Manneville*, 5 East, 221; *King v. Moseley*, 5 East, 224, note; and *King v. Soper*, 4 T.R. 278). Sir James Mansfield, C. J. said, "There is no affidavit before the court to show any ground of apprehension that the child would incur any danger from being left with the mother. It is not unlikely, indeed, that by granting this application, we may be doing a great prejudice to the child; but still the mother is entitled to the child, if she insist upon it. The application in this case may have arisen from pure affection, and the mother may be disposed to take care of the child, but it is not probable that it will be so advantageously brought up under her care, as under the care of some person whom the father approves of. It often happens, that the mother insists upon the custody of the child, not so much out of regard to the child itself, as with the view to make the father pay a sum of money towards its maintenance and education. Nevertheless, the mother must have the child, unless some ground be laid by affidavit to prevent it. Let the child be delivered to the mother." The other judges, *Heath*, *Rooke*, and *Chambre*, being of the same opinion, the child was delivered to the mother in court. See 2 Saund. 84 (*a*); and Chambers on Infancy, pp. 58 and 59. and the cases there quoted.

for no right of appointing one is possessed either by the putative father or the mother, but the Court of Chancery will appoint a guardian, and administer the estate, as in the case of legitimate children (*h*); and, in confirming such an appointment, it will be especially considered, what intercourse could be reasonably provided between the child and its mother (*i*). The Court will generally adopt the person as guardian who has been nominated by the father, unless some valid objection be substantiated against his qualification. The mother is frequently appointed guardian to her illegitimate children.

A natural child, after acquiring the reputation of being the child of his or her father, may do all legal acts, and acquire all legal rights, under the description of child of the reputed father (*j*).

Excepting these disabilities, a natural child has the same rights, privileges, remedies and immunities, as any other member of our regal commonwealth of England; and if this were not so, it would be an injustice indeed!

(*h*) *Wallis v. Campbell*, 3 Ves. 517.

(*i*) *Courtois v. Vincent*, Jac. 268.

(*j*) *Williamson v. Adam*, 2 Ves. & B. 422, 452, 466.

## CHAPTER IV.

### THE DOCTRINES OF EQUITY RELATING TO INFANTS.

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| <p>I. <i>Custody</i> of infants.</p> <p>II. Mode of making a ward in Chancery.</p> <p>III. Infant-ward must reside in this country.</p> <p>IV. Exceptions.</p> <p>V. Proper custodian of infants,—great power of the court.</p> <p>VI. <i>Guardianship</i>, and its kinds.</p> <p>VII. Mother's access and custody (2 &amp; 3 Vict. c. 54).</p> <p>VIII. When mother will be appointed guardian.</p> <p>IX. Formal appointment of guardians.</p> <p>X. Authority and duties of guardians.<br/><i>Education</i> of the ward—determination of the guardianship.</p> <p>XI. <i>Habeas corpus</i>.</p> <p>XII. Grounds for suspending a guardian.</p> <p>XIII. Directions of the Court.</p> <p>XIV. Modes by which the Court interferes.</p> <p>XV. Effects of certain gifts to infants.</p> <p>XVI. <i>Maintenance</i> and <i>advancement</i>.</p> <p>XVII. Rules as to maintenance.</p> <p>XVIII. When maintenance is not allowed.</p> <p>XIX. From what period it is usually given when allowed.</p> | <p>XX. When it ceases.</p> <p>XXI. Its usual amount.</p> <p>XXII. From what fund provided.</p> <p>XXIII. How enforced.</p> <p>XXIV. To whom and by whom payable.</p> <p>XXV. Rules as to advancement.</p> <p>XXVI. The <i>property</i> of infants.</p> <p>XXVII. Guardian of the estate.</p> <p>XXVIII. Non-convertibility.</p> <p>XXIX. Securing the property of infants (36 Geo. 3, c. 52; 10 &amp; 11 Vict. c. 96; 12 &amp; 13 Vict. c. 74; 13 &amp; 14 Vict. c. 60).</p> <p>XXX. Account from guardians, &amp;c.</p> <p>XXXI. Gifts to guardians.</p> <p>XXXII. Effect of infant's acquiescence.</p> <p>XXXIII. Beginning and period of the account.</p> <p>XXXIV. Modes of compelling an account.</p> <p>XXXV. Costs.</p> <p>XXXIV. Infant cannot act as a trustee.</p> <p>XXXVII. <i>Marriage</i> of infants.</p> <p>XXXVIII. Contempt of court.</p> <p>XXXIX. Settlement.</p> <p>XL. Punishment for ravishment of ward.</p> <p>XLI. Restraint of marriage.</p> <p>XLII. Infant-trustees or mortgagees.</p> <p>XLIII. Infant-suitors.</p> |
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THE Court of Chancery, which administers the peculiar law known in this country as Equity, exercises prerogative and exclusive powers over the custody, guardianship, education, maintenance, advancement, property and marriage of infants. We will give a sketch of these extensive powers :—



Custody of infants.

I. And first, as to the custody of infants.

Mode of making a ward in Chancery.

II. In order that the court may exert its authority, the infant must be made, what is rather inappropriately termed, a ward in Chancery, which is effected by filing a bill in the court on its behalf (*a*); and the infant must be entitled to property within the Court's jurisdiction, otherwise there would be a want of means for exercising any power usefully and effectually; and it would be unreasonable to expect the Court to take upon itself the maintenance of all the unportioned children in the kingdom, which would be the effect in the absence of this rule (*b*). Should an infant have no property, and yet it is advisable to obtain for it the Court's protection, the expedient adopted is for a friend to settle a small sum of money (one hundred pounds being sufficient), upon the infant in order to raise the jurisdiction of the Court, and then to file a bill for the due administration of such property, and the making of the infant a ward.

Infant ward must reside in

III. An infant, being a ward in Chancery, becomes the object of the Court's peculiar care: the Court will

(*a*) The merely filing a bill, to which the infant is a party, makes an infant a ward of court, even if it be only on the very day the act complained of, or to be guarded against, occurred, and when the infant is once a ward, any matter may then be determined on petition or motion. Chambers on Infancy, 25.

(*b*) To this rule, however, there is an exception provided by the Marriage Act (4 Geo. 4, c. 76), which empowers the Court of Chancery, in certain cases, to appoint a guardian. A guardian has, on petition, been appointed to an orphan infant, without property, to consent to her marriage; the petition being supported by the affidavit of the petitioner's brother, that the father died a widower, and that the deponent was the brother and nearest friend of the infant, and that she was not entitled to any property real or personal, and was of the age of twenty. *Re Woolcombe*, 1 Mad. 213; see *post*, Book III, c.I.

not allow it to be removed out of the realm, so as to be beyond its control and protection. If, then, it be suggested to the Court that the ward is likely to be so removed, an order will be issued, altogether prohibiting it (c); and commanding security to be given against such removal.

IV. To this rule there are these exceptions:—

- (1.) Where the infant's health absolutely requires a residence abroad (d).
- (2.) The acquirement of a better education in another country.
- (3.) A permanent official foreign residence of the parent, entitled to the custody of the ward.

The Court, under any of these circumstances, consents to the infant-ward being taken abroad upon the usual terms, that the parent or guardian become responsible

(c) Thus, in *Shaftesbury v. Hannam* (Finch, 343), upon a suggestion that the mother,—the testamentary guardian,—intended to take the infant beyond sea, she was ordered (although denying it) to enter into a recognizance in a penalty of 100*l.*, not to send or willingly permit the infant to be sent beyond sea. In *Newport v. Moore* (1 Dick. 166), where an infant was sent by his mother to Douay, in Flanders, the allowance for his maintenance was ordered to be stopped. In *De Manneville v. De Manneville* (10 Ves. 56), the infant was a ward of court, the son of an alien by an English woman, but a natural-born subject. The father had attempted to carry the infant out of the kingdom, but Lord Eklon, on the petition of the mother, made an order as a matter of course, restraining the father, and all other persons from removing the child, and from doing any act towards, or for the purpose of removing him out of the jurisdiction.

(d) In *Campbell v. Mackay*, 2 Myl. & Cr. 32, the Court remarked:—“ It cannot be said, that the court will not, in any case, permit its wards to be taken out of the country. No doubt, circumstances may arise under which it would be most inexpedient to adhere strictly to the general rule against permitting an infant ward of the court to be taken out of the jurisdiction, because cases may occur in which the health, and possibly the life of the ward may depend upon his removal to another climate; such instances are, however, if I trusted, very rare.

for the proper management of the ward ; that security be given to bring the infant home at a given time, or when ordered ; that its condition and residence be verified by affidavit when required ; and, that the infant shall not contract a marriage without the leave of the Court (*e*).

Proper cus-  
todian of  
infants—  
great power  
of the  
court.

V. The father is the lawful person entitled to the custody of his children, and the presumption is that this is the best and proper custody ; yet, if it can be shewn that cruelty or corruption is to be apprehended from the father, a counter-presumption then arises upon which the Court will act. It must be remarked, that a mother, as such, has no legal right, although she is undoubtedly entitled to reverence and respect ; and that an application to the Court by the mother to take her children out of their father's custody, in the absence of any proof of cruelty or corruption, or of any fear that the children may come into contact with vice, will not be successful (*f*).

But so solicitous is the Court that its infant-ward should be educated in sound and wholesome principles of religion and morality, and properly protected from every evil and corrupt influence, that it exercises the great and delicate power of depriving the father of his infant-ward's custody, whenever it is satisfactorily proved that the father habituates himself to drunkenness, gross immorality, or low debauchery, or professes irreligious or atheistical opinions, or treats his child cruelly or severely, or contaminates its mind or presence with blasphemous discourses, or the association of depraved

(*e*) In *Lyon v. Watson*, a mother who was going to Marsilles for her health, was allowed to take the ward, her infant child, with her, giving such security for its return as the Master should approve. Chamber's Inf. 32.

(*f*) *Re Flynn*, 2 De Gex & Sm. 457.

characters, for such unjustifiable conduct on the father's part ought justly to operate a forfeiture of his natural authority, and his natural right. The Court then places the child under the control of a suitable guardian, and watches over its proper education and training. Such a person is rather a curator than a guardian, for he takes care of the child, and protects it against prejudice during the life of the father. So wholesome is this power, when properly and discreetly exercised, that nothing needs be said as to its propriety and indispensableness (*f*).

VI. The custody of infants involves the voluminous subject of Guardianship, or temporary parentage, which Guardianship, and its kinds.

(*f*) The leading cases, amongst a host, for this power has been exercised by the court for nearly two hundred years, are, *De Manneville v. De Manneville*, 10 Ves. 59; *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 20, affirmed by the House of Lords, 2 Blish, N. S. 124; *Shelley v. Westbrook*, Jacob, 266; *Ward's Case*, 2 Phil. 786; Forsyth on Infants, 31—36; *Lyons v. Blenkin*, Jac. 262. The following is a very recent and remarkable case:—A person belonging to a sect called “the Lampeter Brethren,” married a lady, and, after cohabitation, abandoned her when she was far advanced in pregnancy. He then, with several other persons, formed a society under the name of “Agapemone,” in which there was no observance of a Sabbath, no practice of public or private worship (except only that hymns or anthems of praise were sung), no usage of prayer as intercession with the Almighty, and in which it was held that prayer was useless, as the day of grace was passed, and the day of judgment had arrived. The husband, more than four years after the abandonment of his wife, endeavoured to obtain forcible possession of their child, a son between three and four years old. The child had been made a ward of Chancery, and by his next friend presented a petition to restrain the father from interfering with him, or suing out a writ of *habeas corpus* to obtain possession of him; and the Court of Equity held that, in England, a man who holds that prayer, as entreaty and supplication to the Almighty, is no part of duty, but is superfluous,—that no day ought to be observed as the Sabbath—is to be deemed as entertaining opinions noxious to society, adverse to civilization, opposed to the usages of Christendom, contrary (as to prayer) to the express commands of the New Testament,—and is disqualified

arises at the death of the father, or when the infant is taken away from its parents.

In modern times, guardians may be said to be of five kinds. (*g*)

(1.) *Testamentary.*

By the 12 Car. II, c. 24, § 8, where any person has any child under twenty-one years old, and unmarried at

from having the guardianship of an English child, although his own; and therefore, made an order that the child should not be removed from the custody of his mother and maternal grandmother. *Thomas v. Roberts*, 14 Jur. 639; 19 L. J., Chan. 506 (V. C. Bruce).

(*g*) There are five other species of guardians recognized by our law, but which have now become obsolete or comparatively rare:—

(1) *Guardian by nature, (jure naturæ).*—To this guardianship the father has the first title, and should he not appoint one, pursuant to 12 Car. II. c. 24, then the mother, and afterwards the other ancestors, can claim it. Only an heir apparent, either male or female, can be the subject of this guardianship, which merely extends to the infant's person, and endures until majority.

(2) *Guardian in Socage, or, by the common law, (jure gentium).*—This occurs only when an infant is legally entitled in possession to socage land by descent, and is in such of the infant's next of blood, who cannot possibly become entitled to such property upon the infant's death.

There are two kinds:—(1) Guardian by right, (*tutor proprius*); and (2) Guardian by possession and claim, (*tutor alienus*).

This is a personal trust for the infant's benefit, both as to his person and estate, and cannot be devised or assigned or transmitted by succession, or forfeited by outlawry or attainder. On the guardian dying or becoming incapacitated, it devolves upon the next relation in blood, who can never become entitled to the land; he cannot be removed.

This guardianship determines when the infant, male or female, attains fourteen (or fifteen in gavelkind land). Such guardian is superseded by the father's testamentary guardian.

A guardian *per cause de ward*, exists only in socage land; it occurs where an infant in ward is guardian to another, in which case the wardship of the first infant draws after it that of the second.

(3) *Guardian for nurture* arises, when the infant has neither land nor guardian, the father or mother possessing the right, for its education and governance. It ends at fourteen, and it cannot be assigned. As to the in-

the time of his death, *the father of such child*, whether born at his decease, or *en ventre sa mère* (*h*), or whether such father be within twenty-one or of full age, may by deed executed, or by last will (*i*) in writing, executed in the presence of two witnesses, dispose of the custody and tuition of such children until they attain twenty-one years, or any lesser time, to any person in possession or remainder, other than Popish recusant convicts (*j*), which disposition shall be good against all persons claiming the custody or tuition of such children, as guardian in socage or otherwise; and such person to whom the custody of such children shall be so disposed or devised, may main-

fant's property, this guardian is very much on the same footing as a stranger.

(4) *Guardian by the election of the Infant*.—In the absence of a guardian, the infant may, after fourteen, choose one for himself. The election is frequently made before a judge in equity, or on circuit, but this is not absolutely necessary. An infant thus electing, does not supersede the power of Chancery to appoint another, if it should be considered more advantageous.

The advisable course is always to apply to the Court of Chancery to appoint a guardian.

(5) *Guardianship by appointment of the ecclesiastical court*.—The ecclesiastical courts claim the right of appointing a guardian to protect the personalty of an infant; and also to take care of the infant if there be no other guardian; but this claim seems not to be admitted, but simply their authority to appoint a guardian *ad litem*. Cham. on Inf. pp. 72 and 73.

There is no trace, in modern times, of any appointment by these Courts of a guardian of the person and estate, but the name is given to those, who are appointed administrators *durante minore etate* of one, who would be entitled, if of full age, to act. For further details, see Co. Litt. 86 *b*, with Mr. Hargrave's notes.

(*h*) *Ante*, p. 10.

(*i*) An infant father may still appoint a guardian to his children *by deed*, which has no operation during his life, and is revocable at pleasure, but not by will. See 1 Viet. c. 26, § 7; *Ex parte Earl of Ilchester*. 7 Ves. 348; *et seq.*; *Talbot v. Shrewsbury*, 4 Jur. 380.

(*j*) No conviction can now be had for this recusancy. Where a Roman

tain an action of ravishment of ward (*k*), or trespass against any, who shall wrongfully take away or detain them, and shall recover damages for the use and benefit of such children.

By § 9, persons to whom the custody of such children shall be so disposed, are to have the custody of their lands and personal estate till twenty-one, and may bring such actions as guardians in socage may do. But the act is not to alter or prejudice the custom of London, nor of any other city or town corporate, or the town of Berwick, concerning orphans, nor to operate to discharge any apprentice from his apprenticeship (*l*).

This guardianship, which supersedes all others, being a continuation of the parental authority, and a mere power or authority connected with an interest—a private office of personal trust,—is not assignable, but determines at the guardian's death. If the guardian, being an unmarried woman, afterwards marry, the office is not transferred to her husband, but she nevertheless continues to act herself. The mother cannot appoint a guardian to her children under this act, though she be a widow at the time, for the statute is wholly confined to fathers; but she has the first claim upon the attention of the Court of Chancery in the selection of a guardian.

(2.) *Customary.*

This guardianship is entirely local, and depends altogether upon the particular law of the particular place

Catholic father appointed a Roman Catholic priest to be guardian to his children, the validity of the appointment was not questioned. *Talbot v. Earl of Shrewsbury*, 18 Law Jour. 125. And every religion is now respected.

(*k*) This remedy is abolished by 3 & 4 W. IV., c. 27, § 36.

(*l*) See *Bedell v. Constable*, Vaugh. 177, a case which expounds the Statute.

where it exists. It is found in copyhold manors, ancient corporations, and gavelkind lands. The father's authority of appointing a guardian under the just-quoted act does not extend to copyhold property (*m*).

(3.) *Ad litem*.

Every Court before which an infant is one of the suitors, has power to appoint a guardian for the purpose of protecting such infant's particular interests in the particular proceedings instituted (*n*).

(4.) *By appointment of Chancery*.

The Court has power to appoint a guardian, as its instrument, to protect the general interests of its infant-ward, where there is no guardian already selected. Unless all the persons interested are agreed upon an unobjectionable person as guardian, or the infant has chosen and nominated an unexceptionable individual, a reference to one of the Masters in Chancery will be made, to approve of a proper and willing person for the office. The person appointed must usually be of the same religious persuasion as the infant's parents, and of a moral, solvent, capable, and humane character, residing, moreover, in England.

The Court will, if practicable, and not disadvantageous to the infant, give the preference to the father, who is *primâ facie* and naturally entitled to his children's custody, even as against their mother, provided the children be seven years old.

Next to the father's right is recognized that of the testamentary or statute-guardian, whose authority is hardly to be distinguished from that of the father, and deriving his title, as he does, from the right of the pa-

(*m*) Co. Litt. 88*b*, n. 16.

(*n*) See the concluding subject of the present chapter.



rent by virtue of the act of parliament already quoted. It is, in fact, a continuation of the same trust under the same control and jurisdiction (o).

(5.) *Guardian in tort, or by intrusion (tutor alienus).*

This is an implied, indirect kind of guardianship, arising from a person intruding himself into an infant's property: if such a one receive the profits belonging to the wronged infant as its guardian, he must account for them in Chancery, being, by this Court, regarded as such infant's trustee.

Mother's  
access and  
custody  
(2 & 3 Vict.  
c. 54).

VII. The access of a mother to her own children is secured by the statute 2 & 3 Vict., c. 54, which empowers the Court of Chancery, upon hearing the petition of the mother of any infant being in the sole custody or control of its father, or of any person by his authority, or of any guardian, after the death of the father, to make an order for the admission of the petitioner to her infant-child, at such times and subject to such regulations as it shall deem convenient and just; and if such infant shall be within the age of seven years, then the Court can make order that such infant shall be delivered to, and remain in the custody of, the petitioning mother, subject to such regulations as it shall deem proper (p).

The fourth section enacts, that no order shall be made whereby any mother against whom adultery shall be established by a judgment in an action for criminal conversation at the suit of her husband, or by sentence of an Ecclesiastical Court, shall have the custody of, or access to, her infant-child.

When  
mother  
will be ap-  
pointed  
guardian.

VIII. Next to the testamentary guardian, the mother has the right, and will be appointed by the Court, unless

(o) *Wellesley v. Wellesley*, 2 Bligh, N. S. 145.

(p) Section 1.

there be some valid objection to it. (*q*). Her second marriage is not an absolute or necessary disqualification, even though she have a second family; but in such a case a second appointment will be necessary<sup>r</sup> (*r*). A wife living separately from her husband, without any justifiable reason, will not be appointed (*s*).

After the father, his testamentary guardian, and the mother, the Court selects those who appear the most eligible and advantageous for the infant; the father's wish, though only verbally expressed, will be regarded, and relations will be preferred to indifferent parties, more especially those who have a claim to the guardianship by the Common Law, should they be willing to act. The rational practicableness of Chancery does not recognise the barbarous maxim of the Common Law, that the next of kin, to whom the infant's property may peradventure descend, cannot be guardian.

The Court of Chancery is the proper tribunal to determine the right of guardianship and custody of an infant, when it is disputed.

IX. Chancery will appoint a guardian on petition only, without a bill being filed. The petition should be presented by some person on the infant's behalf, praying either an order of reference to one of the Masters in ordinary, to approve of a competent individual to be guardian, (and this is the proper course where there are any disputes, or the person proposed is not well known to the Court); or should a reference be unnecessary, that the Court be pleased to appoint one forthwith,—this the Court will do upon the production of an affidavit that the party pro-

Formal appointment of guardians.

(*q*) *Dormer v. Dormer*, Finch, 432.

(*r*) *Corbet v. Tottenham*, 1 Ball & B. 59; *Re Gornal*, 1 Beav. 347.

(*s*) *De Manneville v. De Manneville*, 10 Ves. 59.

posed is proper and unobjectionable; and this is the practice where the infant's property is very small, or where the infant, being fourteen years old, chooses a guardian in Court, or where the proposed guardian has been nominated by the father's will.

The proceeding upon a reference is this:—The order of Court being drawn up, a statement of the facts duly verified, with a proposal of the intended guardian, is taken into the Master's Office; the interested parties then attend before him, and he makes his report, that the person proposed and approved of by him is qualified and willing to undertake the office, which report is first filed, and afterwards confirmed by the Court, upon a petition praying that the person approved of may be appointed guardian, that the maintenance (if any) may be paid to such guardian, and that the costs of the transaction may be taxed.

This report of the master cannot be excepted to in the ordinary manner, but a party complaining of it, may, upon petition, obtain an order of the Court for the Master to review the passages of his report complained of.

A guardian may be appointed by a decree in a suit, or by a petition in a suit, or on motion in the cause after bill filed.

The costs are usually paid out of the infant's estate, or out of a specific legacy given to it.

Authority  
and duties  
of guardi-  
ans,—

X. Where the guardians of an infant disagree amongst themselves as to its management, the care of the infant devolves upon the Court.

A guardian appointed by Chancery is its own creature, the Court may, therefore, modify, restrain, or direct his acts as it may seem fit for the benefit of the infant.

Guardians are entitled to the custody of their infant-

wards, and to select their place of residence, and Chancery will take care that this right is respected. Guardians are not compellable to maintain their wards out of their own private property, but they must do so out of the infant's property in their control, under pain of removal.

The most important duty which attaches to a guardian is, to provide for the infant a proper education, both moral and religious, in accordance with its expectations in life. The ward must be educated within the jurisdiction of the Court, unless it is otherwise ordered. If a guardian be in any difficulty upon this subject, he should apply to the Court for a direction.

Education  
of the  
ward—

As to the religious principles in which guardians should educate their wards, two general rules have been laid down:—

(1) That a guardian may educate his ward in any system of belief which is not contrary to the law, or detrimental to the moral well-being of the community; but, nevertheless,

(2) A guardian should educate his ward in the religious principles of the family to which it belongs, more especially in those of the father.

The guardian must bring up the ward in dutiful obedience to its parents, and according to their wishes (*t*).

(*t*) Lord Eldon, in restraining the father from carrying his child out of the kingdom, in the case of *De Manneville v. De Manneville*, 10 Ves. 65, said he should take care that the intercourse of both father and mother with the child, as far as was consistent with its happiness, should be unrestrained. And in *Jackson v. Hankey*, Jac. 264, the Court said, that as children ought to be brought up in dutiful obedience to both parents, the father will not be allowed to take them so out of access as to prevent them from having opportunities of nourishing those feelings respecting their mother. In *Wellesley v. Beaufort*, 2 Russ. 43, when taking children from their father, Lord Eldon said that into whose hands soever they might fall, it would be their duty to consult the interest and happiness of

Determi-  
nation of  
guardian-  
ship.

The guardianship of an infant's *person* terminates at majority. In the case of a female infant, it would appear, that if she have not arrived at the age of puberty, the guardian's right still continues; if she have arrived at puberty, and is married, then the marital right supersedes that of the guardian, who still, however, has an authority over his infant female-ward, to compel a proper settlement, if the marriage be a contempt of court, or contrary to his consent.

A guardian may disclaim the office, or obtain his discharge by petition in a suit; but the Court has power to compel him to complete the duties of his office, after he has once accepted it.

Habeas  
corpus.

#### XI. The most summary remedy (*u*) which is afforded

the children, by allowing filial affection and duty towards their father to operate to the utmost. And in *Ex parte Ilchester*, 7 Ves. 380, 381, the Court remarked, the best and most important duty imposed upon the guardian by the deceased parent, was implanting in the hearts of the children filial and dutiful feelings towards their mother.

(*u*) In *Wright v. Naylor* (5 Madd. 77), where there was a case in Court, the Vice Chancellor, on the petition of the guardians, ordered the mother, who was an objectionable character, to deliver the infant to them, saying he had jurisdiction over the infant's person in respect of its property.

In the *Earl of Westmeath's Case* (Jac. 251), on a writ of *habeas corpus*, issued on petition of the father, children who were in the custody of their mother, under the provisions of a deed of separation between them, were ordered to be delivered to him.

In the great case of *Wellesley v. Beaufort* (2 Bliqh, N. R. 124), the Court had decided that the infant should not be under the management of the father, on account of his depravity, and he and all other persons had been restrained from removing, or attempting to remove the infant from the custody of the Misses Long, their aunts, without permission of the Court.

In *Waine v. Waine*, where the mother, who was not guardian, had been allowed to have her children during the holidays, but refused to let them

to a legal guardian, touching his infant-ward's custody, is the writ of *habeas corpus* (*v*), under which the infant is produced to the Court granting the writ, and enquiry made into any injury or duress practised upon it, while possession of the ward is given to the guardian, provided it be of tender years, and incapable of choosing for itself with whom it will live; but the Court exercises a large discretion in these cases. The right of guardianship cannot be contested under this writ.

Where a person, improperly detained, is brought into Court upon a *habeas corpus*, the Court will order such person to be set at liberty, and protect him accordingly; but should the person be a legitimate child, not old enough to exercise any discretion, the father is entitled to its legal custody, and should the mother possess herself of the child adversely to the father, it will be ordered to be sent back to him, in the absence of any suggestion of cruelty or anticipated gross corruption (*w*).

While the Court of Chancery, as representing the Crown in the character of *Parens Patriæ*, can control (as we have seen (*x*),) the right of the father to the possession of his children, a court of law not having any such delegated power, cannot interfere under a *habeas corpus*, as to the father's custody of his infant, so as to order it into the mother's care, and this although the parents had separated on account of his cruelty, and the father was

go back to school; on a motion for her commitment made on behalf of the guardian, the court held her conduct to be a gross breach of privilege, but said that the notice of motion ought to have been accompanied with a notice for a messenger to bring the infants into court, as it might be necessary to place them in a proper school.

(*v*) See 31 Car. II., c. 2; 56 Geo. III. c. 100.

(*w*) *Rex v. Greenhill*, 4 Ad. & El. 624; *Ex parte McClellan*, 1 Dow. P. C. 81; *Blisset's Case*, 110ft. 748.

(*x*) *Aule*, p. 60.

actually a prisoner, cohabiting with a woman who carried the child daily into the prison for the father to see it (*x*). So that the Court of Chancery is the preferable court to move for this writ, when the custody of infants is involved.

This writ of *habeas corpus* is available on behalf of an infant, in cases of ill usage or duress.

Grounds  
for sus-  
pending a  
guardian.

XII. Chancery, in exercising an absolute and illimitable control over all guardians (*y*), and other parties, who have the care and custody of infants, proceeds upon the principle that the office is in the nature of a trust, which is the peculiar charge of the court.

This unquestionable jurisdiction of the High Court of Chancery is not only punitive, visiting with compensation mischiefs committed, but also preventive, warding off dangers apprehended. Observe, it has not the power of *permanently* removing any guardian possessing a legal title to the office, but only of *suspending* him from the duties of his office (*z*).

The principal grounds upon which the Court interferes to take from guardians the custody of their wards, are the following :—

- (1) Immorality and depraved character ;
- (2) Vicious and irreligious tenets, inconsistent with the welfare of society and the infant ; but it must be shewn that such tenets have been, or are likely to be, enforced upon, or injurious to, the infant ;
- (3) Cruel usage or violence, either towards the infant, or its mother ;
- (4) Alienage, or being out of the jurisdiction of the

(*x*) *Ex parte Skinner*, 9 Moore, 278.

(*y*) See *Wellesley v. Beaufort*, Dom. Proc., 2 Bli. N. S. 128.

(*z*) Chamb. on Infancy. 164.

Court, or threatening to take, or taking, the infant abroad.

In this case it must be observed, that the supersession of the legitimate guardian, and the authority of the appointee of the Court in his stead, will only continue in force, during the absence of such guardian, for on his permanent return, *cæteris paribus*, he will be entitled to be reinstated in his office.

(5) Insolvency, or embarrassed circumstances ;

(6) Abandonment, or neglect, of the ward ;

(7) Lunacy, attainder, or becoming incapable ;

(8) Injury to the ward's property, meditated, apprehended, or inflicted. *Si quis custos fraudem pupillo fecerit, à tutelâ removendus est (a) ;*

(10) A suspicion even of a disparagement of the ward's person, by attempting an unequal and improper marriage for it ;

(11) If a lady (not being the infant's mother (b),) appointed by the court, afterwards marry, she will be superseded, and another guardian appointed ;

(12) By gifts to infants, on conditions express or implicative, that the guardian shall be superseded.

XIII. Chancery will, however, frequently impose rules and conditions upon guardians, without actually superseding them. Directions of the court.

Thus, they will be controlled as to the infant's place of residence, and compelled to fix it, where most advantageous for it, and within the jurisdiction of the Court.

And guardians will not be permitted to move their wards from one place or school to another, even within the jurisdiction, if it be to their injury, or contrary to the express direction of the Court.

(a) Jenk. 39, pl. 75.

(b) As to the mother, see *ante*, p. 66.



In all cases where infants are entitled to considerable property, the Court takes care that they shall be bred accordingly, even though its orders for this purpose compromise the parental authority, by reason of the father's inability, from his want of adequate means to supply the requisite and suitable education, and especially if he refuse or neglect to provide it for his own child.

Modes by which the court interferes.

XIV. The Court will exercise its interference over guardians :—

(1) On petition without suit, in the case of the guardian's misbehaviour, or for the purpose of changing a guardian, or where the infant's property is small ;

(2) On bill and answer, and interlocutory petition, or decree thereupon, which is the proper mode, when it is intended to supersede the guardian's authority, and to place the infant under the care of the Court ;

(3) By writ of *habeas corpus*, in cases of duress or cruelty, obtainable on petition or motion. The granting of this writ,—the rampart of personal liberty,—is part of the common law jurisdiction of the Great Seal, and the practice is the same as that pursued in the Superior Courts of Common Law.

Effects of gifts to infants.

XV. Sometimes, third parties have acquired the right to direct the education of infants, by conferring on them particular benefits, under a condition that the education shall be conducted in a given manner, and the Court of Chancery will enforce the observance of the condition, if it be, upon the whole, for the benefit of the infant (c).

Where there is a gift to an infant, coupled with an appointment of guardians, other than the legal guardians, or, directions for the education of the infant in a particu-

(c) Chamb. on Inf. p. 141.

lar manner, with an express provision that the gift shall be void if the condition be not complied with, equity can afford no relief, but the estate must be forfeited, if the father or guardian refuse to surrender his legal right; and, of course, a stranger cannot deprive a father of his natural privilege of being his child's guardian, against his own consent.

But if, in such case, there be no gift over, or provision for the avoidance of the benefit, on non-compliance with the condition, the Court will not allow the infant's gift to be defeated; but will see that the infant be educated according to its expectation, and that the parents do not obstruct the benefits given to their child.

If there be a gift to the legal guardian, and he do not accept it,—yet the Court will adopt the same course, without, however, superseding the guardian; but if the guardian do accept the gift, the Court will then take the education wholly out of his hands, if that be necessary, (unless he have accepted the gift in ignorance of his rights), and carry out the will of the donor.

When the guardian assents to, and acquiesces in, the directions of the donor, as to the education of the infant, he will not be permitted afterwards to disturb the arrangement (*d*).

Of course, the Court requires the education of an infant to be conducted with a view to its ultimate benefit, and suitable to its fortune, rank, and expectations; and the feelings of parents will not be permitted to interfere or prejudice the interest of their children.

“Looking to a moral and religious education,” observed Lord Eldon in the well-known case of *Shelley* (the poet) *v. Westbrook* (*e*), “as the foundation of all that is valu-

(*d*) Read Lord Eldon's decision in *Lyons v. Blenkin*, Jac. 245.

(*e*) Jac. 266.

able here, or to be hoped for hereafter, I cannot put pecuniary considerations in the balance, with the imperious duty of taking care that the children shall have a moral and religious education.”

Education ceases when the infant attains majority ; and it cannot dispute anything which has been done by the Court, touching past maintenance and education, unless fraud or collusion be proved (*f*).

Maintenance and advancement.

XVI. While maintenance is the necessary money furnished from time to time for the bringing up of the infant according to its station, rank, and circumstances ; advancement is a sum of money paid at once out of the infant's property, for the purpose of promoting its personal interests and preferment in life.

As to maintenance, the guardian, trustee, or executor may always do what the Court itself would have done if applied to.

Rules as to maintenance.

XVII. The following propositions embody the leading rules, guiding the Court upon this question :—

(1) Where an infant's legacy is *specific*, as of stock or land, or the gift be direct and absolute to individuals or trustees for the infant, as of a sum of money or landed estate, the donee-infant will be entitled to maintenance from the testator's death, or other accruer of the interest ; and in such a case it is immaterial whether the period of enjoyment be postponed or not. Where the interest is very small—not sufficient for the purpose—the Court will sometimes allow part of the principal to be applied to maintenance or advancement, the infant having no other property.

(2) Where an absolute life-interest is given in realty or personalty, maintenance will, perhaps, be allowed out of the proceeds from the death of the donor or the previous taker; or the accruer of the estate, provided there be no reason for deferring it. If, however, the life-interest be in a sum of money by will, then maintenance will be allowed from the end of the second year after the testator's death.

(3) Maintenance will be given in all cases of legacies or devises, whether absolute, vested though postponed as to payment, or contingent, when any class of persons, children or strangers, have amongst them the whole interest, so that the Court may compensate in one way for what it takes from them in another, and that although some of the class may be yet unborn: and so, also, where the contingent or postponed gift or legacy is, on certain events, to go over to others, but the consent of those others must be obtained.

(4) It makes no difference in the case of a vested and immediate interest, whether of realty, or a principal sum or residue, that the devise may be defeasible by a condition subsequent, maintenance will nevertheless be given; and this, notwithstanding a provision for accumulation, or an express direction that the legacies shall not carry interest.

(5) Where the money or land is not a gift in actual possession, but the time of payment, or vesting, or enjoyment is postponed by the donor, or is contingent, the general rule is, that maintenance cannot be given from the estate or interest till that period arrive, but that then it may, although it be a legacy charged upon a dry or mere reversion.

No maintenance will be given, where the gift is of a residue vested, but postponed in payment, nor on a contingent bequest, before the contingency happen; nor out of a reversionary interest.

(6) The rule is the same with regard to portions out of land, whether charged by will or settlement.

(7) If, however, the provision be for a child, or one to whom the testator, settlor, or donor has placed himself *in loco parentis*, the rule is different; and in such case it is immaterial, whether the legacy or portion be particular or residuary; vested, but payable at a future time; or contingent (excepting contingent portions of money charged on land, or of stock, by contract or settlement), for maintenance will be given, although the legacy or portion be not due; unless, indeed, the child have maintenance from another fund, or have an expressly limited maintenance.

This exception will not be extended to adults, nor to illegitimate children, nor to more distant relations, nor to strangers.

Where there are donees over, or parties entitled in remainder to a contingent or postponed gift, their consent must be obtained.

(8) Where legacies or gifts are given to children, grandchildren, or any persons wholly strangers to the donor, whether vested or contingent, or payable upon a future or contingent event, though the legacy may be given over to others, yet, if their consent can be obtained, the court will give maintenance.

(9) Maintenance is allowed where all the donees compose a class having equal interests, or who may be equalized, where the legacy or gift is not given over to others.

(10) Of course, maintenance is given in all cases, where the intention is plain that it should be allowed.

These rules as to maintenance do not apply to cases of settlement or formal contract, unless, perhaps, all the parties interested consent to the application to the court.

Where maintenance is expressly given by the instrument of donation, it is settled, that a gift of interest on

a legacy or portion to a child, is a gift of maintenance, and is the same thing as if expressly provided for it (*g*).

The time and mode of allowance depend upon the terms of the donation; and it matters not that the infant has another provision from other sources. Where the amount or time is specified by the instrument of gift, that must be observed, and no more than is therein directed will be allowed, although that which is given may be less than the usual rate ordered by the Court.

If, however, the amount specified be very insufficient, the Court will increase it in all cases where it would otherwise be allowed if no maintenance had been provided by the donor, except where the donor's intention is the only reason for making the maintenance.

Where maintenance is expressly given according to the discretion of trustees or third persons, the infant is entitled to have such maintenance-money applied for its benefit; but such discretion will generally be the measure of the time and quantity of the money to be so applied, and the Court will not interfere with this discretion, unless there be a refusal to exercise it, or an improper mode of exercising it adopted, or there be no persons to exercise it.

All unapplied maintenance will belong to the infant, or his personal representatives, if he die under age; and will be allowed for time past and to come; but the representatives cannot claim anything for the period elapsed after the infant's death.

XVIII. The Court will not allow maintenance to, or on behalf of, infants out of their property, whether expressly given or not by the will or deed, and whether they

When maintenance is not allowed.

(*g*) *Boycot v. Colton*, 1 Atk. 555.

be children or strangers to the donor, unless it be for their benefit: and it will not be considered to be for their benefit, if they have any other sufficient provision for their maintenance, or have a right, which can be enforced, to demand it from other sources; but the Court will suffer the money which would be so applied to accumulate for their benefit, or for the benefit of those who may ultimately be entitled to the principal.

This rule, however, does not apply where the infant is entitled to express maintenance out of an estate, or fund belonging to a third party, or a postponed or contingent interest: for then it will be allowed by the Court, notwithstanding the infant has other property absolutely his own.

The Court will not grant maintenance to infants out of their property, if their father be of sufficiently comparative ability to maintain them without it, and that whether maintenance be expressly given by the instrument of gift or not. The Court will not take into consideration the ability of the mother to do so out of her separate estate, for she is under no equitable obligation to maintain them (*h*). And *à fortiori*, *quoad* collateral relations and strangers.

To this general rule there are these exceptions:—

- (1.) Where the parent surrenders or is deprived by the Court of the control of his child, maintenance will be ordered without regard to his ability; and his property will not be called in aid.
- (2.) If the father desert and abandon his children, or give them up to the care of others, who wish to keep possession of them, or refuse or neglect to bring them up in a manner befitting their situation, maintenance will be allowed without re-

(*h*) *Haley v. Bannister* 4 Mad. 281; *Douglas v. Andrews*, 12 Bea. 310.

gard to the father's ability, the Court not being able to enforce against him more than a bare maintenance; unless, perhaps, by way of punishment, should he be in contempt.

- (3). Maintenance will also be given where the parent is of a certain ability to bring up his children, but not capable of doing it in a manner correspondent to their fortunes and stations in life; or if he did so educate them without assistance, it may operate a hardship upon him, and perhaps be injurious to his other children, who may not be so amply provided for.
- (4.) It will also be given to the father, although he may be of ability, where the proceeds of the fund or estate are set apart as a bounty to the father for the maintenance of his legatee-child.
- (5.) And will be given, where the fund settled does not operate as a bounty to the children, but it is provided for them as part of the execution of a trust contained in a contract, as by settlement, to which the father is a party.

A wife, during the husband's life, is not under any legal obligation to maintain her children; but when their father is dead, the general rule, with its exceptions, are equally applicable to the mother, whilst a widow; but upon her second marriage she is not held bound to maintain her children, the issue of her first marriage (*i*), but is entitled to an allowance for maintenance out of the proceeds of such children's property.

With respect to the duty of the mother to maintain her children; in equity, it is apprehended that the same principles are applicable, as with regard to the father,

(i) *Billingsly v. Critchet*, 1 Bro. C. C. 268.



modified, however, by a consideration of the peculiar character with which a woman is invested, both at law and equity. In two cases (*k*), the Court would not allow the mother to deduct the expense of maintenance and education out of a legacy left to the son, so as to diminish the principal sum, as it was said the mother ought, by the law of nature, to maintain and educate the child. In another case (*l*), Lord Macclesfield said, the mother, by the law of the land and of nature, was bound to provide for the child. Lord Hardwicke said (*m*), that every father and mother are under an obligation to maintain their own children. It appears that (*n*), the practice formerly was, on an application for maintenance, when both parents were alive, to refer it to the Master to see if the *parents* were of ability; but in a later case (*o*), that was said to be the only decision to that effect: and it was subsequently held (*p*), that although the father be not of ability, the mother was not bound to maintain the children out of a separate income of 4000*l.* a-year; and the point was afterwards fully discussed (*q*), and it was expressly decided that the mother, during the lifetime of the husband, not being under a legal obligation to maintain the children, the Court cannot take into consideration her separate estate (*r*).

In the case already quoted (*s*), it was held that a

(*k*) *Smee v. Martin*, Bunb. 126; *Anonymous*, 2 Ventr. 355; Nels. Ch. Ca. 250.

(*l*) *Butler v. Duncombe*, 1 P. Wms. 454.

(*m*) *Fawkener v. Watts*, 1 Atk. 408.

(*n*) *Hughes v. Hughes*, 3 B. C. C. 387.

(*o*) *Haley v. Bannister*, 4 Madd. 270.

(*p*) *Cavendish v. Mercer*, 5 Ves. 195 n.

(*q*) *Haley v. Bannister*, 4 Madd. 270.

(*r*) *Re Wallen*, Lloyd & G. 328.

(*s*) *Billingsley v. Critchet*, 1 B. C. C. 267; overruling *Swinmock v. Crisp*, 2 Freem. 78.

mother, married to a second husband, was not bound to maintain her children by the first, on the ground that the husband took all her interest, and this though the father had made a provision for her by his will, and she had another estate. On counsel for the infants urging that the mother was under a natural obligation to maintain her own offspring, Lord Commissioner *Ashurst* said, that *if she continued unmarried*, he should have had some doubt, and the order for maintenance being confined to the time subsequent to the second marriage, shews that the doctrine of the Court was according to counsel's proposition. Again, where the plaintiff (*q*) was the daughter of the Duchess by a former marriage, and part of the question being as to 80*l.* maintenance, directed by the will of the plaintiff's father, Lord *Hardwicke* said, that as to compelling the mother to maintain her children out of her own property, that was going too far. A large allowance of maintenance was given in another case (*r*), to the mother, who, on the father's death, had *not* married again, and had a jointure of 2000*l.* a year, the son being entitled to 7000*l.*, and the daughters to 10,000*l.* between them. And in a case (*s*) where the mother was insolvent, part of the maintenance was given to the mother.

As to illegitimate children, maintenance will be given to them, subject to the rules already enunciated, without any regard to the ability of either of their parents (*t*).

XIX. The ordinary rule is, (unless otherwise directed), From what

(*q*) *Lanoy v. The Duchess of Athol*, 2 Atk. 477.

(*r*) *Ex parte Petre*, 7 Ves. 403; and see *Douglas v. Andrews*, 19 Law Jour. 69; 12 Beav. 310.

(*s*) *Heyshem v. Heyshem*, 1 Cox, 179.

(*t*) *Courtois v. Vincent*, Jac. 268; *Ex parte Bradshaw*, 1 Jac. & W. 647.

period it is usually given, when allowed. that maintenance is only allowed from the vesting or accruing of the interest, or time of payment or possession of the fund, unless otherwise requested by the donor, since from this time alone it bears interest for delay of payment of the principal. The exception to this rule is, as to non-specific or general bequests, which are payable after a year from the testator's death, from which period, interest, by way of maintenance, may be ordered to begin.

When it ceases.

XX. Maintenance, properly speaking, ceases with the infant's minority, and none will be allowed beyond that period; but marriage does not put an end to it. It is apportionable.

Its usual amount.

XXI. The amount of maintenance specified by the donor is generally the limit allowed by the Court; yet if insufficient, more will be ordered, should the property admit of it; and this, notwithstanding any direction for accumulation. If, however, more than is necessary is given, only the necessary sum will be allowed, and the remainder will be ordered to accumulate.

When the amount of maintenance is to be fixed by the Court, the Master determines the amount, subject to the approval of the Court, which will be guided by the rank, fortune, expectations, state, and age of the infant (*u*).

From what fund provided.

XXII. The ordinary fund for raising maintenance is from the rents, dividends, or produce of the realty or personalty. Where there is more than one fund, from which the maintenance may be derived, the infant's interest must determine which shall be first resorted to; as between real and personal property no preference, it

(*u*) *Nunn v. Harvey*, 2 De G. & S. 301.

seems, is shown, except from motives of convenience. As between property absolutely the infant's, and contingent, future or postponed interests or property belonging to third parties, the interest, and perhaps principal, of the absolute property must first be applied. Where there are two or more funds, it is referred to the Master to report out of which the maintenance should come.

Maintenance is not to be paid out of principal, except in very urgent cases, and generally it is only payable out of estates in possession, unless otherwise directed by the donor.

By statute 1 W. IV, c. 65, § 32, "the Court of Chancery may,—by an order to be made on the petition of the guardian of an infant in whose name any stock shall be standing, or any sum of money, by virtue of any act for paying off any stock, and who shall be beneficially entitled thereto, or if there shall be no guardian, by an order to be made in any cause depending in the said Court,—direct all or any part of the dividends due or to become due in respect of such stocks or any such sum of money, to be paid to any guardian of such infant, or to any other person according to the discretion of such Court, for the maintenance and education, or otherwise, for the benefit of such infant, such guardian or other person to whom such payment shall be directed to be made, being named in the order directing such payment; and the receipt of such guardian or other person for such dividends or sums of money, or any part thereof, shall be as effectual as if such infant had attained the age of twenty-one years, and had signed and given the same."

The funds over which this authority is most usually exercised, are either legacies to infants which have been paid into Court and invested in the funds under 36 Geo.

III, c. 52, § 32, or sums of money belonging to infants, which have been paid in and invested under railway and local acts.

How en-  
forced.

XXIII. The payment of maintenance can only be compelled by bill, unless there be an express power in the instrument of donation to enforce it in a given manner.

Maintenance or advancement may be obtained for infants from the Court upon petition only of the infant or some person on its behalf, without a suit; and this is the proceeding where it is proposed to break in upon the capital of the infant's property for such purpose. And the usual reference to the Master is dispensed with, when the property is very small, and the benefit to the infant is manifest. Increase of maintenance is obtainable on petition only.

But maintenance is only to be obtained by suit and decree, where the infant has not an absolute interest, or the matter is complicated, or accounts are to be taken, or the party subject to pay it refuses to do so, or is an infant.

Where there is already a suit in Court, maintenance is then obtainable either by motion or petition in the cause, but usually by the latter.

To whom  
and by  
whom pay-  
able.

XXIV. The person to whom the allowance is made payable by the Court, is generally the father, mother, guardian, or other person, who has the care, and conducts the education, of the infant, whether appointed by the Court or not. The person by whom the maintenance is payable, may be either the receiver or other officer of the Court, if there be a pending suit: or the guardian, trustee, or party in possession of the estate or fund, subject to the payment.

The money allowed is always a gross annual sum, whether in consideration of past or future maintenance.

XXV. The general rules of the Court as to advancement, are, for the most part, the same as those relating to maintenance; and, therefore, guardians and trustees will be safe in making such advancements for the benefit of infants, which the Court itself would have ordered. Rules as to advancement.

While maintenance, as we have seen, usually comes out of the interest, advancement is generally derived out of the principal of the infant's property.

If a trust or power for purposes of advancement be contained in the instrument of gift, the Court will necessarily exercise it for the infant's advantage.

Where a power for advancement is not exercised, this cannot be aided, unless it appear that such advancement ought to be afforded to the infant, for then it will be entitled to the amount that may be required (*u*).

The general rule is, that every advancement must be conformable to the rank, expectations, and age of the infant, and in all other respects according to propriety, and for its interest, and it must appear that the infant is in want of it. If these conditions be violated, the Court will treat the appointment or application as a breach of trust.

When a power is given to executors, trustees, or guardians, to advance monies for the preferment of an infant, it will be allowed to them, if within the scope of their authority, even though there be no very accurate adoption of the language of the power.

XXVI. The jurisdiction of the Court of Chancery touching an infant's property is wholly protective; it as- The property of infants.

(*u*) Chambers on Inf. p. 383.

sumes, as soon as an infant is made one of its wards, the superintendency of its fortune, even in the life-time of its father-guardian : it not only shields the property, but manages, and, if possible, improves it, for the infant's advantage.

Guardian  
of the  
estate.

XXVII. The Court, whenever an infant's property is brought within its jurisdiction, will appoint a guardian of its estate, as well as of its person, and he is in the nature of a receiver ; but, where a suit is pending, the property is then under the management of the Court, and a guardian is unnecessary, though a receiver, if advisable, will frequently be appointed.

Guardians of the estate will generally be the same parties as those of the person ; but if more convenient or suitable, the guardianship of the estate and that of the person will be placed in different individuals.

The mode of appointing guardians of an infant's property is the same as that of appointing a guardian of the person (*v*).

These guardians being, as it were, receivers, generally, as the infants are wards of Court, enter into a recognizance with two sureties, duly to account for the infant's property, in the amount of all the personalty, and two years' income of the realty. Such a guardian is a mere officer of the Court, little more than a bailiff or servant, is not personally possessed of the property, acts entirely under the Court's direction, and is bound to account annually. If the guardian retain money in his own hands, he will be chargeable with interest thereon, as the balance ought to have been made a productive fund.

If there is a suit in Court, a receiver will, when

(*v*) See *ante*, p. 65, *et seq.*

deemed desirable, be appointed on behalf of all parties, with a salary. The appointed receiver enters into a recognizance, together with two sureties resident in England.

XXVIII. The nature of the infant's property cannot be changed—as realty into personalty, or *è converso*—<sup>Non-convertibility.</sup> during minority, either by the guardian, receiver, trustee, or even the Court, unless it be most clearly for the infant's interest, or else not to effect the change would be prejudicial to it, when the Court will convert it accordingly.

It is a principle, that where property of one nature has been applied for the benefit of an infant to property of another nature, to make an express provision that if the infant should not attain the age at which it shall have a disposing power, the representatives shall not be prejudiced in any degree by the act done by the Court in contemplation of the infant's advantages (*w*).

The exceptions to this rule of non-convertibility, are, where money is expended in repairs of realty, cutting ripe timber, and leaseholds.

The Court will not bind an infant's inheritance by any discretionary act.

It is the duty of a guardian or trustee to pay the debts of infants with interest, according to their priorities, out of the personalty, without any direction from the Court, taking care to procure an assignment of the real incumbrances for the benefit of the personal estate.

When the personalty is insufficient for the satisfaction of the debts, the realty is then resorted to.

In case of an estate being devised, or descending, or



coming to an infant, subject to a mortgage, if the mortgagee consent to a sale, it is so directed, after an inquiry whether it will be for the infant's benefit, and after the accounts of all the property and debts have been first taken : the decree for sale will bind the infant under the statute.

In case of a devise to trustees, or a direction for payment of debts, a similar course will be pursued, by a direction at the hearing, without any special reference, if the personalty on inquiry be found insufficient. Where an estate is to be sold for liquidating certain charges, others, superior in their nature, may be paid at the same time ; but where it is sold to satisfy certain specified incumbrances only, others cannot be paid during minority merely because they are superior.

In the case of Statutes subjecting realty to the payment of debts, decrees are frequently made against infant-heirs and devisees, for sale or mortgage of their realty to liquidate them. (*x*). If a sale be directed by the Court, the infant will not have any day to shew cause after majority.

Securing  
the pro-  
perty of  
infants.  
36 G. IV.,  
c. 52.

XXIX. The 36 Geo. III, c. 52, § 32, enacts thus :—  
The person, having or taking the burthen of any will or testamentary instrument, or the administration of any personal estate, in the case of infancy, or absence beyond the seas, of any person entitled to any *legacy*, or to the *residue of any personal estate*, or any part thereof, chargeable with the legacy duty, is enabled to pay such legacy or residue, after deducting the duty chargeable thereon, into the bank of England, in the name of the accountant-general, to the account of the person for whose benefit the same is payable ; and such money,

(*x*) See 1 Wm. IV., c. 47 ; 2 & 3 Vict., c. 60, and 11 & 12 Vict., c. 87.

when so paid in, is directed to be laid out by the accountant-general without any formal request for that purpose, in the purchase of bank three per cent. consolidated annuities. The legatee must bear the costs of getting the money from the accountant-general (y).

Where an infant's personal property is in danger, from the conduct of executors, trustees, guardians, or others having its management, the Court will, upon bill filed, take it from their control, and undertake its administration, either requiring the money to be paid into Court, or security given for its due payment. And, indeed, where the property is not in danger, and there is no suspicion of misbehaviour in those entrusted with it, yet, if a bill be filed, the Court will take the property under its protection.

The rule applies where infants have an absolute interest in personalty, for they have a right to apply to the Court to have their legacy separated from the bulk of the testator's property, if the gift be by will, or paid over by the trustees, if their right be derived from a deed or settlement, and duly invested under the control of the Court, in the three per cent. consols, or otherwise to have it secured.

It also applies where the infant's interest is vested, although the time of enjoyment is postponed; or where an infant is entitled to a vested life-estate only in money or other personalty; or for a less estate; or to an absolute interest, subject to another's life interest; or where the gift is contingent or future, and interest is given: but it is otherwise if no interest be given.

Where money is placed to the separate account of an infant, or stock is invested upon trust for it by the

(y) *Whopham v. Wingfield*, 4 Ves. 630; but the costs of paying it in are to be borne by the estate, *Re Cawthorne*, 12 Beav. 56; *Re Lorimer*, ib. 521; *Ross's Trust*, 1 Sim. N.S. 196.

accountant-general, under an order of the Court, the infant, on attaining majority, may obtain the money, or a transfer of the stock, upon petition, supported by affidavits, which verify the facts.

10 & 11 V.  
c. 96.

The 36 Geo. III., c. 52, § 32, is limited in its provisions. A more extensive proceeding is now afforded by the Trustee Relief Act, 10 & 11 Vict., c. 96, which, after reciting that it is expedient to provide means for better securing trust-funds, and for relieving trustees from the responsibility of administering trust-funds in cases where they are desirous of being so relieved, enacts, "that all trustees, executors, administrators, or other persons having in their hands any monies, *belonging to any trust whatsoever*, or the major part of them, shall be at liberty on filing an affidavit shortly describing the instrument creating the trust, according to the best of their knowledge and belief, to pay the same, with the privity of the accountant-general of the High Court of Chancery, into the Bank of England, to the account of such accountant-general in the matter of the particular trust, (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said Court; and that all trustees or other persons having any annuities or stocks standing in their names in the books of the governor and company of the Bank of England, or of the East India Company, or South Sea Company, or any government or parliamentary securities standing in their names, or in the names of any deceased persons, of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stock or securities into or in the name of the said accountant-general, with his privity, in the

matter of the particular trust, (describing the same as aforesaid), in trust to attend the orders of the said Court ; and in every such case, the receipt of one of the cashiers of the said Bank for the money so paid, or, in the case of stocks or securities, the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited (*a*).

The 12 & 13 Vict., c. 74, removed some difficulties in 12 & 13 V. the just-quoted statute, by enacting, that if, upon any petition presented to the Lord Chancellor or Master of the Rolls, in the matter of the Act (10 & 11 Vict., c. 96), it shall appear to the judge of the Court of Chancery, before whom such petition shall be heard, that any monies, annuities, stocks or securities are vested in any persons as trustees, executors or administrators, or otherwise, upon trusts within the meaning of the said act, and that the major part of such persons are desirous of transferring, paying or delivering the same to the Accountant General of the High Court of Chancery under the provisions of the said act, but that for any reason, the concurrence of the other or others of them cannot be had, it shall be lawful for such judge to order and direct such transfer, payment, and delivery to be made by the major part of such persons, without the concurrence of the other or others of them ; and where any such monies or government or parliamentary securities shall be deposited with any banker, broker, or other depositary, it shall be lawful for such judge to make such order for the payment or delivery of such monies, government or parliamentary securities, to the major part of such trustees,

(*a*) Section 1. *Re Masselin*, 15 Jur. 1073.

executors, or administrators, or other persons as aforesaid, for the purpose of being paid or delivered to the said Accountant-General, as to the said judge shall seem meet; and every transfer of any annuities, stocks, or securities, and every payment of money or delivery of securities, in pursuance of any such order, shall be as valid and effectual as if the same had been made on the authority or by the act of all the persons entitled to the annuities, stocks or securities so transferred, or the monies or securities so paid or delivered respectively, and shall fully protect and indemnify the governor and company of the Bank of England, the East India Company, and the South Sea Company, and all other persons acting under or in pursuance of such order.

Various orders, pursuant to 10 & 11 Vict., c. 96, were issued by the Court, on the 10th of June, 1848, for the regulation of the practice, the force of which is as follows:—

Any trustee desiring to pay money, or transfer stock or securities, into the name of the Accountant-General of the Court of Chancery, under the above act, is to file an affidavit, intituled in the matter of the act and of the trust, and setting forth,

- (1) His own name and address.
- (2) The place where he is to be served with any petition, or any notice of any proceeding or order of the said Court relating to the trust-fund.
- (3) The amount of the stock, securities, or money, which he proposes to deposit, or to transfer, or to pay into Court to the credit of the trust.
- (4) A short description of the trust, and of the instrument creating it.
- (5) The names of the parties interested in, or entitled

to, the fund, to the best of the knowledge or belief of the trustee.

(6) The submission of the trustee to answer all such inquires relating to the application of the stocks, securities, or money transferred, deposited, or paid in, under the act, as the Court may think proper to make or direct.

The Accountant-General, on production of an office copy of the affidavit, is to give the necessary directions for transfer, deposit or payment, and to place the stock, securities or money, to the account of the particular trust, and such transfer, deposit or payment, is to be certified in the usual manner.

The trustee having made the payment, transfer or deposit, is forthwith to give notice thereof to the several persons named in his affidavit, as interested in, or entitled to, the fund.

Such persons, or any of them, or the trustee, may apply by petition, as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends or interests thereof.

The trustee is to be served with notice of any application made to the Court respecting the fund, or the dividends, or interest thereof, by any party interested therein, or entitled thereto.

The parties interested in, or entitled to the fund, are to be served with notice of any application made to the Court by the trustee, respecting the fund in Court, or the interest or dividends thereof.

No petition is to be set down to be heard, until the petitioner has first named a place, where he may be served with any petition, or notice of any proceeding, or order of the court, relating to the trust-fund.

Petitions presented and affidavits filed under the said

act, are to be entitled in the matter of the said act (10 & 11 Vict., c. 96), and in the matter of the particular trust (a).

13 & 14 V.  
c. 60.

Where any infant (b) is entitled to any money, payable in discharge of any lands, stock, or chose in action, conveyed, assigned or transferred under this act [13 & 14 Vict., c. 60], the person by whom such money is payable may pay the same into the bank of England, in the name and with the privity of the accountant-general, in trust in any cause then depending concerning such money; or, if there shall be no such cause, to the credit of such infant, subject to the order or disposition of the Court of Chancery; and the Court, upon petition in a summary way, may order any money so paid to be invested in the public funds, and may order payment or distribution thereof, or payment of the dividends thereof, as to the Court shall seem reasonable; and every cashier of the bank of England who shall receive any such money is required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received (c).

Account.

XXX. An infant is entitled through his *prochein*

(a) The purpose designed by these two acts, and the orders of the court, is to empower trustees, &c., to relieve themselves from further responsibility by paying their trust-monies into court, and to enable the persons beneficially entitled to such trust-monies, to obtain the opinion of the court upon their rights, and an administration of the fund in court, by the summary proceeding of a petition. See *Re Woods*, 15 Sim. 469; *Re Gaffee*, 13 Jur. 78; *Re Biggs*, 11 Jur. 958; *Re Sharpe*, 15 Sim. 470; 12 Jur. 492; *Re Bloye's Trust*, 1 Mac. & Gor. 504; *Ex parte De Beaumont*, 13 Jur. 354; *Re Joseph's Will*, 11 Beav. 625; *Re Jervoise*, 12 Beav. 209; *Re Parry*, 6 Hare, 306; *Ex parte Fletcher*, 12 Jur. 619; *Ex parte Peart*, 12 Jur. 620.

(b) The provision relates also to lunatics.

(c) 13 & 14 Vict., c. 60, § 48.

*ami* (a), to have an account and satisfaction from the guardian, executor, or trustee, or his representatives, if dead, as to the management of its property. from guardians, &c.

It is a great principle of equity, that no guardian or trustee shall make any profit whatever of the infant's property for himself, or receive any remuneration for his trouble ; and he must pay interest for all money and balances, unnecessarily kept unproductively in his hands. He will not be permitted, unless expressly directed by the instrument of gift, to employ the infant's property in any trade or speculation, whether on his own account, or on that of his infant-ward. If he trade with the infant's property on his own speculation, he must account as well for the profits of the trade, or interest at 5 per cent. at the infant's option, when of age, or, of the Court for him, while yet under age, as also for any loss.

A guardian can neither sell, nor otherwise part with, the infant's property for his own advantage, nor can he himself buy such property.

Leases renewed by guardians in their own names, and paid for out of their own money, and *à fortiori*, if paid for out of the infant's property, will enure for the infant's benefit, and the guardians will have to account for the profits.

The guardian, or his representatives, will be compelled to make good, with costs, all loss and damage caused by the non-performance, or the negligent, or ill-performance, of his duty, and to reinstate the infant's property in that condition in which it would have been, had he properly discharged his duty.

A guardianship, being a personal confidence, cannot



be delegated, and, therefore, a guardian will be himself responsible, who permits others to act for him.

Gifts to  
guardians.

XXXI. Equity will avoid and set aside all gifts, conveyances, securities, bonds, and advantages, obtained by guardians and all persons in confidential situations as to infants, or who have acquired influence over them by reason of their infancy, if so obtained during infancy, or afterwards, whilst the relationship is still subsisting, or if resulting from the influence or confidence thence arising (*d*).

The connection must be actually dissolved before a guardian can take anything by way of gift from his ward.

Marriage-brocage (*e*) agreements, or bargains, that a guardian, parent, or trustee shall receive a reward or *louccur* for marrying an infant to a given person, will be set aside on the broad ground of public policy, and this after any length of time, and a subsequent confirmation will not cure the defect, unless it is express, and also with a knowledge of the whole transaction.

Effect of  
infant's ac-  
quiescence.

XXXII. A full and fair settlement of the accounts between an infant after his or her majority and the trustees or guardians, without any undue influence or fraud, but voluntary on his or her part, and having ample knowledge of all his or her rights, will be binding, and bar any further account, as well as excuse any wrongs or breaches of trust.

A great equitable rule is this, that if a *cestui que* trust or beneficiary join with trustees, in that which is a breach of trust, knowing the circumstances, he can never complain

(*d*) See *Hatch v. Hatch*, 9 Ves. 292.

(*e*) See *post*, Book. III. c. I.

of such breach: either the concurrence in the original breach of trust, or acquiescence without original concurrence, will release the trustees; but equity will inquire into the circumstances which induced acquiescence or confirmation.

If an infant contract a debt during minority, and, after full age, shew his consent to it, by expressly confirming it, this will effectually bind him, though it would have been otherwise voidable at the infant's election.

As to implied concurrence, loose expressions in a letter will not do; but the acceptance of rent from a lessee sets up a voidable lease by the guardian; so suffering persons to lay out money on the premises; and a consent to a sale and receipt of the purchase money and interest, if done with full knowledge of all the circumstances, validates the sale.

A *cestui que trust*, concurring in breaches of trust, must compensate the trustee out of the property coming to him, so far as he was thereby benefitted, any loss thereby incurred by the trustee. (*f*).

So acquiescence in breaches of trust, or waiver of the remedy by infants, if proved by the defendant, will bar relief against their guardians or trustees, provided the infant acquiesce fairly, with knowledge of the circumstances, and there be an absence of undue influence or fraud (*g*).

XXXIII. As a general rule, the account of a guardian or trustee is to begin, and restoration of the mesne profits, or satisfaction in lieu thereof, is to be made from the time of the accrual of the title of the infant or of the wrong done.

Beginning  
and period  
of the ac-  
count.

(*f*) *Booth v. Booth*, 1 Beav. 125.

(*g*) See 3 & 4 W. IV., c. 27, § 27.

To this rule there are these exceptions:—

(1) If an infant suffer six years to elapse, after majority, before he take proceedings, the account will be limited to that time, provided the statute of limitations be pleaded by the guardian or trustee; unless, however, a good reason for the delay be assigned.

(2) If the defendant were a *bonâ fide* possessor, without notice from deeds or otherwise of the infant's title, and ignorant of the fact of being an express trustee, the account will not be ordered farther back than the filing of the bill. And this will be the case, if the title be disputable and the law unsettled, or if the possession have been merely adverse, without fraud or concealment, or if the whole family and the other parties concerned were ignorant of their respective rights.

(3) Default and laches will generally confine the infant's claim to mesne profits and interest to the time subsequent to the filing of the bill.

The account and satisfaction will be required for so long a time as the breach of trust or wrong continued, and this though the infancy have determined.

If realty have been misappropriated, the guilty party will be bound to restore it, and account for and pay over the rents and profits; if the restoration be impracticable, then its value must be paid to the infant, or other realty purchased, and conveyed to such infant to the uses and upon the trusts to which the former was subject.

If realty be directed to be converted into money, and it be sold too late, or at an undervalue, or not sold at all, and the produce becomes thereby deteriorated in value, the trustees will be answerable for the difference between the money actually produced, and that produced on a resale, and for the intermediate profits; or they will be

required to pay the money and the interest thereon, whichever shall be most for the infant's benefit, or at its option after majority.

If personalty be lost, or improperly retained, the guardian or trustee will be ordered to replace it, and to pay equitable interest (*i. e.*, four pounds *per cent. per annum*) from the time of the loss or retention, and legal interest (*i. e.*, five pounds *per cent. per annum*) if it be misapplied. If an accumulation have been directed, and it be disregarded, compound interest will be charged.

The infant's property, so misapplied or alienated, will, in the first place, be liable, in whose hands soever it may be, if it can be equitably got at towards satisfaction of the infant's claims; but, if this cannot be accomplished, then the property of the guardian or trustee, either in his own hands or in those of his representatives, whether with or without notice, will be liable thereto.

XXXIV. The mode of compelling an account against a guardian or trustee is by bill, and an injunction may be obtained restraining him from acting in the trust, or from bringing actions before the matter be sifted and the accounts perfected. Modes of compelling an account.

There are two modes of enforcing the account, either (1) as accessory to other relief; or, (2) independently of any other relief.

The court will allow payments on account of infants in these cases:—maintenace, education, necessaries, or plain advantage; advancement in the world; prevention of injury to the property; compulsion; express direction; payments occasioned by the infant's fraud; payments directed by the deed or will; payments confirmed by or acquiesced in by the infant; payments pursuant to statute or order.

Costs.

XXXV. Costs are generally paid out of the infant's estate, for it is just that they should pay for what is so much for their advantage. But where guardians or trustees have induced expences by their delay, or declined to act after they have once acted, thus rendering a suit necessary; or refused a legacy in a clear case; or occasioned a suit through negligence, or instituted a suit unnecessarily, or conducted a suit carelessly, or behaved fraudulently, they must in such cases pay their own costs. And they will be ordered to pay the costs of their opponents, when they are guilty of a breach of trust, or a fraud, or corruptly used the property, or have practised concealment or gross negligence. These costs will be limited to those proceedings, which are occasioned by such conduct; but they are charged with all the costs of a suit occasioned by their improper conduct.

Trustees and executors are not entitled to costs out of the infant's estate, as between themselves and strangers.

Infants are liable to costs like other people, and they may lose their right to costs against their trustees by fraud, laches, or acquiescence after majority.

Generally the costs with which a trustee is charged will be calculated as between party and party; those which they are entitled to, as between solicitor and client.

Infant can-  
not act as  
a trustee.

XXXVI. Whenever property is given to an infant, it is presumed that it is intended that the infant shall take it beneficially, for he cannot act as a trustee; hence, upon any gift to him arises a strong presumption that it was not intended that an infant was to take in this character, but for his own benefit.

Where a fund is given to an infant for one purpose,

and it cannot be so applied, it will be applied in another way for its benefit.

XXXVII. The guardian's consent to a marriage (*h*), Marriage of infants. must be obtained previously to its celebration, otherwise the Court will punish (*i*) the parties contriving it, even though the infant have fully assented; for an infant is held incapable of proper judgment and discretion, and is deemed to be a mere passive party in the affair. If the Court have made any order, or the infant be a ward of Court, then the consent of the Court (*j*)

(*h*) This subject is fully treated of in Book III, *post*. It is here somewhat anticipated, in order to present the equities of infants in one connected view.

(*i*) As the chief object in the court's interference in such cases, is that of avoiding, as far as it is possible, the evils likely to arise to the person injured, from an improvident act; it endeavours to place the parties upon that footing on which they would have stood, if its sanction had been obtained, and such discretion had been exercised as ought to attend a transaction of so important a nature. It will be found, however, that the court whilst it admits that, in some cases, such an act may arise from very virtuous motives, and to a certain extent be excusable, it will in others go far in expressing its disapprobation, not only by the punishment which it inflicts, but by framing the settlement in a manner so unfavorable to the offender, as would be contrary to the policy of the law with reference to such instruments in ordinary cases, where no want of confidence is to be presumed or inferred from the conduct of either of the parties. Jeremy's Eq. Jurisp. 229.

(*j*) Where the Court of Chancery appoints a guardian, or committee in the nature of a guardian, to have the care of an infant, it usually requires a recognizance to be given, that the infant shall not marry without the leave of the Court, which form is rarely altered, and only upon special circumstances. So that if an infant should marry, though without the privity, or knowledge, or neglect of the guardian or committee, yet the recognizance would, in strictness, be forfeited, whatever favour the Court might, upon an application, be inclined to extend to the party, when he should appear to have been in no fault. *Eyre v. Shaftesbury*, 2 P. Wms.

must also be obtained by a decree in the suit, or by a petition on the infant's behalf, upon which there will be a reference to the Master (*k*), to certify whether it be a proper marriage; and even then if the Court disapprove of the proposed marriage, it will withhold its order, and enjoin all intercourse between the parties (*l*).

Where the parties are legally married, the rights and privileges of husband and wife will be respected, and the Court will not interrupt their correspondence further than may be necessary to punish the contempt, and secure the infant-ward's property. Should, however, the legality of the marriage be doubtful, then, until that be ascertained, the Court will stop all communication between the parties and their confederates, and will place the female-ward in whose custody soever it pleases (*m*).

The Court cannot compel guardians or other persons

112. This obligation may be modified under the courts' sanction, so as to make the guardian responsible only, should a marriage take place with his consent, privity or connivance.

(*k*) If the marriage be already solemnized, and the Master report in favour of its validity, the court will proceed as though its validity had never been questioned. If against its validity, then, if a female, and there has not been cohabitation, or if the infant be *infra annos nobiles*, or, it would seem in any case, where the infant is a male, a suit will be ordered for nullity of marriage in the ecclesiastical court; if there have been cohabitation, and the infant is *post annos nobiles*, and a female, a fresh marriage will be ordered by banns; and, perhaps, under certain circumstances, where the infant is a male, the same order would be made on the ground of morality. Until such nullity of marriage be declared, or the new marriage be celebrated, and, in some instances, until the husband execute the settlement, all intercourse between the parties will be prohibited.

(*l*) *Stevens v. Savage*, 1 Ves. 154.

(*m*) *Stackpole v. Beaumont*, 3 Ves. 89; *Bathurst v. Murray*, 8 Ves. 74.

*in loco tutoris* to consent to a proposed marriage of their ward, how beneficial soever it may be.

XXXVIII. A marriage of an infant-ward of Court, or one committed to a guardian by the Court, without the Court's consent, and that of the guardian appointed by it, is an aggravated criminal contempt (*n*), in all the parties concerned, as setting at nought the honor and justice of the Court; it is punishable by committal to prison, under a writ of attachment, during pleasure, and no lapse of time will avail with the Court to withhold its punishment (*o*). Ignorance, or want of notice, that the infant was a ward of Court, does not avoid the contempt, since the proceeding in Chancery which made the infant a ward of Court is a *lis pendens*, of which every person is bound to take notice. Such ignorance, however, may perhaps extenuate the fault.

It is not any contempt of Court to marry a ward after majority without the Court's assent, although the Court still has the property.

The age of the parties marrying must be congruous. The infant, whether male or female, cannot, however, be restrained from marriage *ad annos nobiles*, if there be no other reason, but want of congruity of age.

The Court rests its rule, touching congruity of age, on three grounds:—(1), the general happiness of the infant; (2), the desirableness that the infant should be old enough to know its own mind; and, (3), the assurance that the infant has perfect free will in the matter.

(*n*) In aggravated cases, where there had existed a conspiracy to carry off the ward, the parties implicated, whether they have succeeded in their object or not, have been ordered to be indicted for the offence.

(*o*) See *Ball v. Coulls*, 1 Ves. & Bea. 292—305.



The Court expects, that the person marrying the ward shall be equal in rank and fortune to the infant. Inequality in point of fortune, however, may in some degree be counterbalanced by great superiority of rank.

Settlement      XXXIX. A proper and equivalent settlement (*p*), must be made of the infant's property, particularly in the case of females, before the marriage will be allowed.

For the purpose of claiming the Court's protection, a bill should be filed for the express purpose of making the infant a ward of Court, or there should be some cause or proceeding in Court, to which the infant is a party, concerning either its person or estate; but if there be no cause in Court, yet if a guardian have been appointed on petition under the general power of the Court, the infant becomes so far a ward, that a marriage without consent is a contempt of Court.

Punish-  
ment for  
ravislmnt  
of ward.

XL. In order to punish the offenders on a clandestine marriage of a ward of Court, the complaint may be made by any person party to the suit or not, on behalf of the infant, by petition usually, supported by affidavit. Upon the attendance of the parties, and hearing the facts on the petition, either upon affidavits on both sides, or upon the result of the interrogatories and the Master's report, where there has been a reference, or the personal enquiry of the judge himself, the Court will proceed to punish the offenders, and secure the infant's property.

Where the contempt is not aggravated, or where the parties appear not to be criminally implicated, they are usually discharged without committal, upon appearing in Court, and making their submission,

(*p*) The law and practice of Marriage Settlements are observed upon, *post*, Book III., c. II.

and sometimes receiving a reprimand : their costs are generally allowed them.

In cases of aggravated contempt, the Court, as we have just seen, commits the offenders to prison during pleasure.

After actual committal, the Court will discharge the parties on their petition, upon certain terms, and paying the costs incurred, unless a prosecution for conspiracy have been ordered, or the validity of the marriage be directed to be tried.

XLII. Conditions, both precedent and subsequent, in restraint of marriage annexed to legacies or gifts to infants, are valid, provided they do not prohibit marriage altogether, or lead to a probable prohibition of it.

Restraint  
of mar-  
riage.

Conditions precedent are valid, whether there be a limitation over to others on the non-performance of the condition or not ; and conditions subsequent are valid, so that there be limitations over ; for, without such a limitation, these conditions are merely *in terrorem* and void.

It is said, conditions annexed to portions charged on land must be strictly fulfilled (g).

XLIII. Where a trust or mortgage is thrown upon an infant, the 13 & 14 Vict., c. 60, makes these provisions :—

Infant  
trustees'  
and mort-  
gagees.

Where an infant is seised or possessed of any lands upon any trust or by way of mortgage, the Court of Chancery may make an order upon petition, vesting such lands in such persons in such manner and for such estate as the Court shall direct ; and the order shall

(g) 1 Atk. 379.

have the same effect as if the infant-trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands, in the same manner, for the same estate.

And where an infant is entitled to any contingent right to any lands upon any trust or by way of mortgage, the Court of Chancery may make an order upon petition, wholly releasing such lands from such contingent right, or disposing of the same to such persons as the Court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed, so releasing or disposing of the contingent right (*r*).

By many acts of Parliament for public and general purposes, and by many local acts, the inconveniences arising from the disabilities of infant-proprietors have been obviated, by enabling guardians and trustees to contract and convey on their behalf, duly applying the purchase-money for the benefit of the infants, according to the specific directions of the particular act (*s*).

(*r*) Sections 7 and 8.

(*s*) See 3 & 4 Vict., c. 87 (Improvement of the Metropolis); 1 & 2 Vict., c. 7; 4 & 5 Vict., c. 12 (Houses of Parliament); 2 & 3 Vict., c. 10 (British Museum); 4 & 5 Vict., c. 27 (Royal Parks); 6 & 7 W. IV., c. 79 (Lighthouses); 4 & 5 W. IV., c. 30 (Exchange of Lands in Common Fields); 1 Geo. I., c. 10; 1 W. IV., c. 65, §§ 25 and 26; 58 Geo. III., c. 45; 59 Geo. III., c. 134; 17 Geo. III., c. 53; 21 Geo. III., c. 66; 55 Geo. III., c. 147; 6 Geo. IV., c. 86; 5 Geo. IV., c. 8; 6 Geo. IV., c. 8; 7 Geo. IV., c. 66; 55 Geo. III., c. 147; 17 Geo. III., c. 53; 43 Geo. III., c. 107; 1 & 2 Vict., c. 107; 1 & 2 Vict., c. 23; 1 & 2 Vict., c. 106, and 2 & 3 Vict., c. 18 (Ecclesiastical Purposes); 4 & 5 Vict., c. 38 (Sites for Schools); 22 Geo. III., c. 83; 59 Geo. III., c. 12; 5 & 6 W. IV., c. 69; 1 Vict., c. 50; 7 Geo. IV., c. 74; 1 & 2 Vict., c. 56 (Sites for Workhouses and Prisons), 6 & 7 W. IV., c. 71, § 15 (Tithe Commutation); 1 W. IV., c. 65, §§ 3, 4, 5, 6, 7, 8, 9 and 10 (Admittance of Infant Copyholders); §§ 17

XLIII. Since our law considers an infant discretion-<sup>Infant</sup>less, and incapable of rightly deciding whether proceed-<sup>suitors.</sup>ings in Chancery should be commenced on its behalf, or resisted when brought against its interests; an infant must be represented in Court by some proper person.

When the infant is a plaintiff, claiming a right or seeking protection from an injury, the suit is usually instituted on its behalf by its nearest relation, and hence is styled in the proceedings the infant's *prochein ami*, or next friend. Such *prochein ami* signs a written authority to the solicitor for that purpose, which must be filed with the bill, information, or claim (*t*). Should, however, the nearest relation refuse or neglect to do so, or indeed be the wrongdoer, then the Court permits any person to act as next friend, who is willing to become responsible for the proper conduct of the proceedings.

Whenever two or more suits are instituted on behalf of the same infant, and for the same purpose, by two or more next friends, the Court will stay the proceedings in all, excepting the one which the Master (*u*) points out as the most beneficial for the infant's interest, for Chancery exercises a very careful discretion, in order to facilitate the proper exercise of the right which is given to all persons to initiate proceedings on behalf of infants, yet it will always be anxious to prevent any abuse of the right, or any unnecessary expense to an infant's prejudice (*v*).

If, after an infant is before the Court as a plaintiff, it

and 12 (Leases and Surrenders): 4 & 5 Vict., c. 35, § 11 (Copyhold Enfranchisement).

(*t*) 15 & 16 Vict., c. 86, § 11.

(*u*) The office of Master in Ordinary is to be abolished, and the Master of the Rolls and Vice Chancellors are to sit at chambers for the speedy and efficient despatch of business. See 15 & 16 Vict., c. 80.

(*v*) *Sturten v. Bartholemew*, 6 Beav. 144.

is discovered that he would be better protected by being made a defendant, the Court will order such a change to be effected.

The general rule is, that where a decree is given in a suit where an infant is a plaintiff, it binds him, and the Court does not give an infant-plaintiff a day to show cause against it after majority. But when a day is given, the practice is to have the cause reheard, which is effected by the infant plaintiff presenting a petition of rehearing after attaining full age.

So anxious is the Court to protect infants, that they will be relieved on grounds which are neither mentioned, insisted upon, nor prayed for in their behalf, and will also be protected against mistakes and improper submissions.

It is not necessary that the next friend be a responsible person, nor is he removeable on account of poverty, but the Court will remove him for non-performance of his duty, or for misconduct, or should his interest be adverse to the infant. The next friend cannot be a receiver in the cause, nor can he retire from the suit without giving security for the costs already incurred. If a next friend dies during the pendency of the suit, another must be appointed to carry on the proceedings.

Where a suit has been instituted on behalf of an infant, his coming of age is no abatement of it; but the infant may elect whether he will proceed with it or not. If he proceed with it, all future proceedings may be carried on in his own name, and the bill need not be amended or altered. He will also be liable to all the costs of the suit, in the same manner that he would have been, had he been of age when the bill was originally filed. If he elect to abandon it, he may move to dismiss it on payment of costs by himself; but he cannot compel the

*prochein ami* to pay the costs, unless it be shewn that the bill was improperly filed.

The next friend will be allowed his costs out of the infant's estate, if that be practicable, but he will not be so entitled, if the suit have been instituted from improper motives, or due diligence have been wanting on his part (*u*).

In the case of an infant defendant, the court appoints a guardian *ad litem*, to defend on its behalf, and to be responsible for the conduct and propriety of the defence. An infant is bound by the *bonâ fide* acts of such guardian, who, of course, is removable for misconduct.

An infant's answer (*v*) is expressed to be made by his guardian, and is generally confined to a mere submission of his rights and interest in the matters in question in the cause to the care and protection of the court. The general saving at the beginning, together with the denial of combination at the conclusion, common to all other answers, are in this case omitted; for an infant is entitled to the benefit of every exception which can be taken to a bill, without expressly making it, and he is considered incapable of the combination charged. The general traverse is also left out of an infant's answer, because it cannot be excepted to for insufficiency (*w*). An infant is not bound by the guardian's answer, nor can it be read in evidence against him, for it is not, in fact, the infant's answer. An infant, who is dissatisfied with the guardian's answer, may, after full age, apply to the Court for leave to file another answer; but there must not be any delay or laches.

(*u*) 1 Daniell's Prac., by Head., c. III., pt. II., § 1; Smith's Handbook, 83.

(*v*) As to proceedings against an infant for want of appearance or answer, see Ord. 8 May, 1845, 16, Art. 48; and also Ord., 21 Aug. 1841, 23.

(*w*) Lord Red. 251.

A plaintiff must prove formally his whole case against an infant, for admissions cannot be made on the infant's behalf, unless they are for his or her advantage.

An infant-defendant is bound by a decree in equity, unless in cases of fraud, collusion, or error.

Whenever an estate vested in an infant is ordered by the Court to be sold for the payment of the debts of the person through whom such infant claims, either as heir or devisee, a conveyance of such estate to a purchaser, may, under the Court's sanction, be immediately made by the infant, and the heir of a devisee may be compelled to join in the conveyance (*x*). In cases of partition of property, where one of the parties interested is an infant, the Court will now order such infant to execute the necessary deeds, instead of waiting till its majority (*y*).

In cases not within the meaning of these statutes, an infant-defendant has a day given to him within six months after full age, where the decree orders a conveyance to be made, either in form or substance (*v*), or a foreclosure against an infant.

Where an estate is directed to be sold, and a day is given to an infant to show cause after he attains twenty-one, a direction is generally inserted in the decree that, in the mean time, a purchaser under it shall hold and enjoy the estate against such infant till he attains such

(*x*) 1 W. IV., c. 47; *Brook v. Smith*, 2 Russ. & M. 73.

(*y*) *Cole v. Sewell*, 17 Sim. 40; *Brown v. Wright*, 20 L. J. 216, Ch., see *ante*, p. 107, as to the conveyances of infant-trustees and mortgagees.

(*z*) *Sheffield v. Duchess of Buckingham*, 1 West. 648; *Mallack v. Gallon*, 3 P. Wms. 352.

age; and it seems that a purchaser buying the estate under such a decree must accept the order of the Court for a future conveyance as a sufficient security (*a*).

When an infant has a day to shew cause against a decree, a copy of a judicial writ of *subpœna* is served upon him at majority. If no cause be shewn within the time limited, the decree will be made absolute and conclusive (*b*).

(*a*) *Powell v. Powell*, Mad. & Geld. 53.

(*b*) Daniell's Prac., c. iv., § 8.



## CHAPTER V.

## THE DOCTRINES OF THE COMMON LAW RELATING TO INFANTS.

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| <p>F. Legal incapacity.<br/>         II. Classification of an infant's contracts.<br/>         III. Void contracts.<br/>         IV. Voidable contracts.<br/>         V. Binding contracts.<br/>         VI. Liable for wrongs or torts<br/>         VII. Disability under the Statutes of Limitation.<br/>         VIII. Witnesses.</p> | <p>IX. Infant-suitors.<br/>         X. Protection of infants.<br/>         XI. Outlawry.<br/>         XII. Labor in mines and factories.<br/>         XIII. Poor-laws:—<br/>             (a) Relief.<br/>             (b) Classification of paupers.<br/>             (c) Settlement.<br/>             (d) Removal.</p> |
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Legal incapacity.

I. AN infant being under a legal incapacity, cannot, as a general rule, enter into a formal and binding contract. This incapacity is founded upon the public policy of protecting the immaturity and inexperience of minors against the artifice and imposition of craft and subtlety, and is a personal privilege entirely confined to the infant, who, or whose representatives, can alone take advantage of it, for none of the adult-parties to the contract can protect themselves from its liabilities, by setting up the defence of infancy (*a*). An infant, then, may sue by next friend, (except (*b*) as informer upon a penal statute); but cannot be sued upon his or her contract.

(*a*) If, therefore, any person being of full age, enter into an agreement with an infant, he is bound thereby, in despite of the want of reciprocal responsibility, and it is only in the option of the infant or his representatives to avoid it. Yet, as the remedy is not mutual, Equity will refuse to decree a specific performance of such contract at the suit of the infant; because, if a decree were pronounced for a specific performance, the court could not compel the infant to complete the contract, either by paying the purchase-money, or executing the necessary conveyance; *Flight v. Bolland*, 4 Russ. 298. Story on Contracts, 23.

(*b*) Because an infant cannot legally appoint an attorney, and penal

II. This broad principle of the old Common Law has been very much broken in upon and qualified by judicial authority and modern interpretation. For the purpose of exhibiting these innovating modifications, it is necessary to classify the contracts of infants into three kinds, namely :—

Classification of an infant's contracts.

- (1) Those which are altogether void ;
- (2) Those which are simply voidable ; and,
- (3) Those which are binding.

III. Under the first kind of contracts are included all those, which are positively injurious to an infant's interest, and can only redound to its prejudice ; for, then, an uncontrollable presumption of fraud arises from an infant's flexible and easily deceived reliance, and consequently they are irratifiable, and nullities amongst all the parties thereto. Such are penal obligations, surty-bonds, releases to guardians, powers (c) and warrants of attorney, a *cognovit actionem*, and deeds of annuity or rent-charge (d).

Void contracts.

The following is a curious old case, illustrating the doctrine of an absolutely void contract ;—Miss Anna Secrogham, an infant of the age of sixteen, brought an action, through her guardian, against one Stuartson, a hairdresser, for having cut off all the hair of her head. The defendant justified the act under a contract made by the lady with him, whereby the lady had bargained, for a certain sum of money, that the defendant should cut off from her head two ounces of her hair. The Court held

actions must be maintained by the informer in person, or by attorney, not by next friend. 18 Eliz., c. 5, § 1.

(c) But see *post*, pp. 119, 122.

(d) 53 Geo. III., c. 141, § 8 ; the intended purchaser being guilty of a misdemeanor.

the cutting off of the hair unlawful ; for such a contract as was alleged could not legally be made by the infant, and was therefore absolutely void, as being decidedly injurious to the lady's beauty and personal appearance. But if the infant had been attacked by fever, and the shaving of her head had been necessary and beneficial, then such a contract may have been valid, and the defendant's act consequently justifiable (*e*). A contract of a female-infant for the sale of her necessary apparel and ornaments is also void

Voidable  
contracts.

IV. Under the second kind of contracts are included all those which may be beneficial to the infant, and are, therefore, only voidable.

The distinction between a *void* and *voidable* contract, is important. A void contract is absolutely null, and cannot, by any subsequent act or proceeding, be validated and legalised ; but, a voidable contract may be afterwards rendered legally efficacious by the express or implied confirmation of the infant on attaining majority, without any new inducement or consideration ; the moral obligation to pay a justly incurred debt being deemed sufficient ; yet, the infant on majority possesses the undoubted option either of ratifying or of repudiating a voidable contract, and so leaving the parties remediless ; which option cannot be controlled by the Courts,—it is such infant's sole and arbitrary privilege.

And this being so, the confirmation may be conditional or qualified, and the person relying upon such a confirmation must prove that the condition is performed, or the qualification accomplished, before he can fix the infant with any liability upon it. Should the ratification

(*e*) 3 Keb. 369,

be restrictive, the infant is only liable to the extent of the restriction.

And an action cannot be maintained, whereby to charge any person upon any promise made after full age, to pay any debt, contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification be made by some writing signed by the party to be charged therewith; but oral evidence may supply defects in the written ratification as to the sum, the date, and the person to whom the promise is addressed (*f*).

An infant's option to elect, whether he or she will repudiate or confirm a contract entered into during infancy, does not necessarily entitle such infant to recover back money paid in pursuance of it. It is a general rule, that an infant cannot recover back money paid, (without any practised imposition), even upon a contract, which, by reason of infancy, he is not bound to complete; as a premium paid on a lease of premises, which the infant actually occupied, although he may have avoided the lease on attaining twenty-one years of age. Yet an infant may recover back a deposit paid on an agreement, which he refused to perform, and which is wholly unexecuted (*g*).

But if horses or carriages, diamonds or jewels, or costly articles of any description, have been delivered to an infant, pursuant to an intended contract of sale, and he possesses them at his majority, and has not paid, and will not pay, the price of them, the vendor may demand them back; if they are not returned, (the now adult infant having them at the time in his possession and under his control), the vendor will

(*f*) 9 Geo. IV., c. 14, § 5; *Hartley v. Wharton*, 11 Ad. & E. 934.

(*g*) Chitty on Contracts, 154, 155.

be entitled to recover their value in an action of trover. If the infant, after attaining majority, keep the things, and at the same time repudiate the contract of sale, and refuse to pay the price of them, the right of property reverts in the vendor, (the contract being at an end); they cannot be rightfully detained after their return has been demanded by the true owner, for the privilege of infancy is to be used as a shield, and not as a sword; as a defence against the demands of unconscientious and rapacious creditors, and not as an offensive weapon of fraud (*h*).

All voluntary transfers or conveyances (*i*) of an infant's property are voidable, and are rescindable or confirmable on majority.

The conveyance must, however, to be valid, be re-made, re-executed, and re-delivered by such infant, and bear a date after such infant's majority (*j*).

An infant may purchase property, which, after majority, may be either abandoned or adopted. The adoption may be either by express confirmation or simple acquiescence, or by remaining in possession of such property for a reasonable period after full age without any dissent, or receiving, from time to time, its rents and profits, or continuing a partnership without any disaffirmation after majority (*k*).

The following contracts are also voidable—bills of exchange (*l*), promissory notes, stated accounts, loans of

(*h*) Addison on Contracts, 864, 865.

(*i*) See *post*, p. 122.

(*j*) Bac. Abr., "Inf." (A.)

(*k*) As to marriage settlement, see *post*, Book III. c. II.

(*l*) An infant may sue thereon, and payment to the infant is good, and an infant may indorse bills, and the indorsee may sue all the other parties thereto, the infant excepted.

money, purchases of goods, powers of attorney to receive possession of land, or to perfect title thereto, agreements to refer disputes to arbitration, trade agreements, horse and other warranties, money lent to purchase necessaries, although it was so expended, for the law will not trust an infant, treating him as invincibly ignorant, and fearing that he may misapply such money (*m*).

V. Under the third kind of contracts are included all those the object of which is to furnish necessaries (*n*) to the infant, who must live as well as any other individual. The word "necessaries" is relative, not confined to those needful things without which existence could not endure, but comprehending every liberal supply and expense suitable to the actual rank, fortune, and age of the infant, yet not warranting prodigality, or wasteful and reckless expenditure (*o*). While it is the province of a jury to determine whether the things provided for the infant are or are not necessaries in the particular instance presented to them, to assist them in the forming of which opinion, the person who furnished the things must prove them to be necessaries, in order that he may recover their reasonable price from the infant; it is the duty of the

Binding  
contracts.

(*m*) But the Court of Chancery will relieve in such a case, and treat the lender as a creditor for necessaries of the infant. See *Marlow v. Pitfield*, 1 P. Wms. 558.

(*n*) It is said, an infant may be sued on a bond, without a penalty, given for the exact sum due for necessaries, but not a penal bond, or one carrying interest. Co. Litt. 72 a, n. 2. This doctrine is questionable.

(*o*) Silks, furs, and velvets may be necessary and suitable for a young lady of rank and station in society, who keeps a carriage, and servants in livery, and appears at the tradesman's shop surrounded with the ordinary accompaniments of wealth and station. *Dalton v. Gib*, 5 Bing. N. C. 198.

judge to decide (*p*) whether, in point of law, the things themselves are necessaries, truly suitable to persons in the worldly condition of the infant.

But our law says, that if things, however necessary, be provided for an infant, already adequately supplied by his or her friends, or by other persons (*q*), or if they be too expensive, or too profuse, or if the infant live beneath the parent-roof, or under the care of a guardian, who furnishes ample necessaries, an action is not maintainable for their price; so that it behoves a person supplying necessaries to an infant, to make due enquiry, and exercise proper diligence, that he may ascertain whether he will be able to recover the value of the articles ordered, should he furnish them and his account be afterwards resisted.

Now, in order to recover from a father the cost of things, furnished pursuant to the order of his infant-

(*p*) In an action against a husband and wife, for money paid to the use of the wife before her marriage, it appeared that the plaintiff and the defendant's wife were brother and sister, and each had a sum of 300*l.* as a fortune. In 1792, the sister then being under age, the plaintiff paid a sum of 40*l.* to a third person, as a premium for taking the sister as an apprentice to learn millinery; and a letter was read from the sister to the plaintiff, wherein she expressed her gratitude to him for this mark of his kindness, and hoped it would be in her power to pay him soon. But she was under age when this letter was written, and no subsequent promise was proved. Lord Kenyon declared himself clearly of opinion that this sum of money could not be considered as necessaries, and, therefore, that the payment of it could not be enforced in a court of law: where a man does an act of generosity for an infant, he relies wholly on the generosity of the infant to make a suitable return. The infant ought to make a due return, but it is a duty of imperfect (moral), not of legal, obligation. *Smith v. Gibson*, Peake, Addl. Ca. 52.

(*q*) An infant, then, can resist many demands more easily than one, since if he have credit with a number of tradesmen, he need not pay any of them. *Charlton v. Boynton*, 7 C. & P. 52.

child, the transaction must be by his authority, or with his assent, either express, or implied from particular circumstances, or subsequently recognized by him. Were this otherwise, a parent having an improvident child might be prejudiced to an indefinite extent, and perhaps ruined.

A parent or guardian, placing the infant at a school, implies that credit was given to the parent or guardian only, who is, therefore, liable, and not the infant. Our law does not, as it ought to do, compel a father to educate his children, and therefore, if his assent to his infant's instruction were negated by the peculiar circumstances of the transaction, he would not be liable to pay. All that a parent is compellable by law to do is to provide for his child a bare subsistence, so as to prevent it's being chargeable to the parish (*r*).

Under "necessaries" will range an infant's fair and reasonable food, apparel, lodgings, medicine, medical attendance, schooling, jewellery, horses, servants, &c.; and also necessaries furnished to an infant's wife and children; money paid for an infant's necessaries, under the direction of its advancer, is recoverable.

An infant may be bound by a formal deed as an apprentice even to another infant, but the infant may repudiate the deed at twenty-one, by a deliberate announcement to that effect, and will not be liable upon the covenants contained in such deed (*s*); but in practice, an adult-friend, either the parent or guardian, covenants for

(*r*) A father cannot reclaim an absolute gift to his child, a minor, of an article of dress or ornament; for instance, a watch (*Smith v. Smith*, 7 C. & P. 401); and where a parent advances money to his child, the presumption of law is, that it was a gift and not a loan (*Hick v. Keats*, 6 Dow. & Ry. 68; S. C. 4 B & C. 71.)

(*s*) *Gilbert v. Fletcher*, Cro. Car. 179.



the due and proper behaviour of the infant. An infant may enter into a contract of service, if beneficial (*t*).

Transfers or conveyances of infants made pursuant to a condition, or a custom, or by virtue of an Act of Parliament, or under a power simply collateral (*u*), (for then the infant is but a mere instrument), or by the order of the Court of Chancery, will be valid and binding even during minority.

Infants may grant leases of their property, when obviously for their advantage, and they will not be permitted to avoid them on attaining majority; neither can they avoid their contracts for necessary repairs to their property, since to permit them so to do would be to convert their privilege into an offensive weapon of injustice, while it is only intended as a shield.

Contracts of infants concerning the public service and pursuant to statute, are binding; and so are an infant's representative acts, as an agent, &c., and also acts of necessity, as presentations of clergymen to ecclesiastical benefices, admittances to, and grants of, copyhold estates, &c.

If an infant-widower give directions for the funeral of his deceased wife, he is personally responsible for its expenses; and the same liability arises in the case of an infant-widow, who has given an order to an undertaker for the funeral of her deceased husband, although the latter may have died in insolvent circumstances (*v*).

If an infant be a joint-contractor with others, he ought not to be included in an action to enforce the contract, unless the infant have become adult, and duly ratified the contract before action brought.

(*t*) See *Reg. v. Lord*, 12 Q. B. 157.

(*u*) By a *deed*, and not by *will*, which an infant cannot make for any purpose whatever. 1 Vict., c 26, § 7.

(*v*) Addison on Contracts, 862.

Infants cannot be made bankrupts, unless they have pretended to be of legal maturity; nor can they take the benefit of the Insolvent Act, for they cannot execute the required warrant of attorney on their future acquired property, as the condition of their relief; nor are they liable as innkeepers under the custom of the country (*v*).

VI. Seeing that the privilege which we have just examined, is purely protective, and will not justify abuse or artifice, infants are clearly liable for all the consequences of wrongs,—or, as they are legally denominated, torts—actually perpetrated by them: as assaults and batteries, positive frauds, embezzlement, actual trespasses on land, slanders, and retaining property tortiously, without any title or lawful excuse.

Liable for wrongs or torts.

There are some rights of action, which may be vindicated either by treating them as a contract or a tort. This kind of conversion will only be allowed against infants, where they are liable for a tort, since the law will not permit them to evade their liability, because the damage is sued for as on a contract; but where infants

(*v*) By the custom of the realm, innkeepers are obliged to preserve the goods and chattels of their guests, which are within their inns, without subtraction or loss, day and night, so that no damage, in any manner, shall thereby come to their guests from the negligence of the innkeeper or his servants. Rigorous as this rule may seem, and hard as it may actually be, in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield. For travellers, who must be numerous in a rich and commercial country, are obliged to rely, almost implicitly, on the good faith of innholders, whose education and morals are none of the best, and who might have frequent opportunities of associating with ruffians and pilferers, while the injured guest would seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them. Jones on Bailments, 95.

are not liable on a contract, they cannot be made so merely by suing in a tort action, for that would be to destroy, by a technical circuitry, that protection with which the law has surrounded them.

For example, if an infant have been guilty of an embezzlement, which is a tort, the amount embezzled may be recovered in a contract-action for money had and received, and infancy would be no defence, as the infant is properly liable for such a wrong, which might have been sued for in a tort action; but if, under a contract for the hire of a horse by an infant, the horse be immoderately ridden, and is injured, a tort action will not lie, for the infant is protected from liability under such a contract, by reason of infancy, which may therefore be successfully pleaded, for the matter is founded purely in contract, although pursued in the form of a tort (*w*).

Disability  
under the  
Statutes of  
Limitation

VII. Infants are, for the most part, specially exempted from the Statutes of Limitation (*x*), and have a certain time given them, after attaining legal maturity, in which to pursue the remedies for the protection of their rights or redress of their wrongs. Should they not be particularly exempted, they are of course bound by the provisions of the statute.

Witnesses.

VIII. Children are admitted as witnesses in courts of justice, if they exhibit a competent understanding, capable of distinguishing good from evil, and comprehend the nature and responsibility of an oath, without any regard being taken as to their age. The uncorroborated testi-

(*w*) See further, upon this subject, Chitty, or Story, or Addison on Contracts, or Lush's Practice, Introduction.

(*x*) 21 Jac. I., c. 16; 3 & 4 W. IV., cc. 27 and 42.

mony of children is sufficient to establish the truth of what they depose to, especially if delivered plainly and fairly, without any indication either of partiality or ill-will (*y*).

IX. An infant-plaintiff sues in the Common Law Courts, either through a *prochein ami* or guardian, for an infant cannot appoint an attorney, nor prosecute an action in person. An infant usually sues by *prochein ami*, who is appointed by a Judge at Chambers, and acts without any authority or warrant from the infant. The old practice was to sue by guardian, who, however, required an authority or warrant from the infant, and, therefore, this method has fallen into desuetude. The infant's father, or some friend who is willing to proceed in the action, is appointed. The appointment is made after the writ of summons is issued and served, and before the declaration, containing the complaint, is delivered. The address of the *prochein ami* must be furnished to the other party, if required. By a rule of all the Courts of Common Law (*z*), a special admission of a *prochein ami* or guardian to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action specified.

The *prochein ami* is an officer of the Court, appointed to look after the infant's interests, and is, therefore, removable by its order. The judgment in such an action is binding upon the infant, who cannot disavow it. The *prochein ami* is responsible for the costs both to the plaintiff's attorney, and to the defendant, should the ac-

(*y*) Starkie on Evid. 94; 1 Phillipps on Evid. c. ii.; and Roscoe's Evid. 112.

(*z*) H. T., 2 W. IV., r. 2.

tion terminate in his favour, who may recover them against the *prochein ami* by attachment, or he has his remedy against the infant by any of the ordinary writs of execution. The infant cannot be compelled to give security for costs, even though the *prochein ami* is sworn to be insolvent (*a*). In the fictitious action of ejectment, if the real plaintiff were an infant, the defendant might have, after pleading, obtained a stay of the proceedings until a responsible party had been appointed, on behalf of the infant, to answer for the costs, should the infant have been cast in the action. This fiction in ejectment is abolished, and the action is now commenced by writ of summons as in personal actions (*b*).

An infant-defendant can only appear to, and defend, an action by guardian, who must have an authority or warrant from the infant. This guardian is appointed in the same manner as the *prochein ami*.

The ordinary common appearance cannot be entered by the plaintiff on behalf of an infant-defendant (*c*); and, therefore, when such a defendant neglects to appear, a Judge at Chambers will order that unless the infant appear within six days after personal service of the order, the plaintiff may assign a certain named person for his guardian, and enter a common appearance for such defendant.

The infancy of the defendant must be specially pleaded; and strict proof of infancy at the time of the contract adduced by the defendant. The registry of birth under 6 & 7 Wm. IV., c. 86, together with the testimony of some of

(*a*) As to whether the *prochein ami* can be compelled to give such security, see *Watson v. Fraser*, 9 Dowl. 741.

(*b*) Nor can such an appearance, called an *Appearance sec. stat.*, now be entered by a plaintiff in any case; 15 & 16 Vict., c. 76, §§ 27 and 28.

(*c*) 15 & 16 Vict., c. 76, s. 166.

the defendant's family, or the medical attendant, will be sufficient.

An infant-defendant is liable for the costs, if the action be determined against him; and any of the ordinary writs of execution may be issued, but the guardian is *primâ facie* liable for the costs of the defendant's attorney, in the absence of a special arrangement to the contrary (*b*).

X. The Court of Queen's Bench, (as well as the other common law Courts), interferes as to the personal restraint of infants, by granting a writ of *habeas corpus*, under which the infant is produced in Court, and the whole matter investigated. Protection of infants.

The distinction between this Court and the Court of Chancery (*c*), is that while the care of the person to protect it from violence, cruelty, improper restraint, or moral contamination, belongs to the former tribunal; the care of the person with respect to education, belongs to the latter, as to which the Queen's Bench never mediates (*d*).

It must be observed, that where an application is made to take away an infant from any person, except its father, it is not a necessary preliminary to shew that force or restraint is employed; but there must be some illegal force, or improper restraint, on the part of the father, in order to induce the Court to remove the child from his custody (*e*).

XI. When a person disobeys the order or process of a Court of law, and exhibits a contumaciousness to its Outlawry.

(*b*) 2 Clitty's Arch. 889—894; 2 Saund. 117 k; Brown's Actions at Law, 290—298.

(*c*) See *ante*, p. 58, *et seq.*

(*d*) 2 Bligh, N. S. 136; 9 Moore, 278.

(*e*) *Ex parte McClellan*, 1 Dow. 81.

authority, he is in danger of the punishment of outlawry, *i.e.*, of being deprived of his personal rights and privileges, and treated as legally defunct (*civiliter mortuus*). He forfeits, moreover, his property, and is exposed to the suits and prosecutions of his creditors, claimants, and opponents, according to the maxim,—“ Let outlaws be answerable to all, and none to them.” His representative character, as an executor or trustee, is, however, unaffected by his outlawry, for then he is but an instrument, and the rights of his beneficiaries are respected and preserved from his contempts and wrongful conduct.

Should the contumacious individual be of the fair sex, she is not outlawed, (as it was never the practice to exact from them the oath of allegiance, whereby the person having taken it, was said to be an inlaw,) but she is simply waived, *i.e.*, disregarded, and left out (*derelecta*).

Labor in  
mines and  
factories.

XII. The 5 & 6 Vict., c. 99, altogether prohibits the employment of women and girls in mines and collieries, after the 1st day of March, 1843, under heavy penalties (*f*).

As to female-labour in factories, the 13 & 14 Vict. c. 54, provides, that after the 5th August, 1850, no young person, and no female above the age of eighteen years, shall be employed in any factory before six of the clock in the morning, or after six of the clock in the evening of any day, (save to recover lost time); and no young person, and no female above the age of eighteen years, shall be employed in any factory, either to recover lost time, or for any other purpose, on any Saturday after two of

(*f*) The same act regulates the employment of boys working in mines and collieries. See 13 & 14 Vict., c. 100, as to the inspection of coal mines. As to chimney-sweeping, &c., see 4 & 5 W. IV., c. 35, and 3 & 4 Vict., c. 85.

the clock in the afternoon. The meal times must be between half past seven in the morning, and six in the evening, and not less than an hour and a half must be allowed for meals in the course of every day (*g*), one hour thereof, at the least, shall be given, either the whole at one time, or at different times, before three of the clock in the afternoon; and no child or young person shall be employed more than five hours before one of the clock in the afternoon of any day, without an interval for meal-time of at least thirty minutes, and during any meal-time which shall form any part of the hour and a half allowed for meals, no child or grown person shall be employed or allowed to remain in any room in which any manufacturing process is then being carried on; and all the young persons employed in a factory, shall have the time for meals, at the same period of the day, unless otherwise allowed by an inspector (*h*). Young persons and females above eighteen are not to be employed in recovering lost time after seven o'clock in the evening; and the times before six o'clock in the morning and after six o'clock in the evening, during which any such young person or female is so employed in any day, shall not together exceed one hour.

By the 7 & 8 Vict., c. 15, it was enacted, that in any factory in which any part of the machinery was moved by the power of water, when the stream was so diminished by drought or swollen by flood during any part of the day that any part of the manufacturing machinery driven by the water-wheel had been stopped by reason of such drought or flood, the young persons who would have been employed at such machi-

(*g*) 3 & 4 W. IV., c. 100, § 6.

(*h*) 7 Vict., c. 15, § 36.



nery might recover such lost time during the night next following the said day, unless the said day were Saturday; provided that no such young person should be employed during any twenty-four consecutive hours for a greater number of hours than that to which the ordinary daily labour of such young persons in factories was otherwise restricted by law, and that no young person so employed in the night should work more than five hours without an entire cessation from work of at least thirty minutes. The 13 & 14 Vic., c. 54 (*i*), provides, that for the purposes of this last-recited enactment, the word "night" shall include the whole period between six of the clock in the evening and six of the clock in the morning; and no young person and no female above the age of eighteen years, shall be employed to recover such lost time as last aforesaid during any twenty-four consecutive hours for more than ten hours and half of another hour; and, save as herein-before mentioned, young persons and females may be employed to recover lost time according to the provisions of the above recited act.

But during all or part of the period between the 30th day of September of any year and the first day of April of the following year, young persons, and females above the age of eighteen years, may be employed, except on Saturday, between the hours of seven of the clock of the morning and seven of the clock of the evening, instead of the hours above limited, under the following regulations and conditions (that is to say), notice signed by the occupier of any factory, or his agent, of the intention to employ young persons and females under this provision, specifying the period, not being less than one month, during which they are to be so employed in such factory, shall

(*i*) §§ 5, 6, 7, & 8.

be given to one of the inspectors of factories, and a notice to the like effect, in such form as shall be approved by such inspector, and signed by such occupier, or his agent, and by such inspector, shall be hung or fixed up, and during the period specified in the notice shall be kept fixed up, according to the directions for other notices in the 7 & 8 Vict., c. 15, in such factory; and during the period specified in such notice young persons, and females above the age of eighteen years, may be employed in such factory after six of the clock and not later than seven of the clock in the evening of any day, except Saturday; and during the period specified in such notice (save to recover lost time as above provided) no young person, and no female above the age of eighteen years, shall be employed in such factory before seven of the clock in the morning of any day, except Saturday; and the provisions in the 13 & 14 Vict., c. 54, contained, shall, as to every day, except Saturday, during the period specified in such notice, take effect as if seven of the clock in the morning and seven of the clock in the evening were throughout substituted for six of the clock in the morning and six of the clock in the evening respectively.

The 7 & 8 Vict. c. 15, also enacted, that any child above eleven years of age, employed solely in the winding and throwing of raw silk, and who shall have obtained the requisite surgical certificate of his having completed his eleventh year, may work, without any proof of having attended a school, for any time not exceeding ten hours on any working day, but not after half-past four of the clock of the afternoon of any Saturday. This provision, the 13 & 14 Vict., c. 54, repeals, and provides that, in lieu thereof, it shall be lawful

for any child employed solely in the winding and throwing of raw silk, who shall have obtained the requisite surgical certificate of his having completed his eleventh year, to be employed in all respects as young persons may be employed under this act.

It then enacts, that every young person, and every female above the age of eighteen years, who shall be employed in any factory, or shall be allowed to remain in any room where any manufacturing process is then being carried on in any factory, during any part of the times which by the notice then fixed up in such factory in that behalf are mentioned as the times allowed for meals, shall be deemed to be employed contrary to the provisions of the acts relating to this subject.

We must refer to these and other (*i*) important acts for the wholesome provisions which they contain, relative to the labour, education, and holidays of children.

Poor-Laws: XIII. We owe our system of poor-laws entirely to Acts of Parliament, beginning from the time of the eighth Henry. It will only be necessary in this place to speak of them briefly (*j*), under the four heads of relief, classification of paupers, settlement, and removal.

Relief. (a) Any person, who is in need, is entitled to relief by applying to the overseers or guardians of the parish, which will, however, be relieved of the burthen, should the pauper have a father or grandfather, mother, grandmother, or child; for he or she (being able to do so) is liable to maintain him or her at a rate to be assessed by

(*i*) They are,—3 & 4 W. IV., c. 103; 4 & 5 W. IV., c. 1; 8 & 9 Vict., c. 29; 9 & 10 Vict., cc. 18 and 40; 10 & 11 Vict., cc. 29 and 70.

(*j*) The reader is referred to the many voluminous works on the poor-laws for further details upon this extensive theme. The law relating to

an order (*k*) of the justices at their general, quarter, or petty sessions, or by the guardians of a union; a disobedience to which is summarily punishable (*l*).

All relief given to or on account of a wife, or to or on account of any children under sixteen, not being blind, or deaf, or dumb, shall be considered as given to the husband or father, as the case may be: and if the children belong to a widow, competent to maintain them, the relief will then be considered as given to her; nevertheless, the right to proceed against any of the natural or blood relations just enumerated, shall not be affected (*m*).

So long as it may appear that a husband is beyond the seas, or in custody of the law, or confined as a lunatic, all relief given to his wife or her children shall be considered as relief granted to a widow, and under the same conditions, but without affecting the husband's obligations and liability (*n*).

In the case of a widow, having a legitimate child, and no illegitimate child born after her widowhood, and residing at her husband's death with him in some place other than the parish of her legal settlement, and not situated in any union, in which such parish is comprised, the guardians of such parish may grant her relief, at their option, although she does not reside in such parish, which, however, will not supersede the liability of the parish of her actual domicile from relieving her (*o*).

the officers for the administration of this system, the auditing of accounts, and the poor rates, will be found therein.

(*k*) The order must show, that the person is poor, old, blind, lame, or impotent, or not able to work. 1 Ld. Raym. 699.

(*l*) 43 Eliz., c. 2, s. 7 and 59 Geo. III., c. 12, § 26.

(*m*) 4 & 5 W. IV., c. 76, § 56, and see *ante*, p. 132.

(*n*) 7 & 8 Viet., c. 101, § 25.

(*o*) *Ib.* §. 26.

Every person running away, and leaving his wife, or his or her children, chargeable to the parish, shall be deemed a rogue and a vagabond, and be liable to three calendar months' imprisonment (*p*).

Overseers of the poor are not authorised to give any relief beyond the order of a select vestry or the guardians, (as the case may be), except in instances of sudden and urgent necessity; and then not in money, but only in articles of absolute need (*q*).

The cost of the relief given to any pauper chargeable to any union being a destitute foundling, as well as the costs of its burial, shall be chargeable to the common fund of such union. A destitute foundling is deemed to be any destitute deserted child under twelve, not being in the care of any relative, guardian, or friend, and whose settlement shall not be known (*r*).

Classifica-  
tion of  
paupers.

(b) By the articles 98, 99, 100, and 101 of the rules framed by the Poor Law Commissioners, paupers are classified as follows:—

- Class. 1. Men infirm through age, or any other cause.
2. Able-bodied men, and youths above the age of fifteen years.
3. Boys above the age of seven years and under that of fifteen.
4. Women infirm through age, or any other cause.

(*p*) 5 Geo. IV., c. 83, § 4, and see 5 Geo. I., c. 8, § 1.

(*q*) 4 & 5 W. IV., c. 76, § 54, and see § 52 as to the relief of able-bodied poor.

(*r*) 11 & 12 Vict., c. 110, § 1, 12 & 13 Vict., c. 103, § 2. AS TO THE emigration of paupers, see 4 & 5 W. IV., c. 76, § 62, 7 & 8 Vict., c. 110, § 5, 9 & 10 Vict., c. 66, 11 & 12 Vict., c. 110, § 5, and 12 & 13 Vict., c. 103, § 20.

5. Able-bodied women, and girls above the age of fifteen years.
6. Girls above the age of seven and under that of fifteen.
7. Children under seven years of age.

To each class shall be assigned that ward, or separate building, or yard, which may be best fitted for the reception of such class; and each class of paupers shall remain therein without communication with those of any other class.

Provided, 1stly, that the guardians shall, from time to time, after consulting the medical officer, make such arrangements as they may deem necessary with regard to persons labouring under any disease of body or mind.

2ndly. The guardians shall, so far as circumstances will permit, further subdivide any of the classes enumerated above, with reference to the moral character or behaviour, or the previous habits of the inmates, or to such other grounds as may seem expedient.

3rdly. That nothing in this order shall compel the guardians to separate any married couple, being both paupers of the first and fourth classes respectively, provided the guardians shall set apart for the exclusive use of every such couple a sleeping apartment separate from that of the other paupers.

4thly. That any pauper of the 5th and 6th classes may be employed constantly or occasionally in any of the female sick wards, or in the care of infants, or as assistants in the household work; and the master and matron shall make such arrangements as may enable the paupers of the 5th and 6th classes to be employed in the household work, without communication with the paupers of the 2nd and 3rd classes.

5thly. That any pauper of the 4th class, whom the master may deem fit to perform any of the duties of a nurse or assistant to the matron, may be so employed in the sick wards, or those of the 4th, 5th, 6th, or 7th classes; and any pauper of the 1st class, who may by the master be deemed fit, may be placed in the ward of the 3rd class, to aid in the arrangements and superintend the behaviour of the paupers of such class, or may be employed in the male sick ward.

6thly. That the guardians, for a special reason to be entered on their minutes, may place any boy or girl between the ages of ten and sixteen years in a male or female ward, respectively different from that, to which he or she properly belongs, unless the Commissioners should otherwise direct.

7thly. That the paupers of the 7th class may be placed in such of the wards appropriated to the female paupers as shall be deemed expedient, and the mothers of such paupers shall be permitted to have access to them at all reasonable times.

8thly. That the master, (subject to any directions given or regulations made by the guardians), shall allow the father or mother of any child in the same workhouse, who may be desirous of seeing such child, to have an interview with such child at some one time in each day, in a room in the workhouse to be appointed for that purpose. And the guardians shall make arrangements for permitting the members of the same family, who may be in different workhouses of the union, to have occasional interviews with each other, at such times and in such manner, as may best suit the discipline of the several workhouses.

9thly. That casual poor wayfarers, admitted by the

master or matron, shall be kept in a separate ward of the workhouse, and shall be dieted and set to work in such manner and under such regulations as the guardians, by any resolution now in force or to be made hereafter, may direct.

The guardians shall not admit into the workhouse, or any ward of the same, or retain therein a larger number, or a different class of paupers, than that heretofore, or hereafter, from time to time, to be fixed by the Commissioners; and in case such number shall be at any time exceeded, the fact of such excess must be forthwith reported to the Commissioners by the clerk.

No pauper of unsound mind, who may be dangerous, or who may be reported as such by the medical officer, or who may require habitual or frequent restraint, shall be detained in the workhouse for any period exceeding fourteen days; and the guardians shall cause the proper steps to be taken for the removal of every such pauper to some asylum or licensed house, so soon as may be practicable.

(c) A settlement under the poor-laws means the right a Settlement person has to resort to a particular parish for relief.

The several modes of acquiring a settlement are these:—

(1). By birth. *Primâ facie* the place of one's birth is his or her place of settlement, until some other settlement be proved.

Should, however, the settlement of a pauper's father be proved, that will be the child's settlement; but if the father have no settlement, then the place of the mother's maiden settlement, if proved, will be that of the child.

The exceptions to the rule of birth-settlement are,



first, children born in prisons or lying-in hospitals, 13 Geo. III., c. 82, §§ 3 & 5 ; 54 Geo. III., c. 170, § 2. Second, children born in workhouses of unions, who gain a settlement in the parish, which sends the mother to such union, 20 Geo. III., c. 36, § 2 ; 54 Geo. III., c. 170, § 3 ; 7 & 8 Vict., c. 101, § 56. Third, children born out of England or Wales, unless they acquire a settlement in their own right, or derive it by marriage or parentage, as presently stated (*r*).

(2). By marriage. A wife follows her husband's settlement, (for she cannot acquire one herself), and loses her maiden settlement. Should, however, her husband not have any settlement, or it is unknown, a wife then retains her maiden settlement (if any).

(3). By parentage. Children follow their father's settlement, until they are emancipated, and cease to continue members of his family, which they do by marrying, or acquiring a settlement in their own right, or residing separately at the time they attain majority, unless lunatic. Should the father have no settlement, or it be unknown, then they are entitled to that of their mother.

(4). By apprenticeship and inhabitation. But the binding must be by indenture, 3 W. & M., c. 11, § 8.

(5). By renting a tenement of ten pounds annual value, and, since 14th August, 1834, the occupant must have been assessed to the Poor-rate, and have paid the same for one year, 4 & 5 Wm. IV. c. 76, § 66.

(6). By possessing any estate in any land, how small soever its value, provided the possessor have resided forty days either consecutively or in the whole, in the parish, whilst possessing the estate there (*s*).

(*r*) As to the settlement of illegitimate children, see *ante*, p. 51.

(*s*) See 4 & 5 W. IV., c. 76, § 68.

By 9 Geo. I., c. 7, § 5, it was enacted, that, from and after the 25th March, 1793, no person shall be deemed to have acquired or gained any settlement in any parish or place, by purchasing any estate or interest therein, whereof the consideration of such purchase doth not amount to thirty pounds, *bonâ fide* paid, for any longer or further time than such person shall inhabit in such estate, and shall then be liable to be removed to such parish or place where such person was last legally settled, before such purchase and inhabitancy.

(7). By payment of parochial taxes. A person, being charged, and paying his or her share towards the public taxes, or levies of a town or parish, gains a settlement therein, 3 W. & M., c. 11, § 6.

Since 1795, the premises rated must be of the annual value of ten pounds at least, 35 Geo. III., c. 101, § 4.

Since 1825, the tenement must be a separate and distinct building, *bonâ fide* rented for 10*l.* per annum at least, and such rent paid for one whole year; the tenement must also be occupied by the tenant for one year at the least. 6 Geo. IV., c. 58, § 2 (*t*).

(d) The poor of a parish are either settled, and chargeable thereto, or casual, entitled only to temporary relief, and liable to be removed to the parish of their legal settlement. Removal.

The law of removal is intricate and voluminous; we can but lay down a few leading propositions relating to it, and refer the reader for further information to the text-books on the subject.

(*t*) A settlement by hiring and service, or by residence under the same, cannot be acquired since 14th August, 1834; nor can a settlement be gained since that period, by serving a public annual office; 4 & 5 W. IV., c. 76, § 61. See Arch. P. L. pp. 367—431, and pp. 581—586.

A person renting a tenement of any value, if he or she become actually chargeable to the parish in which it lies, may, at any time before gaining a settlement therein, be removed to the parish, in which he or she was last legally settled (*u*); but a person, having an estate in the parish, cannot be removed from it, notwithstanding such person become chargeable (*v*).

If a wife become chargeable in her husband's absence, she may be removed to the place of his last legal settlement; or, should he not have any, then to her own maiden settlement; but if the wife be residing with her husband, and he has a settlement, she cannot be removed alone, so as to separate her from her husband, unless they both consent to such an arrangement; and should the husband not have any settlement, the wife, although she become chargeable, cannot legally be removed from him to the place of her maiden settlement, without they both consent thereto (*w*).

The 9 & 10 Vict., c. 66, § 1, after reciting that no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years; provides, that whenever any person shall have a wife or children, having no other settlement than his or her own, such wife and children shall be removeable, whenever he or she is removeable; and shall not be removeable, when he or she is not removeable (*x*).

No woman residing in any parish with her husband at the time of his death, shall be removed; nor shall any

(*u*) 35 Geo. III., c. 101, § 1.

(*v*) *Rex v. Matlock*, 1 Ad. & El. 124.

(*w*) See the cases collected in Arch. Poor Laws, pp. 592—595.

(*x*) Sec 11 & 12 Vict., c. 111.

warrant be granted for her removal from such parish, for twelve calendar months next after his death, if she so long continue a widow (*y*).

No child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, step-father or step-mother, or reputed father, shall be removed; nor shall any warrant be granted for the removal of such child from such parish, in any case where such father, mother, step-father, step-mother, or reputed father, may not lawfully be removed therefrom (*z*).

A child, as a general rule, cannot be removed from its parent, if it be under the age of seven years, which is called the age of nurture, even although the parent consent to or wish it; and if it become chargeable, and have a different settlement from its parent, still it must be allowed to remain with its parent, until it attain seven years, or if the parent be removed, it must also be removed to the same parish. When a child residing with its mother for nurture, but having its place of settlement elsewhere, becomes chargeable, the parish in which it resides must relieve it; they may then obtain an order upon the overseers of the parish, in which the child is settled, from two justices of the county in which the latter parish is, to reimburse them (*a*).

No warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant shall state in such warrant that

(*y*) 9 & 10 Vict., c. 66, § 2.

(*z*) *Id.*, § 3.

(*a*) Arch. P. L. 597.

they are satisfied that the sickness or accident will produce permanent disability (*b*).

An unmarried woman, pregnant, cannot be removed, unless she really become chargeable by seeking relief, when she can be removed like any other pauper (*c*).

No person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years next before the application for the warrant (*d*). This residence must be continuous, for if there be an interval by reason of removal, imprisonment out of the parish, or otherwise, the irremovability ceases, and the time of residence must begin anew (*e*).

*no power under the Act of George the First to remove*  
*top* (*b*) 9 & 10 Vict., c. 66, § 4; 11 & 12 Vict., c. 110, § 2.

(*c*) 4 & 5 W. IV., c. 76, § 69. As to convicts, vagrants, &c., see 25  
 9 Geo. III., c. 101, § 5; 5 Geo. IV., c. 83, § 20; and 11 & 12 Vict., c. 103,  
 § 3.

~~although it was certified that~~  
 (*d*) 9 & 10 Vict., c. 66, § 1.

(*e*) As to the practical proceedings governing the examination of the  
 pauper, the order of removal, the notice of chargeability, the removal, and  
 the appeal, see Arch. P. L. p. 611, *usque ad finem*.

## CHAPTER VI.

## CRIMINAL RESPONSIBILITY OF INFANTS.

I. Absolute disability.  
 II. Qualified disability.  
 III. Full responsibility.  
 IV. Misdemeanors.  
 V. Parent and child.

VI. Trial and punishment of juvenile offenders.  
 VII. Care and education of infant felons.

I. An infant, under the age of seven, cannot be guilty of a felony, and is not punishable for any criminal offence; since the presumption of law is, that such a person is quite incapable of malice or craft (*doli incapax*), and without treachery or discretion, a presumption which is irrebuttable by any proof to the contrary; it is, indeed, final and conclusive (a).

II. Between the ages of seven and fourteen, the assumption is still, that such a person is *doli incapax*, yet this assumption may be destroyed by evidence of a mischievous discretion,—of wilful acts premeditated and done cunningly and intentionally, without any just excuse, for malice supplieth age (*malitia supplet aetatem*); but such evidence must be strong, and decisive beyond any rational doubt. In such a case, the jury have two questions to decide; first, whether the infant was the perpetrator of the crime charged; and then, whether at the time of its commission, the infant knew that it was wrong and unjustifiable. If the jury determine these

(a) If a person employ an innocent and unconscious agent, as a child, to complete an offence, he will, nevertheless, be guilty, for the thing done is, to all intents and purposes, his own act.

questions in the affirmative, they should find the infant guilty, who will then be obnoxious to any sentence, which the judge may deem it proper to pronounce.

There is one exception to this principle, which obtains in our criminal jurisprudence, and it is this: an infant under the age of fourteen is conclusively presumed to be incapable of committing the atrocious crime of rape, and cannot be found guilty of it. He may, however, be convicted of being a principal in the second degree, *i. e.* aiding and assisting another in the perpetration of the offence, provided he exhibited a mischievous discretion; for the excuse of physical impotency will not shield him from the consequences of his subilty or plotting villainy.

Full re-  
sponsibility

III. When an infant has attained the age of fourteen, he or she is then amenable to the law for any criminal offence, because it is conceived that the mind is so far developed by example and cultivation, as to render the infant fully qualified to appreciate the great *criteria* of right and wrong, and to foresee the consequence of every wilful and malicious act. Such an infant is dealt with in criminal enquiries just as any other responsible individual of the community (*b*).

Misdemeanors.

IV. With regard to common misdemeanors, charging an infant with non-feazance, as omitting to repair

(*b*) A girl of thirteen has been burnt for killing her mistress; and a boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged, because it appeared, upon their trials, that one concealed himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil (1 Hale's P. C.

bridges (c) or roads, an infant is privileged until majority, for laches or neglect is not imputable to an infant, and, beside, such a person has not the command of his or her property till full age, and therefore does not possess the means of paying for such repairs.

V. Parents are competent to give evidence for or against their children, and children (d) are competent to

Parent and child.

26; 4 Bl. Com. 24). And there was an instance in the last century but one, where a boy of eight years old was tried at Abingdon, for firing two barns, and it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. (Emlyn on Hale's P. C. 25; 4 Bl. Com. 24). And a boy of ten years old was convicted on his own confession, of murdering his bed-fellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment. Post. 72.

(c) As to liability of an infant to repair a bridge, in respect of ownership of lands of which there is no occupier, see *R. v. Sutton*, 3 Ad. & E. 597; S. C., 8 Ad. & E. 516.

(d) As to the admissibility of the dying declarations of children in cases of homicide, see *Pike's Case*, 3 C. & P. 598; and *Perkins's Case*, 2 Moo. C. C. 135. The admissibility of children as witnesses, depends not merely upon their possessing a competent degree of understanding, but also upon their having received a certain share of religious instruction. On a trial for murder, where it appeared that a girl eight years old, up to the time of the deceased's death, was totally ignorant of religion, but subsequently she had received some instruction as to the nature and obligation of an oath, but at the trial, seemed to have no real understanding on the subject of religion or a future state, Mr. Justice Patteson would not allow her to be sworn, observing, "I must be satisfied that this child feels the binding obligation of an oath, from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, recently communicated to



give evidence for or against their parents. A parent may correct a child by moderate but not too severe a chastisement (*e*). It is justifiable for a parent to commit a battery in the necessary defence of his assaulted child, or for a child in the necessary defence of his assaulted parent; such a battery, however, must not be excessive, but only just so much as to repel the aggression; otherwise, if it were intemperate, or made after the assailing had ended, or even in resistance to a lawful attack, or it indicated any feeling of revenge, it would then be unjustifiable, and subject to punishment. The killing of an assailant in the necessary defence of each other is excusable, for the act of the parent or child assisting is treated as the act of the parent or child assailed.

her for the purposes of this trial; and as it appears that previous to the happening of the circumstances to which this witness comes to speak, she had no religious education whatever, and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony." *William's Case*, 7 C. & P. 320.

(*e*) Parents, masters, and other persons, having authority *in foro domestico*, may give reasonable correction to those under their care, and if death ensueth without their fault, it will be no more than accidental death. But if the correction exceedeth the bounds of due moderation, either in the measure of it or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances of the case. If with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, manslaughter. If with a dangerous weapon likely to kill or maim, due regard being always had to the age and strength of the party, murder. *Fost., c. I., 262.* Though the correction exceed the bounds of moderation, yet the court will pay regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument is not such as will, in all probability, occasion death, though the party be hurried to great excess. A father, whose son had been frequently guilty of thefts, of which complaints had been made, had often corrected him. At length the son, being charged with another theft, and resolutely denying it, though proved against him, the father, in a passion, beat his son by way of chastisement

VI. For the purpose of ensuring the more speedy trial of juvenile offenders, so as to avoid the pernicious association with hardened criminals during a long imprisonment before trial, the 10 & 11 Vict., c. 2, enacts, That every person, who shall be charged with having committed, or having attempted to commit, or with having been an aider, abettor, counsellor, or procurer in the commission of, simple larceny, and whose age at the period of the commission or attempted commission of such offence shall not, in the opinion of the justices before whom he or she shall be brought, exceed the age of fourteen years, shall, upon conviction thereof, upon his own confession or upon proof, before any two or more justices of the peace, in petty sessions assembled, at the usual place and in open court, be committed to the common gaol or house of correction within the jurisdiction of such justices, there to be imprisoned, with or without hard labor, for any term not exceeding three calendar months, or, in the discretion of such justices, shall forfeit and pay such sum, not exceeding three pounds, as the said justices shall adjudge, or, if a male shall be once privately whipped, either instead of, or in addition to, such imprisonment, or imprisonment with hard labour; and the said justices shall, from time to time, appoint some fit and proper person, being a constable, to inflict the said punishment of whipping when so ordered to be inflicted out of prison. Provided always, that if such justices, upon the hearing of any such case, shall deem

Trial and punishment of juvenile offenders.

with a rope, by reason of which he died. The father expressed the utmost horror at, and was in the greatest affliction for, what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned judge who tried the prisoner, after consulting his colleague and the principal counsel on the circuit, ruled this to be manslaughter only. *Anon.*, 1 East P. C. 261.

the offence not to be proved, or that it is not expedient to inflict any punishment, they shall dismiss the party charged, on finding sureties for his or her future good behaviour or without such sureties, and then make out and deliver to the party charged a certificate under the hands of such justices, stating the fact of dismissal, and such certificate shall be in the form set forth in the schedule of the act. Provided also, that if such justices shall be of opinion, before the person charged shall have made his or her defence, that the charge is, from any circumstance, a fit subject for prosecution by indictment, or if the person charged shall, upon being called upon to answer the charge, object to the case being summarily disposed of under the provisions of this act, such justices shall, instead of summarily adjudicating thereupon, deal with the case in all respects as if this act had not been passed (*f*).

Every person who shall have obtained a certificate of dismissal, and every person who shall have been convicted under the authority of this act, shall be released from all further or other proceedings for the same cause (*g*).

Any justice of the peace, if he think fit, may remand for further examination, or for trial, or suffer to go at large upon his or her finding sufficient sureties, any infant charged before him with simple larceny; and every surety shall be bound by recognizance to be conditioned for the appearance of such person before the same or some other justice of the peace, for further examination, or for trial before two or more justices of the peace, in petty sessions assembled, or for trial in some superior court, as the case may be; and every such recognizance may be enlarged from time to time by any such justice

to such further time as he shall appoint; and every such recognizance which shall not be enlarged shall be discharged, without fee or reward, when the party shall have appeared according to the condition thereof (*h*).

No conviction shall be attended with any forfeiture; but whenever any person shall be deemed guilty under the provisions of this act, it shall be lawful for the presiding justices to order restitution of the property in respect of which such offence shall have been committed to the owner thereof, or his representatives, and if such property shall not be then forthcoming, the same justices, whether they award punishment or dismiss the complaint, may inquire into and ascertain the value thereof in money, and if they think proper, order payment of such sum of money to the true owner by the person or persons convicted, either at one time or by instalments at such periods as the court may deem reasonable, and the party or parties so ordered to pay shall be liable to be sued for the same as a debt in any Court in which debts may be by law recovered, with costs of suit, according to the practice of such Court (*i*).

The Parkhurst Prison in the Isle of Wight was established for the confinement and correction of juvenile offenders of both sexes, as well those under sentence of transportation, as those under sentence of imprisonment (*j*).

Every male infant under eighteen, convicted of any malicious injury to persons or property by fire, or by explosive or destructive substances, or convicted of feloniously setting fire to any building, vessel, or mine, or to any stack or steer, shall be liable, at the discretion

(*h*) Section 5.

(*i*) Section 12.

(*j*) 1 & 2 Vict., c. 82, amended, as to the enlargement of the prison, by 5 & 6 Vict., c. 98, § 12.

of the Court before which he shall be convicted, in addition to any other sentence which may be passed upon him, to be publicly or privately whipped, in such manner and as often, not exceeding thrice, as the Court shall direct (*k*).

The odious practice of whipping female offenders has been long since abolished (*l*).

Care and  
education  
of infant-  
females.

VII. The 3 & 4 Vict., c. 90, entrusts the Court of Chancery with the care and education of infant-felons, and enacts,—

That in every case in which any person being under the age of twenty-one years, shall hereafter (10th Aug., 1840) be convicted of felony, it shall be lawful for her Majesty's High Court of Chancery, upon the application of any person who may be willing to take charge of such infant, and to provide for his or her maintenance and education, if such Court shall find that the same will be for the benefit of such infant, due regard being had to the age of the infant, and to the circumstances, habits, and character of the parents, testamentary or natural guardian of such infant, to assign the care and custody of such infant, during his or her minority, or any part thereof, to such person, upon such terms and conditions, and subject to such regulations respecting the maintenance, education, and care of such infant, as the Court shall think proper to prescribe and direct: and upon any order for that purpose being made, and so long as the same shall remain in force, the same shall be binding and obligatory upon the father, and upon every

(*k*) 9 & 10 Vict., c. 25, § 9. And see Dickenson's Quarter Sessions, c. VI., for other offences that are whippable.

(*l*) 57 Geo. III., c. 75, and 1 Geo. IV., c. 57.

testamentary or natural guardian of such infant ; and no person shall be entitled to use or exercise any power or control over such infant which may be inconsistent with such order. The Court may at any time rescind, alter, or vary any such terms or conditions, or such regulations, and may award such costs as to it may seem fit; against such person who shall make such application, should it not appear to the Court well founded ; and such costs shall be payable to any parent or other natural or testamentary guardian of any such child who shall oppose such application (*m*). In every case it shall be a part of the terms and conditions upon which such care and custody shall be assumed, that the infant shall not, during the period of such care or custody, be sent beyond the seas or out of the jurisdiction of the Court (*n*).

No fee, reward, emolument, or gratuity whatsoever shall be demanded, taken, or received by any officer or minister of the said Court for any matter or thing done in the said Court in pursuance of this act ; and that upon the making or opposing of any such application, it shall be lawful for any judge of the said Court to assign counsel learned in the law, and to appoint a clerk or practitioner of the said Court, to advise and carry on or to oppose such application, who are hereby required to do their duties therein without fee or reward (*o*).

The act shall not affect, or in any manner interfere with, the execution of the sentence which may have been passed upon such infant upon his or her conviction (*p*).

(*m*) Section 1.

(*n*) Section 2.

(*o*) Section 3.

(*p*) Section 4.

## CHAPTER VII.

## CRIMES AGAINST INFANTS.

- |                                      |   |
|--------------------------------------|---|
| I. Criminal abortion, or foeticide.  | Abduction of females ( <i>continued</i> ).      |
| II. Concealing the birth of a child. |   |
| III. Cruelty.                        |   |
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| V. Abduction of females:—            |   |
| (1) Kidnapping.                      | (2) Carrying away infant females under sixteen. |
|                                      | (3) Stealing heiresses.                         |
|                                      | VI. Conspiracy to debauch.                      |
|                                      | VII. Ravishment.                                |

Criminal  
abortion,  
or foeticide.

I. THE first offence against infants, with which our tribunals have, alas, too often to deal, is the unnatural one of criminal abortion, or,—as the much more appropriate modern word denominates it,—foeticide.

Abortion or miscarriage is the premature expulsion of the contents of the gravid womb, before the term of gestation is completed (*a*). Our law does not recognise the distinction adopted by medical commentators on this subject (*b*), who consider miscarriages during the first six months as abortions, and those during the last three as premature labors; but applies the term abortion to the throwing off of the fœtus at any period of the pregnancy. Medical science divides the causes which induce women to abort, into (1) natural or habitual, and (2) violent or artificial. Natural or habitual it subdivides into predisposing, and occasional or exciting; and violent or artificial into accidental, and premeditated or intentional. The law deals with premeditated or intentional

(*a*) Ramsbotham on Obstetric Medicine and Surgery, p. 666.

(*b*) *Ibid.*

abortion only, justly deeming it criminal, and therefore amenable to human punishment.

To kill an infant in its mother's womb is not murder in legal contemplation; because to constitute this crime, the individual slain must be a reasonable creature, *in being*, and under the Queen's peace, at its perpetration. A child *en ventre sa mère*, and not actually born, does not fall within this predicament (c).

The 7 Wm. IV., and 1 Vict., c. 85, § 6, enacts, that "whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, *any poison or other noxious thing* (d), or shall unlawfully use *any instrument or other means whatsoever*, with the like intent, shall be guilty of felony, and being convicted thereof, shall be liable at the discretion of the Court to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." It seems to be quite immaterial whether the woman be pregnant or not; the intent, as indicated by the act, being the gist of the offence (e).

(c) But where an unskilful practitioner wounded the head of a child before the child was perfectly born, and the child was afterwards born alive, but subsequently died of the injury, it was held manslaughter, although the child was in its mother's womb at the time when the wound was given. *Rex v. Senior*, 1 Moo. C. C. 344.

(d) Administering cantharides is not an indictable offence. *Reg. v. Hanson*, 2 Car. & Kir. 912.

(e) *Reg. v. Goodhall*, 1 Den. C. C. 184; and *Goodchild's Case*, 2 C. & K. 293. The reasoning in these cases is not very satisfactory, for one can hardly appreciate the refinement that a person should be convicted of an attempt to perpetrate this offence, the completion of which could not possibly be effected, for the simple reason that pregnancy did not actually exist. Such, however, is the present state of judicial decision.



The offender may be found guilty of an *attempt* to commit the crime, where the evidence does not prove the completion of the offence charged, and be liable to the same consequences as if charged with the attempt only (*f*).

It is no excuse that the woman consented to, or even solicited, the perpetration of the offence; for this would be to set the law at naught, inasmuch as the crime is never attempted but with the woman's approval.

It is considered doubtful whether a woman could be tried under this act, for abortion attempted or committed on herself; but it is submitted that she could at all events be put upon her trial for the misdemeanor at common law (*g*).

The two enquiries involved in prosecutions for fœticide are these:—

Has the *fœtus in utero* been actually destroyed? If so,

Has it been the consequence of criminal means, or of accidental or natural causes?

The act first quoted divides criminal abortion into—*general*, acting through the constitution of the mother, as the administration of irritating medicinal substances, which must, however, be proved to be a “poison,” or “other noxious thing,” to bring the case within the operation of the statute; and *local* or *mechanical* by instruments introduced into the uterus, or by external violence applied to the abdomen or loins.

It should never be forgotten by those engaged in judicial investigations of this offence, that abortion from natural, habitual, and non-criminal causes are of frequent occurrence: so frequent, that Dr. Glanville's expe-

(*f*) 14 & 15 Vict., c. 100, § 9.

(*g*) 1 Russ., by Greaves, 671.

rience (*i*), indicates that one in three of all conceptions in London, terminate in abortion (*j*).

All the medical authorities are unanimous that the means for procuring abortion are uncertain in their operation upon the *fœtus*, or child; that they always endanger the mother's life, and sometimes destroy the mother, without affecting the *fœtus* (*k*).

It is a misdemeanor for a mother to conceal the birth of her own child, whether with a view to hide her shame or to effect its destruction. The concealment, however,

Concealing  
the birth  
of a child.

(*i*) Quoted by Taylor, in his *Medical Jurisp.*, p. 514.

(*j*) Before quitting this subject, there is one question which is of serious import. It is, under what circumstances, and by what means, is it morally and legally proper for a medical man to induce premature delivery? Dr. Guy (*Forensic Med.*, 117), answers, "The medical man is clearly justified resorting to any measures which promise to preserve the life of mother and child, when both are threatened, and where only one can by any possibility be preserved, the female herself may use her right of self-preservation, and choose when her own life or that of her child shall fall a sacrifice to the means recommended to be used."

Mr. Taylor, 1 *Med. Jurisp.*, 518, states the grounds, upon which many eminent authorities have objected to this practice, to be:—1. That there are few cases in which parturition, if left to itself, might not take place at the full period. 2. The toleration of the practice might lead to great criminal abuse. 3. It is attended with danger to both mother and child. He then adds his own opinion in these words:—"It appears to me, that before a practitioner resolves upon performing an operation of this kind, he should hold a consultation with others, and before it is performed, he should feel well assured that delivery cannot take place without greater risk to the life of the mother than the operation itself would create. These rules may not be observed in practice; but the non-observance of them is naturally attended with some responsibility to a practitioner. In the event of the death of a mother or child, he exposes himself to a prosecution for a criminal offence, from the imputation of which even an acquittal will not always clear him in the eyes of the public!"

(*k*) Beck's *Med. Jurisp.* 265.

which the law contemplates and seeks to check, is that which would keep the world at large in ignorance of the child's birth (*l*). The anxiety of the law is to prevent secret delivery, because it so often leads to infanticide.

The 9 Geo. IV., c. 31, § 14, enacts, that "if any woman shall be delivered of a child, and shall by *secret burying or otherwise disposing of the dead body of the said child*, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labor, in the common gaol or house of correction, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth: *provided always*, that if any woman tried for the murder of her child shall not be convicted thereof, it shall be lawful for the jury by whose verdict she shall be acquitted, to find in case it shall appear in evidence that she was delivered of a child, and that she did by secret burying, or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof; and thereupon the Court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth."

If a mother be aided and assisted by another in concealing the birth of her child, both may be indicted as principals under this statute (§ 31); but the fact of concealment must be brought home to the mother, otherwise the person assisting must be acquitted (*m*).

In order to substantiate this offence, there are three things to be proved:—

1. That the woman was delivered of a male or female

(*l*) *Morris's Case*, 2 Cox C. C. 489.

(*m*) *Reg. v. Waterage and another*, 1 Cox C. C. 338.

child. This is usually testified to by a medical witness, who has had an opportunity of examining the alleged mother ; unless she confess the fact.

(2) That the child was dead. The period when it died is immaterial. If the child were living, at the time it was concealed, this is not any offence.

(3) The mode of concealment. The present state of authority is, that any concealment or disposition of the dead body of a child, whether it be final (*n*) or temporary, is within the statute. It is essential to the commission of this offence, that the mother should have done some act of disposal of her dead child (*o*). The following is an important case (*p*) :—

Frances Douglas and one Robert Hall, were indicted for the murder of a female-child, of which they were acquitted ; whereupon the jury were desired to inquire whether the female was guilty of endeavouring to conceal the birth. The prisoners had been living together for some time, and in the night, or rather about four in the morning, she was delivered of the child, in the presence of the male prisoner, who was the father of it, and who, with his two sons, aged fourteen and ten, all slept on the same pallet with her, up four pair of stairs. The male prisoner, very soon afterwards, put the child (which had not been separated from the after-birth) into a pan, carried it down stairs into the cellar, and threw the whole into the closet, the female prisoner remaining in bed up stairs. She was proved to have said, she knew it was to be done. The fact of her being with child was, some time before her delivery, known by her mother, who

(*n*) *R. v. Goldthorpe*, C. & M. 355 ; *R. v. Farnham*, 1 Cox C. C. 349.

(*o*) *Turner's Case*, 8 C. & P. 755.

(*p*) *Douglas Case*, 1 Moo. C. C. 480 ; 7 C. & P. 644, S. C.

lived at some distance ; and was apparent to other women. No female was present at the delivery ; one had been sent for at the commencement of the labor, about twelve at night, but was so ill she could not attend. There were no clothes prepared, or other provision made, but the parties were in a state of the most abject poverty and destitution. For the female prisoner, it was contended that she could not, under these circumstances, be convicted of concealment ; it was then agreed, that the opinion of the jury should be taken upon the fact, and if it should be adverse to the prisoner, that the sentence should be respited, and the point reserved. The jury found her guilty of endeavouring to conceal the birth.

The questions for the opinion of the judges were—first, whether there was evidence to convict the prisoner as a principal ; secondly, whether, in point of law, the conviction was good ? The case was argued before all the judges (except one), who were of opinion that the communication made to other persons was only evidence, but no bar, and that the conviction was good ; but they recommended a pardon.

A woman accused of this grave offence may rebut it by proving that she confessed herself pregnant, or had consulted a medical man, or had called for help during delivery, or had made provision or preparation for her lying-in (*q*), or indeed by showing any other act or conduct altogether inconsistent with her supposed guilt, and yet perfectly consistent with the presumptive testimony given against her.

Cruelty.

III. It is an indictable offence to expose an infant of tender years to the inclemency of the weather, or to

(*q*) The argument against the guilt of Effie Deans, founded upon this

keep a child, unable to provide for itself, without adequate food, lodging, raiment, or necessary medicine. Unless, however, the child be of tender years, unable to provide for itself, and is under the control of a master or mistress, so as to be unable to take any steps by quitting such service, or of complaining to a magistrate, the neglect of, or omission to provide for, the child, would be only a breach of contract, and not indictable (*r*).

In order the better to protect apprentices and servants, the 14 Vic., c. 11, enacted, that where the master or mistress of any person shall be legally liable to provide for such person as an apprentice, or as a servant, necessary food, clothing, or lodging, and shall wilfully and without lawful excuse refuse or neglect to provide the same, or where the master or mistress of any such person shall unlawfully and maliciously assault such person, whereby the life of such person shall be endangered, or the health of such person shall have been or shall be likely to be permanently injured, such master or mistress shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be imprisoned, with or without hard labor, in the common gaol or house of correction, for any term not exceeding three years (*s*).

That the guardians of every union and of every separate parish under the management of a board of guardians, and the overseers of every parish not in union or under the management of a board of guardians, shall provide and keep a book or books, and shall cause to be registered therein the name of every young person under the age of sixteen, who shall hereafter be hired or taken as a servant

ground, will be remembered in the trial scene of Sir Walter Scott's *Heart of Mid-Lothian*.

(*r*) *Reg. v. Ridley*, 2 Camb. 650; *R. v. Frend*, Russ. & Ry. C. C. 20.

(*s*) Sect. 1. As to the costs of prosecution, see § 2.

from the workhouse of such union or parish, together with the age, and the date of hiring as servant, and also the name of the master or mistress, his or her trade, or other description and residence; and every such entry shall be signed by the presiding chairman of such board of guardians at an ordinary meeting thereof; or by some one of such overseers: provided that nothing herein contained shall be taken to supersede or affect the obligation to keep such register of poor children apprenticed by overseers or guardians, as is required by 42 Geo. III. c. 46, and 7 & 8 Vict., c. 101 (t).

That where any young person under the age of sixteen shall have been, or shall be, hired or taken as a servant from the workhouse of any union or parish, or shall have been, or shall be, bound out as an apprentice by the guardians of any union, or the guardians or overseers of any parish, it shall be lawful for such guardians or overseers respectively, and they are hereby required, so long as such young person shall be under the age of sixteen, and shall be known to them to reside as servant or apprentice in the same service into which such young person shall have so gone as a servant from such workhouse, or as such apprentice within such union or parish respectively, or within five miles of any part of such union or parish, to cause the relieving officer, or, where there is no relieving officer, then some other officer duly authorised for the purpose, to visit such young person at least twice in every year, and to report to them, in writing, whether he has found reason to believe that such young person is not supplied with necessary food, or is subjected to cruel or illegal treatment in any respect (u).

(t) Section 3.

(u) Section 4.

That where any young person, under the age of sixteen shall hereafter be hired, or taken as a servant from the workhouse of any union or parish, or shall be bound out as an apprentice by the guardians of any union, or by the guardians or overseers of any parish, and the residence of the master or mistress shall be more than five miles from any part of such union or parish, then a written notice of such hiring, taking, or binding, specifying the name and age of the apprentice or servant, and the name, description, and residence of such master or mistress, shall be forthwith sent from such guardians or overseers to the guardians or overseers of the union or parish in which such master or mistress shall reside; and, thereupon, it shall become the duty of such last-mentioned guardians or overseers to cause the particulars contained in such notice to be registered in some book or books, to be provided by them for the purpose, together with the name of the union or parish from which such notice shall have been received; and such last-mentioned guardians or overseers shall cause such young person to be visited as frequently, and in the same manner in all respects, as if such young person had been hired or taken from their own workhouse, or had been bound out as an apprentice by themselves (*v*).

IV. The heartless crime of infanticide, or the murder of a new-born child, is treated and punished by our common law like any other murder, or felonious homicide. <sup>Infanti-</sup>  
<sup>cide:</sup> The first proof that is necessary to establish the guilt of infanticide is, that the deceased child was born alive, in

(*v*) Sect. 5. The remaining sections relate to the prosecution, and costs in pursuance of the act.



order to rebut the legal presumption (*w*) that the child was still-born. The burthen of this proof lies upon the accuser. If such child were alive after its whole body had come into the world, it will be enough ; for its continuous connexion with the mother by the umbilical cord will be no available defence for the criminal.

Now the medical proofs of live-birth are for the most part conjectural, and occasion considerable controversy, defeating the promotion of justice, by the acquittal of delinquents. It is not necessary that the child should have breathed or respired, and any other kind of evidence will be received, that the child has lived ; but, medical authorities altogether fail to lay down a positive principle on this point, although they admit that, physiologically speaking, a child may live for a certain period after its birth without breathing. Undoubtedly, respiration is the best evidence of a child having lived at or about its birth (*x*).

Another important question in infanticide is, what was the cause of death ? If the child have died from natural or even violent causes, originating in accident only, there can be no legal criminality, which never arises unless the death were the consequence of felonious or criminal design alone.

If a person engaged in a felonious attempt to procure abortion, do an act which causes the premature birth of the child at a period when it cannot maintain an existence separate from and independent of the mother for any considerable time, and the child, being born alive, die afterwards in consequence of the premature birth,

(*w*) If the child be under the seventh month of gestation, then the medical presumption is, that it was born dead.

(*x*) For the medical tests and authorities, see the works of Beck, Taylor, and Guy on Medical Jurisprudence.

the person so acting is guilty of the murder of the child (*y*).

Where a married woman was charged with the murder of her illegitimate child, three years old, by omitting to supply it with proper food, Mr. Baron Alderson held that she could not be convicted, unless it was shewn that her husband supplied her with food to give to the child, and that she wilfully neglected to give it. The learned judge said, "There is no distinction between the case of an apprentice and that of a bastard child, and the wife is only the servant of the husband, according to the case before Mr. Justice Lawrence (*z*), and can only be made criminally responsible by omitting to deliver the food to the child, with which she had been supplied by her husband." (*a*). But in the case of an infant, the mother would be liable, if the death arose from her not suckling the child, when she was capable of doing so (*b*). In such a case, the indictment must state that it was the duty of the prisoner to supply the child with food, otherwise it will be bad.

Where a person standing *in loco parentis* inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies of consumption, hastened, however, by the ill-treatment, it will not be murder, but only man-slaughter, in the person inflicting the punishment, although it was cruel and excessive, and accompanied by violent and threatening language, if such person believed that the child was feigning illness,

(*y*) *Reg. v. Ann West*, 2 Cox, C. C. 501.

(*z*) *Squire's Case*, 2 Stark. 349.

(*a*) *Saunders's Case*, 7 C. & P. 277.

(*b*) *Per Patteson, J., Edwards's Case*, 8 C. & P. 611.

and was really able to do the quantity of work required (c).

Abduction  
of females.

V. The grave offence of abducting, or carrying away, females is distributed into these three kinds:—

Kidnap-  
ping;

(1). Kidnapping. If any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away or detain, any child *under the age of ten years*, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such articles may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any child, knowing the same to have been by force or fraud, led, taken, decoyed, or enticed away, or detained as hereinbefore mentioned, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported for a term of seven years, or to be imprisoned with or without hard labor in the common gaol or house of correction, for any term not exceeding two years; and if male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment. Provided always, that no person, who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted, by virtue hereof, on account of his getting possession of such child or taking such child out of the possession of the mother, or any other person having the lawful charge thereof (d).

(c) *Rex v. Cheeseman*, 7 Ar. & P. 455.

(d) 9 Geo. IV., c. 31, § 21.

(2). Carrying away infant-females under sixteen. If any person shall unlawfully take, or cause to be taken, *any unmarried girl being under the age of sixteen years*, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or both, as the court shall award (*e*).

Carrying away infant-females under sixteen.

The abduction of a natural-daughter from her putative father is within this law (*f*).

In order to constitute this offence, it is not necessary that any corrupt motive should be the inducement to commit the offence, and the consent of the child herself would be no excuse, the gist of the offence being the taking away of infant-daughters from the possession of their parents or guardians (*g*). If the parents or guardians once consent, it seems doubtful whether they can afterwards revoke it (*h*). The offender's ignorance of the tender age of the female is no extenuation of his crime (*i*).

(3). Stealing heiresses. Where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate; or shall be an heiress presumptive, or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling,

Stealing heiresses.

(*e*) 9 Geo. IV., c. 31, § 20.

(*f*) 1 Hawk., c. 11, § 14.

(*g*) *Biswell's Case*, 2 Cox, C. C. 279.

(*h*) 1 East's P. C. 457.

(*i*) *Rex v. Robins*, 1 C. & K. 451.

aiding, or abetting such offender shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years (*k*).

If the woman first consent to be taken away, and afterwards refuse to continue with the offender, and he forcibly detain her; or if she be forcibly taken away, and she afterwards consent to her marriage or defilement; or if she be taken away and married with her own consent, obtained by fraud or imposition, it is equally an offence within this statute.

The female, though married, is a competent witness for or against the offender; for though his wife *de facto*, she is not *de jure*.

Conspiracy  
to debauch.

VI. For the better preventing the heinous offence of procuring the defilement of women, which certain infamous persons do most wickedly practise, it is enacted by 12 & 13 Vict., c. 76, "that if any person shall by false pretences, false representations, or other fraudulent means, procure any woman or child under the age of twenty-one years, to have illicit carnal connexion with any man, such person shall be guilty of a misdemeanor, and shall, being duly convicted thereof, suffer imprisonment for a term not exceeding two years, with hard labor." (*l*)

Ravish-  
ment.

VII. The aggravated and abominable crime of ravishing a female is severely punished by transportation for

(*k*) 9 Geo. IV., c. 31, § 19.

(*l*) § 1. The prosecutor and witnesses are entitled to costs, and com-

life ; and the killing of the assailant during the attempt is perfectly justifiable (*m*). The legal definition of rape is, the carnal knowledge of a female under the age of ten years, with or against her will ; or, of a female, above the age of ten years, against her will.

If any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, and, being convicted thereof may be transported for life (*n*) ; and if any person shall unlawfully and carnally know and abuse any girl, being above the age of ten years, and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labor, in the common gaol or house of correction, for such term as the Court shall award (*o*).

It is quite immaterial whether the child herself consent or not to the act ; and she may be a witness if she sufficiently understand the solemn obligation of an oath.

With regard to females above twelve years of age, it is absolutely indispensable to prove non-consent. A submission through fear of death or duress, shows non-consent, so if the crime were committed during insensibility produced by liquor ; and it matters not, that the woman at first consented, if the offence was afterwards perpetrated by force and against her will ; neither is it any extenuation of the offence that she consented after the fact.

. A husband cannot be guilty of rape upon his own  
pensation for loss of time (§§ 2 and 3). See *Reg. v. Mears*, 20 Law  
Jour. 59, M. C. ; 2 Den. C. C. R. 79.

(*m*) 1 Hale, 485.

(*n*) 4 & 5 Vict., c. 56, § 3.

(*o*) 9 Geo. IV., c. 31, § 17 ; § 18 provides for a very delicate proof.

wife, but he may be guilty of aiding and abetting another to commit the offence against her; and the wife is a good witness against him to prove such a fact. It is said not to be a rape to converse with a wife, under circumstances which induce her to suppose it is her husband (*p*), on account of the absence of that terror and violence, which are essential to the crime.

Although it is no defence to show that the woman is immoral, or even the mistress of the ravisher, yet a jury should consider, whether under the particular circumstances of the affair, it be not probable that the woman willingly received his caresses; but if otherwise shown, a verdict of condemnation should be pronounced; for the law will aid an unhappy woman in abandoning her vicious course of life, and will encourage her in her efforts of amendment.

It is a melancholy fact, that the accusation of rape is much too frequently brought, from motives of greed and revenge, against a man who is altogether innocent of so infamous an offence,—an offence which, although difficult of proof, is much more difficult of contradiction. It is most usually proved by the prosecutrix herself. Her previous reputation, and her conduct about the time of the perpetration of the alleged crime, are, then, particularly to be sifted and scrutinized: if her moral character be chaste and exemplary, if she had immediately communicated to any of her friends the injury which she had received, the time and place of its committal, the name or description of the ravisher, and had made pursuit after him; if he had fled from the neighbourhood; if she had raised an outcry at the time of the offence; or the place where the act is said

(*p*) See *Jackson's Case*, 1 Russ. & Ry. 487; *William's Case*, 8 C. & P. 286; and *R. v. Stanton*, 1 C. & K. 415.

to have been committed was remote and solitary; these concurrent circumstances strengthen the truth of the charge, and enhance the value of her testimony, more especially if she be corroborated by other witnesses as to any material points of her evidence. But if her conduct generally have been not that of a perfectly modest woman, or if she had concealed the transaction for some time after its alleged perpetration, especially where she had had many and proper opportunities of communicating it to her friends and relations; if she made no attempt at the time of the offence committed to obtain assistance, though from the place and situation she might have known that assistance would probably have been forthcoming; if she had delayed in giving up the offender to justice, he being to be found, and remaining still in her neighbourhood; if her evidence be given in a hesitating or a reckless manner; and she be without corroboration; then a jury ought to pause long and carefully before they decide upon conviction. For while it is absolutely necessary to protect the invaluable chastity of honourable women by the stern and swerveless administration of the law in their behalf, it is no less essential to the character of a guiltless man, and the good weal of society, to dismiss, with every mark of reprobation, the suspicious, wicked, and malevolent accusations of the designing, the crafty, and the abandoned (*g*).

(*g*) To the detection of false charges, medical evidence is peculiarly valuable, when taken in connection with the circumstantial facts of the case, and the inconsistencies of the accuser's statements. The medical juriconsults, whose works have been repeatedly quoted in this and the previous chapter, have debated the two questions,—(1) Can a female asleep be violated without her knowledge? and (2) Can pregnancy follow violation? Medical and legal authority adopt the affirmative of these enquiries.



We here conclude our attempt to expound the many and intricate laws relating to infancy. In finishing this portion of our task, we feel abundantly sensible of our want of power to cope with the great subject with didactic precision, and to perfect all its minute details and critical niceties within the space allotted. Emboldened, however, with having accomplished, although thus imperfectly, so much of our labor, we will now proceed to the remaining divisions of our volume.

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## BOOK II.

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### MAIDENHOOD.

“ He (Boethius) would have seen personal slavery nearly extinguished, and women, first released from Oriental imprisonment by the Greeks, and raised to a higher dignity among the Romans, at length fast approaching to due equality;—two revolutions the most signal and beneficial since the dawn of civilization.”— *Mackintosh's Progress of Ethical Philosophy*, § iii.

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# BOOK II.

## MAIDENHOOD.

### CHAPTER I.

#### THE LEGAL CONDITION OF AN UNMARRIED WOMAN.

- |   |                        |
|---|------------------------|
| I. No political franchise.                  | VI. Seduction.         |
| II. May exercise a parochial vote.          | VII. Theft.            |
| III. Her rights as heiress and next of kin. | VIII. Embezzlement.    |
| IV. The offices she may hold.               | IX. Negligent burning. |
| V. Master or mistress and servant.          | X. False character.    |

THERE are a few distinctions between the rights and duties of women and those of men, arising for the most part from difference of sex.

I. While an unmarried woman (*a*) or spinster (*b*), as she is formally described in legal documents, may enjoy and deal with her property with the same freedom and choice as any of the more robust sex; yet she cannot exercise the constitutional right of voting in elections for members of parliament, such right being confined to men of twenty-one, possessing the

(*a*) The rights and disabilities of married women will be detailed in the next Book or Division.

(*b*) So called, because, in former days, a lady was obliged to spin certain articles of dress and furniture before she married.

necessary property-qualification. This disability has been much canvassed, and often found fault with, but the acquirement of such a right would deprive the fair sex of much, if not all, of that powerful and humanizing influence, which their purely social virtues now so justly command, and would very sensibly detract from that mild majesty of their private life, which contributes more effectually to the increase of refinement and good manners, than all our other social elements combined. This natural empire of woman, without which, indeed, our infancy would be without succour, our manhood without happiness, and our old age without consolation, would be lost, were she to quit the sacred retirement of her undisputed care and sympathy, and mix in the public arena of angry debate and heartless ambition ; her powerful spell would be broken, her worth compromised, her respect decreased, and her unalloyed virtues—the consequences indeed of her domestic life—weakened and debased. Let not, then, her present glorious mission be taken away !

May exercise a parochial vote.

II. But although a woman cannot exercise the political franchise, yet she may, if qualified as to property, vote upon parish questions, and also in the choice of parochial officers, such as overseers, surveyors, vestry clerks, &c.

Her rights as heiress and next of kin.

III. In the case of her father or mother dying without a will, *i.e.*, intestate, and leaving property, she takes an equal share with her brothers and sisters of the *personal* property ; but should she have a brother, he and his children, even daughters, will, according to the canons of descent, take the *real* property, as the heir-at-law,—the

rule being that males and their issue shall be preferred to females, except in the very rare case of lands entailed upon female-issue; if, however, she have sisters only, then all the sisters take the real property equally (*c*) as partners or coparceners (*d*). Should she be the only child, then she would be entitled to all the intestate *real* property and all the personalty, if her father—should the personalty have belonged to him—do not leave a widow,

(*c*) Primogeniture, amongst females, obtains only in the succession to our Crown.

(*d*) A coparcenary arises when inheritable lands descend from an intestate ancestor deceased, to several persons possessing an equal title to it. It arises by act of law only, *i.e.*, by descent, which, in relation to this subject is of two kinds.—(1) Descent by the common law, which takes place where an ancestor dies intestate, leaving two or more females as his next co-heiresses; these, according to the canon of real-property-inheritance, take altogether as co-parceners or parceners (they are, however, deemed to be as one heir); and (2) Descent by particular custom, as gavelkind lands, which descend to all the males in equal degree, as the sons, brother, or uncles of the deceased intestate ancestor: in default of sons, they descend to all the daughters equally. Coparcenary relates to the estate,—joint tenancy to the person. Coparceners have a unity, though not an entirety, or necessarily an equality, of interest: if there be two only, each is properly entitled to the whole of a distinct moiety; and being seised in moiety, there is no *jus accrescendi* between them, for on the death of one of them intestate, her moiety descends to her heir at law, who holds, subject to curtesy (if any), with the surviving parcener in coparcenary, although such heir may be a male, and a collateral. Indeed, their estates are held in co-parcenary, so long as they claim by descent, As soon as any part is severed from the title of the remaining part, the part so severed will be held in common.

Between an alienee or purchaser from one sister and the other coparceners there will be a tenancy in common. The remaining coparceners will, as between themselves, continue to hold in coparcenary. They are seised both jointly and severally, and possess a unity of title, but the estate may vest in them at different periods. Coparcenary is like joint tenancy, so far as the same unity of title, and similarity of interest is common to both, but they differ in this, that while coparceners always must claim

otherwise the widow and daughter share it equally, after his debts are paid.

The offices she may hold.

IV. While the crown of this country devolves upon a woman, who happens to be the next in hereditary succession, on the demise of the previous monarch, as in the instance of our present most gracious Sovereign; there are no other important offices, for which women are qualified, and the professions, whether civil, naval, or military, are closed to them. They may, however, engage in trade and commercial enterprise, and some inferior situations,

by descent, for if two sisters purchase an estate to hold to them and their heirs, they are not parceners, but joint tenants; joint tenants always claim by act of parties. Coparcenary is intermediate, in its nature, between joint tenancy and tenancy in common. This estate may be dissolved by any of the following modes:—

- (1). By a deed of partition;—as,
  - (a) Where they agree to divide the estate into equal parts in severalty, each to have a determinate position.
  - (b) Where they appoint some third person to divide the estate, and, after a division by him, each coparcener, according to seniority of age, or as shall be agreed between them, selecting her own portion.
  - (c) Where the eldest coparcener divides the estate; in which case she takes the portion remaining after her sisters have made their choice.
  - (d) Where they agree to cast lots for their shares.
- (2). By the alienation of one of the parties, which destroys the unity of title.
- (3). By all the estate at last descending to one person, which reduces it to a severalty; and,
- (4). By a compulsive partition under a decree in Chancery.

The privilege of seniority is in the case of dividing the estate personal; for, if the eldest sister be dead, her issue shall not chose first, but the next sister. But if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay, her husband, or her assigns, shall present alone, before the younger. And the

such as matron of a charity, or sextonness of a church, and a few other parochial offices (*e*), employ a few.

A larger number is devoted to the trials of tuition, the drudgery of needlework, and the confinement of domestic servitude, or shop-labor (*f*); while the stage, the concert platform, and the music gallery of our places of worship are the pursuit of others. But for those, whose circumstances will not allow them to pass their lives in ease and affluence, or in the beneficent exercise of philanthropical charity, few, very few are the opportunities presented for the modest exertion of their faculties, or the adequate earning of a respectable maintenance;—unless, indeed, their genius places them in an elevated position in the republic of letters.

V. Since women make up by far the great majority of domestic or menial servants, a sketch of this law becomes necessary.

Master or  
mistress  
and ser-  
vant.

The relationship between master or mistress and servant is created by a verbal or written agreement.

reason given is, that the former privilege, of priority in choice upon a division, arises from an act of her own, the agreement to make partition, and, therefore, is merely personal; the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also.

(*e*) The cases of *R. v. Stubbs*, 1 Bott, 10, in which it was held, that a woman is not exempt from serving the office of overseer of the poor, and *Olive v. Ingram*, 2 Str. 1114, in which it was held that she may be a parish sextonness, furnish some grounds for contending that a woman is not exempt from this duty. But, however this may be in point of law, there can be little doubt that the courts would relieve her from the burden of serving, unless the necessity of the case required that she should do so. Instances have occasionally occurred, in which the office of parish clerk has been held by a woman, the actual duties being performed by a deputy clerk; but this can hardly be legal, since parish-clerks were originally in holy orders. *Prideaux on Churchwardens*, v. 5.

(*f*) As to factory work, see *ante* p. 128.



In certain parts of England and Wales, there are special local customs as to the hiring of domestic servants, which, of course, must be observed. But where no special custom exists, and there is not any express agreement in writing (*g*), a general hiring of a servant, without any engagement regarding the time of its duration, is a hiring for a year, and so on from year to year, and involves the common custom of the realm, that it cannot be put an end to without giving a month's warning on either side; and if the master or mistress dismiss the servant without such notice, and without any just cause, the servant will be entitled to a month's wages beyond what is due up to the day of dismissal.

But if there be any gross misconduct on the part of a servant, then, the master or mistress may dismiss her at once, without any warning, and without a month's wages; and such servant even forfeits any wages, which may be then coming due to her (*h*).

The following cases of misconduct have been held to warrant such a dismissal:—frequent absence, remaining abroad all night without leave, pregnancy, refusing to conform to the discipline of the house, drunkenness, entertaining guests without the knowledge or permission of the master or mistress, wilful disobedience, habitual neglect, or being guilty of a criminal offence; but a short absence without leave, occasional insolence, or sulkiness, or trifling disobedience, is not a sufficient ground for instant dismissal (*i*).

(*g*) This agreement does not require a stamp, 55 Geo. III., c. 184, sch. "Agreement." The common custom stated in the text is implied in a written agreement, unless excluded by express words. *Johnson v. Blenkinsop*, 5 Jur. 870.

(*h*) *Turner v. Robinson*, 6 Car. & P. 15; *Spain v. Arnott*, 2 Stark. 256.

(*i*) Addison on Contracts, p. 746.

Where a servant is wrongfully dismissed, and the master or mistress refuses to pay the wages due to her, she may bring an action for them after the period at which they would have become due, if it had not been for the dismissal (*h*). Should the wages not exceed fifty pounds, she may, although under age, sue for them in one of the petty County Courts (*i*).

A master or mistress is not bound to provide medical attendance or medicine for a servant, in case of illness, even though such illness arise from an accident which occurred whilst the servant was performing the duties of her situation. If a master send for a medical practitioner for his servant, whilst under his roof, the master is liable; and he cannot deduct the expense from the servant's wages, unless it was specially so agreed. A master is not, however, *impliedly* liable for medicines supplied to his servant, who met with an accident whilst in the master's employ, unless the master send for the surgeon himself (*j*). But if she happen to become disabled, by sickness or other accident, from the performance of her duties, this does not justify a discharge without proper warning or a month's wages (*k*).

A master or mistress is civilly liable for the acts and contracts of a servant, within the scope of her duty, authority, or employment, on the grounds of the servant being of his or her selection, and also of a delegated authority, either expressed or implied. But a master or mistress is not liable for the wilful act of a servant in committing a wrong (*l*).

If a person usually deal with a tradesman by himself,

(*h*) *Smith v. Hayward*, 7 Ad. & E. 544 S. C.

(*i*) 9 & 10 Vict., c. 95, § 64; 13 & 14 Vict., c. 61, § 1.

(*j*) *Sellen v. Norman*, 4 C. & P. 80.

(*k*) Dalt. Just. 141.

(*l*) Bac. Ab., "Master and Servant," (K).

or constantly pay him ready money, he is not answerable for what his servant obtains upon trust or credit, for there is no implied order to the tradesman to trust the servant; but if he even *once* send her upon trust, or sometimes upon trust, and sometimes with ready money, he is then answerable for all the servant orders, as the tradesman cannot possibly distinguish when the servant comes by the master's order, and when upon her own authority; and even though the master (where he deals upon trust) furnish the servant with money to pay, which the servant omits, he is liable. If a person have invariably paid a tradesman, when the bill amounted to a small sum, and the tradesman trust the servant to a great amount, the master is not liable for the surplus amount. Where the usual routine is departed from, it becomes the tradesman's duty to satisfy himself that the servant has authority to pledge the master's credit (*k*).

It is not lawful for a master or mistress to correct a servant, otherwise than by remonstrance; should a servant be beaten, she may quit the house at once, and bring an action for the assault and battery (*l*).

In the absence of an express understanding, a master or mistress cannot deduct from the wages the value of any articles which may have been broken, injured, or lost by the servant's carelessness, however gross it may be (*m*).

Payment of the wages will be presumed, after a long lapse of time, the servant having left her place, and having made no application for them; for it is unusual to allow such claims to remain, even for a short period, unsatisfied, or to take a receipt for them (*n*).

(*k*) Browne's Actions at Law, 174.

(*l*) *Winstone v. Linn*, 1 B. & C. 469.

(*m*) *Le Loir v. Bristow*, 4 Camp. 134.

(*n*) *Sellon v. Newman*, 4 C. & P. 80.

A master or mistress is not under any legal compulsion to give a character to a discharged servant, but should a character be given, it should be strictly truthful, for if a false good character be given, and a servant, taken on the strength of it, commit a robbery in her new place, the person who gave such a character would be liable to an action for a compensation of the loss occasioned thereby. If, however, a bad character be untruly and maliciously given, the servant may sustain an action for defamation, giving indeed clear proof of the falsehood and expressed malice; for if the representation have been honestly made, though false in fact, and injurious to the servant's character, no action will lie (*o*).

A master or mistress may maintain an action against any person, who entices away any servant from his or her service, or who persists in retaining such servant after notice from him or her; an action may also be maintained for an injury done to a servant, which deprives the master or mistress of her services.

VI. The state of our law on the revolting subject of Seduction, followed by desertion on pregnancy, is imperfect and reprehensible. On the present occasion, however, it is our duty to detail what that law is, rather than argue what it ought to be. This we will here endeavour to do.

It is only by a fiction, that our law affords any remedy for the wrong of seduction, which is not held to be a criminal offence, as it is not perpetrated against the consent of the woman (*p*). And even this remedy is not available by the injured party herself, but can only be

(*o*) *Rogers v. Clifton*, 3 Bos. & Pull. 587.

(*p*) A conspiracy by two or more persons to seduce a female is, however, indictable in a criminal court. *R. v. Lord Grey and others*, 3 State Trials, 519.

resorted to by one, who can shew he has lost her services, by reason of such wrong. Seduction is not deemed to be an injury to a daughter, but only a detriment to her parent, and not always so, as we shall presently see.

One of three persons may bring this action against the seducer—the parent (*q*), or a person standing *in loco parentis*, or the master. The action emanates from the relationship of master and servant, and its foundation is the loss of the seduced's service, which may or may not be imaginary, but this will make no difference. If the daughter be the servant of a third person, the latter, and not the parent, must sue the seducer; for the loss of service is the gist of the action. And so strictly do the courts insist upon this *quasi* fiction, that if the daughter be apprenticed to a married woman, whose husband seduces her, the father cannot sue; this monstrous wrong then being without a remedy (*r*)! And where the seducer himself is her master, the parent is also remediless, unless her master induced the daughter to leave her father, under the pretence of hiring her as his servant (*s*), for such a fraud will not destroy the relationship of master and servant thitherto existing between the parent and daughter.

If the daughter be merely absent on a visit, the father may maintain the action, for she is, in contemplation of law, still the father's servant, and there is an *animus revertendi* (*t*).

The form of the action is either "on the case," or "trespass;" the latter form being the more usual. It

(*q*) *i.e.*, the father, if alive, or the mother, being a widow.

(*r*) *Harris v. Butler*, 2 M. & W. 539.

(*s*) *Spaight v. Oliviera*, 2 Stark. 493.

(*t*) 5 East, 15.

cannot be brought in an inferior court (*u*), but only in a superior court of Common Law at Westminster. The action may be brought before the confinement of the seduced (*v*).

The plaintiff in this action has two circumstances to prove, (1) That the seduced was in his service at the time; and (2) The seduction.

If the parent or guardian be the plaintiff, some proof of constructive service must be adduced; it will not be sufficient to show that the plaintiff has incurred expense in consequence of the confinement of the seduced. Slight evidence of service will be enough, such as residence with the plaintiff and forming part of the family; the habit of making tea; attending the parent during illness; milking cows, &c. Indeed, if the slightest act of service (*w*) were not sufficient, this action would necessarily be confined to the lower ranks of life, in which the daughter is literally a servant; and could never be extended to the higher order, where it is generally more wanted, and where the injury is often of a more aggravated kind. However, some evidence of service, slight as it may be, will be absolutely necessary; and it seems to be equally

(*u*) 9 & 10 Vict., c. 95, § 58.

(*v*) Roscoe on Evid. 495.

(*w*) A different rule, with respect to the necessity of proving acts of service, has been adopted in the action of trespass for breaking and entering the plaintiff's house, and debauching his daughter. In the case of *Cock v. Wortham*, 1 Selw. N. P. 999, the court of Queen's Bench determined, that where the loss of service is the foundation of the action, as in trespass for assaulting the servant, there the loss of service must be proved; but where it is laid only in aggravation of damages, as in an action for breaking and entering the plaintiff's house, there, although the loss of service is not proved (and consequently no damages for the seduction can be given), yet the plaintiff will be entitled to a verdict for the trespass.

necessary, whether the daughter be of full age or under age (*x*).

If the master be the plaintiff, then, proof of actual service will be easy and conclusive. The action cannot be supported by the assignees of a bankrupt-master (*y*).

The fact of the seduction is invariably proved by the seduced herself.

If it is sought to recover the expenses attendant on the confinement, they should be laid in the declaration or complaint, as special damage.

The plaintiff cannot be admitted to prove that the defendant had promised the woman marriage previously to the seduction, for the breach of such a promise raises a distinct cause of action, of which she herself may take advantage (*z*).

If the defendant plead "not guilty" only, he merely denies the seduction; if, therefore, he wants to deny the service to the plaintiff, he must plead it expressly. Should the defence be that the plaintiff consented to the familiarity, the license must be specially pleaded.

In mitigation of damages, the defendant may show the loose character of the daughter; but if the daughter be asked whether, before her acquaintance with the defendant, she had not been criminally connected with other men, she is not bound to answer the question (*a*). He may prove expressions of the daughter, tending to show the levity of her character; but if the expressions also tend to contradict her evidence, they cannot be proved

(*x*) 1 Phill. on Evid., c. 13, § 3, II. The action will lie, though the daughter be a married woman, separated from her husband, and living as a servant with her father. *Harper v. Luffkin*, 7 B. & C. 387.

(*y*) *Howard v. Crowther*, 8 M. & W. 601.

(*z*) See *post*, Book III. c. I.

(*a*) *Dodd v. Norris*, 3 Camp. 519.

without previously asking her, on cross-examination, whether she used them (*b*).

In answer to such evidence, the plaintiff may give testimony to the general character of the seduced, for modesty and decorous conduct.

In these actions generally large damages are given; and our courts of law are disinclined to grant new trials on account of excessive damages, from an anxiety to suppress the atrocious vice of heartless seduction, against which the criminal law of this country has not, we repeat, provided any proceeding or punishment. Damages, then, are awarded, not only for the loss of service, but for the deprivation, on the part of the parent, of the social purity of his child, and the dishonor sustained in consequence of the ineradicable wrong (*d*).

In no case whatever, unless she has had a promise of marriage, can a woman herself obtain any legal reparation for the injury she has sustained from the seducer of her virtue, and then it is by an action for breach of promise of marriage (*e*).

(*b*) *Carpenter v. Wall*, 11 A. & E. 803.

(*c*) Where evidence of the circumstances of the father's family, its general good conduct, and the number of his children, was proposed and objected to, Lord Eldon received the evidence: that great judge said,—“ In point of form, the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact, that this is an action brought by a parent for an injury to his child; in such a case, I am of opinion, the jury may take into their consideration all that he can feel from the nature of the loss. They may look upon him as a parent losing the comfort as well as the service of his daughter, in whose virtue he can feel no consolation, and as the parent of other children, whose morals may be corrupted by her example.” *Belford v. M'Kowl*, 3 Esp. N. P. C. 119.

(*e*) See *post*, Book III. c. I.



ally attend such an engagement ; from her being present and not objecting when the consent of a parent was asked ; the making preparation as for the wedding ; the receiving her suitor's visits, and her expressive demeanour towards him. The promise on the part of the man is more frequently capable of proof by means of explicit declarations, but this is very often but matter of presumption from his conduct (*p*).

A bill may be filed in the Court of Chancery (*q*) against a party to compel him to disclose upon oath, whether he had promised the plaintiff marriage or not, in aid of an action for the breach ; and this practice is still preserved, for the Evidence Act, 14 & 15 Vic. c. 99, § 4, does not permit either the plaintiff or defendant, in an action for breach of promise of marriage, to be examined as a witness.

A promise to marry generally, without fixing a time, is held to be a promise to marry within a reasonable or convenient time upon request (*r*).

If the defendant should deny the breach of the promise, evidence on behalf of the plaintiff must be given, either of an actual refusal after a tender, or of conduct or declarations equivalent to an actual refusal, or that the defendant has married another, so as to render a marriage with the plaintiff impossible.

It is sufficient if the father of an infant-female plaintiff demand performance of the defendant, whose answer, declining the marriage, will be proof enough of the breach of promise (*s*).

Should the defendant's promise be special, as to marry within a certain period, or when certain family affairs

(*p*) 2 Stark. Evid. 706, note (*m*).

(*q*) *Vaughan v. Aldridge*, Forr. 42.

(*r*) *Potter v. Deboos*, 1 Stark. 83.

(*s*) *Gough v. Furr*, 2 C. & P. 631.

the Court of Chancery set aside the security, and ordered it to be delivered up to be cancelled, properly treating it as a premium for improvident matches, and contrary to the wholesome policy of the law. "The Court," said Lord *Hardwicke*, "has been extremely jealous of any contract of this kind, made with a guardian or servant, especially with a servant, in respect of the marriage of persons over whom they have an influence (and justly so, nothing tending more to improper matches); and by rules established, not regarding whether the match is proper or no, if brought about by a marriage-brokrage-contract, sets such contract aside, not for the sake of a particular person, but of the public, and that marriages may be on a proper foundation; therefore, though a proper match, yet, for the sake of mischief that would be introduced, and to prevent that influence which servants more especially would gain over young ladies, the Court sets it (the contract) aside."

V. All contracts in restraint of or prohibiting marriage are void, as contrary to the common weal, and as destructive of that freedom of choice, which is the great safeguard of moral and happy marriages.

Contracts  
in restraint  
of marriage.

Thus an agreement between a man and a woman, by which he covenanted to pay her one thousand pounds, if he married any person except herself, was held to be void (a). So, also, a bond from a widow not to marry

(a) This covenant is in restraint of marriage. It is not a covenant to marry the plaintiff, but not to marry any one else; so that it restrained him from marrying at all, in case she had chosen not to permit him to marry *her*. There is a great difference between promising to marry a particular person, and promising not to marry any one else. If this had been a covenant to marry the plaintiff, the motion in arrest of judgment would not have been a proper motion. But it is not a covenant to marry her;

The following criminal offences are peculiarly confined to servants :—

Theft.

VI. Larceny or stealing by servants is punishable by 7 & 8 Geo. IV., c. 29, § 46, which enacts, that if any clerk or servant shall steal (*f*) any chattel, money, or valuable security, belonging to or in the possession or power of his master, every such offender, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment.

Embezzlement.

VII. The offence of embezzlement is the act of appropriating to one's self that which is received in trust for another.

- The 7 & 8 Geo. IV., c. 29, § 47, enacts—that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender being convicted thereof, shall be liable, at

(*f*) A servant clandestinely taking his master's beans to give to the master's horses, and thereby depriving his master of his property, and diminishing his own labor, is guilty of larceny. *R. v. Morfit and another*, Russ. & Ry. 307.—Verily, an unintelligible doctrine!

the discretion of the Court, to any of the punishments which the Court may award in the case of larceny by clerks or servants.

It shall be lawful to charge in the indictment, and proceed against the offender for any number of distinct acts of embezzlement, *not exceeding three*, which may have been committed by him against the same master, within the space of *six calendar months* from the first to the last of such acts; and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such an amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him, in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly (*g*).

The offence of embezzlement is made up of these three facts:—

(1). The offender must be actually a servant or clerk, although not perhaps so denominated. A female servant, if employed to receive money, which she purloins, is clearly within the statute (*h*).

(2). Such servant must have received the property purloined by virtue of her employment, for, or in the

name of, or on account of her master. It must appear that the servant had a special direction to receive the money or other property of the master, or that the service was of that character, whence such an authority can be necessarily inferred.

(3). Such servant must fraudulently retain and conceal the property. An act of embezzlement cannot be said to have been perpetrated, until the servant refuses to account, or falsely accounts for the property.

The omission to pay over a balance, after rendering a true account of it, will only subject the party to a civil action for money had and received; and absconding with the money, after accounting for it, is not embezzlement, but larceny; nor is it a criminal act to retain the money, after an account of it, upon some frivolous right or pretext.

The distinction between larceny and embezzlement is this:—in larceny, the servant takes the property from the actual or constructive possession of the master or mistress, or the property has been given to the servant for a special purpose; in embezzlement, the property has never been in the master's possession, but the servant, having received it for the master's use, fraudulently appropriates it. This is frequently a nice and subtle distinction, and often difficult to determine. Take the following cases as illustrations:—a servant is sent to get change for a bank-note, and fraudulently appropriates *the change*; this is embezzlement, for the change was never in the master's possession (*i*); but if the servant had converted the bank-note to his or her own use, it is larceny, for it was in the constructive possession of the master, the possession of the servant being that of the master (*k*), the servant having merely the charge and custody of the property, without any right to its possession.

(*i*) *R. v. Sullens*, 1 Moc. C. C. 129. (*j*) *R. v. Atkinson*, 1 Leach, 302.

Often has a failure of justice happened, because after conviction, the judges have determined the offence to be a larceny, and not an embezzlement, or *è converso* (*k*). In future, however, justice cannot thus be defeated; for the 11 & 15 Vict., c. 100, § 13, enacts, that, if upon the trial of any person indicted for embezzlement, as a clerk, servant, or person employed for the purpose, or in the capacity of a clerk or servant, it shall be proved that he took the property in question in any such manner, as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that such person is not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose, or in the capacity of a clerk or servant, as the case may be; and, thereupon, such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement; and no person so tried for embezzlement or larceny, as aforesaid, shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts.

IX. By 11 Geo. III., c. 78, § 84 (repealing the <sup>Negligent</sup> 6 Anne, c. 31, which contained a similar provision), if <sup>burning.</sup> any servant, through negligence or carelessness, shall

(*k*) *Reg. v. Wilson*, 9 Car. & P. 27.

fire, or cause to be fired, any dwelling-house or out-houses, or other buildings, and be thereof convicted on the oath of one witness, before two or more justices, he shall forfeit one hundred pounds, to be distributed among the sufferers, by the churchwardens, in such proportions as to such churchwardens shall seem just; and in case of default, shall be committed to gaol or the house of correction for eighteen months, to be kept to hard labour.

False  
character.

X. By 32 Geo. III., c. 56, if any person shall personate a master, and give a false character to a servant, or assert in writing that a servant has been hired for a period of time or in a station, or was discharged at any time, or had not been hired in any previous service, contrary to truth; or if any person shall offer himself as a servant, pretending to have served where he has not served, or with a false certificate of character, or shall alter a certificate, or shall pretend not to have been in any previous service, contrary to truth; such offenders are liable, on conviction before two justices of the peace, to be fined twenty pounds, and in default thereof to be imprisoned with hard labour for any time not more than three nor less than one calendar month.

Except what we have here detailed as peculiarly applicable to the condition of an unmarried woman or spinster, she is affected by the same laws, possesses the same rights, and incurs the same responsibilities, in all her contracts and doings, as though she belonged to the ruder sex; and, unless expressly exempted by a law from its operation, she is amenable to it, although its language is altogether masculine,—provided, of course, she can be naturally comprehended within its purview, since it is a general rule, that words importing the first gender shall, unless otherwise set forth, include the second gender, in despite of its grammatical inconsistency and confusion.

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## BOOK III.

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### MATRIMONY.

Far other strains, far other fires,  
Our marriage offering grace ;  
Welcome, all chaste and kind desires,  
With even matron pace  
Approaching down the hallow'd aisle!  
Where should ye seek Love's perfect smile,  
But where your prayers were learn'd erewhile,  
In her own native place ?—*The Christian Year.*

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The Third Book of this Exposition will be devoted to an elucidation of the momentous and interesting law relating to marriage,—at once the most perilous, yet, if successful, the most righteous bond of humanity.

This great and popular subject—the institutional parent of civilized society—we will unfold in the following order:—First, the method of contracting the obligation of marriage, together with the consequences of its non-fulfilment, or breach; then, the practice of marriage settlements and the law of separate estate, followed by the proper ceremonials; the effect of the nuptials upon the mutual rights, conduct and property of the wedded ones; the redress of their wrongs; their agreed separation; and, lastly, the mode of obtaining a divorce, and releasing the parties from the bonds of their nuptial-vows.

# BOOK III.

## MATRIMONY.

### CHAPTER I.

#### BETROTHMENT, WITH ITS OBLIGATIONS.

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| <p>I. Disabilities to contract marriage.</p> <p>(a) Consanguinity or affinity.</p> <p>(b) Impotence.</p> <p>(c) Force, menace, or duress.</p> <p>(d) Mental alienation.</p> <p>(e) Want of age.</p> <p>(f) Non-consent of parents and guardians.</p> | <p>(g) Prior undetermined marriage.</p> <p>II. Betrothment.</p> <p>III. Remedy for its breach.</p> <p>IV. Marriage-Brocage bonds.</p> <p>V. Contracts in restraint of marriage.</p> <p>VI. Wagers.</p> |
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THE honorable estate of matrimony results from a willing and legal consent between a man and woman of competent capacity, and is treated by our law as a civil (*a*) but indissoluble contract; neither party can repudiate it, nor withdraw from it, nor release it, nor renounce it, nor let the other free from its fetters; both

(*a*) Matrimony is a civil contract, the essence of which, as of all contracts, is the consent of the parties. But the contract, from its object being the procreation of the species, has necessarily reference to other beings than those whose hands are joined in wedlock; and the public good requires that the interests of the expected progeny should be protected by adequate conditions annexed to the contract. Experience, independently of religion, teaches that the great ends of matrimony cannot be fulfilled without imprinting on it a character of indissolubility, unless for such a breach of obligation as would render a forced continuance of the union

together are so absolutely bound, that both together cannot put an end to the mutual obligation contracted towards each other. At the threshold of our enquiry,

hurtful to society. The law has therefore imposed on the contract of marriage such a condition; and it is unphilosophical to infer from the indissolubility, at the pleasure of contracting parties, that it is something different from a contract. It is the law, as the expression of the general will, that gives effect to, and supports all contracts; and that which supports may impose conditions on what demands its sanction. All who enjoy the protection of society are bound to conform to its rules, and every one who contracts matrimony knows the terms of his engagement. It is no less unphilosophical to maintain that, though the law declares null all such contracts as are entered into without conformity to the enactments of the legislature, the marriages still are valid—because human laws cannot reach them.

In prescribing a form of celebration, there seems nothing or little inconsistent with the principle, that marriage is constituted by the consent of the parties, since all which either law or religion requires is, that the consent shall be given in such a solemn manner as may not only preclude all pretence of the want of a deliberate purpose, but render the contract of the sacred and important nature which it so justly merits. 1 Stair's Inst., p. 25, *in notis*.

Marriage differs from other contracts in this, that the rights, obligations, or duties arising from it, are not left entirely to be regulated by the agreement of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control, by any declaration of their will. It confers the *status* of legitimacy on children born in wedlock; with all the consequential rights, duties, and privileges thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot in general, amongst civilized nations, be dissolved by mutual consent; and it subsists in full force, even although one of the parties should be for ever rendered incapable, as in the case of incurable insanity, and the like, from performing his part of the mutual contract.

The canonists consider it in a religious light, and define it a sacrament peculiar to the laity; by which a man and woman are joined together according to the precepts of the church. Among Protestants, it is considered partly as a holy union of Divine institution, partly as a civil contract; in the latter view alone it is regarded by the temporal courts; its

the question presents itself,—Who can legally contract marriage?—which we will at once answer.

I. All persons can, as a general rule, lawfully contract marriage, unless they come within the following categories:—

(a) Where a man and woman are related to one another, within the prohibited degrees of *consanguinity* or *affinity*, they cannot lawfully intermarry.

Disabilities to contract marriage.

Consanguinity or affinity.

Consanguinity or kindred is a relationship by blood, between two persons descended from the same ancestor. It is of two kinds:—(1) *lineal*, as between children, parents, grand-parents, and so on upwards, directly ascending; or between children, grandchildren, great grandchildren, and so on downwards, directly descending; and, (2) *collateral*, where the two persons descend indirectly from the same ancestor, as brothers and sisters, uncles and nieces, aunts and nephews, and so forth.

Affinity is a relationship between the consanguinity of a husband and wife. It is distinguished into three kinds. 1. *Direct*, or that which subsists between the husband and his wife's relations by blood, or between the wife and the husband's relations by blood. (2). *Secondary*, or that which subsists between the husband and his wife's relations by marriage; and, (3). *Collateral*, or that which subsists between the husband and the relations of his wife's relations.

The wholesome propriety of this law prohibiting marriage between near relations is so universally acknow-

sacred bonds being left entirely to the guardianship of the spiritual tribunals. 1 Brown's Civil Law, p. 50.

ledged and practised, that it needs no arguments to maintain its thoroughly sound morality.

• Our law upon this subject adopts the following propositions :—

The degrees prohibited by the law of nature, extend to all persons related in lineal consanguinity.

Those prohibited by the positive Divine law extend to all collateral relations to the third degree according to the computation of the civilians, *i.e.*, to uncle and niece, as set forth in the eighteenth chapter of the third book of Moses, called Leviticus; so that marriages between relations in the fourth and any subsequent degrees are lawful (*b*).

(*b*) In computing the degrees according to the Civil or Roman law, every person who is generated makes a degree, without reckoning the common stock. By this rule, father and son are in the first degree of consanguinity, because the son is the only person generated; brothers in the second, uncle and nephew in the third, and first cousins, or cousins-german in the fourth, and second cousins in the sixth.

The computation of the degrees of propinquity in the canon law, agrees precisely with that in the Roman or civil law, in the direct or right line of ascendants and descendants; but in the collateral, the canonists compute, not by the number of persons descended on both sides from the common stock, but by the number of generations upon one side only. According to this reckoning, cousins-german are in the second degree, because each of them is but two generations distant from the grandfather, who is the common stock: whereas they are, by the Roman or civil rule, in the fourth. In the unequal collateral line, where one of the two is farther removed than the other from the common stock, the canon law reckons the distance by the number of generations of the person farthest removed. Thus, a niece is related in the second degree to her uncle, because she is related in the second degree to her grandfather, the common stock, and by the same rule she is no farther removed from her uncle's son: which abundantly discovers the absurdity of this mode of reckoning.

The *canon* law prohibits in the fourth degree, which is that of second cousins, and the *civil* law allows in the same degree, which, according to

This disability, until recently, was canonical only, but since 1835, the Statute law has made it civil ; for by the 5 & 6 Wm. IV., c. 54, it is enacted, that all marriages which shall have been celebrated before its passing (31st August, 1835), between persons being within the prohibited degrees of *affinity* shall not hereafter be annulled for that cause by any sentence of the ecclesiastical court, unless pronounced in a suit which shall be depending at the time of the passing of the act (thus preventing that uncertainty formerly existing, as to the right of children, born of such marriages) ; provided that nothing therein-before enacted shall affect marriages between persons being within the prohibited degrees of *consanguinity*, (which marriages are voidable only during the lives of both the parties) (c). It also enacts, that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of *consanguinity* or *affinity* shall be absolutely null and void to all intents and purposes whatsoever (d).

The 32 Hen. VIII, c. 38, enacts that marriages contracted between lawful persons (as by this act we declare all persons to be lawful, that be not prohibited by God's law to marry), and solemnized in the face of the church,

the civil law computation, is that of first cousins. And this, perhaps, accounts for a misapprehension which is said to have prevailed in this kingdom, that first cousins may marry, but second may not. There is no affinity between the husband's brother and the wife's sister, which is called *affinitas affinitatis* ; because there the connection is formed, not between one of the spouses and the kinsman of the other, but between the kinsmen of both. Shelford on Marriage, pp. 160, 162.

(c) Such marriages, if not avoided during the lifetime of both the parties, confer the civil rights of marriage, as the right of dower, and of administering the effects of the deceased. *Elliott v. Gurr*, 2 Phil. 16.

(d) §§ 1 & 2. The act does not extend to Scotland (§ 3). It is usually called Lord Lyndhurst's Act.

and consummate with bodily knowledge or fruit of children or child being had therein, between the parties so married, shall be deemed lawful, just, and indissoluble; notwithstanding any pre-contract, not consummate with bodily knowledge, which either of the parties so married, or both shall have made, with any other person, before the time of contracting the marriage, which is solemnized and consummate, or whereof such fruit is ensued or may ensue; and notwithstanding any dispensation, prescription, law, or other thing granted or confirmed by act or otherwise; and no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees; and no person shall be admitted in the Spiritual Court to any process, plea, or allegation to the contrary.

This act declares the Divine Law in Leviticus to be the accepted law in England, and the table of the forbidden degrees set forth at the end of our Common Prayer-books, reduces this sacred ordinance to great precision.

Gibson, in his Code of the English Ecclesiastical Law, gives (*d*) some special rules for the construction of these inhibited degrees. He says "that marriages in the ascending and descending line, that is, of children with their father, grandfather, mother, grandmother, and so upwards, are prohibited, without limit; because they are the cause (immediate or mediate) of their being; and it is directly repugnant to the order of their nature, which hath assigned several duties and offices essential to each, that would thereby be inverted and overthrown. A parent cannot obey a child; and, therefore, it is unnatural that a parent should be a wife to a child. A parent, as a parent, hath a natural right to command

and correct a child ; and that a child, as husband, should command and correct the same parent is unnatural. To which we may add, the inconsistency, absurdity, and monstrosity of the relations to be begotten, if such prohibition were not absolute and unlimited. The son or daughter, for instance, born of the mother, and begotten by the son, considered as born of the mother, would be a brother or sister to the father ; but as begotten by him would be a son or daughter. So the issue procreate upon the grandmother, as born of the grandmother, will be uncles or aunts to the father ; but as begot by the son, they will be sons or daughters to him, and this in the first degrees of kindred. Further, there are several degrees which, although not expressly named in the Levitical law, are yet prohibited by that, and by the statute of 32 Hen. VIII., c. 38., by parity of reason, which is thus illustrated in the *Reformatio Legum* (e). This, in the Levitical degrees, is to be observed, that all the degrees by name are not expressly set down ; for the Holy Ghost there did only declare plainly and clearly such degrees, whence the rest might evidently be deduced. As, for example, where it is prohibited that the son shall not marry his mother, it followeth also, that the daughter shall not marry her father. And by enjoining that a woman shall not marry her father's brother, the like reason requireth that she shall not marry her mother's brother. To which the same book adds two particular rules for our direction in this matter—first, that the degrees which are laid down as to men will hold equally as to women in the same proximity ; second, that the husband and wife are but one flesh ; so that he

(e) Fol. 23 a.



who is related to the one by consanguinity, is related to the other by affinity in the same degree.”

The present state of the Law of England as to a widower marrying his deceased wife’s sister, is that such a marriage is incestuous, as being within the prohibited degrees, and the issue of such a union will be illegitimate. This is not a fitting place to discuss the soundness or expediency of this law, which has been, and is still being, agitated throughout the country (*f*)

The following marriages are prohibited, viz. :— a widow with the brother of her deceased husband (*g*) ; a widower with his deceased wife’s sister’s daughter, for she is, by affinity, in the same degree as an uncle to his niece by consanguinity (*h*) ; a widower with a daughter of his deceased wife by a former husband (*i*) ; and a widower with his deceased wife’s mother’s sister (*j*).

But a marriage between a man and the widow of his great-uncle ; or between cousins-german (*k*) ; or between a husband’s brother and a wife’s sister ; or a husband’s son by a former wife, with the wife’s daughter by a former husband, for a husband’s kindred are not of

(*f*) Innumerable pamphlets, letters, &c. are from time to time put forth both for and against this law. Jurisconsults, divines, publicists, and laymen print their various and conflicting opinions, and a league exists for the avowed purpose of effecting its abolition. The authorities which develop the law are, *Hill v. Good*, Vaug. 302, 305 ; *Gibs. Cod.* 412 ; 3 *Keb.* 106 ; *Ray v. Sherwood*, 1 *Curt.* 173 ; *Reg. v. St Giles in-the-Fields* ; *Reg. v. Chadwick*, 11 *Q. B.* 173, and 12 *Jur.* 174 ; and see the report of the Commissioners on this subject, pub. in 1848.

(*g*) *Aughtie v. Aughtie*, 1 *Phil.* 201.

(*h*) *Clement v. Beard*, 5 *Mod.* 448.

(*i*) *Blackmore v. Brider*, 2 *Phill.* 359.

(*j*) *Butler v. Gashill*, *Gilb.* 156.

(*k*) *Harrison v. Burwell*, *Vaugh.* 206 ; 2 *Vent.* 9.

affinity to a wife's kindred (*l*), and *affinis mei affinis non est mihi affinis*, is valid and lawful.

We have seen (*m*) that consanguinity or affinity is equally an impediment, where the children are illegitimate.

The awful and abhorrent crime of incest, or the carnal knowledge of persons within the Levitical degrees of kindred, is positively unrecognizable and unpunishable by our Common Law, and is left to the very feeble and despised powers of the ecclesiastical courts (*n*). This is a serious omission in our national jurisprudence.

(*b*). *Impotence*, or the incapacity in either the man or the woman of accomplishing the main purpose of marriage, is another disability. Impotence.

It is obvious that an impotent person contracting matrimony does a serious injury to the other, the consequences being the disappointment of the laudable object of marriage, the desire of having offspring, and the lawful pleasure of each other's society.

Either party may, but in practice the injured party does usually promote a suit in the ecclesiastical court for obtaining a sentence, annulling the marriage on account of impotency; to induce the court however to grant it (*o*),

(*l*) Taylor's Civil Law, 339.

(*m*) *Ante*, p. 54.

(*n*) See c. VI., *post*.

(*o*) A three years' cohabitation is required by law, before a suit can be entertained for annulling a marriage by reason of impotence, unless it appear from evidence that the party is so absolutely and naturally incapable of performing the act of generation, that the infirmity can be ascertained at once, as in the case of mal-conformation. A triennial cohabitation is so requisite, that if the parties have been married three years, but

proof must be given that at the time of the espousals, (*p*) the impotence actually existed without the knowledge of the other party, for the knowingly contracting a marriage with an impotent will shut out such party from a divorce on such ground.

The presumption is, in case of a natural defect, that it existed prior to marriage; but the contrary is assumed where the defect is the result of accident, and then, if such presumption be not rebutted by clear proof, it will be no ground for annulment, since the most vigorous individual may be at some time or other afflicted with a supervening incapacity (*q*).

These suits are almost always promoted by the wife. Cases where the husband is the complainant are extremely rare.

A dissolution of the marriage on the ground of impotence enables either party lawfully to marry another, and the issue of such second marriage will be legitimate.

A man will not be allowed to plead his own natural impotency as a ground for the Court's sentence of nullity of marriage (*r*).

a great part of that time have been absent from each other, the man will be allowed the further time during which he had been absent. Inspection has been refused, until after a triennial cohabitation.

(*p*) Lord *Stowell* said, in *Greenstreet*, falsely called *Cumyns v. Cumyns*, 2 Hag. Cons. R. 332, "I think there is enough to satisfy the court, that at the time when this marriage took place, there was incompetency on the part of the man, to perform the duties of marriage; a capacity to perform which is necessary to render it valid. The court is, upon the whole, satisfied of the existence of this fact, and there has been no collusion between the parties. There is an air of truth and sincerity in the evidence; and the party appears willing to compensate, as far as is in his power, the injury which he states he has ignorantly done.

(*q*) *Brown v. Brown*, 1 Hagg. 524.

(*r*) *Norton v. Seton*, 2 Phil. 163.

(c) Where a marriage is induced by *force, menace, or duress*, the Ecclesiastical Court will dissolve it (s). Force, menace, or duress.

It must, however, be observed that error about the family or fortune of one of the parties, though it be the consequence of misrepresentation, will not affect the validity of the marriage, for it is expected that every one will exercise a prudent diligence in ascertaining the character and position of a person before entering into so solemn an engagement.

The disabilities of impotence and force are purely *canonical*, only making a marriage voidable by the Court's sentence during the joint lives of the husband and wife, and if a sentence be not, during that time, obtained, such a marriage is held perfectly valid for all the civil purposes which pertain to the rights of property and the legitimacy of issue.

The remaining disabilities to be noticed are *civil*, which render (except the disability of want of age) a marriage, tainted with any of them, void from the very beginning, and do not require any sentence to dissolve the union, which is treated as meretricious and non-matrimonial.

(d) *Mental alienation.* Neither a lunatic nor an idiot Mental alienation. can lawfully contract matrimony, for the contract would be altogether null, since such a person is incapacitated

(s) *Vide ante*, p. 165, *et seq.*, as to stealing heiresses. Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable, without fear of any person whatever; for matrimony contracted through any menace or impression of fear, is null and void *ipso jure*; so that it is not necessary to rescind the same by an action, in the civil and canon law called *quod metus causá*, because all marriages

from giving an assent—(the very essence of the union)—not being a rational and responsible agent (*t*).

A marriage between two persons of sound and disposing intellect at the time of its celebration, cannot be avoided by the subsequent insanity of either.

A deaf and dumb person may lawfully marry by signs, provided he or she be sane; and so may a lunatic during a lucid interval.

But the 15 Geo. II., c. 30, enacts “That from and after the 24th day of June, 1742, in case any person who now is, or at any time hereafter, shall be found a lunatic, by any inquisition taken, or to be taken, by virtue of a commission under the Great Seal of Great Britain; or any lunatic or person under a phrenzy, whose person and estate, by virtue of any act of parliament, now or hereafter, shall be committed to the care and custody of particular trustees, shall marry before he or she shall be declared of sane mind by the Lord High Chancellor of Great Britain, the Lord Keeper or Lords Commissioners

ought to be free. But though matrimony, contracted through such a fear as may happen to a man of courage, constancy and resolution, be null and void *ipso jure*; yet this fear may be purged and done away by a spontaneous cohabitation for so long a time as that the cause of such fear may be presumed to have ceased and have been destroyed thereby, and a spontaneous consent added in its room. Ayl. Par. 361 X., 4, 7, 2.

(*t*) In *Turner v. Myers* (1 Hagg. Cons. 416), Lord Stowell observed, “A defect of incapacity invalidates the contract of marriage, as well as any other contract. It is true, that there are some obscure *dicta* in the earlier commentators on the law, that a marriage of an insane person could not be invalidated on that account, founded, I presume, on some notion that prevailed in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. In more modern times, it has been considered in its proper light, as a civil contract, as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons.”

of the Great Seal of Great Britain for the time being, or such trustees as aforesaid, or the major part of them respectively, every such marriage shall be, and is hereby declared to be null and void to all intents and purposes whatsoever." (u)

Where persons have been found to be insane, under a commission of lunacy, from a period antecedent to their marriage, it is the usual practice for the Lord Chancellor, on the petition of the committees of lunatics, to direct a reference to inquire as to the propriety of instituting proceedings in the Ecclesiastical Court for setting aside such marriages; and on the Master reporting in favour of such proceedings, then to direct them to be taken.

Where no commission had issued, and the sanity at the time of the marriage of a party to a suit in Chancery is a point which calls for a determination, that Court will direct an issue to a jury to try the question (v).

It is a contempt of Chancery to marry a lunatic whose custody has been intrusted to a committee.

The marriage of a lunatic, not under a commission of lunacy, during a lucid interval, is valid, and a marriage by a *non compos*, when of unsound mind, is rendered valid by consummation during a lucid interval (w).

It is a rule of law, that in civil suits it is not necessary to trace or connect the morbid imagination with the act itself. If the mind be unsound, the act is void. The law avoids every act of the lunatic during the period of the mental alienation, although the act to be avoided

(u) See 51 Geo. III., c. 37, relating to Ireland.

(v) This was done in the case of a ward of the Court who had been married with her father's consent, during a lucid interval, but whose sanity appeared doubtful. 1 Dow. P. C. 178.

(w) *Aske's case*, Pr. Ch. 703.

cannot be connected with the influence of the insanity, and may be proper in itself.

The marriage of a lunatic being absolutely void, and not merely voidable, the validity of it may be questioned, and declared void after death, in a suit as to the right to administer. Thus, administration of the effects of a wife was refused to the husband, on the ground that his marriage had been illegally contracted with a person of unsound mind (*w*).

Want of  
age.

(e) *Want of age*.—A marriage with a boy under fourteen, or with a girl under twelve years of age, is so imperfect, that it may be declared void, upon his or her attaining fourteen or twelve, (which are the respective ages of consent,) without any judicial proceeding; but should the parties then agree to continue as husband and wife, the marriage becomes perfect and binding *ab initio*, without any further ceremony.

It is said, that if the husband be of years of discretion, and the wife under twelve, when she attains the age of consent, he as well as she may repudiate the marriage; and so, *è converso* (*x*).  $\square$

Non-con-  
sent of  
parents or  
guardians.

(f) *Non-consent of parents or guardians* (*y*). Where a marriage has been had *by banns*, the want of the parents' consent will not invalidate it (*z*); but if the parents or guardians of an infant openly and publicly declare in the church or chapel, where the banns are published, at the time of such publication, his, her, or their dissent to

(*w*) *Browning v. Reane*, 2 Ph. 69.

(*x*) Co. Litt., 79 *a*, 79 *b*; Bac. Abr., Inf. A; 1 Bl. Comm. 436.

(*y*) By 12 Geo. III., c. 11, no member of our Royal family can marry without the previous consent of the Sovereign. See *Heseltine v. Lady Augusta Murray*, 2 Adams, 400; 7 Law Mag. 176, 432.

(*z*) *Diddear v. Faucit*, 3 Phil. R. 581.

such marriage, such publication of bands is absolutely void (a).

Before, however, a *licence* to marry is granted, either by the surrogate, or by the superintendent-registrar, where either of the parties, not being a widower or widow, shall be *under the age of twenty-one years*, one of the parties must swear that the consent of the persons, whose consent to such marriage is required, has been obtained thereto, *or* that there is no person having authority to give such consent (b).

The father, if living, of any party under twenty-one years of age, such parties not being a widower or widow, or if the father shall be dead, the guardian or guardians of the person of the party so under age lawfully appointed, or one of them, and in case there shall be no such guardian or guardians, then the mother of such party, if unmarried, and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage by license of such party so under age, unless there shall be no person authorised to give such consent (c).

In case the father or fathers of the parties to be married, or one of them, being under age, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them, whose consent is made necessary to the marriage of such party or parties, shall be *non compos mentis*, or in parts beyond the seas, or shall

(a) 4 Geo. IV., c. 76, § 8.

(b) 4 Geo. IV., c. 76, § 14; 6 & 7 Wm. IV., c. 85, § 12.

(c) 4 Geo. IV., c. 76, § 16.



unreasonably, or from undue motives, refuse or withhold his, her, or their consent to a proper marriage, then any person desirous of marrying in any of the before-mentioned cases may apply by petition to any of the judges of the Court of Chancery, who are respectively empowered to proceed upon such petition in a summary way; and in case the marriage proposed shall upon examination appear to be proper, such judge shall judicially declare the same to be so; and such judicial declaration shall be deemed and taken to be as good and effectual to all intents and purposes, as if the father, guardian or guardians, or mother of the person so petitioning, had consented to such marriage (*d*).

After the last day of June, 1837, the like consent is required to any marriage in England, solemnized by the superintendent-registrar's licence, as would have been required by law to marriages previously solemnized by licence, and every person whose consent to a marriage by licence is required by the law, is thereby authorised to forbid the issue of the superintendent-registrar's certificate, whether the marriage is intended to be by licence, or without licence (*e*).

But *after* the solemnization of the marriage, evidence will not be admitted in any suit as to the validity of the marriage, to show that the necessary consent was not obtained (*f*). ✓

The Attorney-General may sue for a forfeiture of the estate and interest in any property accruing to the offending party in the following cases:—

First, if any valid marriage solemnized by *licence* shall

(*d*) Section 17.

(*e*) 6 & 7 W. IV., c. 85, § 10, and 1 Vict., c. 1, § 1.

(*f*) 6 & 7 W. IV., c. ~~85~~ § 25.

be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, contrary to the provisions of the act 4 Geo. IV, c. 76, by means of such party falsely swearing as to any matter or matters to which such party is therein-before required personally to swear, such party wilfully and knowingly swearing.

Second—If any valid marriage by *banns* shall be procured by a party thereto to be solemnized by banns between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow such party knowing that such person as aforesaid under the age of twenty-one years had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published according to the provisions of the law, and having knowingly caused or procured the undue publication of banns (*a*).

Third.—Where any valid marriage shall be had under the provisions of 6 & 7 Will. IV., c. 85 (*b*), by means of any wilfully false notice, certificate, or declaration made by either party to such marriage, as to any matter to which a notice, certificate, or declaration is by this act required.

The following is the method of proceeding:—The Attorney-General (or the Solicitor-General, in case of the vacancy of the office of Attorney-General), by information in the nature of an English bill (*c*) in

(*a*) 4 Geo. IV., c. 76, § 23.

(*b*) Section 43.

(*c*) To distinguish it from the proceedings within the common law jurisdiction of the court, which were in Latin, now however abolished by 34 Geo. II., c. 26.

the Court of Chancery, at the relation of a parent or guardian of the minor, whose consent has not been given to such marriage, and who shall be responsible for any costs incurred in such suit, such parent or guardian previously making the required oath, may sue for a forfeiture of all estate, right, title, and interest in any property which has accrued or shall accrue to the party so offending by force of such marriage. The Court may in such suit declare such forfeiture, and thereupon order and direct that all such estate, right, title, and interest, in any property as shall then have accrued, or shall thereafter accrue, to such offending party, by force of such marriage, shall be secured, under its direction, for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the said Court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal estate, or pecuniary benefits from such marriage. If both the parties so contracting marriage shall, in the judgment of the Court, be guilty of any such offence as aforesaid, the Court may settle and secure such property, or any part thereof, immediately for the benefit of the issue of the marriage, subject to such provisions for the offending parties, by way of maintenance or otherwise, as the Court, under the particular circumstances of the case, shall think reasonable—regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves, in case either of them should survive the other. But no such information shall be filed unless it shall be made out to the satisfaction of the Attorney or Solicitor-

General before he files the same, by oath or oaths sworn before one of the proper officers in Chancery, that the valid marriage to be complained of in such information has been solemnized in such manner and under such circumstances as in the judgment of the said Attorney or Solicitor-General are sufficient to authorise the filing the information under the provisions of the act, and that such marriage has been solemnized without the consent of the party or parties at whose relation such information is proposed to be filed, or of any other parent or guardian of the minor married, to the knowledge or belief of the relator or relators so making oath; and that such relator or relators had not known or discovered that such marriage had been solemnized *more than three months previous* to his or their application to the Attorney or Solicitor-General (*d*).

All agreements, settlements, and deeds entered into or executed by the parties to any marriage, in consequence of, or in relation to, which marriage, such information as aforesaid shall be filed, or by either of the said parties, before and in contemplation of such marriage, or after such marriage, for the benefit of the parties, or either of them, or their issue, so far as the same shall be contrary to or inconsistent with the provisions of such security and settlement as shall be made by or under the direction of the Court as aforesaid, under the authority of the act, shall be absolutely void, and have no force or effect (*e*).

Any original information to be filed for the purpose of obtaining a declaration of any such forfeiture as aforesaid, must be filed *within one year* after the solemniza-

(*d*) 4 Geo. IV., c. 76, § 23.

(*e*) Section 24.

tion of the marriage by which such forfeiture shall have been incurred, and shall be prosecuted with due diligence. In case any person or necessary party to any such information shall abscond, or be or continue out of England, the Court in which such information shall be filed may order such person to appear to such information, and answer the same within such time as to the Court shall seem fit, and may cause such order to be served on such person at any place out of England, or cause such order to be inserted in the London Gazette, and such other British or Foreign newspapers as to the Court shall seem proper, and, in default of such person appearing and answering such information within the time to be limited as aforesaid, may order such information to be taken as confessed by such person, and may proceed to make such decree or order upon such information as the Court might have made if such person had appeared to and answered such information: provided always, that in case the person at whose relation any such suit shall have been instituted shall die pending such suit, the Court of Chancery may, if it shall see fit, appoint a proper person or persons at whose relation such suit may be continued (*f*).

Prior undetermined marriage.

(*g*) *Prior undetermined marriage*. A second marriage, whilst a former husband or wife is living, is not only null and void (*g*), but is a felony, for which the offending person may be prosecuted and transported.

Betrothment.

II. A man and woman who are not, however, under any of these disabilities, may mutually agree to intermarry at a future period (*h*). Such an agreement forms a con-

(*f*) Section 25.

(*g*) *Duas uxores eodem tempore habere non licet*, is the rule of the civil law, which has been adopted and enforced by the codes of all civilized countries. See c. VI. *post*.

(*h*) Marriage is defined to be a conjunction of man and woman, containing an inseparable connexion and union of life. But as there is no-

tract of betrothment, and is binding upon both, by their verbal consent, the promise of one party to marry being the inducement or consideration for the other's promise. A betrothment almost always precedes a marriage, since the wedding can hardly take place at the same time that it is agreed upon.

III. Either party is entitled to bring an action in a superior Court of Common Law against the other upon a refusal to complete this contract (*i*). The purpose of the action is to recover compensation for a personal wrong, which may probably be irreparable, to obtain damages, perhaps, for loss of health, or loss of happiness, or loss of protection from relations and friends, or loss of hitherto unimpeachable honor (that full measure of a woman's ruin), and, sometimes, in addition to all these, loss of property in the disappointment of a settlement for life. The general rule is, that the mutual promises must be legally binding, so as to render a contract obligatory upon the both parties; to which rule this action presents a remarkable exception, for if either of the parties be an infant, although he cannot be sued upon his breach of

Remedy  
for its  
breach.

thing that is begotten and finished at once, so this contract of coupling man and woman together hath an inception first, and then an orderly proceeding. The first beginning of marriage (as in respect of contract, and that which law taketh hold on), is when wedlock by words in the future tense is promised and vowed, and this is but *sponsio*, or *sponsalia*. The full contract of matrimonie, is when it is made by words, *de præsenti*, in a lawfull consent, and thus two be made man and wife, existing without lying together; yet matrimonie is not accounted consummate, until there goe with the consent of mind and will conjunction of body. *The Lawes Resolutions of Women's Rights*, lib. ii., § 1.

(i) *Harris v. Caye*, 5 Mod. 411.

promise of marriage, yet, such an infant may sue (*j*) the other party, if of full age, upon a violation of this contract.

This general rule, with its exception, obtains, when the agreement is verbal or in an unsealed writing, but if a man bind himself *by deed* to marry a woman by a day named, and omit to do so, he may be sued by her in an action of covenant for damages, although she may have not bound herself to marry him; for mutuality is in such a case not essential, and so it would be, if the woman only were so bound; but as women are generally little versed in matters of business, and are peculiarly liable to be deceived and imposed upon in matters in which their feelings are concerned, such a contract or engagement obtained from a woman would be regarded by the Courts with the greatest jealousy and suspicion, particularly where the man had entered into no corresponding engagement on his part. It is probable, indeed, that a Court of Equity would consider the procurement of a bond or covenant of this nature from a woman by a man who had given to the latter no corresponding obligation or covenant to marry her, as a fraud upon the woman, and would restrain him by an injunction from proceeding against her by his action upon her covenant (*k*).

But, to return to the ordinary verbal or unsealed betrothment; the proper action is technically called an action of *assumpsit*, or on promises, and must be brought within six years from the breach. It cannot be had in any of the County or Small Debts' Courts, being expressly excepted by the 9 & 10 Vict. c. 95, § 58 (*l*).

This action is so far of a personal nature, as to be

(*j*) *Holt v. Ward*, Stra. 937; *Warwick v. Bruce*, 2 M. & S. 209.

(*k*) See *Cock v. Richards*, 13 Ves. 429—441.

(*l*) And see 13 & 14 Vict., c. 61, § 11.

within the maxim *actio personalis moritur cum personâ*, and therefore it cannot be brought by the personal representatives of the deceased party to whom it was made, and as regards whom it was violated (at least, unless there be laid in the declaration, and proved, some special damage affecting the personal estate of the deceased, as some actual pecuniary loss); because it is not in the power of such representatives to complete the contract on their part (*m*).

Where the defendant pleads that there was no promise, the plaintiff must be prepared to prove that the defendant did promise, and the evidence for this purpose is either *express* or *presumptive*. If the express promise be in writing, it can be adduced in evidence, without being stamped (*o*). A written promise is not necessary, for the Statute of Frauds (29 Car. II. c. 3, § 4) applies to promises "in consideration of marriage," affecting property, and liable to be enforced at law or in equity, and not to promises to marry (*n*). It is not, however, necessary to prove an express promise; it may be evidenced by the unequivocal conduct of the parties manifesting that a marriage was to take place between them. If there be an express promise by the man, and it appears that the woman countenanced it by her actions at the time, and behaved as if she agreed to the matter, although there be no actual promise, yet it will be sufficient evidence of a promise on her part. A promise on the woman's part may be inferred from such circumstances of apparent acquiescence as usu-

(*m*) *Chamberlain v. Williamson*, 2 M. & S. 416.

(*n*) *Orford v. Cole*, 2 Stark. 351.

(*o*) The 4th section of this statute only extends to agreements to pay marriage portions, and not to contracts to marry; *Cork v. Baker*, 1 Str. 33. An oral engagement to marry *more than a year hence* will not do, it must then be in writing, pursuant to the 17th section of the same statute.



ally attend such an engagement ; from her being present and not objecting when the consent of a parent was asked ; the making preparation as for the wedding ; the receiving her suitor's visits, and her expressive demeanour towards him. The promise on the part of the man is more frequently capable of proof by means of explicit declarations, but this is very often but matter of presumption from his conduct (*p*).

A bill may be filed in the Court of Chancery (*q*) against a party to compel him to disclose upon oath, whether he had promised the plaintiff marriage or not, in aid of an action for the breach ; and this practice is still preserved, for the Evidence Act, 14 & 15 Vic. c. 99, § 4, does not permit either the plaintiff or defendant, in an action for breach of promise of marriage, to be examined as a witness.

A promise to marry generally, without fixing a time, is held to be a promise to marry within a reasonable or convenient time upon request (*r*).

If the defendant should deny the breach of the promise, evidence on behalf of the plaintiff must be given, either of an actual refusal after a tender, or of conduct or declarations equivalent to an actual refusal, or that the defendant has married another, so as to render a marriage with the plaintiff impossible.

It is sufficient if the father of an infant-female plaintiff demand performance of the defendant, whose answer, declining the marriage, will be proof enough of the breach of promise (*s*).

Should the defendant's promise be special, as to marry within a certain period, or when certain family affairs

(*p*) 2 Stark. Evid. 706, note (*m*).

(*q*) *Vaughan v. Aldridge*, Forr. 42.

(*r*) *Potter v. Deboos*, 1 Stark. 83.

(*s*) *Gough v. Farr*, 2 C. & P. 631.

should be settled, or upon any other definite and reasonable condition, such condition must be proved to have arisen by the plaintiff (*t*).

It is no defence to this action, that the defendant is pre-engaged to another (for it is a wrong of which no avail can be taken), or that the defendant was married at the time of the betrothment. And if a married man represent himself to be single, and induce a woman to betroth herself to him, upon the faith of such representation, a special action for the deceit would lie against him for damages (*u*).

But the following circumstances are good defences, and, if substantiated, will defeat the action:—that the plaintiff has absolved, exonerated, and discharged the defendant's promise; that the defendant has, *since the promise*, discovered gross immorality or depraved conduct in the plaintiff, or some serious bodily infirmity, which would affect the social happiness of the parties; for, if the defendant promised, after full knowledge of the moral guilt or bodily disease of the plaintiff, it would be binding; or, that there has been a material misrepresentation, or a wilful suppression of the real position of the plaintiff or the plaintiff's family.

If a defendant promise marriage in consideration that the plaintiff would have connection with him, it is void; but if he renew his promise after the illicit intercourse, such subsequent promise would be binding (*v*).

Should presents be made by a lover to his lady-love, in consequence of her encouragement of his attentions,

(*t*) *Cole v. Cottingham*, 8 C. & P. 75.

(*u*) Addison on Contracts, 575. In *Millward v. Littlewood*, 5 Exch. 775, Lord C. B. Pollock held that a promise by a married man to marry another after his present wife's decease, is illegal and void. See *Wild v. Harris*, 7 D. & L. 114.

(*v*) *Morton v. Fean*, 3 Dougl. 211.

and she should afterwards be fickle, and refuse to marry him, the presents or their value may be sued for by the disappointed one (*w*), unless he were but a mere adventurer or social *intrigant*.

Marriage-  
Brocage  
bonds.

IV. Since marriage should be contracted with a perfect freedom of choice, the law discountenances all agreements, in anywise interfering with that mutual love and confidence which can alone insure domestic happiness, and secure fidelity and affection. Therefore, those transactions, called marriage-brocage-contracts, which are agreements for the payment of money, the forgiveness of a debt, the release of an obligation, the conveyance of property, or the performance of some act or duty, on the condition of bringing about a particular marriage between two persons named, are utterly void and unconfirmable; and any money paid in pursuance of them is recoverable by proceedings in equity (*x*).

A bond given by an expectant husband to the wife's father, to induce the latter to give his consent to the marriage, has been held to be in the nature of a marriage-brocage-contract, and contrary to public policy, as tending to induce parents to exercise their parental influence from base and corrupt motives, and to encourage the buying and selling of affections which, if not utterly worthless, defy alike the efforts of policy and the power of wealth (*y*).

Where a bond (*z*) was given to a lady's maid for the payment to her of one thousand pounds, and it appeared that the instrument had been given to her as a bribe to induce her to bring about a match between the obligor or giver of the bond and her mistress, which she succeeded in doing,

(*w*) *Robinson v. Cumming*, 2 Atk. 409.

(*x*) 1 Fonbl. Eq. 255; 1 Madd. Ch. 377.

(*y*) *Keat v. Allen*, 2 Vern. 588.

(*z*) *Cole v. Gibson*, 1 Ves. sen. 503.

the Court of Chancery set aside the security, and ordered it to be delivered up to be cancelled, properly treating it as a premium for improvident matches, and contrary to the wholesome policy of the law. "The Court," said Lord *Hardwicke*, "has been extremely jealous of any contract of this kind, made with a guardian or servant, especially with a servant, in respect of the marriage of persons over whom they have an influence (and justly so, nothing tending more to improper matches); and by rules established, not regarding whether the match is proper or no, if brought about by a marriage-brokrage-contract, sets such contract aside, not for the sake of a particular person, but of the public, and that marriages may be on a proper foundation; therefore, though a proper match, yet, for the sake of mischief that would be introduced, and to prevent that influence which servants more especially would gain over young ladies, the Court sets it (the contract) aside."

V. All contracts in restraint of or prohibiting marriage are void, as contrary to the common weal, and as destructive of that freedom of choice, which is the great safeguard of moral and happy marriages.

Contracts  
in restraint  
of marriage.

Thus an agreement between a man and a woman, by which he covenanted to pay her one thousand pounds, if he married any person except herself, was held to be void (*a*). So, also, a bond from a widow not to marry

(*a*) This covenant is in restraint of marriage. It is not a covenant to marry the plaintiff, but not to marry any one else; so that it restrained him from marrying at all, in case she had chosen not to permit him to marry *her*. There is a great difference between promising to marry a particular person, and promising not to marry any one else. If this had been a covenant to marry the plaintiff, the motion in arrest of judgment would not have been a proper motion. But it is not a covenant to marry *her*;

again, was decreed to be delivered up, although there was a counter bond to pay a sum of money, if she did not (*b*).

Conditions annexed to gifts, legacies, and devises, in restraint of marriage generally, are also void. Yet, if the condition be reasonable in itself, and do not, in point of fact, operate improperly to restrain the union of marriage, it will be binding; for the law will not break down those conditions, which a provident affection has erected to guard the inexperience of youth against the machinations of the crafty and selfish; and while its policy is to encourage perfect liberty of untrammelled election in marriage, it will also protect the rash and hasty from the consequences of their own folly.

Thus, a legacy given to a daughter, to be paid her at twenty-one years of age, on condition that she do not marry before that time, is valid; for such a postponement would manifestly enure to the benefit of the child (*c*). So, a condition not to marry against the consent of friends, or not to marry a particular person, or prescribing a particular person, or prescribing a particular place, or particular ceremonies, is good; because such conditions are not considered as creating an unreasonable restraint of marriage. The same rule also applies to a condition, that a widow shall not marry again, or that she shall only receive an annuity while she remains a widow. But a condition, that a child shall not marry until fifty years of age, or shall not marry any person inhabiting the same town, or county, or shall not marry

the words import no such thing; it is a restraint upon matrimony, and is illegal. *Lowe v. Peers*, 4 Burr. 2230.

(*b*) *Baker v. White*, 2 Vern. 215.

(*c*) *Stackpole v. Beaumont*, 3 Ves. 96.

any person unless he be of a particular profession or trade, are void ; because they operate as a virtual restraint of marriage generally (*d*).

VI. A wager on a marriage is illegal, since it tends to encourage the interference of third parties, or to restrain marriage altogether. <sup>Wagers.</sup>

(*d*) 1 Story's Eq. Jurisp. § 208, *et seq.*

## CHAPTER II.

## MARRIAGE SETTLEMENTS, AND THE LAW OF SEPARATE ESTATE.

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WE will, before we detail the marriage ceremony, with all its legal consequences, sketch the principles and practice relating to family-settlements, and the law of a wife's separate estate.

Ante-nuptial settlement.

I. In order to secure (*a*) a wife and her children, and protect them against the failures, liabilities, and marital powers of the husband-father, it is very usual to settle

(*a*) The following suggestions are quoted from the concluding chapter of Atherley on Settlements:—

In making marriage settlements, the title to the property (whatever the nature of the property may be), should be carefully investigated by counsel; not only to ascertain that it is good, but in order that all proper persons may be made parties to the settlement. If this be not done, it may possibly happen that the settlement may be completely defeated. In case of eviction, the only remedy would be on the covenants for the title; which might frequently be a remedy little better than none; and

property, belonging either to the wife or husband, or to both, as may be agreed, upon them, *before* the marriage actually takes place; the husband having, usually, some interest and benefit in such an arrangement. This is done sometimes by articles of agreement, concisely setting forth the limitations of the property amongst the several contemplated participants, to be completed by a formal deed after the marriage is celebrated; sometimes by a perfect and final settlement at once. The latter is always, when practicable, the safer course to adopt; for it often happens that the formal settlement is no further thought of after the mar-

if the covenants did not extend to the cause of eviction, the parties claiming under the settlement would be entirely without a remedy.

Where the property belongs to the intended husband, the wife or her friends should be careful not to employ the husband's solicitor; for in his character of solicitor to the husband, he might have notice of some equitable charge or incumbrance affecting the property, which he might not disclose to the wife or her friends; and in case he had, the wife generally speaking, (on the ground that notice to the agent is notice to the principal), would be bound by the incumbrance.

It almost always happens, that trustees are necessary in marriage settlements. Wherever there are trustees, it will be proper that the settlement should contain powers for changing them, and for reimbursing their expences. And a declaration should be inserted, that they shall not be answerable for the acts of each other, or for involuntary losses.

And where the property is limited in strict settlement, it will mostly be proper to insert powers of leasing, and of selling and exchanging. And if the undivided part of an estate is limited in strict settlement, a power of partition should be inserted.

So in strict settlements, powers of charging a jointure for a future wife, and portions for children by a future marriage, should be introduced.

Such powers as the above will be expedient in almost every strict settlement. A variety of others, however, may sometimes be necessary, according to the necessities, or wishes, or even caprice of the parties,—as powers to raise money on mortgage, to cut timber, &c.

And if the estate is in a register county, the settlement should be registered as soon as possible after the execution. If houses form any con-



riage. Should then the estate agreed to be settled be sold to a purchaser *without notice* of the articles of agreement, the provision intended for the wife and children would be totally defeated. This can never happen, if an actual, legal settlement be made at once ; which is obviously the more advisable practice. The parties, indeed, may sometimes be impatient of the delay attending the preparing of a settlement by a person of skill ; and if that is so, it may then be better to have preliminary articles of agreement, rather than a final settlement, drawn by an incompetent hand. And should the intended settlor be an infant, that would be such an obstacle, as to necessitate a resort to articles, preliminary to a future post-nuptial settlement.

Settlement by infants, and a brief II. While all persons of full age and of sound mind can make a settlement of their property, the interesting

siderable part of the property comprised in the settlement, a power should be given to keep them insured.

Estates of inheritance, and leaseholds for lives, are not so dissimilar in their natures, than that if both should happen to be comprised in the same settlement, they may likewise be comprised in the same limitations ; or the one may be limited by reference to the limitations of the other. And where the leasehold estate is a renewable one, a power of renewal should always be inserted.

As all copyholds of inheritance may in effect, be entailed : they may, of course, be limited in strict settlement.

A personal estate, through the medium of a trust, may be rendered inalienable for as great a length of time, as real estate can by means of a strict settlement. As, for instance, by directing that the trustees shall be possessed of the property, upon trust for A. for life, and after his decease, upon trust for his children, with a direction, that in case all the children should die under the age of twenty-one years, that the trustees should be possessed of the property upon other trusts. By this means the property is rendered inalienable during the existing generation, and

question presents itself, whether a settlement can be made by an infant. view of the  
law of  
jointure.

A female-infant may bar her future right by a pre-

during the minority of the ensuing one, which is as long as real estate can be rendered inalienable.

Where real and personal property are comprised in the same settlement, it often happens that the intention is, that they shall go together. Where such is the intention, it is not unusual to declare the trusts of the personal property by reference to the limitations of the real estate, "This," Mr. Butler observes, in one of his valuable notes to Coke upon Littleton, "should never be done. The nature of real and personal estate is so different, as to make it almost impracticable to frame such a set of trusts as will, in every possible event, or even in common contingencies, carry the personal estate in the same course of devolution as the real estate; and the modes of doing it are so various, that hardly two professional men would agree upon the same plan. *The best method, therefore, is to insert a complete set of limitations for the personal estate.* If, however, from the smallness of property, it is thought advisable to do it by way of reference to the limitations of the real estate, a declaration may be inserted, expressing that the leasehold or personal estate shall not vest absolutely in any child or children of any tenant for life, unless or until he, she, or they shall attain the age of twenty-one years, provided, however, that such child for the time being may, during his minority, be entitled to the rents and interest."

To suggest appropriate settlements for given states of circumstances, would be as endless as the condition of families is various, besides the limitations of a settlement altogether depend upon the wishes and purposes of the parties interested, and these are usually effected under the advised assistance of professional men; it will be enough then, to say, in this place, that the ordinary settlement in families, whose wealth consists of lands, the owner of which is tenant for life, the inheritance being entailed upon his eldest son, who is about to marry, is that the father and son take the proper legal steps for unsettling the estate, and obtaining the absolute dominion over it; they then proceed to resettle the estate, making the father tenant for life, as before, but reducing the son, who was previously tenant in tail, to a tenant for life, thus the maintenance of the family estates is secured for another generation, by settling the inheritance upon the eldest male issue of the intended marriage. By this method of entail-

nuptial agreement (*b*), to her dower, freebench, and distributed share of her husband's intestate personalty, as well under the statutes of distributions, as by the custom of any particular place (*c*).

To render an agreement in bar of dower binding, a provision called a jointure is made for her in lieu of it.

The qualities of a jointure, in order to render it a valid bar to a wife's dower under the Statute of Uses (*d*), and where the marriage took place prior to or on 1st January, 1834, are these :—

(1) The jointure must take effect in possession or profit, *presently* after the husband's death.

If, therefore, the jointure, in its creation, had been so limited as that an estate either for life or years, would take effect in possession *after* the death of the husband, and *before* the estate given to the wife, the jointure would not be such as would bar her of her dower; and this will be the case although by the death, in the lifetime of the husband, of the party to whom the intermediate estate is limited, there should not in the result be anything to prevent the widow's estate taking effect immediately upon the death of her husband; for, as it was not in construction of law a jointure at first, whatsoever happens afterwards, shall not make it to be one (*e*).

ing, disentailing, and re-entailing land, repeated upon the marriage of every eldest son, the dignity of the family is sustained; for a *perpetual indestructible entail* (except by act of parliament), is unknown to the laws of England, as contrary to commercial enterprise and the public prosperity.

(*b*) *Buckinghamshire v. Drury*, 2 Eden, 60.

(*c*) These subjects will be discussed in Book IV. of this work.

(*d*) 27 Hen. VIII., c. 10, §§ 6 and 7.

(*e*) Bell's Husband and Wife, 334.

The Courts of Equity, as well as the Courts of Law, recognize this rule.

(2) It must be given to the wife for her own life at least, or for some greater estate.

If the wife be of age, however, and accept a jointure made for her before marriage, which, in its inception, might not so long endure as her own life, though this would not at law be a bar to her dower, it would in equity, because, being the wife's own agreement, made while she was competent to consent, it ought to bind her (*f*).

The common practice, indeed, is to grant a rent-charge to the wife during her life, but to begin at her husband's death, with powers of distress and entry, secured also by a term of years. This is simple, and obviates the inconveniences of limiting lands in jointure.

(3) It must be made to the wife herself, and not to others in trust for her, in order to be good at law; but in equity, if she consent to its being given to others in trust for her, she will be bound by such consent.

(4) It must be expressed or averred to be made in satisfaction of her whole dower, and not of a part only; or, at all events, this must appear by necessary implication from the contents of the instrument granting it; a rule which obtains both at law and equity. A widow, how-

(*f*) Accordingly, there are instances in equity of an agreement by the wife to accept a term of years, a life estate in copyholds, or a bond for an annuity not secured upon any land, being sustained as sufficient to bar the widow's claim to dower, in satisfaction of which the provision had been made and accepted by her.

ever, cannot claim her dower, and at the same time take a benefit under her husband's will, where the benefit was intended, although not so expressed, to be in satisfaction of her dower (*g*). She must, then, make her election.

(5) It must be made *before* marriage, in order to prevent the widow's election between it and her dower, which she may exercise when the jointure is made after the marriage is celebrated, except it be in pursuance of a private act of parliament (*h*), and which she would probably exercise in favor of the dower, where the jointure is inadequate as compared with it.

Before the widow is put to elect between her dower and the gift in satisfaction of it, she is entitled to know the relative value of each; and she will not have forgone her right to this, and be said to have elected the gift by having enjoyed it for a period of time, unless such enjoyment were necessarily accompanied with a full knowledge of the circumstances of her own rights.

But there is this distinction between the rule at law and that in equity, *viz.* at law, if the jointure, whether made before or after marriage, be not such as comes within the terms of the statute, in the qualities which have been noticed, there is nothing to prevent the widow taking the jointure, and, at the same time, claiming her dower; for if the act do not, the common law will not in such case conclude her of her dower. Whereas, in equity, if the jointure were intended to exclude the dower, then, whether it were made before or after marriage, and whether it came within the terms of the statute or not, the widow will not, against conscience, be

(*g*) See the cases collected in Bell's Husband and Wife, pp. 341—345.

(*h*) 27 Hen. VII., c. 10, § 9.

allowed to claim her dower, and at the same time take that which her husband gave her in satisfaction of it. If, however, the jointure be made before marriage, the wife is bound to take it, both at law and in equity, how inadequate soever it may be.

To validate a jointure, it is not necessary that it should proceed immediately from the husband; it will be good if made by his father in contemplation of his son's marriage, or by any other relation; and it will be good, whether limited to the wife solely, or to her and her husband in joint-tenancy.

The jointure must arise from real property, to be binding at law; but equity will sustain it, if it come out of any other kind of property. While the adequacy of an ante-nuptial jointure to the dower, is not essential, yet an illusory jointure should be avoided, as it may be set aside in equity on the ground of fraud.

While at law, a jointure will only bar a widow's dower at common law, in equity, it will also prevent her right to customary freebench (*i*) in copyholds.

But equity will enforce articles of agreement, or a covenant or power to settle a jointure, treating the widow as having purchased it for the valuable consideration of marriage. It will amend defects in the mode of carrying out a power of jointuring (*j*), and decree any deficiency arising from the property, out of which such jointure is to be derived, to be made good from the husband's other property.

A jointure can only be preferred to the claims of

(*i*) See Book IV., *post*.

(*j*) It is now unusual to give a power of making a jointure by settlement of lands, the practice being, as we have already observed, to give a power to create a rent charge of a fixed amount *per annum* to be derived from a certain estate.

creditors and purchasers, when it is secured upon specified land, for otherwise the widow ranks with specialty creditors, *i. e.* those whose debts are evidenced by a sealed writing.

If a widow be lawfully deprived or evicted of any part of her jointure, she is entitled to be endowed of as much of the residue of her husband's lands whereof she was dowable, as the lands of which she shall be so evicted shall amount to (*k*); so long as that does not exceed what would have been the amount of her dower had there not been any jointure made (*l*).

An actual final jointure (unlike dower in this respect,) is not forfeited by the wife's elopement, and living in adultery, unless it be made payable only *dum castè se gesserit*. So, by the husband's treason or felony, the wife does not lose her jointure, as she does her dower (*m*).

The dower act, 3 & 4 Wm. IV, c. 105, has made a great alteration in the law upon this subject, as to all wives married after the 1st of January, 1834, and has put their right to dower entirely in the control of the husband, who may destroy all right to dower, without giving a jointure by way of equivalent; so that any provision, however infirm or scanty, which is declared to be in bar of dower, will no doubt be held to be so.

But since the old law still obtains as to marriages prior to this date, a sketch of dower has been attempted in Book IV. of this volume.

A female-infant may also, by a reasonable settlement or agreement before marriage, bind her personal estate,

(*k*) 27 Hen. VIII., c. 10, § 7.

(*l*) If, therefore, the jointure evicted exceed the dower, the compensation is limited to the dower; and if the dower exceed the jointure evicted, the compensation is limited to the amount of the eviction.

(*m*) Co. Litt. 37 a.

of what species soever, and the consent of parents or guardians is unnecessary, unless she be a ward of Chancery.

Such property, if in possession, would belong to the husband immediately upon the marriage, and is, therefore, bound by the settlement to which he is a party. Should such property be in expectancy, and not reduced into possession during the marriage, then if the wife be the survivor, her right of survivorship will supersede the settlement.

But a female-infant cannot make a binding settlement or agreement, before marriage, of her real property, for she may, on majority or widowhood, either repudiate or confirm it, unless there be children of the marriage, who have an interest in such property, by virtue of such settlement, when the property will become bound. The husband, however, could not defeat such a settlement in any case.

A male-infant may bar himself by agreement before marriage, either of his estate by the curtesy (*n*), or of his right to his wife's personalty (*o*).

A male-infant may also, by agreement before marriage, settle his personal estate.

But a male-infant cannot make a binding settlement of his real property; although he may charge it with a jointure in favor of his intended wife.

The settlements of infants *after* marriage are in no case binding.

The circumstance of one of the parties being of age, and the other not, requires a remark.

If an infant-husband marry an adult-wife, he is bound

(*n*) See chapter IV. of this Book, *post*.

(*o*) See, as to these subjects, *Ibid*.



by her covenants (*p*), but if the ages of the parties be reversed, the infant-wife would not be so bound, and her husband's settlement would only be good to the extent of his interest in her land. The same principle is applicable to personal property ; but as regards her leaseholds for years, and *choses en action*, a settlement made by an adult-husband and his infant-wife is binding, on her surviving him (*q*), provided the husband could have exercised a marital right over such property, and it was never previously settled to her separate use, nor, being a *chose en action*, was irreducible into possession during the marriage (*r*).

Every kind of property may be the subject of a settlement.

Articles of agreement for a marriage settlement.

III. Articles of agreement for a marriage settlement, entered into before the nuptials, should be in writing, and signed by the party to be charged therewith, or by some lawfully authorized agent (*s*).

The agreement needs not be a formal, technical instrument, for a bond, undertaking to make a settlement, will suffice ; and so will letters, sufficiently setting forth the terms of the proposed settlement, and containing an express promise, with an indication of its nature and extent (*t*) ; and a trustee is not actually indispensable.

(*p*) *Slocombe v. Glubb*, 2 B. C. C. 551.

(*q*) *Trollope v. Linton*, 1 Sim. & Stu. 477.

(*r*) See c. IV., *post*, and 9 Byth. Conv. 40—44.

(*s*) 29 Car. II., c. 3, § 2, commonly called the Statute of Frauds.

(*t*) Even a bond given by a husband to his wife, to which she is not a party, although it is executed with her consent, conditioned for enabling her to dispose of her estate as a *feme sole*, operates in equity as her settlement, and will entitle her appointee to enforce his equitable claim against the heir. *Rippon v. Dawling*, Amb. 565 ; *Estcourt v. Estcourt*. 1 Cox. 20.

It is in the power of the Court of Chancery to enforce the performance of these articles or agreements, should the parties refuse to complete their covenants or undertakings.

Chancery regards not the form of the agreement, but addresses itself to the substantial intent of the parties, and supplies any necessary technical or formal parts; but this liberality of construction cannot justify a lax carelessness in the preparation of these important documents; since it is obvious that explicit language and technical precision, in setting forth the definite meaning of the parties, better secure their interests, than the hazard of incurable omission, or the uncertainty of judicial sentence. Should the agreement be intended to be reduced into writing, and duly signed, but this is prevented by the party to be bound, from a fraudulent motive, the Court of Equity will nevertheless compel him to perform it; and so, if the agreement be in writing, but from a fraud, it is not executed.

Although, in cases of fraud, equity will enforce a parol, or an unsigned written agreement, yet, notwithstanding the minutes or heads of a marriage agreement have been committed to writing in the presence of the party to be bound by it, these facts will not subject him or her to a specific performance of it, provided the non-execution of the agreement was not occasioned by circumstances of fraud; and if the agreement be fully drawn up, and not merely its minutes or heads, it is apprehended it will be the same thing. An unexecuted agreement, indeed, is fully within the letter of the Statute of Frauds, and if its execution be not prevented by fraud, there is really no ground on which to rest the interposition of a Court of Equity.

It is a rule firmly established, that a parol agreement, in part substantially acted upon and performed, does not come within the mischief contemplated by the statute ; and, consequently, that such an agreement may be specifically enforced, in equity. The principle on which equity thus acts upon such agreements, is this, that the act performed, in itself, shows that there has actually been an agreement ; and not only shows this, but also throws a light upon the nature of the agreement ; so that neither the fact of an agreement, nor even its nature, rests solely upon parol, or merely verbal evidence. The parol evidence, therefore, which is admitted in such cases, is only auxiliary to the internal evidence, afforded by the circumstances of the transaction itself. If the act performed, however, be an *equivocal* act, it will afford no proof of an agreement : the payment, therefore, of a portion on one side will afford no proof of an agreement to make a settlement on the other, for it may have been paid without a settlement being at all contemplated ; neither will the marriage itself be a part performance, for then there would always be a part performance ; and, consequently, the object of the Statute of Frauds would thus be altogether set at naught.

In framing a marriage settlement pursuant to prior articles of agreement, they are considered merely as instructions ; and, therefore, the intent of the parties, as we have already observed, is to be carried out, and not the language of the articles, or their legal import and operation ; thus where the articles, according to their legal import, give an estate-tail to the settlor, the settlement should limit the estate in what is technically called *strict settlement* (*v*), so as to put it out of the power of

(*v*) A strict settlement limits the estate to the use of the husband for

the parents to deprive their children of their expectant interests; for equity wisely considers a provision for the children of the marriage to be the main intent of the husband and wife. The word "*issue*," in the construction of marriage articles, is held to mean "*heirs of the body*," and "a suitable jointure settlement" is con-

life, remainder to trustees to support contingent remainders, remainder to the wife for life, remainder to other trustees for raising portions for younger children, &c., remainder to the first and other sons in tail male, remainder to the daughters as tenants in common, with cross remainders between them, remainder to the husband in fee.

In the case of articles before marriage, containing limitations that would give the parents, or either of them, such an estate tail as would enable the father alone, during the coverture, or the surviving parent afterwards, to bar the issue of the marriage, under a legal settlement limiting the estate in the same words, equity will rectify it, and make a strict settlement, unless the issue is otherwise provided for than by the limitation to the heirs, &c., or from other limitations or provisions in other lands, it appears that the parties knew and intended the distinction. The court will not interfere, if both articles and settlement are made before marriage, unless the settlement in that case be expressed to be made in pursuance of the articles; for the court will suppose that the parties had altered their intention with respect to the terms of the marriage, which they may do before the marriage, though not afterwards; and that the settlement was made in pursuance of such new agreement, and not of the articles. But when it is said to be made in pursuance of the articles, all room for such a supposition is precluded. *Fearne's Cont. Rem.* 107.

The court, indeed, prevents the settled estate from falling within the power of one of the parents. This would be the inevitable consequence in those instances in which the limitations prescribed by the articles would have made them joint tenants in tail; since, by virtue of the right of survivorship, which is incidental to a joint tenancy, either parent, by becoming the survivor, might acquire the fee simple by barring the entail; but where the limitations would have vested an estate tail in one only of the parents, this effect would depend upon the contingency of that parent happening to be the survivor; however, the mere possibility of such an event affords, in the latter instance, an equally valid ground

sidered to mean a strict settlement (*u*). Indeed, so strongly does the Court of Chancery incline in favor of a strict settlement, that if the articles even limit the estate to the husband or wife absolutely in fee, yet if it appear that the object was evidently to make a provision for the children, the articles will be directed to be executed in strict settlement. And the Court will avail

for not framing the settlement in conformity to the literal construction of the articles, as the certainty of it in the former.

If the estate could not, in any possible event, become alienable by either parent, singly and alone, the reason for departing from the language of the articles fails, and the limitations are then framed in exact consistency therewith. Such is the result, when the estate articulated to be settled proceeds from the husband or his ancestors, and the limitations to be inserted in the settlement would make the wife sole tenant in tail; for then, the husband being the survivor, would be merely tenant for life, and the wife being the survivor, would be restrained by the statute 11 Hen. VII., c. 20, from alienating the estate, as being derived *ex provisione viri*; and therefore the estate is in every event effectually taken out of the dominion of either parent singly. 9 Byth. Conv. 53.

(*u*) In devises of real estate, instead of inserting, in the formal, technical language of conveyancers, a long chain of limitations, with numerous powers, provisoes, &c., it is not unusual for wills merely to contain brief heads or directions for a settlement; to be made in a more careful and formal manner after the testator's death.

Settlements made in pursuance of such wills, must always be made in conformity with the testator's intention, and not according to the literal import or meaning of the will. In this respect there is no difference between a settlement made in pursuance of directions contained in a will, and a settlement made in pursuance of marriage articles.

Whenever the testator intended a strict settlement, a strict settlement must be made; notwithstanding the words of the will vest an estate-tail in the parents.

If the testator's intention be not consistent with the policy of the law, so that it cannot be specifically acted upon, yet equity will give effect to such intention, as near as the rules of law will allow, by applying what is technically called the doctrine of *cy près*, which is simply a practically legal scheme to carry out an intent, which is strictly impracticable and not perfectly consistent with legal doctrine.

itself of the slightest circumstance on which to found a decree for a strict settlement; and not by leaving the estate in the power of the parents, to expose their children to the risk of being deprived of a provision.

It may be observed, that daughters cannot require the settlement to be made in their favor, unless the limitation in the articles comprise them. For instance, if the limitation in the articles be to the settlor and his heirs *male*, on what ground could the daughters claim to have an estate-tail limited to them? Nor could they have any better right to require it, where the articles expressly direct a strict settlement upon first and other *sons*, without saying anything about *daughters*.

If the plain intention of the articles do not exactly accord with legal principle, the articles are not therefore void, for though they cannot be acted upon to the full extent of the intention, yet equity will carry them into effect as near to such intention as legal principle will admit, by applying a well known rule commonly called *cy près*, which is based upon the principle, that a particular intention, inconsistent with the policy of the law, must give way to a general intention, which is consistent with it.

It is of great importance to determine what powers are authorized to be inserted in settlements made pursuant to executory trusts in articles, wills, or other instruments. We can do no more than lay down a few of the leading principles on this subject.

Where the articles, &c., are silent as to the insertion of powers of any kind, then a power of sale and exchange cannot be inserted in the settlement.

But a power of sale and exchange ought to be inserted where there is a direction that the settlement shall contain "usual powers."

A power to grant leases for twenty-one years, being essential to the beneficial management of property, should be inserted (x).

A power to join in partition should be introduced where the settlement comprises an undivided share in lands.

While a power of selling and exchanging will warrant a partition, a power to make partition will not authorise a sale or exchange.

The direction of a qualified power will not warrant the insertion of a more extensive or indefinite power of the same nature; but two powers of the same nature, the one limited and the other general, if not absolutely inconsistent, may be inserted, provided such be the clear intention of the parties.

A general direction to insert usual powers will not authorise powers of jointuring or charging portions, which affect the destination of the beneficial property: to insert these powers in the settlement requires a particular direction expressly pointing out the extent of interest to be affected thereby.

A term of years is frequently assigned to trustees to raise pin-money for the wife during the marriage. Pin-money is intended to furnish a wife with the means of providing for her dress, ornaments, and personal expenses, independently of her husband (y); and so much is the object of it considered by Equity, that the wife herself cannot recover more than one year's arrears of her pin-money; and her representatives cannot recover any

(x) The fact is not so clear as to building leases. *Pearse v. Baron*, Jac. 158.

(y) Pin-money is frequently a gift or payment made to a wife by her husband after marriage, for these purposes. It is a wife's duty to expend the money about her personal decoration,—its especial object.

at all, if her personal expenses have been paid by her husband.

Marriage articles will be carried out by the Court of Chancery at the instance of all persons, who are within the influence of the marriage consideration, (these are the husband and wife (*a*), and their children), and also at the instance of a person, who claims through any of these, though he himself could not rest his claim upon the marriage consideration.

And Equity will enforce marriage agreements indirectly in favor of persons at whose personal instance it would lend no assistance. This happens where articles contain limitations, both to those to whom equity will lend its aid, and also to those to whom it will not lend its aid; as, for instance:—suppose the articles contain

(*a*) Equity will lend a wife its aid, even if she have eloped with an adulterer; for although elopement with an adulterer is a forfeiture of dower, by the Statute of Westminster the Second, (unless the husband is afterwards reconciled to, and voluntarily lives with her again); yet as the statute does not extend to a jointure, or a provision by settlement, it is no forfeiture of them (unless they are to continue only during chastity); and not being a forfeiture of a jointure or provision, when secured by a final complete settlement, so it is no forfeiture of them, where they rest on mere articles; and therefore Equity will lend its assistance to enforce a specific performance of them. Atherley on Marriage Settlements, p. 126.

When the wife unnecessarily elopes from her husband, whether she does or does not live in adultery, if she apply to a Court of Equity for a *favor* merely, as for a maintenance out of her property, the interest of which her husband is entitled to receive, the Court will not interfere in her behalf; but if she apply to its jurisdiction for the recovery or enforcing of her *right*, as for the performance of articles before the marriage, for a settlement to her separate use; there the Court must interfere; since the law has not made elopement or adultery a forfeiture of any rights, but that of dower only. *Sidney v. Sidney*, 3 P. Wms. 269; *Blount v. Winter*, 3 P. Wms. 277 (note); 13 Ves. 444.



limitations, both to the issue of the marriage, and also to other persons, for whom the settlor is under no natural or moral obligation to provide. If a suit for a specific performance is brought by the issue, the Court will direct the articles to be executed *in toto*; and, consequently, the settlement will contain limitations in favor of the volunteers; whereas, if the suit had been brought by the volunteers themselves, the Court would have dismissed it, and declined all interference.

Where a man, who is a mere social adventurer, without property, marries a ward for the sake of her fortune, the Court will not permit him to enjoy any benefit under the settlement.

It may here be noticed that the Court has no jurisdiction to compel a male ward, with whom a marriage has been solemnized without its consent, to settle his estate on attaining twenty-one, so as to exclude the wife from participation in the property (*b*).

What settlements are valid and unassailable.

IV. Since marriage<sup>4</sup> is the highest and most valuable consideration recognised by the law (seeing that it irrevocably changes the condition of the spouses, and that *restitutio in integrum* is impossible), a settlement founded upon it is valid against the husband, his creditors, or purchasers, and indeed all the world; and it would not be in anywise affected, even though the settlor were insolvent at the time, and this was known to the wife in whose favor the settlement was made (*c*). Settlements made before marriage, or even after marriage, if in pursuance of articles entered into before marriage, are within this protective principle, so far as their limitations were contemplated by such articles, for all beyond these would be deemed voluntary only; but not so settlements made

(*b*) *Re Murray*, 3 Dru. and War. 87.

(*c*) *Campion v. Cotton*, 17 Ves. 263.

after marriage, and not in pursuance of previous articles, for the consideration of a marriage already had, which can never form a legal inducement for it. There exists considerable doubt, whether a settlement after marriage, in pursuance of an *oral* agreement before marriage, is within the principle (c). A settlement, however, of any species of property, made in consideration of the wife's giving up some interest in the same, or any other property over which she may have a disposing power, is clearly valid and impregnable, unless the consideration were exceedingly inadequate; and even then, perhaps, the settlement would be sustained to the fair extent of the consideration (d). The consideration needs not be stated in the settlement, although it is always advisable to do so, and contemporaneous settlements are presumed to be in consideration of one another, unless a contrary intention is manifested (e). Where the consideration proceeds from the wife's friends, the settlement would be equally within the protection of the above stated principle, for she is then a *bonâ fide* purchaser of the property settled.

A settlement by a husband of his wife's *equitable choses en action* (f), which the Court of Chancery would have

(c) Jarman's Byth., vol. ix, p. 71.

(d) *Dolin v. Coltman*, 1 Vern. 264.

(e) *Scott v. Bell*, 3 Lev. 70.

(f) *Choses en action* are either legal or equitable. A *chose en action* is said to be legal when the remedy for its recovery is at common law, as in the instance of bonds, bills of exchange, arrears of rent, or other specialty, or simple contract debts, owing to or contracted with the wife before marriage, or stock in the public funds standing in her name, and perhaps her general cash balance at her bankers. *Choses en action* are equitable, when they are recoverable only in a Court of Equity, as money in the hands, or stock standing in the name of, a trustee, for the wife, or a legacy to her, unreceived from an executor, or a residuary personal estate.

compelled him to have settled upon her, is as conclusive against creditors, as if it had been effected under the direction of the Court of Chancery; it is, indeed, a settlement of the wife's own property. And it would not make any difference if the settlement be such as the Court would not have, under the circumstances, directed, or exceed the proportion usually ordered by the Court to be settled upon the wife (*f*).

A post-nuptial settlement of the wife's *legal choses en action*, which the husband can recover in the Courts of Common Law *absolutely*, is not valid against his then creditors (*g*), for it would be, in fact, a settlement of his own property; and a settlement by husband and wife, of the wife's realty, is regarded as his settlement to the extent of his marital interest in it (*h*).

These principles assume the absence of fraud, which vitiates every transaction. Now a *general power of revocation* reserved to the settlor, or to any person in the interest or under the control of the settlement, will, of itself, render void an ante-nuptial settlement of realty against a subsequent *bond fide* purchaser of such property (*i*). If, however, such a power be reserved to persons not in such interest, or under such control, the

(*f*) *Moor v. Rycault*, Pre. Ch. 22; *Middlecombe v. Mallow*, 2 Atk. 519; 9 Jarm. Bythe. 72.

(*g*) Although the debts must be *owing* and in existence, they need not be *due and payable* at the time of the settlement. Upon the satisfaction of the debts, the surplus of the settled property belongs to the settlee, yet, where a settlement is once vacated, even subsequent creditors are let in upon the property.

(*h*) *Pringle v. Hodgson*, 3 Ves. 617; *Fitzer v. Fitzer*, 2 Atk. 511.

(*i*) 27 Eliz., c. 4, § 5. A reserved power to charge the settled lands to near their value, or to lease them with or without rent, will also vitiate a settlement, for such powers amount to a power to revoke.

settlement will then be valid (*j*). And a power to sell and exchange being reserved, will not avoid a settlement (*k*).

The Bankruptcy Consolidation Act, 12 & 13 Vict., c. 106, § 126, enacts:—"That if any bankrupt, being at the time insolvent, shall (*except upon the marriage of any of his children, or for some valuable consideration*), have conveyed, assigned, or transferred to any of his children, or to any other person, any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person, or into any other person's name, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy; and every such sale shall be valid against the bankrupt, and such children and persons, and against all persons claiming under him" (*l*).

Property cannot be settled or limited so as to remain in a person after bankruptcy or insolvency, unaffected thereby (*m*), but a wife's property may be given to a husband until bankruptcy or insolvency, and if either should happen, then to go over to, and be enjoyed by, other persons; if, however, the property belong to the husband (*n*), then it cannot be settled so as to be held by

(*j*) *Butler v. Waterhouse*, 3 Keb. 751.

(*k*) *Doe v. Martin*, 4 T. R. 39.

(*l*) See the Insolvent Act, 1 & 2 Vict., c. 110, § 59.

(*m*) *Brandon v. Robinson*, 18 Ves. 429.

(*n*) If the settlement really and *bonâ fide* embrace property of the wife, but is framed by mistake, so that the settled property appears to proceed from the husband, the court will amend it according to the fact, moulding the limitation into a valid disposition, though it is in the form

him, until bankruptcy or insolvency, and upon that event to be shifted ; for that would be in direct opposition to the bankrupt laws, by giving a different destination to his property, precisely in the event in which those laws have declared that it shall belong to his creditors (*n*).

Bonds or covenants for the payment of money upon the event of a bankruptcy, are equally void against creditors, unless the husband has received a portion from his wife, when such bond or covenant will be deemed a settlement of the wife's property to the extent of such portion.

Post-nuptial settlements, pursuant to ante-nuptial agreements.

V. If a marriage settlement, made pursuant to articles, depart from their spirit and import, equity will generally set it aside, and direct a proper one to be executed. But if the settlement be before marriage, and not expressed to be made in pursuance of articles, then a new settlement would not, under such circumstances, be directed, for it will be presumed that the articles were abandoned, and that the parties had entered into another agreement.

The articles should be produced to the Court, which will reform the marriage settlement not only as against the settlor, and every one claiming under him, but also

of a complete and executed settlement, and not executory in terms. *Higginson v. Kelly*, 1 Ball & Beat. 253, 256 ; *Ex parte Verner*, *Id.* 260. And so, property belonging to the husband would clearly be considered as such, although it is represented to the contrary in the settlement.

(*m*) In the very recent case (*Re M'Burnie*), a man, being in difficulties, married, and covenanted to settle 500*l.* upon his wife, for her separate use ; he was afterwards made a bankrupt, and the court admitted the wife to prove upon the estate for the 500*l.*, and to take a dividend upon it with the other creditors. 16 Jur. 807. Again, articles were executed previously to a marriage, by which the husband and wife agreed

as against purchasers for a valuable consideration, where they had notice of the articles.

VI. But a settlement made *after* marriage, though in the absence of any ante-nuptial articles, is valid, *provided it be made upon a valuable consideration*. The voluntary payment of a portion in consideration of making the settlement will support a post-nuptial settlement; so will a portion agreed to be paid, provided it be afterwards actually paid; so perhaps a portion secured to be paid; so giving up an interest in the settlor's estate (*n*); so if a husband make a settlement upon his wife and children, in consideration of the trustees making over to

Post-nuptial settlements, without any prior agreement.

that any property to which the husband or wife might thereafter become entitled, should be settled to such uses as the wife should appoint; and in default, then upon trust for the husband, wife, and children. At the time, neither husband nor wife had any property, the husband was insolvent, and soon after the marriage, took the benefit of the Insolvent Act. Property subsequently descended on him, which, as against the husband's assignee, was bound and protected by the articles. *Hardey v. Green*, 12 Beav. 182.

(*n*) And although such interest is not expressly relinquished in consideration of the settlement, yet if it is relinquished by the same deed by which the settlement is made, and the settlement is in favor of the person relinquishing—in a case so circumstanced, the relinquishment of the interest will be presumed to have been the inducement to the settlement and not that the release and the settlement were both voluntary.

So if the settlement be made upon those in whose favor the person relinquishing the interest may be presumed to have stipulated—as of near relations—there also, the relinquishment of the interest will be presumed to have been the inducement to the settlement.

And if the interest were not relinquished by the settlement, but by another deed, yet if it were done about the same time, so that it might reasonably be presumed to be a part of the same transaction, the Court it is apprehended, would presume so, and look upon it as the consideration, which produced the settlement.

him his wife's equitable property, out of which the Court of Equity would have directed a settlement upon her, had the husband sought its aid in order to recover such property.

The wife's relinquishing an interest under a former valid settlement, or an interest under a bond, even though it be contingent, or releasing her jointure, or parting with her right of dower, or joining with her husband in destroying a settlement made upon her children, or parting with her own estate, or making a charge upon it for her husband's benefit, are all valuable and binding considerations.

In order to render post-nuptial settlements valid, the consideration should bear a reasonable proportion to the value of the thing settled, in order to sustain them against the claims of purchasers and creditors, yet, as against the settlor himself, his heirs, and subsequent volunteers, a settlement resting solely upon a meritorious or moral consideration is binding, provided the transaction be free from fraud or undue advantage, and the settlement is good, where it is made upon the person giving the consideration, or upon those in whose favor he may be presumed to have stipulated.

The question whether a settlement executed by persons contemplating matrimony, can be revoked by them before marriage, has been thus settled:—a settlement contemplating a future marriage generally, may be revoked before marriage; but a settlement contemplating a particular marriage, which took place, cannot be revoked before such marriage, the marriage contract having been considered by the parties as binding, and having been duly carried out (*n*).

(*n*) See *Page v. Horne*, 11 Beav. 227.

VII. A voluntary settlement is purely gratuitous, there being no legal consideration or binding inducement for its creation; it is simply the result of a natural moral duty. Voluntary settlements.

Such a settlement, where there is no power of revocation, is generally binding upon the settlor himself, and any person claiming under him, in the absence of all undue influence or fraud; and should there be any reason to suspect that he may destroy the settlement, he will be ordered to bring it into Court, that it may be preserved for the benefit of the settlees or persons beneficially interested.

A mere voluntary settlement of *realty* is completely null and void against a subsequent purchaser from the settlor of the property settled for a valuable and adequate consideration, or indeed a mortgagee of such property, whether he have had notice of it, or not. But a purchaser can only avoid a voluntary settlement of *personalty*, where it is either positively or circumstantially fraudulent, for there is no law existing which makes these voluntary settlements, as such, void against purchasers (*o*).

A voluntary settlement is fraudulent and void against a *prior* creditor, without having any regard to the amount of his debt; provided the settlor was so indebted as to make it obvious that the intent of the settlement was to defeat his creditors. So a subsequent creditor's power to defeat a voluntary settlement, in nowise depends upon

(*o*) Atherloy's Marriage Settlements, p. 207. 27 Eliz., c. 4, § 5. A voluntary deed, not actually fraudulent, by which husband and wife settled the wife's chattel interest on R. M., is not avoided under the 27 Eliz., c. 4, by a mortgage made by the widow surviving her husband. *Doe d. Richards v. Lewis*, 15 Jur. 512. Chancery will neither restrain a voluntary settlor from selling or mortgaging the settled property, (albeit it is a gross moral fraud), nor aid him to defeat his settlement.



the amount of the antecedent debts. If he only shew that there were antecedent debts, though ever so small in amount, he proves that the settlement was fraudulent against the prior creditors; and by proving that it was fraudulent and void against them, he proves that it was fraudulent and void against himself also;—for every fraudulent settlement is void against *all* creditors. Subsequent creditors may take advantage of an avoidance of a settlement effected by prior creditors (*p*).

There are other badges of fraud, which may be hung about the transaction, besides being indebted; as the settlor's reservation of a power of revocation, or a power to mortgage the settled property, or his retaining a considerable interest in it, or his continuing in possession inconsistently with the terms of the settlement.

While a settlement may be purely voluntary in its creation, and therefore void against purchasers and creditors; yet it may be rendered valid by subsequent circumstances. Thus, if the volunteer or settlee, upon a marriage, settle the estate which is the subject of the voluntary settlement, the voluntary settlement immediately becomes good, or at least will acquire validity, so far as concerns the interests of those who rest their claims, either upon the marriage, or upon any other valuable consideration. So, if a voluntary settlement be made in favor of a child to take effect upon marriage with consent, should the child even marry without consent, the settlement will acquire validity, provided the father be afterwards reconciled to the marriage. If there are two voluntary settlements, and the latter present an inducement to marriage, then this will acquire validity, not only against subsequent purchasers from

(*p*) 13 Eliz., c. 5.

the settlor and his creditors, but also against those who claim under the prior settlement. Should, however, the person claiming under such subsequent settlement have notice of the settlement being fraudulent, he would not be protected against creditors. (*p*)

Voluntary limitations ulterior to, or concurrent with, limitations in tail, supported by a valuable consideration, are good against purchasers and creditors, provided they are free from fraud, and the volunteer have obtained the legal estate (*q*).

Of course, if a person be not in debt, he may make any settlement he desires, and it would be unimpeachable, unless he contract debts so soon after the settlement as to raise a suspicion that he then contemplated a fraudulent defeat of his future creditors. The existence of a debt, adequately secured by a mortgage, would form no ground for impeaching the settlement's validity, nor would trivial unsecured debts (*r*).

A person impeaching a settlement must shew such an extent of debt or pecuniary embarrassment, as to raise a *prima facie* case of fraudulent intention in the settlor, to meet which, it is incumbent on the opposite party to prove the adequacy of the settlor's present property to pay his debts, or, in other words, his solvency; for perhaps, any extent of debt short of insolvency would not invalidate a settlement, although the solvency must be independent of the property settled, and must not leave him in a state of inability to pay his debts. The creditors can only avoid a settlement to the extent of

(*p*) 13 Eliz. c. 5, § 6.

(*q*) Atk. N. 2. Mar. 1764. Settlements, 23.

(*r*) 9 Jarm. Byth. 78.

their claims: satisfy these claims, and the settlement stands good.

Settle-  
ments im-  
properly  
procured  
by parental  
influence.

VIII. The Court of Chancery will set aside a settlement obtained by parental influence, if it be unreasonable, and so far as it is unreasonable: as, where a father gained an advantage to himself, or there were circumstances of intimidation and concealment of a child's right. The application to set such settlement aside should be made whilst the parent is living; should the settlement be only in part unreasonable, the Court will only afford relief as to that part, and will refuse to interfere as to such parts as are reasonable.

Covenants  
to invest  
money in  
realty.

IX. A covenant for a valuable consideration to invest money in lands will be enforced against the covenantor himself, or his personal representatives, or his heir, provided he be bound by such covenant, or his widow (*s*), and this at the instance of any person who comes within the influence of the consideration, or claims through one who does. The covenantor's heir will be entitled as against the personal representatives to money agreed to be laid out in lands, unless the covenantor has either disposed of it by his will, or done some act whereby it has resumed its personal character.

The strict *legal* performance of such a covenant is, to invest the money in land, and then to settle such land according to the meaning and spirit of the covenant;

(*s*) A husband covenanted, in pursuance of an agreement between the parties to a marriage settlement, that, if any personalty should, during the marriage, come to the wife, or to him in her right, it should be transferred upon the trusts of the settlement. After the husband's death, his personalty was paid to the wife, and the court compelled her to execute it. *Butcher v. Butcher*, 14 Beav. 224.

but there may be an *equitable* performance of it, or rather a satisfaction of it in equity. Where such a covenantor makes a purchase of land, equity presumes it to have been made in pursuance of his covenant, and if he suffer the land to descend to the party claiming under the covenant, it will be presumed, in the absence of proof to the contrary, that he intended the land should be taken in satisfaction of the covenant, so far as it is adequate in value to the money covenanted to be invested, provided the land be of the nature contemplated by such covenant. And a devise of after-purchased land for the same interest and with the same remainders over as expressed in the covenant, will be presumed as a satisfaction. Where the covenant, however, relates to a specific sum, which still remains uninvested; there the reverse will always be the *prima facie* presumption; and consequently, lands purchased and suffered to descend, are not to be taken as a satisfaction, unless it actually appear that the covenantor intended that they should be so taken.

The reason for the distinction between a sum to come out of the covenantor's general assets, and a specific sum, is obvious: where a person stipulates to lay out a sum of money to come out of his general assets, if he make a purchase, and suffer the land purchased to descend, it is certainly reasonable to presume (and such is the presumption,) that the purchase was made in pursuance of the covenant, and not to suppose that he intended his personal estate should be still liable to the performance of it. But where the covenant relates to a specific sum, and it still remains uninvested, there it is fair to presume, that the covenantor intended it should be applied to the purpose agreed upon; notwithstanding his making a purchase with other money. Circumstances, however, may exist to repel this presumption.

Marriage settlements sometimes contain a covenant to purchase and settle lands of a certain annual value. A specific performance of such covenant will be enforced against every person, and also at the instance of every person against whom, and at whose instance a covenant to lay out money in lands would be enforced ; for a covenant to purchase and settle lands of a certain annual value, is in effect the same thing as a covenant to lay out money in the purchase of lands. Whatever would be deemed a satisfaction of such a covenant, would be deemed, it is presumed, a satisfaction of a covenant to purchase lands of a certain annual value.

A general covenant to settle property creates a claim or lien on the covenantor's real estate, under these circumstances :—

Where a person covenants to settle lands, not having any at the time, a subsequent purchase of lands corresponding with the terms of the covenant, will be deemed to be made with the intention of performing it ; and, therefore, on his decease, without any positive evidence of such intention, the lands, whether they may have descended or been devised, will be bound in equity by the covenant.

If the covenantor, when he entered into the covenant, had lands adequate to its performance, and died without making any farther purchase, the lands of which he was seised at the time will be bound.

Where the covenant is to purchase and settle, it should seem that the lands of which the covenantor is seised at the time will not in any event be affected ; but all after-purchased lands, or an adequate portion of them, if more than sufficient, will be bound, whether the purchase is made within the period, if any, prescribed by the covenant or not, and should the lands not be of the

full value required by the covenant, they will satisfy it *pro tanto*, *i.e.* so far as their value will extend.

A covenant to settle all future personalty will only comprise capital, and not income; for otherwise the covenantor would be deprived of all means of subsistence, which could hardly be his intention.

X. As to purchases in the names of children, which are treated as settlements upon them.

Purchases  
in the  
names of  
children.

Though a purchase made by one person in the name of another, creates, as a broad rule, a trust in favor of the person paying the money, without any express declaration to that effect, the case being considered as falling within the exception to that clause of the Statute of Frauds which requires declarations and creations of trusts to be in writing; yet this rule does not prevail in the case of a purchase in the name of a child, a Court of Equity presuming that the purchase was intended for the child's benefit; because the parent being under both a natural and moral obligation to provide for his children, it is presumed, that in making a purchase in his child's name, he intended to fulfil that obligation.

Bonds, or other securities, taken in a child's name, are likewise considered to be for the benefit of the child, and not a trust for the parent. And a purchase in favor of a wife is considered for her benefit.

If a purchase be made in the name of an illegitimate child, such purchase would probably be considered as an advancement, and not a resulting trust for the reputed father (s).

To entitle a child to the benefit of a purchase, it is not

(s) Loft. 490; Fearn's Posthum. Works, 327.

necessary that it should be made solely in his own name; for if it be made jointly in his and his father's names, they will be considered as joint-tenants; and in case the child survive, and the joint-tenancy be not severed, he will be entitled to the whole. And if a purchase be made in the name of a child and an indifferent person, it will be taken to be entirely for the benefit of the child, and the other person will be considered as his trustee. So if a remainder, either in fee or in tail, be limited to a child in an estate purchased by the father, it will be considered as an advancement.

The doctrine, that a purchase made in the name of a child, shall be considered as made for the benefit of the child, extends to the case of a purchase made in the name of a grandchild, provided the father be dead at the time of making it. The reason seems to be, that upon the death of the father, the moral duty of providing for the grandchild devolves upon the grandfather, and, therefore, in making a purchase in the name of his grandchild, he is presumed to be performing that duty.

Although a purchase in the name of a child, will, *primá facie*, be always presumed to have been intended for the child's benefit, (except where there is a declaration of trust by the father, executed before or at the time of making the purchase, and also, except, perhaps, in the case of copyholds for lives granted successively :) yet, there are circumstances which are held to rebut such presumption, and consequently, to convert the child into a mere trustee, as if the child be already well provided for; and more especially if there be other children who would go unprovided for, or be only scantily provided for, by considering it a further provision for such a child. If, however, he have only a partial provision, then, *primá*

*facie*, he will not be considered a trustee, but the purchase will be taken to be for his own benefit. But although he had only a partial provision, or perhaps even if he had none at all, yet, if the property purchased is the only property out of which the father can make a provision for the other branches of his family, a Court of Equity would, probably, consider him a trustee; for, as a parent is as much under a natural and moral obligation to provide for one child as for another, the presumption certainly ought to be, that he intended to fulfil that obligation with respect to them all; and consequently that he did not intend to give the whole of his property to one.

XI. Sometimes, the better to bring about marriages, a third person is induced to convey his estate to the intended husband or wife, in order to give the appearance of property, when, in fact, there is none; and such person takes, at the same time, a reconveyance, or a secret declaration of trust in his own favor. So securities for feigned or pretended debts are sometimes entered into for the same purpose. Feigned property.

Such transactions being a fraud and deception, the Courts have properly held, that the parties entering into them shall be bound by them, should the marriage take place upon their faith. And though the particular marriage which was in contemplation should not take place, yet if the feigned conveyance or security should be an inducement to any other marriage, the party making such feigned conveyance, or entering into such feigned security, will be bound by it.

And to render such transactions binding, it is not necessary that the estate conveyed, or debt secured,



should be actually settled upon the marriage. For if it appear that it was any inducement whatever to the marriage, the party will be as much bound as if the estate or debt had been the subject of a settlement.

If a person, for the facilitating the marriage of one who is in debt, agree to take the debt upon himself, and give the creditor a security for it, but privately takes a counter-security from the original debtor; the person taking the debt upon himself will be bound to pay it, and the counter-security will be set aside as void.

So, in pursuance of the same principle, if the creditor of a person, who is about to marry, represent to the wife or her friends, that he has no demand upon the intended husband, he will be restrained altogether from recovering his debt. And if a creditor merely acquiesce in a false statement made by the debtor, it will amount to the same thing; for in one case, as well as in the other, he concurs in an act of deception and misrepresentation.

To bind the estate of a third person, which another settles upon his marriage, it is not essential that such third person should have actually conveyed it to the settlor; for if he look on and see the settlement made without giving any notice of his right, he will be as much bound as if he had actually made a previous conveyance of it; and equity will compel him to make good the settlement by conveying the estate in conformity therewith.

Should a parent or guardian stipulate for any advantage to himself, as the price of consenting to the marriage, such stipulation, and all securities entered into in pursuance of it, and all payments made in consequence of it, are considered, in equity, as completely null and void.

If any of the parties to a marriage settlement secretly

make an agreement varying or recinding any of its provisions, such underhand agreement is treated by a court of equity as fraudulent, and altogether void, but the Court will not act if the effect of its interference would be to maintain one marriage agreement at the expense of another: the first will have the preference, pursuant to the maxim *qui prior est in tempore potior est in jure*.

XII. While the Common Law does not allow a married woman to possess any property independently of her husband, yet, when property is settled to her separate use and benefit, equity treats her, in respect to that property as a *feme sole*, or unmarried woman. A wife's separate property may be acquired by a pre-nuptial contract with her husband, or by gift either from the husband, or from any other person. Separate estate.

A power is frequently given to the wife to dispose of her own or her husband's real or personal property, notwithstanding her coverture. This dominion is sometimes a *general* one—unrestrained, both as to the mode of exercising it, and as to the objects in whose favor it is to be exercised. At other times, a kind of *special* dominion only is given—being restrained, either as to the contemplated beneficiaries of the power, or as to the mode or form in which it shall be exercised, and sometimes as to both of these purposes.

With regard to personalty, whether in possession or expectancy, a mere limitation of it to her separate use will enable her in equity to dispose of it to the full extent of her interest either by deed or will, unless she be restrained from doing so by the instrument giving it to her. Of course, if there be a power for express and special purposes, it must be strictly observed; for it will

vacate this implied general power, where the latter is inconsistent with the former.

As to the rents and profits of realty, a gift of them to, or in trust for, the wife, to her separate use, enables her to dispose of them also as a *feme sole*.

But a limitation of realty to her in fee for her sole and separate use, without expressing more, will not enable her to dispose of it during the marriage, otherwise than under the 3 & 4 Wm. IV., c. 74 (t), because no power of disposition having been given to her, she can only dispose of it by the mode prescribed by the general law; and if she omit to do so, her heir will take the estate. And she cannot make a will of such realty.

But by vesting the legal estate in trustees, and giving to her a power of appointment, either expressly or by implication, she may dispose of the equitable or beneficial interest in such property. A mere agreement will enable a married woman to dispose of her realty in equity, and she may dispose of it at law, by means of a power over the technical use or legal estate. Where it is intended that a married woman should have a power of disposing of her separate estate in realty at law, the estate should be conveyed to a trustee, upon trust to stand seised to such uses as the wife should appoint.

It will always be more advisable that the wife should have a power over the estate at law, rather than a mere equitable power; more especially if the estate belong to the husband, or to a third person; for in this case if the power be a mere equitable one, and the settlor should sell the legal estate to a purchaser without notice, any appointment made under the power would be completely defeated. And even where the estate belongs to the wife, there are strong reasons why the power should be

(t) See the next chapter, pl. VIII., for an exposition of this subject.

a power operating at law ; for if the legal estate remained in her, then, upon her death, it would descend to her heir-at-law ; and if he sold the estate to a purchaser without notice of her equitable appointment, it would thus be entirely defeated.

But a wife having a power to dispose of the principal, has necessarily the like power over its saved produce ; for the sprout is to savour of the root, and to go the same way (*u*).

Should she not dispose of such savings, her husband will be entitled to them by his marital right.

A wife may dispose of the produce of her separate estate by will, if she have such a power over her personalty ; but if it have been laid out in realty, she cannot devise it, but in pursuance of an express power to that effect.

When a wife has a power of absolutely disposing of her separate estate, she may make grants out of, or otherwise encumber, it (*v*).

A trust for the wife's separate use is effectual against the husband, although the wife may be unmarried at the time of the creation of the trust, or being married at that period, may have become discoverd, and afterwards married again (*w*). Where, however, the trust for the wife's separate use is confined to a *particular marriage*, it will, of course, be inoperative against a second husband (*x*).

As to what words or expressions will create this separate estate, it may be stated generally that any language

(*u*) *Gore v. Knight*, 2 Vern. 535.

(*v*) 2 Bright Husb. & Wife, 220.

(*w*) *Tullet v. Armstrong*, 4 M. & C. 377 ; 1 Beav. 1.

(*x*) *Bradley v. Hughes*, 8 Sim. 149.

indicative of such intent will suffice, but the ordinary formula (*y*) should always be adopted.

The following phrases, however, have been held to vest a separate estate in a wife:—"to be at her own disposal;" "for the livelihood of the wife;" "her receipt in writing shall be a sufficient discharge;" "to pay into the proper hands;" "for her own sole use;" "for the sole use and benefit;" "free from the power of her husband." Also, a direction to deliver a legacy on the legatee's demand; but a trust or direction to pay the proceeds of property, simply to a wife for life, will not create a separate estate, and the addition of the sentence "for her own use and benefit," will not, in such a case, alter this effect (*z*).

In creating a trust for separate use, a trustee should be named, to obviate inconvenience; but the trust will not fail for want of a trustee, since equity would treat the husband as his wife's trustee, or any other person having the legal estate in the property.

In order to assure to the wife a full protection against marital influence, she herself should be incapacitated from affecting her interest, or even anticipating it.

Lord *Langdale*, the late Master of the Rolls, thus stated (*a*) the summary of this doctrine:—"It appears

(*y*) This is one of the usual forms:—"For her sole and separate use and benefit, independently and exclusively of the said [*husband*], and without being in anywise subject to his debts, control, interference, or engagements, and the receipts of the said [*wife*], notwithstanding her coverture, to be from time to time sufficient discharges for the same; but so, nevertheless, that the said [*wife*] shall not have power to dispose of or affect the same, or any part thereof, by any sale, mortgage, or charge, or otherwise in the way of anticipation."

(*z*) 9 Jarm. Byth. 102; Bright's *Husb. & Wife*, 206—213.

(*a*) *Tullet v. Armstrong*, 1 Beav. 1.

to me, as the result of the authorities, and of the constant practice of conveyancers, which great and eminent judges have considered to be no mean evidence of the law :

(1) "That property given to a woman for her separate use, independent of any husband, may, under the authority of this Court, be enjoyed by her during her coverture, as her separate estate, although the property originally, or at any subsequent period, became vested in her when discovert.

(2) "That, in respect of such separate estate, she is, by this Court, considered as a *feme sole*, although *covert*. Her faculties as such, and the nature and extent of them, are to be collected from the terms in which the gift is made to her, and will be supported by this Court for her protection.

(3) "The words 'independent of a husband,' whether expressed or implied in the terms of the gift, mean no more than that this Court will not permit the marital power of the husband to be used in contravention of the enjoyment of the property according to the terms of the gift.

(4) "If the gift be made for her sole and separate use, without more, she has, during the coverture, an alienable estate independent of her husband.

(5) "If the gift be made for her sole and separate use, without power to alienate, she has, during coverture, the present enjoyment of an unalienable estate, independent of her husband.

(6) "In either case she has, when discovert, a power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; whilst the woman is discovert,

the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage (*b*).

“The restriction cannot be considered distinctly from the separate estate, of which it is only a modification; to say that the restriction exists, is saying no more than that the separate estate is so modified; the donor in giving the woman, when married, some of the faculties of a *feme sole*, has withheld the power of alienation; under the terms of the gift, and by the aid of equity, the woman is a *feme sole* as to the present enjoyment of the property, but no further; measuring her faculty by the terms of the gift, she is not a *feme sole* as to the disposition of her property in anticipation of her intended provision. If there be no separate estate, there can be no such restriction, as that which is now under consider-

(*b*) The doctrine of separate estate, as now settled, may be embodied in the following propositions:—(1) That a gift to a woman, for her separate use generally, secures to her the sole enjoyment, and the sole dominion, during coverture, when and so often as coverture exists. (2) That such a gift, if accompanied by an *express* restriction on alienation, secures to her the sole enjoyment during coverture, when and so often as coverture exists, but such enjoyment will be strictly personal and inalienable. (3) But that, since the restriction is of no force, except in connection with, and as a modification of, *separate* property, which *ex vi termini* supposes coverture, alienation, taking place during discoverture, will be effectual, notwithstanding the restriction. (4) That, as the effect of such alienation will *not* be defeated by a subsequent marriage, the only check of which alienation admits during discoverture, is a gift over, or a clause of cesser, (either of which may, it is conceived, be confined to the particular interest attempted to be aliened), or a power enabling trustees or others to revoke and re-settle; the principle of the check being either deprivation, or a gift *de novo*, modified, and springing from the volition of a third party. (5) That, therefore, the date of the marriage is, with reference to the act of alienation, material, but is, in every other respect, immaterial. 1 Haye's Conv. 539.

ation. The separate estate may, and often does exist without the restriction, but the restriction has no independent existence; when found, it is a modification of the separate estate, and inseparable from it."

A wife may contract for the sale of her separate estate, and equity will specifically perform such contract.

If a wife sell her separate estate to her trustee, and the transaction be *bond fide*, and for a proper consideration, the disposition will be valid, notwithstanding the suspicion which attaches to purchases by trustees from their *celles que trusts* (c).

Where a creditor of the husband procured himself to be appointed a trustee of the wife's separate estate, and then prevailed upon her to execute a deed, providing for payment of the interest and principal of the debt out of her separate property vested in him as her trustee, Equity, under such circumstances, set aside the transaction. If, however, the wife, with full knowledge of her rights, acquiesce for a length of time in a disposition of her separate property, against which she might originally have obtained redress, the Court will not relieve her.

A wife can enter into contracts, which shall bind her separate estate, as though she were unmarried; and Equity will enforce their satisfaction out of such property, but not against her person. Her general personal engagements, however, will not bind her separate property; but her bond or promissory note, or written promise, will be a charge upon it.

A wife is not legally bound to support her husband out of her separate property, or to apply any part of it

(c) *Davidson v. Gardner*, 3 Leon. V. & P. 231. 10th edit.; *Parkes v. White*, 11 Ves. 209.



to the maintenance of the children or household ; for his liability in this respect, is as though she did not possess any such estate, and the doctrine is not affected by the husband's inability or destitution (*a*).

If a wife, however, permit her husband to receive and apply her separate property to these purposes, and make no objection thereto at the time, she will then be considered as having yielded it to him absolutely and irrecoverably (*b*).

At the wife's death, her personalty in possession, although settled to her separate use, will belong to her surviving husband absolutely, unless she have otherwise disposed of it in pursuance of a power reserved to her for the purpose ; because the quality of separate estate ceases at the wife's death. This principle applies to her separate chattels-real. The surviving husband will also be entitled to his curtesy of her separate realty, if not expressly prevented ; and also to administer to her unreduced separate *choses en action*.

(*a*) *Hodgen v. Hodgen*, 4 Cl. & Fin., 323.

(*b*) See *Caton v. Rideout*, 1 Mac. & G., 599, and *Rowe v. Rowe*, 12 Jur. 909.

## CHAPTER III.

## THE MARRIAGE CEREMONY.

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| <p>I. Banns.<br/>         II. Special license.<br/>         III. A license by the ordinary or surrogate.<br/>         IV. The superintendent-registrar's certificate, with or without license.<br/>         V. Time, place, and modes of solemnizing marriage.</p> | <p>VI. The marriages of Quakers and Jews.<br/>         VII. Registration of marriages.<br/>         VIII. Marriages in Scotland, Ireland, and Isle of Man.<br/>         IX. Marriages in our colonies.<br/>         X. Marriages abroad.<br/>         XI. International law relating to foreign marriages.</p> |
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**MATRIMONY** (*a*) may be solemnized by a religious service, or by a mere secular formulary. The Established Church of England no longer monopolizes the power of marrying.

(*a*) The nuptial usages and phrases, amongst the moderns, are chiefly of Roman origin. It was a rule amongst the Romans, that the bride should be brought to her husband with a covering, or veil, cast over her head; and hence the ceremony was called *nuptiæ*, from *nubo*, to veil.

The bridegroom gave to the bride a ring, which she was to wear upon the fourth finger of her left hand. The Romans had an idea that there was a small artery which ran from that finger to the heart; and the wearing of the ring upon it, was designed as an emblem of hearts united. The researches in anatomy have shewn this supposition to be erroneous; but the custom of wedding with the ring, and wearing it on the fourth finger of the left hand, still survives.

When the bride was brought home to the house of her husband, she was preceded by five torches, which were intended to signify, the need which married persons have of five deities,—Jupiter, Juno, Venus, Suada, and Diana, or Lucina. When the bride was thus brought to the door, she anointed the posts with oil; and from this ceremony, obtained thereafter the name of *uxor*, or, for the sake of euphony, *uxor*, whence our term, *uxorious*. Percy Anecdotes, Vol. XX., p. 6, 2nd pt.

Banns.

I. The ordinary ecclesiastical mode is by banns, published in the parish church, or other religious place, duly authorized to celebrate the ordinance.

Banns are public proclamations that certain named parties meditate marriage; their object is to ascertain whether any legal impediment exists to prevent the marriage (*b*). Contriving a marriage by an undue publication of banns is an indictable conspiracy, but the concealment of the marriage by the parents of one of the parties from the parents of the other is not a fraud; it is, however, unseemly and dishonorable, and may shew to some extent that the publication was undue and irregular.

The banns must be published from the register books of banns in the church or chapel (*c*), where the parties to be married dwell, upon three several Sundays, during the time of morning service, or of evening service (should there not be any morning service), immediately after the second lesson; the register book must then be signed by the officiating minister, or by some other person by his direction. When the parties to be married dwell in dif-

(*b*) The curate is not to stop his proceedings because any peevish or pragmatical person, without just reason or authority, pretends to forbid him; as is the case sometimes, when the churchwardens or other officers of the parish, presume to forbid the publication of the banns because the parties are poor, and so like to create a charge to the parish; or because the man is not perhaps an inhabitant, according to the laws made for the settlement of the poor. But poverty is no more an impediment of marriage than wealth; and the kingdom can as little subsist without the poor, as it can without the rich. And as to the pretence of the man's not being an inhabitant of the parish, it is certain, that by the canon law, a traveller is a parishioner of every church he comes to. Wheatley on the Common Prayer, c. x.

(*c*) As to banns and marriages in district churches or chapels, see 7 & 8 Vict., c. 56.

ferent parishes or chapelries, the banns must be asked in both, and the curate of the one parish or chapelry must not solemnize marriage between the parties without a certificate of the banns having been thrice asked, being produced to him from the curate of the other parish or chapelry. A marriage by banns must be solemnized in one of the parish churches or chapels where such banns shall have been published (*d*). Extra-parochial places are deemed to belong to the adjoining parish or chapelry, for the purposes of marriage (*e*).

Whenever a marriage shall not be solemnized *within three months* after the complete publications of banns, no minister can proceed to its solemnization until the banns shall have been republished on three several Sundays in due form and manner, or a licence (*f*) have been duly obtained for the purpose.

No parson, vicar, minister, or curate is obliged to publish the banns of matrimony between any persons, unless they shall *seven days at least* before the time required for their first publication, deliver or cause to be delivered to him, a notice in writing, dated on the day of delivery, of their true Christian names and surnames, and of the houses of their respective abodes, within such parish or chapelry, where the banns are to be published, and of the time during which they have inhabited or lodged in such houses respectively (*g*).

A falsely described residence will compel the clergyman (should the fact be known to him) to decline proceeding with the marriage, but it does not invalidate the

(*d*) 4 Geo. IV., c. 76, §§ 2 and 6.

(*e*) § 12. As to dissent of parents, see *ante*, p. 206.

(*f*) 4 Geo. IV., c. 76, § 3.

(*g*) *Ibid*, § 7.

ceremony when performed and completed. A clergyman marrying persons without licence, or the publication of banns, is liable to be suspended for three years; and the parties so marrying may be cited for the offence in the Ecclesiastical Court, and there severely censured.

After the solemnization of any marriage, either by licence, or pursuant to a publication of banns, it is unnecessary in proof of such marriage to give any evidence of the actual dwelling of the parties in the respective parishes or chapelries, wherein the banns were published; neither will evidence be received to prove the contrary in any proceeding touching the validity of such marriage (*h*).

A marriage by banns is perfectly legal, although only one of the parties resided in the parish where they were published (*i*).

The true names of both parties are required to be published; for if any persons knowingly and wilfully intermarry without due publication of banns, or without a licence from a person having authority to grant the same, the marriages of such persons shall be null and void to all intents and purposes whatsoever; (*j*) but in order to render a marriage null and void within this statute, by reason of an undue publication of banns, *both parties* must be proved to have been cognizant of the undue publication *before* the celebration of the marriage.

Where, indeed, both parties are aware of an undue publication of banns, or an illegal or irregular licence, previously to the marriage, it will be void (*k*).

(*h*) 4 Geo. IV., c. 76, § 26.

(*i*) *Robinson v. Grant*, 18 Ves. 289.

(*j*) 4 Geo. IV., c. 76, s. 7.

(*k*) *Ibid*, § 22.

Every minister of the Church of England, solemnizing any marriage in England, must observe all the rules prescribed by the rubric relating to this solemnity; but where by any law or canon in force before the 17th August, 1836, any marriage may be solemnized after publication of banns, such marriage may be solemnized in like manner, on production of the superintendent-registrar's certificate (*l*). The giving of notice to the superintendent-registrar, and the issue of his certificate, as provided in the acts 6 & 7 Wm. IV., c. 85 (*m*), and 1 & 2 Vict., c. 22 (*n*), may be used instead of the publication of banns in the church; and every parson, vicar, minister, or curate in England, shall solemnize marriage after such notice and certificate in like manner, as after due publication of banns; but the church wherein any marriage, according to the rites of the Church of England, shall so be solemnized, must be within the district of the superintendent-registrar, by whom such certificate may have been issued. Every marriage thus solemnized, is good, and will be cognizable in like manner as marriages according to all the strict rites of the Church of England.

II. The Archbishop of Canterbury may grant a special licence to marry at any convenient time or place (*o*). A special licence. A special *fiat* is addressed by the Archbishop to the Master of the Faculties, upon which the special licence, with a five-pounds-stamp, issues from the Faculty-office, Knight

(*l*) See *post*, p. 271.

(*m*) §§ 1 and 35. This is usually called "Lord John Russell's Act."

(*n*) §§ 1 and 36.

(*o*) 25 Hen. VIII., c. 21; 4 Geo. IV., c. 76, § 20; 6 & 7 Wm. IV., c. 85, § 1.

- Rider-street, Doctors' Commons, permitting the marriage to be solemnized "at any time, in any church or chapel, or other meet and convenient place."

A licence by the ordinary or surrogate.

III. A faculty or licence may be granted for solemnizing marriage, without publication of banns, by any person having episcopal authority, or the commissary for faculties, vicars-general of the archbishop or bishop, the guardians of the spiritualities, or ordinaries, exercising of right episcopal jurisdictions in the several jurisdictions respectively (*p*).

No licence of marriage can be granted by any archbishop, bishop, or other ordinary, or person having authority to grant such license, to solemnize any marriage in any other church or chapel than in the parish church, or in some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such licence (*q*).

Should any *caveat* be entered against the grant of any licence for marriage, such *caveat* being signed by or on behalf of the person who enters the same, with his place of residence and the ground of objection on which his *caveat* is founded, no licence can issue till the said *ca-*

(*p*) No surrogate, deputed by any ecclesiastical judge, who has power to grant licences, shall, however, grant any such license until he have taken an oath before such judge, or before a commissioner appointed by commission issued under the seal of the judge, faithfully to execute his office according to law, to the best of his knowledge, and have given security by his bond, in the sum of 100*l.*, to the bishop of the diocese, for the due and faithful execution of the said office. 4 Geo. IV., c. 76, § 18; see 10 & 11 Vict., c. 98, § 5.

(*q*) 6 Geo. IV. c. 76, § 10.

*veat*, or a true copy thereof, be transmitted to the judge out of whose office the licence is to issue, and until the judge has certified to the registrar that he has examined the matter of the *caveat*, and is satisfied that it ought not to obstruct the grant of the licence for the said marriage, or until the *caveat* be withdrawn by the party who entered it (*r*).

For avoiding all fraud and collusion in the obtaining of licences of marriage, before any such licence be granted, one of the parties shall personally swear before the surrogate, or other person having authority to grant the same, that he or she believes that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any Ecclesiastical Court, to bar or hinder the proceeding of the matrimony according to the licence; and that one of the parties has, for fifteen days immediately preceding such licence, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required by the acts has been obtained thereto; but if there shall be no person having authority to give such consent, then, upon the oath made to that effect by the party requiring such licence, it may be granted, notwithstanding the want of any such consent (*s*).

Whenever a marriage shall not be had *within three*

(*r*) 6 Geo. IV., c. 76, § 11.

(*s*) *Ibid.*, §§ 16 and 17. A false oath taken before a surrogate, to procure a marriage licence, was holden not sufficient to support a prosecution for perjury. In such a case it has been usual to indict as for a mere mis-



*months* after the grant of the licence, no minister can proceed to the solemnization of such marriage until a new licence be obtained, unless by banns duly published (*t*).

Forging, or altering, or uttering, knowing the same to be forged or altered, any licence of marriage, is a felony, for which the offender is liable to transportation for life, or for any term not less than seven years, or to imprisonment for any term not exceeding four years, nor less than two years (*u*).

Marriages by licence ought to be in the true names of the parties; but there is this material distinction between banns and a licence—in the former, it is essentially necessary that the publication should be in the true name, as it would otherwise be defective in substance, as no one would be put on his or her guard by such publication; the latter is not of the same notoriety, but is granted by the ordinary on the evidence he is content to receive—the oath of the party, as required by the canons of the church (*v*) and the Marriage Act (*w*). The mere circumstance that a licence had been obtained in the name of the person which she had actually borne, though

demeanor at common law. Should the indictment only charge the taking of the false oath, without stating that it was for the purpose of procuring a license, or that a license was thereby procured, the party cannot be punished thereon as for a misdemeanor; but if the purpose is to obtain a license, and the license is obtained, and the marriage had, the party may be indicted as for a misdemeanor. *R. v. Foster*, R. & R. 459. See the 3 Geo. IV., c. 75, § 10, and 6 & 7 W. IV., c. 85, § 38, which subject a false oath or declaration made for this purpose to the penalties of perjury.

(*t*) *Ibid*, § 19.

(*u*) 1 W. IV., c. 66, § 20.

(*v*) 102 Canon of 1603.

(*w*) 4 Geo. IV., c. 76, § 14.

not the true name, will not authorise the Ecclesiastical Court to pronounce a marriage null and void.

The superintendent-  
registrar's  
certificate,  
with or  
without a  
licence.

IV. In the case of a marriage solemnized according to the rites of the Church of England, (unless by license or by special license, or after publication of banns, all which we have just treated upon) and in every case of marriage intended to be solemnized according to the usages of the Quakers or Jews, or according to the secular and civil form authorized by this act (*w*), one of the parties must give notice under his or her hand, in the form below (*x*).

(*w*) 6 & 7 W. IV., c. 85. See *post*, p. 290.

(*x*) The following is the very inelegant form of the notice of marriage, set forth in Schedule (A) of the act :

To the Superintendent-Registrar of the District of *Hendon*, in the county of *Middlesex*.

I hereby give you Notice, that a marriage is intended to be had, within three calendar months from the date thereof, between me and the other party herein named and described (that is to say),

Name.	Condition.	Rank or profession.	Age.	Dwelling place.	Length of residence.	Church or building in which marriage is to be solemnized.	District and county in which the other party resides, when the parties dwell in different districts.
<i>James Smith.</i>	<i>Widower</i>	<i>Carpenter.</i>	<i>Of full age.</i>	<i>16, High Street.</i>	<i>23 days.</i>	<i>Sion Chapel, West Street, Hendon, Middlesex.</i>	<i>Tonbridge, Kent.</i>
<i>Martha Green.</i>	<i>Spinster.</i>	—	<i>Minor</i>	<i>Grove Farm.</i>	<i>More than a month.</i>		

Witness my hand, this *sixth* day of May, 18—.

(Signed)

JAMES SMITH.

[The *italics* in this schedule to be filled up as the case may be.]

or to the like effect, to the superintendent-registrar of the district within which the parties have dwelt, *for not less than seven days then next preceding*, or, if the parties dwell in the districts of different superintendent-registrars, the like notice must be given to the superintendent-registrar of each district, and must state therein the name and surname, and the profession or condition of each of the parties intending marriage, the dwelling place of each of them, and the time, not being less than seven days, during which each has dwelt therein, and the church or *other building* (*y*) in which the marriage is to be solemnized; provided that if either party shall have dwelt in the place stated in the notice during *more than*

(*y*) The church or building must be in the same district as that in which the required residence of one of the parties for seven days has been, unless the party declare, at the time of giving such notice, by indorsement thereon, the religious appellation of the body of Christians to which the party professeth to belong, and the form, rite, or ceremony which the parties desire to adopt in solemnizing their marriage, and that, to the best of his or her knowledge and belief, there is not within the district in which one of the parties dwells, any registered building in which marriage is solemnized according to such form, rite, or ceremony, and the district nearest to the residence of that party, in which a building is registered, wherein marriage is so solemnized, and the registered building within such district in which it is intended to solemnize their marriage; and after the expiration of seven days or twenty-one days, as the case may require, it shall be lawful for the superintendent-registrar to whom any notice shall have been given, to issue his certificate, according to the provisions of the 6 & 7 W. IV., c. 85; and after the issuing of such certificate, the parties shall be at liberty to solemnize their marriage in the registered building stated in such notice; provided always, that after any marriage shall have been solemnized, it shall not be necessary, in support of such marriage, to give any proof of the truth of the facts herein authorized to be stated in the notice, nor shall any evidence be given to prove the contrary in any suit touching the validity of such marriage. 3 & 4 Vict., c. 72, §§ 1 and 2.

*one calendar month*; it may be stated therein that he or she has dwelt there one month and upwards (*z*).

The superintendent-registrar files these notices, keeps them with the records of his office, and forthwith enters a true copy of them in a book, called "The Marriage Notice Book," which is open at all reasonable times, without fee, to all persons desirous of inspecting it (*a*).

In analogy to the publication by banns, if such superintendent-registrar be clerk to the guardians of any poor law union, or of any parish or place comprising the district for which he acts, he then reads such notices; but if he be not such clerk, then he transmits to such clerk on the day previous to each weekly meeting of such guardians, all such notices of intended marriage as he shall have received on or since the day previous to the weekly meeting immediately preceding the same; and such clerk then reads such notices immediately after the minutes of the proceedings of such guardians at their last meeting shall have been read; and such notices shall be so read *three several times*, in three successive weeks, at the weekly meetings of such guardians, unless in any case a licence for marriage shall be in the meantime granted, and notice of its being granted shall have been given to such clerk; but if it happen that the board of guardians of any such union, parish, or place, shall not so meet, it shall be sufficient that such notices be read at any meeting of such guardians which shall be held within twenty-one days from the day of such notice being entered (*b*).

(*z*) § 4. Giving a wilfully false notice, is perjury (§ 38), and the offending party forfeits all property accruing by such marriage (§ 43). See *ante*, p. 210.

(*a*) Section 5.

(*b*) Section 6.

Where there shall be no guardians in a superintendent-registrar's district, but only until the election of such board of guardians, and of a clerk to their board, every notice of marriage, or a true and exact copy thereof, under the hand of the superintendent-registrar, shall be suspended in some conspicuous place in his office during *seven successive days*, if the marriage is to be solemnized by licence, or *twenty-one successive days* if the marriage is to be solemnized without licence, before any marriage can be solemnized in pursuance of such notice; and the particulars of every such notice shall be sent by the superintendent-registrar to every registrar of marriages within his district, and shall be open to the inspection of every one applying at reasonable times to inspect it (c). After the expiration of *seven days*, if the marriage is to be solemnized *by licence*, or of *twenty-one days* if the marriage is to be solemnized *without licence*, after the entry of such notice, the superintendent-register, upon being requested so to do, by or on behalf of the party by whom the notice was given, shall issue under his hand a certificate, provided that no lawful impediment be shown to the satisfaction of the superintendant-registrar why such certificate should not issue, and provided that the issue of such certificate shall not have been forbidden by any authorised person; and every such certificate shall state the particulars set forth in the notice, the day on which the notice was entered, and that the full period of seven days, or of twenty-one days (as the case may be), has elapsed since the entry of such notice, and that the issue of such certificate has not been forbidden by any authorised person (d).

The registrar-general is to furnish to every superin-

(c) 1 Vict. c. 22, § 24.

(d) Section 7.

tendent-registrar forms of certificates, and in order to distinguish the certificates to be issued for marriages by licence from the certificates to be issued for marriages without licence, a watermark in the form of the word "licence," in Roman letters, is laid and manufactured in the substance of the paper on which the certificates are written or printed; and every certificate to be issued for marriage by licence shall be printed with red ink, and every certificate to be issued for marriage without licence shall be printed with black ink, and such other distinctive marks between the two kinds of certificate shall be used from time to time as shall seem fit to the registrar-general (*e*).

Any authorised person may forbid the issue of the superintendent-registrar's certificate by writing, at any time before the issue of such certificate, the word "forbidden," opposite to the entry of the notice of such intended marriage in the marriage-notice-book, and by subscribing thereto his or her name and place of abode, and his or her character, in respect of either of the parties, by reason of which he or she is so authorised; and in case the issue of any such certificate shall have been so forbidden, the notice, and all proceedings thereupon, shall be utterly void (*f*).

The like consent is now required to any marriage in England, solemnized by licence, as would have been required by law to marriages solemnized by licence immediately before the 17th August, 1836; and every person whose consent to a marriage by licence is required by law is authorised to forbid the issue of the superintendent-registrar's certificate, whether the marriage is intended to be by licence or without licence (*g*).

(*e*) Section 38.

(*g*) Section 10.

(*f*) Section 9.

The superintendent-registrar (*h*) has no authority to grant any licence for marriage in any church or chapel, in which marriages may be solemnized according to the rites of the Church of England, or in any church or chapel belonging to the Church of England, or licensed for the celebration of divine worship, according to the rites and ceremonies of the Church of England (for in respect to these, the archbishops, bishops, and surrogates retain their exclusive privileges), or any licence for marriage in any registered building which shall not be within his district. The superintendent-registrar's office for the purposes of marriages, is to be taken to be within the district of which it is the register-office, although not locally situated therein (*i*).

Before any licence for marriage can be granted by any superintendent-register, one of the parties intending marriage must appear personally before him; and when the notice of such intended marriage was not given to him, must deliver to him the certificate of the superintendent-registrar to whom such notice was actually given; and such party shall make oath, or solemn affirmation, or declaration, instead of taking an oath, that he or she believes that there is not any impediment of kindred or alliance, or other lawful hindrance to the said marriage; and that one of the said parties has for the space of *fifteen days* immediately before the day of the grant of such licence, had his or her usual place of abode within the district within which such marriage is

(*h*) Every superintendent-registrar has authority to grant licences for marriage in any registered building, within any district under his superintendence; or in his office; but no superintendent-registrar can grant any such licence until he shall have given security by his bond in the sum of 100*l.* to the registrar-general, for the due and faithful execution of his office.

(*i*) Section 11, and 1 Vict., c. 22, § 12.

to be solemnized, and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required by law has been obtained thereto, or that there is no person having authority to give such consent, as the case may be; and all such licences and declarations shall be respectively liable to the same stamp duties as licences for marriage, granted by the ordinary of any diocese, and affidavits made in order to procure the same (*j*).

After any marriage shall have been solemnized, it shall not be necessary in support of such marriage, to give any proof of the actual dwelling of either of the parties previous to the marriage, within the district wherein such marriage was solemnized, for the time required, or of the consent of any person whose consent thereunto is required by law, nor shall any evidence be given to prove the contrary, in any suit touching the validity of such marriage (*k*).

Any person on payment of five shillings may enter a *caveat* with the superintendent-registrar against the grant of a certificate or a licence for the marriage of any person named therein; and if any *caveat* be entered with the superintendent-registrar, such *caveat* being duly signed by or on behalf of the person who enters the same, together with his or her place of residence, and the ground of objection on which his or her *caveat* is founded, no certificate or licence shall issue or be granted until the superintendent-registrar shall have examined into the matter of the *caveat*, and is satisfied that it ought not to obstruct the grant of the certificate or licence for the marriage, or until the *caveat* be with-

(*j*) 6 & 7 W. IV., c. 85, § 12.

(*k*) Section 25.



drawn by the party who entered the same: but in cases of doubt the superintendent-registrar may refer the matter of any such *caveat* to the registrar-general, who shall decide upon the same; and in case of the superintendent-registrar refusing the grant of the certificate or licence, the person applying for the same may appeal to the registrar-general, who shall thereupon either confirm the refusal, or direct the grant of the certificate or licence (*k*).

Every person who shall enter a *caveat* with the superintendent-registrar against the grant of any licence, or issue of any certificate, on grounds which the registrar-general shall declare to be frivolous, and that they ought not to obstruct the grant of the licence, is liable for the costs of the proceedings, and for damages, to be recovered in a special action upon the case by the party against whose marriage such *caveat* shall have been entered (*l*). To enable any person to recover costs and damages in any such action, a copy of the declaration of the registrar-general, purporting to be sealed with the seal of the general register office, shall be evidence that the registrar-general has declared such *caveat* to have been entered on frivolous grounds, and that they ought not to obstruct the grant of the licence or issue of the certificate, as the case may be; and such declaration shall have the effect of the declaration required by the 6 & 7 Will. IV., c. 85 (*m*).

No marriage after such notice, unless by virtue of a licence to be granted by the superintendent-registrar, shall be solemnized or registered in England until after the expiration of twenty-one days after the day of entry of such notice: and no marriage shall be solemnized by

(*k*) Section 13.

(*l*) Section 37.

(*m*) 1 Vict., c. 22, § 5

the licence of any superintendent-registrar, or registered until after the expiration of seven days after the day of entry of such notice (*n*).

Whenever a marriage shall not be had within *three calendar months* after the notice shall have been entered by the superintendent-registrar, the notice and certificate, and any licence which may have been granted thereupon, and all other proceedings, are utterly void; and no person can proceed to solemnize the marriage, nor can any registrar register the same, until new notice be given, and entry made, and certificate thereof given (*o*).

The superintendent's certificate, or in case the parties shall have given notice to the superintendent of different districts, the certificate of each superintendent, shall be delivered to the officiating minister, if the marriage shall be solemnized according to the rites of the Church of England, and the said certificate or license shall be delivered to the registering officer of the people called Quakers, for the place where the marriage is solemnized, if the same shall be solemnized according to the usages of such people, or to the officer of a synagogue by whom the marriage is registered, if the same shall be solemnized according to the usages of persons professing the Jewish religion; and in all other cases shall be delivered to the registrar present at the marriage (*p*).

Every superintendent-registrar, who shall knowingly and wilfully issue any certificate for marriage after the expiration of three calendar months, after the notice shall have been entered by him, or any certificate for marriage by license, before the expiration of seven days

(*n*) Section 1, and 6 & 7 W. IV., c. 76, § 14.

(*o*) Section 15. 1 Vict., c. 22, § 3.

(*p*) Sections 16 and 20.

after the entry of the notice; or any certificate for marriage without license, before the expiration of twenty-one days after the entry of the notice; or any certificate; the issue of which shall have been forbidden by any authorized person to forbid the issue of the superintendent-registrar's certificate; or who shall knowingly and wilfully register any marriage therein declared to be null and void; and every registrar who shall knowingly and wilfully issue any license for marriage after the expiration of three calendar months after the notice shall have been entered by the registrar; or who shall knowingly and wilfully solemnize in his office any marriage therein declared to be null and void, shall be guilty of felony (*g*).

Every superintendent-registrar who shall knowingly and wilfully issue any licence for marriage after the expiration of three calendar months after the notice shall have been entered by the superintendent-register, as provided by the 6 & 7 Will. IV. c. 85, or who shall knowingly and wilfully solemnize, or permit to be solemnized, in his office, any marriage in the same act declared to be null and void, shall be guilty of felony (*r*).

Marriages are void under the 6 & 7 Will. IV., c. 85, if any persons shall knowingly and wilfully intermarry in any place other than the church, chapel, registered building, or office, or other place specified in the notice and certificate, or without due notice to the superintendent-registrar, or without certificate of notice duly issued, or without licence (in case a licence is necessary), or in the absence of a registrar or superintendent-registrar (where his presence is necessary (*s*)). When the issue of

(*g*) Section 40.

(*r*) 1 Viet., c. 22, § 3.

(*s*) 6 & 7 W. IV., c. 85, § 42.

a certificate shall have been forbidden, the notice and all proceedings thereupon are utterly void: The notice and certificate, and any licence, and all proceedings thereupon, are utterly void whenever a marriage shall not be had within three calendar months after the notice shall have been entered by the superintendent-registrar (*t*).

V. While a special licence authorises, as we have just seen, the marriage ceremony to be performed, at the time and place specified therein (*u*); every other marriage, which is to be had according to the rites of the Established Church, must be solemnized pursuant to the rubric in our Common Prayer Books. Accordingly, the marriage service must be performed in a church or public chapel (wherein banns may be lawfully published), between the hours of eight and twelve in the forenoon, when it is supposed persons will be serious (*v*),

Time,  
place, and  
modes of  
solemniz-  
ing mar-  
riages.

(*t*) Section 15. The superintendent-registrar is entitled to a fee of one shilling for entry of the notice in the marriage notice book; to one shilling for the certificate of notice; to three pounds, and the stamp duty of ten shillings for the licence; and of two shillings and sixpence for each affidavit for procuring the same. The registrar before whom the marriage is solemnized is entitled to ten shillings, if by licence, otherwise to five shillings. §§ 7, 11, 12, and 22.

(*u*) The following passage occurs in Wheatley (Com. Pra. c. X.) :—"The Archbishop of Canterbury, in virtue, I suppose, of the old legantine power, claims a privilege of granting licenses for persons to be married, *quolibet loco aut tempore honesto, i. e.*, in any decent time or place. A privilege which I cannot but humbly conceive his Grace would be very backward of using, were he apprized what indecencies generally attend it." A very unjust remark of the reverend vicar, and not borne out by fact; he records no instance whatever in support of his very gratuitous and very unfounded assumption.

(*v*) 4 Geo. IV., c. 76, § 21. It was formerly required that the bridegroom and bride should be fasting when they made their matrimonial vow; by which means they were secured from being made incapable by

in the presence of two witnesses besides the clergyman (*w*).

The following interesting remarks on the marriage ceremonies are extracted from Wheatley's Rational Illustration of our Common Prayer Book (*x*), and are introduced to relieve the monotony unavoidably attendant on the dry details of dry acts of parliament:—

“At the day and time appointed, the persons to be married are directed to come into the body of the church. The custom formerly was for the couple, who were to enter upon this holy state, to be placed at the church door, where the priest was used to join their hands, and perform the greater part of the matrimonial office. It was here the husband endowed his wife with the portion or dower before contracted for, which was therefore called *Dos ad ostium Ecclesie*—the dower at the drink, of acting decently and discretely in so weighty an affair. Wheatley on the Common Prayer, c. X.

(*w*) A clergyman was indicted for refusing to solemnize a marriage between Henry F. and Ann H., who had obtained a certificate under the 6 & 7 Will. IV., c. 85. It was proved that Henry F. applied to the clergyman after nine p. m. on a second of August, and desired him to fix a time for the marriage on or before the 14th August following, after which day the certificate would be void. Ann H. was not with her intended husband. The clergyman said, “I will marry him when he has expressed a desire to be confirmed.” Henry F. thereupon went away, and made no further application:—Held, that this did not support a conviction on an indictment which averred that the clergyman “unlawfully did refuse, &c.,” to solemnize a marriage, &c., at any time on or before the said 14th day of August, or at any other time whatsoever, inasmuch as the refusal laid was *absolute*, and that proved *conditional*.

The indictment should have shewn that the man and woman were parties who might lawfully have been married; but is it not a matter solely of ecclesiastical jurisdiction? *Quare*, is a clergyman justified in refusing to marry parties who have not received the sacrament, nor have expressed a desire to be confirmed. *Reg. v. James*, 2 Den. C. C. R. 1.

(*x*) Ch. X.

church door (*y*). But at the Reformation the rubric was altered, and the whole office ordered to be performed within the church, where the congregation might afford more witnesses of the fact.

The persons to be married (saith the rubric) are to come into the church with their friends and neighbours, *i.e.*, their relations and acquaintances, who ought to attend on this solemnity, to testify their consent to it, and to join with the minister in prayers for a blessing on it. Though it may not be improbable but that, by the friends here mentioned may be understood such as the ancients used to call *paranympths*, or bridemen—some traces of which custom we find to be as old as the days of Samson, whose wife is said to have been delivered to his companion, who, in the Septuagint version of the Scriptures, is called by a Greek word meaning brideman. And that bridemen were in use among the Jews in our Saviour's time, is clear from St. John iii. 26. From the Jews the custom was received by the Christians, who used it at first rather as a civil custom, and something that added to the solemnity of the occasion, than as a religious rite; though it was afterwards countenanced so far as to be made a necessary part of the sacred solemnity. An account of this custom as it prevailed here during the time of King Henry VIII., may be seen in Polydore Virgil. Some remains of it are still left among us; but as to countenancing or discountenancing it, our church has left it (as in itself) a thing indifferent.

The remaining part of this rubric (which was added to the foregoing part at the Restoration) is concerning the position of the parties, whom it orders to stand, the

(*y*) Now abolished by 3 & 4 W. IV., c 105, § 3.

man on the right hand, and the woman on the left, *i.e.*, the man on the right hand of the woman, and the woman on the left hand of the man, as it is worded in the Salisbury Manual. The reason that is there given for it is a very weak one, *viz.*, because the rib out of which the woman was formed was taken out of the left side of Adam. The true reason, to be sure, is because the right is the most honorable place; which is, therefore, both by the Latin and Greek, and all Christian churches, assigned to the man, as being the head of the wife. The Jews are the only persons that we ever heard acted otherwise, who place the woman on the right hand of her husband, in allusion to that expression in the forty-fifth Psalm—"At thy right hand did stand the queen in a vesture of gold," &c.

The joining of hands, which is an ancient ceremony, naturally signifies contracting a friendship, and making a covenant: and the right hand especially was esteemed so sacred, that Cicero calls it *the witness of our faith*; and therefore the joining of these being used in all covenants, no wonder it should be observed in the solemn one of marriage. Accordingly we find it has been used, upon this occasion, by Heathens, Jews, and Christians in all ages.

In the old Salisbury Manual, (that was used in the southern parts of England in the times of popery, as the York Manual was in the northern), instead of the woman's stipulating to love, cherish, and obey her husband, she engaged "to be bonair and buxum in bedde and at borde;" and so in the York Manual, the minister, in asking the woman's consent, instead of demanding of her, whether she would serve and obey her husband, asked her, whether she would be buxum to him.

Whence we may observe, that whatever meaning those words have been perverted to since, they originally signified no more than to be meek and obedient.

The reason why a ring was pitched upon for the pledge, rather than any thing else, we suppose, was, because anciently the ring was a seal by which all orders were signed, and things of value secured; and, therefore, the delivery of it was a sign that the person to whom it was given was admitted into the highest friendship and trust; for which reason it was adopted as a ceremony in marriage to denote that the wife, in consideration of her being espoused to the man, was admitted as a sharer in her husband's counsels, and a partner in his honor and estate; and, therefore, we find that not only the ring, but the keys also were in former times delivered to her at the marriage. That the ring was in use amongst the old Romans, we have several undoubted testimonies. And that the use of it was not owing to any superstition amongst them, we have the authority of Tertullian, a very ancient Father of the Christian Church. Pliny, indeed, tells us that, in his time, the Romans used an iron ring, without any jewels; but Tertullian hints that, in the former ages, it was a ring of gold; which, being the nobler and purer metal, and continuing longer uncorrupted, was thought to intimate the generous, sincere, and durable affection which ought to be between the married parties. As to the form of it being round (which was the most perfect of all figures, and was used by the ancients as the hieroglyphic of eternity), was understood to imply, that the conjugal love should never have an end.

But these seem only allegorical significations: the use of it was instituted at first to imply something more,



viz., that the woman, in consideration of a certain dowry contracted for by the man, of which the ring is delivered as an earnest and pledge, espouses and makes over herself to him as his wife. With this signification it has been used by Christians in all ages, and all parts of the church; and for the same intent it is prescribed by our own, as is evident from the words which are spoken at the delivery of it, and from the prayer which follows immediately after, where the giving and receiving it is called a token and pledge of the vow and covenant betwixt them made. The same is practised by the modern Jews, who it is not likely would have taken up the custom in imitation of the Christians, and who, therefore, probably received it from their forefathers. Good reason, therefore, had our judicious reformers to retain a right so ancient and universal, and which even Bucer himself (who, one would think, was as scrupulous as any man need to be), thought fit to approve of as decent and proper.

When the man espouses his wife with it, he is to put it upon the fourth finger of her left hand. The reason of this, the rubric of the Salisbury Manual says, is because from thence there proceeds a particular vein to the heart. This, indeed, is now contradicted by experience; but several eminent authors, as well Gentiles as Christians, as well physicians as divines, were formerly of this opinion; and, therefore, they thought this finger the properest to bear this pledge of love, that from thence it might be conveyed, as it were, to the heart. However, the moral may safely be retained, viz., that the husband hereby expresses the dearest love to his spouse, which ought to reach her heart, and engage her affections to him again. If we should add the other reason of placing

the ring upon this finger, viz., its being the least active finger of the hand least used, upon which, therefore, the ring may be always in view, and yet not so subject to be worn out; this also may teach us that the two parties should carefully cherish each other's love, that so it may endure and last for ever."

Marriage may also be solemnized in registered (z) places, certified according to law, as places of religious worship and for the solemnizing of marriages, observing, however, these formalities:—after the expiration of the period of twenty-one days from the day of the entry of the notice in the marriage-notice-book, *or* of seven days after such entry, if the marriage is by licence, marriages may be solemnized in the registered building stated in the notice of such marriage, between and by the parties described in the notice and certificate, according to such form and ceremony as they may see fit to adopt; but every such marriage must be solemnized with open doors, between the hours of eight and twelve in the forenoon, in the presence of some registrar of the district in which such registered building is situate, and of two or more credible witnesses, and in some part of the ceremony, and in the presence of such registrar and witnesses, each of the parties must say, "I do solemnly declare, that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D." And each of the parties must say to the other, "I call upon these persons here present to witness, that I, A. B., do take thee, C. D. to be my lawful wedded wife [*or* husband.]"

There must not be any lawful impediment to the marriage of such parties (a).

(z) See 52 Geo. III., c. 155; 6 & 7 Wm. IV., c. 85, §§ 18 and 19, Vict., c. 22, § 35, for the method of registering these places.

(a) 6 & 7 W. IV., c. 85, § 20. There is also a provision for marriages in the Welsh tongue, 1 Vict., c. 22, § 23.

The 6 & 7 Wm. IV., c. 85, enables persons to marry before the superintendent-registrar (*b*) of marriages of the district in which they may happen to reside at the time, thus making the transaction a secular formulary only.

The following requisites, however, must be observed :—

The marriage must be solemnized at the office, and in the presence, of the superintendent-registrar, and some registrar of the district, and in the presence of two witnesses, with open doors, and between the hours of eight and twelve in the forenoon, making the already noticed declaration, and using the same form of words (*c*).

The marriages of Quakers and Jews.

VI. The Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, may continue to contract and solemnize marriage according to their respective usages, and every such marriage is good in law, provided that the parties to such marriages be both of the said society, or both persons professing the Jewish religion, and that notice to the registrar have been given, and the registrar's certificate duly issued (*d*).

(*b*) The superintendent-registrar of births and deaths of every union, parish or place, in right of his office, is superintendent-registrar of marriages within such union, parish, or place, which is to be deemed the district of such superintendent-registrar of marriages. 6 & 7 W. IV., c. 85, § 3. He may appoint a deputy in certain cases; 1 Vict., c. 22, § 16.

(*c*) Section 21. Until a register office shall be provided in any superintendent-registrar's district, such superintendent shall appropriate some fit room, approved by the registrar-general, as such office of that district. The superintendent-registrar's office is taken to be within the district of which it is the register office, though not locally situated therein. 1 Vict., c. 22, §§ 12 and 22.

(*d*) 6 & 7 W. IV., c. 85, § 2.

The ceremony of the Society of Friends, or Quakers, is attended with great decency and solemnity. Previous to the ceremony, the man and woman present themselves at a monthly meeting of the society, where they reside, and there declare their intention of taking each other as husband and wife, if the meeting have no material objections against it. The principal conditions of acceptance are the following:—1st. It is a rule, that no man propose marriage to a woman, without the previous consent of his own and her parents, or guardians; but if the unbridled affections of any one should have precipitated him into a breach of this rule, he is required to remove the offence, as is also the woman, and to give satisfaction to such parents or guardians, and to the meeting to which they belong, by a due and open acknowledgment of the offence, and to get the consent of their guardians before they can proceed with the marriage. 2nd. That the parties be of the same opinion and judgment in religion, and professing members of the society. 3rd. That none shall marry within such degrees of consanguinity or affinity as are forbidden by the law of God; and 4th. That if either party has given scandal or offence to their friends, they shall acknowledge it. If no objections are then made, notice of the intended marriage is published in the meetings where the man and woman reside, or did reside, which must be done before the marriage is solemnized, in order that convenient time may be granted for satisfaction concerning all scandal, &c. The parties are required to give their attendance a second time at the monthly meeting, which is usually the next ensuing, when the persons appointed to make the inquiry return and give the answer, which, if found satisfactory, the parties are at liberty to proceed

to the solemnization of the marriage. The marriage is solemnized in the ordinary meeting, on a week-day, usually Thursdays.

Towards the conclusion of the meeting the parties stand up, and, taking each other by the hand, declare, in an audible and solemn manner, to the following effect: The man first says, "Friends, I take this my friend, C. D., to be my wife, promising, through Divine assistance, to be unto her a loving and faithful husband, until it shall please the Lord, by death, to separate us." After this, a friend of the man or woman reads publicly a certificate of the marriage, the names and designations of the parties being first inserted; they then sign the certificate, the man first, then the woman by her maiden name, the relations lastly; and in further confirmation, such of the members present who choose may adhibit their names, but do not add "witness." The ceremony here closes, and the happy couple leave the chapel, arm-in-arm, man and wife, without a priest's blessing, or any further solemnity (*e*).

The Jews, though British subjects, under the protection of the general laws of this country, enjoy their own particular ordinances in religious ceremonies (*f*).

(*e*) See Sewell's History of the Quakers, 691.

(*f*) On deciding upon questions of this kind, the Court is obliged to learn questions of Jewish law from the professors of it, in the same way as foreign laws are proved in this country. *Goldsmid v. Bromer*, 1 Hag. 321. Subject to the provisions of the New Marriage Act, the matrimonial law of England for the Jews is their own matrimonial law, and an English Court Christian, examining the validity of an English Jew marriage, will examine it by Jewish matrimonial law only. If a rule of that law be, that the fact of the witness to the marriage having eaten prohibited viands, or profaned the Sabbath-day, would vitiate the marriage itself, an English Court would give such effect to it, when duly proved, though

There exists among the Jews a distinction between marriages *solemn* and *unsolemn*; with them there are marriages which have certain solemnities attached to them, for the purposes of public notification, and for the complete satisfaction of the civil and ecclesiastical law, though not necessary for the purpose of validity. The solemn marriage appears to be effected by a formal contract in the Hebrew language, entered into by the bridegroom with the bride, according to the formalities and rules of the congregation; and such contract must be drawn up by the priest, and be signed by the bridegroom; be entered and registered in a certain book kept for that purpose by the priest, and the entry must be signed by the bridegroom and two other witnesses, which being done, the original contract is delivered to the bride (*g*).

But if Jews conform in the solemnization of marriage to the Christian form, they will be bound by it, and the validity of the marriage will be decided with reference to the Marriage Acts. On this ground the marriage by licence of a minor Jewess, without the knowledge and consent of her father, was declared null and void (*h*):

All marriages amongst the people called Quakers, and amongst persons professing the Jewish religion, solemnized in England before the first day of July, one thousand eight hundred and thirty-seven, or in Ireland before the first day of April, one thousand eight hundred and forty-five, according to the usages of those

a total stranger to any such effect upon an English marriage generally. Lord *Stowell* presumed, that a Dutch tribunal would treat the marriage of a Dutch Jew in a similar way, not by referring to the general law of the Dutch Protestant Consistory, but to the ritual of the Dutch Jews, established in Holland. *Ruding v. Smith*, 2 Hagg. 385.

(*g*) *Lindo v. Belisario*, 1 Hagg. 225

(*h*) *Ibid.*

denominations respectively, are good in law to all intents and purposes whatsoever, provided that the parties to such marriages were both Quakers, or both persons professing the Jewish religion respectively (*i*).

Registration of marriages.

VII. All marriages are now registered according to the provisions of the two acts 6 & 7 Will. IV., cc. 85 & 86.

The registrar-general furnishes the rector, vicar, or curate of every church and chapel in England, whercin marriages may be lawfully solemnized, with a sufficient number in duplicate of marriage-register-books, and forms for certified copies thereof, the costs of which are to be borne by the union, parish, or place for which the superintendent-registrar is appointed, who superintends the registrar, for whose use such books were provided, or to whom such clergyman is to deliver one copy of such registrar, and such cost shall be paid to the superintendent-registrar by the guardians, or by the churchwardens and overseers, as the case may be, out of the monies coming into their hands, as such guardians or such churchwardens and overseers for the relief of the poor (*j*).

Every clergyman of the Church of England, immediately after every office of matrimony solemnized by him, must register in duplicate, in two of the marriage-register-books, the several particulars relating to that marriage, and every such entry must be signed by the clergyman and by the parties married, and by two witnesses (*k*).

(*i*) 10 & 11 Viet., c. 58.

(*j*) 6 & 7 W. IV., c. 86, § 30 ; 1 Viet. c. 22, § 25.

(*k*) 6 & 7 W. IV., c. 86, § 31. The rector, vicar, or curate of every church and chapel, must keep such marriage-register-books *safely*, until they be filled, and one copy of such register book, when filled, must be de-

Marriages performed in chapels licensed by the bishop are subject to the same regulations as those performed in parish-churches.

The rector, vicar, or curate of every church or chapel in England, wherein marriages may lawfully be solemnized, must, in the months of April, July, October, and January respectively, make and deliver to the superintendent-registrar of the district, or to some registrar under his superintendence, a true copy, certified by him under his hand, of all the entries of marriages in the register-book kept by him during the three calendar months last preceding; and if there shall have been no marriage registered during the three calendar months last preceding, must certify the fact under his hand (*l*).

The registrar must forthwith register every marriage solemnized in a registered-building, or at the superintendent-registrar's office in his presence, in his marriage-register-book, according to the form provided for the registration of marriages, the cost of which is defrayed in like manner as the cost of providing register-books of births and deaths; and every entry of such marriage

livered to the superintendent-register of the district, and the other copy remains in the keeping of such rector, vicar, or curate, to be kept by him with the registers of baptisms and burials of the parish or chapelry within which the marriages registered therein shall have been solemnized. § 33.

(*l*) § 33. A party refusing, or during one calendar month neglecting, after having been duly required, to deliver such certified copy or certificate, is liable to incur a penalty of 10*l.*, recoverable within three months after the commission of the offence. Each superintendent-registrar directs the registrar of births and deaths, under his superintendence, quarterly, or oftener if he think fit, or be so ordered to do by the registrar-general, to collect the notices, certificates, and certified copies from every rector, vicar, and curate within his district. 1 Vict., c. 22, §§ 28, 29, and 31. The directions as to certified copies are contained in the registrar-general's letter, dated 25 July, 1837.



must be signed by the person by or before whom the marriage was solemnized, if there be any such person, and by the registrar, and also by the parties married, and attested by two witnesses (*m*).

The registrar-general furnishes to the registering officer of the Society of Quakers, and to every secretary of a Synagogue in England of persons professing the Jewish religion, a sufficient number in duplicate of marriage-register-books, and forms for certified copies thereof, and the cost of all such books and forms are to be paid by the registering officer or secretary respectively to whom the same may be furnished.

Every registering officer of the Quakers, as soon as conveniently may be after the solemnization of any marriage between two Quakers, in the district for which he is registering officer, and every secretary of a synagogue, immediately after every marriage solemnized between two Jews, of whom the husband shall belong to the synagogue whereof he is secretary, must register in duplicate, in two of the marriage-register-books, the several particulars relating to such marriage, according to the same form; and every registering officer or secretary, whether present or not at such marriage, must satisfy himself that the proceedings in relation thereto have been conformable to the usage of the Quakers, or Jews, as the case may be.

Every entry must be signed by such registering officer or secretary respectively making it, as the case may be, and by the parties married, and by two witnesses (*n*).

(*m*) 6 & 7 W. IV., c. 86, § 23. As to the custody of the register books, and the transmissal of certified copies, the enactments impose duties similar to those of the rector, &c., explained in the text, § 24, and 1 Vict., c. 22, § 26.

(*n*) 6 & 7 W. IV., c. 86, §§ 30, 31; the custody of the books and the certified copies are provided for by § 33.

Every clergyman of the Church of England solemnizing any marriage in England, and every registering officer of the Quakers, and every secretary of a synagogue, and the registrar before whom any marriage is solemnized under the 6 & 7 Will. IV., c. 85 (already noticed), may ask of the parties to be married the several particulars required to be registered touching such marriage. The particulars are, as to the bridegroom, his name and surname, whether of full age or a minor, whether bachelor or widower,—his rank or profession, his residence at the time of the marriage, his father's name and surname, and the rank or profession of his father; and as to the bride, her name and maiden surname; or, if she be a widow, her late surname—whether of full age or a minor—whether a spinster or widow—her rank or profession (if any)—her residence at the time of the marriage—her father's name and surname, and her father's rank or profession. The penalties of perjury are incurred by a wilfully false statement touching any such particulars (*o*).

No person charged with the duty of registering any marriage, who shall discover any error in any such entry will be therefore liable to any of the penalties for not duly registering marriages, or for injuring the registers, or for falsifying register-books, if *within one calendar month* next after the discovery of such error, in the presence of the parties married, or in case of the death or absence of such parties, then, in the presence of the superintendent-registrar, and of two other credible witnesses, who shall respectively attest the same; he shall correct the erroneous entry, according to the truth of the case, by entry in the margin, without any altera-

(*o*) 6 & 7 W. IV., c. 86, §§ 40 & 41. and 1 Vict., c. 1, § 1.

tion of the original entry, and sign the marginal entry, and add thereto the day of the month and year of the making of such correction ; and make the like marginal entry, attested in like manner, in the duplicate marriage-register-book, and in every case make the like alteration in the certified copy of the register-book, or in case such certified copy be provided, he shall make and deliver a separate certified copy of the originally erroneous entry, and of the marginal correction therein made (*p*).

Marriages  
in Scot-  
land, Ire-  
land, and  
Isle of  
Man.

VII. The marriage law of Scotland is founded upon the canon law.

In Scotland there are two kinds of marriages ; (1) regular and solemn, and (2) irregular and clandestine.

A regular and solemn marriage requires the publication (*q*) of banns on three several Sundays in the parish church of the parties, while the people are met for divine service, and the performance of the ceremony by a clergyman, before at least two credible witnesses.

Although it is not required to a regular marriage *in facie Ecclesie* that the ceremony be performed in Church, it is requisite that it should be performed by a clergyman. The want of his presence does not, indeed, affect the validity of the marriage ; it simply exposes the parties and celebrator to penalties.

No special form of words is necessary to be used in the ceremony ; but there is, generally, first, a solemn admonition to the parties ; second, the question of mutual acceptance solemnly put, and an answer required, as in the Roman *stipulatio* ; and, third, a declaration made by the clergyman that the parties are married.

(*p*) G & 7 W. IV., c. 86, § 44.

(*q*) A certificate of the session-clerk is received as legal evidence of proclamation of banns on three different Sundays.

By the law of Scotland, children may enter into marriage without the knowledge and even against the remonstrance of a father (*r*).

An irregular or clandestine marriage may be effectually entered into, without the intervention of any religious ceremony, in one of these three modes:—

(1) By a promise of marriage given in writing, or proved by a reference to the oath of the party, followed by a *copula*.

(2) By a solemn and deliberated mutual declaration exchanged between a man and a woman, either verbally or in writing, expressed *per verba de presenti*, that the parties consent to take each other for husband and wife, without any cohabitation, or celebration *in facie Ecclesie*. Such mutual declaration of consent, whether oral or written, and however expressed, must unequivocally import immediate consent to hold each other thenceforth as man and wife. The consent being the essence of the contract, must be real. Words uttered in jest, or with a different object, cannot, whatever their literal signification, be obligatory.

(3) By notorious cohabitation as man and wife.

A marriage may also be constituted in Scotland by a period of cohabitation as married persons, and being publicly held and reputed to be such, which from the acknowledgement implied in these circumstances establishes a presumption that an actual marriage has intervened; a presumption, however, like all others, capable of being refuted.

Parties may go out of England and marry by necessity or choice; such a marriage is not void upon that account by our law.

(*r*) Ersk. Prin. of Law of Scot. 69.

Nay, it is perfectly well known, that so much of the marriage acts\* as prohibits the marriage of minors, without the consent of the parents or guardians, is frequently evaded by the parties going into Scotland to be married, and returning into England immediately afterwards.

The validity of such a marriage is now fully established, although it would be invalid according to our law; and although the parties had acquired no *bond fide* domicile in Scotland, but had resorted thither for the purpose of making a contract, which, if they had remained in England, they were prohibited from making (s).

It is a constant practice for persons whom the law of England incapacitates from contracting a marriage here, to go for a few hours to the Scottish borders, and be there married as effectually as if they were under no incapacity whatever, in their own country, and then return, after eluding the law, to set its prohibitions at defiance, without incurring any penalty, and to obtain its aid without any difficulty in securing the enjoyment of all the rights incident to the married state (t).

(s) Thus it was decided, that a marriage in Scotland between two English subjects, one of whom was under age, and had eloped without the consent of her guardians, was a good marriage. *Compton v. Bearcroft*, 2 Hagg. 444. The judges both of the Consistorial and Common Law Courts have held, that a Scotch marriage, contracted by English parties, in the face and in fraud of the English law, is valid to all intents and purposes, and carries all the real and all the personal rights of an English marriage, affecting, in its consequences, land and honours, and duties and privileges, precisely as does the most lawful and solemn matrimonial contract entered into amongst ourselves, in our own churches, according to our own ritual, and under our own statutes.

(t) *Warrender v. Warrender*, 2 Cl. & F. 542.

In Gretna-green marriages by English parties, whose domicile continues in England, the law of their own country is disregarded, such marriages taking place without form or solemnity of any kind, except a mutual declaration of consent by the parties before witnesses. The validity of these marriages is referred to the principle, that a marriage solemnized according to the rule of the place of celebration, however peculiar that municipal rule may be, is by the law of nations valid in all other countries. And accordingly this is now the settled law of England, which proves that no domicile is required to constitute in Scotland the relation of husband and wife among foreigners, who have just arrived there before celebrating their marriage, and which, nevertheless, is adjudged to be universally good and effectual. It frequently happens, however, that parties who have gone to Scotland to be married, are re-married in England. The purpose of such second marriage is to satisfy all the friends and connections, as well as the parties themselves, that the holy estate of matrimony has been effectually and properly contracted. Another purpose is, that of giving ease and happiness to the minds of the parties themselves. Assuming, however, the marriage in Scotland to have been valid, its re-celebration in England has no legal effect (*u*).

It must be remarked that persons domiciled in England, and having illegitimate children, cannot, by merely proceeding to Scotland and there marrying, and then returning, thus legitimize their children (*v*). A domicile of the father in Scotland, however, legitimates

(*u*) *Ex parte Hall*, 1 Ves. & B. 112.

(*v*) *Monro, or Rose v. Rose*, 4 Wils. & Shaw, 289.

his children, wherever born, within Scotland, by means of a subsequent marriage, wherever celebrated (*w*).

A child born in Scotland of parents domiciled there, not married at the time, but who married afterwards, cannot inherit his father's English-realty, for this is a right which depends upon the *lex loci rei sitæ* (*x*).

There is a memorable example of the operation of this principle in the case of William the Conqueror; for though he was never legitimized here, yet he became so

(*w*) *M'Douall v. Dalhousie*, 16 Dun., B. & Mur. 6; 1 Rob. App. Cas. 475; *Munro v. Munro*, 16 Dun., B. & Mur. 18; 1 Rob. App. Cas. 492. Wherever the marriage may have been *de facto* celebrated, it will be dependent for its legal incidents and effects, not upon the law of the place of celebration, but upon the law of the matrimonial domicil. Wherever, therefore, Scotland is truly the matrimonial domicil, there the marriage will, in all respects, operate, both as regards the married persons themselves, and their issue, whether *ante nati* or *post nati*, precisely as if Scotland had been the actual place of celebration. Hence, as a marriage celebrated in Scotland, between Scotch domiciled parties, will, by the law of Scotland, have the effect of legitimating the children *ante nati* of these parties, whether born in England or Scotland; so a marriage celebrated in England, the matrimonial domicil of which is Scotch, will equally have the effect of legitimating the children of the parties, whether born in England or Scotland, so far at least as concerns all right in Scotland. Shelford on Marriage, 795.

The plain meaning of legitimacy, is born in lawful wedlock, *ex nuptiis natus*, rather than *procreatus*, as Coke has it, and which Blackstone adopted after him. (See *ante*, p. 52, note (*b*)). In Scotland then, a child born before marriage is legitimate, not on account of its parents' subsequent matrimony, but because the law there treats it as born in lawful wedlock, which is considered as having preceded its birth. It is deemed *non legitimatus sed legitimus ab initio*. A marriage in Scotland is a consensual contract, and may be perfected, as we have seen, by consent alone. A consensual contract is one completed by mutual consent (*conjunctio animorum*): should the consenting parties afterwards from death, disagreement, or other causes, not consummate their marriage *conjunctione corporum*, still the contract is in full force and effect.

(*x*) *Doe d. Birtwhistle v. Vardill*, 5 B. & C. 438; 2 Cl. & F. 571.

in Normandy by force of its law, in consequence of the subsequent marriage of his parents (*y*).

The law of the place of domicile governs the distribution of personalty, in case of the parents' intestacy.

With regard to marriages in Ireland, they are regulated by the general matrimonial law there existing, as modified and altered by the following Irish acts of parliament:—12 Geo. I., c. 3; 9 Geo. II., c. 11; 11 Geo. II., c. 10; 19 Geo. II., c. 13; 23 Geo. II., c. 10; 21 & 22 Geo. III., c. 25; 32 Geo. III., c. 21; 41 Geo. III., c. 90; 58 Geo. III., c. 81; and 3 & 4 Wm. IV., c. 102.

By the Marriage Act of the Isle of Man, A.D. 1757, <sup>Isle of Man.</sup> banns of marriage must be published upon three several Sundays. If either of the parties be aliens or strangers who shall come to the Isle, no banns shall be published, unless such stranger shall have resided in the Isle at least three months, and one month in the parish before publication.

Marriages solemnized in any other place than a church, unless by special licence, or solemnized without publication of banns or licence of marriage from a person having authority to grant the same, are declared null and void. The churchwardens are directed from time to time, as there shall be occasion, to provide proper books in each parish, in which all marriages and banns of marriage there published and solemnized must be registered.

IX. Marriages in the British Colonies (*z*) are either

(*y*) 2 Inst. 98.

(*z*) The general rules, that conquered countries retain their own laws, until altered by the Crown, and that new colonies, planted by English subjects, are to be governed by so many of the previously established



Marriages in our colonies. regulated by their own municipal laws, or by express and special acts of Parliament (*b*).

There are two acts relating to marriages in India, *viz.*, 58 Geo. III., c. 84, and 14 & 15 Vict., c. 40.

In the Crown Colonies of British Guiana, Trinidad, St. Lusia, the Cape of Good Hope, and Mauritius, and in all islands and territories dependant upon any of such colonics, marriages are celebrated pursuant to certain Orders in Council, gazetted 18 September, 1838.

Marriages in Newfoundland, are regulated by 5 Geo. IV., c. 68; 10 Geo. IV., c. 17; 2 & 3 Wm. IV., c. 78; and 3 Wm. IV., c. 10, an act of the colonial Parliament.

In Upper Canada, by 33 Geo. III., c. 5; and 38 Geo. III., c. 4, an act passed by the legislature of the colony.

In Lower Canada, by 35 Geo. III., c. 4; 44 Geo. III., c. 11; 1 Geo. IV., c. 19; and 5 Geo. IV., c. 25.

In Nova Scotia, by 33 Geo. III., c. 5; 35 Geo. III., c. 2; and 2 Wm. IV., c. 31.

In New Brunswick, by 31 Geo. III., c. 5; and 8 Geo. IV., c. 9.

In Prince Edward's Island, by 6 Geo. IV., c. 6, an act of the local legislature.

In the Bahamas, by 32 Hen. VIII., c. 8.

In Barbadoes, by its own municipal law.

In Jamaica, by 6 Geo. IV., c. 17; 1 Wm. IV., c. 22; 2 Wm. IV., c. 18; 4 Wm. IV., c. 31.

In Antigua, by their own legislative acts.

In Dominica and Granada, by their own statute-law.

English laws as are convenient for their situation, and that English statutes do not bind the colonies which are not named in them, will be found fully illustrated in *Hall v. Campbell*, Cowp. 204; and *Attorney General v. Stewart*, 2 Meriv. 143.

(*b*) Stowell's stat. 121.

X. As to marriages abroad, the 4 Geo. IV., c. 91, <sup>Marrriages abroad.</sup> after reciting that it was expedient to relieve the minds of all his Majesty's subjects from any doubt concerning the validity of marriages solemnized by a minister of the Church of England, in the chapel, or house of any British Ambassador (*b*), or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines, by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, declared and enacted that all such marriages shall be deemed and held to be as valid in law as if the same had been solemnized within his Majesty's dominions, with a due observance of all forms required by law. But that nothing in this act shall confirm, or impair, or anywise affect the validity in law of any marriages solemnized beyond the seas, except such as have been or shall be solemnized in the places, form, and manner herein specified and recited.

The 13 & 14 Vict., c. 68, affords greater facilities for the marriage of British subjects resident in foreign countries, by solemnizing it at the office of the British consulate.

XI. Now that the intercommunication of the peoples <sup>International law relating to foreign marriages.</sup> of the several nations of the world is so rapid and frequent, our tribunals are being constantly appealed to for the enforcement of rights, and the interpretation of contracts originating in other countries. Let us then state

(*b*) The house and chapel of an ambassador are considered part of the country of which he himself is a subject.

the prominent principles guiding our courts in their handling of such nice and intricate questions.

These three axioms form the basis which upholds the system of international jurisprudence :—

(1) Every nation possesses an exclusive jurisdiction within its own territory.

(2) A nation cannot, by any laws, affect property beyond, or bind any persons who are not resident within, its own territory.

(3) But the laws of one nation may acquire power in another, which has expressly or tacitly consented thereto, yet only to the extent of such acquiescence.

This voluntary concession is emphatically designated “the comity of nations.” It is a discretionary obligation of pure justice, and obviates the serious prejudices which would inevitably arise both to individuals and nations, were it refused or discountenanced. A nation has an undoubted right to judge for itself as to the nature and extent of this comity, and, of course, possesses the unquestionable power of forbidding the recognition of any laws, which may be oppressive or injurious to the interests of its own inhabitancy, or which may promulgate principles of an immoral tendency, or of an unjust or impolitic character.

With regard to marriage, our law recognises this general proposition,—that a foreign marriage between persons *sui juris*, valid according to the law of the place of its celebration, is valid here (c), unless such local law

(c) The distinction between that part of the law of the foreign country where a personal contract is made which is adopted, and that which is not adopted by our English courts of law, is well known and established; namely, that so much of the law as affects the rights and merits of the contract, all that relates *ad litis decisionem*, is adopted from the

operates a plain injustice, or is repugnant to the policy of our own laws (*d*), or is *contra bonos mores*.

The exceptions may be classed into these three kinds : (1) Marriage involving polygamy or incest ; (2) Marriage altogether prohibited by our laws from motives of policy—As the marriage of any member of our reigning family (*e*), without the royal assent, or a subsequent marriage after a foreign divorce of an English marriage indissoluble in England, (thus rendering the children of the second marriage illegitimate here) ; and (3) Marriage by subjects, entitled, under special circumstances, to the benefit of their own native laws, applicable to persons residing in foreign factories, in conquered places, in desert or barbarous countries, or amongst people of an opposite religion.

It must, however, be noted that a foreign marriage of British subjects, invalid according to the law of the place of its celebration, is not, under every possible circumstance, invalid in England (*f*).

The general rules as to the powers and disabilities of the wife consequent upon her marriage are :—

(1) That her acts done in the place of her domicile will have validity or not, as they are or are not valid there.

(2) When the parties move to a new domicile, whether

foreign country ; so much as affects the remedy only, all that relates *ad litem ordinationem*, is taken from the *lex fori* of that country where the action is brought. In judging, however, of the effects of a marriage contract, and in defining the rights which it confers on either party, it has been said that these must be modified and controlled by the various changes which may afterwards take place in the domicile of the offending party. Shelf. on Marriage, 123.

(*d*) As an illustration of this exception, see *ante*, p. 301.

(*e*) 12 Geo. III., c. 11; *Heseltine v. Lady Augusta Murray*, 2 Add. 400.

(*f*) See further, upon this point, *Ruding v. Smith*, 2 Hagg. 390; *Harford v. Higgins*, 2 *Ib.*, 432; *Scrimshire v. Scrimshire*, 2 *Ib.*, 395.

the law of the new domicile, as to the wife's powers, is to prevail, or that of the matrimonial (*h*), is a question upon which foreign jurists are at issue (*i*).

As to the effect of marriage upon the mutual property of husband and wife, and their respective rights over it:—

(1) Where there is an express nuptial contract or settlement, that, if it speak fully to the very point, will generally be admitted to govern all the property of the parties, not only in the matrimonial domicile, but in every other place, under the same limitations and restrictions as apply to other cases of contract.

(*h*) But a question may sometimes occur, What is to be deemed in the proper sense of the rule, the true matrimonial domicile? Is it the place where the actual marriage is celebrated? or that where the contract of marriage is entered into? or that where the parties are domiciled, if the marriage is celebrated elsewhere? or, if the husband or wife have different domicils, whose is to be regarded? These, and many other perplexing inquiries may be raised; and foreign jurists have not passed them over without examination.

Where the place of domicile of both the parties is the same with that of the contract and the celebration of the marriage, no difficulty can arise. The place of celebration is clearly, then, the matrimonial domicile. But let us suppose that neither of the parties has a domicile in the place where the marriage is celebrated; but it is a marriage *in transitu*, or during a temporary residence, or on a journey made for that sole purpose, *animo revertendi*; what is then to be deemed the matrimonial domicile?

The principle maintained by foreign jurists, in such cases, is, that with reference to the personal rights and rights of property, the actual or intended domicile of the parties is to be deemed the true matrimonial domicile; or, to express the doctrine in a still more general form, they hold, that the law of the place where, at the time of marriage the parties intend to fix their domicile, is to govern all the rights resulting from the marriage. Hence, they would answer the question proposed, by stating, that in such a case, the law of the actual domicile of the parties is to govern, and not the place of the marriage *in transitu*. Story's Conflict of Laws, 257.

(*i*) See these conflicting opinions remarked upon in Story's Conflict of Laws, c. vi, §§ 136—142.

(2) Where there is no change of domicil, and no express nuptial contract, the law of the place of the celebration of the marriage ought to govern the rights of the parties as to moveable property, wherever acquired and wherever situate; but real property ought to be left to be adjudged by the *lex rei sitæ*, as not within the reach of any extra-territorial law.

(3) Where there has been a change of domicil, and no special nuptial contract, then :—

(a) As to personal property acquired before the change, the law of the matrimonial domicil will govern.

(b) As to future acquisitions of personal property, the law of the actual domicil should govern.

(c) As to real property, the *lex rei sitæ* should, in every case, prevail.

Let us conclude this chapter with a quotation from the works (*h*) of an eloquent and virtuous divine, upon the benefits derived from the institution of matrimony.

The benevolence and wisdom of the Author of Christianity are eminently conspicuous in the laws he has enacted on this bench of morals; for, while he authorizes marriages, he restrains the vagrancy and caprice of the passions, by forbidding polygamy and divorce; and, well knowing that offences against the laws of chastity usually spring from an ill-regulated imagination, he inculcates purity of heart. Among innumerable benefits which the world has derived from the Christian religion, a superior refinement in the sexual sentiments, a more equal and respectful treatment of women, greater dignity and permanence conferred on the institution of marriage, are not the least considerable; in consequence of which

(*h*) His Discourse on Modern Infidelity, considered with respect to its Influence on Society.

the purest affections, and most sacred duties, are grafted on the stock of the strongest instincts (*i*).

Marriage, by shutting out many evils, and enabling every man to rest secure in his enjoyments, is the great civilizer of the world: with this security, the mind is at liberty to expand in generous affections, and has leisure to look abroad, and engage in the pursuits of knowledge, science, and virtue.

Nor is it in this way only that marriage institutions are essential to the welfare of mankind. They are sources of tenderness, as well as the guardians of peace. Without the permanent union of the sexes, there can be no permanent families. The dissolution of nuptial ties involves the dissolution of domestic society. But domestic society is the seminary of social affections, the cradle of sensibility, where the first elements are acquired of that tenderness and humanity which cement mankind together; and were they entirely extinguished, the whole fabric of social institutions would be dissolved.

(*i*) The aim of all the leading champions of infidelity is to rob mankind of these benefits, and throw them back into a state of gross and brutal sensuality. In this spirit, Mr. Hume represents the private conduct of the profligate Charles, whose debaucheries polluted the age, as a just subject of panegyric. A disciple in the same school has had the unblushing effrontery to stigmatize marriage as the worst of all monopolies; and, in a narrative of his licentious amours, to make a formal apology for departing from his principles, by submitting to its restraints. The popular productions on the continent, which issue from the atheistical school, are incessantly directed to the same purpose. Under every possible aspect in which infidelity can be viewed, it extends the dominion of sensuality; it repeals and abrogates every law by which divine revelation has, under such awful sanctions, restrained the indulgence of the passions. The disbelief of a supreme, omniscient Being, which it inculcates, releases its disciples from an attention to the heart, from every care but the preservation of outward decorum; and the exclusion of the devout affections, and an unseen world, leaves the mind immersed in visible, sensible objects.

## CHAPTER IV.

## THE LEGAL AND EQUITABLE CONSEQUENCES OF MARRIAGE.

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| <p>I. A husband's right to his wife's person.</p> <p>II. His power over his wife's personal property, as well possessed as in action.</p> <p>III. Over her chattels real.</p> <p>IV. A wife's equitable settlement.</p> <p>V. His power over her real property;—his curtesy.</p> <p>VI. His leases.</p> <p>VII. His power of charging his wife's lands.</p> <p>VIII. Requisites for transferring realty by husband and wife.—Protector of the settlement.—Appointor of a power.</p> <p>IX. Her freeholds <i>pur autre vie</i>.</p> <p>X. Her renewal of leaseholds.</p> <p>XI. Her copyholds.—Curtesy.</p> <p>XII. Grants between husband and wife.</p> <p>XIII. Husband and wife take property by entireties.</p> | <p>XIV. Peculiarity of a tenancy in tail after the possibility of issue is extinct.</p> <p>XV. A wife's last will.</p> <p>XVI. Effect of a marriage on the prior acts of the husband and wife.</p> <p>XVII. As to the validity of a wife's contracts, and her husband's liability therefor.</p> <p>XVIII. Responsibility of a wife.</p> <p>XIX. Liability of a husband for his wife's acts before marriage.</p> <p>XX. Witnesses.</p> <p>XXI. The Statutes of Limitation as to marriage.</p> <p>XXII. Actions by and against husband and wife.</p> <p>XXIII. The defence of coverture.</p> <p>XXIV. Suits in Chancery by and against husband and wife.</p> <p>XXV. Criminal offences by husband and wife.</p> |
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The marriage ceremony completed, and the man and woman legally husband and wife, or, according to the old feudal phrase, baron and feme, many rights, privileges, and liabilities, result from the interesting but indissoluble relationship.

Its most remarkable characteristic is, that husband and wife are treated at Common Law as one person indivisible, the personal and separate existence of the wife being legally considered as absorbed and consolidated in that of her husband, from which it is judicially indistinguishable, and under whose wing, protection, and



cover she acts ; hence marriage is technically styled coverture (*a*). -

This Common Law rule is now very much infringed by equitable doctrines (*b*).

A husband's right to his wife's person.

I. The custody of the wife belongs to her husband, to secure which he may resort to the writ of *habeas corpus*.

It is a great error to suppose that a husband can chastise his wife, for she may have the security of the peace against him, should he attempt any thing of the kind. Our laws fully recognise the fine truth embodied in the following passage :—

The man that lays his hand upon a woman,  
Save in the way of kindness, is a wretch  
Whom 'twere gross flattery to name a coward (*c*).

It is also a vulgar error that a husband can get rid of his wife by selling her in the open market-place with a halter round her neck ; such an act on his part would be severely punished by the local magistrate.

(*a*) When a small brooke, or little river, incorporated with Rhodanus, Humber, or the Thames, the poore rivulet loseth her name ; it is carried and recarried with the new associate ; it beareth no sway, it possesseth nothing during coverture. A woman, as soone as she is married, is called *covert*, in Latine, *nupta*, that is, vailed, as it were, clouded and overshadowed, &c. ; she hath lost her streame ; she is continually *sub potestate viri*. Bracton terms her under the scepter of her husband, and that which the same author is bold to say of the king in a paradox, his fellowes, Earles and Barons, are above him, *nam qui habet socium habet magistrum*, I may more truely farre away say to a married woman, her new selfe is her superior, her companion, her master. The mastership shce is fallen into may be called in a terme, which the civilians borrow from Esop's fables, *Leonina societate*. The Lawe's Resolutions of Woman's Rights, l. iii., § 4.

(*b*) See *ante*, p. 257, and pl. IV. of this chapter, *post*.

(*c*) The Honeymoon.

The husband has, as we shall see, great powers and authoritative rights, but they are all subject to judicial interference, whenever he attempts to transgress their proper limits.

Let us now consider the extent of a husband's rights in his wife's property (*d*), not settled or separated in her sole favor (*e*), merely observing, that a husband's property is not affected by the marriage during his life, but still continues his own; his wife having no right, or title, or claim thereto.

II. Assuming, then, that the wife has no separate interest in her own property, secured to her by settlement, or otherwise, the husband by the marriage acquires an *absolute* right to all his wife's *personal* property in her actual and beneficial possession at the time, such as money in hand, deposit at a banker's, jewels, household goods, &c., or which comes into actual possession during the marriage, and he may assign or dispose of them at his own good pleasure. This right is wholly independent of the circumstance whether they live together, or not. Should any personalty, however, be in expectancy (technically denominated a *chose en action*, or personalty in sus-

His power over his wife's personal property, as well possessed as in action.

(*d*) If a wife is the subject of a foreign state, the rights of her and her husband, in respect to his possession of her property, will be regulated by the law of that state; and if by it he is entitled to have the property, without being under the necessity of making a settlement upon her, the property will be delivered over to him to be enjoyed absolutely; or if the parties, whether foreigners or English subjects, have married in a foreign country, while living there *animo remanendi*, and have executed a settlement, the court will direct payment of the wife's estate according to the settlement, as interpreted by the law of the country in which it was made.

(*e*) See *ante*, p.222, *et seq.*, for the law of marriage settlements, and a wife's separate property.

pense) the husband may acquire an absolute right thereto, by a contract or agreement (*f*) before marriage, or by receiving it without suit, or should that be found impracticable,

(*f*) The mere fact of a settlement having been made, however, by the husband on the wife, is not sufficient to entitle him thereto, unless a particular intention in his favour, can be collected from the settlement itself, either by express words, or by necessary and plain implication.

But, if by the settlement the wife's property is recited to consist of the *choses en action* in question, and, *à fortiori*, if the settlement be expressed to be made in consideration of the wife's fortune generally, without any specification of particulars, the husband is entitled to all the property of this nature then *in esse*, including a portion already secured, but payable *in futuro*.

Yet, a settlement by the husband, in consideration of the *present* fortune of the wife, does not affect the wife's title by survivorship to *subsequently acquired* property.

But if the settlement be expressed to be made in consideration of the property, *future* as well as *present*, of the wife, the husband will be absolutely entitled to all the *choses en action* accruing to her during the coverture, though not reduced into possession, and though the wife should be the survivor.

If the intention be clearly manifested, that the husband shall take the wife's *choses en action*, it is immaterial whether he has made a settlement on her or not; or, in other words, whether the provision which she agrees to accept in satisfaction, comes out of his estate or her own, or indeed, whether she receives from any quarter a provision by way of equivalent or consideration, or not; since marriage alone is a sufficient consideration for all that either of the parties may relinquish to the other.

If the settlement have disposed of the wife's *choses in action* in certain contingencies only, it leaves untouched the wife's title by survivorship in the alternative events. Thus, where certain sums of stock, the property of the wife, were vested in trustees, in trust for the husband, during the joint lives of the husband and wife; and, in case he should survive her, for him absolutely; and, in case the wife should survive the husband, then as he should by deed or will appoint; and, in default, to the children of the marriage; but without making any disposition in the event of the husband's dying in the lifetime of the wife, without having exercised his power, and of there being no issue of the marriage; this event happened, and the surviving wife was held to be entitled. 3 Ves. 467.

then by resorting to the proper legal remedy, in his own name alone, if he like, should the property have devolved upon her during marriage, but if she were possessed of it before marriage, then by joining her in the proceedings, and thus reducing it into possession during the marriage. Equitable *choses en action*, the husband has also the power of reducing into possession; but, in a suit in Chancery for their recovery, the joining of the wife in the proceedings is equally necessary, whether they belonged to her *before*, or accrued to her *during* marriage; the reason for which is, that the wife, in both cases, is entitled, on behalf of herself and her children, to claim a provision out of the property (*g*),

The same rule obtains where the husband has not performed the condition to which he is to become entitled.

It is to be observed, that all the preceding propositions relate to settlements made *before* marriage, when the wife, if adult, was competent to contract with the husband as to the terms on which he should acquire her *choses en action*; but, settlements *after* marriage stand upon a different footing. From the incapacity of the wife to bind herself by contract during the coverture, such a settlement is necessarily inoperative to deprive her of her title by survivorship, unless in relation to her separate property, as to which she is a *feme sole*, and can contract. 9 Jarm. Byth. 14—18.

(*g*) The distinction between legal and equitable *choses en action*, in regard to this claim, may be thus illustrated:—If stock in the funds is standing in the name of the wife, the husband, either in the joint names of himself and the wife, or in the name of the husband alone (according to the fact whether the property was acquired before or during the coverture), may bring an action against the Bank of England, to compel a transfer to him, without being obliged to settle any portion of it on the wife, and a Court of Equity would not, even at the solicitation of the wife, interfere with his legal right; while, on the other hand, if the stock were in the hands of an executor or trustee, so as to be recoverable only by the husband in a Court of Equity, this Court would not allow him or his assignee (whether the latter had given a valuable consideration or not), to touch the fund, without having ascertained, by its own private examination of the wife, taken either in Court or by commission, that she renounced her

Should species of his property be outstanding, and not in actual possession, when the marriage is dissolved by the death of either of them, then, if the wife be the survivor, she will be entitled to such property, with all its accrued profits, against her husband's representatives; but should the husband survive, he has an absolute right (*h*) to administer to his wife's effects in the Ecclesiastical Court, in order to obtain it; for he would not be entitled to it, *jure mariti*, by virtue of the gift by marriage, and therefore he takes this property, subject to the claims of his deceased wife's ante-nuptial creditors. If he do not take out letters of administration, he is entitled to any surplus which may remain after satisfying the wife's debts (*i*). If, however, he die before obtaining possession of the property by virtue of his administration, his legatees or next of kin will then be beneficially enti-

claim, unless such claim to a settlement out of it has been barred by the stipulations of an ante-nuptial settlement, or unless the fund were less than two hundred pounds in amount or value; in which case, the rule is to pay it to the husband, as a matter of course, without evidence of the wife's consent. If the wife insist on a provision, a moiety of the fund, or any less proportion which the wife may agree to accept, is settled on her and the children, and the remainder is paid or transferred to the husband. If the wife waive her equity, he takes the whole. Where there is no suit, the conduct of an executor or trustee should be governed so far as possible by the rules on which the Court itself acts. He should inform the wife of her right, and if she decline to assert it, and not otherwise, the executor should place the fund at the disposal of the husband. But it is not *legally* incumbent on the executor to apprise the wife-legatee of her title to a settlement. He might, with perfect safety to himself, pay the whole legacy to her husband, without any communication with her, and the husband's receipt would effectually discharge him. 9 Jarm. Byth. 19.

(*h*) 29 Car. IV., c. 3; a husband and wife are *not* of kin to one another.

(*i*) *Clough v. Bond*, 6 Jur. 50.

tled, and will be allowed to administer, even where the husband did not himself administer (*i*).

A wife's *choses en action* cannot be assigned or sold by the husband at *common law*, on account of the general principle that rights of this nature cannot be assigned, as tending to multiply litigation. But nevertheless he may negotiate and pass her bills of exchange and promissory notes by his simple endorsement, and transfer her legal terms of years, and her estates by *elegit* upon a judgment obtained by her, when sole and unmarried.

*Equity*, however, allows him to assign terms of years held in trust for his wife; money owing to her, which is secured upon a mortgage of a trust-term; Chancery decrees for payment of money to her, whilst sole, or giving her a right to hold certain property, until such money should be forthcoming; or mortgage-money secured upon any kind of property.

Equity will also treat an assignment, which is void at law, as an agreement by the husband to give to his transferee the benefit of the right assigned, and will thus validate it.

The *choses en action* of a wife will survive to her against the assignees of her bankrupt-husband, should they not come into actual possession during such husband's life, or should not the assignees have reduced them into actual possession before that event (*k*). And the same principle applies when he has petitioned the Insolvent Court to be relieved from his difficulties.

A husband's voluntary assignment, without consider-

(*j*) 1 Bright's Husb. and Wife, 42.

(*k*) *Mitford v. Mitford*, 9 Ves. 87; *Sherrington v. Yates*, 12 M. & W. 683.

ation, of his wife's *choses en action*, which may be at once reduced into possession, will be defeated by the wife's survivorship, where they have not been reduced into possession by the assignee during the husband's life (*o*). But where the assignment was made for a valuable consideration, the assignee has an absolute right against the wife's survivorship, although he may not have reduced the property into possession during the husband's life (*p*).

A husband's assignment, with or without consideration, of his wife's contingent or reversionary *chose en action*, which it has not been practicable for the assignee to reduce into possession before the husband's death, by reason of the event upon which the right would have come into possession not having occurred in his lifetime, will not prevail over the wife's right of survivorship, which will defeat the assignee's title under the transfer (*q*). But seeing that equity deems the husband's assignment as tantamount to an agreement that he will reduce the property into possession, and treats that which a person has agreed to do as actually done; an assignment by a husband who has the power of reducing the property into possession, would be regarded as a reduction of it into possession, and would of itself defeat the wife's right of survivorship (*r*).

Where a wife has a contingent or reversionary interest in *personalty*, which either cannot or may not fall into possession during the marriage, the Court of Chancery

(*o*) *Wright v. Rutter*, 2 Ves., jun. 673; *Johnson v. Johnson*, 1 J. & W. 479.

(*p*) *Bell's Husb. and Wife*, 67—73.

(*q*) *Watson v. Dennis*, 3 Russ., 90; *Scott v. Davis*, 4 M. & C., 87.

(*r*) *Honner v. Martin*, 3 Russ. 64.

will not in any case accept her consent to dispose of it (s); the Court will only receive her consent to renounce that equity which itself can afford to her, *i. e.* to require a settlement, where there is a present right in the husband to take possession of his wife's property (t). Before her consent is received, the property must be first ascertained, and the amount clearly known, and the husband and wife must make an affidavit, that there is no settlement whatever. Should there be any, it must be produced to the Court (u). If the wife be an infant, her consent cannot be taken. And whatever may be the ultimate effect upon the wife's rights, of assigning to her estates prior to her reversionary interests, Chancery will not lend its aid to accomplish the plan of merging or destroying the prior estates in her reversionary estate, so as to vest her interest in actual possession, and thus validate her assignment of her reversionary *chose en action*, during the marriage (v).

It is a well settled and intelligible principle, that neither a husband alone, nor a husband and wife together, can bar a wife's legal right to her personalty by survivorship, when the *chose en action* is not only

(s) *Box v. Jackson*, 1 Dru. 42; *Osborn v. Morgan*, 3 Hare, 434.

(t) *Breton v. Clifden*, 1 Sim & S., 363.

(u) *Jones v. Smith*, 1 Hare, 67.

(v) *Whittle v. Henning*, 1 M. & C. 37; 11 Beav. 222, affirmed on appeal, 2 Ph. 731. The case was this, a *feme covert* was entitled to a reversionary interest in a sum in the funds. All the other parties entitled surrendered their interests to her. The fund was in Court; yet the Court decided that the *feme covert* was still unable to dispose thereof. Where a married woman is entitled to a fund to be raised out of real estate on the death of a tenant for life, a deed executed during the lifetime of the tenant for life by her and her husband and the parties entitled to the estate, and acknowledged by her under the Fines and Recoveries Act, will not bar her right. *Hobby v. Allen*, 15 Jur. 1835.



not reduced, but is incapable of being reduced, into possession during the husband's lifetime (*w*).

A husband's release of his wife's present *chose en action* to the debtor would defeat her right of survivorship. If the wife's right be vested, though reversionary, and the reversion may and does fall in during the marriage, or if it depend upon an event which may and does happen during that period, the husband's release of it operates the same defeat; but not so, where the reversion does not or cannot, or where the event does not or cannot happen during the marriage (*x*), since the husband's release or assignment is not a constructive reduction into possession of future property of this nature.

With regard to the effect of legal proceedings to reduce a *chose en action* into possession, should an action at law be brought by the husband and wife jointly, and should he die after judgment, and before execution, the wife will be entitled to the benefit of such judgment,

(*w*) The leading cases are *Perdew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 *Ib.* 65; and *Stiffe v. Everett*, 1 M. & C., 371. By an ante-nuptial settlement a renewable leasehold, the property of the wife, was settled upon trust for the separate use of herself during the joint lives of the husband and wife; and should the wife survive, then in trust for her absolutely, subject to the raising portions for their issue, if any; but should the husband survive, and there was issue, then, subject to raising portions for such issue, if any, in trust for the husband for life, with remainder to the issue of the marriage absolutely. After the marriage the husband and wife joined in executing various deeds, by which they purported to charge all their interest under the settlement in favour of certain creditors of the husband. The wife survived, and such deeds were held to be invalid against her right of survivorship, and that the husband could not effectually charge or incumber his wife's reversionary interest in the leasehold, as such reversion could not by any possibility vest in possession during his life, it being limited to vest in possession only in the event of his wife surviving him. *Duberley v. Day*, 16 Jur. 581.

(*x*) In *Belcher v. Hudson* (Cro. Jac. 222), the defendant promised,

which may be enforced by her ; but should the action be brought in the husband's name only, and he die after judgment and before execution, his representatives will be entitled to its benefit. If the wife, when sole, have brought an action and obtained a judgment, and after marriage she and her husband sue out an execution, then if the wife die before it is put in force, the surviving husband will be entitled to the fruits of such execution. A husband proving his wife's debt under the debtor's bankruptcy, and dying before a dividend paid, the wife will be entitled to it (*y*).

Where a suit in Chancery has been brought, and a decree for payment obtained, and the husband die before execution, its benefit will accrue to the wife. On the other hand, if the decree order a settlement out of the money recovered, the surviving husband will take it, subject to the children's claims, under such ordered settlement.

Where there have been a submission to arbitration, and an award be made in the husband's favor, but he die

that if the plaintiff would marry a certain man, he, the defendant, would pay her an annuity. The plaintiff married the man, and after his death brought an action for payment of the annuity. The defendant pleaded a release by the husband, during the coverture, of all actions or demands which he had or might have, &c. ; but his plea was disallowed upon demurrer, for, being a promise to make payment after the death of the husband, it was not in demand during his life, nor by any possibility could be demanded from him. If a stranger promise to a woman, that, in consideration she would marry such a man, he would pay her so much if she survive her husband, the husband could not have released this promise, because nothing could become due during the coverture ; but when the wife has a duty, which may become due during the coverture, the husband may discharge it. *Cage v. Acton*, 1 Raym. 515.

(*y*) *Anon.*, 2 Vern. 707.

before payment of the money awarded, his representatives, and not his widow, will be entitled to its benefit (z).

But the mere intention by a husband to take possession of his wife's *chose en action* will not be sufficient to transfer the property to him; it must be an intention followed by some positive act, changing the property and divesting it out of the wife (a). And if a husband obtain actual possession of the *chose en action*, yet even this will not defeat the wife's right to it by survivorship, if such possession were obtained with an intention other than that of changing the property, and divesting it out of the wife (b).

Thus, mere possession obtained by the husband, as trustee or executor, will not defeat the wife's right by survivorship; neither will the fact of his having directed the *chose en action* to be vested in others, as trustees for the wife, have that effect (c). If, however, the trust authorised by the husband be one under which he himself will take a benefit, then the act done by him authorising such a trust will be sufficient to divest the right of the wife by survivorship (d). But the husband alone, or he and his wife together, may authorise a third person to receive the wife's *chose en action*, which will divest the title of the wife, and be such a reduction into possession as will support an action by the husband against the third party for its recovery (e).

(z) *Oglander v. Baston*, 2 Vern. 396.

(a) *Blount v. Bestland*, 5 Ves. 515; *Nash v. Nash*, 4 Madd. 133, confirmed by *Gaters v. Madeley*, 5 M. & W. 423.

(b) *Baker v. Hall*, 12 Ves. 497; *Wall v. Tomlinson*, 16 Ves. 413.

(c) *Ryland v. Smith*, 1 My. & Cr. 53.

(d) *Burnham v. Bennett*, 2 Coll. 255.

(e) Rolle's Abr. 342, D. 7.

Where a promissory note, given to a woman before marriage, is payable to order, an indorsement of it by her husband to himself will be a reduction by him into possession (*f*).

But a husband's receipt of the interest, without obtaining the principal, is not a reduction into possession, so as to defeat the wife's right by survivorship; neither is a transfer of stock into her name, nor a mere agreement to sell the fund (*g*).

III. With regard to a wife's chattels-real, which are Over her chattels real. estates held during a term for years, or under a writ of *elegit*, or Chancery decree, &c., in order to entitle her husband thereto, *jure mariti*, and bar his wife's right to them, he must do some act to appropriate them during his life, as by an absolute disposition of them, even without her concurrence, and without any consideration, if he like, and this though the property be held in trust for her benefit, as long as it is not settled to her separate use; or by a creditor of his selling them under an execution during his life; for otherwise the wife surviving him will at once have an absolute right thereto, by virtue of her ante-nuptial ownership, notwithstanding any will or disposition he may have made of them, to take effect after his decease. Should the husband, however, survive, such property belongs to him absolutely, in his marital right, without anything further being done by him.

Since a husband is entitled to his wife's chattels-real in her right only, his appropriation of them is but co-extensive with her actual interest in them, and, therefore,

(*f*) 12 M. & W. 855.

(*g*) 1 Bright's Husb. & Wife, 48.

subject to every equity and claim against her that existed before the marriage, for he is only deemed a volunteer, and not a purchaser of such property for value.

Where a husband disposes of his wife's chattels-real, the disposition must commence *in interest* during his life, though it need not be *in possession* during that period; thus, an underlease, not to begin to be enjoyed till after his decease, will be effectual. The disposition may be conditional (*h*), and it need not comprehend the whole of the chattel, but then the undisposed residuc will accrue to the surviving wife.

A husband may defeat the wife's right by survivorship to her chattel-real, by acts, which, although not amounting to an express disposition, have the effect of, or imply, an alienation. Thus, if he, holding a term in right of his wife, grant a lease of the lands covered by the term, for the lives of himself and his wife, the wife's term would thereby merge, and her right in it be defeated (*i*).

Again, if the wife be one of two joint-tenants of a chattel-real, as of a lease for years, the husband may sever the tenancy during the coverture, so as to destroy the co-tenant's chance of survivorship, and thereby ap-

(*h*) If its taking effect is made conditional upon previous payment of a sum of money, in such a case, should the time for payment occur after the death of the husband, and should his executors enter for the condition broken, the wife's right will be barred. Co. Litt. 46. If, however, the payment ought to have been made during the life of the husband, and he should himself have entered for the condition broken, the case will be changed; for the wife surviving will be entitled to take the chattel as undisposed of by her husband; since he would then have been in of his original estate, *i. e.*, in right of his wife, and not of the new estate created, or rather perfected, by his disposition. 4 Vin. Abr. 50, pl. 14.

(*i*) 2 Roll. Abr. 495, pl. 50.

propriate to himself a moiety of the estate ; but if he do not do so, and the co-tenant should survive the wife, the co-tenant will take the entire chattel, to the exclusion of the husband, because the survivorship in the joint-tenancy is an older title than the marriage, which did not divest the term out of the wife, but left her estate in it as it was at first (*j*).

The following acts of the husband will not defeat his wife's right by survivorship :—A mortgage, or covenant to mortgage, a wife's term for years, since it will only be good against the wife's right to the extent of the loan, which being paid, the term will be wholly hers ; a rent-charge created out of her term for years, for it may be avoided by the wife on his death ; paying off a mortgage, and taking an assignment of the legal estate, but the husband would be entitled to come upon the estate for the amount of money paid, unless he had evinced an intention to exonerate the property for his wife's benefit (*k*).

(*j*) Plow. Com. 418.

(*k*) If the mortgage were created for the purpose of raising money for the husband himself, of course his payment of such mortgage gives him, or his representative, no claim against his wife's estate. But, in such a case, it seems to be the better opinion, that his taking the assignment to himself, would have the effect of vesting the term absolutely in him, the act clearly not having been done in the character of an incumbrancer.

It seems doubtful, whether a mere reservation of the equity of redemption to the husband in a mortgage made by him of the wife's term, would bar her title by survivorship. The occurrence of the question should always be prevented by a clear expression of the intention ; if it is meant that the wife shall retain her interest, the equity of redemption should be reserved to both her and the husband, or, in general terms, to the persons entitled, without naming either of them. If it is intended to take away the wife's equitable title, a recital to this effect should be inserted, in order to exclude all ground for applying the doctrine, (which is familiar in its application to mortgages of the wife's freeholds), that, in order to

The husband's treason, felony, or outlawry, defeats his wife's right by survivorship, for it incurs a forfeiture of all his rights and property; and so if he commit waste, or become bankrupt, for then his assignees will be entitled to take such property for the benefit of his creditors.

A wife's  
equitable  
settlement.

IV. While our *Common Law* permits a husband to possess himself absolutely of the whole of his wife's personal property, and affords him every facility to enforce his right thereto, *Equity*, exercising its parental care, compels him, whenever he or any person claiming in his right (*l*), is obliged to sue for its recovery in Chancery, to make a settlement of some portion (*m*) of it (unless it be under 200*l.*, or 10*l.* in

change the ownership of the equity of redemption, a clear intention must be manifested.

The husband's equitable alienation of his wife's term, of course, will bind the wife in equity, in the same manner as his legal assignment will bind her at law. If, therefore, he sell the wife's term, and die before the completion of the contract, the wife would be bound to carry it into execution, though the purchase money, if unpaid, would go to the husband's representatives; and the principle, of course, extends to any other binding contract for alienation entered into by the husband.

An assignment by the husband to himself (which purpose could only be accomplished by the circuitry of two deeds), or to a trustee for him, would, it is clear, completely exclude the title of the surviving wife. 9 Jarm. Byth. 12, 13.

(*l*) This includes his assignees, in case of his bankruptcy or insolvency, as well as his voluntary assignee under a trust for payment of his debts, and against a purchaser for value from him, since a husband cannot convey more than he himself possesses.

(*m*) There is no rule fixing the proportion of the property to be settled upon the wife: it will depend upon all the circumstances of the particular case, such as a prior settlement upon her; the acquirement of any other property by the husband with her; the husband's behaviour towards his

annual payment (*n*)), on his wife (provided her conduct have been proper and virtuous, and she is otherwise unprovided for, or inadequately provided for), as its condition for giving him assistance, since "he who asks equity must do equity;" and the Court will enforce this right, whether the wife be a plaintiff or defendant in the proceedings.

Should he refuse to make the settlement directed, the Court will preserve the *capital* of the property for the wife and children, and order the *interest* to be accumulated for her benefit, should he have had a large portion through the wife, which he has spent, unless indeed he be actually starving for want of a maintenance (*o*). If a husband desert his wife, and leave her destitute, equity will not allow him to touch either the

wife. In *Coster v. Coster*, 9 Sim. 597, Sir L. Shadwell, V. C., after considering the conduct of the husband in having seduced the wife before her marriage, and the conduct of both the husband and the wife after marriage, with a view to ascertain the origin and justification of a separation which had taken place, decreed three fourths of the wife's fortune to be settled upon herself and child, and one-fourth to be transferred to the husband. The court may, in its discretion, settle the whole upon the wife and children. *Dunkley v. Dunkley*, 16 Jur. 767. See *Bagshaw v. Winter*, 16 Jur. 561; and *Ex parte Pugh*, *ib.* 652.

One half of the fund seems to be the most usual proportion, unless the marriage had been clandestine, for then *all* the property must be settled. See *ante*, p. 210.

(*n*) Should her husband be insolvent, a wife would then be entitled to have the whole of even this small sum settled upon her and her children. *Culler's Trust*, 15 Jur. 911. A wife's equity to a settlement does not extend to include a reversionary interest in stock. The settlement of such a fund cannot be asked for, until it falls into possession, *i. e.*, until the husband has a right (subject to his wife's equity), to receive it. *Osborn v. Morgan*, 16 Jur. 52.

(*o*) *Bond v. Simmons*, 3 Atk. 20.



principal or income of the property, but will direct a maintenance from it for the wife and children (if any). And maintenance will sometimes be given to the wife, where she has been obliged to leave her husband on account of his cruelty.

If a husband, or those claiming under him, sue in an Ecclesiastical Court for a legacy, or share of an intestate's estate belonging to the wife, Chancery will grant an injunction to stay proceedings therein, until a proper settlement is made, for the Ecclesiastical Courts have no power to enforce this wholesome condition; but an injunction will not be granted to restrain an action at common law for the recovery of such property, since Chancery has not then any jurisdiction to interfere.

Equity will also direct a settlement to be made on the wife out of her equitable estate, upon her own application, through her next friend, against her husband, or those claiming under him. If, before any proceeding in Chancery be commenced, the property be paid or transferred to the husband, it will then be too late to apply to the Court for its aid to insist upon a settlement out of it on the wife and children. But a settlement cannot be thus avoided, after proceedings have been initiated. If the wife be of full age, and had not been a ward of Court, married without its consent, she can waive her equity, and that of her children, to a settlement, and consent that the whole property be given up to her husband (*p*).

The settlement directed by the Court is usually

(*p*) It would seem, that a wife may waive the benefit of a decree, ordering proposals to be carried in by the husband; but, after these proposals have been carried in, and have been approved of by her and by the court, the court will not then allow her further to deal with the equity, which it

extended to the children. Where the wife dies pending a suit, without having obtained the settlement, but an order has been made for the husband to bring in his proposals for a settlement, then her children have the right to apply to the Court to complete the settlement; but, as a general rule, after her death, the husband is not bound to make a settlement upon the children. The Court will not render any assistance to the wife, who leaves her husband *without adequate cause*, or who has been guilty of adultery (q).

If the husband, prior to the marriage, settle property

then administers, not for the benefit of her alone, but of her, together with her children. But if she die after such a decree has been made, and before the proposals have been carried in, leaving issue, and without having waived her equity, the court will not permit the estate to go to the husband, but will hold him to the order, on the principle that the wife had by it obtained a judgment for the issue, liable to be waived, no doubt, if she thought proper, otherwise left standing for their benefit at her death; and the children may have the benefit of the order by bill accessory to that on which it was made; *Groves v. Clark*, 1 Keo. 132; *Lloyd v. Mason*, 5 Hare, 149; 10 Ves. 92. The rights of children in a decree, directing proposals for a settlement, where nothing has followed upon it, would seem, however, to be operative only against the husband, and not against the wife; for should the husband die after such a decree has been made, the wife would be entitled to take the fund absolutely, and unaffected by the decree. 1 Fonb. Eq. 97. But if the death of the husband does not occur until after the proposals directed by the decree have been carried in and approved of by the Court, then, according to the opinion of Sir *W. Grant*, expressed in *M' Aulay v. Phillips*, 4 Ves. 19, the proposals will, in such case, be held to be binding upon the wife surviving, in favor of the children of the marriage.

(q) Although the court will not, in case of adultery by the wife, make her an allowance for maintenance out of her estate, or give effect to her equity to a settlement out of it, it will not follow that the court will allow the husband to obtain possession of the estate discharged from any liability in this respect, while he is under the circumstances not actually maintaining the wife, for which purpose her estate is given to him by the

upon his wife, in consideration of the fortune she then is, or may afterwards become entitled to, the wife being a party to such settlement, she will not be entitled to any settlement out of her equitable property, whether her husband's settlement be adequate or not; but if his settlement be made after marriage, in consideration of his wife's equitable property, then, if it be not adequate, the Court will allow the wife a further settlement out of such equitable estate.

Where the wife is under age at the time of her marriage, there a settlement by the husband (though made previously to the marriage, and expressed to be in consideration of future accessions of property, as well as of her present fortune), will not deprive her of a settlement out of equitable property, which comes to her unexpectedly, and which could not be in the contemplation of the parties at the time of the settlement made by the husband, was entered into. If the settlement, which is made by the husband, is expressed to be in consideration of a part only of the wife's fortune, she will be entitled, it is presumed, to a provision out of such of the residue as consists of equitable property. And it will be almost unnecessary to observe, that if the settlement by the husband is expressed to be, in consideration

marriage. So far from this, the court will avail itself of the jurisdiction which the husband has given it, by coming for its aid to obtain possession of the estate to prevent his obtaining this object. But, if the husband have by settlement, acquired a right to the income of his wife's estate as a purchaser, of course her separation from him through her own misconduct, will not affect his rights in this respect. In the recent case of *Greedy v. Lavender* (13 Beav. 62), a husband and wife made an assignment of the wife's interest in a reversionary fund, which afterwards fell into possession. It was mutually imputed, and not denied, that they were both living apart, and in adultery; the court, however, decided that the wife was entitled to a settlement out of the fund.

of the fortune of the wife *then* had, that in a case so circumstanced, the wife will be entitled to a settlement out of any equitable property which may devolve upon her subsequently to the marriage.

Where a wife at the time of the marriage was a ward of the Court, and married, without its consent, the Court not only refuses its assistance to enable the husband to get possession of the wife's estate, unless upon terms of making a settlement out of it, but it puts in motion an active jurisdiction, founded upon the contempt of the Court, by the fact of the marriage, and the power of imprisonment which that gives, to compel the husband to make a settlement of the wife's estate; and it will put this jurisdiction in motion, although years may have elapsed before the contempt was brought under its notice (*r*). In exercising this jurisdiction, the Court will consider the motives of the husband for entering into the marriage, and his conduct towards the wife, both then and subsequently, and will regulate the portion to be settled, and the mode of settlement accordingly. Where the conduct of the husband has been very flagrant, either in the way in which he entrapped the wife into marriage, or in the terms upon which he has lived with her since the abduction, and prior to the marriage, the Court, with the view of defeating the object which the husband had in the marriage, will not allow him to have any part either of the income, or of the capital of the wife's estate. But in order to induce amendment in his conduct, and better treatment of the wife, it will give her a power (*s*) to appoint to him a part of

(*r*) *Ball v. Coutts*, 1 Ves. & B. 300.

(*s*) *Millet v. Rowse*, 7 Ves. 419.

the capital by *will*, in case of his surviving (*s*). Where, however, there are extenuating circumstances in the conduct of the husband, and the wife's fortune does not appear to have been his object, the Court allows him benefit from the estate, and treats him as a husband under ordinary circumstances. (*t*).

The fact that the wife has committed adultery, and is living apart from her husband, will not, in the case of a ward of Court, who has been married without its consent, as in the ordinary case, be a bar to her obtaining a settlement. The Court will view the circumstances which took place at her marriage as having led her into misconduct.

Although the husband is bound to support the wife and supply her with the means necessary for her maintenance corresponding to his own rank in life, the Common Law and Equity Courts have no direct active jurisdiction to enforce the discharge of this obligation, which belongs exclusively to the Ecclesiastical Courts (*a*), or to her parish. Courts of Equity do, however, lend their aid towards this object, by consenting or refusing to assist the husband in the recovery of the wife's property, according as he may or may not be justified in refusing to support her.

His power  
over her  
real pro-  
perty. His  
curtesy.

V. With regard to a wife's unsettled *real*-property, the wife cannot deal with it during the marriage, except as presently stated, its management devolving upon her husband, who may apply the proceeds of it to his own use, for he acquires by the marital right a freehold estate in his wife's lands of inheritance during the *joint* existence of himself and wife, in right of his wife. Should there

(*t*) *Balhurst v. Murray*, 8 Ves. 77.

(*u*) See Book III., c. VI., *post*, and p. 133 *ante*.

be no child or children, then, upon her death, such estates would devolve upon her heir, to the exclusion of the husband; but, after the birth of a child, he becomes, (unless otherwise expressly provided by a marriage settlement), what is called a tenant by the curtesy or favor of the law of England "initiate," which is a *droit de viduité*, and acquires an estate in his wife's heir-land in his own right during his life, whereby his widow's heir-at-law is postponed (*v*). To entitle him, however, to this estate, five conditions are necessary, viz. :—

(1) A legal marriage, with power in the husband to hold and enjoy landed-property, which an alien cannot do, unless naturalized by act of Parliament, or made a denizen by letters-patent from the Crown (*w*).

(2) The estate of the wife must be a fee-simple or a fee-tail, either general or special; for an estate for life or at will is not susceptible of this marital interest.

Curtesy attaches, however, to an equity of redemption; to all kinds of trusts; to land settled to the wife's separate use, unless he be wholly excluded from all benefit therein (*x*); to money directed to be laid out in inheritable land, for such money has at once the character and incidents of realty; to incorporeal hereditaments; to shifting uses or executory devises, where the estates devolve upon the children by descent; to inheritable reversions and remainders expectant upon terms for years;

(*v*) If the land be gavelkind property, as in the county of Kent, the husband then takes a moiety only, and this, during widowhood, whether he have issue or not. Co. Litt. 111.

(*w*) 7 & 8 Vict., c. 66.

(*x*) Of course, where a clear intention is expressed, that the husband shall have no interest whatever in the estates settled upon his wife, he will not be entitled to curtesy. See 1 Bright's Hus. & Wife, 138—141.

and to inheritances held in coparcenary or in common ; but curtesy does not attach to the following estates, viz., joint-tenancies, unless the wife survive all her co-joint-tenants ; estates given to husband and wife and their own children, for they are not liable to the curtesy of a second husband, since his issue could not inherit them ; lands assigned for dower, for dower is *not* an inheritance ; reversions and remainders expectant upon freeholds ; and, perhaps, titles and offices of honor.

Where an estate is given to two sisters for their joint-lives, and then to the heirs of their bodies, and one marries, and has issue, and then dies, her surviving husband shall not be tenant by the curtesy, because the estate of the surviving sister intervenes, the estate-tail having never been executed in his late wife's possession.

(3) An *actual* entry or seisin, in fact, must be made in the wife's lifetime, either by her or her husband, or by some other person for her, if the property be lands or tenements, provided that be practicable or possible. Such seisin or possession must be of the entirety of the inheritance.

Where actual possession in fact is impossible, such a possession as the property admits of will be sufficient, so that a seisin *in law*, or a title, is all that is necessary, where the property is incorporeal, as rents, tithes, offices, advowsons, commons, &c.

If the property be in trust, or is an equity of redemption, an *equitable* seisin will suffice, *i.e.*, the enjoyment of the profits by the wife, or her possession of the property mortgaged.

(4) There must be a child born of the marriage capable of inheriting his mother's property, either immediately or by possibility ; for if the estate be made to the wife and the heirs *male* of her body, the birth of a

daughter will not entitle the husband to curtesy, for she is not capable of inheriting her mother's estate.

It is immaterial whether the child live or die, or whether it be born before or after the wife-mother's scisin.

The child must be born alive during the lifetime of the mother, for *mortuus exitus non est exitus*.

Any kind of motion is evidence of live-birth, thus a twitching and tremulous motion of the lips (*y*), the high red color and warmth of the skin, a free and full respiration, motion of the heart and limbs; yet crying is the strongest proof, but it is not the only proof, although the reason given by Lord Coke, that, peradventure, the child may be dumb, is an error, for medical experience has established the fact, that a deaf and dumb child will often raise a *natural* cry at the time of birth, like other children; it is the *acquired voice* which it is incapable of attaining (*z*).

If a living-child be extracted from its dead mother by the Cæsarian operation, the husband would not be entitled, since the child would not be born during its mother's existence, although it may be a fair argument to present, that a child *en ventre sa mère* is considered as actually born (*in esse*) for many purposes, and why not for the purpose of conferring upon its father an initiate title to curtesy? However, if the operation be successfully performed, the mother and child surviving it, then, we apprehend, the husband-father's initiate right would certainly arise (*a*).

(*y*) See *Fish v. Palmer*, Beck's Med. Jurisp. 214.

(*z*) Dunglison's Physiology, vol. I., p. 317.

(*a*) *Cæsarian* is derived from *Cæsar*, or rather *Caso*, the first of that



If the husband become a bankrupt, but obtain his certificate of discharge before the birth of issue, upon the birth of issue his curtesy would be after-acquired property, and therefore would not pass to the assignees under such bankruptcy. Should a woman marry, have issue, her husband then die, and she take another husband and have issue, which dies, and then the wife dies, the second husband shall be tenant by the curtesy, though the issue by the first husband be living. So, if a woman, tenant in tail general, marry and have issue, which issue dies, and the wife dies without any other issue, yet the husband shall be tenant by the curtesy, although the estate tail is determined, because he was entitled to be tenant, *per legem Angliæ*, before the estate in tail was gone.

(5) Predecease of the wife, whereupon the husband's initiated estate becomes consummated and perfected.

The incidents of this marital estate are as follows:—

The owner is entitled to reasonable estovers, or botes, *i. e.*, to wood necessary for building and burning, and the general purposes of agriculture, as requisite to the

name, who was cut out of his mother's womb. By most men, the life of the mother has been considered of the greatest importance, and, therefore, as the Cæsarian operation is full of danger to her, no British practitioner will perform it, when delivery can, by the destruction of the child, be procured *per vias naturales*. There are, I think, histories of twenty-three cases, where this operation has been performed in Britain; out of these only one woman has been saved, but eleven children have been preserved. On the continent, however, where the operation is performed more frequently, and often in more favorable circumstances, the number of fatal cases is much less. If we confine our view to the success of the operation in this island, we must consider it as universally fatal to the mother. Burn's Principles of Midwifery, 473.

full enjoyment of the estate. His personal representatives are also entitled to emblements, or the annual fruits, growing when the estate ends, and this in order that agriculture should not suffer through fear of the sudden determination of the possessor's interest, and the loss thereby of the crops sown by him.

He may grant leases for years, but enduring only so long as he himself lives ; before issue born, he can grant an estate only for the joint-lives of his wife and himself.

His estate confers upon him the protectorship of the settlement pursuant to the Fines and Recoveries Abolition Act (*a*).

He is liable to the heir-at-law for waste, and must keep down the interest of incumbrances upon the estate.

If his deceased wife's advowson had been held by her along with her sisters in coparcenary, and she had been the eldest, then, if no vacancy occurred during her life, the husband would be entitled to present on a vacancy in his life, in right of his deceased wife's seniority.

Seeing that this estate of the husband is a continuance of the wife's interest, and that the husband-widower has no greater privilege than a simple tenant for life, whatever legally extinguishes the latter, defeats as a consequence the former : and although his interest is independent of her, yet he takes it subject to all the incumbrances which affected it in his wife's hands ; but the husband does not forfeit his estate now by attempting to grant a greater interest in the property than he has, for only that which he can transfer will pass by his grant (*b*). A husband's adultery does not forfeit this estate, but his treason or felony will, unless he receive a pardon, and

(*a*) 3 & 4 W. IV., c. 71, § 22.

(*b*) 8 & 9 Vict., c. 106, § 2.

then have issue. And the wife's guilt of treason or murder, *before* issue born, will bar the curtesy in respect of her *then* property. Any condition or proviso restraining a husband from curtesy is altogether void.

His leases. VI. With regard to the husband's power to grant leases of his wife's lands, he may, according to the principles of the old common law, lease them for his own life, and no longer, for the wife upon surviving him, may put an end to his lease, although she may have joined him in it; nevertheless, she, or her second husband, if she have married again, may confirm it, at her or his option. This right may be exercised by those who claim under, or in privity with, the wife.

The statutory power of a husband and wife to make leases of the wife's lands, is derived from the act of Parliament, 32 Henry VIII., c. 28,—a statute passed for the encouragement of agriculture,—which enacts, that these leases must be strictly made, according to the following conditions, otherwise they will be absolutely void:—

(1). The property which a husband alone in right of his wife, or jointly with her, can lease pursuant to this act, are manors, lands, tenements, and hereditaments, out of which rent may be reserved; therefore, advowsons, fairs, markets, or franchises, cannot be demised; but tithes may (*c*). The property to be leased must be an inheritable estate in the wife, or in her husband and herself jointly.

(2). Should there be a prior lease of the property to be demised, the same must expire, or be actually surrendered, within one year of the making of the new

(*c*) *Valentine v. Denton*, Cro. Jac. 3; 5 Geo. III., c. 17.

lease. Cancellation will not amount to a surrender; but granting a new lease to the same person, who holds a prior subsisting lease, will be a surrender of such lease.

(3). The lease, which must be an indenture, and not a deed-poll, and duly sealed by the wife, her husband and herself being named parties in it, must take effect in possession at once, *i. e.*, commencing from the day of its delivery, and not in reversion or expectancy at a future time.

(4). The property to be leased, must have been commonly let or occupied by a lessee for twenty years before the date of the present lease.

(5). The lease must not be made, so that the lessee become under it a tenant, without impeachment of waste.

(6). The lease must not be made so as to endure beyond twenty-one years, *or* three concurrent lives, for there must not be a compound of these two durations. Any excess of duration invalidates the lease altogether.

(7). The yearly rent reserved upon such lease, to the husband and wife, and to the heirs of the wife, must be so much or more, as has been most accustomedly paid within the previous twenty years.

A lease void under this statute may nevertheless be good at common law, and let in the wife's election, as we have just shewn.

A husband cannot dispose of any interest in his wife's lands, beyond that which his marital right may have conferred upon him, *i. e.*, an estate for their joint lives, should there be no children, or for his own life, if there be children.

His power  
of charg-  
ing his  
wife's land.

VII. A husband possesses the power of charging the wife's lands with his debts, *only* to the extent of his own interest in them, and if the wife have been no party to such charge, and have not given a formal consent thereto, her rights, upon surviving the husband, will not be affected or prejudiced thereby. Any attempt therefore, direct or indirect, secret or colorable, by the husband, to affix the payment of his own liabilities upon his wife's lands against her approval, will fail, as against her own rights, interests, and privileges; for whatever may be the incapacity of a married woman to deal with her *personal property*, yet, anomalous as it may appear, she has, in regard either to alienating or charging her *real estate* all the powers of a *feme sole*, with this qualification only, that what she does must be done with the consent of her husband, and with certain observances (*d*), which the law has prescribed, in order to ensure that what she does is done with full knowledge of her rights, and of the nature of the act, and not under the pressure of any undue influence from her husband.

If a wife's lands be charged for her husband's purposes, and there be no gift to the husband intended by the charge, they will be exonerated out of his assets, should he leave any at his death, for she is as it were a surety for her husband; and none of his creditors will have a right to stand in the mortgagee's place, so as to come upon the wife's estate; she may, however, waive this right. Of course, if the debt charged were originally incurred by the wife before marriage, or if a mortgage actually subsisted on the estate at that time, she would

(*d*) See post, p. 341, et seq.

not be then entitled to exoneration, since such debt was not that of her husband.

If the wife suffer a sum of money to be raised out of her estate for the purpose, and join in a conveyance which is binding upon her, and the trust be declared to raise the money by sale or mortgage for her husband's benefit, this will be considered as a disposition in his favour of so much of the inheritance absolutely, and subject to no after-reckoning or claim of the wife, or of any person claiming under her.

But if part of the sum borrowed on security of the wife's estate is the debt of the husband, and the remainder of the money is applied in payment of debts owing by the wife, *dum sola*, or to which the estate was liable previously to the marriage; in that case, it seems that the general rule is applicable, and that the wife will be a creditor upon her husband's estate for the proportion of the debt received by him.

The husband's assets would certainly be exonerated, if a clear intent existed at the time that the wife's estate was to be wholly and solely liable to the satisfaction of the loan or incumbrance. And this exemption will be inferred from a settlement of the estate contained in the mortgage deed, or made at the same time (*e*). The question to be determined is this:—was it the intention of the wife merely to pledge her property for her husband's necessities, or to give it to him irrevocably?

VIII. The numerous and elaborate formalities to be observed that a married woman (*f*) may le- Requisites for convey-

(*e*) 1 Bright's Hus. & Wife, 275.

(*f*) When a husband conveys his wife's land by a deed not binding upon her, the time will not run against her till her widowhood. 3 & 4 Wm. IV., c. 27, §§ 5 and 17. See 1 Bright's Husb. & Wife, 180.

ing realty  
by husband  
and wife.

gally (*g*) convey her estate or extinguish her rights or powers in realty, or money directed to be laid out in realty, are provided for by the 3 & 4 Wm. IV., c. 74, and the rules of Hilary Term 1834, amended by the rules of Trinity Term 1834, framed by the Court of Common Pleas (*h*). We will detail them in the language of the statute and rules.

A married woman (*i*), not being a tenant-in-tail, may, by an ordinary deed, dispose of her lands of any tenure, and money subject to be invested in the purchase of lands, and also may dispose of, release, surrender, or extinguish any estate (*j*) which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any money to be laid out in land, and also may release or extinguish any power vested in or limited or reserved to her in regard to any lands of any tenure, or any such money, or in regard to any estate in any lands of any tenure, or in any such money, and also may convey her contingent, executory, and future interests, and possibilities coupled with an interest, and also rights of entry (*k*), as fully and effectually as she could do if she were a *feme sole*; but such disposition will not be valid and effectual unless her husband concur (*l*) in the deed by which the same is to be effected, nor unless the deed be produced and acknowledged by her (except it be such a deed as may be executed by her in the character of protector, for the sole purpose of giving her consent to the disposition of a

(*g*) A wife's common law deed is null, unless her husband, by his disclaimer, give effect to it.

(*h*) Section 89.

(*i*) Section 77.

(*j*) A wife can thus bar her dower, which may have attached prior to 1st January, 1834.

(*k*) 8 & 9 Vct., c. 106, § 6.

(*l*) See *post*, p. 345, as to dispensing with a husband's concurrence.

tenant-in-tail), upon her executing it, or afterwards, as her act and deed, before a judge of one of the supreme courts at Westminster, or a Master in Chancery, or before two of the perpetual commissioners, or two special commissioners (*m*); but before such acknowledgment can be received, he or they must examine her apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consent to such deed, and unless she freely and voluntarily consent, he or they cannot permit her to acknowledge it; and then the deed will, so far as relates to her execution of it, be void (*n*).

When a married woman has acknowledged the deed, the Judge, Master in Chancery, or commissioners, taking such acknowledgment, will sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed, which memorandum (subject to any alteration which may, from time to time, be directed by the Court of Common Pleas), shall be to the following effect:—

This deed marked — [here add some letter or other mark, for the purpose of identification], was this day produced before me [or us], and acknowledged by —, therein-named, to be her act and deed; previous to which acknowledgment, the said — was examined by me [or us], separately and apart from her husband, touching her knowledge of the contents of the said deed, and her consent thereto, and declared the same to be freely and voluntarily executed by her.

Dated, &c.

(Official signature).

(*m*) § 79. As to the appointment and duties of the perpetual commissioners, see §§ 81 and 82. Special commissioners are appointed by the Court of Common Pleas in those cases where the wife resides abroad, or where, from ill health or “other sufficient cause,” she cannot attend the regular offices. § 83. The office of Master in Ordinary in Chancery is abolished by 15 & 16 Viet., c. 80.

(*n*) Section 80.



And he or they must also sign a certificate of the taking of such acknowledgment, to be written or engrossed on a separate piece of parchment; which certificate (subject to any alteration which may, from time to time, be directed by the Court of Common Pleas), shall be to the following effect:—

These are to certify, that, on the — day of —, in the year one thousand eight hundred and —, before me, the undersigned —, Lord Chief Justice of the Court of Common Pleas at Westminster, [*or before me —, one of the justices of the Court of Queen's Bench at Westminster; or before me the undersigned —, one of the Masters in Ordinary of the Court of Chancery; or before us, — and —, two of the perpetual commissioners appointed for the —, for taking the acknowledgements of deeds by married women, pursuant to an act passed in the — year of the reign of his Majesty King William the Fourth, intituled, "An Act" [insert the title of the Act]; or before us the undersigned — and —, two of the commissioners specially appointed pursuant to an act passed in the — year of the reign of his Majesty King William the Fourth, intituled, "An Act" [insert the title of the Act], for taking the acknowledgment of any deed by —, the wife of —,] appeared personally —, the wife of —, and produced a certain indenture, marked —, [*here add the mark*], bearing date the — day of —, and made between [*insert the names of the parties*], and acknowledged the same to be her act and deed: and I [*or we*] do hereby certify, that the said — was, at the time of her acknowledging the said deed, of full age and competent understanding, and that she was examined by me [*or us*], apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same (o).*

(*Official Signature.*)

This certificate, together with an affidavit made by some person verifying the same, and the signature

thereof by the party by whom the same shall purport to be signed, must be lodged with the officer of the Court of Common Pleas appointed to receive them, at his office in Serjeant's Inn, Fleet-street, London; and such officer shall examine the certificate, and see that it is duly signed, either by some Judge or Master in Chancery, or by two commissioners appointed pursuant to this act, and duly verified by affidavit, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and if all the requisites in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas (o). When this certificate is filed of record, the deed acknowledged, so far as regards the disposition, release, surrender, or extinguishment thereby made by any married woman, whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, takes effect *from the time of its being acknowledged*, and the subsequent filing of such certificate has relation to such acknowledgment (p).

The officer with whom these certificates are lodged keeps an index of them, containing, alphabetically, the names of the married women and their husbands, and the dates of such certificates, and the deeds to which they respectively relate. This officer will furnish a copy of any certificate filed, which copy is receivable in evidence as proof of the fact (q).

If a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have

(o) § 85.

(p) § 86.

(q) §§ 87 and 88.

been found such by inquisition (*r*) or not, or shall, from any other cause, be incapable of executing a deed, or of making a surrender of lands held by copy of court-roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or *from any other cause whatsoever*, the Court of Common Pleas may order, upon a summary application of the wife to such Court, and upon such evidence (*s*) as to it shall seem meet, a dispensation of the husband's concurrence, and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her, shall (but without prejudice to the rights of the husband as then existing independently of this act), be as good and valid as they would have been if the husband had concurred: Provided always, that this clause shall not extend to the case of a married woman, where, under this act, the Lord High Chancellor, lord-keeper, or lords commissioners for the custody of the Great Seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or her Majesty's High Court of Chancery, shall be the protector of a settlement in lieu of her husband (*t*).

(*r*) *i.e.*, By proceedings in Chancery.

(*s*) An affidavit is required to be made by the wife.

(*t*) § 91.

The Court has dispensed with the husband's authority in the following cases :—Absconding, and his residence unknown ; absconding after an act of bankruptcy ; residing with a mistress for a long time ; mutual separation, and he had declined to join without being paid ; but temporary absence will not induce the Court to grant a dispensation (*u*).

These are the rules of Court above referred to (*v*) :—

Where any acknowledgment shall be made by any married woman of any deed under and by virtue of the just-quoted act, before commissioners appointed under it, one at least of the said commissioners shall be a person who is *not in any manner interested* in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned.

Before the commissioners shall receive such acknowledgment, they, or in case one of them be interested or concerned, then such one of them as shall not be so interested or concerned, must inquire of every married woman separately and apart from her husband, and from the attorney or solicitor concerned in the transaction (*w*), *whether she intends to give up her interest in the estate to be passed by such deed, without having any provision made for her in lieu of, or in return for, or in consequence of, her so giving up such interest* ; and where such married woman, in answer to such inquiry, shall declare that she intends to give up such her interest without any

(*u*) 2 Bright's Husb. and Wife, 48.

(*v*) *Ante*, p. 342.

(*w*) This enquiry should not be made, where the property is sold under the compulsory provisions of an act of Parliament. *Re Foster*, 7 C. B. 120.

provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment; but if it shall appear that it is intended that a provision is to be made for any such married woman, then the commissioners shall not take her acknowledgment until they are satisfied that such provision has been actually made by some deed or writing produced to them, or if such provision shall not have been actually made before, then the commissioners shall require the terms of such intended provision to be shortly reduced into writing, and shall verify the same by their signatures in the margin, at the foot, or at the back thereof.

The affidavit verifying the certificate, shall (except in such cases where the acknowledgment shall be taken elsewhere than in England, Wales, or Berwick-upon-Tweed,) be made by some practising attorney, or solicitor of one of the Courts of Westminster, or one of the Counties Palatine of Lancaster or Durham; and that in all cases it shall be deposed, in addition to the verification of the certificate, that the deponent, or, if more than one person join in the affidavit, that one or more of the deponents, knew the person or persons making such acknowledgment, and that at the time of making such acknowledgment, the person or persons making the same, was or were of full age and competent understanding; and that one, at least, of the commissioners taking the acknowledgment, to the best of the deponent's knowledge and belief, is not in any manner interested in the transaction, giving occasion for the taking of the acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or

agent so interested or concerned; and that the names and residences of the said commissioners, and also the place where such acknowledgment is taken, shall be set forth in such affidavit; and that previously to such acknowledgment being taken, the deponent had inquired of such married woman, (or, if more than one, of each of such married women), whether she intended to give up her interest in the estate to be passed? and also the answer given thereto; and where any such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision; the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true. And where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or, if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing, he verily believes has been produced to the said (judge, master, or) commissioner.

The affidavit must state the parish, or several parishes, or place, or several places, and the county or counties, in which the several premises wherein any such married woman shall appear to be interested, shall by deed be described to be situate.

The affidavit shall be in the form following, subject to such variations as the circumstances of the case may render necessary; or such affidavit may be made, where it is found convenient, by one of the commissioners, with such variation in the form thereof as may be necessary in that behalf.

This is the form of affidavit :—

A. B., of —, in the — of —, gentleman, one of the attornies [or solicitors] of the Court of —,

maketh oath and saith, that he knows —, the wife of —, in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said —, and the certificate signed by the judge [*or* master, *or* by —, of, &c., and —, of, &c., the commissioners in the said certificate mentioned], on the day and year therein mentioned, at —, in the — of —, in the presence of this deponent, and that at the time of making such acknowledgment, the said — was of full age (*v*) and competent understanding, and that the said — knew the said acknowledgment was intended to pass her estate in the premises, respecting which such acknowledgment was made: [And this deponent further saith, that to the best of this deponent's knowledge and belief, neither of the said commissioners is [*or* the said —, *or* the said —, one of the said commissioners is not] in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein, as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned]: And this deponent further saith, that previous to the said — (the married woman) making the said acknowledgment, he this deponent inquired of the said — (the married woman) [*or, if more than one, of each of them the said — and — (the married women)*], whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of, her so giving up her interest in such estates, and that in answer to such inquiry the said — (the married woman) declared that she did intend to give up her interest in the said estates, without having any provision made for her in lieu of or in return for, or in consequence of her so giving up such her interest; of which declaration of the said — (the married woman), this deponent has no reason to doubt the truth, and verily believes the same to be true; [*or* declared that a provision was to be made for her in consequence of her giving up such her interest

This is to be omitted when the acknowledgment is taken by a judge or master.

(*v*) If this cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person in whose presence the affidavit shall be made shall consider competent so to do. Reg. Gen., Trin. T. 1834.

in the said estates: And this deponent further saith, that before her acknowledgment was so taken, he was satisfied, and does now verily believe that such provision has been made by deed or writing, or that the terms thereof have been reduced into writing, and that such deed or writing has been produced to the said judge, master, or commissioners]; And lastly, this deponent saith, that it appears by the deed acknowledged by the said —, (the married woman), that the premises wherein she is stated to be interested are described to be in the parish or place of —, [*or parishes or places of — and —*], in the county of —, [*or counties of —*], (*as the case may be*).

Sworn, &c.

(Signed.) A. B.

N. B.—When the whole of the facts cannot be spoken to by one deponent, variations may be made to enable more than one deponent to state their respective parts of the affidavit.

This affidavit must be sworn before a Judge of the Court of Common Pleas, or a Commissioner appointed for taking affidavits in this Court,<sup>†</sup> and duly stamped.

The certificates and affidavits verifying the same must, *within one [lunar] month* from the making of the acknowledgment, be delivered to the proper officer, who shall not after that time receive the same without the direction of the Court or a Judge (*a*).

The above statute excepts the case of a married woman being a tenant in tail. Where she is such a tenant, and desires to bar the entail, the deed must be enrolled in Chancery, according to the directions of the act: and should such deed operate as a transfer of her beneficial interest, it must also be duly acknowledged by her as just explained. So that enrolment and acknowledgment are, in such a case, both requisite.

(a) The rules fixing the fees and expences are omitted.



Protector  
of the set-  
tlement.

But where she has but a mere personal office, as protector of the settlement under this statute, whose consent becomes necessary in order to enable the tenant-in-tail to bar his entail and acquire the fee-simple, then being such protector, she may, either alone or jointly with her husband, give her consent as a *feme sole* (b), and inrolment, without acknowledgment, is alone requisite.

Appointor  
of a power.

As to interests settled to the wife's separate use, and to powers of appointment vested in her, the act neither disables a married woman from dealing with her separate property, or from exercising her powers, by other forms than those which it has prescribed, nor enables her by such forms, to effect those objects, for the legislature expressly disclaims all interference with powers vested in married women (b).

A wife may execute powers coupled with an interest, as though she were a *feme sole*.

As examples, the following powers may be so exercised:—

If by deed or will, the wife take as tenant for life, with a general power of appointing the fee, she may convey the estate by an execution of the power, the appointee taking the estate under the deed or will. If the wife be tenant for life, with remainder to such uses as she shall appoint, and in default of appointment to herself in fee, she alone may by appointment, defeat her own remainder, although she cannot, by an instrument independent of her power, convey away her remainder, without the concurrence of her husband.

Again, if she be tenant for life, with a power of leas-

(b) Section 45.

(c) Section 78.

ing, she alone may exercise the power; but she cannot without a statute-deed grant such a lease, if she do not strictly pursue her power.

When a power is given to an unmarried woman, who afterwards marries, or to a married woman who survives her husband, and marries again: in such cases she may execute the power, and the concurrence of her husband is not necessary.

And the appointment will be good, although the wife is not expressly empowered to appoint "during coverture."

But a power given expressly to a woman "being sole," cannot be exercised by her during coverture. And where a power is confined to a particular coverture, it can, of course, only be executed during such coverture.

When a *feme covert* has not actually conveyed her estate, but previously to her marriage entered into a contract to convey to certain uses, that contract (even so far as it was a stipulation for her own benefit) will be considered as binding against her own heirs, in the same manner as the contract of any other person, Equity holding that her heir was bound as she was bound herself. But a mere contract to convey, entered into after marriage, is void, whether made for her own benefit or that of other persons.

When a wife takes an express estate for life in a fund, with a power to appoint the principal after her death, she can only dispose of the capital by an execution of her power, which may be immediate, if the power authorise a deed; but if it require the appointment to be made by will only, the disposition cannot take effect till after the appointor's death, and the wife is precluded from making an immediate disposal of the fund.

An express provision that in the event of the wife surviving, the property shall be absolutely her own, implies an exclusion of a power of so appointing it during the coverture, as that it shall not in that event belong to her.

Where an appointment by the wife is necessary, the trustees acting on her behalf need not join as parties to it, unless their concurrence be expressly required by the power.

And this distinction equally prevails, when the wife is *cestui que trust* of her real property, the legal estate being outstanding; because the same rule is applicable to a trust as to a legal estate, equity following the law.

If, then, the wife be *cestui que trust* in fee of real estates, and she and her husband, by articles in writing before marriage, agree that she shall have power to dispose of the trust property; her disposition will be good against her heir, as it is where the wife is seised of the legal estate. But if the agreement be after marriage, then, from the analogy between legal and equitable estates, such a contract would not have the effect of empowering the wife to appoint the absolute trust to the prejudice of her heir, who would be entitled to it at her death, if not disposed of by her in such a mode as by law is allowed to married women to pass their estates during coverture.

With respect to real estates which may accrue to the wife during the marriage by deed or will, if no trustees be interposed, and the deed or will express that the lands shall be to her separate use, and that she shall have power to dispose of them; although she take the legal fee, she may nevertheless appoint it, which will bind her heir and convert him into a trustee for the appointee.

A specific performance of an agreement to make a lease entered into by the wife, who was tenant for life, for her separate use, with a leasing power, will be enforced against her (a).

To establish in evidence the will of a married woman, made in execution of a power, probate of it in the Ecclesiastical Court is first necessary, in order to confirm, judicially, its testamentary nature; but the probate should be limited to the property comprised in the power.

IX. With regard to land limited to the wife, *and her heirs*, during the life of a third person (technically called a freehold *pur autre vie*), it will go to her heir-at-law, upon her death, and the husband would be excluded; but should such land be limited to the wife, *her executors and administrators*, or to the wife alone, without adding her representatives, either real or personal, it will then devolve upon the husband-survivor for the remainder of the life of such third person, who is styled the *cestui que vie*, on his taking out letters of administration to his deceased wife's effects, subject, however, to the claims of the wife's ante-nuptial creditors.

X. The 1 Wm. IV., c. 65 (which repealed the 29 Geo. II., c. 31, containing similar provisions), has removed the disability of coverture, where the wife is seised or possessed of leasehold property for lives or for years, so as to enable her, or any other person on her behalf, to surrender the old and take new leases. It enacts (b), that in all cases where a married woman was or should

(a) *Dowell v. Dew*, 1 Y. & C. C. C. 355.

(b) § 12.

The difficulty which existed in regard to the passing of the *equitable* interests of married women in copyholds, is wholly removed by the 3 & 4 Wm. IV., c. 74, which not only enables married women to pass such interests by deed acknowledged, but directs, that on their surrender of such interests, they shall be separately examined in the same manner as if the estate had been *legal*, declaring such surrenders, as well as all surrenders antecedently to the act, and similarly circumstanced (the separate examination having been taken), to be valid (*e*).

Curtesy.

A husband's title to curtesy (*f*) out of his deceased wife's copyholds, altogether depends upon special custom, which governs it in its quality and extent, and which must be very strictly construed and followed.

Mr. Watkins was of opinion (*g*) that where the custom does not expressly require that there should be issue, the birth of issue is not essential to give the husband a title. Mr. Serjeant Scriven (*h*), on the other hand, apprehends that when curtesy is allowed, if the custom be silent as to issue, the rule of the common law would prevail, and the curtesy would not arise to a childless father.

While a husband is entitled to his curtesy of a trust in copyholds in favor of his wife, his widow under the same circumstances, is precluded from claiming her freebench out of her husband's equitable copyholds.

Although a husband cannot grant a copyhold to his

(*e*) Section 90.

(*f*) Formerly the husband's estate in his wife's copyholds was termed his dower, equally with the widow's estate in her husband's lands. It was also termed dower by the curtesy. It is now mostly distinguished by the name of curtesy.

(*g*) 2 Cop. 103.

(*h*) 1 Cop. 80.

wife, nor she to him, they being but one person in law ; yet the husband and wife (if the custom authorise her to surrender) may surrender a copyhold, the one *to the use* of the other ; because then, neither the husband nor the wife makes it *immediately* to the wife or husband, but by a circuit, *i. e.*, by a surrender to the lord of the manor, who thereupon admits the wife or husband.

XII. While husband and wife cannot, by any common law deed, give directly any property to one another, because this law treats them as one undivided person ; yet by a deed operating by virtue of the Statute of Uses (*i*), giving the property to a third person to the use of the wife or husband, this may be effected, and the husband or wife enjoy the legal estate accordingly, without any intervening trustee, thus cleverly evading the strict rule of the ancient common law.

Grants between husband and wife.

They may, however, appoint to one another, under a power of appointment ; but should the appointment be defective, then, this distinction prevails, that if it be made by the husband to the wife, equity will make it good, and cure the defect ; but not so, if made by the wife to the husband (*j*), for then the husband claims as a volunteer, but if he can make himself out a purchaser under any marriage-contract, then, perhaps, the Court would assist him (*k*). And the following transactions will be valid :—a purchase by the husband in his wife's name, or in their joint names, for the wife surviving will be entitled, unless the property being personal, he sold it during his life ; securities for money lent by the husband,

(*i*) See another sensible operation of this celebrated act, *ante* p. 6.

(*j*) *Tollet v. Tollet*, 2 P. Wms. 489.

(*k*) 2 Atk. 415.

taken in the names of himself and wife; a transfer of stock into her name, or their joint names; improvements made by him upon his wife's estate. They may also devise or bequeath by will to one another, and confer gifts *mortis causâ*.

But although, with the exceptions just stated, immediate gifts to each other are void at law, yet in equity they will be validated, provided they are fair and reasonable (*l*).

Husband  
and wife  
take pro-  
perty by  
entireties.

XIII. This is a peculiar tenancy, and arises when property is conveyed or devised to a husband and wife jointly during coverture, each is seised *per tout et non per my*: *i. e.*, of the whole estate, and neither of a part; they are, therefore, tenants by entireties; for a strict joint-tenancy cannot be created between them during marriage, in consequence of the legal unity of their individualism. There is no survivorship of this tenancy, for the whole is in each tenant during the marriage as much as it is in the survivor, after the decease of the other; the survivor takes the whole of the estate by the original limitation, and not by the happening of any subsequent event, as a new acquisition.

An estate of this indivisible quality is an exception to the rule that husband and wife are one person in law, for if that were the case, the husband might then convey away the whole estate alone; but this he cannot do, for the wife must concur, by a deed duly acknowledged under the 3 & 4 Will. IV., c. 74 (*m*), in order to bind her to the transaction, should she survive him.

But an alienation by husband alone, in his wife's life-

(*l*) 2 Bright's *Husb. & Wife*, 29—33.

(*m*) See *ante*, p. 341.

time, will, in the event of his surviving her, be good for the interest both of himself and his wife. The husband alone can assign a term for years in entirety, so as to bind his surviving wife. The husband's treason or felony will not forfeit his wife's interest in this estate.

When the two tenants by entireties for life convey to a stranger, he takes the whole estate for the survivor's life (*n*).

If an estate be granted to three persons, as joint-tenants, two of whom are husband and wife, these take one moiety as tenants by entireties, and the third person the other moiety; and to enable him to take by survivorship, he must outlive both husband and wife.

It is the legal notion of the unity of two persons, who are husband and wife, which gives occasion to the construction of an *entirety* of interest on their tenancy.

In point of fact, and agreeably to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and, accordingly, when a grant is made to a husband and his wife and a third person, *as tenants in common*, each of these three persons will severally have a separate and distinct interest in, and tenancy of, a third part.

Also, when lands are granted to them, *as tenants in common*, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons would do.

When an estate is limited to a husband and wife and a third person, jointly, then, as against the third person, the husband and wife have, in point of ownership, a moiety only; and of this moiety, and also of the other

(*n*) *Doe v. Wilson*, 4 B. & A. 311.



moiety, in case it should become their property by survivorship, the husband and wife will be tenants by entireties; and as to the whole, the husband and wife and third person will be joint-tenants.

When husband and wife are tenants by entireties in fee, and the wife survives, so that she becomes solely seised, and dies intestate, her heir, it should seem, would take the fee by descent, and the heirs of the blood of the husband, merely as such, would be excluded.

But it is more difficult to ascertain what would be the course of descent of a fee taken by the heir of their two bodies, under a descent to him of an estate-tail to his father and mother, and the heirs of their two bodies, and which he has enlarged into a fee-simple. He took by descent from his father and mother; each of his parents was equally the purchasing ancestor. The difficulty is to decide whether the heir of the blood of each parent, or the heir of the blood of the survivor of them, considered as a surviving joint-tenant, should be admitted into the succession. The probability is, that the decision would, from analogy, be in favor of the heir of the blood of the survivor.

A gift to a man and woman who afterwards intermarry does not make them tenants by entireties. They are joint-tenants both before and after marriage, and the husband alone may in that case create a severance by selling his moiety.

Peculiarity  
of a ten-  
ancy in tail  
after the  
possibility  
of issue is  
extinct.

XIV. This estate arises out of a special entail, when the express condition has become impossible by reason of death. Thus, if an estate be granted to a husband and wife, and their children, male or female, if either of

them die, and there be no children of the marriage, the survivor is denominated a tenant-in-tail after possibility of issue extinct; and even if there have been children, yet if they die without leaving children, then the surviving parent is also such a tenant; and also if an estate be entailed upon a man and his issue from a particular wife, if she die without issue, the interest of the husband becomes reduced to a tenancy-in-tail after possibility of issue extinct. Only a donee in tail special can become such a tenant, for if the entail be general, such a tenancy can never arise; for whilst he lives he may have issue, the law not admitting the impossibility of having children at any age. As an estate-tail is originally carved out of a fee-simple, so this estate is carved out of a special entail.

There may be tenant-in-tail after possibility of a remainder as well as of a possession. And thus, if a lease for life be made, remainder to husband and wife in special tail, and the husband die without issue, now is the wife tenant-in-tail after possibility of this remainder; and if the tenant for life surrender to her, as he may, (an estate for one's own life being greater than an estate for the life of another), now is she tenant-in-tail after possibility in possession (o).

This estate must be created by the act of God—death; it cannot arise out of any arrangement of parties, but *ex dispositione legis*, and not *ex provisione hominis*; if, therefore, an estate be given to husband and wife, and the heirs of their bodies, should they afterwards be divorced *causâ præcontractûs vel consanguinitatis affinitatis*, their estate is converted into a joint estate for life, and not into a tenancy in tail after possibility of

(o) *Lewis Bowles's Case*, 11 Co. 81 a.

issue extinct, because their estate has been altered by their own act, and not by the act of the Deity. Such a tenancy can endure only for the life of the surviving donee in tail, who has no power under the 3 & 4 Wm. IV., c. 74, § 18, to bar the remainders or reversion over; and if he convey his interest to another, such other will be only a tenant *pur autre vie*, and would be punishable for waste.

A wife's  
last will.

XV. A wife may make a will, with her husband's particular permission, of her unsettled personal property, for such permission waives his marital right to it. He should consent to such will, when it is proved, and therefore his previous permission to her is revokable at any time before probate. Should he once act under the will, or agree to it after her death, he cannot afterwards retract. Should he die before the wife, it is a partial revocation of such will, and unless she make another, she will be held to have died intestate. We say a partial revocation, because such a will will be valid, so far as her separate estate is concerned, or so far as she was empowered to make a will without his assent, as executrix, or under a power. In all such cases, however, it will be better to make a new will.

Effect of a  
marriage  
on the  
prior acts  
of the hus-  
band and  
wife.

XVI. After a woman has entertained a proposal of marriage, or has engaged herself to enter into that holy state, no voluntary (*p*) disposition of her property, by

(*p*) But should there exist an obligation, either legal or moral, to make the disposition, it will be sustained. In *Blanchet v. Foster* (2 Ves. sen. 264), Lord Hardwicke said, a debt contracted for a valuable consideration, though concealed from the husband, was no fraud upon the marriage, and he refused the husband relief against a bond, which had been

way of preserving it from the marital rights of her intended spouse, will be valid, if made without his knowledge or assent, even though he be ignorant of the existence of such property (*g*); he, whether infant or adult, must be a party to such a disposition, in order to validate it, unless, indeed, his conduct towards her, as inducing her to cohabit with him before marriage, justified the concealment (*r*). An engaged woman entertaining such a distrust of the man to whom she is about to commit her happiness, as to secure herself in so secret a manner, bids fair to render her nuptials an unconfiding, if not wretched, union; she had better pause! for the

granted by the wife on the eve of marriage, to her aunt for valuable consideration. In *Hunt v. Mathews* (1 Vern. 408), a widow had executed a deed, assigning the greater part of her estate to trustees, as a provision for her children by her deceased husband; her after-taken husband got the deed into his possession, and suppressed it; but the Master of the Rolls decreed him to pay the money, observing that a widow might, with a good conscience, before she put herself under the power of a second husband, provide for the children she had by the first. In *King v. Cotton* (2 P. Wms. 674), Lord King said, it was a very reasonable thing for a widow, while it was in her power, to make a provision for her children by her former husband; and the same sentiment was echoed by Lord Langdale, M. R., in *England v. Downe* (2 Beav. 528). But even then the future husband must be dealt fairly with. Accordingly, where a widow, during the treaty for a second marriage, intimated her intention to settle her fortune for the benefit of her daughter by the first marriage, in consequence of which the treaty was broken off, and afterwards married the same man, concealing from him the fact that she had made the settlement, and allowing him to entertain hopes of enjoying her fortune, the settlement was set aside (*Howard v. Hooker*, 2 Rep. in Chan. 42). A woman in such circumstances can only reconcile all her moral duties by making a proper settlement on herself and her children, with the knowledge of her intended husband.

(*g*) *Goddard v. Snow*, 1 Russ. 485.

(*r*) *Taylor v. Pugh*, 1 Harc, 608.

law would treat as a legal fraud upon the husband, any such clandestine disposition, and set it aside accordingly.

c If a husband knew before marriage, that a settlement had been made, he cannot then set it aside, nor can he, if he have recognised such settlement after his marriage.

. But where a woman has not entertained any such proposals, and is not engaged, then she has an undoubted right to dispose of her property as she pleases, even though such an ante-marital disposition be in contemplation of marriage, generally, at a future period (s).

If a woman have entered into an incomplete contract before marriage, the marriage prevents her from completing it, so as to charge her husband.

Every will made by a man or woman is revoked by his or her subsequent marriage, unless it has been made in exercise of a power of appointment, under which the property appointed would not, in default of the exercise, pass to her heir, or representative, or next of kin (t).

If a woman, having made a will before 1st January, 1838, afterwards marry, the marriage is a revocation of it, not only because it is her own act subsequently to marry a husband, but also because the construction that marriage is only a revocation in case the wife shows her intention that it should be so, might be disadvantageous to her, since the husband, by the exercise of undue influence, might oblige her to revoke or continue the will as best suited his interest.

While marriage extinguishes at common law the legal obligations in which the husband and wife were bound to one another prior to their marriage, since they cannot sue one another at law, it has not that effect in equity,

(s) See the extraordinary case of *Strathmore v. Bowes*, 1 Ves. jun. 22.

(t) 1 Vict., c. 26, § 18.

where they may sue each other, and therefore, equity enforced a bond given by a wife before matrimony, whereby she obliged herself, in consideration of the expected marriage, to convey her real property to her intended husband (*u*).

Of course, marriage will not extinguish a debt owing by the husband to the wife as executrix or administratrix of another, for the wife is then simply a trustee, to protect the interests of third parties; nor will his prior obligation be released, where it is to be performed after his death, as a bond to assign to her a sum of money after his decease, for such an obligation is only suspended during marriage, and is not thereby extinguished (*v*), although no right of action arises upon it, during such period.

When, previously to a marriage, a bond was given by the husband to a person in trust for his intended wife, so that she became a *cestui que trust*, or equitable beneficiary of such bond; or, if a wife, *dum sola*, lend money to her intended husband, and take a bond for its repayment in the name of her trustee, marriage will not, in either case, release the bond at law, for in both cases, the legal right to sue is in the trustee, and there is no inconsistency between the right of action and the law arising out of the relation of marriage (*w*).

As a broad rule, a wife cannot be a partner with others in a trade or commercial speculation, and if she be entitled to any shares in banking houses, and other mercantile concerns, her husband becomes entitled thereto, and a partner in her stead.

The marriage of a *feme sole* partner dissolves a part-

(*u*) *Cannel v. Buckle*, 2 P. Wms. 243.

(*v*) *Clark v. Thomson*, Cro. Jac. 571; *Cage v. Acton*, 5 T. R. 384.

(*w*) See, however, 2 Rep. H. & W. 78 n.

nership as to her, by simple operation of law; for by marriage, her unsecured and unseparated personalty belongs to her husband absolutely, and she is incapable of binding herself, during the coverture, by any continuing contract (x).

As to the validity of a wife's contracts, and her husband's liability therefor.

XVII. A wife cannot enter into any contract or obligation, so as to bind either her husband or herself, unless by his assent, for the law deems a husband the uncontrolled principal of the family, his authority is, therefore, necessary in order to render him responsible. The husband's assent to his wife's contracts needs not to be obtained, either at the time, or prior thereto: he may affirm them after their creation, and will thus pledge himself to their performance. In order, then, to render a wife's contracts nugatory, the husband should, so soon as he knows of them, express his dissent to them, for a long silence after knowledge, indicates an acquiescence in, and an adoption of, them.

A wife cannot receive or discharge money owing either to her husband or herself; all persons dealing with her alone, deal at their own peril; they should always take care that the husband be a party in such dealings.

But a wife may act as her husband's agent, and her transactions under such an authority will be binding on him. It behoves, however, those who transact business with her, to ascertain the extent of this authority, and that the business is justified by it, for beyond the verge of such authority, the husband is not, of course, responsible.

With regard to a wife's *domestic contracts for the use of the family*, it is always presumed that they are made

(x) *Nerot v. Burnand*, 4 Russ. 247; Story on Partnership, 13, 14.

with the husband's authority. But this presumption is rebuttable by the husband shewing that he expressly, with the previous knowledge of the creditor, refused his authority; or that the articles supplied were manifestly extravagant, and beyond his apparent condition in life; he must not, however, allow his wife to retain and use the things, after he has become acquainted with her unjustifiable purchase; and previous purchases of a similar nature having been made with his knowledge, will raise presumptively his authority to incur a subsequent expenditure (*x*).

The husband's consent to his wife supplying herself with *necessaries* (*y*) suitable to his own station in life, is implied, whether she lives with him, or apart under circumstances which justify her in so doing, provided she be chaste, since a husband is bound to maintain and protect his wife, seeing that he acquires all her available property (if any) by force of his marital right. A wife, however, has no direct mode of compelling her husband to maintain her, if he unjustly refuse to do so; but she may either resort to the parish for relief (*z*), or apply to the Ecclesiastical Court for alimony (*a*). Any person supplying a wife with necessaries, may sue her husband therefor, even although the husband has refused to provide them, but such person must prove that the

(*x*) Bell's *Husb. & W.* b. III., c. III., p. 19.

(*y*) The following are deemed necessaries:—Board, lodgings, suitable apparel, medicines, medical attendance, reasonable expences during illness, furniture, &c. The jury decides the question,—What are necessaries? Where a husband is liable, the price of articles supplied to the wife up to the date of the record, *i.e.*, just before trial, may be recovered from him. *Joll v. Fisher*, 5 C. & P. 514.

(*z*) See *ante*, p. 133.

(*a*) See *post*, c. VI.



wife was in a condition which rendered the supply necessary (*b*).

If a wife purchase necessaries, and pay for them with money borrowed from a stranger for the purpose, although at law (*c*) such a loan could not be recovered from her husband; yet, upon proof of the money having been properly applied, equity will interfere, and allow the creditor to stand in the place of the persons who actually supplied her with the necessaries, to receive satisfaction against the husband, to the value of the articles proved to have been furnished to the wife (*d*).

The only grounds upon which a husband can resist his liability for necessaries are (1), that he has actually supplied his wife with necessaries, or that he has paid to her the agreed allowance for maintenance or alimony, during the period when the necessaries were furnished; or (2), that the wife is otherwise provided for by a competent provision from other sources; or (3), that she has voluntarily and notoriously quitted his house, without anything in his conduct obliging or justifying her in taking such a step; or (4), that she has left him to pursue an adulterous connection (*e*), unless, indeed, he have been kind enough to have forgiven the heinous

(*b*) Where cohabitation continues, a party dealing with the wife has no enquiry to make, and need only exercise his own prudence and discretion. On the other hand, where cohabitation has ceased, then the party must not only exercise his prudence and discretion, but must, previously to dealing, enquire into the situation and circumstances of the wife, at his peril.

(*c*) *Earle v. Peale*, 1 Salk. 387.

(*d*) *Harris v. Lee*, 1 P. Wms. 483.

(*e*) But her adultery *during* their living together will not relieve him from liability.

offence, and received her back again (f); or, (5), that the debt contracted is extravagant, altogether transcending his rank, station, condition, and circumstances; or (6), that he has expressly cautioned the creditor; or his servants, not to credit his wife; but a general or public notice to such an effect, not proved to have been seen by the particular person, will not, during cohabitation, protect the husband.

Where a wife has been compelled to quit her husband's house, as where he has turned her out of doors, or threatened her with restraint, or behaved indecently, or put her in fear of him, then she takes with her an implied authority to render him liable to pay for proper necessaries.

The following judgment, however, is somewhat astounding, but is, at the same time, an authority:—~~\_\_\_\_\_~~  
*Mansfield* (g) decided, that conduct insulting to the delicacy of a wife, by placing a mistress at the head of her table, would not support an action for necessaries supplied to the wife, who had in consequence quitted the husband's house, and that nothing short of actual terror and violence would justify the action; otherwise, suits for alimony and divorce *à mensâ et thoro* would be superseded.

(f) An instance may occur, in which the wife's adultery will not discharge her husband's obligation to maintain her. For should a wife carry on adultery in her husband's house, unknown to him, yet, so soon as he has become acquainted with it, if, instead of turning her out of his doors publicly, he himself leave his own house, and permit her to continue in possession of it with the adulterer; then the implied authority of the husband to his wife to purchase necessaries, is not determined until their separation, and her misconduct become notorious. *Norton v. Fagan*, 1 Bos. & Pull. 226.

(g) *Horwood v. Heffer*, 3 Taunt. 421.

But Lord *Ellenborough* (*h*) said, that “the husband was bound to afford his wife the means of support, if by the indecency of his conduct he precluded her from living with him.” The same great Judge also held, (*i*) that “when a husband, by bringing another woman under his roof, renders his house unfit for the residence of his wife, who thereupon removes, and lives apart from him, he is bound to provide her with necessaries during the separation.”

Lord C. J. *Best* decided (*j*), not only that a woman was not bound to wait till actual violence was committed, and that if there were reasonable ground for apprehension, she might fly from her husband; but also said, that the doctrine in *Horwood v. Hoffer*, that a woman was not justified in leaving her husband’s house when ~~he~~ placed a profligate woman at his table, could not be law!

Where a wife’s separation is her own voluntary act, uncompelled by any behaviour on her husband’s part, yet if she offer, under such circumstances, to return to her husband’s house, it would seem that he is bound to receive her; and should he refuse, she would thereafter have an implied power from him to purchase necessaries (*k*).

It may, however, be doubted whether this opinion is quite correct; for since the wife, by her own voluntary act, discharged her husband from his obligation to maintain her, by unnecessarily quitting his house without his consent, it is but reasonable that his liability to support

(*h*) *Liddlow v. Wilmott*, 2 Stark. 87.

(*i*) *Aldis v. Chapman*, 1 Selw. N. P. 298.

(*j*) *Houlston v. Smith*, 3 Bing. 127.

(*k*) *Manby v. Scott*, 1 Keb. 429.

her afterwards should not be revived by implication, without his express concurrence in consenting to his wife's return to his protection, or until their cohabitation be restored either by mutual agreement, or by the sentence of an Ecclesiastical Court (*l*).

But when a wife has voluntarily withdrawn herself from her husband's protection under circumstances which do not justify her in so doing, as where she has eloped with an adulterer, or where she has committed adultery, after having quitted her husband's house even under justifiable circumstances, the husband would neither be liable upon her contracts nor bound to admit her into his house again, should she even offer to return; but were he to receive her to his grace again, his responsibility would be renewed, and perhaps the world would call him very, very kind.

A wife may purchase property, but her husband may repudiate it, and sue the seller of it for the purchase-money. The purchase will be effectual during the marriage, should the husband be silent upon it; but, after his death, the wife may waive the purchase without assigning a reason; and this even if the husband have assented to it. If the purchase be made by a wife, pursuant to her husband's authority, he is bound by it.

A husband is not liable, if the creditor trust to the wife, or make out the account in her name alone, or draw a bill of exchange for her to accept, or rely on the credit of a third person, or agree not to charge the husband. And a husband's executors are not liable for goods supplied to the widow, although her husband's death was not known.

Of course, a husband is liable to discharge the ex-

(*l*) 2 Bright's *Husb. and Wife*, 13.

penses of his deceased wife's funeral (*o*) ; and if he do not do so, any person who voluntarily employs an undertaker, and pays him for performing such funeral, is entitled to recover the sum so expended from the husband in an action for money paid (*p*).

Responsibility of a wife.

XVIII. A married woman (unless she be a Queen-Consort), can neither sue nor be sued alone upon her contracts; the liability devolving upon her husband, he must be joined with her, when it is necessary to sue her (*q*). Where, then, a person has credited her, pursuant to a contract, upon which the husband is not liable, such a person is remediless, for the wife cannot be sued. *Caveat venditor* should be the maxim of those crediting a married woman (*r*).

Marriage, however, does not interfere with the liability of a married woman for debts or obligations duly contracted by her before or during the coverture, so far as that liability can be made effectual out of any estate of which she may be possessed to her separate use.

To the general rule, that a married woman cannot make a contract binding on herself, as though she were a *feme sole*, so as to sue or be sued upon it, there are these exceptions:—

(1). Where a wife fraudulently conceals her marriage,

(*o*) See *ante*, p. 122.

(*p*) *Ambrose v. Kerrison*, 20 Law Jour. 25.

(*q*) See *post*, 381, pl. XXII. of this chapter.

(*r*) In *Smout v. Ilberry* (10 M. & W. 1), a wife, in the absence of her husband, who had gone abroad upon business, ordered necessaries for the use of herself and the family; the husband died abroad, and the wife was held not to be liable for the necessaries supplied upon her order for the period between her husband's death and the time at which the fact became known to her. And see *Marshal v. Rutton*, 8 T. R. 547.

and deals with others as though she were unmarried : she is then liable in the same way as an unmarried woman, and the Court will not protect her against any proceedings of her creditors ; she must take the consequences of her own deception.

(2). With regard to the husband's absence from this country, the following distinctions are important :—if his absence be involuntary, as banishment for life, he is deemed dead in law (*civiliter mortuus*), whereupon his wife is in a state of legal widowhood, and then contracts with all the liability of an unmarried woman ; but if his absence be voluntary, his wife cannot be sued upon her contracts made during his absence.

(3). Where the husband went abroad, and has not been heard of for seven years ; then his death is presumed, and she is deemed widowed ; but, of course, this presumption may be rebutted by satisfactory proof of his actual existence.

(4). It would appear that where the husband is an alien enemy, and has never at any time been in this country, his wife is treated as a *feme sole* ; but not so where he is an alien friend, for it is then his own choice to stay abroad.

(5). Where the wife carries on a trade separately from her husband, and on her own sole account, according to the custom of and within London. She may then sue and be sued in that city's courts as a *feme sole* merchant ; and although the husband must be made a nominal party to the proceedings, for the sake of conformity, yet she is held to be the real party in interest, for the judgment does not affect the husband, and he cannot be made a bankrupt in respect of the liabilities of such trading, although she can.

A wife may also carry on a trade with her husband's consent for her separate benefit, as a *feme sole*.

When the agreement is made previously to the marriage, since the consideration is valuable, the transaction will not only be obligatory upon the husband, but also binding upon his creditors. Where the agreement originates during the marriage, it will be void against his creditors, but good against himself. She cannot, however, deal with bills of exchange or promissory notes in her own name, but may in that of her husband, as his agent, and she is not liable to be made a bankrupt (s).

Where the husband permits the wife to have and make profit of certain articles of his property, either for her own use, or in consideration of her supplying the family with particular necessaries, or when he makes to her a yearly allowance for the keeping of his house, the profits in the first case, and the savings in the second, have in equity been considered as the wife's own separate estate, although at law, upon the principle that all the personal property which a married woman acquires is that of her husband, they belong to him (t).

(6). Where there has been a divorce *à vinculo matrimonii*; but not where it is *à mensa et thoro* only.

Whilst a wife cannot properly be arrested in an action *before* judgment, for if she be, the Court will discharge her from custody, provided she have not done any fraud; and so it will, if she be arrested even *after* judgment, along with her husband, in an action brought against them jointly, if she have no separate

(s) 2 Bright's *Husb. and Wife*, 292.

(t) *Ib.* 304.

property whatever; yet she is liable to be imprisoned *after* judgment under a writ of execution, if the action have been rightly brought against her alone, and the Court will not discharge her, unless there be a collusion between her husband and the execution-creditor, to keep her imprisoned (*u*).

She is, however, entitled to be discharged out of custody by the Insolvent Court (*v*).

But the order of the Court vesting the estate and effects of any married woman in the provisional assignee, operates upon all property, real and personal, to which she may be entitled for her *separate* use, or over which she shall have any power of disposition, notwithstanding her coverture, or which shall be vested in any trustees or trustee, or other person or persons for her benefit, and upon all personal estate and effects of which she shall have the actual possession, except her wearing apparel, bedding, and other such necessaries, not exceeding in the whole the value of twenty pounds, and upon all other real and personal estate and effects to which she may be entitled in any manner whatsoever, in possession, remainder, or reversion, subject only to such right, title, or interest, as her husband may have therein, and without prejudicing any rights of her husband in such real and personal estate and effects respectively; and all provisions in the Insolvent Act contained touching the real and personal estate of any prisoner whose estate shall under it be vested in the provisional assignee, apply to such real and personal estate and effects respectively, in the same manner as the same would apply to such real or personal estate and effects if such woman had been sole and unmarried, subject only to the rights of her

(*u*) *Pitts v. Meller*, Str. 1167,

(*v*) 1 & 2 Vict., c. 110, § 101.



husband therein ; and such married woman shall also execute a warrant of attorney to confess judgment in one of the superior courts of Common Law, for the amount of the debts remaining unpaid from which she shall be so discharged out of custody ; and such warrant of attorney so executed shall be sufficient authority for entering up judgment against such woman accordingly, notwithstanding her coverture ; but such judgment shall not in any manner prejudice or affect the rights of her husband, except that the same shall be deemed and taken to be her debt, in case she shall die in the lifetime of such husband, to the end that the same may be discharged out of her personal assets in a due course of administration, or out of her real estate, if any she shall have at the time of her death, but without prejudice to any estate or interest of her husband therein as tenant by the curtesy ; and in case such woman shall, during the lifetime of her husband, become entitled to any property for her separate use, such judgment may be enforced against such separate property by suit in equity or otherwise, under the order of the Insolvent Court, for the purpose of obtaining payment of so much of the debts in respect of which such woman shall have been discharged, as shall then remain unpaid, and in case such woman shall survive her said husband, such judgment may be after his death enforced against such woman or her property, real and personal, in such and the same manner, and with the same effect, as it might have been if she had been sole and unmarried at the time when she executed such warrant of attorney, and at the time when such judgment shall have been so entered up ; yet the discharge of any married woman under the authority of the Insolvent Act, will not operate to discharge her husband from any debt in respect

of which his wife shall be so discharged; but such debt, so far as the same shall remain unpaid and unsatisfied, is chargeable upon or in force against such husband, as fully to all intents and purposes as if his wife had not obtained such discharge.

An attachment for non-payment of costs will not be granted against a married woman.

XIX. A husband is liable, during the marriage, for his wife's debts, existing at the time of the marriage, and also for her breaches of trust committed prior to that event, and his taking his wife from the hands of a priest, clothed only in her chemise, will not get rid of his liability for her debts and engagements, as was once very erroneously supposed; upon his death, however, the debt not having been recovered or the breach satisfied, his widow will become liable thereto (unless her husband had been bankrupt or insolvent, and duly discharged therefor), and not his personal representatives, although *he* may have received a large fortune with his wife; for the marriage only suspends her obligation. Upon her death, under similar circumstances, the husband surviving, is no longer liable, unless, indeed, a judgment have been recovered against him and his wife during the marriage, for then the debt becomes that of the husband. But, if a judgment have been recovered against the wife, prior to her marriage, and she die before its enforcement, the husband would not be liable; and such a judgment can only be enforced during the marriage against the wife, for execution must strictly follow the judgment. To render the husband liable thereto, a writ of *scire facias* must be issued, to make him a party to the judgment (*u*). If, pending an action against a woman,

Liability of a husband for his wife's acts before marriage.

(*u*) 15 & 16 Vict., c. 76, § 132.

she marry, and judgment be recovered against her alone, she may be arrested; or a writ of possession may issue against her land, if the action be an ejectment: but her personalty having become vested in her husband, cannot be taken in satisfaction of such judgment.

Should property of the wife vest in the husband, not in his marital right, but as her administrator, he is then liable to the extent of her assets; for since he cannot recover her property outstanding at her death, except as her administrator, it will of course be assets subject to her debts.

XX. It is a general rule that neither a husband nor a  
 Witnesses. wife can be witnesses either for or against one another, in a court of common law or equity; and their evidence continues to be thus inadmissible after the death or divorce of either. In an action, however, between third parties, a wife is not incompetent to give evidence simply because it would tend to expose her husband to a legal demand, or to a charge of felony. But the admissions of a wife will not bind her husband, unless she can be treated as his agent in the transaction sought to be affected by them.

Now the 14 & 15 Vict., c. 99 (*v*), enacts, that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as herein-after excepted, be competent and com-

(*v*) Sections 2, 3, and 4.

pellable to give evidence, either *vivâ voce*, or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

But that nothing herein contained shall render any person who, in any criminal proceeding, is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

And that nothing herein contained shall apply to any action, suit, proceeding, or bill, in any court of common law, or in any Ecclesiastical Court, or in either House of Parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage.

The judicial interpretations of this statute as to husbands and wives are by no means coincident.

The Court of Queen's Bench has ruled (Mr. J. Erle dissenting (*w*)), that its second section does not render a wife a competent witness *for* her husband in an action by or against him (*x*). The Court of Exchequer ruled that the statute does not render husband and wife competent witnesses, either *for* or *against* each other, in civil proceedings (*y*). The Court of Chancery has ruled

(*w*) This learned judge admitted the defendant's wife as a witness for him. *Harrison v. Dunn*, 18 Law Times, 66.

(*x*) *Stapleton v. Croft*, 16 Jur. 408.

(*y*) *Barbat v. Allen and another*, 16 Jur. 339.

that the statute does not authorise the examination of a wife, either *for* or *against* her husband (*z*), although the suit is a civil proceeding, and not of the kind mentioned in the fourth section. Where the wife is a joint party to the action with her husband, she is then, it appears, an admissible witness (*a*). And in an action by husband and wife, where the wife is the meritorious cause of action, she is a competent witness (*b*).

By the Bankrupt Law Consolidation Act, the Courts of Bankruptcy may summon the wife of any bankrupt, and examine her, (after she shall have made and signed the necessary declaration), either by word of mouth or interrogatories in writing, for the finding out and discovery of the estate, goods, and chattels of such bankrupt, concealed, kept, or disposed of, by such wife, in her own person, or by her own act, or by any other person, and she will incur such danger or penalty for not coming before the Court, or for refusing to be sworn and examined, or for refusing to sign or subscribe her examination, or for not fully answering to the satisfaction of the Court, as any other person (*c*).

By the Small-Debts-Act, 9 & 10 Vict., c. 95, § 83, all parties to any proceeding in the petty County Courts, their wives, and all other persons, may be examined on behalf of the plaintiffs or defendants, upon oath or affirmation.

The Sta-  
tutes of

XXI. From the incapacity of wives to bring actions, unless with their husband's concurrence and joining

(*z*) *Percival v. Caney*, 18 Law Times, 219; *Alcock v. Alcock*, 16 Jur. 653.

(*a*) *Christian v. Horwood and Wife*, 18 Law Times, 175.

(*b*) *Nicholls and Wife v. Brookes*, 19 Law Times, 351.

(*c*) 12 & 13 Vict., c. 106, §§ 117 and 118.

therein, the Statutes of Limitations exempt them from their general operation, giving a certain time after the marriage is determined and they are discovert, to assert their claims and resort to litigation. Limitation as to marriage.

With regard to realty, the 3 & 4 Wm. IV., c. 27, § 16, gives married women, and their representatives, ten years from the determination of their disability or death, to enforce their rights. The extreme period of limitation is fixed, notwithstanding this disability, at forty years from the accrual of the right (c).

As to sealed contracts, and parol contracts, the 3 & 4 Wm. IV., c. 42, § 4, gives wives the same time after their discoverture, as they would have had, had they been sole at the time of the right arising to bring the action, *i. e.*, twenty years for specialties, and six for parol contracts.

The Prescription Act, 2 & 3 Wm. IV., c. 71, § 7, provides, that the time of the endurance of matrimony in the case of wives, shall not be computed in the periods fixed by the act as to commons, rights of way, or to watercourses, and the enjoyment of the access of light, save those periods which it declares to be absolute and indefeasible. The Tithe Act, 2 & 3 Wm. IV., c. 100, § 6, contains a similar provision.

The statute relating to the time within which personal actions must be brought, 21 Jac. I., c. 16, provides, (§ 7), that the periods shall not begin to run against a wife, until her widowhood or discoverture.

XXII. A husband may bring an action for the abduction of his wife, or for adultery (*d*) committed with her, or for ill-treating her, in which case she must be

(c) Sections 17, 18, and 19.

(d) See *post*, c. VI., pl. vii.

Actions by and against husband and wife. joined in the action, if the cause be only a common assault, battery, or false imprisonment.

Where the cause of action arose *before* the marriage, on a contract made by the wife, the action must be brought against the husband and wife jointly, and the husband must sue with his wife, when the action will survive to her upon widowhood; but where the cause of action arises during the marriage, the husband sues, or is sued, alone. If an action is founded on the tort or wrong of the wife before her marriage, then husband and wife must be sued together, unless the effect of the tort is the acquirement of property by wrongful conversion, when the husband is alone responsible. When an action arises from the wrong of the wife alone, during the marriage, or of husband and wife together, then both may be sued, and an action of trespass can be brought against the both for their joint act.

When a wife, living apart, brings an action in her husband's name, without his authority or consent, the Court will generally stay the proceedings until an indemnity be given to him.

If the husband become lunatic, the wife has an implied authority to sue in his name, unless he have a committee appointed by the Court of Chancery.

A wife cannot make herself a trespasser on land, either by a prior command to another to commit it for her use and benefit, or by a subsequent assent of another's tortious or wrongful act. And a wife's leave and license to trespass on her husband's lands, will be no excuse or justification for the wrong.

In an action against a husband and wife, who go abroad to avoid it, he may be outlawed, and she may be waived (*d*).

(*d*) As to arresting her, see *ante* p. 376.

The 15 & 16 Vict., c. 76 (the Common Law Procedure Act), has affected this subject as follows :—

In any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it will be lawful for the husband to add thereto claims in his own right ; and separate actions brought in respect of such claims may be consolidated, if the Court or a judge think fit : Provided that, in the case of the death of either plaintiff, such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate (*e*).

The marriage of a female plaintiff or defendant shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment ; and such judgment may be executed against the wife alone, or by suggestion or writ of revivor pursuant to this act (*f*), judgment may be obtained against the husband and wife, and execution issue thereon ; and in case of a judgment for the wife, execution may be issued thereupon by the authority of the husband, without any writ of revivor or suggestion ; and if in any such action the wife shall sue or defend by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence, unless such authority be countermanded by the husband, and the attorney changed according to the practice of the Court (*g*).

The marriage of a female plaintiff or defendant in error, shall not abate the proceedings in error, but the same may be continued in like manner as herein-before provided with reference to the continuance of an action after marriage (*h*).

(*e*) Section 40.

(*g*) Section 148.

(*f*) Section 129.

(*h*) Section 167.



The defence of  
coverture.

XXIII. If a wife sue or be sued at common law alone, her husband not being joined, her marriage may be alleged as error in fact in the proceedings, in a written memorandum to the Master, accompanied with an affidavit of the fact comprised in such error, whereupon a note of its receipt is delivered out and served, with a copy of the affidavit, on the opposite party, and the error is then argued before the Queen's Bench (*h*); or the marriage may be specially and successfully pleaded as a defence. In order that a wife may as a defendant plead her marriage, she must appear and plead it in person, since she cannot appoint an attorney or agent. The testimony in support of this defence are a copy of the register of marriage, and proof of identity, or the presumptive evidence of the marriage, arising from repute and cohabitation, and proof that her husband was living at the time the cause of action arose, or within seven years of such period.

Suits in  
Chancery  
by and  
against  
husband  
and wife.

XXIV. The rule in the Courts of Chancery is that, in all cases in which a husband seeks to recover his wife's property, she must be joined with him as co-plaintiff, and this whether the property sought to be recovered accrued to her before or after marriage. This rule gives the wife an opportunity of making an election during her examination apart from her husband, whether the property shall be wholly enjoyed by her husband, thus waiving her right to a settlement, or whether a settlement of a portion of it shall be made upon her and her children. If the wife reside in town, she is examined by the judge; if in the country or abroad, by commissioners duly appointed for the purpose.

All applications for payment to the husband of an ascertained sum of money belonging to his wife, with her

(*h*) 15 & 16 Vict., c. 76, § 158.

consent (*i*), must either be supported by an affidavit that there was no settlement on the marriage, or if there had been any settlement or agreement for a settlement made upon the marriage, it must be produced for the purpose of enabling the Court to judge whether or not it affects the fund in question.

A wife may, through the intervention of a next friend, initiate proceedings in Chancery against her husband (*j*), in order to have property, to which she is entitled, secured to herself and family. The next friend, who needs not be a relation, must have the wife's consent, otherwise the suit will be dismissed. He must be a person of substance, because he is liable to the costs (*k*).

Where a next friend is in humble life, or goes out of the jurisdiction of the Court, he must give security for costs. He may be changed, upon the new next friend giving security for all the costs of the suit. Upon his death or insolvency, another must be named, otherwise the suit will be dismissed, unless in case of his insolvency, the wife give security for costs.

(*i*) Where property is settled to the separate use of a married woman, her examination in court is not necessary in order to pass her interest to a purchaser, for she is treated as to such property as a *feme sole*, with a disposing power over it.

(*j*) So a husband may sue his wife in respect of her separate estate; 13 Ves. 266.

(*k*) There is a material difference between the *prochein ami* of a wife, and that of an infant. In the latter case, the court does not require that the next friend should be a person of substance, because if the friends of an infant are poor, the infant might, by such a rule, be deprived of the opportunity of asserting his right, but in the case of a wife, as the object for which a *prochein ami* is required is, that he may be answerable for the costs, the court expects that the person she chooses to fill that office should be one who can pay the costs, if it should turn out that the proceeding is ill-founded. A *prochein ami* cannot sue, even on behalf of an infant, *in forma pauperis*. 1 Ves. 410.

The marriage of a *feme sole* plaintiff abates a suit, and it becomes necessary to revive it; but the marriage of a *feme sole* defendant does not abate it, for then it is only necessary to name her husband in the subsequent proceedings. If a husband die, pending a suit touching his wife's personalty, she may carry it on by virtue of her right of survivorship, for his death does not operate any abatement of the suit. If she do not continue the suit, she will not be liable to the costs of it. Should the wife die, the suit then abates, and the surviving husband must revive it, after he has become her administrator.

A wife cannot be made defendant in a suit without her husband, for if she be sued as a *feme sole*, she may plead her marriage, unless he be an *alien nè*, or an exile, for then she is virtually a *feme sole*. Should the suit relate to a wife's separate property, and her husband be out of the Court's jurisdiction, then, although they are both named as parties in the proceedings, yet the wife may be, if a defendant, proceeded against alone; but she cannot be attached without the express order of the Court. In other cases, this will not be allowed, unless she appear and pray permission to defend separately from her husband.

Where they are joint-defendants, process may be served upon him alone, and he may be attached for her default. But where he cannot defend jointly with her, he should obtain the order of the Court to answer separately, upon his affidavit, that his wife lives apart, and that he has no influence over her, or otherwise showing his inability to answer for her, upon which he will be exonerated from all liability on her account.

A wife cannot be arrested under the writ of *ne exeat regno*, although she is an executrix or administratrix; but she can *quoad* her separate property.

Where a husband and wife are living apart, she is compelled to defend herself separately for her wrongful or tortious acts, for which her husband will not be liable. And a husband is not compelled to join his wife in the defence, where she is not under his control, but lives separate from him; and where the wife refuses to join with her husband, he will be allowed to defend himself, and she may be proceeded against separately.

A wife may obtain an order of the Court to answer as a defendant separately from her husband (1), where her interests are adverse to his, (2), where she lives apart, and (3), where she disapproves of the defence he purposes to make.

While a wife must answer fully and fairly, yet she is protected from exposing herself to a forfeiture, or from discovering her separate estate, if the decree could not possibly affect it, or from disclosing matters which may subject her husband to a charge of felony, or which may be made use of against him.

A wife's answer can never be read in evidence against her husband, but can against herself, nor can a husband's answer be read against his wife; but their joint answer may be read against them both, as to personalty, but not where the suit relates to realty.

A personal decree cannot be made against a married woman, but only against her separate property. A wife is bound by a decree of foreclosure of a mortgage, and also for a sale of estates.

A husband's death will not abate a suit, and the wife will be bound by the previous proceedings, unless a new interest then accrue to her, for *quoad* the new interest, she may put in another defence. Should, however, the wife die, there will be an abatement of the

suit. An abated suit is now revived by an order of revivor (*k*).

. It is against the policy of Equity, that a husband or wife should be witnesses either for or against one another (*l*).

Criminal offences by husband and wife.

XXV. It is a legal presumption that a wife acts under the coercion or command, actual or implied, of her husband, and, therefore, she is excused from punishment for certain offences committed in her husband's presence, he taking a part in the transaction. This presumption may, however, be rebutted by proof that she did not perpetrate the offence under such compulsion, but wilfully and of her own accord, and then she will be punishable for it, just as though it was done in her husband's absence, although by his order or procurement. And when a crime has been completed in his absence, no subsequent act of his can be referred to that which was done in his absence, so as to protect the guilty wife from the law's vengeance, though it may render him an accessory to his wife's felony.

Only the offences of theft, burglary, or housebreaking, and other civil offences against the laws of society (*mala prohibita*) are privileged; but the crimes of treason, murder (*m*), manslaughter, or robbery, *i. e.*, theft accompanied with violence, are not privileged by reason of coercion; for these being *mala in se*, prohibited by the law of nature, and dangerous in their consequences, the wife will be, under any circumstances of perpetration,

(*k*) 15 & 16 Vict., c. 86, § 52.

(*l*) See *ante*. p. 380; and consult Daniell or Smith on the practice of the Court of Chancery.

(*m*) If a husband and wife jointly commit a murder, both are equally amenable to the law, as the doctrine of presumed coercion of the wife

fully and properly liable to punishment. Where a husband delivered a threatening letter ignorantly as the agent of his wife, she alone is punishable (*n*).

Where a wife knowingly receives stolen goods in her husband's absence, and she conceals them in the house, without his knowledge, she alone is punishable; but the husband's ignorance of the affair must be very clearly established, in order not to involve him in the criminality. A wife jointly with her husband cannot be convicted of receiving stolen goods, and therefore, where both are found guilty on a joint indictment, the conviction of the husband will be affirmed, while that of the wife will be quashed (*o*).

A wife may be found guilty with her husband of all misdemeanours committed by her, but she cannot be indicted as an accessory for rescuing or concealing her felon husband, or for concealing a felon jointly with her husband; nor can she be legally guilty of theft in taking away her husband's goods, but if she and another person take them away, such person is liable to be punished. But an adulterer cannot be found guilty of stealing the

does not apply to cases of murder. So, also, a wife is amenable as an accessory before the fact, to a murder committed by her husband; but if the only part she took in the transaction was in harbouring and comforting her husband after the committal of the crime, she is not liable as an accessory after the fact. If a person knowingly invite another to a certain place, in order that he may be murdered, and he be murdered accordingly, that would constitute such person an accessory before the fact to the murder. A female alien, who has married a natural-born subject of this realm, is, by virtue of 7 & 8 Vict., c. 66, § 16, naturalized, and acquires the *status* of a natural-born subject; she is, therefore, not entitled to a jury *de medietate lingue* on her trial for a crime. *Reg. v. Manning*, 2 C. & K. 887, 903.

(*n*) *Rex v. Hammond*, 1 Leach, 447.

(*o*) *Reg. v. Mathews*, 1 Den. C. C. R. 596.

husband's property, which is brought by the wife to his residence, and which are not traced to his personal possession. She cannot be guilty of arson in setting her husband's house on fire, under 7 & 8 G. IV., c. 30, § 2 (*p*), since it is held essential to constitute the offence, that the intent of the offender must be to injure or defraud some person, not legally identified with the offender, which wife and husband are deemed to be. She may be punished for a forcible entry into her husband's premises. If she incite her husband to a felony, she is an accessory before the fact.

A husband and wife cannot alone be convicted of a conspiracy, for being treated as one person, they are presumed to have but one will, and the offence cannot be committed, unless there are two distinct persons at least.

Where property in a wife's possession is stolen, it must be laid as belonging to her husband in the indictment, for her possession is tantamount to his own, the property legally belonging to him.

While the testimony and declarations of husband and wife are inadmissible either for or against each other (*q*), even after a divorce, or the death of one of them; yet what a husband is overheard to say to his wife, or to himself, is evidence against him. A wife is, however, a competent witness against her husband on a trial or judicial hearing relating to any charge against him, which affects her person or her liberty, and her dying declarations are admissible, in case of her murder by her husband. In treason, husband and wife are admissible witnesses against each other.

(*p*) *Marsh's Case*, 1 Moo. C. C. 182.

(*q*) See *ante*, p. 380.

A wife is incapable of entering into a recognizance to appear and give evidence on a criminal trial; if then she refuse to appear when before the magistrate, she may be committed to prison, until the time of trial arrives. The usual course is, however, to bind over her husband, or other competent person, as surety for her appearance.

A wife is justified in committing a battery in defence of her husband, so as to place him in safety, and if it be necessary, in the heroic defence of the beloved one, to resort to the slaughter of the criminal assailant, it will be most righteously excusable, for the act of the devoted wife will be treated as the act of the oppressed and overpowered husband. And the law justifies a husband in the actual defence of his wife, whatever may be the consequences of such his necessary defence.



## CHAPTER V.

## THE VOLUNTARY SEPARATION OF HUSBAND AND WIFE.

- |                                  |  |                                       |
|----------------------------------|--|---------------------------------------|
| I. The deed of separation.       |  | V. Charging the separate maintenance. |
| II. Covenants.                   |  | VI. The avoiding of the deed.         |
| III. The interference of equity. |  |                                       |
| IV. The wife's savings.          |  |                                       |

The deed of separation. I. OF course, if a husband and wife cannot agree so as to carry out the great purpose of their union,—mutual love and respect, the contributing to the happiness of one another, and their solemn duty to their children,—they should resolve to live apart. A deed of separation, containing the terms and reciprocal conditions upon which an *actual* and *immediate* separation is to be arranged and governed, will be valid, so far as relates to the trusts and covenants of the husband, and his indemnity by the trustees for the wife; but if it only contemplate a *contingent* or *future* separation, it will be void, as obviously opposed to the policy of marriage, and the sound well-being of the community (*a*).

(*a*) *Durant v. Titley*, 7 Price, 577; *Jee v. Thurlow*, 2 B. & C. 551; 2 Bright's *Husb. & Wife*, 310. Where a married couple execute a deed, by which they agree to separate, but at the same time it is stipulated between them *verbally* that they shall continue to live together, and they do, in fact, continue to live together after such deed has been executed, in pursuance of such verbal agreement, residing in the same house, although they may not cohabit together as husband and wife, yet, under such circumstances, such a deed cannot in point of law be sustained. *Hindley v. Westmeath*, 6 B. & C. 200; 7 Scott, 338; and *Westmeath v. Salisbury*, 5 Bligh. N. S. 395. But where the separation, though not

The wife's trustees are parties to the deed, and in them the property (*b*), of which it is intended the wife shall have the disposition, vests uncontrolled by the husband's rights; and with them the husband must covenant for the wife's benefit, since a husband and wife cannot legally covenant together.

II. The trustees usually covenant with the husband Covenants. to indemnify him against any debts which the wife may incur during the separation (*c*), whereupon the husband covenants to provide a given maintenance for the wife, which will secure the deed from being upset by his creditors (*d*) or subsequent valuable purchasers (*e*), the trustees' indemnity being a valuable and binding consideration validating the settlement. The absence of this indemnity would render the deed void as against creditors (*f*) and subsequent purchasers; unless the conside-

immediately contemplated, is to take place, not at the pleasure of either husband or wife (for that would be to make each a tenant-at-will of the other, *quoad* marital rights), but by the approbation of third parties, selected by the husband and wife, as a domestic *forum* for adjustment of their differences, the agreement will, on the authority of *Rodney v. Chambers*, 2 East, 283, have effect.

(*b*) By a deed of separation, the husband covenanted with a trustee for the wife to assign, upon trusts therein referred to, one moiety of all property which should afterwards come to her or him in his marital right, and it was agreed that the other moiety of all such property should belong to the husband. It has been ruled that this covenant does not extend to property afterwards given by the trustee of the deed to the wife for her separate use, so as to entitle the husband to a moiety of such property. *Kerr v. Ruxton*, 16 Jur. 491.

(*c*) See *ante*, p. 367.

(*d*) *Jee v. Thurlow*, 2 B. & C. 553; see *Westmeath v. Westmeath*, Jac. 138; and *Worrall v. Jacob*, 3 Mor. 267.

(*e*) *M'Donnell v. Murphy*, Fox & S. 279.

(*f*) *Fitzer v. Fitzer*, 2 Atk. 511.

ration be the relinquishment by the wife of her alimony, or the compromise of a suit by the wife, either of which would be valuable and binding (*g*).

Whatever be the cause of separation, justifiable or otherwise, the covenant of indemnity should always be inserted, in order to render the deed of separation secure against creditors, and not to rely upon the cases where such deeds have been sustained in the absence of such indemnity, on the ground of a justifiable cause of separation.

It must be remarked that a mere agreement to separate will not be a valuable consideration for the deed, which would then be void as against creditors and purchasers (*h*), being only a voluntary transaction.

A covenant not to sue for restitution of conjugal rights, usually introduced into deeds of separation, is nugatory in the Ecclesiastical Courts. Equity, however, did, in one case, enjoin a proceeding contrary to this

(*g*) But, if the conduct of the husband, by cruelty or otherwise, have been such as would entitle the wife to alimony, if she were to sue him in the ecclesiastical courts, this state of circumstances will take away the character of being either fraudulent or voluntary from his covenants in an agreement for separation, and will support them both against creditors to whom he may have been indebted at the date of the agreement, and against creditors with whom he may have contracted debts subsequently to that date; for, where the wife, instead of prosecuting her right, agrees to accept the maintenance proposed by the husband, his act in giving that maintenance cannot be said to be such a voluntary act as to be a fraud upon his creditors; neither can it be said that the wife, giving up her rights in the ecclesiastical courts, has not given up something, so as to make the covenants without consideration. The covenants of the husband under such circumstances, are not such as the 13 Eliz.; c. 5, was meant to prevent, and will, therefore, receive effect against his creditors. Bell's *Husb. & Wife*, 533.

(*h*) 13 Eliz., c. 5; and 27 Eliz., c. 4.

covenant (*i*) ; but the Court has not repeated it, and seems very unwilling to do so. The provision can have no effect against the wife personally.

A husband's covenant for the payment of an annuity to his wife, where it is not limited to the period of separation, is vacated neither by the wife's suit for restitution of conjugal rights, nor by her adultery (*j*).

A husband is bound by his stipulations in a deed of separation, and cannot be allowed to defeat them.

If the agreement between husband and wife be for a mere temporary separation, the husband's offer of cohabitation is a bar to her claim of the separate maintenance for the future. But if the agreement be for a permanent separation during the joint lives of the husband and wife, that is, until both of them shall agree to come together again, and that he shall pay her a separate maintenance, so long as such separation continues, then no offer on his part only to cohabit will prevent her claim to her separate maintenance being enforced by the Court.

The separate maintenance provided for the wife will not be determined by their living together again, where it clearly appears by the deed of separation to be the husband's intention to secure the property for the separate use of the wife during her life, in the same manner as he might originally have done on marriage (*k*).

A deed of separation, granting an annuity to the wife, does not require to be enrolled in Chancery, under 53 Geo. III., c. 141, s. 3 (*l*).

(*i*) *Westmeath v. Salisbury*, 5 Bligh. N. S. 356.

(*j*) *Baynon v. Bailey*, 8 Bing. 256.

(*k*) *Shelford on Marriage*, 629.

(*l*) *Carter v. Smith*, 6 Nev. & M. 480.

Where it is intended that the wife shall not dispose of the fund, or interest given to her, an express clause should be inserted, that she shall not sell, mortgage, charge, or otherwise dispose of the same in the way of anticipation; without such a restriction, there is no difference between separate maintenance and any other separate estate of the wife.

If a husband, after a deed of separation, confine his wife, she may obtain her liberty by means of a writ of *habeas corpus*, for he waives his right (*m*) to his wife by the articles of separation, and his covenant to permit her to live separately, and not to exercise any control over, or to molest, her, will be a renunciation of his marital right over her person; any attempt against her would be a breach of the peace (*n*). The deed of separation would be a good answer to a writ of *habeas corpus* issued by the husband, seeking to regain the possession of his wife's person.

These deeds sometimes contain a covenant on the husband's part to resign the children, or some of them, to the care of the wife; but the legality of such a covenant has been questioned (*o*).

We have seen (*p*) the presumption to be, that children

(*m*) He may, however, try his conjugal remedy in the ecclesiastical court.

(*n*) *Lister's Case*, 1 Str. 347; *Lord Vane's Case*, 13 East, 171 n.; *Rea v. Mead*, 1 Burr. 542; and *Rea v. Winton*, 5 T. R. 91. Lord Denman, C. J., ruled (*Lewis v. Ponsford*, 8 Car. & P. 687), at Nisi Prius, that, until the husband has given distinct notice to persons that, so far as by law he can, he has revoked the licence given to his wife in a deed of separation to live where she pleases, and so long as the licence stands, he is not justified in going into any person's house to reclaim her.

(*o*) 2 Bright's *Husb. & Wife*, 318.

(*p*) *Ante*, p. 17.

born during a separation are legitimate, unless proved to be spurious.

We have heard of a provision being inserted in a separation deed, stipulating, that if the husband and wife should be at any time together for five minutes, after either of them had requested the other to retire, the deed should instantly become void; this provision has been called "the five-minute clause."

III. A mere agreement for a separation will not be specifically enforced in equity, by a decree, establishing it personally (*p*), whether the covenants be or be not binding on the husband and trustees; for the effect of the decree would be to make them binding on the wife, and to permit married people to effect, at their pleasure, a partial dissolution of their solemn contract. The interference of equity.

Besides, equity will not infringe upon the jurisdiction of the Ecclesiastical Court, by enforcing the specific performance of a mere personal contract entered into by husband and wife to live apart, without the appointment of trustees. Yet although the Court will not directly decree a separation, it will nevertheless do so indirectly by compelling the husband to perform his agreement to pay the separate maintenance. Equity, however, will not perform a mere agreement between the husband and wife, by which the former is to pay a separate maintenance to the latter, since the wife not being able to contract, such an agreement would be without consideration.

Should the wife, however, be possessed of separate property, and agree to relinquish or settle it, this might be

(*p*) *Willtes v. Willies*, 2 Dick. 791.

a valid consideration for the husband's agreement. A mutual separation by consent does not deprive a husband of his right to the personal property which may accrue to his wife whilst they continue disunited, so that he make some provision for her out of it. Should the contract be between the husband and a third person on behalf of the wife, and no indemnity be given to the husband against his liability to pay his wife's debts, the wife has then precisely the same right as any other beneficiary to call for the execution of such a trust created in her favor, and this is her right whether the deed of separation securing a maintenance to her be purely voluntary, or be supported by a valuable consideration. If her trustees refuse to act, or the deed have been destroyed, she, in the one case, will be entitled to have the trust performed, and in the other, to have the loss of the instrument supplied.

Since the Court will execute a voluntary agreement of the husband entered into with a third person to allow his wife maintenance upon their separation, much more would it do so when the husband receives a valuable consideration for such his engagement, as the covenant of a trustee to indemnify him against his wife's debts.

When trustees have agreed to indemnify the husband against his wife's debts, this is a sufficient consideration for the allowance stipulated to be paid by the husband, and equity will never refuse to perform such an agreement.

The object of the husband in making a separate allowance to his wife upon their separation by mutual agreement being to provide for her support and maintenance, such allowance will be apportioned upon the death of the wife between the last and accruing times of payment.

IV. As the wife may dispose by will of savings from her separate estate, limited to her own sole use by a stranger, so also she may dispose of savings from her separate maintenance (q); but if she do not make any disposition, and her husband survive, he will be entitled to them as her administrator, subject to her separate debts. During the wife's life, her savings will not be liable to her husband's engagements, if the settlement were made for a valuable consideration. The wife's savings.

V. The intent of the provision made for the wife upon separation being to enable her to procure necessaries, it follows that the application of it to those purposes, however it may have been settled, is a legitimate appropriation of the property; and when the wife's intention appears, or is inferred, to charge her separate maintenance with a debt for necessaries, it will entitle the creditor to a satisfaction of his debt out of the fund provided for such maintenance. Charging separate maintenance.

VI. Where the husband and wife have agreed to live apart, and she has a separate maintenance secured to her by agreement, forasmuch as this is founded upon express The avoiding of the deed.

(q) But note this case:—A husband and wife separated by a written though unsealed agreement. The husband agreed to allow his wife a certain sum weekly, for her support, which was paid. She made savings out of this maintenance, and invested them in stock; a few days before her death she sold out the stock, and disposed of the proceeds by way of gift. The husband, however, was held to be entitled to recover back the proceeds so given, in an action for money received against the persons who had them. But if the wife had disposed of them in the payment of debts incurred for necessaries, or parted with them for good and valuable consideration, the husband would have been barred. *Messenger v. Clarke*, 14 Jur. 748.



contract between the parties, or between the husband and the friends of his wife, it requires the same mutual agreement to dissolve, as to make, the contract.

The following distinctions have been established touching this subject :—

First, that if the agreement for separation be for the lives of the parties, or until both agree to live together again, the wife's consent is necessary to put an end to the allowance of separate maintenance; so that the offer of her husband to take her back again will not have that effect.

A sentence of an Ecclesiastical Court directing a return to cohabitation, even if not obeyed, will also, perhaps, supersede the operation of the deed, at least so far as to prevent it from being enforced in favor of the disobedient party.

Secondly, that if the agreement for separation be merely temporary, or for an uncertain period, then the husband's offer to take her back again, if not artfully and insincerely made, will, without regard to her refusal to return, determine her separate allowance (*r*).

If, after the separation, the husband and wife be reconciled, and live together again, that circumstance will avoid and put an end to the deed or agreement, and,

(*r*) 2 Bright's *Husb. & W.* 347. • If, however, a third person covenant for a valuable consideration, moving from the husband, to pay to the wife a separate maintenance, who was living apart from her husband by mutual agreement, it seems that the offer of such person to take her to his house will not exempt him from her demand for the separate allowance, because the law imposes upon her no obligation to reside with such person; besides, if such residence were accepted by her, it would have no effect in promoting a reconciliation between her and her husband, which is the object the law has in view in withholding the maintenance when it is proper to do so.

consequently, determine the separate allowance ; for, by cohabiting, the separation, which was the principal, having ceased, the maintenance, which was the accessory, must expire with it (s).

A separation deed is not put an end to at law by an ineffectual suit by the wife for a restitution of conjugal rights, or by a divorce *à mensâ et thoro*, obtained by the husband on the ground of her adultery (t)

The deed does not prevent these suits.

The crime of adultery will not incapacitate a wife from compelling her husband to pay her the stipulated separate maintenance, because, at common law, it does not affect her right to prosecute her civil claims.

A separation will not deprive the husband of the legal right of maintaining an action for his wife's seduction, what effect soever it may have upon the amount of damages.

(s) But if by express provision the trusts were to continue valid, notwithstanding any reconciliation, the wife, who had returned to live with her husband, was held still to be entitled to a provision made for her in the deed. *Wilson v. Muskett*, 3 B. & A. 743.

(t) *Jee v. Thurlow*, 2 Barn. & Cress. 547; *Coode v. Coode*, 1 Curt. 757.

## CHAPTER VI.

### MATRIMONIAL LITIGATION.

- |  |  |
|--|--|
| <p>I. Jurisdiction of the Ecclesiastical Courts.</p> <p>II. Sketch of the practice in these courts:—</p> <p>(a) The citation ;</p> <p>(b) Its service ;</p> <p>(c) The appearance ;</p> <p>* (d) Appearing under protest ;</p> <p>(e) Enforcing process ;</p> <p>* (f) Process against persons privileged or out of the jurisdiction ;</p> <p>(g) The pleadings ;</p> <p>(h) The contest ;</p> <p>(i) The answer ;</p> <p>(j) Allegation responsive ;</p> <p>(k) Allegation in rejoinder ;</p> <p>(l) Supplemental allegations ;</p> | <p>(m) The mode of taking evidence ;</p> <p>(n) The hearing and sentence ;</p> <p>(o) Costs ;</p> <p>(p) Appeal ;</p> <p>(q) Proof of these proceedings in other courts.</p> <p>III. Suits for the restitution of conjugal rights.</p> <p>IV. Suits for nullity of marriage.</p> <p>V. Suits of jactitation of marriage.</p> <p>VI. Alimony :—</p> <p>(a) Alimony pending a suit ;</p> <p>(b) Permanent alimony.</p> <p>VII. Adultery.</p> <p>VIII. Bigamy.</p> <p>IX. Articles of the peace.</p> <p>X. Supplicavit.</p> |
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In detailing the subjects of law-suits between husband and wife, we will first show the matters within the jurisdiction of the ecclesiastical or spiritual courts, except divorce, which we will detail in the ensuing chapter ; then, the common law remedy for adultery ; and lastly, the criminal prosecutions, which are open to or against them, under given states of circumstances (*a*).

Jurisdiction of the ecclesiastical courts. I. Our Ecclesiastical Courts have an ample, and in certain cases, an exclusive jurisdiction touching the legality of marriages (*b*), and the rights and obligations

(*a*) As to equity proceedings and relief, see *ante*, pp. 257, 315, 326, and 386.

(*b*) Questions as to the validity of marriages depending upon civil disabilities, and the provisions in the Marriage Acts, arise in a great variety of cases, before other judicial tribunals, as committees of privileges in the

connected therewith. Should they however exceed their jurisdiction, the Courts of Common Law or Chancery may issue a writ of prohibition to restrain them from proceeding in the non-cognizable matter. These Courts may also be prohibited from proceeding contrary to the spirit of an Act of Parliament, or in contraversion of the general law of the realm. The temporal courts have the power to command the ecclesiastical tribunals to exercise their rightful jurisdiction, should they decline to do so, in order to redress wrong, and secure justice.

Before we remark upon particular suits arising from causes matrimonial, we will briefly sketch the practice of these tribunals.

II. The mode of proceeding in the Ecclesiastical Courts is governed by the canon and civil laws, modified by and made consonant to the common law. Proctors

*Sketch of the practice in these courts.*

House of Lords; in suits in courts of equity; in the common law courts, in divers actions; in Criminal Courts upon charges of bigamy; and in the inferior courts of quarter sessions, upon cases of settlement of paupers.

Courts of Equity have no jurisdiction to try the legality of marriage, especially after sentence in the Spiritual Court in a cause of jactitation of marriage, although the proceedings in the latter court may have been collusive.

In one case, the Lord Chancellor directed the validity of a Jewish marriage to be tried in the Ecclesiastical Court; for which purpose a suit of jactitation of marriage was instituted therein by the wife against the asserted husband. *Lindo v. Balisario*, 1 Hagg. 216. A suit has been directed to be instituted by the Lord Chancellor for trying the validity of the marriage of a ward of Court; 19 Ves. 491. And there are several instances of suits directed by the Court of Chancery to be instituted in the Ecclesiastical Court for the purpose of testing the validity of marriages of persons who have been found lunatic by inquisition.

It does not come within the province either of a court of law or equity to decide whether there exist grounds of divorce by reason of adultery

and doctors of civil law conduct the proceedings in these courts, answering to attornies or solicitors, and counsel, in the temporal courts. In matrimonial causes, the power of the ecclesiastical courts is *in personam*, and depends upon the residence of the person cited being within the court's jurisdiction. Costs, but not damages, are only recoverable, and a penance may be commuted for money paid to the complainant.

Ecclesiastical causes are either *summary* or *plenary*, otherwise called *ordinary*; the latter are those which require a solemn, full, and formal order in the proceedings, while the former are disposed of shortly and promptly.

The citation ;

(a) A suit is commenced by issuing from the Court a citation or summons, containing the names of the judge and the litigants (*c*), the cause of the proceeding, and the time and place for the appearance of the defendant. Ordinarily, the citation is obtained from the registry of the court, without motion, and as a matter of course, but in special cases, the facts are set forth in an act of court, upon which the judge, or his surrogate, decrees the defendant to be cited, to which decree is usually appended an intimation, that if the defendant do not appear, or appearing, do not show substantial cause against it, the plaintiff's prayer, stated in such decree, will be granted.

Its service ;

(b) This citation or decree is brought to the knowledge or cruelty ; or whether the conduct of the parties has been such as will entitle one of them to a divorce, to be obtained in the Ecclesiastical Court or in the House of Lords.

(c) A married woman may sue alone, either for a legacy given to her separately, or for defamation, on giving security for costs.

of the defendant by personally serving the English note, which is a translated summary of the citation, and this is effected by the apparitor of the Court, if the parties reside within twenty miles of London, and endorsing upon it a certificate of service, verified by oath, and returned to the registry; but if the parties reside beyond this distance, the original citation or decree is sent to a solicitor residing in the place of the defendant's residence, who, after effecting its service, certifies by endorsement the fact, which he verifies by an affidavit, sworn before a master extraordinary in Chancery, and duly returns it.

Should a defendant demand a copy of the citation, he must be furnished with it, if it be a common or ordinary citation, on payment of sixpence, but if extraordinary, containing an inhibition, then, on payment of one shilling.

The citation may be served on a Sunday, as it is for the enforcement of a moral or religious duty.

If it be served upon an infant, a certificate of its service, in the presence of the natural or legal guardian, or custodian of the infant, is required.

If the defendant cannot be found, the fact is properly certified, and then either a citation *viis et modis*, or a compulsory citation, is issued, which is personally served, if possible; but if that cannot be accomplished, then a copy should be fastened upon the door of the defendant's last known abode, or upon the door of the parish church, when the residence is not known.

Should an appearance be not then obtained, the defendant is in contempt of Court, and the further proceedings may be conducted either *ex parte*, or *in penam contumaciæ*, which shall presently be explained.

The difference between the service *viis et modis* and personal service is this:—the latter concludes both the Court and the parties, while the former is a constructive service, binding the party, but not the Court, who may, upon proper cause shewn, open the proceedings.

The appearance;

(c) The defendant cited may appear either in person or by proctor, who is duly appointed by a written instrument called a proxy, under the hand and seal of such defendant. The proctor then acts for the defendant as a person's attorney does in the Common Law Courts.

The following orders (*d*) apply to the proceedings in this stage:—

When a party shall have been duly cited, and shall not appear on the day assigned for his appearance, such party shall be pronounced in contempt, and the proceedings shall on the following court day, and afterwards, be carried on in pain of his consent,—*in pœnam contumaciæ*.

Where proceedings are carried on "*in pœnam contumaciæ*," witnesses may be produced and sworn before a surrogate in his chambers as well as in open Court, and such production shall be immediately entered and recorded in the register-book; but the witness so produced shall not be repeated to his deposition until forty-eight hours at least shall have expired from the time of his production.

The proctor of a party taking out a citation, or other process, shall on the day of its return be prepared to exhibit his proxy, and to proceed in the cause by taking the first step therein, according to the nature of the proceedings.

Any party who shall have been served with a citation

(*d*) Made 13 February, 1830.

or other process to appear, and who shall appear on the day assigned therein, shall be dismissed with his costs, unless the party taking out such citation or process shall return the same, and be prepared to proceed in the suit, for which costs the proctor taking out such citation or other process shall be liable.

A proctor appearing for a party cited, shall be prepared with his proxy, and shall exhibit the same on entering such appearance.

The proctor of a defendant in a matrimonial cause shall admit or deny the fact of marriage, under pain of suspension, on the same day that the plea alleging the marriage is admitted.

(d) If a defendant intend to object to the court's jurisdiction, or to prove that he is not amenable thereto, he should appear under protest, to save his contumacy, and then shew cause against the citation upon petition and affidavits, upon which the Court allows the protest and dismisses the defendant, or overrules it, and assigns the defendant to appear absolutely. The unsuccessful party pays the costs. Either party may appeal from the Court's decision upon this preliminary point; and the defendant may apply to a Court of Common Law for a writ of prohibition, if he think he have a chance of obtaining it.

Appearing  
under pro-  
test;

A party appearing in Court under protest may be assigned to extend his protest, that is, to state his grounds of exception to the jurisdiction of the Court in a sort of informal plea, which is termed in the Ecclesiastical Courts "an act of petition." The object of which is, that the grounds of exception should be stated specifically and distinctly, so that both the Court and



the adverse party may be duly apprized of them, and in order that the latter may furnish, if in his power, a counter statement upon any matter either of fact or law.

Enforcing  
process;

(c) In case of disobedience or contempt of Court, the party guilty of it is pronounced contumacious; and if he still persist for ten days, a writ of *significavit* issues, upon which an attachment (*de contumace capiendo*) from the Court of Chancery is obtained, and the party is then imprisoned, till he obey the Court's process (*e*).

Process  
against  
persons  
privileged  
or out of  
the juris-  
diction.

(f) Where persons residing beyond the jurisdiction of any Ecclesiastical Courts, either in England or Ireland, are cited to appear, or are required to comply with any order or decree of such Courts, and refuse obedience, the judge thereof may pronounce them contumacious, and certify the same to the Lord Chancellor within ten days; and if the person shall not be a peer, or member of the House of Commons, a writ *de contumace capiendo* shall issue; and upon the appearance or submission of the party, the judge may order him to be absolved or discharged. Where persons, whether peers, members of parliament, or not, shall refuse to comply with any order of any such Court, the judges may pronounce such persons contumacious, and certify the same to the Lord Chancellor, who shall cause process of sequestration to issue against the estate of the party, with the same power and effect as if it were an order of the Court of Chancery (*f*).

Imprisonment for contempt is neither in the discretion nor terminable at the pleasure of the Ecclesiastical

(*e*) 53 Geo. III., c. 127, § 1, and 5 Eliz., c. 23.

(*f*) 2 & 3 Wm. IV., c. 93, §§ 1, 2, and 3.

Judge by whom the party is pronounced in contempt. The imprisonment takes place under the authority of the temporal jurisdiction, nor has an Ecclesiastical Court the power of releasing at pleasure, but only on the obedience of the party. Such Court can no more release than a judge at Common Law can, at pleasure, release a defendant who is imprisoned for non-payment of damages recovered in an action. Unless the opposite party will consent to waive his rights, or unless the prisoner obey the monition, or unless it can be shown that he or she is not in a fit state of mind to obey, this Court can take no step.

(g) The first pleading contains the formal statement of the complaint, and is called in plenary non-criminal causes a libel (*Libellus*, Lat., a little book) (*g*). It answers to the declaration at Common Law, and the Bill or Claim in Chancery: The pleadings;

A solemn libel should contain these particulars:— The libel.

- (1) The plaintiff's name;
- (2) The thing demanded or controverted;
- (3) The defendant's name;
- (4) The action whereby the demand is made, and the defendant sued; and,
- (5) The judge, giving judgment, with his power and commission (*h*).

(g) In testamentary causes, it is called an allegation, and in criminal causes, the articles, which run in the name of the judge, who objects the facts charged against the defendants.

(h) These particulars are thus summed up in Latin verse:

*Quis, quid, coram quo, quo jure petatur, et à quo,  
Rectè compositus quique libellus habet:*

Of which this English translation has been given:—

Each plaintiff and defendant's name,  
And eke the judge who tries the same;

Where reliance is placed on the general law, it is not necessary to plead it; but a peculiar or sectarian law must be distinctly pleaded. The reason of this difference is manifest; the Court is bound to know the general law of the land, but not a particular law, which should then be set forth for the information of the Court.

When any exhibits are pleaded in supply of proof, annex them, and pray that they may be taken as part of the libel.

It is a settled rule that a party cannot plead the contents of an instrument, unless it is destroyed, or in the possession of the adverse party.

Before a plea of any kind is admitted, it is open to the adverse party to object to its admission, either in the whole or in part; in the whole, when the facts altogether, if taken to be true, will neither entitle the party giving the plea to the demand which he makes, nor support the defence which he sets up; in part, if any of the facts pleaded are irrelevant to the matter in issue, or could not be proved by admissible evidence, or are incapable of proof.

These objections are made and argued before the judge, and decided upon by him, and his decision may be appealed from. For the purpose of the argument, all the facts capable of proof are assumed to be true: they are, however, so assumed merely for the argument, but are not so admitted in the cause; for the party who offers the plea is no less bound afterwards to prove the facts; and the party who objects to the plea is no less at liberty afterwards to contradict the facts.

The thing demanded, and the right whereby  
 You urge to have it granted instantly;  
 He doth a libel write and well compose,  
 Who forms the same omitting none of those.

These proceedings have the convenience of enabling parties, in many instances, to take the opinion of the Court in a very summary way, particularly in amicable suits; if the facts are candidly stated, and the Court, upon the plea being objected to, should be of opinion, that, if proved, the facts either will or will not support the prayer of the plea; in the one case, if the plea is admitted, the further opposition may be withdrawn; in the other case, if the plea is rejected, the party offering it either abandons the suit, or appeals, in order to take the judgment of a superior tribunal. This course saves the expence and delay consequent upon proving the facts by witnesses, in cases where there exists no doubt of the facts being correctly alleged in pleas, and where the question between the parties is principally, or perhaps altogether, a question of law, arising out of the facts so stated in the plea.

(h) Should the libel be admitted, the defendant may con-<sup>The con-</sup>test it, either affirmatively or negatively; if the former, test; he confesses the libel, and submits to the judge, and offers the damages to be taxed; if the latter, he denies it, and he is then said to contest suit (*contestatio litis*), upon which he is assigned to answer thereto.

(i) When a libel has been admitted, a time or term pro-<sup>The an-</sup>bationary is given to the plaintiff, to examine his witnesses, swer; in order to prove what he sues for, and the defendant is assigned to give in his answer upon oath. A personal answer ought to be pertinent, absolute, unconditional, clear, and certain. The answer is deposited in the registry, with the other papers in the cause; the opposite party's proctor then obtains a copy of it, and

considers its sufficiency, and acts accordingly. An insufficient answer is treated as no answer, and, upon motion, the judge will, by an interlocution, enjoin a new answer.

If the plaintiff require the defendant's answer, he should, on the day that his libel is admitted, apply to the Court to fix a time for its being filed; should the defendant make default, the facts pleaded are taken *pro confesso* against him so neglecting. The Court will extend the time, upon reasonable cause shewn. A defendant is not bound to answer matter, either degrading, or criminating.

An answer sometimes dispenses with other evidence, and causes are frequently tried upon the defendant's answer only. An answer, however, only becomes evidence, when read by the adverse party, it is then in his power to admit or exclude it. If the answer be incorrect, or redundant, the plaintiff should plead to it, and not bring the cause before the Court at this stage of the suit.

Allegation responsive.

(j) The defendant may counterplead facts, which, assuming the libel to be true, offers a legal defence to the charges of it. This he may do at once, or wait until the plaintiff has examined his witnesses. The proceeding is called a responsive allegation, and is proceeded on in the same manner as the libel; objections may be taken to its admissibility, answers upon oath urged, and witnesses examined.

Allegation in rejoinder.

(k) The plaintiff may, in his turn, rejoin by a further allegation, and in that and every subsequent allegation, the same course may be pursued.

Supplemental allegations.

(l) While the Court will compel the parties to bring the whole of the substantive case before it at once, if

practicable, yet, a party is not always bound by the original charges in the libel, for even facts, not existing at the commencement of the suit, may be brought forward in a supplemental allegation. The cause is never concluded against the judge, who at the hearing, may admit an allegation or exception, if he deem it necessary.

Either party may be admitted to sue or defend *in formá pauperis*, either at the commencement of the proceedings, or at any subsequent period, upon an affidavit that he or she is not worth 5*l.*, debts being paid.

(m) The witnesses are either brought to London to be examined, or if they reside at a great distance, or are otherwise unable to attend, they are examined by commission at or near their residence. The mode of taking evidence;

If a witness will not attend voluntarily, upon the proctor of the party alleging that he is a necessary witness, that he has been tendered his expences, but refuses to attend and give evidence, the judge, or his surrogate, will direct a compulsory, in the nature of a subpoena, to be issued. Should the witness disobey its exigency on being served with a copy of it, the proctor then serves a written notice upon him, intimating his intention of applying to the Court on a given day, to pronounce him in contempt; should this notice be unheeded, the Court will pronounce the contempt, and direct the same to be signified, whereupon a writ *de contumace capiendo* issues from Chancery, under which the offending witness is incarcerated until he submit: upon doing which a writ of deliverance is duly sealed by the Ecclesiastical Court, and the now obedient witness released from custody.

Witnesses are secretly examined both before the ex-

aminer in town and the commissioners elsewhere by questions framed upon the allegations previously delivered. A notary is, however, present, who reduces the depositions into writing. They are then read over to the witness, who after approving them, signs them.

The Ecclesiastical Court will, under peculiar circumstances, receive testimony *vivâ voce*.

Sir John Nicholl made the following observations in favor of the mode of taking evidence in the ecclesiastical courts. "It is said, and very truly, that in *vivâ voce* examinations, the Court and jury have the benefit of seeing the witness, and of collecting from his manner and deportment whether the substance of his evidence be true or false. This advantage is denied to our mode of examining witnesses; but then it has others, with which examinations of witnesses in open Court *vivâ voce* are not attended.

"It affords us an opportunity of considering maturely the story which the witness has told deliberately; of balancing the parts of that story one with another, so far as to form an adequate opinion of its probability or improbability; finally, of inspecting its general tone and character, which last to those, the habit of whose life it is to consider written testimony, may ordinarily furnish as accurate a test of the forwardness or shyness of a witness, of his proneness to add or suppress, and the like, as his manner and deportment could do if the witness himself were examined in open Court, where, it may be added, very erroneous impressions of these are sometimes at least liable to be formed from the mere embarrassment of witnesses of a certain character under that course of examination. All this, independent of the

benefit of deliberately weighing and comparing the stories told by different witnesses.”

The cross-examination is by interrogatories addressed to the adverse witness, after he has given his evidence in chief. Every witness is enjoined not to disclose the interrogatories, or any part of his evidence, until after their publication. In order that the party cross-examining may be the better prepared, the proctor producing the witnesses delivers a designation of the articles of the plea, as to which it is proposed to examine the witnesses. Twenty-four hours must be given to the party to prepare the cross-examination, which time the Court has power to extend or abridge.

If a witness's answer be objected to as insufficient, a monition will be decreed against him, to answer explicitly.

The Ecclesiastical Courts do not ordinarily allow the examination of a witness *de bene esse*, *i.e.*, conditionally.

The re-examination of a witness after a cross-examination is granted with great jealousy.

After publication of the evidence, if a re-examination be necessary, the Court will direct a *vivâ voce* examination in open court.

Upon publication, every party is entitled to copies of the testimony, and then may except to the credit of any witness upon matter contained in his deposition, showing that the witness has sworn falsely and corruptly. A witness's character may be investigated before but not after publication.

(n) After all the evidence on both sides has been published, the cause is set down for hearing, and all the The hearing and sentence;

(i) 1 Add. 195.



papers delivered to the judge, for his perusal, before the hearing. When the cause is called on in court, it is publicly argued by the advocates for the respective litigants, after which the Court pronounces sentence or judgment.

The execution of the judgment is either completed by the Court when practicable, or by the successful party resorting to the compulsory process of contumacy, *significavit*, and attachment. An Ecclesiastical Court cannot award damages or amerce; they can only enjoin the performance of a duty or a particular penance, which may, as we have already said, be commuted into a pecuniary satisfaction.

Costs;

(o) The costs are in the discretion of the Court, adhering to general rules and former precedents.

If either party be condemned in the costs, the proctor of the other litigant brings in his bill, which is referred to the registrar for taxation. The registrar then reports to the judge in open court the amount of the allowed costs, upon which the proctor makes oath that the amount has been necessarily expended on behalf of his client; and if no objection be raised, the judge decrees a monition for its payment, which is enforced in the ordinary manner already stated. A proctor, however, must recover his costs against his own client by an action at law: the Court having no power to determine disputes relating to them between a proctor and his client.

The Court may order security for costs to be given by all or either of the litigant parties.

Appeal;

(p) Every subject has a right to appeal from the decision of a lower to the judgment of a higher tribunal. The order of appeal in the Ecclesiastical Courts is from the archdeacon or his official to the bishop of the diocese;

from the bishop or his commissary to the archbishop of the province; from the archdeacon of any archbishop or his commissary to the Court of Arches or Audience of the same archbishop; and from the Court of Arches or Audience to the archbishop of the same province; and from him to the Privy Council, substituted for the abolished Court of Delegates (*k*).

The Court of Peculiars is an exempt jurisdiction, having an ordinary of its own; it is a branch of the Court of Arches, and has jurisdiction over all those parishes through the province of Canterbury in the midst of other dioceses, which are exempted from the ordinary's jurisdiction, and subject to the metropolitan only.

There are three sorts of Peculiars:—

(1) Royal Peculiars, under the jurisdiction of the Crown (*l*).

(2) Peculiars exempt from the bishop's visitation, having an appeal directly to the archbishop.

(3) Peculiars subjected to the bishop's visitation, with an appeal to him as Diocesan.

The Court of Arches, which is a Court of Appeal from the tribunals of the several bishops or ordinaries within the province of Canterbury, and its jurisdiction, is settled by the statute 23 Hen. VIII., c. 9.

The Court of Arches, by this statute, is empowered to take original cognizance, by virtue of letters of request, of such causes as the civil and canon laws allowed the inferior judge to remit to the superior, which are those that are called arduous causes, of which

(*k*) 2 & 3 W. IV., c. 92.

(*l*) 24 Hen. VIII., c. 12.

the matrimonial were always esteemed the chief; the statute vested this power in the judge, without mentioning consent either of the bishop or parties—in fact, the bishop's consent was never required; and if the parties' acquiescence had ever been deemed necessary, there hardly could be a cause commenced in the Court of Arches by request, for the defendant almost constantly desires as many opportunities of appealing as possible, in order to create delay.

Letters of request usually lie to the same tribunal whither the appeal lies, and for this reason:—The judge who signs them, by so doing, waiving or remitting his own Court (which is all that he can do), the jurisdiction which, generally speaking, at once alone attaches, is that of the appellate Court.

Where the inferior ordinary waives or remits his Court, the appellate Court, generally speaking, is alone competent to take cognizance of the cause; and this it is which has given rise to the notion—a notion, generally speaking, perfectly correct—that letters of request go in the same course with appeals, or, in other words, that the inferior ordinary must make request, or instance, of jurisdiction to that judge, into whose Court the cause must have been appealed had he himself proceeded in it in the first instance.

The Judicial Committee of the Privy Council is the last appeal from the Ecclesiastical Courts (*m*).

These appeals must respectively be taken within fifteen days after judgment or sentence (*n*).

Though the regular appeal from a jurisdiction, not peculiar but subordinate, is to the diocesan, yet if the judge

(*m*) See 3 & 4 W. IV., c. 41, for the constitution, powers, and duties of this court.

(*n*) 24 Hen. VIII., c. 12, § 7.

of the subordinate and diocesan Courts be the same person, the appeal may be, *per saltum*, to the metropolitan; but the reason must appear by the formal instruments in the cause; for if the bishop think fit to appoint the same individual to both offices, they must be considered as consolidated and merged, otherwise the absurdity and extreme inconvenience of appealing from the same person to the same person would be introduced.

Appeals lie as well from definitive sentences as from interlocutory decrees or grievances upon incidental points, to enunciate which is not within the bounds of any man's knowledge or foresight to particularise (o).

An inhibition is a writ to forbid a judge from further proceeding in a cause depending before him, until an appeal be determined. It usually issues from a superior to an inferior Court.

An *attentat* is anything wrongfully innovated or attempted in the suit by the judge pending an appeal, which may be revoked by a civil or criminal proceeding against such judge.

During an appeal, the inferior judge's authority is suspended. If the sentence appealed from be affirmed, the cause is remitted to the Court below, and the sentence stands as if there had not been any appeal, and is enforced accordingly.

If an appeal be from a definitive sentence, new relevant allegations are permitted, but not so when the appeal is from a grievance.

An appellate Court cannot give costs in the Court below, but the Judicial Committee have a discretion with regard to its own costs.

(o) Couset. 187.

Proof of these proceedings in other courts.

(q) The sentences of ecclesiastical courts as to matters within their jurisdiction are received as evidence in the temporal courts, which take judicial notice of the limits of their jurisdiction. Their sentence in matrimonial causes is conclusive evidence of the facts it establishes, except in suits of jactitation of marriage, which we will presently explain. The proceedings are proved by examined copies of the libel, answer, depositions, and sentence.

A copy of the probate of a will under the seal of the ecclesiastical court is conclusive evidence of a will of personal property, and of the proper execution, except upon an indictment for forging the will, when the prosecutor must then give evidence of the forgery of the will and probate, or that it was obtained by surprise.

An administration is proved by the production of the letters of administration, or by a certificate from the ecclesiastical court that administration was granted, or by a clerk from the ecclesiastical court, attending at the trial with the book of acts, containing the direction for letters of administration to be granted, and the surrogate's *fiat* for the same.

We will now address ourselves to the particular suits in the ecclesiastical courts, in which husbands and wives are opposing litigants.

Suits for the restitution of conjugal rights.

III. The object of these suits, which may be brought either by the husband or wife, is to compel a husband or wife who is guilty of the injury of subtraction, or lives separately from the other without any sufficient reason, to return to matrimonial cohabitation only; for the Court cannot obviously compel matrimonial intercourse.

This suit has sometimes been resorted to for the

purpose of trying the validity of a marriage, of which some doubt may exist, or there is a chance that the witnesses to establish it may be dead, or not forthcoming, should the marriage be contested at a future period.

The Ecclesiastical Court can only interfere in the way of restitution of conjugal rights, where matrimonial cohabitation is suspended. Hence it is not competent for the wife to institute such a suit, on the ground that she is not treated by the husband with conjugal affection, for matrimonial intercourse may be broken off on account of ill health, and other causes, with which it is quite incompetent for the Court to interfere.

If a man have solemnized matrimony with one, and afterwards marry another; should the lawful wife be desirous to be restored to her husband, she may institute a suit in a cause of divorce from the tie of the second marriage, and of restitution of conjugal rights. Or, if the deceived woman in the second marriage wish to have such marriage declared null, she may sue in a cause of divorce from the tie of marriage, joining the lawful wife in such a suit.

Suits for the restitution of conjugal rights involve all the questions which can arise, not only upon the legality of the marriage, but also upon the collateral question, whether the husband or the wife has, by adultery or cruelty, or infamous conduct, forfeited the matrimonial rights, and the ultimate decree will depend on these circumstances.

In a suit by a wife for restitution of conjugal rights, if the husband in defence or excuse allege the adultery of the wife, he may in that very suit pray and proceed, without the necessity of instituting a cross suit for the purpose, for a divorce on the latter ground. A suit for

restitution of conjugal rights may also assume the shape of a suit of nullity of marriage, when the marriage, or its validity, is denied.

The proceedings in this suit are these:—A citation issues under the seal of the Ecclesiastical Court, claiming jurisdiction, or a decree (by letters of request) from the Arches Court, at the suit of the promoter or plaintiff, calling upon the defendant to render conjugal rights. Upon a personal service having been effected, and the citation returned, and an appearance entered, a libel is brought into Court, pleading and setting forth the following facts: that the parties being free from matrimonial engagements, A. B. paid his court in the way of marriage to C. D.; the marriage, when, where, and the entry thereof, in the register book of the parish wherein they were married, a copy of which entry must be annexed; the living and cohabiting together, and passing as man and wife, and birth of children (if any); the ceasing and refusal of one of the parties to cohabit, and the jurisdiction of the Court; and concludes by praying that the marriage may be pronounced for, and the party offending render conjugal rights. The defendant as a bar may, by responsive allegation, plead cruelty or adultery (if the facts are so); and if either be established, the suit may, as we have seen, terminate in a decree of divorce. But if no such answer be advanced, then, after the libel has been admitted, the defendant is required to give an answer thereto; should it be in the affirmative, the party offending is admonished and directed by the judge to render conjugal rights; should the answer however be in the negative, witnesses are examined, and upon publication of the evidence, and no allegation excepting to the testimony of any of them given, the judge hears the cause, and passes sentence.

The only lawful cause of withdrawing from cohabitation is the cruelty or adultery of the other party, and the wife's incontinence in her single state may be pleaded by the husband in answer to the wife's libel in this suit.

The long discontinuance of cohabitation is not alone a bar to this suit. A deed of separation cannot be pleaded in bar to proceedings in these Courts.

The sentence of the Court in the complainant's favor, usually enjoins the husband to receive his wife at home in that character, and to treat her with conjugal affection, and to certify to the Court that he has done so within the allowed time. The consequences of a non-compliance with a decree of the Court is excommunication and imprisonment. Though it may be thought hard to send a wife back to a husband who has given proof of alienated affections by deserting her, yet, the Court does not send her back without due care for her reception; since the monition is not only that he shall take her back, but, that he shall treat her with conjugal kindness; and though the Court cannot interfere in the minute details of family life, for much must be left to the consciences of individuals, yet, the Court will see its monitions so far obeyed that the great obligation of conjugal duty shall be complied with. When a husband, who has been sued successfully for restitution, certifies as usual, in order to his dismissal, that he has taken his wife home and treated her with conjugal affection, the wife may be heard in objection to such certificate, and on proof that, though she has been taken home, the husband has not treated her with "conjugal affection," the Court will refuse to dismiss the husband, but direct him to certify over (*o*).

(*o*) This suit may be undoubtedly instituted, greatly to the prejudice



Suits for  
nullity of  
marriage.

IV. The object of a suit instituted for the purpose of having marriages declared null and void is twofold :— (1), where, although the marriage is *ipso facto* null and void, and no declaratory sentence is absolutely necessary, yet it is expedient to procure a sentence (*p*), in order to prevent any pernicious consequences which might take place hereafter from the death of witnesses or other contingencies rendering the proof of the invalidity of the

of an already injured husband : indeed, instances are not wanting, where a wife, after a formal separation, occasioned by her own misconduct, has (with the mere intention of giving weight to a demand for an increased allowance, or for some motive equally improper), instituted this suit, alleging that her husband had withdrawn himself from her society without lawful cause. Were this to happen, the husband should, for his own justification and protection, satisfy the Court that it was not without lawful cause that the separation took place. Should he happen to fail in his defence, it follows, of necessity, that he must either accede to the terms proposed, as an equivalent for cohabitation, or overcome the repugnant idea of receiving back (it may be), a polluted partner to his bed : and not only of taking her home, but (in such a case, contrary to his own honest conviction), he must submit to receive her in the character of an injured and innocent wife : and, according to the injunction of the Court, treat her with conjugal affection. But yet this species of suit is attended with advantages, which more than counterbalance any occasional abuse of the privileges it affords : for it places within the reach of an innocent wife an effectual protection against the extreme consequences which an unfounded calumny might produce, by its operation on a credulous or a jealous mind : or it enables her to put an unprincipled husband to the proof of whatever malicious accusations he may think fit to publish to the world, in palliation of the wanton desertion of his family, or as a pretext for withholding that maintenance to which every wife is *primâ facie* entitled, in proportion to the fortune and rank of her husband. Poynter on Marriage and Divorce, 243.

(*p*) Where a marriage is void, the sentence of the Ecclesiastical Court is *declaratory* only of the situation of the parties ; it does not make it void.

marriage difficult or impossible. Such is a suit for declaring a second marriage null and void, when at the time of its celebration, one of the parties had been previously legally married, and the marriage not then dissolved by death or divorce *à vinculo*; also a suit for the purpose of having a marriage *de facto* declared void by reason of legal invalidity, arising from a noncompliance of the marriage law, or from force. (2) Where the marriage is voidable only; for should the sentence of the Ecclesiastical Court not be obtained during the lives of both the parties, the marriage cannot, after either's death, be questioned anywhere.

In these suits, the Courts exercise a very proper care, for in them is often involved the legitimacy of innocent, helpless children.

Either party may institute a suit of nullity of marriage, and, if it be absolutely void, is entitled to the declaratory sentence of the Court, which has not, in such a case, any discretion. A parent of a minor who has contracted a void marriage may institute this suit, for such a one has a moral interest in the welfare of a child involved in such a meretricious connection. A guardian may also sue on behalf of his ward, and a committee on behalf of a lunatic. A stranger wishing to proceed in this suit must show a special pecuniary interest involved, and so must a parent after a child's majority.

A third person, not originally a party to the suit, but claiming an interest in the matter, may interpose at any stage of the suit, in defence of his own interest, whenever it is affected either as to his person or property. The proceeding is called an intervention, and is peculiar to the Ecclesiastical Courts. An intervener must take

the cause in which he intervenes as he finds it at the time of his intervention, and can only do, what he of right may have done had he been a party in the first instance. The Court may relax this rule under special circumstances.

After a libel has been given, a decree to see proceedings is served upon interested parties, inviting them to become parties to the suit, in order to protect their own interests, and intimating that otherwise the suit will proceed in their absence. This is by no means a compulsory process.

The Court will not pronounce sentence without proof of the marriage sought to be annulled, where the plaintiff and defendant are the alleged contracting parties, and also the identity of the parties satisfactorily established.

Suits for nullity of marriage on account of incest are usually civilly promoted at the instance either of the husband or wife, or of a party, who must have a special pecuniary interest, by virtue of the office of the judge, upon his entering into a bond to pay any costs and charges as the judge or his surrogate shall allot, if the suit fail. A decree is then personally served, charging the defendant with being guilty of the foul crime of incest, upon the return of which, and an appearance entered, or in the event of non-appearance, a further decree, calling upon the defendant to see proceedings, is served, and if no notice be taken of this, the suit proceeds, articles are exhibited and admitted, pleading the marriage and cohabitation of the father and mother of A. B. and C. D. (accompanied with a certificate of such marriage); the birth and consanguinity or affinity of A. B. and C. D., when and where they were baptized,

(annexing copies of the certificates of such baptisms) ; the identity of the parties, the marriage of defendant with A. B., then living and cohabiting as man and wife, (annexing a copy of the certificate of marriage and identity) ; the committing of the incest, and the jurisdiction of the Court, the prayer being that the judge do pronounce the marriage null and void, and that the defendant be corrected.

In the criminal form of proceeding, the office of the judge may be promoted by any one with the permission of the judge himself, the promoter need have no interest ; for the object of the suit is to punish and prevent the commission of that which the Ecclesiastical law deems a vile offence ; it does not seek to secure or advance the interest of any one ; if such an effect be produced by the sentence, it is purely accidental, and no part of the judicial object of the suit.

The usual punishment for incest is the performance of public penance on a Sunday, in church, during divine service. The parties were also formerly subjected to excommunication, which by statute 53 Geo. III., c. 127, § 3, is commuted for such imprisonment, not exceeding six months, as the court, pronouncing or declaring a person excommunicate, shall direct (*q*).

V. This suit, which is of very infrequent occurrence, is brought when a person maliciously and falsely boasts or gives out, that he or she is married to another, whereby a common reputation of their marriage may ensue. The party injured sues for the purpose of

Suits of  
jactitation  
of mar-  
riage.

(*q*) A sentence of nullity of marriage may be obtained *propter impotentiam*, or on account of sterility in either sex, when it can be shewn to have existed at the time of the marriage.

having perpetual silence enjoined upon the unjustifiable boaster.

The Ecclesiastical Courts are bound to entertain such proceedings, for the protection of persons against the extreme inconvenience of unjust claims and pretensions to marriage, which has no existence at all. If a person pretend such a marriage, and proclaim it to others, the law considers it as a malicious act, subjecting the party against whom it is set up to various disadvantages of fortune and reputation, and imposing upon the public (which for many reasons is interested in knowing the real state and condition of the individuals who compose it), an untrue character; interfering in many possible consequences with the good order of society, as well as the rights of those who are entitled to its protection. It is therefore a fit subject of legal redress; and this redress is to be obtained by charging the supposed offender with having falsely and maliciously boasted of a matrimonial connexion, and upon proof of the fact, obtaining a sentence, enjoining him or her to abstain in future from such false and injurious representations, and punishing the past offence by a condemnation in the costs of the proceedings.

The proceeding in way of jactitation of marriage is in the nature of a criminal suit. The libel sets forth that the complainant being in no way married or united with the defendant, that the defendant falsely and maliciously boasts and reports that he or she is married, whereas, in fact, no marriage has taken place, and that on his or her being desired to desist from such conduct, he or she paid no attention to such desire, but continued falsely and maliciously to boast and report such facts to the no small prejudice and injury of the complainant, and prays that the Court

will pronounce that the defendant has been in no manner married to the complainant, that it will restrain him or her from such conduct, and condemn him or her in the costs of the suit.

To a charge of jactitation three different defences may be opposed; (1) the allegation of having made any such representations may be denied, in which case, if not proved, the accusation shares the common fate of other unfounded charges. This defence is in the character of a suit for defamation, with this difference, that the defendant in this suit is compellable to answer the libel on oath; or (2) it may be admitted that such representations have been made, but that they are true; for that a marriage had actually passed, and in such a way as to give the party a right to claim the benefit of it. This defence assumes the shape of a suit of nullity on one side, and the restitution of conjugal rights on the other. The Court would pronounce a sentence of nullity, or decree a return to matrimonial cohabitation unless intervening circumstances have occurred to dissolve the matrimonial obligation; and (3) that though no marriage have passed, yet the pretension was fully authorised by the complainant, and therefore though the representation be false, yet it is not malicious, and cannot be complained of as such by the party who has denounced it.

The court is bound in a cause of jactitation to see that parties do not usurp the characters of husband and wife to the injury of the complainant; but if there be no usurpation, if the title have been licensed by the authority, and still more by the example of the complainant himself, the court will not interfere, but leave him to relieve himself by his own exertions from the inconvenience of his own acts; for it would be difficult

to maintain that the defendant is liable to a charge of malice by following the plaintiff's own permission for adopting the character he had conferred upon her,—for echoing his own assertions and conforming to his own course of acting. The court would dismiss the suit under such circumstances.

Alimony :-- VI. Alimony is the allowance to be made to the wife out of her husband's estate for her maintenance, either during a matrimonial suit or at its termination, when she proves herself entitled to a separate maintenance either by showing a marriage, or by the husband admitting it.

A wife is not entitled to alimony, if she elope with an adulterer, or wilfully leave her husband without any just cause for so doing (*r*).

Alimony  
pending a  
suit.

(a) In causes between husband and wife, on the principle that the whole property is supposed by law to devolve upon the husband, he is generally obliged to pay the expenses on both sides, and to allow his wife alimony during the suit, and this whether the suit be commenced by or against him, and whatever its nature may be. In a suit of nullity against the alleged wife, the Court will not proceed until the wife is provided with funds for conducting her defence, although fraud in procuring the marriage is expressly charged upon the wife, and though costs may be ultimately awarded against her.

Before the alimony is fixed, an allegation of faculties is given in on the wife's part, stating the husband's property and income, to which the husband answers upon his oath, and may state that his wife brought him no fortune. This allegation should be given in at an early

period of the suit, so as to be disposed of as soon as practicable. The amount of alimony is in the discretion of the Court; but alimony, *pendente lite*, is always less than that which is assigned after the proof of a husband's delinquency; it is usually about one-fifth of the husband's net annual income. Alimony generally commences from the return of the citation, unless there be an improper delay, and then it will commence from its issue. On appeal, it runs from the date of the sentence appealed from, and not from the return of the inhibition.

The alimony will be reduced according to the fluctuations of the husband's income.

If the husband's circumstances should alter, if he be *lapsus facultatibus*, he should, without delay, apply to the Court to have the alimony reduced, his means having diminished; and the wife may apply for an increase, if his means have improved.

The independency of a wife may in some cases relieve a husband from the charge of alimony pending proceedings, but cannot, except perhaps where there has been gross misconduct on her part, tend to his entire exoneration. The insufficiency of his means can form no reason why he should not pay alimony, and also costs, when his own conduct has made him liable.

All alimony due must be paid before the hearing of the cause.

(b) This kind of alimony is allotted to a wife, irrespective of a suit, upon a separation on account of the husband's conduct. It is altogether within the exclusive jurisdiction of the Ecclesiastical Courts. Although its amount is in the Court's discretion, yet it is a judicial, and not an arbitrary discretion, to be exercised upon an <sup>Permanent alimony.</sup>



equitable consideration of all the peculiar circumstances of the given case. This alimony is more ample than alimony pending a suit; it is sometimes a third, at other times a moiety (*s*), and is larger in proportion to a small than a great income. A less proportion will be given where the husband derives his income from his own personal industry.

Permanent alimony is usually decreed from the date of the divorce *à mensâ et thoro*, where there is no unnecessary delay. It is never granted to a second wife in a cause of nullity, by reason of a former existing marriage.

Upon a general principle, after separation, by the husband's misconduct, the wife is entitled to be alimoned as if living with him as his wife (*t*).

An appeal will lie in respect of alimony alone, but this is rarely resorted to.

Of course, a material alteration in the husband's circumstances will induce the Court to alter the rate of this alimony, as well as that *pendente lite*, either by increasing or decreasing it, as the case may be.

Alimony being allotted from year to year, the Court will not, without some very sufficient cause, enforce payment of arrears beyond one year prior to the monition,

(*s*) Where the husband had raised himself to independence and affluence by marrying a young woman, whom he not only injured, but insulted, by debauching a maid servant who lived in the adjoining house; had taken a house for such servant, and for her society had abandoned that of his wife; had children by such servant; received his friends in the house, and introduced her as his wife; the Court gave a moiety of the husband's property to the wife for permanent alimony. *Cooke v. Cooke*, 2 Phill. 40.

(*t*) *Durant v. Durant*, 1 Hag. 530.

for delay infers that the wife has made some more beneficial arrangement.

After an Ecclesiastical Court has decreed alimony, and the husband meditates a departure from this country, in order to evade its payment, the Court of Chancery will grant its prerogative writ of *ne exeat regno*, under which he will be arrested. The Ecclesiastical Court cannot arrest or hold any person to bail.

A wife may apply for a writ *ne exeat regno* to prevent her husband from leaving the kingdom, which he threatens to do, till a suit instituted by her against him in the Ecclesiastical Court for alimony, charging him with cruelty and adultery, be determined. An affidavit to found such a writ upon, must not only say that the defendant is indebted in such a sum, but must also mention the facts on which it arises, and on which it is grounded. The rule is, that there must be an affidavit positive to the extent that the husband is going abroad, or some declaration that he is (*u*).

The arrears of alimony are not recoverable in equity, but only in the Ecclesiastical Court; it is not chargeable as a separate estate. While alimony is liable, as we have seen, to be varied by the Ecclesiastical Court, according to the husband's circumstances, separate property remains the same, whatever alteration may take place in

(*u*) Although Courts of Equity do not assert any general jurisdiction to decree a suitable maintenance for the wife out of her husband's property, because he had deserted her, or ill-treated her; yet we have seen they do not abstain altogether from interference in her favor. Whenever the wife has any equitable property within the reach of the jurisdiction of courts of equity, they will lay hold of it: and in the case of the desertion or ill-treatment of the wife by the husband, as well as in the case of his inability or refusal to maintain her, they will decree her a suitable maintenance out of such equitable funds.

the husband's circumstances, and whether he is living or dead, or whether he is abroad or not.

Although the Ecclesiastical Court may perhaps allow a wife's executors to enforce payment of the arrears of alimony against the husband, a court of equity will certainly decree their payment.

#### Adultery.

VII. Adultery is a wrong whereby another's marriage-bed is violated and betrayed; it is a gross breach of the great rules of morality (*v*). The law holds it to be manslaughter only, if a husband detect a man in the act of adultery with his wife, and then and there directly kill him or her; but it will be murder to kill any person on mere suspicion only (*w*). This offence is otherwise called Criminal Conversation, usually abridged into Crim. Con.

There are two remedies for this abominable wrong: an action at Common Law for damages, and a suit in the Ecclesiastical Court (*x*). It is not a criminal offence according to English Law, but simply a civil injury, susceptible of pecuniary compensation only for the loss of a wife's society, comfort, and assistance.

With regard to the Common Law action, the husband only (*y*) can bring it against the adulterer, and

(*v*) Lord *Kaimes* observes (Sketches, 4th vol.) that by "adultery mischief is done both externally and internally. Each sex is so constituted as to require strict fidelity and attachment in a mate. The breach of these duties is the greatest external harm that can befall them; it harms them also internally, by breaking their peace of mind."

(*w*) *Manning's Case*, T, Raym. 212; *Reg. v. Kelley*, 2 C. & K. 814.

(*x*) 13 Edw. I., *Circumspecte Agatis*. See next chapter for the suit in the ecclesiastical court.

(*y*) Where the wife of a minor committed adultery, and his father procured himself to be appointed *prochein ami*, and commenced an action for criminal conversation, without the knowledge or authority of the son;

he must present himself in Court with perfect propriety of conduct, and without any imputation of having courted his own dishonor, or of having been instrumental to his own disgrace, for otherwise he cannot successfully maintain this action, since *volenti non fit injuria*,—an abettor can hardly murmur.

The circumstances in extenuation to lower the amount of damages will vary with every individual case. Proof of the wife's tainted character, as that she has been before a prostitute, or eloped with another; or proof of her being a woman of notoriously bad character, and that she made the first advances of a criminal nature to the defendant; or proof of the husband's profligate habits, and his criminal connection with other women, or that he felt no affection for his wife, turning her out of his house, and refusing to maintain her, before the intercourse with the defendant; or that he connived at the indecent familiarities with the defendant, and showed the utmost indifference about her reputation and character; these are some of the many circumstances which manifestly ought to have a very considerable effect with the jury in reducing the amount of damages (*z*).

An action for damages may be brought for adultery committed abroad.

It must be brought within six years after the perpetration of the wrong (*a*), in a Superior Court of Common Law, and not in a county court (*b*).

as he was entitled to do so, a judgment in such action would be a good bar to any proceedings for the same cause by the son when of age. 7. M. & W. 400.

(*z*) 2 Phill. on Evid. 204.

(*a*) 21 Jac. I., c. 16, § 3.

(*b*) 9 & 10 Viet., c. 95, § 58.

The form of the action is either "on the case," or "of trespass," but more usually the latter (*c*).

The declaration in this action is very concise. The statement is simply that the defendant debauched and carnally knew the plaintiff's wife.

In defence, the defendant may plead "not guilty," or if he can substantiate it in evidence, "leave and licence of the husband," or "that the plaintiff is not married."

On the trial the plaintiff must prove the marriage strictly by producing an examined copy of the register, or by a person present at the ceremony, and the identity of the parties, unless the defendant have solemnly and seriously recognised the woman as the plaintiff's wife; the fact of adultery (*d*), and any circumstances in aggra-

(*c*) Case is the best form of action, where there is a doubt whether the adultery can be proved, and there is a ground of action for enticing away or harbouring the wife without the husband's consent, because under such circumstances there may be a second count for the latter grievance; see form of such count, *Winsmore v. Greenbank*, Willes, 578.

(*d*) The evidence of this fact, which, from its very nature, is usually circumstantial, must be sufficient to satisfy the jury that an adulterous intercourse has actually taken place. Proof of familiarities, however indecent, is insufficient, if there be reason to apprehend, from the fact of the parties being interrupted, or on any other circumstance, that a criminal conversation has not actually taken place. In fact, the wife must be proved to have violated not only her delicacy, but her duty; it is not enough that she has surrendered her virtue, without having surrendered her person.

The nature of the proofs upon this head are too obvious to require specification. They usually consist of evidence of indecent familiarities between the parties; their elopement; their passing as man and wife; the season, frequency, and privacy of their meetings, and of any other circumstances attending their intercourse, and indicating the nature of it.

Where a discovery has been made by a servant, it is of importance to show that it was promptly communicated to the party injured: if it were

vation, such as endearing converse between the plaintiff and his wife; her letters either to him or to others, penned before the adulterous intercourse, in order to prove the terms of affection on which they lived before their happiness was blasted by the wiles of the adulterer; her remarks and anxiety concerning her husband expressed to others; her declared intentions when leaving her home, as removing all suspicion of the plaintiff's connivance; or a settlement and provision, which he may have made for her and her children.

The evidence for the defence may be that the marriage was irregular, and is void, if the marriage be denied by special plea, and not admitted by the plea of "not guilty;" or that the wife's character is worthless; or that the plaintiff's misconduct estops him from claiming damages, which may be proved under the plea of "not guilty;" or that the plaintiff himself permitted the intercourse, proved under a plea of leave and licence.

While the wife's confession is not evidence for the plaintiff, her conversations with the defendant are evidence against the defendant, and so are her letters to the defendant, coupled with his conduct on receiving them, such as continuing the suspicious intercourse. The wife's letters to the defendant are not evidence for him, but, where they were written before the crim. con. began, they may be read with a view of shewing that the wife had really solicited the defendant.

not made till after a quarrel or dismissal from the service, or after a long interval, the evidence labours under great suspicion. 2 Stark. Evid. 353.

The testimony of discarded domestics should be received with great caution and the most sifting scrutiny, otherwise our position is fearful, our tables and our beds would be surrounded with snares, and our comforts converted into instruments of terror and alarm.

Proof of the defendant's wealth will not be admitted, in order to indicate that he can afford to pay large damages (*e*), for this is not a question in issue.

Where the damages recovered are under forty shillings, the plaintiff will not be entitled to have his costs paid by the defendant (*f*), unless the judge certify that the grievance for which the action was brought was wilful and malicious.

A new trial will not be granted in this action, on account of large damages, unless they are very excessive, or a strong case can be made out to convince the Court at Westminster that the jury on the trial took a perverted view of the matter.

By 1 & 2 Vict., c. 110, § 78, a defendant imprisoned for damages recovered in an action for criminal conversation, is liable to be detained for any period not exceeding two years. But a prisoner in execution for damages under twenty pounds, in such an action, is entitled to his discharge at the end of a twelvemonth, under 48 Geo. III., c. 123.

#### Bigamy.

VIII. This is a serious and criminal offence against the holy estate of matrimony, and is indictable in the Superior Criminal Courts only. The 9 Geo. IV., c. 31, § 22, provides that if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage

(*e*) The plaintiff is entitled to damages in criminal conversation, though the wife die before the action, and it appear that the husband was not aware of her infidelity until she was on her death-bed: and damages may be given for the shock to the husband's feelings, and the loss of her society from the time of the discovery until her death, though the husband continued to treat her kindly. *Wilton v. Webster*, 7 C. & P. 198.

(*f*) 3 & 4 Vict., c. 24, § 2.

shall have taken place in England or elsewhere, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labor, in the common gaol or house of correction, for any term not exceeding two years; and any such offence may be dealt with, inquired of, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county; provided always that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of our Crown, or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

A prosecution for this crime must be supported by evidence of the first and second marriages of the prisoner, and of the existence of the first wife or husband at the time of the second marriage.

If the first marriage be *void*, an indictment for bigamy cannot be sustained. Thus, if a woman marry A., and in the lifetime of A. marry B., and after the death of A., and whilst B. is alive, marry C., she cannot be indicted for bigamy in her marriage with C., because



her marriage with B. was a mere nullity. Proof, however, of a marriage which is *voidable* merely, will support an indictment for bigamy.

The first wife or husband is not a competent witness to prove any part of the case, but the second wife or husband is, after the first marriage is established, for she or he is not legally a wife or husband.

Either one of the following defences, properly substantiated, will procure the acquittal of the accused:—

(1) That the wife or husband of the party indicted has been continually remaining absent from the other for the space of seven years then last past, and has not been known by the other to be living within that time, *i. e.* has not been known at any period during the seven years to be alive.

(2) That before the second marriage, the accused was divorced from the bond of the first marriage (*à vinculo matrimonii*).

(3). That the former marriage was declared to be void by the sentence of a court of competent jurisdiction.

(4) That the prisoner is not a subject of our Crown, and that the second marriage was contracted out of England.

These exceptions only protect from the felony; they do not bar the ecclesiastical jurisdiction over the offence of bigamy; neither do they confer any validity on a second marriage had during the existence of the husband or wife of the first, under whatever circumstances it may be contracted, such second marriage (or, in technical language, profanation of marriage), being so total a nullity that it cannot be amended even by the dissolution of the first, without a formal and legal ceremony, subsequently to such dissolution.

A wife can prosecute her husband for any offence committed against her person by him, as an assault and battery (*f*); a threat to do some grievous bodily harm; an attempt to perpetrate such a dastardly act, or actually committing it; and she would be a competent witness against him (*g*).

IX. A wife may exhibit articles of the peace, which is Articles of the peace. called swearing the peace against her husband, (or a husband, if absolutely necessary, against his wife), on the ground of present fear, or future danger, arising from a threat of corporal injury, imprisonment, or cruelty (*h*), for the purpose of binding him with sureties, or her by her friends (for a wife is seldom personally bound), in a recognizance or obligation to the Crown, to keep the peace, or be of good behaviour (*i*), so as to prevent the anticipated offence.

(*f*) An agreement by the wife to waive the further prosecution of an indictment against her husband for an assault, in consideration of his allowing her an annuity by way of separate maintenance, is an illegal contract, though entered into with the sanction of the court in which the indictment is pending, and the wife cannot claim the arrears of the annuity as a debt against her husband, in competition with her husband's creditors. *Garth v. Earnshaw*, 3 Y. & C. 584.

(*g*) See *ante*, p. 164, as to abduction, and p. 392, as to evidence.

(*h*) When, by a long course of cruelty on the part of the husband, the possibility of the wife residing with him has become hopeless, a suit in the spiritual court for a divorce and alimony is the better remedy. See next chapter.

(*i*) The authority to take sureties to keep the peace is derived from the common law; that to require sureties for good behaviour is founded upon the 34 Edw. III., c. I. A recognizance to keep the peace is only forfeited by an actual attack or threat of bodily harm, or burning a house; therefore it is not forfeited by bare words of heat and choler, as calling a man a knave, liar, rascal, or drunkard; for though such words might provoke a choleric man to break the peace, yet they do not directly challenge him

If this application be made through malice or vexation alone, 'without any apprehension, or for past breaches of the peace, it will fail.

The application is made either to a local magistrate, or to the quarter sessions of the peace, then being held.

A justice of the peace has authority to take sureties of the peace out of sessions ; yet if there be no particular pressure for adopting such a private proceeding, the more usual and better mode is to take the recognizance "for the appearance of the person complained against at the next general, or general quarter session of the peace ; and in the mean time, for his keeping the peace to the Queen, and all Her Majesty's liege subjects, especially to the complainant."

Every justice who takes a recognizance for keeping the peace must certify the same to the next sessions, that the person bound may be called upon his recognizance before the sessions. If he do not appear when called, his recognizance may be estreated ; if he do appear, the Court may make proclamation, that, "if any

to do it, nor does it appear that the speaker designed to carry his resentment further ; and it has been said that even a recognizance for good behaviour shall not be forfeited by such words ; yet a challenge to fight would undoubtedly constitute a breach of such recognizance. But a recognizance to be of good behaviour will not only be forfeited by actual breaches of the peace, but also by some other acts for which a recognizance to keep the peace would not be forfeited, as for going armed with great numbers, to the terror of the people, or speaking words tending to sedition, and also for such actual misbehaviours which are intended to be prevented by such a recognizance, but not for barely giving cause of suspicion for what perhaps may never actually happen.

No *legal* assault or other act, however, will constitute a breach of either recognizance if it were justifiable as a battery, in defence of a wife, child, or servant, or in one's own defence.

man can shew cause why the peace granted against such a one shall be continued, he shall speak;” and, if no person come to demand the peace against him, or to shew cause why it should be continued, then the Court may discharge his recognizance.

But if a man be bound to keep the peace towards a certain person, then, although such person do not come to desire the surety of the peace to be continued, yet the Court, in their discretion, may bind him over till the next session to keep the peace against that person only, since such person, who first craved the peace, may be sick, or otherwise prevented from coming to that session to demand the continuance of the peace.

If the applicant appear, either before the quarter sessions or before the magistrates, his or her counsel may then move that the Court do receive the articles of the peace exhibited against the offender. They should be ready engrossed on parchment, so as to be handed to the clerk of the peace to be read by him, after which the exhibitant must be sworn to the truth of them. The Court then, on the motion of counsel, declares in what sum, and for what period, the defendant's recognizance shall be taken. Upon his entering into it with two sureties, his former recognizance to appear (if there be any), may be discharged; but if he cannot procure sureties, the Court, on motion, will commit him till he does. The party is usually bound by recognizance to the next session; and so on from session to session, so long as the applicant shall be able to make it appear that his reasonable apprehensions continue. Or the justices may bind him for a certain definite period, without reference to any succeeding session, at their discretion, as the local justice may do in the first instance, thus avoiding the necessity of the parties appearing at the next sessions.

The truth of the articles cannot be disputed by the defendant: he can only take advantage of any informality or ambiguous expression in them; should they be malicious, he can indict the exhibitant.

Justices of the peace cannot proceed against a party for the forfeiture of his recognizance, either in respect of his not appearing, or of his breaking the peace; but the recognizance itself, with the record, on default of appearance, ought to be removed into a superior court at Westminster, which proceeds by *scire facias* upon such recognizance, and not by indictment.

After the condition of a recognizance for keeping the peace is broken, the Crown may pardon the forfeiture; but it cannot release the condition before it is broken; because the person upon whose complaint the recognizance was entered into, has an interest in such condition.

An attorney's bill of costs for exhibiting articles of the peace by the wife against her husband, are recoverable against the husband, as being necessary for her protection (*j*).

If the party required to find sureties be a peer or peeress, or the local magistrates have refused to interfere, or be a married woman, and require immediate protection against her husband, the Court of Queen's Bench may be applied to (*k*).

The articles are framed substantially in the same terms as those exhibited before justices, and must particularly state the past as well as future personal danger, and other circumstances. It is advisable to have

(*j*) *Shepherd v. M'Koull*, 3 Camp. 326. But the costs of an indictment for an assault, or for preparing a deed of separation, cannot be so recovered by the wife's attorney, for neither of them is necessary.

(*k*) 21 Jac. I., c. 8.

corroborate affidavits, but no affidavit in contradiction of the allegations respecting the battery or injury, and threat of repetition, can be received, as they are to be taken to be true until disproved by a prosecution for perjury; but an explanation of ambiguous parts of the exhibitant's affidavits may be received, and also affidavits showing direct evidence of express malice on the part of the applicant, such as a declaration to that effect, though not of inferred malice collected from general reasoning or collateral circumstances.

The Court may require a recognizance, with sureties, to keep the peace for any term of years (which may be afterwards reduced), or generally, when it continues during life. Where the party required to give security is aged or ill, or at a distance, the Court will authorize, and by *mandamus* command, local justices to take the recognizance.

X. The Lord Chancellor being by the common law a *Supplicavit* conservator of the peace, the Court of Chancery has an exclusive jurisdiction in granting the writ of *supplicavit* (*l*), which is in the nature of articles of the peace

(*l*) The nature and objects of this process have been thus stated:—It is granted upon complaint and oath made of the party, where any suitor of the Court is abused, and stands in danger of his or her life, or is threatened with death by another suitor. The contemnor is taken into custody, and must give bail to the sheriff and if he move to discharge the writ of *supplicavit*, the court hears both parties on affidavits, and continues or discharges it, as the case appears before them. If they order the contemnor to give security for his good behaviour (for this writ is in the nature of a Lord Chief Justice's warrant to apprehend a man for a breach of the peace), he must do it by recognizance, to be taken before one of the officers of the Court, who must be in the commission of the peace. He is to find sureties to be of his good behaviour. If he beat or assault the party the second time, the Court will order the recognizance to be put in suit,

at the common law to find sureties to keep the peace. It is now rarely resorted to, as the common law remedy is prompter, and not less adequate.

A wife may, however, issue this writ, in order to obtain her security of the peace against her husband, when there are other proceedings between them pending in the Court; but it is very doubtful whether the Court will decree a separate maintenance to her as incident to this jurisdiction.

Before this writ is granted, the party who demands it must make an affidavit that she or he does not pray it out of malice, upon which a warrant will issue for the *supplicavit*.

If the offender be ordered to give security for his good behaviour, he must do it with sureties by recognizance before an officer in the commission of the peace. If he beat or assault the party a second time, the Court will order the recognizance to be put in suit, and permit the party to recover the penalty; but the recognizance is never enforced but by special leave of the Court.

A writ of *supplicavit* has also been granted upon articles filed on oath of assault and battery, and that the complainant goes in fear of her life. It has also been granted upon information to the Court of violent behaviour.

and permit the party to recover the penalty; for the recognizance is never to be sued but by leave of the Court. But this proceeding very rarely or ever happens. So if any suitor of the court is arrested either in the face of the court or out of the court, as he is going and coming to attend and follow his cause (for so far the Court does and will protect every man), upon complaint made thereof, sitting the Court, they will send out the tipstaff, and bring in the bailiffs and prisoner into court instantly, sitting the court, and they will order them forthwith to discharge him, or lay them by the heels; and the plaintiff in the action, upon complaint

The security is not, in the first instance, to be taken in an amount unreasonable with referencē to his circumstances, but liberty will be given to apply again, in case of a repetition of ill conduct.

The Court exercises a discretion on the subject of discharging a party; but in general the Court of Chancery, as well as the Court of Queen's Bench, in the case of articles of the peace, at the end of the year, if nothing new happen, will discharge a party for want of finding sureties.

and oath made thereof, will certainly stand committed. He shall lie in prison till he petitions, submits, and begs pardon, and pays the costs of the other party. *Gilb. Forum Rom.* 202.

This writ is also grantable against a magistrate who has declined to bind a person to keep the peace, to compel him to act as a ministerial, and not as a judicial officer; and he must make a return to such writ, specifying his compliance, under his hand and seal. But this writ is seldom used; for when application is made to the Superior Courts, they usually take the recognizances there, pursuant to 21 Jac. I., c. 8.



## CHAPTER VII.

## DIVORCE.

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| <p>I. The two kinds of divorce.<br/>         II. Divorce <i>à mensâ et thoro</i>.<br/>         III. Mode of proceeding.<br/>         IV. Intolerable cruelty.</p> |  | <p>V. Divorce <i>à vinculo matrimonii</i>.<br/>         VI. Foreign divorces.—Conflict of<br/>         the English and Scotch laws.</p> |
|---|--|---|

The two  
kinds of  
divorce.

I. A DIVORCE is the judicial separation of a husband and wife. It is of two kinds:—(1), a divorce *à mensâ et thoro*, being only a separation from bed and board; (2), a divorce *à vinculo matrimonii*, being an entire dissolution of the bonds of matrimony (*a*).

The first kind of divorce takes place when the marriage between the parties was lawful, but for some supervenient cause, it becomes impossible for the parties to live together any longer.

The Ecclesiastical Courts can only pronounce this divorce or separation, which does not, however, sever the matrimonial tie, so as to permit the parties to contract another marriage, but rather contemplates and hopes the possibility of reconciliation.

There are three grounds for this divorce:—(1), adultery—(2), intolerable cruelty; and (3), unnatural practices (*b*).

(*a*) Upon the subject of allowing an unlimited right to divorce, see Hume's Essay on Polygamy and Divorces; Lord Stowell's judgment in *Evans v. Evans*, 1 Hagg. Cons. R. 36; and Milton on the Doctrine and Discipline of Divorce.

(*b*) See Sanchez, lib. 10, Disp. 4, § 3; *Bromley v. Bromley*, 2 Adams, 158, n.; *Mogg v. Mogg*, *ib.* 292.

A divorce *à vinculo matrimonii* is only pronounced on account of the adultery of the husband or wife, and this great power is vested solely in the House of Lords, the highest tribunal in the kingdom, and is exercisable by a specific act of parliament releasing the injured party from the matrimonial bond with the wrong doer (*c*).

Our laws cannot dissolve the *vinculum, proprio vigore*: it is only by the intervention of the legislative power, which is above the law, that this can be accomplished.

The expenses of even a common divorce bill is between 600*l.* and 700*l.*, which excludes the greater part of the community from resorting to this proceeding; it is indeed a law for the rich only—the privilege of the aristocracy.

We will now detail the law and practice of these divorces.

II. Either an injured husband (*d*) or wife may bring a suit for divorce, on account of the other's adultery, in the Ecclesiastical Courts, since it is held there equally an offence whether committed by the husband or the wife, thus differing from the Common Law (*e*). The

Divorce *à mensâ et thoro.*

(*c*) See the *Case of the Marquis of Northampton*, 2 Burnet's Hist. of the Reformation, 53, 237; 4 Reeves's Hist. of Law, 549.

(*d*) The committee of a lunatic may sue without the Lord Chancellor's leave, 2 Hag. 170; so also the parents or guardians of a minor.

(*e*) Montesquieu (*L'Esprit des Lois*), Pothier (*Tracté du Contrat de Marriage*, 512), and Dr. Taylor (*Elements of Civil Law*, 254), insist that the cases of husband and wife ought to be distinguished, and that the violation of the marriage vow on the part of the wife is the more mischievous, and that the prosecution ought to be confined to the offence on her part.

Lord Eldon (Parl. Hist. c. xxxv., p. 1433) said, "It was to be considered that adultery committed by a wife, and adultery committed by her husband, were widely different in their consequences. The adultery

right to sue is purely a private right, the exercise of which is permitted, but not absolutely enjoined.

Lapse of time alone is not a sufficient bar to suits for divorce by reason of adultery. There is no limitation of time imposed by statute, or by any rule which the Court has laid down for itself; but a great delay should be satisfactorily accounted for.

A divorce, on proof of adultery of the wife, is not barred by the desertion of the husband from a conviction of her crime, or by his not providing for her from inability to do so (*f*).

A voluntary separation by deed or agreement is no bar to this suit, for the Ecclesiastical Courts treat it as

of the wife might impose a spurious issue upon the husband, which he might be called upon to dedicate a part of his fortune to educate and provide for; whereas no such injustice could result to his wife from the adultery of a married man; and, in many cases, not only a reconciliation might be brought about, but it became the especial duty of a wife to forgive her husband's misconduct from motives of tenderness and concern to the interests of his innocent children."

(*f*) In proceeding for a divorce, distance of time, as between the period of instituting the suit, and the date of the facts relied on, though not of itself sufficient, may, nevertheless, under circumstances, form a material point in bar of proceedings; for, although there is no limitation of time acknowledged by the Courts, still, if a considerable interval have elapsed between the date of the fact, and the date of the complaint, or (as respects adultery), between the time of the complainant's knowledge of the injury and the date of the complaint, an inference arises to the prejudice of the promoter, who appears *primâ facie* to have slumbered over the wrong complained of. Such conduct creates a suspicion of insincerity and indifference in the party praying for a separation, and a presumption, that by long acquiescence in the injury, the penalty has been remitted by an implied condonation. Hence a full and satisfactory explanation of such delay, if not incidentally apparent, is usually required in these suits, whether proceeded in by reason of adultery or cruelty.

But there is a great difference between the conduct of a husband and

an illegal contract, implying a renunciation of stipulated duties,—a dereliction of those mutual offices which the parties are not at liberty to desert.

III. The plaintiff or promoter issues a citation or decree, calling upon the defendant to appear and show cause why the plaintiff should not be divorced from bed, board, and mutual cohabitation, by reason of adultery. Service and appearance having taken place, a libel is brought in and admitted by the judge. Mode of proceeding.

The libel states the courtship and marriage of the parties, their cohabiting and passing as man and wife, the birth of children (if any), the various acts of adultery, when, where, and with whom committed, and then shows the jurisdiction of the Court, and concludes by praying the judge to pronounce the party to be divorced from bed, board, and mutual cohabitation. If there have been an action of crim. con. at common law, and a judgment have been obtained against the adulterer, that fact should be pleaded, and a certified copy of the judgment annexed (*g*).

The libel must plead the conclusion of adultery, because unless it is pleaded, it does not follow that it may not be a suit for mere solicitation of chastity. But

wife on this point, and an equal presumption does not, in all cases, arise to the prejudice of the wife, inasmuch as forbearance on her part is held to be praiseworthy until all reasonable expectation of recalling the husband to his duty has ceased. Besides, the husband may, by his authority, command the adherence and obedience of the wife; whereas she, in case of the desertion and criminality of the husband, must adopt some other mode than that of compulsion. *Poynter on Marriage and Divorce*, 202.

(*g*) A verdict in an action at law for the recovery of damages for crim. con., is usually pleaded, but it is not analogous to proceedings for a divorce, as it is not brought against the wife, but the adulterer, for the injury sustained; where, however, the husband has not felt the

if the plaintiff aver it, and he or she prove only proximate acts, the whole of the averment in the libel is proved. The Court will draw such inference as the proximate acts proved by witnesses unavoidably suggest and point out.

The whole case should be at once brought before the Court; but where it can be clearly shewn that the facts could not have been sooner pleaded, additional articles may be presented. The plaintiff is not bound to the contents of the original libel, for further acts of adultery may be pleaded supplementarily, and a sentence obtained upon facts not existing at the commencement of the suit. And although publication have passed, the Court, on an affidavit that material facts are newly discovered, has a discretion to allow the cause to be opened for the purpose of pleading any further adultery.

There appears to be five causes, any one of which, if pleaded and established, will bar this divorce on account of adultery. They are:—

(1) Compensation (*h*), or Recrimination. If husband and wife are both convicted of adultery, the effect of it on the part of one is taken away by the mutual compensation; for it would be unjust for one person to judge

injury, nominal damages only are given. In the Ecclesiastical Court, it is not the measure of the injury which is to be considered, but whether the complainant is entitled to a separation or not. This verdict is not evidence against the wife: it is pleaded to show the Ecclesiastical Court that the husband has honestly endeavoured to obtain all the redress that the law can afford.

(*h*) The offence of which the plaintiff or promotor complains, is said to have been compensated, when it is proved that the promotor, whether previously or subsequently to the infidelity of the party accused, whether before the commencement, or at any time during the pendency of the suit, has also committed the like offence; in which case the parties are *in*

of another, and not give another leave to judge of himself.

This principle is founded upon reason and propriety, for it would be inequitable if a person could legally complain of the breach of a contract, which he or she has virtually violated, being thus obnoxious to a charge of the very same offence. Both parties being equally guilty, the Court very properly dismisses the suit, and so leaves the parties either to seek mutual forgiveness in the deep humiliation of mutual guilt, or to reflect in private upon the degradation of their own abominable devices.

In a suit for separation *à mensá et thoro*, although the wife's adultery was fully established, she was dismissed, because on a recriminatory allegation, she proved facts antecedent to her adultery, whence the Court necessarily presumed such guilt on the husband's part as amounted to a *compensatio criminum* (i).

Where adultery is pleaded by way of recrimination, in bar of a divorce, it is not necessary to prove such strong facts as are required for convicting the other party, since, in order to obtain a divorce, the promoter must have a pure character; the evidence, however, should emanate from highly credible witnesses.

The husband, under circumstances of great extenuation, will not be barred from obtaining a divorce by reason of adultery by his wife, although he had some time previously been guilty of adultery, which was condoned or forgiven by the wife. Thus, suppose the

*eodem delicto*, and the party cited is entitled to be dismissed from all observance of justice, as respects the particular grievance complained of, and, consequently, stands, in point of the relative rights of matrimony, as though no offence had been committed. Poynter on Marriage and Divorce, 218.

(i) 1 Hagg. 714.

case of a husband who had committed adultery ten or twelve years before his wife's misconduct, under a chain of events which, peradventure, would render it comparatively venial; that she had overlooked it, had lived with him, and had children by him; if she were afterwards guilty of adultery herself, it seems that the husband would be entitled to a divorce (*j*).

If the defendant's allegation responsive to the libel plead that adultery was committed by the plaintiff, the plaintiff may meet the same by a defensive plea, and then the defendant may afterwards offer additional articles, negating part of the plaintiff's defensive allegation, and the latter will be admissible, although it be a fourth allegation, because they may afford the Court better means of arriving at a just conclusion. Cruelty cannot be pleaded by a wife in bar of a charge of adultery, for the *delictum* or wrong is not the same. A libel pleading specific acts of adultery and cruelty, can only be rejected *in toto* on one of these two grounds;—1st, that the plea on the face of it shews a case impossible of proof; 2nd, that it evidently appears from the facts pleaded, that the party complaining is barred from all relief, by such party's own conduct.

The wife's incontinence in her single state cannot be pleaded in the first instance by the husband in this suit (*k*).

Where neither party has an interest in the suit, that is, when the proceedings are *ad publicam vindictam*, and

(*j*) It is doubtful whether the mere solicitation of chastity on the part of the husband would be considered as a bar to a sentence of divorce for adultery, proved to have been committed by the wife. 3 Phill. 507.

(*k*) It may possibly be a defence in a suit for restitution of conjugal rights in justification of the husband, where the wife sets up a plea of malicious desertion.

not for a divorce, recrimination is no defence, for there the public, and not the prosecutor, is injured; it can then be no excuse for the breach of the good order of society by the one party, that the other has been guilty of the like also (1).

(2) Connivance, either direct or implied from circumstances, or collusion of the husband or wife to the other's adultery, for *volenti non fit injuria*.

Collusion is an agreement between the parties, for one to commit, or appear to commit, an act of adultery, so as to suffer the other to obtain a legal remedy as for a real injury.

Collusion may exist without connivance, but connivance is generally collusion for a base and abominable purpose, or with a view of creating evidence for this divorce.

Connivance may be inferred from a forbearance to institute legal proceedings.

It is the bounden duty of a husband to exercise a certain degree of caution,—a due measure of vigilance over the conduct and actions of his wife. It is not however required that he should condescend to act the spy, or become the gaoler.

Yet he is not permitted to complain of the consequences, if he is found to have inactively reposed in a stupid indifference, at a period, when to others it was apparent that his honor was in danger, or, to have suffered his rights to be openly invaded, without exerting himself in their defence.

Mere imprudence and error of judgment are not connivance; and in determining whether the husband's behaviour has barred him from relief, on proof of his

(1) 1 Hagg. 148.



wife's adultery, the honesty of his intentions, not the wisdom of his conduct, is to be considered.

A husband will not be barred by a mere permission of opportunity for adultery, nor is it every degree of inattention on his part which will deprive him of relief; it is one thing to permit, and another to invite; he is perfectly at liberty to let the licentiousness of his wife take its full scope; but to contrive the meeting, and to invite the adulterer, in order to obtain conclusive evidence of guilt, is in fact legal prostitution.

Passive consent is sufficient; yet there must be a consent or acquiescence of his will, not mere negligence; not too high a confidence, nor misplaced confidence; there must be evidence that he was intensely quiescent; that he saw the train laid for the corruption of his wife; that he saw it with pleasure, and gave a degree of tacit concurrence to it (*m*).

Forbearance on the part of the wife, under a reasonable hope of his return to her society, will not constitute a bar to her legal remedy, after every hope of that kind shall be extinct.

In a suit for separation by reason of the wife's adultery, connivance on the part of the husband may be pleaded by the wife, consistently with a denial of her guilt; for such a plea does not necessarily admit adultery.

We must remark, that a man who knowingly marries a female of previously loose and profligate habits, is not thereby barred of his remedy, if, after marriage, she violate the conjugal vow; the *knowledge* of these antenuptial irregularities, however, imposes upon him an additional measure of vigilance over his wife's conduct, and circumspection as to his own (*n*).

(*m*) 3 Hagg. 59.

(*n*) Poynter on Marriage and Divorce, 230.

(3) Involuntary adultery, through mistake, as for instance, embracing one through error, taking him or her to be her husband or his wife, or a second marriage, through belief that the first husband or wife is dead. Upon his or her return, she or he is bound to go back, unless a different arrangement is agreed upon by all parties.

(4) Ravishment.

(5) Condonation, or forgiveness of the offence complained of, which is a legal release of the injury.

This condonation may be either *direct*, when expressed in words or letters; or *implied*, as when a husband, after reasonable knowledge of his wife's infidelity, continues to admit her to his bed, or there has been long *unexplained* delay in adopting legal proceedings, since it exhibits a passive acquiescence.

Condonation by a husband of a wife's adultery, or repeated reconciliations after repeated acts of adultery, create a bar of far greater effect than does the condonation by a wife of such repeated acts by the husband.

Condonation, being retrospective only, and not absolute or unconditional, extinguishes merely the right of complaint for past transgressions and not for subsequent acts. It implies the condition that the offence shall not be repeated, and that upon its repetition, the condonation is at an end, and operates as a revivor of former acts (o). Solicitation of chastity or cruelty will revive previously condoned adultery.

Repeated condonation would amount to leave and li-

(o) *Wilson v. Wilson*, 6 E. F. Moo., 484. The wife having committed adultery on the first of three successive nights, and the husband aware, and having full knowledge of this, sleeping with her on the second, condones thereby the previous adultery, and cannot take advantage of further adultery on the third night. 3 Hagg. 33.

cence ; and a person proved to have submitted easily to frequent injury, would be scarcely allowed to complain of what appears to be considered by such a one as hardly an evil and dishonor.

The effect of continuing cohabitation is less stringent on the wife ; she is more *sub potestate*, more *inops consilii* ; she may entertain greater hopes of the reform of her husband ; her honor, perhaps, is less injured, and more easily healed. So that condonation by implication is a less strict bar against the wife. While the husband cannot be compelled to the bed of his wife, a woman may submit to it from necessity.

A wife needs not withdraw from cohabitation on the first or second instance of the husband's misconduct ; for it is not only legal but meritorious to be patient as long as possible. Forbearance will not weaken her right to relief ; since it is not improper that she should for a time entertain the hope of her husband's reform, (*spes recuperandi*), especially where there is a large family. Condonation, then, is not presumed as a bar of the remedy of divorce so readily against the wife as the husband.

Condonation and connivance essentially differ, though either may have the same legal consequence. Condonation may take place, without imputing either to a wife or husband the slightest blame, especially as to a wife, whose conduct might be more praiseworthy from her forgiveness of injury. But connivance necessarily involves criminality on the part of the individual who connives, and therefore the evidence to establish it should be grave and conclusive. While connivance precedes, or is cotemporaneous with, the adultery, condonation is subsequent to the fact.

A plea of a former marriage is a good ground for

staying proceedings. The question of the former marriage must be determined previously to entering upon the question of adultery, for if a previous marriage be established, it will bar the suit.

A valid marriage must be first proved as a necessary preliminary in a divorce-cause, for there is no adultery if there be no marriage. A marriage void *ab initio*, and so pronounced in a suit of nullity of marriage, cannot be said to be dissolved, because it was never legally constituted.

The absence of consummation of a marriage is no bar to these proceedings, especially when the wife would not allow it, but immediately eloped with her adulterer (*p*).

There are four circumstances from which the knowledge of adultery can be derived :—(1), letters ; (2), information of witnesses ; (3), detection in the fact ; and, (4), confession.

The husband's letters exhibited by his wife are evidence against him, and explanations contained in them, touching his conduct with respect to the matter charged, will be taken into the Court's consideration, but other statements in them are not evidence for the husband, at least in debating the admissibility of the plea.

Letters from a wife to her paramour, leaving no doubt of gross familiarity and indulgence, and of proposals for future intrigue, are frequently the main evidence of adultery ; but the paramour's letters, where there are no strong facts proved, from which adultery can be inferred, found in the wife's possession, not necessarily implying the commission of adultery, will not support this suit, for some women will go a great way without proceeding to the last extremity of guilt (*q*).

(*p*) 3 Phill. 496.

(*q*) Rogers' Ecclesiastical Law, 366.

The Court cannot decree a separation for improper conduct short of actual adultery. The law does not require direct evidence of the very act committed at a specific time and place; but the Court must be satisfied that actual adultery has been committed.

Adultery, being an act of darkness and of great secrecy, can hardly be proved by any direct testimony; presumptive evidence, therefore, is sufficient proof; and this presumption is collected and inferred from the proximity or nearness of the acts.

Thus, adultery is proved by such inferences as are received and approved of either by law or nature (*r*).

It is a great principle, that confession alone cannot be received, for without this restriction there would be no check upon the collusion and imposition that might be practised upon the Court. But a confession may be received, accompanied by collateral evidence, which, when taken together, form the strongest possible proof.

If the guilt of the husband in a suit by the wife is once established, and he seek to deprive her of her remedy, by imputing to her a criminal charge of any

(*r*) It is a fundamental rule of evidence upon this subject, that it is not necessary to prove the direct fact of adultery, because if it were otherwise, there is not one case in a hundred in which that proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost, the fact is inferred from circumstances that lead to it by fair inferences as a necessary conclusion, and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights.

The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial

kind, such charge must be established by evidence, which admits of no dispute.

The Court receives the evidence of friends, dependants, and servants, who can alone speak as to domestic conduct, with sifting scrutiny, and considerable hesitation.

The adultery may be inferred from the general cohabitation of the parties, so as to exclude the necessity of proof of particular facts, although the parties have separate beds (*s*).

The Court will judge of facts, as men of discernment, exercising a sound and sober judgment, on circumstances that are properly established in evidence.

In cases of adultery, proof by two witnesses to distinct facts is sufficient upon which to found a sentence of divorce. One clear and unimpeached witness, and circumstances in corroboration, are all that is required.

The following are very pregnant proofs of guilt:—

A wife going to a brothel with a man: since it is hardly to be conceived that a woman would go to such a place, but for a criminal purpose. So going to such a house, and remaining alone for a considerable time in a room with a notorious woman, is sufficient evidence

reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. *Loveden v. Loveden*, 2 Hagg. 3.

(*s*) It may be possible, that persons of peculiar and eccentric dispositions or habits, may live together in such a manner, without actual criminal connection; and it is physically possible that persons may be in the same bed together without criminal intercourse. Courts of justice, however, cannot proceed on such ground; finding persons in such a situation as presumes guilt generally, they must presume it in all cases attended with these circumstances. They cannot adopt the extravagant professions of Platonism for the principles of their decisions. 2 Hagg. 6 n.

whence to infer adultery. A husband visiting an establishment, knowing it to be a house of this description, raises a suspicion of adultery, necessary to be rebutted by the very strongest evidence (*t*).

The law has not affixed the same imputation on the visit of a wife at a bachelor's room, or residence, as it does on going to a brothel. Such visits may be very improper, but the Court must be satisfied in its legal judgment that the woman has transgressed, not only the bounds of delicacy, but of duty. In the absence, therefore, of other circumstances, to induce an inference of guilt, it will not arise from such a visit, where there is no evidence of any improper conduct or behaviour of the parties during such visit.

Confession generally ranks high in the scale of evidence; what is taken *pro confesso*, is considered as indubitable proof. The plea of guilty by the party accused, excludes further inquiry. *Habemus confitentem reum* is demonstrative, unless, indeed, motives can be assigned for it. But though confessions will support charges of the highest nature, as treason, murder, &c., they are not alone sufficient to establish a charge of adultery. A sentence of divorce will not be given upon the sole confession of the parties. The principle upon which the rule is founded is a fear of collusion between the husband and wife (*u*).

Though confession is not inadmissible, it is to be regarded with great distrust; and though it is not abso-

(*t*) A vile disease, long after marriage, is *primâ facie* evidence of adultery. The husband's attempts, when so affected, to force his wife to his bed, is of a mixed nature, partly cruelty, and partly evidence of adultery, and would undoubtedly remove condonation of either.

(*u*) To prevent fraud in these cases, the practice is for the judge (all

lutely excluded, but is received in conjunction with other circumstances, yet it is on all occasions to be most critically weighed. Confession of adultery, when perfectly free from all taint of collusion, when confirmed by circumstances and conduct, ranks with the highest species of evidence.

Since the rule is founded, as we have seen, upon a fear of collusion between the husband and the wife, it will not apply where the wife has written letters to third parties, containing confessions of her guilt, to be kept secret, and on which she exercised her ingenuity how to account for her absence from home, and so allay her husband's suspicions.

A *particeps criminis* is a competent witness to prove the adultery; and his confession, as connected with the act of the wife, has been admitted. The declaration of such a person will be but weak evidence; yet where criminal intention is fully proved, and nothing than the consent of the other party is wanting, the conduct of such a person is evidence of a most stringent kind that the act which he was always attempting to accomplish has actually taken place.

A declaration of the paramour in the wife's absence, that she had committed adultery previously to the adultery charged in the libel, is not admissible; but a declaration in her presence, and confirmed by her, is. Where the wife is charged with adultery, her conduct and declarations, on a confession of guilt by the alleged

persons, especially the husband, being removed), to examine the woman as to the truth and cause of her confession, and to ascertain the truth by all other lawful ways and means. If there be fraud or deceit, or a probable suspicion of it, a sentence of divorce will not be granted unless the adultery be otherwise satisfactorily proved.



*particeps criminis* being communicated to her, are admissible evidence on behalf of the husband.

Care must be taken that the person appearing and confessing the adultery is not some supposititious person; satisfactory evidence must therefore be adduced as to identity of the party.

There are two rules upon this proof of identity :—(1), that it is to be proved, not merely by the acknowledgment to the officer who served the citation and by the appearance of the party in the cause, but by extrinsic evidence; (2), that the identity must be proved by other testimony than that of the parties themselves: it must be established by witnesses who can speak to the facts from their own personal knowledge.

The conclusion of the cause may be rescinded generally, if the Court shall be of opinion, after argument, that the alleged adultery is not sufficiently proved.

But, even after the arguments of counsel are closed, and after the Court has delivered its opinion that the evidence does not prove the charge of adultery, although it has established against the defendant a case of great impropriety and culpability, yet the Court may, in its discretion, rescind the conclusion of the cause for the purpose of admitting an allegation pleading further matter to establish the defendant's guilt.

It appears to be doubtful whether the Court has power to rescind the conclusion of a cause, after sentence against the will and consent of the party for whom it was given.

The sentence of divorce, or rather of separation, so far from dissolving the matrimonial tie, and permitting the parties to marry again, by its very tenor contemplates the possibility of reconciliation and renewed cohabitation.

In conformity to this principle, the injured party, before becoming entitled to the benefit of the sentence, is obliged to enter into a bond for the observance of a chaste and continent life, without contracting marriage during the existence of the offender. "*Separantur, sed remanent conjuges*," is the Ecclesiastical maxim.

IV. It is the law of religion, and the law of this country, that the husband is entrusted with authority over his wife. He is to practise tenderness and affection towards her, and obedience is her duty; for in taking the character of wife, she is to take upon herself, at the same time, the duties attached to it (*v*). Intolerable cruelty, then, which sets at naught the precepts of religion, the chief purpose of matrimony,—mutual comfort, and the laws of our realm, is a sufficient ground for a divorce *à mensâ et thoro*.

A wife is usually the complainant; but a husband may possibly have equal cause of complaint, and can therefore sue for this divorce on the ground of cruelty (*propter sævitiam*).

With regard to that which constitutes cruelty in a legal sense, it may be generally stated, that the cruelty must be so grave and weighty as to render it absolutely impossible to discharge the duties of marriage: the facts

(e) 1 Hagg. 363. Public government is in perfection when the Sovereign commands with humanity, and the subjects are cordial in their obedience. Private government in conjugal society, arrives at still greater perfection, where husband and wife govern, and are governed reciprocally, with entire satisfaction to both. The man bears rule over his wife's person and conduct, she bears rule over his inclinations; he governs by law, she by persuasion. Nor can her authority ever fail, where it is supported by sweetness of temper, and zeal to make him happy. Lord Kaimax's Sketches.

should establish personal ill-treatment, such as blows (*w*) or any bodily injury, or threats (*x*), that would reasonably excite, in a mind of ordinary firmness, a fear of personal harm.

Spitting on a wife is a gross and unmanly act of cruelty, but insisting on a separate bed is not. A husband's attempt to debauch his own female servant is also a gross act of cruelty.

Legal cruelty, however, may be without actual personal violence; and such cruelty, at least when coupled with adultery, may concur to obtain a sentence of separation, although the parties had separated for a long time, and the husband was not seeking a return to cohabitation, and had been bound, with two sureties, under articles of

(*w*) A blow between parties in the lower conditions and in the higher stations of life, bears a very different aspect. Among the lower classes, blows sometimes pass between married couples, who, in the main, are very happy, and have no desire to part; amidst very coarse habits, such incidents occur almost as freely as rude or reproachful words; a word and a blow go together. Still, even amongst the very lowest classes, there is generally a feeling of something unmanly in striking a woman; but if a gentleman, a person of education, the discipline of which *emollit mores*, and tends to extinguish ferocity: if a nobleman of high rank and ancient family uses personal violence to his wife, his equal in rank, the choice of his affections, the friend of his bosom, the mother of his offspring,—such conduct in such a person, carries with it something so degrading to the husband, and so insulting and mortifying to the wife, as to render the injury itself far more severe and insupportable. The particular situation of the parties, when the ill-treatment is inflicted, may create a still further aggravation. 2 Hagg. 73.

(*x*) If words of menace raise a reasonable apprehension, it matters not whether they are addressed to the wife or a third person. The Court must not wait till threats are carried into execution, but must interpose when words raise a reasonable apprehension of violence, and excite such terror as makes life intolerable. Words of menace, if accompanied with a probability of bodily violence, will be sufficient. 1 Hagg. 775.

the peace exhibited against him, to keep the peace towards his wife. It is not then necessary to prove acts of personal violence to substantiate a charge of cruelty, as it is the acknowledged doctrine that *danger to the person and health is sufficient (w)*.

Deliberate insult, confinement, adulterous connection with a person in the same house, and invested with the government of the family, and other acts calculated to distress and harass a wife, as connected with adultery proved, amount to cruelty in the husband.

But an interdict of the wife's intercourse with her family is not legal cruelty to a wife, though under some circumstances, it may perhaps tend to illustrate the temper of the husband. For although it may be a harsh exercise of marital authority to forbid the wife to hold intercourse with her own family, there may be circumstances which will justify such a prohibition. The wife may be amiable, but her connections may not be so, and there may be very proper reasons, justifying a husband in forbidding any intercourse with them.

So the not allowing a wife to have access to her child or children, is not a ground for this divorce; yet, though the husband certainly may exercise this right, it is a most improper exertion of the marital power, very disgraceful to a husband, and a most wanton and unnecessary outrage upon the feelings of a mother.

(w) What merely wounds the mental feelings can hardly be admitted where it is not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they threaten not any bodily harm, do not amount to legal cruelty; they are high moral offences undoubtedly, not innocent indeed in any state of life, but still they are not that cruelty against which the law can relieve.

Courts of justice cannot cure all the miseries, imaginative and self-imposed, of married life (*x*).

A wife is not entitled to a divorce by reason of the cruelty of her husband, if she be a woman of bad or violent temper, and provokes his ill usage and indignation; her best remedy in such cases is by reforming her own manners and disposition, and thus remove the cause of her sufferings. Her own conduct must appear to the Court guarded and proper. Nevertheless, a wife's failings are not to be resented with a dangerous intemperance, for then the Court must assuredly protect her.

A wife's delay in applying to the Ecclesiastical Court for redress from cruelty, does not infer that there is no ground of complaint, nor even raise a presumption against the truth of the charge.

A party before the Court in a suit for divorce, by reason of cruelty, may plead acts of adultery subsequent to the citation.

Adultery by the husband occurring prior to the institution of the suit, but sworn to have come recently to the wife's knowledge, may be pleaded, even though publication of the evidence on the libel, and on a responsive plea, is ripe for passing.

Should a reconciliation be effected, subsequent acts of cruelty will revive all the legal consequences of former condoned cruelty, and indeed of adultery.

Recrimination is no defence to this suit.

(*x*) It is not the habit of the Court to interfere in ordinary domestic quarrels, there must be something which makes cohabitation unsafe; for there may be much unhappiness from unkind treatment, and from violent and abusive language; but the Court will not interfere; it must leave parties to the correction of their own judgment; they must bear, as well as they can, the consequences of their own choice.

V. Our law will not, as we have already observed, untie the nuptial knot, and set the husband and wife free to contract a second marriage with another person; but the parliament will create a law for such a purpose, and pass a private act to effectuate it, should a proper case be presented for such a powerful interference.

The proceedings to obtain this divorce must originate in the House of Lords (*b*). The Peers do not merely adjudicate upon these proceedings, but legislate also, according to their own wisdom and discretion, upon the particular circumstances, so that their orders and divisions in these causes are deemed legislative acts.

Where the wife does not possess any separate property, or having any, it be insufficient to sustain the expenses of her defence, the House will order the husband to hand her a certain sum, according to the particular circumstances of the particular case.

No petition for a bill of divorce can be presented to the House of Lords, unless an official copy of the proceedings, and of a definitive (*c*) sentence of divorce *à mensâ et thoro*, in the Ecclesiastical Court, at the suit of a party desirous to present such petition, be delivered upon oath at the bar of the House at the same time (*d*).

(*b*) There is an instance of a divorce bill having been initiated in the House of Commons; *viz.*, that of Mrs. Wharton, in the reign of William and Mary.

(*c*) Definitive, *i.e.*, final on the merits of the case; it may, however, be appealable, and may have been appealed against. If, however, the appeal be brought on probable grounds, then, perhaps, the House of Lords will order a stay of proceedings, till the result of the appeal be ascertained; but if it be upon frivolous grounds, for vexation and delay, it will not, of course, be allowed to impede the progress of the bill.

(*d*) Standing Orders, No. 141.

A judicial sentence of divorce *à mensá et thoro*, by an Ecclesiastical Court, is, therefore, an indispensable preliminary, the absence of which will be an insuperable bar to legislative relief.

A judgment at the Common Law against the adulterer, more especially if large damages have been awarded, facilitates the progress of a divorce bill. It exhibits the opinion of a jury upon the case, and shows the husband's diligence in seeking all that is *legally* open to him—judicial satisfaction.

When a husband prays for a bill of divorce, he must produce a verdict in an action against his wife's seducer, whether it be *for* or *against* him, in order to convince the Peers of his honest diligence, untainted with any collusion, and of the law's insufficiency to perfectly remedy the terrible evil of his wrong.

If this action have not been brought, the omission must be clearly justifiable.

Thus the adulterer may have died before the discovery of his crime; he may be unknown, or a foreigner, and gone abroad before the detection, so that an action was impracticable; but if he be an English subject, and have quitted the country, the husband should then outlaw him. Should he be a poor man, an insolvent, or an uncertificated bankrupt, nevertheless the action should be brought, in order to defeat the imputation of negligence, and destroy every suspicion of collusion.

The husband must also shew that the damages and costs have been actually paid to and retained by him, or that the defendant-adulterer is imprisoned for their satisfaction.

It does not follow that the Lords will grant the divorce, because an Ecclesiastical Court may have pro-

nounced a sentence of separation, and a jury has given damages : it is a matter for their unshackled discretion alone.

When the wife is the petitioner, a verdict at law becomes unnecessary, for she cannot bring such an action.

No private bill can be brought into the House until the House be informed, by petition, of the matters therein contained (*e*). It must be signed by the party suing for the divorce, unless abroad, when an attorney may be appointed to sign the petition on his or her behalf.

The petition and preamble are substantially transcripts of each other, containing the same statements. These we will enumerate below, when we speak of the preamble more particularly.

While this petition is addressed to the Lords Spiritual and Temporal, in parliament assembled, and concludes with a prayer for leave to bring in the bill ; the preamble or introduction to the bill is addressed to the Sovereign, and concludes with a prayer for the proposed law to be enacted.

The preamble to a divorce bill should state these facts and circumstances :—

(1) The date and place of the marriage, setting out the parties, and the particular ceremony which solemnized such marriage.

(2) The period of cohabitation as husband and wife.

(3) The issue of the marriage (if any).

(4) The circumstances of a separation before the adultery (if any), and an abstract of articles of agreement, or a deed of separation (if any).

(5) The charge of adultery, the name of the adulteress (if known), and the time when the adultery began.



(6) Whether the parties are still cohabiting in adultery or not.

(7) No intercourse with the guilty spouse since the discovery of the crime.

If this cannot be so stated, a very satisfactory explanation should here be inserted, so as to do away with any effect of condonation, connivance, or collusion.

(8) If the adultery were committed with several, the parties with whom the commission of the crime is intended to be proved, should be specified.

(9) The spurious issue (if any).

(10) When the husband is the petitioner, the action at law, or the reasons why it was not brought.

(11) The verdict and judgment at law; also the damages (if any), and whether recovered, or the steps taken towards their recovery.

(12) The definitive sentence of divorce *à mensâ et thoro* pronounced by an Ecclesiastical Court.

(13) The deduction that the party complained of has by his or her adulterous and criminal conduct dissolved the connubial bond, by reason whereof the complainant stands deprived of the comforts of matrimony; and (should the husband be the complainant) is liable to have a spurious issue imposed on him, unless the said marriage be declared void and annulled by the authority of parliament.

(14) Prayer that her most excellent Majesty (out of her princely goodness, and compassion to her subjects' calamity), may be pleased that the proposed law may be enacted.

In all bills at the suit of the husband, there are five enacting clauses:—

(1) That the bond of matrimony being violated and broken by the manifest and open adultery set forth in the preamble, the same is hereby from henceforth dissolved, annulled, vacated, and made void to all intents, constructions, and purposes whatsoever.

(2) That it shall be lawful for the complainant, at any time after the passing of the bill, to marry again as freely in all respects as if the party convicted of adultery were actually dead; and that the issue of any such future marriage or marriages shall be legitimate and inheritable, in like manner and form as other issue born in lawful wedlock.

(3) That he shall be entitled to be tenant by the courtesy of the lands, &c., of any after-taken wife or wives; and, on the other hand, that such after-taken wife or wives (unless barred), shall be entitled to dower, free-bench, thirds, &c.

(4) That the guilty wife shall be barred of dower, free-bench, thirds, &c.

(5) That the husband be barred and excluded from all right and title in respect of any *future* property or estate, real, personal, or mixed, that may be afterwards acquired by the wife from whom he is divorced.

If the wife be the complainant, then the third clause enacts, that she shall be entitled to dower, and free-bench of the lands of any *future* husband or husbands, and that such husband or husbands, on the other hand, shall be intitled to be a tenant by the courtesy of her lands, &c.; and the fourth enacts, that the guilty husband shall be barred of all right and interest in any lands or estates, real, personal, or mixed, and all ornaments, wearing apparel, goods, chattels, and personal estate and effects whatsoever enjoyed by the wife, or to which she is intitled in possession in

her own right, or which she may at any time thereafter acquire, become seised or possessed of, or intitled to (f).

IN passing such bills, it is the ordinary course of the legislature to make some provision for the wife out of the husband's estates.

It must be born in mind, that no divorce, or proceeding in the nature of a divorce in any foreign country, Scotland included, will have the effect of *dissolving* a marriage contracted in England.

No bill grounded on a petition to the House of Lords to dissolve a marriage for the cause of adultery, and to enable the petitioner to marry again, will be received by the House, unless a provision be inserted in such bill, that it may not be lawful for the person whose marriage with the petitioner shall be dissolved, to intermarry with any offending party on account of whose adultery with such person it shall be therein enacted that such marriage shall be so dissolved; provided that if, at the time of exhibiting the bill, such offending party or parties be dead, such provision needs not be inserted in such bill (g).

(f) The effect of these property clauses are (1), that the divorced wife shall be considered as dead, and an after-taken wife shall have every right as if such divorced wife had actually pre-deceased the second marriage; (2), that the divorced wife shall lose every right that would have accrued to her otherwise as widow; and, (3), that the husband shall not have any claim on his divorced wife's after-acquired property. Thus, it appears, that while the divorced wife is absolutely deprived of every right on her husband's property, the husband is only barred of his rights upon her property, acquired after the passing of the Divorce Act. This tends to let in many a question and difficulty, which more specific clauses would obviate. But the practice, at present, is to adhere to these usual provisions.

(g) Standing Order 176, 2 May 1809.

A clause founded on this order is inserted in the *bill*, but it is not retained in the *act*, being always struck out on the motion of a peer in committee. Thus it is open to the guilty parties to intermarry and obliterate their offence. This standing order is only acted upon, and the clause retained in the act, when from consanguinity or affinity between the guilty parties, they cannot lawfully contract marriage.

The petition, the official copy (*h*) of the ecclesiastical proceedings, and the bill, are submitted to the House together, as the first practicable step (*i*).

The official copy is first verified by a witness, who examined it with the original record, by being sworn to such effect at the bar of the House. Upon this witness withdrawing, the proceedings and sentence are ordered to lie on the table; after which the petition is presented and read, whereupon leave is given to bring in a bill according to its prayer. A peer then presents the bill, which is read a first time, and ordered to be printed, and read a second time, on a future named day.

After this, a report of the action at law (if any) should be bespoken, to be transmitted to the clerk-assistant of the House by the judge who tried it, or undersheriff before whom a writ of enquiry may have been executed by default of the defendant pleading, when it will be ordered to lie on the table as part of the proceedings.

Before the day appointed for the second reading, the case should be carefully prepared and counsel retained; notice of the second reading must be personally served

(*h*) Bespeak in due time a true and official copy of the proceedings and sentence of divorce *à mensâ et thoro*. This transcript should be carefully examined, and compared with the original record.

(*i*) The formal, or "in-door," department of the procedure, is usually effected by a parliamentary agent.

on the defendant, by delivering to, and leaving with, him or her an attested and examined copy of the bill and of the order for the second reading, both signed by the clerk-assistant, shewing at the same time the originals (*j*).

Sometimes this service is substitutional, where the defendant cannot be found after due diligence and active inquiry, by serving the defendant's proctor in the divorce cause in the Ecclesiastical Court, under an order of the House obtained upon a petition for the purpose, supported by the testimony of witnesses; or by serving his or her attorney, or agent, if there were no proctor retained, or by leaving the copies at his or her last known usual place of residence, when there is neither an attorney nor agent appointed.

The attendance of the petitioner should be secured, and also the witnesses, who are liable on default to be attached by the Serjeant-at-Arms, upon proof of a regular service of the order of the House requiring their attendance, and the bill should also be printed. If books or documents are necessary, they will be ordered by the House to be produced upon petition for that purpose.

Upon the second reading, counsel are called in and the case opened, and established by proof. The person

(*j*) The orders may be procured, with an office copy of the bill, from the Parliament Office, all which should be examined with the House copy.

The usual orders are, that notice be affixed on the doors of the House of Lords, that the Lords be summoned, and that the petitioner may be heard by his counsel on the second reading, to support the allegations of the bill; that together with the examined copy of the bill, notice be given of the second reading to the party against whom the divorce is sued, and that he or she may be at liberty to be heard by counsel against the bill.

who served the defendant must swear to personal services of accurate copies of the originals, which he then delivers in at the bar of the House, and to the identity of the defendant as the same individual who is charged in the bill. He should therefore be a person who well knows the defendant. Sometimes this service is admitted by the defendant.

The marriage must then be proved, and the husband and wife properly identified, after which the fact of adultery must be satisfactorily substantiated, with the other allegations in the preamble of the bill: and the case for the petitioner usually closes with an intimation that he is in attendance to be examined, should the House desire it.

His examination is directed to ascertain whether there have or have not been any collusion directly or indirectly on his part, relative to any act of adultery that may have been committed by his wife, or whether there be any collusion directly or indirectly between him and his wife, or any other person or persons, touching the bill of divorce, or touching any proceedings or sentence of divorce had in the Ecclesiastical Court at his suit, or touching any action at law which may have been brought by such petitioner against any person for criminal conversation with the petitioner's wife; and also whether at the time of the adultery of which the petitioner complains, his wife was by deed, or otherwise by his consent, living separately and apart from him, and released by him, as far as in him lies, from her conjugal duty, or whether she was at the time of such adultery cohabiting with him, and under the protection and authority of him as her husband (*k*).

(*k*) Standing Order, 142.

The House will, upon petition, dispense with the attendance of the petitioner, if the absence be satisfactorily accounted for, especially if abroad in the public service. Should there have been a voluntary separation between the husband and wife, then the House will very seldom dispense with his or her attendance.

The petitioner is rarely examined, since there is generally other evidence either confirming or rebutting the facts and circumstances; should this not be the case, he or she may be fully examined.

The defendant's counsel are then heard, and evidence (if any) received.

After which the Lord Chancellor puts the question for the second reading of the divorce bill. If the question be carried in the affirmative, the bill stands committed some two or three days thence to a committee of the whole House.

In committee, the clauses of the bill are debated; and this is the proper occasion to move a clause securing a provision for the wife, which, when ordered, is generally an annuity, according to the circumstances and condition of the parties. The House does not usually allow even a guilty wife to be left in a state of destitution.

The House of Commons possesses an officer, called "The Lady's Friend," who takes care, if the Lords have not provided for it, that the husband makes a suitably moderate provision for his wife when divorced. But should she continue or renew her misconduct, the provision will become forfeited.

This provision is almost always a matter of private arrangement between the parties, which, being accomplished, the bill is then proceeded with.

Upon the report of the chairman of the committee to the House, with the amendments (if any), the bill will

be ordered to be engrossed, and on a later day, it is read a third time and sent down to the House of Commons.

The investigation in the Commons is summary: they cannot examine witnesses upon oath; besides after the strict and stern ordeal of the Ecclesiastical Court and of the House of Peers, a third searching scrutiny would be rather supererogatory.

In the House of Commons the bill is read a first time on the day it is brought from the Lords. An order is then made for a message to the Lords, to request that their lordships will be pleased to communicate to the House a copy of the minutes of the evidence taken before their lordships upon the bill. When three clear days have elapsed, a clear day's notice in the Private Bill Office having been given, the bill will be read a second time, and then committed to the select committee on Divorce Bills.

The observations before made upon the service of the order and office copy, when the proceedings were before the House of Lords, are applicable to the service here, which must be personal, or made on the agent in the absence of the party, and with leave of the House (*l*).

Seven clear days must elapse before the sitting of this committee, and seven clear days' notice of such sitting must be given in the Private Bill Office.

The regulations of the select committee on divorce bills in the House of Commons, are these:—

(*l*) In a case where evidence had been given that the wife was out of the kingdom, it was ordered that the service of the order of the House for the second reading of the bill, upon her mother, and leaving an attested copy of the engrossed bill, should be deemed good service upon the wife. *Lingham's Divorce*, 1805.



First, that, two days before the sitting of the committee on any divorce bill, a print of the bill, and a copy of the evidence adduced previously to the second reading of the bill in the House of Lords, be furnished by the agent for the bill, to each member of the select committee, in cases in which the evidence has been printed for the use of the Peers; but where the evidence shall not have been printed, then a manuscript copy is to be furnished within the same period, to the chairman only; and in all cases, the evidence communicated by the House of Lords, is to remain with the committee-clerk, from the time of the commitment of the bill, and to be open to the inspection of every member of the committee; and the committee-clerk is to give four days' notice of every meeting of the committee, to the several members thereof.

Second, that, the agent be required to prove service upon the party from whom the petitioner seeks to be divorced, of a copy of the bill, and of the order of commitment and order for the attendance of parties, witnesses, counsel, and agent; also to produce examined copies of the judgment in the action at law, and of the sentence in the suit in the Ecclesiastical Court, except in those cases from India, in which evidence of the judgments in an action of trespass, and in the suits for a divorce, is included in the proceedings transmitted thence in pursuance of the act 1 Geo. IV., c. 101, "to enable the examination of witnesses to be taken in India, in support of bills of divorce on account of adultery committed in India."

Third, That in all cases in which the bill is *opposed*, and *the facts contested* (except cases provided for by the

said act of Geo. IV.), the *preamble* will be required to be proved according to the laws of evidence, in the same manner as if the case had been heard at the bar of the House, under the system existing prior to the session of 1839.

Fourth, That in all cases which are *not opposed*, or where the facts are *not* contested, the agent will read to the Committee, from the official copy of the evidence received by the House of Lords, and referred to the Committee, such testimony as shall appear to him sufficient to establish the preamble of the bill; but the Committee will be entitled to require, as well in opposed as in unopposed cases, that any further part, or the whole of the evidence so referred, shall be read, or that additional evidence be produced.

Before any bill of divorce for adultery can pass the House, evidence must be given before the committee, that an action for damages has been brought in one of her Majesty's Courts of Record at Westminster, or in any one of her Majesty's Courts of Record in Dublin, or in one of her Majesty's Supreme Courts of Judicature of the presidencies of Calcutta, Madras, Bombay, or the Island of Ceylon respectively, against the person supposed to have been guilty of adultery, and judgment for the plaintiff had thereupon; or sufficient cause must be shewn to the committee why such action was not brought, or such judgment was not obtained, as is the practice of the Lords.

Where the petitioner has attended the Lords, he must also attend the select committee.

Counsel are not retained, unless the case be special, and farther evidence is not tendered, unless required by the select committee.

The bill may be reported to the House ten days but one after the committee's sitting, one clear day's notice being given in the Private Bill Office.

The third reading may take place the day after the report, if the last mentioned notice have been given, and sent up to the House of Lords the same night. After this the royal assent is given, and the bill becomes an act.

Parliament will seldom bastardize the issue, except in a very clear case.

The husband was held to be deprived of his right to a divorce in parliament, by a letter offering 200*l.* a-year for the separate maintenance of his wife, and agreeing to articles of separation, and to give up the adulterous connexion (*m*).

Articles of separation were held, in the House of Lords, to form an insuperable bar to the special interposition of the legislature on an application for a divorce (*n*).

Foreign divorces.

V. The broad general rule is, that a divorce regularly obtained, according to the laws of the country where the marriage is celebrated, *and also* where the parties are domiciled, is a complete dissolution of the matrimonial contract in every other country.

The following predicaments are not at all settled :—

(1) Where the marriage is celebrated in one place, and the parties are at the time domiciled in another ; (2), where afterwards there is a change of domicile by one party without a similar change by the other ; (3),

(*m*) *Perry's Divorce*, 1849.

(*n*) *Eden's Divorce*, 1798.

where, by the law of the place of celebration, the marriage is indissoluble, or dissoluble only under peculiar circumstances; (4), where, by the law of another place, it is dissoluble for various other causes, and even at the pleasure of the parties; and (5), other perplexities may arise from the nativity of the parties, as whether they are both citizens or subjects, or both foreigners, or one a citizen and the other a foreigner; whether the marriage is celebrated at home or abroad; whether the jurisdiction of any court to pronounce a decree of divorce is to be founded upon the national character of the parties, or upon the celebration of the marriage within the territorial jurisdiction, or upon the domicile of the parties within it, or upon the actual presence or temporary residence of one or both of them at the time when the process for divorce is instituted (*o*). And if, upon any of these grounds, the jurisdiction is sustained, another not less important inquiry is, whether the law of divorce of the place of the marriage, or that of the place where the suit is instituted, is to be administered by the Court before which the suit is pending.

We must here notice a few of the striking differences between the English and Scotch laws relative to divorce.

Conflict of the English and Scotch laws.

(*o*) Upon the continent of Europe, there has long existed a known distinction between the Catholics and the Protestants upon the subject of divorce. The former, according to the doctrine of the Romish church, consider marriage as a sacrament, and in its effects to be governed by the Divine law; and, according to their interpretation of that law, it was formerly held to be indissoluble. The Protestants, on the contrary, have not generally considered it as a sacrament: but many, if not all of them, have considered it mainly as a civil institution, and subject to the legislative authority, as matter of public policy and regulation. See Story's Conflict of Laws, c.8.

In the latter, adultery and wilful desertion are sufficient grounds for a divorce *à vinculo matrimonii*; the divorced parties may lawfully marry any other person not within the prohibited degree of propinquity, *the paramour only excepted*, which would be a null and unlawful marriage. Process against the deserter may be commenced one year after the desertion, but a decree of divorce cannot be pronounced till after the expiration of four years. A plea of recrimination is not admitted. A husband may, without assigning any reason, remove his wife from his family, though he is still bound to maintain her. In all actions of divorce the pursuer must swear that the action is not carried on by collusion. The appeal from the Scotch Courts is to the House of Lords.

The law of Scotland is applied to divorces in all cases, whether the parties are foreigners, or domiciled subjects and citizens of Scotland; whether, when foreigners, the law of their own country affords the same remedy or not, and whether they have contracted their marriage within the realm of Scotland, or in any other, *provided only* that they have become properly amenable to the jurisdiction of the Scotch tribunals.

The following propositions are borne out by the cases upon this much vexed and greatly discussed question:—

(1) A marriage in England between Scotch people, whose domicile was properly in Scotland at the time, and who afterwards return and actually reside in Scotland, may be dissolved by sentence of divorce in the courts of Scotland (*p*).

(2) The courts of Scotland can entertain suits for a divorce, where the husband only is a native of Scotland,

(*p*) *Edmondstone v. Lockhart*, Ferg. R. 168, 463.

although the parties should have latterly resided principally in England, but in fact had a domicile in Scotland (*g*).

(3) The Courts of Scotland have been long accustomed to pronounce sentences of divorce for adultery, without reference to the country where the marriage was contracted, where a formal domicile has been acquired by a temporary residence (*r*).

(4) A divorce *à vinculo* will be pronounced, in conformity with the law of Scotland, although the parties are English, and were married in England, and retain there their real domicile at the date of the action, provided the defendant has been cited and convened in Scotland for adultery committed there (*s*).

(5) The circumstance that Scotland was the place of marriage, will not authorise a divorce by judicial sentence between foreigners, who have always had their real domicile in their native country (*t*).

(6) Yet the Scotch Courts acquire jurisdiction over foreign marriages, where the defender acquires such a domicile as would be sufficient to found ordinary civil

(*g*) But see *Tovey v. Lindsay*, 1 Dow, 117, 140; 2 Cl. & Fin. 565; *Warrender v. Warrender*, 2 Cl. & Fin. 488; 9 Bligh, 89, which clearly support this proposition.

(*r*) *Gordon v. Englegraaff*, Ferg. R. 251; *Graham v. Wilkinson*, *Ib.* 252; *Scott v. Boucher*, *Ib.*; *Urquhart v. Flucher*, *Ib.* 259; *Brandon v. Dunlop*, *Ib.*; *Hamilton v. Hamilton*, *Ib.* 260; and *Warrender v. Warrender*, 2 Cl. & F. 556.

(*s*) *Duntze*, or *Levett v. Levett*, Ferg. R. 68; *Oldaker v. ———*, 10 Shaw D. & B. 468; but see *Kibblewhite*, or *Rowland v. Rowland*, Ferg. R. 266.

(*t*) See, however, *Bucler*, or *Forbes v. Forbes*, Ferg. R. 209; *Blake v. Blake*, 4 Shaw & D. 795; *Wyche v. Blunt*, Ferg. R. 291.

jurisdiction, *i. e.*, a simple residence of forty continuous days (*u*).

(7) Where the marriage has been contracted in England between natives of Scotland, who were at the time substantially domiciled in England, and had never returned to Scotland, the Courts of Scotland have no jurisdiction whatever (*v*).

(8) The decisions of the English Courts are in direct conflict with those of Scotland; for whilst the latter adjudge (*w*) that a divorce *à vinculo* for adultery may be maintained in Scotland, at the suit of English people married in England, according to the English law; the former have solemnly decided, in a case of bigamy (*x*), that an Englishman married in England, but divorced *à vinculo* by the Scottish Consistorial Court, committed the crime of bigamy by a second marriage in England, his prior (divorced) wife being alive (*y*).

This serious difference ought to be put an end to by a legislative enactment, for now a man who has been divorced in Scotland from his first wife, and then married again, may have two wives, for having been divorced in Scotland, he may again marry in that country; he may live with one wife in Scotland most lawfully, and with the other equally lawfully in England; but if he only cross the border, his English wife may

(*u*) *Utterton, or Tewsh v. Tewsh*, Ferg. R. 23; *Warrender v. Warrender*, 2 Cl. & F. 552; but see *Conway v. Beazley*, 3 Hagg. Eccl. Rep. 646.

(*v*) *Brunsdone v. Dunlop*, Ferg. R. 259; *Morcombe v. Maclelland*, *Ib.* 291, 149.

(*w*) *Russell Manner's Case*, Ferg. R. 296.

(*x*) *Lolley's Case*, Russ. & Ry. C. C. 237; 2 Cl. & F. 567.

(*y*) *McCarthy v. De Caix*, 2 Russ. & Moo. 614.

proceed against him in the English Courts, either for restitution of conjugal rights, or for adultery committed against the duties and obligations of the marriage solemnized in England; again, let him go to Scotland, and his Scottish wife may proceed in the Courts in Scotland for breach of the marriage contract entered into with her in that country. The greatest embarrassment to the rights of parties must arise from this conflict, for what can be more embarrassing than that a person's *status* should be involved in uncertainty, and should be subject to change its nature as he goes from place to place; that he should be married in one country, and single (if not a felon) in another; bastard here, and legitimate there? The utmost inconvenience must arise to the Courts, for what inconvenience can be greater than that they should have to regard persons as married for one purpose, and not for another; single, and a felon, if he marry a few yards to the southward; lawfully married, if the ceremony be performed a few yards to the north; a bastard, when he claims land; legitimate, when he sues for personal succession; widow, when she demands the chattels of her husband; his concubine, when she claims dower of his land. It is obvious that many most important differences may arise in cases of this description. Two Scotch persons married in England, may afterwards go to reside in Scotland; again, one of the contracting parties may be English, the other Scotch; if the law of Scotland continue such as these Courts have hitherto held it to be, and if the decision in Lolley's case be of universal application, the issue of the second marriage may be legitimate in Scotland, and illegitimate in England. The



son may take the real estate in Scotland, and not the real estate in England; he might possibly even be a Scotch peer, and lose his English title, and with it the English estates, the only support of his Scotch peerage. It is impossible, therefore, to exaggerate the importance of the questions; and accordingly the Court has been guarded against laying down any principle which might affect any other case than that before it (z).

(z) 3 Hagg. 646.

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BOOK IV.

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VIDUITY.

“Honour widows that are widows indeed.”—*St. Paul to Timothy*,  
Epist. I., chap. v., v. 3.

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# BOOK IV.

## VIDUITY.

### CHAPTER I.

#### THE RIGHTS AND RESPONSIBILITIES OF A WIDOW.

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WHEN a marriage is naturally dissolved by a husband's death, his wife becomes a widow, and is said technically to be *discovcrt*. She may, of course, lawfully contract a second marriage.

I. A widow resumes the same rights to her unsettled realty as she had before her marriage, and as if they had not been interrupted or suspended by her marriage. Should there be a marriage-settlement, her rights will then be governed by its powers and provisions. In the case of a mortgage of the widow's lands during the marriage, whenever the transaction gives satisfactory proof of an intent to effect a change of the beneficial interest, the husband's real representatives, and not the widow or her heirs, will be entitled to the equity of redemption.

Effect of widowhood upon her own property.

Should the husband and wife have simply mortgaged the wife's property, the equity to redeem the property from the mortgage-loan belongs to the widow, for a mortgage is not such a sale or alienation as will bar the widow's right of survivorship (*a*).

A widow is entitled, pursuant to her right of survivorship, to her chattels-real, which were not disposed of by her husband by a *complete* act in his lifetime; for his will cannot affect them (*b*); to her *choses en action* which were not reduced into possession by him; to unpaid judgment debts, where she was the meritorious cause of action; to arrears of rent due upon her sole or joint lease with her husband, she assenting to such lease; (but if her husband alone made a lease of her property, then the arrears at his decease belong to his personal representatives;) and also to the benefit of contracts under seal made with her alone, or jointly with her husband (*c*).

Causes of action, which have arisen during the marriage, either from a personal wrong to the wife, or out of her realty, survive to the widow on her discoverture.

Her liabilities.

II. A widow is liable for any debts which having been contracted before her marriage, still remain unpaid. If she promise to perform any contract made by her during marriage, which she ought morally to perform, such promise will bind her, and she may be sued upon the contract.

In strict law, a widow is not legally bound to bury her deceased husband, for such duty properly devolves upon his representative; she may, however, bind herself by a special contract to the obligation of discharging his

(*a*) Pow. on Mort. 714.

(*b*) See *ante*, p. 323.

(*c*) See Addison on Contracts, 346, 637.

funeral expenses. But this is for the most part a matter of personal feeling and consideration. •

III. If the husband have left a will, then should the widow take no interest under it, she is deprived of all right in the personalty; but if her husband died intestate, then, if there be children, the widow will be entitled to one-third of the personalty, after paying his debts, and the child or children to the remainder; but if there be no children, or legal representatives of deceased children, then the widow is entitled to one half of it, and the other is distributed amongst the husband's next of kin, among whom a widow is not reckoned (*d*). If there be no next of kin, the moiety goes to the crown. Of course, this is assuming that the widow's right is not barred by settlement or covenant before marriage.

A widow's right in her husband's personalty.

A husband's bequest to his widow in full of her legal claims is no bar to her right in the distribution of any lapsed legacies (*e*).

(*d*) 22 & 23 Car. II, c. 10.

(*e*) But if a husband covenanted to leave, or that his executors should pay, to his widow a sum of money, or other personalty, and he die intestate, her distributive share under the statute is a performance of such covenant, for she cannot claim both. <sup>for the same & share.</sup> 10 Ves. 13. Should this share be less than the amount covenanted, it will, of course, only be a part performance of the covenant, so far as it extends. But if the covenant be entire, and the provision therein expressed to be secured to the wife is such as the covenant in part might be held to be performed by her distributive share under the statute, and the remaining part could *not* be so considered, then the Court will not split it, holding a performance and non-performance at the same time; but the widow will be entitled to the both. And this is the doctrine, if the covenant require the money to be settled during the husband's life, so that there was a breach of it before his death, and a debt decided to be incurred by the widow. Williams on Executors, 1279. [1345. of the 5th ed.]

Where a husband dies intestate, his personal property being subject to the custom of the city of London, the province of York, or the principality of Wales, the property, after payment of debts and funeral expenses, and deduction of the widow's apparel, and the furniture of her bed-chamber (in London called "the widow's chamber"), or the sum of 50*l.*, where the value of the property exceeds 2,000*l.*, will be divided in the following proportions:—If the husband leave children, the widow will be entitled to one-third, another third will go to the children, and the remaining third to the husband's administrator, as deceased's part, which is to be distributed under the Statute of Distribution, where the husband has not disposed of it by will, as by the custom he might. The widow will be entitled to her share of the deceased's part, where the husband dies intestate as to it (*e*).

Paraphernalia,

IV. A wife acquires a right to her paraphernalia, making an exception to the rule, that the whole of her personal chattels vest absolutely in her husband; but in her husband's property, whether real or personal, the wife has no right or interest whatever, during the subsistence of the marriage.

A wife's paraphernalia consists of the clothing and ornaments, which she possessed at the time of the marriage, or which have been given to her by her husband during the marriage, and which are suitable to her condition in life (*f*). Should there be evidence, however, that, although her husband allowed his wife to

(*e*) 1 Jac. I., c. 17, § 8. See 1 Bright's *Husb. & Wife* 295—320.

(*f*) If the articles have been given to the wife by her parents, or strangers, upon the marriage, or during the marriage, they will not be para-

wear the articles, he did not intend them to be considered as paraphernalia, they will not be treated as such (*g*).

The respective rights of husband and wife in paraphernalia are these:—the husband may, during the marriage, sell them or give them away; they may be seized by his creditors, but his power over them ceases at his death, for he cannot bequeath them by will; the wife has merely the use of them during the marriage, subject to the husband's power over them, and therefore she cannot dispose of them; but after his decease, she is entitled to them as her absolute property, and may claim them or their value, as a debt owing from his estate (*h*), a claim, which, although postponed till after his debts are paid, is yet preferred to legacies.

Should there be a deficiency of assets for the payment of the husband's debts, the widow must surrender her paraphernalia to the creditors, although there may fall in contingent assets at some future period, and her right to the value of them will then be utterly destroyed.

If the husband have not disposed of the paraphernalia absolutely, but merely given them in pledge, the widow, after the debts of the husband are paid, will be entitled to have them redeemed out of his remaining estate, in preference to any legacy (*i*).

A wife's right to her paraphernalia may be barred by

phernalia, but will be treated as given to her separate use. *Graham v. Londonderry*, 3 Atk. 392. In *Mangey v. Hungerford*, 2 Eq. Cas. Abr. 156, the widow claimed her gold watch, and several gold rings as paraphernalia, which had been given to her at the funerals of relations, and they were decreed to her by Lord Talbot.

(*g*) *Calmady v. Calmady*, 11 Vin. Abr. 181.

(*h*) *Northey v. Northey*, 2 Atk. 77.

(*i*) *Graham v. Londonderry*, 3 Atk. 395.

settlement, or by her acquiescence in a limited bequest of them to her by her husband's will; but this bequest she may repudiate, and stand upon her legal absolute right to them.

A widow's rights in her deceased husband's real property are two, viz. Quarantine and Dower, or Freebench.

Quarantine.

V. A widow's quarantine is that temporary right which *Magna Charta*, in provident care of the destitute situation into which a widow may be cast by the death of her husband, has given to her to remain in the dwelling-house for forty days from her husband's death, during which time, her dower (if any), should be assigned. She may reasonably make use of all the benefits and advantages connected with such residence, and is entitled to be sustained by the husband's victuals; but if she marry again during the forty days, she forfeits her quarantine.

The mode of enforcing this right is by writ of *Quarantina Habenda*.

Dower.

VI. Seeing that a widow's right to dower is so frequently defeated by the husband in his lifetime, that it arises so rarely in modern times, and that a jointure (*k*) has almost superseded it in family arrangements, it will not be necessary to expatiate at any very great length upon the subject. A brief sketch of the matter will suffice.

Dower arises by the operation of law, being that right which a widow (*l*) has in the third (*m*) part of the lands

(*k*) See p. 226, *ante*.

(*l*) See 7 & 8 Vict., c. 66, § 16, providing that women-aliens marrying any natural-born subject, or husband duly naturalized, are to be deemed to be themselves naturalized, and to have all the rights of natural-born subjects.

(*m*) In gavelkind lands, the widow takes a *half*, which is, however,



and tenements of which her husband died solely and beneficially possessed in fee-simple, fee-tail general, or as heir in special-tail (*n*), which she holds from and after his decease, in severalty by metes and bounds during her life, for her support, whether she have had issue by her husband or not, and of what age soever she may be at her husband's decease, provided she have attained the age of nine years. Her husband's age does not affect her right.

Where there are several widows of successive deceased tenants, each of them is endowed according to the priority of her husband's estate, of such part of the land as remains, after satisfying the dower of those anteriorly entitled, subject to be enlarged by their death, according as the prior endowments may or may not have defeated the estate of the husband through whom the right of the particular widow exists.

These circumstances must concur to create dower :—

1st. A lawful marriage, for *ubi nullum matrimonium, ibi nulla dos*. But if the marriage be dissolvable à *vinculo matrimonii*, and it be not annulled in the lifetime of the husband, the widow will be entitled to her dower. A divorce à *mensâ et thoro* only, will not cause the forfeiture of dower, except when it is for adultery, accompanied by elopement, unless her husband have been voluntarily reconciled to her (*o*).

limited during her chaste widowhood, and in borough-English land, she takes *the whole* for her life. In the Isle of Man she is entitled to dower only *dum sola et casta vixerit*.

(*n*) A widow has no interest in her deceased husband's land, which was limited to him and his heirs, or to him, his heirs, executors, and administrators during the life of another person. *Atkinson v. Baker*, 4 D. & E. 229.

(*o*) In *Sidney v. Sidney*, 3 P. Wms. 262, Lord Chancellor Talbot said,

2nd. The husband must have been seised or possessed in law of the estate out of which the widow claims dower, if the marriage were solemnized *on or before* the 1st January, 1834; but if the marriage took place since that period, seisin is rendered unnecessary by the Dower Act, 3 & 4 Wm. IV., c. 105, a mere right of entry or action in the land being then sufficient.

3rd. The inchoate title to dower is consummated by her husband's death, when the widow's right of action commences.

The following estates are not subject to dower :

Estates held in joint-tenancy, since in them the inheritance is not executed in possession, on account of the right of survivorship; a widow is not dowable of a wrongful estate after it is avoided, by the entry or action of the person having right, or by the operation of the law of remitter (*p*), for though titles of dower attach upon estates of inheritance, notwithstanding such estates are defeasible, by reason of defect of title, yet dower being an interest annexed to the defeasible estate,

“ The reason of the difference why a wife, in case of an elopement with an adulterer, forfeits her dower, and yet the husband, leaving his wife, and living with another woman, does not forfeit his tenancy by the curtesy, is, because the Statute of Westminster II., c. 34, does, by express words, under these circumstances, create a forfeiture of dower; but there is no act inflicting, in the other case, the forfeiture of a tenancy by the curtesy.”  
The wife's treason or felony also operates a forfeiture of the dower.

(*p*) Remitter is where he who has the right of entry in lands, but is out of possession, obtains afterwards the possession of the lands by some subsequent, and, of course, defective title; in this case he is remitted or sent back, by operation of law, to his ancient and more certain title. The possession which he has gained by a bad title shall be *ipso facto* annexed to his own inherent good one; and his defeasible estate shall be utterly defeated and annulled by the instantaneous act of law, without his participation or consent.

(*q*) Park on Dower, 57.

when the estate is defeated, all its consequences are defeated along with it (*q*); lands actually assigned for dower are not subject to subsequent dower, since *dos de dote peti non debet*. A widow cannot be endowed out of partnership property, since it is treated as personalty; nor out of a common *sans nombre*, for the common might then be overstocked.

Although a widow is dowable out of a reversion expectant on *a term for years*, because her husband was seised of the freehold and inheritance, yet she cannot dower out of a reversion expectant on *a freehold*, such as a life-estate, because the husband could not be so seised, whilst it was thus in expectancy.

With these exceptions, a widow is entitled to dower out of the profits of stallage, mills, fairs, courts, fines, heriots, and public offices; also, of a park, dovehouse, piscary, presentation to a living, common, rents certain, franchises, tithes, mines, as well those under the lands of third persons, but purchased by her husband, as under his own lands, provided they have been opened and wrought before his death, although it is immaterial whether he had continued or discontinued their working, and generally of any profits and liberties, of which her late husband had an estate of inheritance.

We will now expound the Dower Act,—the 3 & 4 Wm. IV., c. 105 (*r*), which places every wife's right of dower entirely at her husband's mercy.

When a husband dies *beneficially* entitled to any land

(*r*) The first section is the glossary clause, and enacts, “that the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or different meaning, shall, in this act, *except* where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows:—

“Land,” to extend to manors, advowsons, messuages, and all other

for an interest not dowable at law, and such interest, *whether wholly equitable, or partly legal and partly equitable*, is an estate of inheritance in possession, or equal thereto (other than an estate in joint-tenancy), his widow is entitled, *in equity*, to dower out of the same land (s).

This provision has abolished a great anomaly. Dower was considered as a mere *legal* right, and did not attach unless the husband was, during the coverture, solely seised in possession of the legal inheritance: it was held, therefore, that equity ought not to create the right where it did not subsist at law, and that a widow was not dowable of a trust estate. Yet a man might then, as now, be tenant by the curtesy of his deceased wife's trust estate; a seeming partiality, for which Lord Chancellor Talbot said, he could see no reason, but which, as he found it settled, he did not feel himself at liberty to correct. This distinction, however, is now abolished, and dower is made to attach, in equity, upon the beneficial interest in possession of a sole owner of the inheritance, whether the ownership be exclusively equitable, or be in part composed of a legal estate enjoyed beneficially.

When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she may have dower out of the same, although her husband have not recovered possession thereof; provided the dower be sued for or obtained within the period during which such right of entry or

hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof.

Every word importing the singular number only, to extend and be applied to several persons or things, as well as one person or thing.

(s) Section 2.

action might be enforced (*s*), which period is now limited to twenty years (*t*).

Before this act, a seisin was necessary, as we have seen, but a seisin in law was sufficient, *i.e.*, where the inheritance in lands and hereditaments, of which an owner died seised or possessed, descends upon his heir, who dies before entry or possession; if the heir had left a widow, she would have had dower.

No widow shall be entitled to dower out of any land which shall have been *absolutely disposed* of by her husband in his lifetime or by his will (*u*). And that all *partial* estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subjected or liable, are valid and effectual as against the right of his widow to dower (*v*). A widow shall not be entitled to dower out of any land of her husband when, in the deed by which it was conveyed to him, or by any deed executed by him, it shall be *declared* that his widow shall not be entitled to dower out of such land (*w*). A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, *when*, by his will, he declares his intention that she shall not be entitled to dower out of such land, or out of any of his land (*x*). The widow's right to dower shall be subject to any conditions, restrictions, or directions, which shall be declared by her husband's will (*y*). Where a husband devises any land out of which his widow would be entitled to dower, if the same

(*s*) Section 3.

(*w*) Section 6.

(*t*) By the 3 & 4 W. 4, c. 27, § 41.

(*x*) Section 7.

(*u*) Section 4.

(*y*) Section 8.

(*v*) Section 5.

were not so devised, or any estate or interest therein, to or for the benefit of his widow, she shall not be entitled to dower out of or in any land of her husband, unless a contrary intention appear by the will (z).

In these sections consist the essential alterations made by this act, which puts the widow's dower altogether in the husband's power. It used to be a principle, that, after a title to dower had once attached, it was not in the power of the husband alone to defeat it by any act in the nature of alienation or charge, whether voluntarily, as by deed or will, or involuntarily, as by bankruptcy, &c. ; and that, therefore, all interests created by the husband after the attachment of title to dower, were voidable as to that part of the land which was recovered in dower ; a principle, which this act has exploded.

There are now four modes, by which the owner of freehold lands may exclude from dower a wife, whose marriage with him was subsequently to the 1st of January, 1834:—

(1) By an absolute disposition of the lands by deed or will.

(2) By a declaration in the conveyance of the lands to the husband, or in any deed executed by him.

(3) By a devise of any lands out of which the wife would be entitled to dower, or of any estate or interest therein ; which, unless a contrary intention is declared, prevents dower from attaching on any land of the husband.

(4) By a testamentary provision out of lands not liable to dower, or out of personal estate expressed to be in satisfaction of dower, or, indeed, by any demonstrative intention to exclude the dower.

(z) Section 9.

The fourteenth section enacts, "that this act shall not extend to the dower of any woman who shall have been, or shall be married on or before the 1st January, 1834, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said 1st January, 1834, the effect of defeating or prejudicing any right to dower."

There is great obscurity in this section, and it gave rise to two serious questions. The one was, whether a title to dower was within the Fines and Recoveries' Act (*a*), so that a woman married on or before the 1st January, 1834, could extinguish her title by a deed acknowledged under the act? and it has been long settled that, in every case requiring the wife's conveyance, the substituted assurance, under this act, applies. The other question was, whether the dower of a widow who had been married *on* or *before* 1st January, 1834, out of lands purchased by the husband *after* that day, may be excluded by a declaration, or alienation, &c., under the Dower Act? The sound opinion seems to be, that the new law was made exclusively for widows *married after* the 1st January, 1834, and, therefore, inasmuch as the titles to dower, attaching after 1st January, 1834, of women married on or before that day, cannot be defeated by a declaration or otherwise, under this act; it follows as a reasonable consequence, that such women cannot claim dower out of an *equitable* estate under its second section. This saving clause, which continues to a large class of wives the old provisions, will have the effect of prolonging the practice of inserting limitations to prevent dower, in order to render the fact of marriage on or before the 1st January, 1834, immaterial to the

(*a*) 3 & 4 W. IV., c. 74.

future title. In practice (*b*), the ordinary uses to prevent dower are inserted, together with the declaration.

There are two modern forms of a conveyance to uses to bar (*c*) dower; one is to give to the husband a remainder in fee, expectant upon an estate for his own life, and to interpose between these two estates a freehold estate for the husband's life, in a trustee in trust for

(*b*) "It is usual," observes Lord St. Leonards, in his *Treatise on the Law of Vendors and Purchasers* (Vol. II., p. 222, 10th edit.), "in all cases of conveyances to a purchaser, to insert a declaration depriving his wife of dower, even where there is a limitation to bar the dower of a wife married on or before the 1st of January, 1834, in order to provide against a future marriage; but this practice, without express instructions, seems not to be correct: it was quite correct to prevent dower from attaching, whilst the husband's power of disposition, either by act *inter vivos*, or by will, was inoperative against his wife's dower; but now that he can charge, sell, convey, or devise his estate free from dower, or put an end to it by any deed, it would not be right, without the owner's authority, by a declaration in the conveyance to prevent dower altogether. Why should the wife's dower be guarded against any more than a descent to a distant unknown relative? Neither can take contrary to the owner's disposition. The Real Property Commissioners, in their first report, state the true principle on which the law of dower is to be supported to be, that it is an interest which the law takes from the heir of a deceased proprietor for the support of his widow, whose claims in natural justice and policy appear to stand at least on an equal footing with the claims of the heir, and they thought that by combining this principle with that of a right of alienation inseparably incident to property of every description, the law of dower might be put on a footing more beneficial on the whole to widows, and free from nearly all the then existing inconveniences and mischiefs. These considerations may induce conveyancers not, as a matter of course, to deprive a wife of her chance of dower. If the owner allow his estate to descend, the claim of the widow is equal to that of issue, and superior to that of a lineal ancestor or a distant relation."

(*c*) An equitable bar of dower was deemed sufficient as between vendor and purchaser; as if a wife contract before marriage to relinquish her dower, either in consideration of a substituted provision, or of marriage, which is valuable in itself, and the highest consideration known to our law.



him, so as to prevent the union of the husband's life-estate and his remainder, and thereby create such a seisin in the husband as would give to his widow a right to dower; these limitations are preceded by a power of appointment to the husband, enabling him to dispose of the estate in the most convenient mode.

The following form in a purchase-deed is an example:—

To have and to hold the said hereditaments and premises hereby granted unto the said [*purchaser*] and his heirs, to such uses, and upon and for such trusts, intents, and purposes, as are hereinafter expressed and declared concerning the same: And it is hereby agreed and declared that the direction, limitation, and appointment, and the said grant hereinbefore contained, shall respectively operate and enure, To such uses upon and for such trusts, intents, and purposes, for such estates, and generally in such manner as the said [*purchaser*] shall, by any deed or deeds, direct and appoint, and in default of, and until such direction or appointment, To the use of the said [*purchaser*], and his assigns, for his life, without any impeachment of waste. And after the determination of that estate by any means in his lifetime, to the use of the said [*trustee*], his executors, administrators, and assigns, during the life of the said [*purchaser*], in trust for him and his assigns: And after the determination of that estate, To the use of the said [*purchaser*], his heirs and assigns for ever.

The declaration under the act may be in this form:—

It being hereby declared that the widow of the said [*purchaser*] shall not be entitled to dower, in or out of the said premises.

The other form is:—

To such uses as the purchaser shall by deed or will appoint; and for want of appointment, to the use of a trustee, his heirs and assigns, or executors and administrators, during the life of the purchaser, in trust for him, and subject thereto, to the use of the purchaser, his heirs and assigns.

The different legal effects of these two forms are as follows:—In the former, the husband is seised of a remainder in fee expectant upon his own life; the union of which two estates, and the consequent seisin of the

inheritance, is prevented by the interposed freehold *pur autre vie* in the trustee; so that the husband is not actually so seised for the legal fee as to give a right to dower. In the latter form, the husband takes only a trust estate for his life, the legal freehold *pur autre vie* being vested in the trustee, with remainder to the use of the purchaser in fee. The trust or equitable estate for life, and the legal remainder in fee, not being *ejusdem generis*, cannot unite so as to vest the actual seisin of the inheritance in the husband, upon which a title to dower can attach; but in this, as well as in the other form of limitation, he has complete dominion over the inheritance, and upon his death, the legal estate of inheritance, if not otherwise disposed of, will descend to his heir-at-law (*d*).

The tenth section enacts, that no gift or bequest made by any husband to or for the benefit of his widow, of or out of his *personal* estate, or of or out of any of his land *not liable to dower*, shall defeat or prejudice her right to dower, *unless* a contrary intention be declared by his will.

Acceptance of a bequest of personalty neither did, nor, since this act, does operate in bar of dower, unless an intention to that effect can be unequivocally established.

Nothing in this act prevents the Court of Chancery from enforcing any covenant or agreement, entered into by or on the part of the husband not to bar his widow's right to dower out of his lands, or any of them (*e*); so that it should be ascertained by a purchaser of an estate free of dower, under this act, that the vendor has not entered into any agreement *not* to bar his widow's dower.

(*d*) 1 Bright's *Husb. & Wife*, 519.

(*e*) Section 11.

Also, that nothing in this act is to interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows, in satisfaction of dower, are entitled to priority over other legacies (*f*).

The principle alluded to in this clause is, that where a general legacy is given, in consideration of a debt owing to the legatee, or of his relinquishing any right or interest, inasmuch as such a bequest cannot be treated as a bounty, like other bequests, but as the purchase money for such right or interest, payment of it will be preferred to any other general legacies, which are merely voluntary, and, therefore, a legacy given to a widow in satisfaction of dower, does not, in the event of a deficiency of assets, abate in proportion to the other legacies. This principle, however, only applies to cases where, on a testator's death, his widow is entitled to dower.

No widow is now entitled to dower *ad ostium ecclesie*, or *ex assensu patris* (*g*). Dower *de la plus belle* (*h*), being a consequence of the tenure by knight's service, is virtually abolished by the statute 12 Car. II., c. 24, which converts those tenures into socage. There are then only two out of the five species of dower which are left, viz. :—Dower at the common law, or *ex provisione*

(*f*) Section 12.

(*g*) Section 13.

(*h*) Dower, *ad ostium ecclesie*, was this :—Where a tenant in fee-simple of full age, openly, at the church door (where all marriages were formerly celebrated), after affiance made, and troth plighted between them, endowed his wife with the whole, or such quantity of his land as he pleased, specifying and ascertaining the same; on which the wife, after her husband's death, might have entered without further ceremony. Dower, *ex assensu patris*, was a species of dower *ad ostium ecclesie*, which was made during the husband's father's life, and the son, by the father's consent expressly given, endowed his wife with parcel of his father's lands. Dower *de la plus belle* was where the wife was endowed with the fairest part of her husband's estate.

*legis* (which we are now treating of), and customary dower, or freebench, which we will presently notice.

Although the right to dower is consummated upon the husband's death, yet the widow has no estate in the lands until the heir or terre-tenant assign the dower, unless the precise portion of land have been particularly specified. If the property be capable of division, and were held by the husband in severalty, dower must be assigned by metes and bounds, but if otherwise, it must be done in a special and certain manner. If the heir or terre-tenant refuse to assign the dower, the widow has several remedies for recovering it. Where no dower has been assigned, the original writ of dower *unde nihil habet* will lie, but if any part have been assigned, the writ of dower will lie. The actions under these writs are prosecuted in the Court of Common Pleas. The widow may file a bill in Chancery, and this is the better plan, for she labors under so many difficulties at law, from the embarrassment of trust terms, from an ignorance of the titles, values, and quantities of the lands of her late husband, and other matters, that equity will fully assist her, not only in establishing her right at law, but also giving complete relief, when such right is ascertained.

A widow-dowress may grant an estate out of the endowed property, which may endure so long as her own life, but not beyond her decease, and she is entitled to the emblements growing at the time of the assignment, and to bequeath the crops growing at her death, otherwise they go to her personal representatives (i). If the land assigned for dower contain an opened mine, she may work it for her own benefit. She must perform the

(i) Bell's *Husb. & W.* 297, &c.

services (if any) as tenant of the land, and bear her fair proportion of the rents and charges; she is liable for waste.

A widow, then, should resort to the Court of Chancery in order to recover her withheld dower; she will there meet with fewer embarrassments in the practical proceedings, the Court, moreover, removing all obstacles, which may tend inequitably to delay or to defeat her undoubted right.

Sometimes, however, the Court directs the widow to bring a writ of dower at Common Law, in order to establish her legal title to dower, and retains the bill in the mean time, and also assists her in trying her right, and enjoying the full benefit of it after it is determined at law in her favor, by ordering for her a discovery of any necessary deeds or documents, in ascertaining metes and bounds, and in giving her possession according to her right.

A commission usually issues to set out and assign the dower. But the decree sometimes directs an officer of the Court to assign the dower.

A plea of a purchase for valuable consideration without notice is a defence when the widow is suing in equity; such a purchaser is maintained in his rights in preference to every other person (*m*).

The mere fact of an assignment of dower not having been made before the widow's death will not deprive her representatives of the mesne profits, nor prevent her right whilst living to obtain payment of them in equity. "The want of a formal assignment of dower," said Lord Cowper (*n*), "is nothing in equity, since the widow's

(*m*) *Joyce v. De Moleyns*, 2 Jones & Lat. 374.

(*n*) *Hamilton v. Mohun*, 1 P. Wms. 122.

right in conscience is the same as if it had been made." The general rule is not to allow interest upon arrears of dower.

The costs of such a suit are in the discretion of the Court, and are regulated by the conduct of the parties. Thus, when the widow's suit is merely for an assignment of dower, there being no misconduct on the part of the defendant, she will not be entitled to costs; but if the defendant's opposition be vexatious, or if he fraudulently withhold her dower, he will then be ordered to pay the costs of the suit. And if he set up any defence which fails, he may be liable to the costs thereby occasioned.

When the widow requires the profits of her dower for immediate support, and her claim is not the only subject of the suit, the Court will not delay the payment of such arrears until the other matters are settled; but it will direct an enquiry of what is due to her for arrears, in order that she may forthwith receive them for her maintenance.

**Freebench.** IV. A widow's customary dower out of copyholds is called her freebench, which is regarded as an excrescence growing out of the husband's interest, and being indeed a continuance of his estate.

Since freebench is only claimable by special custom, the estate which a widow is to take, both as to its quantity, quality and duration, must be such as the

(c) The etymology of the term may be thus traced:—on the widow or husband acceding to the estate, on the death of the other, such widow or husband immediately becomes a tenant of the manor, and is enabled to sit on the homage as one of the *pares Curiae*, and hence called a *bencher*. It is somewhat strange and unaccountable, that "free" should be applied to any interest arising out of the base tenure of copyhold.

custom prescribes. It is generally a third for her life, as at common law, but it is sometimes a fourth part only, and at other times only a portion of the rent. In many manors, the wife takes the whole for her life, in others, she takes the inheritance. Frequently the customary right is *durante viduitate*, and in some cases it is confined to her chaste viduity, or widowhood. In the manors of East and West Emborne, and the manor of Chadleworth in Berkshire, the widow, if found guilty of incontinency, loses her freebench, unless she comes into court, riding backwards upon a black ram, repeating certain ridiculous words. The same custom prevails in the manor of Torre in Devon.

Freebench differs from dower *at the common law*, in that the former, unless the particular custom declares it to be otherwise, does not attach, even in right, till the actual decease of the husband; whereas the right to dower at the common law attaches immediately on marriage, and the widow is entitled to dower in lands of which the husband was seised *at any time during the coverture*. As the right of the wife to freebench does not attach till the husband's death, any alienation by him alone, to take effect in his lifetime, though without any concurrence of the wife, whether it be by surrender in court, by forfeiture, or in consequence of enfranchisement, the claim of the widow will be effectually and utterly barred. And even if the husband make a lease for years, though by license of the lord, the widow shall not avoid it. But in this case, it must be remarked, that her claim to freebench is not defeated by reason of the husband's not dying seised (though it should seem to be so urged in some of the books), as he would most

indisputably die seised in the present instance, he being the copyholder, and not the lessee; and even the possession of the lessee being, at common law, the possession of the lessor; and, therefore, it should seem, that the widow would in this case be barred only *quoad* the lease, and consequently be entitled on its expiration. By special custom, however, the widow may have her freebench, notwithstanding such lease, though without prejudice to it, she receiving the rent, &c. And if the husband contract for the sale of his copyhold, and die without any actual surrender, a Court of Equity will compel the widow to relinquish her freebench. *A fortiori*, if the husband actually surrender, and die before the admittance of the surrenderee, she shall be barred: for the subsequent admittance of the surrenderee, though after the death of the husband, relates to the time of the surrender, and so precedes the title of the wife.

So if the husband become a bankrupt, and die after the execution of the bargain and sale by the commissioners, and before the admittance of the vendee, the widow of the bankrupt will not be entitled to her freebench.

And as it is so repeatedly said, that the husband must die seised, at least by relation, in order to enable the widow to claim, it may be proper here to observe, that there can be no disseisin of a copyhold; and, consequently, though a person should enter with strong hand into the copyhold premises, yet the copyholder would continue tenant to the lord; and, by consequence, if the husband were, *before such entry*, seised of the premises, he must, *notwithstanding such entry*, continue seised;



and, consequently, such entry cannot defeat the title of the wife (*p*).

The Dower Act, 3 & 4 Wm. IV., c. 105, does not affect equitable copyholds, but only freeholds.

The widow of a purchaser or heir at law, who dies before admittance into his copyhold, is nevertheless dowable, since the admittance has reference back to the contract or ancestor's decease.

A jointure before marriage, in lieu of dower and thirds, out of any lands of freehold-inheritance, is a bar in equity to freebench, which is a customary right *nomine dotis*; so is a devise with the same intent.

When a widow is dowable by custom, she has all the incidental qualities of dower at common law. Since the wife's estate is a continuation of that of her husband, she holds of the lord, and is not in need of admittance, except by special custom, or, at least, it will be sufficient if she challenge her admittance. Admittance, however, is not dispensed with in gavelkind lands, or where the widow only takes a portion of the husband's copyhold lands, and then the heir must assign her freebench before her entry, and he can be compelled to do this by plaint in the nature of a writ of dower, duly levied in the manor court, a remedy which the 3 & 4 Wm. IV., c. 27, has graciously left to a widow.

VIII. The rights of a widow as jointress (*q*) are these: <sup>Rights as jointress.</sup> she is entitled to emblements, which will either pass by

(*p*) 2 Wat. Cop. 82, *et seq.*

(*q*) See *ante*, p. 226, *et seq.*

her will, or belong to her executors or administrators at her death, but she will not be entitled to the emblements upon the land at her husband's death, for her jointure is not a continuation of her husband's estate; she may grant leases of the jointured-property to endure for her own life; she may regrant copyholds, if the jointure be a manor, for then she is *domina pro tempore*; and redeem prior incumbrances, and hold the estate until reimbursed, but she takes the jointure-estate subject to all the charges existing upon it at the time of the settlement, and interest upon arrears of jointure is never allowed. She is entitled to have charges upon her jointure-estate paid off. The committal of waste will operate a forfeiture of her jointure, but neither her elopement nor adultery, nor her late husband's treason or felony, will have this effect.

It needs scarcely to be observed that how insolvent or distressed soever a husband may have left his affairs, his widow can retain her necessary apparel; creditors cannot strip her, to the exposal of shame, and the chilling pity of the scornful and the heartless.

Writ *de ventre inspiciendo*.

IX. Should a widow feign herself *enceinte*, in order to impose a supposititious heir upon her late husband's intestate-landed-estate, the presumptive heir or devisee, or tenant-in-tail, as the case may be, can obtain, upon petition to the Court of Chancery, a writ *de ventre inspiciendo*, in order to secure the rightful inheritance, and ascertain whether she be in such an interesting state or not (*r*).

(*r*) There does not exist an analogous writ, in order to protect the succession to personal estate against such a fraud. The method would then be to try the legitimacy of the child after its birth.

The mere expectation of an heir-apparent will not be a ground for the issuing of this writ.

The first process is to inquire whether the widow be *enceinte*, and *quando paritura*. If the jury (which is composed of men and women, though the search is made by the latter), find her *enceinte*, then, strictly, she is removed by a second process, issuing out of the Court of Common Pleas (where the first process is returnable), to a castle, where the sheriff is to keep her safely (*s*); but at the present day this writ is not executed in so strict a manner, provided people of skill have, from time to time, free access to the widow, and are present at the birth (*t*).

X. Wives and widows are entitled to the same rank among one another as their husbands respectively hold between themselves, unless the rank be professional or official only. Unmarried women are entitled to the same rank as their eldest brothers bear amongst men, during their fathers' lives. Rights and precedence of women.

A peeress, either by birth, marriage, or patent, is tried for any offence before the same tribunal as peers of the realm (*o*), and possesses all the rights, immunities, and privileges of the peerage.

A peeress in her own right, who marries a commoner,

(*s*) If the widow marry again, the writ may still issue; but instead of being placed in the custody of the sheriff, she is permitted to remain with her husband, on his entering into a recognizance that she should not remove from his house, and that some of the women-jurors returned by the sheriff should see her every day, and three or more be present at her delivery. Cro. Jac. 684.

(*t*) 1 Madd. Ch. 11.

(*o*) 20 Hen. VI., c. 9.

still remains ennobled, although she can communicate no title to her husband ; yet if she be a peeress by marriage alone, she loses her title in strict law by a second marriage with a commoner, although by courtesy she is usually addressed by her prior style and title ; but not so, if her second husband be a peer, for then she legally retains her former title, although it be higher than that of her second husband.

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BOOK V.

CONCUBINAGE AND HARLOTRY.

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If she hath sinn'd, God's angels would not look  
On one so frail and so imperilled!  
But turn away, and, with a pitying tear,  
Breathe her forgiveness in their songs to Heaven.

*Richards's Vandycck.*

One heart-throb sometimes earneth Heaven,—one tear!

*Bailey's Festus.*

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## BOOK V.

## CONCUBINAGE AND HARLOTRY.

## CHAPTER I.

## CONCUBINAGE.

- |                                  |   |                     |
|----------------------------------|---|---------------------|
| I. A mistress's contracts.       | } | III. Her furniture. |
| II. Agreements for cohabitation. |   |                     |

THE unwedded relationship between paramour and mistress, is not recognized in any way by our national jurisprudence, as it was by the civil law (*a*) of Rome, and the municipal regulations of the ancients. Nevertheless, it cannot be denied that such free and unchained endearments are very frequently concluded, and preserved with something more than temporary caprice and alterable attachment. A few questions relating to this subject has been raised before, and ruled by, our Courts of Law, and it therefore becomes necessary to hint at them in this work, which has for its object the discussion of every legal principle and *dictum* concerning the gentler sex, in every possible known condition of life.

I. A paramour, or protector, is liable for the debts contracted by his own mistress, who lives with him in

A mistress's contracts.

(*a*) A concubine did not mean, in the civil law, a harlot; the concu-

the character of a wife, and is not known by the world to be placed in his establishment in any other capacity (*b*). If he have been in the habit of visiting shops, and other places of sale, with her, and indicate by his conduct that she is virtually his wife, he will be responsible, should his mistress afterwards visit these places alone, and give her orders (*c*). Where a mistress has lived for some time with her lover, in the style of a wife, and he should then go abroad, she retains an authority to render him liable upon her contracts for necessaries, just as

bine was a person taken to cohabit in the manner, and under the character, of a wife, but without being authorized thereto by a legal marriage. Concubinage was confined to a single person; was of perpetual obligation as much as marriage itself; was a society recognized by the laws, and in general entered into between persons who, by laws of policy, were forbidden by the state to marry together for want of quality or fortune; the concubine might even be accused of adultery. These characters show how widely mistaken we should be, if we annexed the idea of immodesty and contempt to the name of concubine among the ancients, as we do, somewhat too harshly, and frequently uncharitably, in modern times. 1 Brown's Civil Law, 80.

(*b*) *Munro v. De Charmant*, 4 Camp. 315. If a man cohabit with a woman, and allow her to pass as his wife, without being married to her, he is liable for goods furnished to her, even by a tradesman who knew that the parties were not married; for the assent and the authority of the former are in such case to be inferred. But this must not be taken to apply to the case of a common strumpet, who may assume the name of a person without his authority, from having casually known him; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family. And it matters not whether the man so acting is a married or a single man. But, after they have separated, he may discharge himself from liability, even for necessaries subsequently supplied, by clearly proving that they were not lawfully married; and by giving notice to all persons with whom they have dealt, of discontinuing his responsibility, although she left him on account of ill-usage, and after a cohabitation of many years. Chitty on Contracts, 169, and Addison on Contracts, 639.

(*c*) *Graham v. Brettell*, 18 Law Times, 185.

though she were his wife; but, after his death, his personal representatives are not bound to pay for anything furnished to her subsequently, although the information of his decease had not, and could not have been, received (*d*).

Where a woman does not assume a man's name, and pass as his wife, he will not be liable upon any contracts but those which he directly and expressly sanctions; nor will he be responsible for her board and lodgings, unless he took them himself, or unless a jury be of opinion, from the fact of his living with her, that they were furnished upon his credit.

II. Any kind of contract made by a man to pay an annuity or a sum of money, in consideration of a *future* illicit intercourse with a woman, is absolutely void, as being a violation of good manners, and a premium for perpetuating unchastity; while any money paid under such a contract cannot of course be recovered, yet no action could be brought to enforce such a contract, since *ex turpi contractu non oritur actio*,—justice must flow from pure fountains.

Agree-  
ments for  
cohabi-  
tation.

Yet if a written contract be under seal, and it is made as a recompense for past seduction and cohabitation, or for past cohabitation without seduction, it will be legal, and can be enforced even against a married man, and the reason for this doctrine is obvious and cogent, it is not only obligatory upon the honor and conscience of the paramour, for the law applauds the reparation of an accomplished and frequently a remediless wrong, especially as there is a moral obligation to support or relieve her; but the contract being a specialty (a verbal or unsealed contract would not be binding), there arises the technical principle that a consideration is thereby

(*d*) *Blades v. Free*, 9 B. & C. 157.



implied, which, if legal, prevents all repudiation of the bond (*e*).

Equity will compel the performance of an agreement to grant an annuity to a female, whom the intended grantor had previously seduced (*f*), but not of a verbal promise to settle an annuity on a wife, with whom the promisor had cohabited, during her separation from her husband (*g*).

Her furniture.

III. The household goods and furniture of a woman cohabiting with a man, against whom a judgment has been recovered, cannot be taken in execution pursuant to such judgment, although she pass for his wife (*h*).

(*e*) A bond or settlement, given in consideration of *future* cohabitation, whether expressed or not upon its face, is altogether and entirely void, as subversive of the principles of morality; but if it be given in consideration of *past* cohabitation, it will be good against the party giving it, and his representatives; for then, instead of its being an inducement to vice, it affords the means of retreating from it. It will not, however, prevail against a purchaser for value, or creditors. So a bond or settlement in favor of a woman, whom a man has seduced, or had a child by, will be good, though they have not actually lived together. And where the parties have already lived together, and a settlement or bond is entered into, without saying whether it is in consideration of past or future cohabitation, it will be presumed to be in consideration of past, and even future cohabitation will not rebut that presumption.

(*f*) *Annandale v. Harris*, 2 P. Wms. 232.

(*g*) 1 Madd. 558.

(*h*) It has been indeed questioned, whether a woman, who has cohabited with a man several years, and passed herself off as his wife, can recover in trespass for the taking in execution against the man, her goods being in the house in which the cohabitation took place; but in such case it may be left to the jury to say whether they think that, under the circumstances, the property was given up by the woman to the man, and if they do, they may find a verdict against her. 3 C. & P. 584. It may be here noticed, that a release, by a husband to his mistress, of the costs of an ecclesiastical suit by his wife against her for adultery, decreed to be paid to the wife, was sustained, to bar further proceedings against the mistress for payment of the costs. 1 Salk. 115.

## CHAPTER II.

## HARLOTRY.

- |                             |                         |
|-----------------------------|-------------------------|
| I. What contracts are void. | III. Defamation.        |
| II. Penalties.              | IV. Houses of ill-fame. |

UPON the distressing and very painful subject of harlotry, or prostitution, there are some judicial *dicta*, which may be shortly stated in a very few propositions.

1. A lease of a house or lodgings for purposes of prostitution is absolutely void (*a*). A landlord cannot recover the rent of lodgings, knowingly let for such purposes, and from the profits of which he expected to be paid. Should the landlord be ignorant at the time of the letting of the lady's condition in life, and her object in engaging the lodgings, yet, if he allow her to remain after he knows her position, and becomes acquainted with the use to which the lodgings are applied, and after the period when he might legally have evicted her, he cannot recover from her, any rent for the period which has elapsed since he willingly permitted her to remain and occupy the premises for this illegal purpose; but he may recover his rent, if his tenant do not receive her visitors in such lodging (*b*), and this, although he knows her practices.

What contracts are void.

It is upon the same intelligible ground of recognizing nothing that militates against the public morals that a

(*a*) 4 B. & A. 650.

(*b*) 2 C. & P. 347.

person providing clothes (*e*) or furnishing board and lodging, the price of which is to be paid for out of the wages of profligacy, has no claim in law against anybody for their payment. But the simple fact that the female, for whom these things are provided, is an unfortunate, does not bar the legal remedy to recover the fair price for them ; it is only when the very object of the agreement is to pander to, and enable her to pursue, a career of prostitution, that the contract is invalid and worthless.

The wages of prostitution cannot be recovered in any Court of Law.

Where goods are sold to a woman of the town, but not for the evident purpose of enabling her to continue her immoral career, their price can be legally recovered against her ; and a laundress employed to wash such a woman's linen, &c., which consisted principally of expensive dresses and gentlemen's night-caps, can sue for her account (*f*), although the use to which these articles would obviously be applied, must have been apparent.

Penalties: II. The Metropolitan Police Acts enact, that every common prostitute or nightwalker, loitering, or being in any thoroughfare or public place, for the purpose of prostitution or solicitation, to the annoyance of the inhabitants or passengers, shall be liable to a penalty not more than forty shillings (*e*).

(*c*) If a tradesman sell clothes to a female, for the purpose of enabling her to carry on her prostitution, and expect to be paid from the profits of it, such a contract is illegal, and cannot be enforced in a court of justice ; but a mere knowledge of her way of life will not prevent the tradesman from recovering. *Bowry v. Bennet*, 1 Camp. 348.

(*d*) *Lloyd v. Johnson*, 1 B. & P. 340.

(*e*) 2 & 3 Vict., c. 71, § 54 ; and 2 & 3 Vict., c. 94, § 35.

In the Ecclesiastical Courts a suit may be brought, in order to punish the moral offences of fornication, and solicitation of chastity, by compelling the wicked ones to do penance, covered with linen garments; but no suit can be commenced in any Ecclesiastical Court for fornication, or incontinence, after the expiration of eight calendar months from the time when such offence may have been committed; nor can any prosecution be commenced or carried on for fornication at any time, after the parties offending have lawfully intermarried (*f*). Such suits as these are very rare.

III. For a verbal defamation of character, a cause of defamation may be instituted in the Ecclesiastical Courts. It is a mixed cause, being partly criminal, and partly civil, and must be brought within six calendar months (*h*). Defama-  
tion.

With regard to what words are punishable in these Courts, it is a principle, that they must be such as impute an offence punishable there and there only, and not at all cognisable at the common law. To illustrate this, suppose the words be, "that A. B. is a bawd," a remedy lies in the Ecclesiastical Courts, for this is no offence at common law; but suppose they were, "that A. B. keeps a house of ill-fame," no proceedings therein can be taken, for it is an indictable offence at common law. The following accusations (amongst others) are punishable in the Ecclesiastical Courts:—a drunkard; a usurer; a whoremaster; a prostitute; a pimp; a wittol; or a bastard, when heir-at-law, for it tends to disinherison.

A wife may sue alone for words charging her with

(*f*) 27 Geo. III., c. 44, § 2.

(*g*) *Ib.* § 1.

(*h*) A prohibition lies to an ecclesiastical court to stay proceedings

adultery, since she is liable to do penance for such a crime, and the husband cannot interfere; for it is to restore her credit. A husband, however, cannot maintain such a suit without joining his wife, for being called a cuckold, because she is in fact the person defamed.

The practical procedure in this suit is this:—the plaintiff issues a citation against the utterer of the defamatory words, which is returned into Court, after personal service of a copy of it on the defendant. On the defendant's appearance being given, a libel, stating when, where, and by whom the words were spoken, and shewing that they were only of Spiritual cognizance, and also the jurisdiction of the Court is given in, and upon its admission, the defendant is required to give an affirmative or negative issue thereto. Should the words be admitted, that is, an affirmative issue be given, the defendant is enjoined to perform penance, pay the costs, and extract a certificate, shewing that the sentence of the judge has been complied with. If however the defendant deny the truth of the averment in the libel, witnesses are examined in support of the facts pleaded: two at least must prove the words, but they need not swear to precisely the same words, or to the same time of their utterance, for one may depose to the fact, and the other to the circumstances, and in the event of no responsive plea, justifying the slander on account of its truth, being given by the defendant, publication of the evidence is decreed.

for calling a woman a w—e in London or Bristol, on an affidavit of the custom in those places giving an action in the local Courts there for that imputation; but if part of the words impute only a spiritual offence, then after sentence a prohibition will not be issued, although other words were actionable at law, as imputing to a woman that she was a w—e, and had given several men the bad disorder. 4 Burr. 2418; 2 T. R. 473.

An allegation, excepting to the credit or testimony of a witness, if advisable, can be tendered, and the judge will admit the same, if the facts are sufficiently stringent, and the evidence of the witness excepted to forms a material support of the case; should this however be declined, the judge proceeds to hear the cause and pronounce sentence; presuming it to be in favor of the plaintiff, the defendant is enjoined to perform the penance, and pay the costs of the suit, the same as if an affirmative issue had been given upon the admission of the libel.

If the slander were privately uttered, the penance may be directed to be performed in a private place; but if publicly propagated, then the penance is to be public, as in the church of the parish where the party defamed resides, in time of divine service; and the defamer may be required publicly to pronounce that by such words, naming them, as set forth in the sentence, he had defamed the plaintiff, and therefore that he begs pardon and forgiveness, first of God, and then of the party defamed, for his uttering such words.

IV. The keeping of a brothel or bawdy-house is a common nuisance, since it corrupts the morals of the public, and endangers its peace by the congregation of the dissolute and the abandoned. It is an indictable misdemeanor, punishable by fine or imprisonment, or both, with hard labor (*i*). Houses of ill fame.

This is an offence for which a wife may be indicted, either jointly with her husband, or solely (*j*), for the charge is the criminal management of the house, which

(*i*) 25 Geo. II., c. 26; and 3 Geo. IV., c. 114.

(*j*) The costs of her defence, her husband would be bound to pay.

the law presumes to be principally in the woman's department, and besides that this offence touches the domestic economy of the house, in which the wife usually has the principal share, the law also presumes this kind of dishonest conversation to be generally promoted by the intrigues of the female sex. A lodger, who keeps only a single room for the purpose, is indictable.

The proofs to establish this offence, and ensure a conviction are three, viz. :—

(1) That the house, or a room or rooms in it, was or were let for the purposes of debauchery and indiscriminate prostitution. It is not necessary to shew who frequents the place, for this, in many instances, would not be practicable : it is enough to establish that unknown persons have been there conducting themselves disorderly and improperly.

(2) That the defendant acted or behaved as master or mistress, or as the person having the care, government, or management of the house, so as to shew that the defendant kept the place.

(3) That the house is in the parish stated in the indictment. Since this is a matter of local description, should there be a variance between the indictment and the evidence, the defendant will be entitled to an acquittal.

Parish officers and constables bringing these prosecutions on the requisition of the inhabitants are entitled to their costs and expenses (*k*).

Any person frequenting these noisome dens is liable to be punished for such a foul misdemeanor.

(*k*) 58 Geo. III., c. 70, §§ 7—10.

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## BOOK VI.

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### TRUSTSHIP.

The Goddess of *Faith* (of human and social faith), was worshipped, not only in her temples, but in the lives of the Romans; and if that nation was deficient in the more amiable qualities of benevolence and generosity, they astonished the Greeks by their sincere and simple performance of the most burdensome engagements."—*Gibbon's Roman Empire*, chap. xliv.

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## BOOK VI.

## TRUSTSHIP.

## CHAPTER I.

THE PECULIAR DOCTRINES APPLICABLE TO WOMEN IN  
FIDUCIARY POSITIONS.

- |                     |  |  |
|---------------------|--|--|
| I. Agent.           |  | V. A husband's powers and liabilities. |
| II. Trustee.        |  | VI. Rights of a widow.                 |
| III. Executrix.     |  | VII. Jury-women.                       |
| IV. Administratrix. |  |  |

We have in the preceding five books contemplated the legal rights and responsibilities of woman in her natural capacity, as child, maiden, wife, widow, and mistress; it remains for us, in this last book, to expound the law relating to her, in the artificial character of agent, trustee, executrix, administratrix, and on a jury.

I. A woman, whether married or unmarried, may act as an agent for another, and legally execute the authority delegated to her. A wife cannot act, should her husband express his dissent to it, since the agency may involve duties and services inconsistent with her relationship to her husband and children (a).

A wife may be the agent or attorney of an <sup>own</sup> ~~other~~ <sup>ref</sup> husband, to deliver livery of seisin to her own husband upon a deed of feoffment, granting a freehold estate to him, *i. e.*,

(a) Story on Agency, 8.

to place him in actual possession of it. A wife may also act as the agent or attorney of her own husband, and bind him by her acts as such; and she may act as another's agent in a contract with her own husband (*b*).

The disability of a married woman to do any acts independently of her husband, does not then obtain, where she acts as agent or trustee for another, for their marital interests are in such a matter neither involved nor affected.

She may, therefore, execute a bare authority, whether it be given to her before or after marriage, for then she is a mere instrument. A power given to her to convey another's estate, may be exercised by her, without her husband's concurrence. She acts as a *feme sole*, and whatever she is obliged to do, is deemed the act of her principal, and not her own.

Trustee.

II. An unmarried woman is certainly capable of being vested with a trust, the execution of which may be confided to her; but in practice this is seldom done (*c*), for, upon her marrying, the inconveniences and difficulties would be manifold. A wife, therefore, ought not to be selected as a trustee, albeit she may be appointed; for although she may have abundant discretion, and possess as much legal capacity as though she were *sole*, so far as the duties of her trust extend, in the execution of powers, whether appendant, in gross, simply collateral, and in the general administration of the office, yet, from her inability alone to enter into the requisite deeds and assurances, she should never be chosen (*d*).

(*b*) Story on Agency, 8.

(*c*) 1 Beav. 531.

(*d*) 1 Foul. Eq. 92.

If land however be given to a woman, whilst single, who afterwards marries, or be given during her marriage, upon *condition*, to sell or to convey them to another person, she *alone* may perform the condition. •

But she cannot, it seems, convey lands, which she holds as *trustee*, unless her husband join in the deed (*e*).

Should an unmarried woman be appointed a trustee, and she afterwards marry, the Court of Chancery will, upon the application of those beneficially interested, remove her, and appoint another trustee in her place (*f*).

By the 8 & 9 Vict., 106, c. 7, an estate or interest in any tenements or hereditaments in England may be disclaimed by a married woman, as trustee, by deed executed according to the provisions of the 3 & 4 Wm. IV., c. 74 (*g*).

III. A woman, whether single or married, can act as *Executrix*.  
an executrix under a will.

(*e*) Mr. Hargrave thinks this distinction between a *trust*, and a *power* or *condition*, may be thus accounted for; trusts being properly the subject of consideration for courts of equity only, and though, in them, the estate is made subservient to the trust, yet courts of law take notice of trusts for very few purposes; nor will it be easy to find an authority for departing from any rule about the effect of legal conveyances, merely in respect of their being a performance of trusts. Hargrave's Co. Litt. 112 a, n. 6. Another reason for this distinction may be drawn from the consideration, that if a married woman were allowed to convey a trust estate, without her husband's concurrence, she might convey it before the several objects of the trust were satisfied, for which he might jointly with her be responsible to the *celles que trust*, a reason which does not apply to the mere execution of a power, or performance of a condition. 1 Fonbl. Eq. 92.

(*f*) *Lake v. De Lambert*, 4 Ves. 592.

(*g*) See *ante*, p. 341, *et seq.*

If an unmarried woman, while an infant, be appointed an executrix, and then marry a husband of full age, who assents to the office, it is as if his wife were of age, and he may act in the execution of the will.

A wife cannot accept an executorship without her husband's consent, and he cannot compel her to accept it, nor can she, after acceptance, do any act of administration which may prejudice him, without his concurrence, since he is responsible for her acts.

If a woman, before marriage, become an executrix or administratrix, or if, after marriage, her husband clothe her with the office, she consenting thereto, then, although she will not be responsible during coverture, yet, on surviving, she will be answerable at law to creditors for any waste committed, either by herself before marriage, or by her or her husband during marriage.

If the office be put upon her by her husband against her consent, she may renounce it upon his death.

A husband is not entitled to any property possessed by his wife, as executrix or administratrix, for she has no beneficial interest whatever in it; hence, upon his death, such property survives to her; and if he survive her, it does not belong to him, but goes to her executor, or, in default of such a person, to the administrator *de bonis non* of the original testator or intestate.

But as to the assets in hand at her death, and not outstanding, they belong to the husband (*h*), who must duly account for them.

An executrix may, in some instances, sell to her husband (*i*).

Although a wife-executrix may sue alone in the Eccle-

(*h*) Williams on Exors. and Admors. 787.

(*i*) Co Litt. 112 a.

siastical Courts, and appoint a proctor, in the permanent absence of her husband, on giving security for costs, yet, at common law, her husband must be joined with her, whether as plaintiff or defendant. But a peremptory undertaking of the husband in an action will not bind the wife after his death (c).

So proceedings in Chancery cannot be had against her alone: her husband must be joined, for he is in fact the responsible party, unless he be an exile, or have abjured the realm.

The Court of Chancery will not grant a writ of *ne exeat regno* against a wife-executrix or administratrix, who is going out of the country (d), or an attachment against her, until an order has been obtained, that she shall answer separately from her husband, she having had previous notice of the motion for such order.

A wife can make a will of property, to which she is entitled *en autre droit* as executrix, without her husband's consent, since he cannot take any beneficial interest whatever therein. A wife-executrix may continue the chain of representation by appointing her own executor by will, and where she does not do so, on her death, an administration of the property she had as such executrix, will be granted, not to her surviving husband (if any), but to the next of kin of the testator, who appointed her executrix.

IV. A woman, whether single or married, is also capable of undertaking the office of an administratrix to an intestate-personalty, and administration will be granted to her, if she be next of kin of the intestate.

If a wife act as administratrix, without the knowledge

(c) 9 M. & W. 14.

(d) 1 Turn. & Russ. 103.

and assent of her husband, it is a void proceeding ; but it is always presumed, unless expressly rebutted, that she acted with his consent.

The husband must enter into the administration-bond, which she is incapable of doing alone ; but should he be abroad, or be otherwise incompetent, a stranger may join in the security instead.

The administration is committed to the wife alone, and not to her jointly with her husband.

If the wife be the only next of kin, and under age, she may elect her husband her guardian to receive the administration for her benefit *durante minore* ; but a new administration is granted to her on attaining majority.

A husband's  
powers and  
liabilities.

V. The husband of an executrix or administratrix has the following powers and authorities :—

(1) He is entitled to administer in his wife's right for his own safety ;

(2) He can dispose of the personal property vested in his wife as executrix or administratrix ;

(3) He may release debts owing to the estate of the testator or intestate ;

(4) He may make valid grants or gifts of any part of the personalty of the deceased ;

(5) He may submit questions to arbitration, and the award will bind the wife surviving ;

(6) He cannot, however, sue in right of the testator or intestate, without joining his wife, unless the security (if any) be given to him and his wife as executrix or administratrix ; or unless the nature of the debt or demand be altered, as by an express promise to pay him alone. The money, however recovered, must be properly

administered, otherwise a *devastavit* or waste will be committed.

A husband is liable for a *devastavit* or waste by the wife before marriage, as long as the marriage endures; his liability ceases upon her death. If it be committed during coverture, he is then liable as long as the both of them live, even though he may have separated from her, but this liability also ceases at his wife's death.

The surviving husband is liable in equity for whatever assets come to his wife's hands or his own during the coverture, for being trust monies, he is held to be a trustee for them. And where a wife is an administratrix, and the goods are wasted during the marriage, the assets of the deceased husband are chargeable in equity for such waste, by the next of kin of the intestate.

The wife surviving her husband is liable for a *devastavit* (whether it have been committed by her or her deceased husband), to the creditors at common law, and to the legatees in equity.

VI. The ordinary or bishop may grant an administration to the widow, or the next of kin of the intestate, or to both, at his discretion (*l*). The Ecclesiastical Court prefers a sole to a joint administration, which is usually granted in favor of the widow, even though she have married again, unless, perhaps, where the deceased husband has left children. The next of kin will be preferred to her, when she has barred herself of all interest in her late husband's personalty by a marriage-settlement, or has eloped from him, or committed adultery, or lived separately from him, or been divorced *à mensâ et thoro*, or become lunatic.

(*l*) 21 Hen. VIII., c. 5, § 3.

Jury-women.

VII. Women are empannelled as a jury in two cases only :—(1) upon a writ *de ventre inspiciendo*, which we have already noticed (*m*); (2) where a female-prisoner is condemned to be executed, and pleads pregnancy, as a ground to postpone the completion of the sentence until after her confinement. Upon this, a jury of matrons, or discreet women (*n*), is formed, to inquire into the truth of the plea; should they bring in their verdict that the prisoner is *enceinte*, the execution will be stayed until after the birth of the child, and sometimes the Crown will commute the punishment to perpetual exile.

It is said in the text-books, that if a woman have once had the benefit of this reprieve, and been delivered, and afterwards become pregnant again, she shall not be entitled to a further respite, but may be hanged before the child is quick!

The grave error as to quickening has been entirely exploded, for medical science has demonstrated the fact, that the child lives from the moment of conception, and that motion is only imparted to it by quickening. This being so, by hanging the mother at any period of the gestation, the child is destroyed, and seeing that the respite is for the purpose of saving the innocent babe, the second child is surely as much an object for the law's humanity as the first. Should such an instance now happen, so great an injustice could not be perpetrated, as to slay the helpless child for the crime of the guilty mother.

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(*m*) See *ante*, p. 516.

(*n*) It would, perhaps, be better, if the matter were submitted to three or more medical men.



We have now arrived at the end of our exposition ;— we have now accomplished our self-imposed task, of developing the most interesting and attractive law-learning that can engage the legal pen ;—we now commit it, with all its imperfections and shortcomings, to the notice of our gentle countrywomen and our considerate countrymen, in the fervent hope that it may be found a practically useful commentary upon an universally popular topic.

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*N.B.—This Index is not so elaborate as it would have been, had not the chapters been carefully analyzed, as set forth in the Tables at their beginnings.*

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DISSERTATIONS ON THE PRINCIPLES  
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*By the same Author.*

---

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