A TREATISE

ON THE LAW OF

MARRIAGE, DIVORCE, SEPARATION

AND

DOMESTIC RELATIONS

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Author of "Wills, Executors and Administrators";
"The Law of Personal Property"; Etc.

SIXTH EDITION

IN THREE VOLUMES

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VOLUME I

THE LAW OF DOMESTIC RELATIONS

EMBRACING

Husband and Wife, Parent and Child, Guardian and Ward, Infancy, Separation and Divorce

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PREFACE TO THE SIXTH EDITION

It is over twenty years since any comprehensive work has been issued for the American Bar on the subject of MARRIAGE, DIVORCE, SEPARATION and DOMESTIC RELATIONS.

Conditions arising from the Great War increased the demand, already urgent, for a work on this branch of the law, and this new work is the result of the publisher's desire to meet the needs of the situation.

This present work is an enlargement of Prof. James Schouler's former works on "HUSBAND AND WIFE" and "DOMESTIC RELATIONS."

The plan of the present editor has been to preserve Schouler's text intact, but the development of the law during the last twenty-five years has made necessary the addition of many subjects not considered by him, and the thousands of new cases which the user will find in this volume have also rendered necessary a complete re-arrangement of the whole work.

It is believed that substantially every case of importance during the last twenty-five years has been cited.

Appreciation is hereby expressed for the valuable assistance rendered on certain chapters by Mr. William L. Scoville, of the Boston bar.

ARTHUR W. BLAKEMORE.

BOSTON, *December* 1, 1920.

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SEPARATION AND DIVORCE.

DOMESTIC RELATIONS LAW.

PART I.

INTRODUCTORY CHAPTER.

§ 1. Domestic Relations Defined; Earlier Writers.

The law of the domestic relations is the law of the household or family, as distinguished from that of individuals in the external concerns of life. Four leading topics are embraced under this head: *First,* husband and wife. *Second,* parent and child. *Third,* guardian and ward. *Fourth,* infancy. These will be successively considered in the present treatise.

§ 2. Plan of Classification, &c.

Starting, then, with a definition simple, natural, and well adapted to the materials in hand, we next ask what are the proper limitations of our subject? what should a text-book on the English and American law of the domestic relations comprise? (1) As to three of our topics, — husband and wife, parent and child, and infancy, — the question is easily answered. Their very names convey a distinct significance even to the mind of the unprofessional reader. Except it be in the meaning of the word "infancy,"

which the law applies to all persons not arrived at majority, but popular usage restricts to the period of helplessness, all intelligent persons agree in the general use of the terms we have employed. And so strong are the moral obligations which attend marriage and the training of off-spring, so intimately blended with the welfare and happiness of mankind are the ties of wife and child, that scarcely any one grows up without some knowledge of the general principles of law applicable to these topics, and particularly of such of the rights and duties as concern the person rather than the property. For positive law but enforces the mandates of the law of nature, and develops rather than creates a system.

(2) Yet even here it should be observed by the professional reader that the term "husband and wife" is acquiring at law a more limited and technical sense than formerly. The idea of marriage involves both the entrance into the relation and the relation itself; and akin to marriage celebration is the dissolution of marriage by divorce, or what we may term our recognized legal exit from the relation. Hence marriage and divorce constitute an important topic by themselves; and we find treatises which profess to deal with these alone. Marriage and divorce, moreover, have in England pertained until quite recently to the peculiar jurisdiction of ecclesiastical courts, constituting what is termed an ecclesiastical law.[1] The rights and duties which grow out of the marriage relation, on the other hand, still remain for separate discussion: the consequence of the celebration; the effect of marriage upon the property of each; the personal status of the parties, — in short, what new legal responsibilities are assumed, and what legal privileges are gained by the two persons who have once voluntarily united as husband and wife. It is to this latter subdivision, rather than the former, that the title of husband and wife seems at the present day to apply. Reeve devotes but a brief chapter to marriage and divorce. Kent separates the subdivisions completely, applying the title of husband and wife as above. Yet Blackstone, writing before either, had devoted two-thirds of his lecture on husband and wife to the treatment of marriage and divorce alone, and very briefly disposed of the rights and disabilities of the marriage union under the same general heading. The many and rapid changes to which the entire law of husband

1. Burn, Eccl. Law; 1 Bishop, Mar. & Div., 5th ed., §§ 48-65.

and wife has been latterly subjected; the growth of divorce legislation on the one hand, and of property legislation for married women on the other, fully justifies a subdivision so important. We shall subordinate, then, the topic of marriage and divorce to that of the marriage status, following, in this respect, the modern legal usage; at the same time noting that, if some special term could be coined to distinguish the subdivision husband and wife from that general division which bears the same name, legal analysis would be more exact.

(3) As to guardian and ward, the limitations of our treatise are not so easily marked out. In respect of the domestic relations, the guardian is a sort of temporary parent, created by the law, to supply to young children the place of a natural protector. But the term "guardian" is used rather indiscriminately in these days with reference to all who need protection at the law. Thus we have guardians of insane persons, guardians of spendthrifts, and even guardians of the poor. Blackstone treats of these last guardians under the head of public relations; and certainly they do not fall within the clear scope of private or domestic relations. Yet the legal principles applicable to one class of guardians frequently extend as well to all others; and we shall hardly expect in these pages to trace with distinctness that shadowy line which separates the temporary parent from the town officer; nor would the consulting lawyer expect us to do so. Again, a guardian's duties are chiefly with respect to property; and herein they so nearly resemble those of testamentary trustees that one frequently finds himself gliding unconsciously from the law of the family into the law of trusts.

§ 3. General Characteristics of the Law of Family.

Whether we consult the facts of history or the inspirations of human reason, the family may be justly pronounced the earliest of all social institutions. Man, in a state of nature and alone, was subject to no civil restrictions. He was independent of all laws, except those of God. But when man united with woman, both were brought under certain restraints for their mutual well-being. The propagation of offspring afforded the only means whereby society could hope to grow into a permanent and compact system. Hence the sexual cravings of nature were speedily brought under wholesome regulations; as otherwise the human race must have perished in the cradle. Natural law, or the teachings of a Divine

Providence, supplied these regulations. Families preceded nations. These families at first lived under the paternal government of the person who was their patriarch or chief. But as they increased, they likewise divided; their interests became conflicting, and hostilities arose. Hence, when men came afterwards to unite for their common defence, they composed a national body, and agreed to be governed by the will of him or those on whom they had conferred authority. Thus did government originate. And government, for its legitimate purposes, placed restrictions upon the governed; which restrictions thenceforth were to apply to individuals in both their family and social relations.[2] But the law of the domestic relations is nevertheless older than that of civil society. In fact, nations themselves are often regarded as so many families; and the very name which is placed at the head of this work, the legislator constantly applies to the public concerns of his own country as contrasted with those of foreign governments.

The supremacy of the law of family should not be forgotten. We come under the dominion of this law at the very moment of birth; we thus continue for a certain period, whether we will or no. Long after infancy has ceased, the general obligations of parent and child may continue; for these last through life. Again, we subject ourselves by marriage to a law of family; this time to find our responsibilities still further enlarged. And although the voluntary act of two parties brings them within the law, they cannot voluntarily retreat when so minded. To an unusual extent, therefore, is the law of family above, and independent of, the individual. Society provides the home; public policy fashions the system; and it remains for each one of us to accustom himself to rules which are, and must be, arbitrary.

So is the law of family universal in its adaptation. It deals directly with the individual. Its provisions are for man and woman; not for corporations or business firms. The ties of wife and child are for all classes and conditions; neither rank, wealth, nor social influence weighs heavily in the scales. To every one public law assigns a home or domicile; and this domicile determines not only the status, capacities, and rights of the person, but also his title to personal property. There is the political domicile, which limits the exercise of political rights. There is the forensic

2. See Burlamaqui, Nat. Law, ch.iv, §§ 6, 9.

domicile, upon which is founded the jurisdiction of the courts. There is the civil domicile, which is acquired by residence and continuance in a certain place. The place of birth determines the domicile in the first instance; and one continues until another is properly chosen. The domicile of the wife follows that of the husband; the domicile of the infant may be changed by the parent. Thus does the law of domicile conform to the law of nature.

§ 4. Law of Husband and Wife now in a Transition State; Various Property Schemes Stated.

The most interesting and important of the domestic relations is that of husband and wife.

The law of England and the United States, on this topic, has undergone a remarkable change, which is reflected in this work. The old common-law theory of marriage, that of unity of person and property in the husband, is so repugnant to modern ideas that it has been almost entirely swept away, but a clear idea of the common-law system is necessary for an understanding of modern statutes and decisions. There was in this country and England, during the latter part of the nineteenth century, a remarkable movement for giving the wife equal rights in all respects with the husband, which has been so far successful that it can almost be said now that the modern wife has a legal right which, fortunately for all of us, she does not exercise, to leave home in the morning and go to work, collect and keep her own wages and leave her husband to do the housework and take care of the babies. The modern idea is that the husband and wife are quasi-partners in the business of rearing a family, that her work in bearing and caring for children should be considered as much as is his labor as a wage-earner. The statutes and decisions which reflect this great reform show clearly that the influence of the feudal system, which regarded only the rights of the man who could carry arms, has almost disappeared. The only vestige of the rights of the husband is the right still allowed him of choosing the family domicile, but even this last remnant of his autocratic power is only begrudingly bestowed, as he must now, forsooth, exercise reason in his choice or the wife is not bound to abide by his decision.

The relations of husband and wife in this country have been governed by three separate systems, the common-law scheme, the civil-law scheme, and the community scheme. Let us examine these various schemes separately.

§ 5. Common-Law Property Scheme.

(1) The common-law scheme makes unity in the marriage relation its cardinal point. But to secure this unity the law starts with the assumption that the wife's legal existence becomes suspended or extinguished during the marriage state; it sacrifices her property interests, and places her almost absolutely within her husband's keeping, so far as her civil rights are concerned. Her fortunes pass by marriage into her husband's hands, for temporary or permanent enjoyment, as the case may be; she cannot earn for herself, nor, in general, contract, sue, or be sued in her own right; and this, because she is not, in legal contemplation, a person. The husband loses little or nothing of his own independence by marriage; but in order to distribute the matrimonial burdens with some approach to equality, the law compels him to pay debts on his wife's account, which he never in fact contracted, not only where she is held to be his agent by legal implication, but whenever it happens that she has brought him by marriage outstanding debts without the corresponding means of paying them. Husband and wife take certain interests in one another's lands, such as curtesy and dower, which become consummate upon survivorship. In general, their property rights are summarily adjusted by the law with reference rather to precision than principle. On the whole, however, the advantages are with the husband; and he is permitted to lord it over the wife with a somewhat despotic sway; as the old title of this subject — *baron and feme* — plainly indicates. The witty observation is not wholly inappropriate, that, in the eye of the common law, husband and wife are one person, and that one is the husband.[3]

§ 6. Civil-Law Property Scheme.

(2) The civil-law scheme pays little regard to the theoretic unity of a married pair. It looks rather to the personal independence of both husband and wife. Each is to be protected in the enjoyment of property rights. In the most polished ages of Roman jurisprudence we find, therefore, that husband and wife were regarded as distinct persons, with separate rights, and capable of holding distinct and separate estates. The wife was comparatively free from all civil disabilities. She was alone responsible for her own debts; she was competent to sue and be sued on her own

3. See *post*, Part II, as to coverture doctrine.

contracts; nor could the husband subject her or her property to any liability for his debts or engagements.[4]

The more minute details of the common-law scheme of husband and wife belong to the main portion of this volume, and need not here be anticipated. Not so, however, with the civil-law scheme; and we proceed to elaborate it somewhat further. In the earlier period of Roman law the marital power of the husband was as absolute as the *patria potestas.* But before the time of the Emperor Justinian it had assumed the aspect already noticed; in which it is to be distinguished from all other codes. The *communio bonorum,* which is to be found in so many modern systems of jurisprudence whose basis is the Roman law, treats the wife's separate property and separate rights as exceptional. The peculiarities of the civil law in this respect may, perhaps, be referred to the disuse into which formal rites of marriage had fallen. Formal marriage gave to husband and wife a community of interest in each other's property. But marriage *per usum,* or by cohabitation as man and wife, which became universally prevalent in later times, did not alter the status of the female; she still remained subject to her father's power. Hence parties united in a marriage *per usum* acquired no general interest in one another's property, but only an incidental interest in certain parts of it. The wife brought her *dos;* the husband his *anti-dos;* in all other property each retained the rights of owners unaffected by their relation of husband and wife. The *dos* and *anti-dos* were somewhat in the nature of mutual gifts in consideration of marriage. Every species of property which might be subsequently acquired, as well as that owned at the time of marriage, could be the subject of dotal gift. The father, or other paternal ancestor of the bride, was bound to furnish the *dos,* and the husband could compel them afterwards, if they failed to do so; the amount or value being regulated according to the means of the ancestor and the dignity of the husband. This pecuniary consideration appears to have influenced the later marriages to a very considerable extent. And while the husband had no concern with the wife's extra-dotal property,— since this she could manage and alienate free from all control or interference,— over her dotal property he acquired a dominion which was determinable on the dissolution of the marriage, unless he had become the pur-

4. 1 Burge, Col. & For. Laws, 202, 263.

chaser at an estimated value. As incidental to this dominion he had the usufruct to himself, he might sue his wife or any one else who obstructed his free enjoyment, and he could alienate the personal property at pleasure. But he could not charge the real estate unless a purchaser; and upon his death the wife's dotal property belonged to her, or, if she had not been emancipated, to her father; and to secure its restitution after the dissolution of marriage, the wife had a tacit lien upon her husband's property. Of the *anti-dos,* or *donatio propter nuptias,* not so much is known; but this appears to have generally corresponded with the *dos;* it was restored by the wife upon the dissolution of marriage, and was regarded as her usufructuary property in like manner. It was not necessarily of the same value or amount with the wife's *dos.* Over his general property the husband retained the sole and absolute power of alienation, and his wife had no interest in it, nor could she interfere with his right of management.[5]

But the civil law allowed agreements to be made by which these rights might be regulated and varied at pleasure. And by their stipulations the married parties might so enlarge their respective interests as to provide for rights to the survivor.[6] These agreements were not unlike the antenuptial settlements so well known to our modern equity courts, which we shall consider in due course hereafter.

§ 7. Community Property Scheme.

(3) The *communio bonorum,* or community system, relates to marital property, in which respect it occupies an intermediate position between the civil and common-law schemes. The *communio bonorum* may have been part of the Roman law at an earlier period of its history, but it had ceased to exist long before the compilation of the Digest; though parties might by their nuptial agreement adopt it.[7] This constitutes so prominent a feature of the codes of France, Spain, and other countries of modern Europe, whence it has likewise found its way to Louisiana, Florida, Texas, California, and other adjacent States, once subject to French and Spanish dominion, and erected, in fact, out of territory acquired during the present century upon the Mississippi, the Gulf of Mexico, and the Pacific Ocean, that it deserves a brief notice.

5. 1 Burge, Col. & For. Laws, 202; *Ib.* 263 *et seq.*

6. 1 Burge, Col. & For. Laws, 273.

7. 1 Burge, Col. & For. Laws, 202; *Ib.* 263 *et seq.*

The relation of husband and wife is regarded by these codes as a species of partnership, the property of which, like that of any other partnership, is primarily liable for the payment of debts. This partnership or community applies to all property acquired during marriage; and it is the well-settled rule that the debts of the partnership have priority of claim to satisfaction out of the community estate. Sometimes the community is universal, comprising not only property acquired during coverture, but all which belonged to the husband and wife before or at their marriage.[8] It is evident, therefore, that the provisions of such codes may differ widely in different States or countries. The principle which distinguishes the community from both the civil and common-law schemes is, however, clear; namely, that husband and wife should have no property apart from one another.

Under modern European codes this law of community embraces profits, income, earnings, and all property which, from its nature and the interest of the owner, is the subject of his uncontrolled and absolute alienation; but certain gifts made between husband and wife in contemplation of marriage are of course properly excluded.[9] Whether antenuptial debts are to be paid from the common property, as well as debts contracted while the relation of husband and wife continues, would seem to depend upon the extent of the *communio bonorum,* as including property brought by each as capital stock to the marriage, or only such property as they acquire afterwards.[10] The codes of modern Europe recognize no general capacity of the wife to contract, sue, and be sued, as at the later civil law. On the contrary, the husband becomes, by his marriage, the curator of his wife. He has, therefore, the sole administration and management of her property, and that of the community; and she is entirely excluded in every case in which her acts cannot be referred to an authority, express or implied, from her husband.[11] Hence, too, all debts and charges are incurred by the husband. The community ceases on the termination of marriage by mutual separation or the death of either spouse.[12] And the various codes provide for the rights of the survivor on the legal dissolution of the community by death.

8. 1 Burge, Col. & For. Laws, 277 *et seq.*

9. 1 Burge, Col. & For. Laws, 281, 282. By the French law only the personal estate entered into the community; but the Spanish law included both real and personal estate. Childress v. Cutter, 16 Mo. 24.

10. 1 Burge, 294.

11. Ib. 296, 301.

12. Ib. 303, 305.

The reader may readily trace the influence of the community system upon the jurisprudence of Louisiana and the other States to which we have referred, whose annexation was subsequent to the adoption of our Federal Constitution, by examining their judicial reports. The Civil Code of Louisiana, as amended and promulgated in 1824, pronounced that the partnership or community of *acquêts* or gains arising during coverture should exist in every marriage where there was no stipulation to the contrary. This was a legal consequence of marriage under the Spanish law.[13] The statutes of Texas, Florida, Missouri, California, and other neighboring States, are characterized by similar features. But all of these laws have been modified by settlers bringing with them the principles of the common law. So, too, the doctrines of separate estate, revived in modern jurisprudence, are introduced into the legislation of these as other American States.[14] The American community doctrine, as we may term it, is that all property purchased or acquired during marriage, by or in the name of either husband or wife, or both, including the produce of reciprical industry and labor, shall be deemed to belong *prima facie* to the community, and be held liable for the community marriage debts accordingly.[15] But it will be perceived that, in our American codes, community, as an incident to marriage property, is only a presumption, which may be overcome in any instance by proof that the property was acquired as the separate estate of either the husband or wife. This community rule, moreover, as it is evident, does not apply to the property which either husband or wife brought into the marriage; such property, by the codes, being distinctly kept to each

13. Art. 2312, 2369, 2370; 2 Kent, Com. 183, *n.*

14. Texas Digest, Paschal, "Marital Rights;" Cal. Civil Code, "Husband and Wife;" Parker's Cal. Dig., "Husband and Wife;" Walker v. Howard, 34 Tex. 478; Caulk v. Picou, 23 La. Ann. 277. And see Forbes v. Moore, 32 Tex. 195.

15. Louisiana Civil Code, §§ 2369-2372; Succession of Planchet, 29 La. Ann. 520; Tally v. Heffner, 29 La. Ann. 583. Land owned by a spouse at the time of marriage does not fall into the community. Lake v. Lake, 52 Cal. 428; Eslinger v. Eslinger, 47 Cal. 62. The wife's earnings, unless given her by the husband, and likewise property bought with such earnings, must belong to the community. Johnson v. Burford, 39 Tex. 242; Ford v. Brooks, 35 La. Ann. 157. But see Fisk v. Flores, 43 Tex. 340. The husband, as head and master of the community, has the right to dispose of its movable effects. Cotton v. Cotton, 34 La. Ann. 858. The community doctrine is more fully discussed, *post*, ch. XXIX.

spouse apart as his or her separate property.[16] And, besides, it is now usually provided by legislation that property acquired during marriage, "by gift, bequest, devise, or descent," with the rents, issues and profits thereof, shall be separate, not common property. The tendency, then, in our States where the law of community still exists — though all have not proceeded in legislation to the same length — is to limit rather than extend its application. The wife has a tacit mortgage for her separate property, so far as the law may have placed it in her husband's control; also upon the community property from the time it went into his hands; and, moreover, she may, on surviving her husband, renounce the partnership or community, in which case she takes back all her effects, whether dotal, extra-dotal, hereditary, or proper.[17]

On the whole, there is in the doctrine of community much that is fair and reasonable; but in the practical workings of this system it is found rather complicated and perplexing, and hence unsatisfactory; while in no part of the United States can it be said to exist at this day in full force, since husband and wife are left pretty free to contract for the separate enjoyment of property, and so exclude the legal presumption of community altogether;[18] and, moreover, the constant tendency of our Southwestern States is to remodel their institutions upon the Anglo-American basis, common to the original States and those of the Ohio valley.

§ 8. The Recent Married Women's Acts.

What are familiarly known as the "married women's acts," the product for the most part of our American legislation since 1848, and more recently engrafted upon the code of Great Britain, aim

16. La. Code, §§ 2316, 2369, 2371; Pinard's Succession, 30 La. Ann. 167; McAfee v. Robertson, 43 Tex. 591; Hanrick v. Patrick, 119 U. S. 156; Myrick's Prob. 93; Schmeltz v. Garey, 49 Tex. 49. But the wife should not mingle her separate funds with those of the community in making a purchase, as of her separate estate. Reid v. Rochereau, 2 Woods, 151. See *post*, § 579 *et seq.*

17. And see *post*, § 579 *et seq*, as to the wife's separate property under these codes; viz., dotal and extra-dotal or paraphernal. The status of a married woman under the Louisiana Code, with reference to the husband's liability for her paraphernal property, is discussed by Mr. Justice Gray in Fleitas v. Richardson, 147 U. S. 550.

18. See Packard v. Arellanes, 17 Cal. 525; Waul v. Kirkman, 25 Miss. 609; Succession of McLean, 12 La. Ann. 222; Jones v. Jones, 15 Tex. 143; *Ex Parte* Melbourn, L. R. 6 Ch. 64; La. Civil Code, §§ 2369-2405; 1 Burge, Col. & For. Laws, 277 *et seq.*, where the law of community as it was about half a century ago is fully set forth; and the learned note to 2 Kent, Com. 183.

to secure to the wife the independent control of her own property, and the right to contract, sue, and be sued, without her husband, under reasonable limitations. These acts, therefore, substitute in a great measure the civil for the common law. It may be laid down that the common law, in denying to the wife the rights of ownership in property acquired by gift, purchase, bequest, or otherwise, did her injustice, and that a radical change became necessary; and this is shown, not only in the legislation of our States, but by the fact that the equity tribunals gradually moulded the unwritten law of England so as to secure like results.

All this separate property legislation, as well as the equity doctrines pertaining to the subject in England and the several United States, will be duly set forth in these pages hereafter.[19] And the modification of the respective property rights of a married pair by marriage contracts or settlements will also be considered.[20]

§ 9. Marriage and Marital Influence.

In the connubial joys to which every age and nation bear witness, the vast majority of this globe's inhabitants must have participated from one era to another, with a certain voluntary adjustment of the reciprocal burdens, such as relieved both husband and wife of a sense of bondage to one another. And thus have the inequalities, the hardships of marriage codes, proved less in practice than in literal expression. For whatever the apparent severity of the law, human nature or love's divine instinct works in one uniform direction,— namely, towards uniting the souls once brought into the arcana of married life in an equally honorable companionship. Woman's weakness has been her strongest weapon; where her influence could not overflow, it permeated; and if her life has been, legally speaking, at her husband's mercy, her constant study to please has kept him generally merciful. She has not been superior to her race and epoch, but on the whole as well protected, as well advanced, in her day, as those of the other sex. Except for this, the wife's lot must have been miserable indeed, even under the most civilized institutions ever established. Codes and the experience of nations in this respect show strange inconsistencies: laws at one time degrading to woman, and yet marital happiness; laws

19. See coverture doctrine, modified by equity and modern statutes, ch. X, *et seq. post.*

20. Marriage Settlements, *post*, ch. XXIII.

at another elevating her independence to the utmost, and yet marital infelicities, lust, and bestiality.[21]

§ 10. General Conclusions as to the Law of Husband and Wife.

The conclusions to which this writer's investigation upon the general subject of husband and wife conducts him, are these. Marriage is a relation divinely instituted for the mutual comfort, well-being, and happiness of both man and woman, for the proper nurture and maintenance of offspring, and for the education in turn of the whole human race. Its application to society being universal, the fundamental rights and duties involved in this relation are recognized by something akin to instinct, and often designated by that name, so as to require by no means an intellectual insight; intellect, in fact, impairing often that devotedness of affection which is the essential ingredient and charm of the relation. Indeed, the rudest savages understand how to bear and bring up healthy offspring. Legal and political systems are accretions based upon marriage and property; but in the family rather than individualism we find the incentive to accumulation, and in the home the primary school of the virtues, private and public. At the same time marriage affords necessarily a discipline to both sexes; sexual indulgence is mutually permitted under healthy restraints; woman's condition becomes necessarily one of comparative subjection; man is tamed by her gentleness and the helplessness of tender offspring, and for their sake he puts a check upon his baser appetites, and concentrates his affection upon the home he has founded. Such is the conjugal union in what we may term a state of nature. And now, while man frames the laws of that union, as he always does in primitive society, he regards himself as the rightful head

21. Whether, in setting at naught that identity of interests which is essential to domestic happiness, the later Roman scheme was fatally defective, or the conjugal decay which ensued was due to causes more latent, need not here be discussed. Certain it is, however, that widespread incestuous intercourse, licentiousness most loathsome and unnatural, followed in the wake of marital independence, and as the interests of husband and wife began to diverge, the bonds of family affection became weakened. When the Empire sank into utter dissolution woman possessed a large share of cultivation and personal freedom; yet she had touched the lowest depths of social degradation.

This degradation it became the mission of the Christian Church to correct during the lapse of the dark ages by restoring the dignity of marriage—exalting it, in fact, to a sacrament, and almost utterly prohibiting its dissolution. From so strict a view of marriage, however, Protestant countries in modern times dissent.

of the family and lord of his spouse; and, somewhat indulgent of his own errant passions, he makes the chastity of his wife the one indispensable condition of their joint companionship. She, on her part, more easily chaste than himself, views with pain whatever embraces he may bestow upon others of her sex. Her personal influence over him, always strong, enlarges its scope as the State advances in arts and refinement, until at length woman, as the maiden, the wife, and the matron, becomes intellectually cultivated, a recognized social power in the community. Yearning now for a wider influence and equal conditions, her attention, strongly concentrated upon the marriage relation, seeks to make the marriage terms more equal; first, she desires her property secured to her own use, whether married or single, and, indignant at the inadequate remedies afforded under the law for wifely wrongs, demands the right of dismissing an unworthy husband at pleasure; moreover, as a mother, she claims that the children shall be hers hardly less than the father's. These first inroads are easily made; for what she demands is theoretically just. But just at this point the peril of female influence is developed. Woman rarely comprehends the violence of man's unbridled appetite, or perceives clearly that, after all, in the moral purity and sweetness of her own sex, such as excites man's devotion and makes home attractive, is the fundamental safeguard of life and her own most powerful lever in society, besides the surest means of keeping men themselves continent. She forgets, too, that, to protect that purity and maintain her moral elevation, a certain seclusion is needful; which seclusion is highly favorable to those domestic duties which nature assigns her as her own. More is granted woman. The bond of marriage being loosened, posterity degenerates, society goes headlong; and the flood-gates of licentiousness once fully opened, the hand must be strong that can close them again.

Happiness, we may admit, differs with the capacity, like the great and small glass equally full which Dr. Johnson mentions. Yet marriage is suited to all capacities; and men and women are the complement of one another in all ages, neither being greatly the intellectual superior of the other at any epoch, but the man always having necessarily the advantage in physical strength and the power to rule. The best-ordered marriage union for any community is that in which each sex accepts its natural place, where woman is neither the slave nor the rival of man, but his intelligent helpmate; where a sound progeny is brought up under healthy

home influences. The worst is that where conjugal and parental affection fail, and all is discord and unrest, a sea without a safe harbor. To the household, stability may prove more essential than freedom, and woman's status more dignified or more degraded, as the case may be, than the law assumes to fix it. Under all circumstances, moreover, the physical superiority of the male companion, and his propensity to self-indulgence, are forces which woman will always have to reckon with.

§ 11. Remaining Topics of the Domestic Relations; Modern Changes.

Of the remaining topics to be discussed in the present treatise, little need be said by way of general preface. These have felt the softening influences of modern civilization. The common-law doctrine of Parent and Child finds its most important modifications in the gradual admission of the mother to something like an equal share of parental authority; in the growth of popular systems of education for the young; in the enlarged opportunities of earning a livelihood afforded to the children of idle and dissolute parents; and in the lessened misfortunes of bastard offspring. Guardian and Ward, a relation of little importance up to Blackstone's day, has rapidly developed since into a permanent and well-regulated system under the supervision of the chancery courts, and, in this country, of the tribunals also with probate jurisdiction; and much of the old learning on this branch of the law has become rubbish for the antiquary. The law of Infancy remains comparatively unchanged.

We are now to investigate in detail the law of these several topics. But first the reader is reminded that the office of the text-writer is to inform rather than invent; to be accurate rather than original; to chronicle the decisions of others, not his own desires; to illumine paths already trodden; to criticise, if need be, yet always fairly and in furtherance of the ends of justice; to analyze, classify, and arrange; from a mass of discordant material to extract all that is useful, separating the good from the bad, rejecting whatever is obsolete, searching at all times for guiding principles; and, in fine, to emblazon that long list of judicial precedents through which our Anglo-Saxon freedom "broadens slowly down."

PART II.

HUSBAND AND WIFE.

CHAPTER I.

MARRIAGE.

§ 12. Definition of Marriage.

The word "marriage" signifies, in the first instance, that act by which a man and woman unite for life, with the intent to discharge towards society and one another those duties which result from the relation of husband and wife. The act of union having been once accomplished, the word comes afterwards to denote the relation itself.

Marriage as understood in England means the voluntary union of a man and woman for life to the exclusion of all others and therefore the courts will not recognize a union by polygamists as a valid marriage.[21a]

21a. Bethel v. Hildyard, 38 Ch. D. 220.

§ 13. Marriage more than a Civil Contract.

It has been frequently said in the courts of this country that marriage is nothing more than a civil contract.[22] That it is a contract is doubtless true to a certain extent, since the law always presumes two parties of competent understanding who enter into a mutual agreement, which becomes executed, as it were, by the act of marriage. But this agreement differs essentially from all others. This contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with principles of natural law, and are beyond and above the parties themselves. They may make settlements and regulate the property rights of each other; but they cannot modify the terms upon which they are to live together, nor superadd to the relation a single condition. Being once bound, they are bound forever. Mutual consent, as in all contracts, brings them together; but mutual consent cannot part them. Death alone dissolves the tie,— unless the legislature, in the exercise of a rightful authority, interposes by general or special ordinance to pronounce a solemn divorce; and this it should do only when the grossly immoral conduct of one contracting party brings unmerited shame upon the other, disgraces an innocent offspring, and inflicts a wound upon the community.[23] So in other respects the law of marriage differs from that of ordinary contracts. For, as concerns the parties themselves, mental capacity is not the only test of fitness, but physical capacity likewise,— a new element for consideration, no less important than the other. Again, the encumbrance of an existing union operates here as a special disqualification. Blood relationship is another. So, too, an infant's capacity is treated on peculiar principles, as far as the marriage contract is concerned; for he can marry young and be bound by his marriage. Third parties cannot attack a marriage and have it nullified because of its injury to their own interests. International law relaxes its usual requirements in favor of marriage. And finally the formal celebration now commonly prevalent, both in England and America, is something peculiar to the marriage contract; and in its performance we see but the faintest analogy to the execution and delivery of a sealed instrument.

22. See Stimson, Am. Stat. Law, § 6100; Gatto v. Gatto, — N. H. —, 106 A. 493.

23. Wiley v. Wiley, — Ind. App. —, 123 N. E. 252. Mutual consent is the basis of marriage.

The earnestness with which so many of our American progenitors insisted upon the contract view of marriage may be ascribed in part to their hatred of the Papacy and ritualism, and their determination to escape the Roman Catholic conclusion that marriage was a sacrament. By no people have the marriage vows been more sacredly performed than by ours down to a period, at all events, comparatively recent. That a state legislature is not precluded from regulating the marriage institution under any constitutional interdiction of acts impairing the obligation of contracts, or interfering with private rights and immunities, has frequently been asserted.[24] And as to the private regulation of their property rights, by the contract of parties to a marriage, that, of course, is to be distinguished from their marriage, which may take place without any property regulation whatever.[25]

We are, then, to consider marriage, not as a contract in the ordinary acceptation of the term, but as a contract *sui generis,* if indeed it be a contract at all,— as an agreement to enter into a solemn relation which imposes its own terms. On the one hand discarding the unwarranted dogmas of the Church of Rome, by which marriage is elevated to the character of a sacrament, on the other we repudiate that dry definition with which the lawgiver or jurist sometimes seeks to impose upon the natural instincts of mankind. We adopt such views as the distinguished Lord Robertson held.[26] And Judge Story observes of marriage: "It appears to me something more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belongs to ordinary contracts." [27] So Fraser, while defining marriage as a contract, adds in forcible language: "Unlike other contracts, it is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society." [28] And we may add that an American text-writer, of high repute upon the subject, not only pronounces for this doctrine, after a careful

24. Maguire v. Maguire, 7 Dana, 181; Green v. State, 58 Ala. 190; Frasher v. State, 3 Tex. App. 263; Rugh v. Ottenheimer, 6 Oreg. 231; Adams v. Palmer, 51 Me. 480; Wiley v. Wiley, — Ind. App. —, 123 N. E. 252; Kitzman v. Kitzman, 167 Wis. 308, 166 N. W. 789. Marriage of epileptic forbidden.

25. Lord Stowell, in Lindo v. Belisario, 1 Hag. Con. 216; 1 Bishop, Mar. & Div., 5th ed., § 14.

26. Duntze v. Levett, Ferg. 68, 385, 397; 3 Eng. Ec. 360, 495, 502.

27. Story, Confl. Laws, § 108, *n.*

28. 1 Fraser, Dom. Rel. 87.

examination of all the authorities, but ascribes the chief embarrassment of American tribunals, in questions arising under the conflict of marriage and divorce laws, to the custom of applying the rules of ordinary contracts to the marriage relation.[29]

§ 14. Marriages Void and Voidable.

A distinction is made at law between void and voidable marriages. This distinction, which appears to have originated in a conflict between the English ecclesiastical and common-law courts, was first announced in a statute passed during the reign of Henry VIII.; and it is also to be found in succeeding marriage and divorce acts down to the present day. The distinction of void and voidable applies, not to the legal consequences of an imperfect marriage, once formally dissolved, but to the status of the parties and their offspring before such dissolution. A void marriage is a mere nullity, and its validity may be impeached in any court, whether the question arise directly or collaterally, and whether the parties be living or dead. But a voidable marriage is valid for all civil purposes until a competent tribunal has pronounced the sentence of nullity, upon direct proceedings instituted for the purpose of setting the marriage aside. When once set aside, the marriage is treated as void *ab initio;* but unless the suit for nullity reaches its conclusion during the lifetime of both parties, all proceedings fall to the ground, and both survivor and offspring stand as well as though the union had been lawful from its inception.[30] Hence we see that while a void marriage makes cohabitation at all times unlawful, and bastardizes the issue, a voidable marriage protects intercourse between the parties for the time being, furnishes the usual incidents of survivorship, such as curtesy and dower, and encourages the propagation of children. But the moment the sentence of nullity is pronounced, the shield of the law falls, the incidents vanish, and innocent offspring are exposed to the world as bastards; and herein is the greatest hardship of a voidable marriage. One feature in much of our modern marital legislation is the increasing favor shown to innocent parties who were misled: where the man or the woman or both of them acted in good faith, civil as well as criminal consequences are guarded against: and

29. 1 Bishop. Mar. & Div., 5th ed., § 18. And see Dickson v. Dickson, 1 Yerg. 110, per Catron, J.; Ditson v. Ditson, 4 R. I. 87, per Ames, C. J.

30. 1 St. 32 Hen. VIII, ch. 28. See 1 Bishop, Mar. & Div., 5th ed., § 108 *et seq.*

children innocently begotten before the disability was discovered in fact, are treated as legitimate offspring.[31]

The old rule is that civil disabilities, such as idiocy and fraud, render a marriage void; while the canonical impediments, such as consanguinity and impotence, made it voidable only. This test was never a clear one, and it has become of little practical consequence at the present day. Statutes both in England and America have greatly modified the ancient law of valid marriages, and it can only be affirmed in general terms that the legislative tendency is to make marriages voidable rather than void, wherever the impediment is such as might not have been readily known to both parties before marriage; and where public policy does not rise superior to all considerations of private utility. Modern civilization strongly condemns the harsh doctrine of *ab initio* sentences of nullity; and such sentences have now in general a prospective force only, in order that rights already vested may remain unimpaired, and, still more, that children may not suffer for the follies of their parents.[32] As for availing one's self of a voidable marriage as well as in divorce, it may be asserted as a general maxim that the party should be prompt to act when he has his right and knows it, and that he should also seek to enforce his rights with good faith and honor on his own part.[33] Whenever or wherever an innocent party finds one's self entrapped into a void or voidable marriage, cohabitation should cease and the separation should be instant and absolute.

§ 15. Essentials of Marriage.

We shall consider in this chapter that act by which parties unite in matrimony,— for to this the term "marriage" is most frequently applied. It may be stated generally that, in order to constitute a perfect union, the contracting parties should be two persons of the opposite sexes, without disqualification of blood or

31. See *e. g.* the "Enoch Arden." Statutes cited in Stimson's Am. Stat. Law, § 6116.

32. Shelf. Mar. & Div. 154; *Ib.* 479-484; 1 Bl. Com. 434; 1 Bishop. Mar. & Div., 5th ed., §§ 105-120. See Stat. 5 & 6 Will. IV, ch. 54; 2 N. Y. Rev. Stats. 139, § 6; Mass. Gen. Stats., ch. 106, § 4; Harrison v. State, 22 Md. 468; Bowers, 10 Rich. Eq. 551; Pingree v. Goodrich, 41 Vt. 47; Divorce, *post.* Held *contra* as to the marriage of a negro and white person. Carter v. Montgomery, 2 Tenn. Ch. 216. And see *post* as to impotence or physical incapacity.

The local statutes are collated on this point in Stimson's Am. Stat. Law, §§ 6116-6116.

33. Affirmance, condonation, connivance, are excuses suggested to the defending party; and recrimination is common in divorce libels. See volume II., *post.*

condition, both mentally competent and physically fit to discharge the duties of the relation, neither of them being bound by a previous nuptial tie, neither of them withholding a free assent;[34] and the expression of their mutual assent should be substantially in accordance with the prescribed forms of law. These are the essentials of marriage. Hence we are to treat of the following topics in connection with the essentials of a valid marriage: *first,* the disqualification of blood; *second,* the disqualification of civil condition; *third,* mental capacity; *fourth,* physical capacity; *fifth,* the disqualification of infancy, which in reality is based upon united considerations of mental and physical unfitness; *sixth,* prior marriage undissolved; *seventh,* force, fraud, and error; *eighth,* the formal celebration of a marriage, under which last head may be also included the consent of parents or guardians, not to be deemed as essential, except in conformity with the requirements of the marriage celebration acts. These essentials all have reference solely to the time, place, and circumstances of entering into the marriage relation, and not to any subsequent incapacity of either party.

§ 16. Disqualification of Blood; Consanguinity and Affinity. And, *first,* as to the disqualification of blood. On no point have writers of all ages and countries been more united than in the conviction that nature abhors, as vile and unclean, all sexual intercourse between persons of near relationship. But on few subjects have they differed more widely than in the application of this conviction. Among Eastern nations, since the days of the patriarchs, practices have prevailed which to Christian nations and in days of civilized refinement seem shocking and strange. The difficulty then is, not in discovering that there is some prohibition by God's law, but in ascertaining how far that prohibition extends. This difficulty is manifested in our language by the use of two terms,— "consanguinity" and "affinity;" one of which covers the *terra firma* of incestuous marriages, the other offers debatable ground. The disqualification of consanguinity applies to marriages between blood relations in the lineal, or ascending and descending lines. There can be but one opinion concerning the union of relations as near as brother and sister. The limit of prohibition among

34. Smith v. People, 1 Col. 121, Okl. —, 171 P. 855. 170 P. 959; Thomas v. James, —

remote collateral kindred has, however, been differently assigned in different countries. The English canonical rule is that of the Jewish law which protested against the promiscuous practices of other primitive peoples. The Greeks and Romans recognized like principles, though with various modifications and alterations of opinion. But the Church of the Middle Ages found in the institution of marriage, once placed among the sacraments, a most powerful lever of social influence. The English ecclesiastical courts made use of this disqualification, extending it to the seventh degree of canonical reckoning in some cases, and beyond all reasonable bounds.[35] So intolerable became this oppression that a statute passed in the time of Henry VIII. forbade these courts thenceforth to draw in question marriages without the Levitical degree, "not prohibited by God's law."[36] Under this statute, which is still essentially in force in England, the impediment has been treated as applicable to the whole ascending and descending line, and further, as extending to the third degree of the civil reckoning inclusive; or in other words, so as to prohibit all marriages nearer than first cousins. Archbishop Parker's table of degrees, which recognizes these limits, has been, since 1563, the standard adopted in the English ecclesiastical courts.[37] The statute prohibition includes legitimate as well as illegitimate children, and half-blood kindred

35. In some Roman Catholic countries — *e. g.*, Portugal — the marriage of first cousins is still pronounced incestuous. See Sottomayor v. De Barros, L. R. 2 P. D. 81; L. R. 3 P. D. 1.

36. Stat. 32 Hen. VIII, ch. 38. See 1 Bishop, Mar. & Div., 5th ed., §§ 106, 107; 2 Kent, Com. 82, 83; Shelf. Mar. & Div. 163 *et seq.*; Wing v. Taylor, 2 Swab. & T. 278, 295.

37. 1 Bishop, Mar. & Div., 5th ed., § 318; Butler v. Gastrill, Gilb. ch. 156. According to this table,—

A man may not marry his

1. Grandmother.
2. Grandfather's wife.
3. Wife's grandmother.
4. Father's sister.
5. Mother's sister.
6. Father's brother's wife.
7. Mother's brother's wife.
8. Wife's father's sister.
9. Wife's mother's sister.
10. Mother.
11. Stepmother.
12. Wife's mother.
13. Daughter.
14. Wife's daughter.

A woman may not marry her

1. Grandfather.
2. Grandmother's husband.
3. Husband's grandfather.
4. Father's brother.
5. Mother's brother.
6. Father's sister's husband.
7. Mother's sister's husband.
8. Husband's father's brother.
9. Husband's mother's brother.
10. Father.
11. Step-father.
12. Husband's father.
13. Son.
14. Husband's son.

equally with those of the whole blood.[38] Its principles have been recognized in the United States.[39]

But the English law goes even further, and places affinity on the same footing as consanguinity as an impediment. Affinity is the relationship which arises from marriage between a husband and his wife's kindred, and *vice versa*. It is shown that while the marriage of persons allied by blood produces offspring feeble in body and tending to insanity, that of persons connected by affinity leads to no such result; and further, that consanguinity has been everywhere recognized as an impediment, but not affinity. The worst that can probably be said of the latter is, that it leads to a confusion of domestic rights and duties. No question has been discussed with more earnestness in both England and America, with less positive result, than one which turns upon this very distinction in a collateral application; namely, whether a man may marry his deceased wife's sister. This question has received a favorable response in Vermont.[40] Such marriages were in England, however, deemed incestuous until recently,[41] but were made valid even there in 1907,[42] and a marriage with a deceased husband's brother has been sustained there.[43] Cases of affinity as applied in a lineal direction, however, are more repugnant to sound policy, and indeed seem almost to come within the rule of consanguinity.[44]

Marriages within the forbidden degrees of consanguinity were formerly only voidable in English law; but by modern statutes

38. 1 Bishop, Mar. & Div., 5th ed., §§ 315, 317; Reg. v. Brighton, 1 B. & S. 447.

39. Marriage between an uncle and niece of full blood, or between an aunt and nephew, has been treated as incestuous in various jurisdictions. Harrison v. State, 22 Md. 468; Bowers v. Bowers, 10 Rich. Eq. 551. And there are a few States which forbid the marriage of persons more nearly related than second cousins. See Stimson Am. Stat. Law, § 6111.

40. Blodget v. Brinsmaid, 9 Vt. 27; and see 1 Bishop, Mar. & Div., 5th ed., § 314; Paddock v. Wells, 2 Barb. Ch. 331. Collamer, J., in Blodget v. Brinsmaid, makes this ingenious distinction: "The relationship by consanguinity is, in its nature, incapable of dissolution; but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore, though a man is, by affinity, brother to his wife's sister, yet, upon the death of his wife, he may lawfully marry her sister."

41. Hill v. Good, Vaugh. 302; Harris v. Hicks, 2 Salk. 548; Shelf. Mar. & Div., pp. 172, 178; 2 Kent, Com, 84, n., and authorities cited; Reg. v. Chadwick, 12 Jur. 174, 11 Q. B. 173; Pawson v. Brown, 41 L. T. (N. S.) 339; *Ex parte* Naden, L. R. 9 Ch. 670. And see Commonwealth v. Perryman, 2 Leigh, 717, as to the Virginia statute on this point.

42. 7 Edw. 7, ch. 47.

43. In re Bozzelli (1902), 1 Ch. 751.

44. Cf. Table of Degrees, *supra;* and Stimson, § 6111.

they have been made null and void. In this country they are generally pronounced by statute void (in some cases void from the time the sentence is pronounced),[45] and the offending parties are liable to imprisonment if aware of the relationship. But with regard to marriages among relatives by affinity, the rule is not so stringent as in England,[46] although marriages between first cousins are void in some States.[47]

§ 17. Disqualification of Civil Condition; Race, Color, Social Rank, Religion.

Second, as to the disqualification of civil condition. Race, color, and social rank do not appear to constitute an impediment to marriage at the common law, nor is any such impediment now recognized in England.[48] But by local statutes in some of the United States, inter-marriage has long been discouraged between persons of the negro, Indian, and white races.[49] With the recent extinction of slavery, many of these laws have passed into oblivion, together with such as refused to allow to persons held in bondage, and negroes generally, the rights of husband and wife. The thirteenth article of amendment to the Constitution gives Congress power to enforce the abolition of slavery " by appropriate legislation." As to persons formerly slaves, there are now acts of Congress which legitimate their past cohabitation, and enables them to drop the fetters of concubinage. And the manifest tendency of the day is

45 That is to say, not void *ab inito.* See *supra,* § 14; Harrison v. State, 22 Md. 468. And see Bowers v. Bowers, 10 Rich. Eq. 551; Parker's Appeal, 8 Wright, 309, where an incestuous marriage is treated as simply voidable.

46. 2 Kent, Com. 83, 84, and notes; 1 Bishop, Mar. & Div., 5th ed., §§ 312-320; Regina v. Chadwick, 12 Jur. 174; Sutton v. Warren, 10 Met. 451; Bonham v. Badgley, 2 Gilm. 622; Wightman v. Wightman, 4 Johns. Ch. 343; Butler v. Gastrill, Gilb. Ch. 156; Burgess v. Burgess, 1 Hag. Con. 384; Blackmore v. Brider, 2 Phillim. 359. Some marriages of affinity are prohibited by a local statute, and yet not made void. Boylan v. Deinzer, 45 N. J. Eq. 485.

47. Arado v. Arado, 205 Ill. App. 261, 117 N. E. 816. No estoppel against annulment of incestuous marriage.

48. 1 Bishop, Mar. & Div., 5th ed., §§ 308-311; 1 Burge, Col. & For. Laws, 138.

49. See Bailey v. Fiske, 34 Me. 77; State v. Hooper, 5 Ire. 201; State v. Brady, 9 Humph. 74; Barkshire v. State, 7 Ind. 389; 1 Bishop, Mar. & Div., 5th ed., §§ 154-163; Schouler, Hus. & Wife, § 16. One drop less than one-fourth negro blood saves from the taint in Virginia. McPherson v. Commonwealth, 28 Gratt. 939. The Missouri statute declaring marriages between white persons and negroes a felony is constitutional, even though it permits the jury to determine from appearances the proportion of negro blood. State v. Jackson, 80 Mo. 175.

towards removing all legal impediments of rank and condition, leaving individual tastes and social manners to impose the only restrictions of this nature.[50] But the race barrier has a strong foundation in human nature, wherever marriage companionship is concerned.[51]

§ 18. Mental Capacity of Parties to a Marriage.

Third, as to mental capacity. No one can contract a valid marriage unless capable, at the time, of giving an intelligent consent. Hence the marriages of idiots, lunatics, and all others who have not the use of their understanding at the time of the union are now treated as null; though the rule was formerly otherwise, from perhaps too great regard to the sanctity of the institution in the English ecclesiastical courts.[52] What degree of insanity will amount to disqualification is not easily determined; so varied are the manifestations of mental disorder at the present day, and so gradually does mere feebleness of intellect shade off into hopeless idiocy. Certain is it that a person may enter into a valid marriage, notwithstanding he has a mental delusion on certain subjects, is eccentric in his habits, or is possessed of a morbid temperament, provided he displays soundness in other respects and can manage his own affairs with ordinary prudence and skill,[53] and the mere fact that a girl is inexperienced and unlearned does not show her incapacity.[54] Every case stands on its own merits; but the usual test

50. Act July 25, 1866, ch. 240; Act June 6, 1866, ch. 106, § 14. And see 15th Amendment U. S. Const.; Stewart v. Munchandler, 2 Bush (Ky.), 278; State v. Harris, 63 N. C. 1. For Southern statutes which now legalize the marriages of former slaves, etc., see Schouler, Hus. and Wife, § 16; also Smith v. Perry, 80 Va. 563; Willians v. The State, 67 Ga. 260; Washington v. Washington, 69 Ala. 281; Long v. Barnes, 87 N. C. 329; Downs v. Allen, 10 Lea, 652.

As to statutes formerly forbidding marriage between a Roman Catholic and Protestant, see Commonwealth v. Kenney, 120 Mass. 387; Philadelphia v. Williamson, 10 Phila. 176. The statute 19 Geo. II., ch. 13, to this effect, has partial reference to the solemnization of marriage by a Popish priest. These are disabilities imposed by a Protestant parliament, it is worth observing.

51. Marriage between negroes (or Indians) and whites is still forbidden in many of the United States, those in particular where negroes chiefly dwell; while in Oregon and some other Pacific States similar prohibitions of white and Chinese marriages are found. Stimson, § 6112.

52. See Lord Stowell in Turner v. Meyers, 1 Hag. Con. 414; 1 Bishop, Mar. & Div., 5th ed., § 125; Stimson Am. Stat. Law, § 6112; Wiley v. Wiley, — Ind. App. —, 123 N. E. 252.

53. 2 Kent, Com. 76; Browning v. Reane, 2 Phillim. 69; 1 Bishop, Mar. & Div., 5th ed., §§ 124-142; Turner v. Meyers, 1 Hag. Con. 414, 4 Eng. Ec. 440, 1 Bl. Com. 438, 439.

54. Green v. Green, — Fla. —, 80 So. 739.

applied in the courts is that of fitness for the general transactions of life; for, it is argued, if a man is incapable of entering into other contracts, neither can he contract marriage.[55] This test is sufficiently precise for most purposes. Yet we apprehend the real issue is whether the man is capable of entering understandingly into the relation of marriage. There are two questions, however: first, whether the party understands the marriage contract; second, whether he is fit to perform understandingly the momentous obligations which that contract imposes; and both elements might well enter into the consideration of each case. "If any contract more than another," observes Lord Penzance in a recent English case, "is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage,— an act by which the parties bind their property and their persons for the rest of their lives." [56] Marriage contracted during a lucid interval is at law deemed valid; [57] but the English statute provides that such marriages are void when a commission of lunacy has once been taken out and remains unrevoked.[58] Similar provisions are to be found in some of our States. On the other hand, marriage contracted by a person habitually sane, during temporary insanity, is unquestionably void,[59] as of course would be any marriage contracted by one at the time permanently insane.[60]

55. Mudway v. Croft, 3 Curt. Ec. 671; Anon. 4 Pick. 32; Cole v. Cole, 5 Sneed, 57; Atkinson v. Medford, 46 Me. 510; Ward v. Dulaney, 23 Miss. 410; Elzey v. Elzey, 1 Houst. 308; McElroy's Case, 6 W. & S. 451. See 1 Bishop, Mar. & Div., § 128; *Ex parte* Glen, 4 Des. 546; Kitzman v. Kitzman, 167 Wis. 308, 166 N. W. 789 (marriage of epileptic annulled); *In re* Jansa's Estate, 169 Wis. 220, 171 N. W. 947.

56. Hancock v. Peaty, L. R. 1 P. & D. 335, 341. The question is whether the person had sufficient mental capacity to make the contract of marriage. Evidence of his mental condition before and after the marriage is admissible. St. George v. Biddeford, 76 Me. 593; Durham v. Durham, 10 P. D. 80.

57. Shelf. Mar. & Div. 197; 1 Bishop, Mar. & Div., § 130; Banker v. Banker, 63 N. Y. 409; Parker v. Parker, 6 Eng. Ec. 165; Smith v. Smith, 47 Miss. 211.

58. Stat. 15 Geo. II., ch. 30 (1742), not part of the common law in this country.

59. Legeyt v. O'Brien, Milward, 325; Parker v. Parker, 6 Eng. Ec. 165.

60. See Lord Penzance in Hancock v. Peaty, L. R. 1 P & D. 335; Banker v. Banker, 63 N. Y. 409; McAdam v. Walker, 1 Dow, 148; 1 Bishop, Mar. & Div., § 130; Smith v. Smith, 47 Miss. 211. Cf. Waymire v. Jetmore, 22 Ohio St. 271.

And as to development of the malady about the time of the ceremony, see Schouler, Hus. & Wife, § 19. See Reed v. Reed, 175 N. Y. S. 264.

Upon the principle of temporary insanity, drunkenness incapacitates, if carried to the excess of *delirium tremens;* though not, it would appear, if the party intoxicated retains sufficient reason to know what he is doing.[61] Drunkenness was formerly held a bad plea, for the common law permitted no one to stultify himself; but the modern rule is more reasonable.[62] Some cases require that fraud or unfair advantage should be shown; yet the better opinion is that even this is unnecessary.[63] Deaf and dumb persons were formerly classed as idiots; this notion, however, is exploded. They may now contract marriage by signs.[64] Total blindness or mere deafness, of course, constitutes no incapacity. In general, we may add that the disqualification of insanity is often considered in connection with fraud or undue influence exercised by or on behalf of the other contracting party, over a weak intellect, for the sake of a fortune, a title, or some other worldly advantage.[65]

Suits of nullity, brought to ascertain the facts of insanity, are favored by law both in England and America; and modern legislation discountenances all collateral disputes involving questions so painful and perplexing. "Though marriage with an idiot or lunatic be absolutely void, and no sentence of avoidance be absolutely necessary," says Chancellor Kent, "yet, as well for the sake of the good order of society as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction." [66] In many States this is now the only course to be pursued, such marriages being treated as voidable and not void; and the insane spouse dying before proceedings to dissolve the marriage are begun, the survivor takes all the benefits of a valid

61. Clement v. Mattison, 3 Rich. 93; 1 Bishop, Mar. & Div., 5th ed., § 131; Gore v. Gibson, 13 M. & W. 623, 2 Kent, Com. 451, and authorities cited; Lord Ellenborough, in Pitt v. Smith, 3 Camp. 33; Scott v. Paquet, L. R. 1 P. C. 552.

62. See Gillett v. Gillett, 78 Mich. 184.

63. See 1 Bishop, Mar. & Div., 5th ed., §§ 131, 132, and conflicting cases cited; Elzey v. Elzey, 1 Houst. 308; Steuart v. Robertson, 2 H. L. Sc. 494.

64. 1 Bishop, Mar. & Div., 5th ed., § 133, and cases cited; 1 Fraser, Dom. Rel. 48; Dickenson v. Blisset, 1 Dickens, 268; Harrod v. Harrod, 1 Kay & Johns. 4.

65. Fraud as an element of disqualification will be considered *post,* 123.

66. 2 Kent, Com. 76.

marriage accordingly.[67] The issue in all such cases is, mental condition at the very time of the marriage.[68]

§ 19. Physical Capacity of Parties to Marriage; Impotence, &c.

Fourth. The question of physical capacity involves an investigation of facts even more painful and humiliating than that of mental capacity. Yet as marriage is instituted, in part at least, for the indulgence of natural cravings and with a view to propagate the human family, sound morality demands that the proper means shall not be wanting. Our law demands that, at all events, the sexual desire may be fully gratified. Where impotence exists, therefore, there can be no valid marriage. By this is meant simply that the sexual organization of both parties shall be complete. But mere barrenness or incapacity of conception constitutes no legal incapacity in England and the United States, nor can a physical defect which does not interfere with copulation; nor indeed any disability which is curable, even though not actually cured, unless the party disabled unreasonably refuses to submit to the proper remedies.[69] Such refusal, however, puts the disabled spouse clearly in the wrong.[70] The refusal of carnal intercourse by a healthy spouse is quite a different matter, and gives rise to other inquiries under the head of divorce; [71] nor certainly can physical incapacity arising from some cause subsequent to marriage be referred to the present subject, the question being as to incapacity at the date of marriage.[72]

The reader will find Dr. Lushington's opinion in the leading case of *Deane* v. *Aveling* [73] sufficiently suggestive as to the extent

67. 1 Bishop, Mar. & Div., 5th ed., §§ 136-142; Goshen v. Richmond, 4 Allen, 458; Hamaker v. Hamaker, 18 Ill. 137; Williamson v. Williams, 3 Jones, Eq. 446; Wiser v. Lockwood, 42 Vt. 720; Brown v. Westbrook, 27 Ga. 102; 31 N. Y. Supr. 461; Setzer v. Setzer, 97 N. C. 252. As to bringing such suits, see, further, 1 Bishop, Mar. & Div., §§ 139-142; Schouler, Hus. and Wife, § 21. In Maine such a marriage may be impeached collaterally, 76 Me. 419.

68. Nonnemacher v. Nonnemacher, 159 Penn. St. 634.

69. 1 Bishop, Mar. & Div., §§ 321-340, and cases cited; 1 Fraser, Dom. Rel. 53; B. v. B., 28 E. L. & Eq. 95; 1 Bl. Com. 440, *n.*, by Chitty and others; Ayl. Parer, 227; Devanbagh v. Devanbagh, 5 Paige, 554; Essex v. Essex, 2 Howell, St. Tr. 786; Briggs v. Morgan, 3 Phillim. 325. For a case where the disability was possibly curable, see G. v. G., L. R. 2 P. & D. 287.

70. H. v. P., L. R. 3 P. & D. 126.

71. See, further, Cowles v. Cowles, 112 Mass. 298.

72. See Morrell v. Morrell, 24 N. Y. Supr. 324.

73. 1 Robertson, 279, 298. And see modern case of U. v. J., L. R. 1 P. & D. 460; Stimson, § 6113.

of malformation which invalidates a marriage on the ground of physical incapacity. It will be observed that this case establishes a principle which later cases do not undermine; namely, that it is capacity for fulfilling the conditions of copulation, and not of procreation, that our own law regards. We may add that, with the rapid progress of medical science during the present century, cases of absolute and incurable impotence are happily diminishing in number. It is reasonable that suit should be required to terminate a marriage on this ground.[74]

§ 20. Disqualification of Infancy.

Fifth. Infancy may be an impediment to marriage; but only so far, on principle, as the marrying party, by reason of imperfect mental and physical development, may be brought within the reason of the last two rules. Hence we find that infancy is not a bar to marriage to the same extent as in ordinary contracts; since minors cannot repudiate their choice of husband or wife on reaching majority. Not that marriage calls for less discrimination, for it carries with it consequences far beyond all other contracts, involving property rights of the gravest import; but because public policy must protect the marriage institution against the reckless imprudence of individuals. A certain period is established, called the age of consent, which in England is fixed at fourteen for males and twelve for females,— a rule adopted from the Roman law, but which, in this country, varies all the way from fourteen to eighteen for males and twelve to sixteen for females, according to local statutes; differences of climate and physical temperament contributing, doubtless, to make the rule of nature, in this respect, a fluctuating one.[75]

74. See for instances: T. v. M., L. R. 1 P. & D. 31; T. v. D., L. R. 1 P. & D. 127; Carll v. Prince, L. R. 1 Ex. 246. With modern facilities, including the right of parties to testify in their own suits, such cases appear to be on the increase in the courts of Great Britain. See 1 Bishop, § 331; Schouler, Hus. & Wife, § 23, as to sentences of nullity such cases. The latest English cases interpose no barrier for a mere delay in seeking a decree of nullity for impotence. 10 P. D. 75; 10 App. Cas. 171; Martin v. Otis, — Mass. —, 124 N. E. 294 (impotency renders a marriage voidable and not void).

75. See 2 Kent, Com. 79, notes, showing the periods fixed in different States as the age of consent. In the old States the common-law rule generally prevails. In Ohio, Indiana, and various other western States, the age of consent is raised by various standards to eighteen or even twenty-one for males, and fourteen or even eighteen for females. See Stimson, § 6110; Green v. Green, — Fla. —, 80 So. 739 (common-law rule adopted).

The common-law rule is usually altered by statute in this country.[76] Marriages without the age of consent are as binding as those of adults; marriages within such age may be avoided by either party on reaching the period fixed by law. And even though one of the parties was of suitable age and the other too young, at the time of marriage, yet the former, it appears, may disaffirm as well as the latter.[77] Herein is observed a departure from that principle of law, that an infant may avoid his contract while the adult remains bound; it is a concession which the law makes in favor of mutuality in the marriage compacts. Marriages celebrated before both parties have reached the age of consent may be disaffirmed in season, either with or without a judicial sentence.[78] When the age of consent is reached, no new ceremony is requisite to complete the marriage at the common law; but election to affirm will then be inferred from circumstances, such as continued intercourse, and even slight acts may suffice to show the intention of the parties. If they then choose to remain husband and wife, they are bound forever. Disaffirmance, on the other hand, may be either with or without a judicial sentence.[79] Marriage within the age of consent seems therefore to be neither strictly void nor strictly voidable, but rather inchoate and imperfect;[80] with, however, a reservation by the ecclesiastical law as to marriage with an infant below seven years, which is treated as altogether null.[81]

76. Johnson v. Alexander, — Cal. App. —, 178 P. 297; Morgan v. Morgan, 148 Ga. 625, 97 S. E. 675 (seventeen years of age); Wiley v. Wiley, — Ind. App. —, 123 N. E. 252.

77. Co. Litt. 79, and Harg. *n.* 45; 1 East, P. C. 468; 1 Bishop, Mar. & Div., 5th. ed., § 149. But it is not certain that a party of competent age may disaffirm equally with the party incompetent. People v. Slack, 15 Mich. 193.

78. The complaint should be in the name of the infant, and not of his guardian. Pense v. Aughe, 101 Ind. 317. See Holtz v. Dick, 42 Ohio St. 23. Fraudulent representation by the infant as to his age does not estop him from annulling. Eliot v. Eliot, 81 Wis. 295, an extreme case.

79. 1 Bishop, Mar. & Div., § 150.

80. Co. Litt. 33a; 2 Kent, Com. 78, 79; 1 Bishop, Mar. & Div., 5th ed., §§ 143-153, and cases cited; 1 Bl. Com. 436; 1 Fraser, Dom. Rel. 42; Parton v. Hervey, 1 Gray, 119; Fitzpatrick v. Fitzpatrick, 6 Nev. 63. See Shafher v. State, 20 Ohio, 1, 86 Wis. 498, 65 Vt. 663; *contra*, Goodwin v. Thompson, 2 Iowa, 329; Aymar v. Roff, 3 Johns. Ch. 49, as to the invalidity of such marriage, unless confirmed by cohabitation after reaching the statutory age. Local statutes affect this whole subject. Owen v. Coffey, 201 Ala. 531, 78 So. 885 (voidable at election of infant); People v. Ham, 206 Ill. App. 543 (voidable and not void); Magee v. Nealon, 177 N. Y. S. 517 (marriage of one under age is not void *ab initio*, but is voidable only on judicial decree); Allerton v. Allerton, 172 N. Y. S. 152.

81. 2 Burn, Ec. Law, 434; 1 Bishop, Mar. & Div., § 147.

Only one of the parties to a marriage of one within the age of consent may object to its legality, and action for annulment cannot be brought by a parent of the infant against his wishes.[82]

§ 21. Disqualification of Prior Marriage Undissolved; Polygamy; Bigamy.

Sixth, as to the impediment of prior marriage undissolved. It is a well-established rule in civilized countries that marriage between parties, one of whom is bound by an existing marriage tie, is not only void, but subjects the offenders to criminal prosecution.[83] Polygamy, or bigamy as it is often termed,— since the common law of England could scarcely conceive of such conjunctions carried beyond a double marriage,— is discarded by all Christian communities. It was tolerated, but never sanctioned, in certain territory of the United States. The fundamental doctrine of Christian marriage is that no length of separation can dissolve the union, so long as both parties are actaully living, even though lapse of time should raise a reasonable supposition of death. But to render the second marriage void at law, the first should have been valid in all respects.[84] Some of the harsher features of the old law have been softened in our own legislation; and statutes are not uncommon which possibly extend facilities for divorce from the old relation, and in any event protect the offspring of a new marriage contracted erroneously, but in good faith, by parties who had reason to believe a former spouse dead.[85] But such re-marriage in bad faith and without due inquiry finds no favor.[86] So, too, polygamy in fact is relieved of its penal consequences as concerns parties not guilty of polygamy in intention; but a certain period must elapse — usually

82. Arado v. Arado, 205 Ill. App. 261, 117 N. E. 816; Marone v. Marone, 174 N. Y. S. 151; Magee v. Nealon, 177 N. Y. S. 517; *contra,* Melcher v. Melcher, 102 Neb. 790, 169 N. W. 720 (by statute non-consenting parent may petition for annulment).

83. Cro. Eliz. 858; 1 Salk. 121; 2 Kent, Com. 79, and ontes; 1 Bishop, Mar. and Div., §§ 296-303, and authorities cited; Shelf., Mar. and Div. 224; Hyde v. Hyde, L. R. 1 P. & D. 130; Klee v. Klee, 171 N. Y. S. 632, 175 N. Y. S. 908; Succession of Thomas, 144 La. 25, 80 So. 186 Cunningham v. Cunningham, — Tex. Civ. App. —, 210 S. W. 242 (although first marriage was a common-law marriage and second marriage was ceremonial, entered into in good faith); McCaig v. State, — Ala. App. —, 80 So. 155; Vigno v. Vigno, — N. H. —, 106 A. 285.

84. Bruce v. Burke, 2 Add. Ec. 471; 2 Eng. Ec. 381; Reg. v. Chadwick, 12 Jur. 174; Patterson v. Gaines, 6 How. (U. S.) 550.

85. See 2 N. Y. Rev. Stat., p. 139, §§ 6, 7; Mass. Rev. Laws, ch. 151, § 14; Stimson, Am. Stat. Law, § 6116.

86. Gall v. Gall, 114 N. Y. 109.

seven years — before death can be presumed from one's mere continuous absence without being heard from. Such was one of the provisions in the English statute passed to make bigamy a civil offence, in the reign of James I.,[87] which also exempted from punishment for bigamy persons remarried, during the lifetime of the former spouse, after a divorce, sentence of nullity, or disaffirmance on reaching age of consent. Similar statutes for the punishment of bigamy, with similar reservations, are enacted in this country; but in England and the United States some defects of the original legislation are now cured, and divorce from bed and board would not exempt an offender from prosecution.[88] Polygamy, with such exceptions, remains an indictable offence. One of its less obvious evils — though not the least important when polygamy is regarded as a legalized institution in a free country — is that the patriarchal principle which it introduces is thoroughly hostile to free institutions; and this fact was pointed out many years ago by one of our best writers on political ethics.[89]

Nor is a new marriage entered into by one spouse in good faith, and in full but erroneous belief that the other spouse is dead, valid even after the lapse of the statutory absence; such parties are not free to marry again, but only relieved of the worst consequences.[90]

87. Stat 1 Jac. I, ch. 11, 1604. See Queen v. Lumley, L. R. 1 C. C. 196; Queen v. Curgerwen, L. R. 1 C. C. 1.

88. In New York the period of absence is five years; in Ohio, three years; in Massachusetts, seven years, but with a special relaxation of the penalty. Still further, see 2 Kent, Com. 79, and notes. See also Stats. 9 Geo. IV., ch. 31; 24 and 25 Vict., ch. 100; 1 Bishop, § 297; Stimson, § 6112. Legitimating statutes are to be found in numerous States on behalf of the offspring of innocent marriages of this kind. 1 Bishop, § 301; cases *infra*.

89. 2 Lieber, Pol. Ethics, 9, cited in note to 2 Kent, Com. 81.

As to prosecutions for bigamy, see Kopke v. People, 43 Mich. 41; Reeves v. Reeves, 54 Ill. 332; Queen v. Allen, L. R. 1 C. C. 367, and other cases cited; Schouler, Hus. and Wife, § 25; also "Bigamy" in Bishop or Wharton on Criminal Law.

90. Glass v. Glass, 114 Mass. 563, and cases cited; Williamson v. Parisien, 1 Johns. Ch. 389; Miles v. Chilton, 1 Robertson, 684; Spicer v. Spicer, 16 Abb. Pr. (N. S.) 112; 1 Bishop, Mar. & Div., § 299; Webster v. Webster, 58 N. H. 3, 124 Penn. St. 646. Such marriage, under Massachusetts statutes, may be annulled by a sentence containing (in order to make children begotten before the commencement of the suit legitimate) the statement that it was contracted in good faith and with the full belief of the parties that the absent spouse was dead. Glass v. Glass, *supra*, Randlett v. Rice, 141 Mass. 385, presented curious facts. Lawful competence to marry again results, however, under some local statutes, from such absence. Strode v. Strode, 3 Bush, 227. Where proceedings for annulling are discontinued upon the death of such former spouse, the parties may marry again. Sneathen v. Sneathen, 104 Mo. 201.

One who innocently marries another having an undivorced spouse may have the colorable marriage declared void independently of all divorce legislation.[91] It is often held that there is a presumption of the validity of the second marriage and that the first marriage has been terminated,[92] but this presumption does not hold where there is evidence to the contrary.[93]

§ 22. Same Subject; Impediments following Divorce.

Under this same head may be considered a disqualification introduced into some parts of this country by legislative enactments; namely, the impediment which follows divorce.[94] A divorce *a vinculo* should on general principles leave both parties free to marry again. But such is not always the case. Thus, in Kentucky, the person injured might not marry again before the expiration of two years from the decree of dissolution.[95] And in several States the guilty party is prohibited from marrying again during the lifetime of the innocent spouse divorced,— a provision of law seemingly more judicious to apply *in terrorem* by way of prevention than as a suitable method of punishment.[96] In Scotland there is a peculiar but not unreasonable law, which forbids the guilty party after divorce from marrying the *particeps criminis;* this was framed evidently to defeat collusive practices between persons desiring to put away an outstanding obstacle to their own union.[97] A divorce *nisi* is of course only partial; and a marriage solemnized before

91. Fuller v. Fuller, 33 Kan. 582. See succession of Thomas, 144 La. 25, 80 So. 186 (good faith not presumed where a mature woman marries a man whom she knows to be already married depending on his mere assertion that he had obtained a divorce).

92. *In re* Salvin's Will, 173 N. Y. S. 897. *In re* Hilton's Estate, — Pa. —, 106 A. 69; Tanton v. Tanton, — Tex. Civ. App. —, 209 S. W. 429.

93. Succession of Thomas, 144 La. 25, 80 So. 186.

94. 1 Bishop, Mar. & Div., 5th ed., §§ 304-307; Stimson, § 6241.

95. Cox v. Combs, 8 B. Monr. 231. Mason v. Mason, 101 Ind. 25, treats a marriage in violation of such inhibition as voidable only, so that one party may be estopped to deny the validity in collateral proceedings. And see 152 Mass. 533.

96. See Parke v. Barron, 20 Ga. 702; Clark v. Cassidy, 62 Ga. 407, 53 Barb. 454. Such prohibitions are sometimes evaded by going into another neighboring State, and there contracting what by local law is a valid marriage. Thorp v. Thorp, 90 N. Y. 602, 92 N. Y. 521, 86 N. Y. 18. Notwithstanding a New York prohibition, parties went into New Jersey or Connecticut for such purpose. *Ib.* See Hahn v. Hahn, — Wash. —, 176 P. 3.

97. 1 Fraser, Dom. Rel. 82. In a few of the United States, legislation is found to the same effect. Stimson, Am. Stat. Law, § 6241.

the absolute decree can take effect is void,[98] but where the parties live together after the divorce becomes valid the second marriage becomes also valid.[99]

§ 23. Force, Fraud, and Error, in Marriage.

Seventh. All marriages procured by force or fraud, or involving palpable error, are void; for here the element of mutual consent is wanting, so essential to every contract,[1] and fraud of a vital character going to the essence of the transaction will be ground for avoiding a marriage.[2] The law treats a matrimonial union of this kind as absolutely void *ab initio,* and permits its validity to be questioned in any court; at the option, however, of the injured party, who may elect to abide by the consequences when left free to give or withhold assent. Force implies a physical constraint of the will; fraud, some deception practised, whereby an unnatural state of the will is brought about.[3] Cases of palpable error, which are very rare, usually contain one or both of these ingredients.

What amount of force is sufficient to invalidate a marriage is a question of circumstances. Evidently the same test could not apply to the mature and the immature, to the strong and the weak, to man and to woman. The general rule is that such amount of force as might naturally serve to overcome one's free volition and

98. Cook v. Cook, 144 Mass. 163. Such a marriage may be annulled accordingly. Wilson v. Wilson, 172 N. Y. S. 673.

99. Kinney v. Tri-State Telephone Co., — Tex. Civ. App. —, 201 S. W. 1180; McLaughlin v. Laughlin, 201 Ala. 482, 78 So. 388.

1. 2 Kent, Com. 76, 77; 1 Bishop, Mar. & Div., 5th ed., §§ 164-215; Harford v. Morris, 2 Hag. Con. 423; 4 Eng. Ec. 575; Countess of Portsmouth v. Earl of Portsmouth, 1 Hag. Ec. 355; 3 Eng. Ec. 154; Scott v. Shufeldt, 5 Paige, 43; Dalrymple v. Dalrymple, 2 Hag. Con. 54, 104; 4 Eng. Ec. 485; Keyes v. Keyes, 2 Fost. 553.

2. Davis v. Davis, 90 N. J. Ch. 158, 106 A. 644 (concealment of tuberculosis); Bolmer v. Edsall, 90 N. J. Ch. 299, 106 A. 646 (concealed determination to deny sexual intercourse); Thompson v. Thompson, — Tex. Civ. App. —, 202 S. W. 175, 203 S. W. 939; Reed v. Reed, 175 N. Y. S. 264 (statutory method of annulment must be followed); Weill v. Weill, 172 N. Y. S. 589 (concealment of prior marriage and annulment); Koehler v. Koehler, 137 Ark. 302, 209 S. W. 283; Gatto v. Gatto, — N. H. —, 106 A. 493 (misrepresentation by woman as to her chastity). See Price v. Tompkins, 177 N. Y. S. 548 (concealment by woman of prior marriage to one since died is not fraud). *Where the marriage would not have taken place in the absence of the fraud* this is a ground for annulment, but if the marriage would have taken place anyway, this fraud is not a ground for annulment. Weill v. Weill, 172 N. Y. S. 589; Allerton v. Allerton, 172 N. Y. S. 152.

3. 1 Fraser, Dom. Rel. 234

inspire terror will render the marriage null.[4] And where the party employing force sustains a superior relation of influence, or a post of confidence affording him special opportunities which he chooses to abuse, this circumstance carries great weight. Thus in *Harford* v. *Morris,* where one of the guardians of a young and timid school-girl, having great influence and authority over her, took her to a foreign country, hurried her from place to place and then married her without her free consent, the marriage was set aside;[5] and similar consequences attended more recently the marriage of a young school-girl to her father's coachman, who pursued his scheme while taking her out to ride.[6] So, too, where a man forced a woman who was in pecuniary distress to marry him by operating on her fears of exposure and ruin.[7]

A marriage by compulsion is procured when an adult under illegal arrest is forced to marry; and so, probably, though the arrest were legal, if malicious circumstances are manifest.[8] But if a single man under legal arrest marries, by advice of the officer or magistrate, the woman whom he has seduced or got with bastard offspring, in order to escape a just prosecution, meaning a prosecution for probable cause and not a malicious one, the law disinclines to annul such a marriage for duress in case of an adult, but will favor a presumption of honest repentance on his part, and hold him bound;[9] substantial justice being thereby done to the utmost,

4. Shelf., Mar. & Div. 213; 1 Bishop, Mar. & Div., 5th ed., § 211.

5. 2 Hag. Con. 423; 4 Eng. Ec. 575.

6. Lyndon v. Lyndon, 69 Ill. 43.

7. Scott v. Sebright, 12 P. D. 21.

8. Reg. v. Orgill, 9 Car. & P. 80; Soule v. Bonney, 37 Me. 128; Collins v. Collins, 2 Brews. (Pa.) 515; Barton v. Morris, 15 Ohio, 408; Benton v. Benton, 1 Day, 111; 1 Bishop, Mar. & Div., 5th ed. 212.

A man is sometimes forced into a marriage which ought to be annulled. See Bassett v. Bassett, 9 Bush, 696. In Willard v. Willard, 6 Baxter, 297, before testimony was taken, an allegation of duress was sustained against demurrer. Here the man claimed that the woman's brother seized him on the highway, and forced him to marry her, and that as soon as the duress was over he escaped; also that the woman had a child three months afterwards. Duress was claimed by the husband in Vroom v. Marsh, 29 N. J. Eq. 15; but the court allowed alimony *pendente lite* to the wife, she denying the charge.

9. Jackson v. Winne, 7 Wend. 47; Sickles v. Carson, 26 N. J. Eq. 440; Honnett v. Honnett, 33 Ark. 156; State v. Davis, 79 N. C. 603; Johns v. Johns, 44 Tex. 40; Williams v. State, 44 Ala. 24; Rutgers v. New Brunswick, 42 N. J. Eq. 55; Marvin v. Marvin, 32 Ark. 425. In Smith v. Smith, 51 Mich. 607, the marriage was annulled where the party was a "boy of eighteen and the woman much older." See Beckermeister v. Beckermeister, 170 N. Y. S. 22.

and the lesser scandal to society permitted in order to avert the greater.

As to fraud, in order to vitiate a marriage, it should go to the very essence of the contract. But what constitutes this essence? The marriage relation is not to be disturbed for trifles, nor can the cumbrous machinery of the courts be brought to bear upon impalpable things. The law, it has been well observed, makes no provision for the relief of a blind credulity, however it may have been produced.[10] Fraudulent misrepresentations of one party as to birth, social position, fortune, good health, and temperament, cannot therefore vitiate the contract. *Caveat emptor* is the harsh but necessary maxim of the law. Love, however indispensable in an æsthetic sense, is by no means a legal essential to marriage; simply because it cannot be weighed in the scales of justice. So, too, all such matters are peculiarly within the knowledge of the parties themselves, and they are put upon reasonable inquiry.[11]

Not even does the concealment of previous unchaste and immoral behavior in general vitiate a marriage; for although this seems to strike into the essence of the contract, yet public policy pronounces otherwise, and opens marriage as the gateway to repentance and virtue.[12] If the profligate continue a profligate after marriage, the divorce laws afford a means of escape to the deluded victim. Still, as this doctrine seems to bear hard upon innocent persons marrying in good faith and with misplaced confidence, it is applied not without some limitations. Thus it is held that where a woman, pregnant by another man at the time of the nuptials, bears a child soon after to an innocent husband, the marriage may be avoided by him; for she has thereby not only inflicted upon him, by deception, the grossest possible moral injury, but subjected them both to scandal and ill-repute.[13] The courts, however, have taken heed

10. Lord Stowell, in Wakefield v. Mackay, 1 Phillim. 137; 2 Kent, Com. 77; 1 Bishop, Mar. & Div., 5th ed., §§ 166-168; Libman v. Libman, 169 N. Y. S. 900, 102 Misc. Rep. 143.

11. Concealment by the woman that she was a kleptomaniac — by this not meaning insanity — was held no fraud as to essentials, in Lewis v. Lewis, 44 Minn. 124.

12. Bishop, Mar. & Div., §§ 170, 179; Rogers, Ec. Law, 2d ed., 644; 1 Fraser, Dom. Rel. 231; Ayl. Parer, 362, 363; Swinb. Spousals, 2d ed., 152; Best v. Best, 1 Add. Ec. 411; 2 Eng. Ec. 158; Leavitt v. Leavitt, 13 Mich. 452; Wier v. Still, 31 Iowa, 107.

13. Reynolds v. Reynolds, 3 Allen, 605. See also Baker v. Baker, 13 Cal. 87; Montgomery v. Montgomery, 3 Barb. Ch. 132; Wright, 630; Allen's Appeal, 99 Penn. St. 196; Gard v. Gard, 204 Mich. 255, 169 N. W. 908. See Cogswell v. Cogswell, — D. C. —, 258 F. 287.

not to press this exception far, refusing to allow one to shake off the obligations he has contracted with a woman whom he knew before marriage to be with child, and in fact had himself debauched, notwithstanding he married upon the faith of her previous assurances that her pregnancy was by him, and was undeceived by the time the child came into the world.[14] Furthermore, if a man marries any woman whom he knows to be unchaste and pregnant, it is his own folly if he places implicit confidence in any of her statements;[15] and if he was unchaste with her himself, he debars himself from complaining that he found her pregnant by another.[16] But whenever an innocent man marries a woman, supposing her, with reason, to be virtuous, and she conceals her pregnancy from him, the subsequent production of another man's child so unpleasantly complicates the marriage relation that he ought to be allowed his exit if he so desires, both in justice to himself and because the woman knew the risk she ran of bringing the parental relation to shame by marrying, and chose to incur it. In short, while marriage may be accepted by any one whose past life has been dissolute, as the portal to a new and honest career, for which reason concealment of the past cannot legally be predicated of either party as an essential fraud, we apprehend that the woman who brings surreptitiously to the marriage bed the incumbrance of some outside illicit connection introduces a disqualification to the union as real as the physical impotence of a man would be, resulting from his own lasciviousness.

As to error, it may be said, as in fraud, that the error should reach the essentials; and Chancellor Kent justly observes that it would be difficult to find a case where simple error, without some other element, would be permitted to vacate a marriage.[17] There is an English case in point, where a man courted and afterwards married a young lady, believing her to be a certain rich widow, whom he had known only by reputation. She and her friends had countenanced the deception. It was held, nevertheless, that the

14. Foss v. Foss, 12 Allen, 26. It was here suggested by the court that the man might have taken medical or other advice before marriage, instead of relying upon the woman's word.

15. Crehore v. Crehore, 97 Mass. 330.

16. Seilheimer v. Seilheimer, 40 N. J. Eq. 412; Foss v. Foss, 12 Allen, 26.

17. 2 Kent, Com. 77. See Lord Campbell, in Reg. v. Millis, 10 Cl. & F. 534, 785; 1 Bishop, Mar. & Div., 5th ed., § 207; Clowes v. Clowes, 3 Curt. Ec. 185, 191.

marriage must stand.[18] But the palpable substitution of some other individual for the person actually accepted and intended for marriage may properly be repudiated by the victim to the fraud.[19] And some cases have gone even farther, as where a scoundrel palms himself off as a certain individual of good repute;[20] though, generally speaking, deception as to name is not regarded as more fatal than deception concerning character or fortune.

The element of imperfect consent is readily associated with cases of the present class. Thus, if a person is unwittingly entrapped into a marriage ceremony, not meaning nor affording reason for the other party to believe that it should be binding, this marriage may be repudiated.[21] And in general a mock marriage in jest is no marriage, though a dangerous sport.[22]

The fraud may be waived and the party estopped to rely on it by cohabitation after knowledge of the fraud.[23]

§ 24. Force, Fraud, and Error: Subject continued.

In most of the reported cases of force, fraud, and error, two or more of these elements are united; and frequently another distinct impediment appears, such as tender years on the part of the injured party; or, with regard to the offender, the suppression of material facts relative to some former marriage, or to his own mental or physical incapacity; or some other cause of nullity is shown by the evidence. In the reported cases, where the complainant was successful, some unprincipled man has generally sought to gain undue advantage from the person and fortunes of one whose feebler will or overstrained fears rendered her an easy prey; it rarely, if ever, appears that such force or fraud has led to a reasonable and well-assorted match. Such unequal alliances need find favor from no tribunal.[24]

All marriages of this sort are binding without further ceremony, provided the injured party sees fit to affirm it after all constraint

18. Feilding's Case, cited in Burke's Celebrated Trials, 63, 78, and in 1 Bishop, Mar. & Div., 5th ed., § 204.

19. Fiction supplies such instances, as in Scott's novels, St. Ronan's Well. And see 2 Kent, Com. 77; 1 Bishop, § 207.

20. Rex. v. Burton, 3 M. & S. 537.

21. Clark v. Field, 13 Vt. 460.

22. McClurg v. Terry, 21 N. J. Eq. 225. See *post*, § 22.

23. Koehler v. Koehler, 137 Ark. 302, 209 S. W. 283.

24. See Heffer v. Heffer, 3 M. & S. 265; Rex. v. Burton, 3 M. & S. 537; Swift v. Kelly, 3 Knapp, 257; Nace v. Boyer, 6 Casey, 99; Robertson v. Cole, 12 Tex. 356; Cameron v. Malcolm, Mor. 12586, cited 1 Bishop, § 199; Lyndon v. Lyndon, 69 Ill. 43; Powell v. Cobb, 3 Jones, Eq. 456; Scott v. Sebright, 12 P. D. 21.

is removed, or, in other words, to perfect the consent; but no such freedom of choice seems to be left to the offending party. Hence this sort of marriage seems neither void nor voidable in the legal acceptation; but rather inchoate or incomplete until ratified, though void if the injured choose so to treat it. Where consummation never followed the nuptials, the courts are the more readily disposed to set aside the match;[25] but in any event copulation, with knowledge of the fraud, and after removal of all constraint, is an effectual bar to relief.[26] Here, as in all analogous instances, the complainant should appear not to have yielded knowingly and willingly to the situation.[27]

The issue, we may add, is between the offender and the injured party, and third persons have no right to interfere, even though it be alleged that there was intent to defraud them in their own property interests.[28] In fact, marriage stands or falls by public permission with reference only to the marriage parties; and wherever they have legally assumed the relation as one agreeable to themselves, outsiders cannot meddle with the status from outside considerations. Where, too, a marriage has been affected through the fraudulent conspiracy of third persons, the rule is that, unless one of the contracting parties is cognizant of the fraud, the marriage is perfect; but, if cognizant, it is to be deemed the fraud of such party and treated accordingly.[29]

§ 25. Essential of Marriage Celebration.

Eighth. We are now brought to the important subject of the formal marriage celebration. Here there is a wide difference noticeable between general principles and established practice. We are to consider this topic, then, in two separate aspects: (1) as

25. Lyndon v. Lyndon, 69 Ill. 43; Robertson v. Cole, 12 Tex. 356; Cameron v. Malcolm, *supra.*

26. 1 Bishop, Mar. & Div., 5th ed., §§ 214, 215; 1 Burge, Col. & For. Laws, 137; 1 Fraser, Dom. Rel. 229; Scott v. Shueldt, 5 Paige, 43; Leavitt v. Leavitt, 13 Mich. 452; Hampstead v. Plaistow, 49 N. H. 84.

27. A weak, hysterical woman was wooed by a younger cousin who wanted her or her money, and who took her into a church and threatened to blow his own brains out if she did not marry him then and there. The fact that she went through the ceremony without any signs of unwillingness was taken strongly against her, though the marriage was never consummated. Cooper v. Crane (1891), P. 369.

28. McKinney v. Clarke, 2 Swan, 321.

29. Sullivan v. Sullivan, 2 Hag. Con. 238, 246; Rex v. Minshull, 1 Nev. & M. 277; 1 Bishop, Mar. & Div., § 173 *et seq.;* Barnes v. Wyethe, 28 Vt. 41; Bassett v. Bassett, 9 Bush, 696.

to marriage observance in the absence of civil requirements; (2) as to marriage observance under the statutes now in force in England and America.

It is to be premised, however, by way of enlarging upon the idea of perfect and imperfect consent suggested under the last head, that some form of marriage promise, some ceremony, however slight, has always been deemed essential to the validity of marriage. The common language of the books is that, in the absence of civil regulations to the contrary, marriage is a contract, and nothing but mutual consent is required. And the old maxim of the Roman law is quoted to support this view: *Nuptias non concubitus, sed consensus, facit.*[30] But is there not an ambiguity in the use of such language? For it is material to ask whether *consensus,* or *consent,* is used in the sense of simple volition or an expression of volition. We maintain that the latter is the correct legal view; and that it should be said that the law requires in such cases *a simple expression of mutual consent,* and no more. For the very definition of marriage implies that there should be not only the consenting mind, but an expression of the consenting mind, by words or signs, which expression in proper form constitutes in fact the marriage agreement. It is in this sense that we shall apply the terms *formal* and *informal* to marriage in the following sections.

Here, however, we mean to distinguish between the promise of marriage in the future, such as involves a mere engagement to marry and renders one liable in breach of promise suits; and such promises as justify the inference that there is a marriage.

§ 26. Same Subject; Informal Celebration.

(1) To constitute a marriage, then, where there are no civil requirements, or, in other words, to constitute an informal marriage,— words clearly expressing mutual consent are sufficient without other solemnities. Two forms of consent are mentioned in the books: the one, consent *per verba de præsenti,* with or without consummation; the other consent *per verba de futuro,* followed by consummation.[31] Some writers have added a third form of

30. See 2 Kent, Com. 86, 87; Co. Litt. 33a; 1 Bishop, Mar. & Div., §§ 218-267; Gatto v. Gatto, — N. H. —, 106 A. 493 (consummation does not establish the validity of a marriage to which there was no consent).

31. Swinb. Spousals, 2d ed., 8; 2 Burn, Ec. Law, Phillim. ed., 455e; Lord Cottenham, in Stewart v. Menzies, 2 Rob. App. Cas. 547; 1 Bishop, Mar. & Div., 5th ed., § 227; Green v. Green, — Fla. —, 80 So. 739; Love v. Love, — Ia. —, 171 N. W. 257; Edmondson v. Johnson, — Tex. Civ. App. —, 207 S. W. 586.

consent,— by habit and repute; but this is, very clearly, nothing more than evidence of consummated marriage amounting to a presumption conclusive enough for the purpose at hand.[32] So, too, there is reason to suppose that the marriage *per verba de futuro* is of the same sort as the former; marriage *per verba de præsenti* constituting the only real marriage promise, while consummation following *de futuro* words of promise raises simply a legal presumption, not probably conclusive, that words *de præsenti* afterwards passed between the parties. The copula is no part of the marriage; it only serves to some extent as evidence of marriage.[33] *Consensus, non concubitus,* is the maxim of the civil, ecclesiastical, and common law alike.[34]

Informal celebration constitutes marriage as known to natural and public law. The English canon law, as it stood previous to the Council of Trent, the law of Scotland, and in various European countries, the law of some of the United States, and perhaps the common law of England, all dispense with the ceremonial observances of formal marriage.[35] Informal marriage is to be sustained

32. Lord Selbourne, in the case of De Thoren v. Attorney-General, 1 H. L. App. 686, confirms this view. See also Breadalbane's Case, L. R. 1 H. L. Sc. 182; Wilson v. Burnett, 172 N. Y. S. 673.

33. Port v. Port, 70 Ill. 484; 1 Bishop, Mar. & Div., 5th ed., §§ 228, 254; Jackson v. Winne, 7 Wend. 47; Dumaresly v. Fishly, 3 A. K. Marsh. 368, 372; Peck v. Peck, 12 R. I. 485; Walton v. Walton, — Tex. Civ. App. —, 203 S. W. 133.

34. Dalrymple v. Dalrymple, 2 Hag. Con. 54; 4 Eng. Ec. 485, 489; Shelf., Mar. & Div. 5-7. But the California Civil Code now provides that consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, and obligations. Sharan v. Sharon, 79 Cal. 663.

35. Informal marriage has been recognized to a greater or less extent in the United States. Dickerson v. Brown, 49 Miss. 357; Hutchins v. Kimmell, 31 Mich. 126; Port v. Port, 70 Ill. 484; Lewis v. Ames, 44 Tex. 319; Dyer v. Brannock, 66 Mo. 391; Campbell v. Gullat, 43 Ala. 57; Askew v. Dupree, 30 Ga. 173; Hynes v. McDermott, 91 N. Y. 451; White v. White, 82 Cal. 427. But Maryland repudiates the doctrine of informal marriages. Denison v. Denison, 35 Md. 361; as by force of statute or otherwise, do certain other States. See 1 Bishop, § 279; Estill v. Rogers, 1 Bush, 62; Holmes v. Holmes, 1 Abb. (U. S.) 525; Robertson v. State, 42 Ala. 509; State v. Miller, 23 Minn. 352; Commonwealth v. Munson, 127 Mass. 459; State v. Hodgskins, 19 Me. 155; Schouler, Hus. & Wife, §§ 31-34; Tholey's Appeal, 93 Penn. St. 36; Stimson, § 6101; Beneficial Association v. Carpenter, 17 R. I. 720; § 28, *post.* And see Dysart Peerage Case, 6 App. Cas. 489 (1881). "By the common law, if the contract be made *per verba de presenti*, it is sufficient evidence of marriage; or if made *per verba de futuro cum copula*, the *copula* would be presumed to have been allowed on the faith of the mar-

on the theory that an institution of such fundamental importance to our race ought to be good independently of, and prior to, the formal requirements which human government imposes at an advanced stage of society. But, as we shall see, the marriage acts now in force in England and many of the United States render certain solemnities, religious or secular, indispensable. Most of the continuous decisions relating to informal marriages (prior to 1870 at least) are therefore to be found in the Scotch reports, where the general doctrine has been pretty fully discussed. And the great, the almost insuperable, difficulty which presents itself at the outset in such cases is thus clearly indicated by Lord Stowell in *Lindo* v. *Belisario:* "A marriage is not every carnal commerce; nor would it be so even in the law of nature. A mere carnal commerce, without the intention of cohabitation and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation,— that, in a state of nature, would be a marriage; and, in the absence of all civil and religious institutions, might safely be presumed to be, as it is properly called, *a marriage in the sight of God.*"[36] Did parties therefore coming thus together mean fornication, or did they mean marriage?

Here it is seen that there should not only be words of promise, but that they should be uttered with matrimonial intent. Not even is a solemn companionship assumed on other fundamental conditions than those which public policy assigns to the institution a marriage of this character.[37] To ascertain the purpose of the

riage promise, so that at the time of the *copula* the parties accepted each each other as husband and wife. On this subject the maxim of the law is inexorable, that it is the consent of parties, and not their concubinage, that constitutes valid marriage. The well-being of society demands a strict adherence to this principle." Hebblethwaite v. Hepworth, 98 Ill. 126, 132. And see Mathewson v. Phoenix Iron Foundry, 20 Fed. Rep. 281, which sustains the common-law validity of informal marriage. Hughes v. Kano, — Okla. —, 173 P. 447; Coleman v. James, — Okla. —, 169 P. 1064; McDaniels v. McDaniels, 5 Alaska, 107; Wilson v. Burnett, 172 N. Y. S. 673; Love v. Love, — Ia. —, 171 N. W. 257; Great Northern Ry. Co. v. Johnson (Minn. and Mo.), 254 F. 683; *In re* Sheedy's Estate, 175 N. Y. S. 891; Hamlin v. Grogan, U. S. C. C. A. Mo., 257 F. 59.

36. 1 Hag. Con. 216; 4 Eng. Ec. 367, 374. See 1 Bishop, Mar. & Div., 5th ed., §§ 216-267, and cases cited; 2 Kent, Com. 86 and *n.;* 1 Fraser, Dom. Rel. 149, 184, 187, 212.

37. As where a man and woman made in presence of witnesses a "co-partnership" contract in writing to live together "so long as mutual affection shall exist." Peck v. Peck, 155 Mass. 479.

parties in each case, the courts will look at all the circumstances, and even admit parol evidence to contradict the terms of a written contract,— in this respect modifying the ordinary rules of evidence. For writings of matrimonial acknowledgment may have been interchanged as a blind or cover for some scheme well understood between the parties.[38] Or again by way of jest.[39] But, in cases of doubt, the rule is to sustain the marriage as lawful and binding, as every presumption is to be taken in favor of the validity of a marriage.[40] If there has been continued intercourse between the parties, this presumption becomes of course still stronger.[41] And if promises were exchanged while one acted in good faith and in earnest, the other is not permitted to plead a mental reservation.[42]

Hence we may observe, generally, that a betrothal followed by copulation does not make this informal marriage a legal one, when the parties looked forward to a formal marriage ceremony, and did not agree to become husband and wife without it.[43] If, too, a woman, in surrendering her person to a man, is conscious that she is committing an act of fornication instead of consummating such a marriage, the copula cannot, for her sake, be connected with any previous words of promise so as to constitute a marriage.[44] And a union once originating between man and woman, purely illicit in its character, and voluntarily so, there must appear some formal and explicit agreement between the parties thereto, or a marriage ceremony, or some open and visible change in their habits and

38. Dalrymple v. Dalrymple, 2 Hag. Con. 54, 105; 4 Eng. Ec. 485, 508, 509, cited in 1 Bishop, Mar. & Div., 5th ed., §§ 239-241.

39. *Ib.; supra,* § 14; McClurg v. Terry, 21 N. J. Eq. 225; Clark v. Field, 13 Vt. 460.

40. Appeal of Eva, — Conn. —, 104 A. 238; Price v. Tompkins, 177 N. Y. S. 548; Marone v. Marone, 174 N. Y. S. 151; *In re* Hilton's Estate, — Pa. —, 106 A. 69; Price v. Tompkins, 177 N. Y. S. 548; Kinney v. Tri-State Telephone Co., — Tex. Civ. App. —, 201 S. W. 1180; Copeland v. Copeland, — Okla. —, 175 P. 764; Price v. Tompkins, 171 N. Y. S. 844, 172 N. Y. S. 915 (although prior marriage of one of the parties is claimed); *In re* Simms' Estate, 172 N. Y. S. 670; Copeland v. Copeland, — Okla. —, 175 P. 764; Hamlin v. Grogan, U. S. C. C. A. Mo., 257 F. 59.

41. Wilson v. Burnett, 172 N. Y. S. 673; Love v. Love, — Iowa —, 171 N. W. 257; Smith v. People, — Colo. —, 170 P. 959; Jackson v. Claypool, 179 Ky. 662, 201 S. W. 2; Coleman v. James, — Okla. —, 169 P. 1064; Linsey v. Jefferson, — Okla. —, 172 P. 641; Wells v. Allen, — Cal. App. —, 177 P. 180; Reynolds v. Adams, — Va. —, 99 S. E. 695.

42. *Ib.* And see 1 Fraser, Dom. Rel. 213; Lockyer v. Sinclair, 8 Scotch Sess. Cas. N. S. 582.

43. Peck v. Peck, 12 R. I. 485; Beverson's Estate, 47 Cal. 621; Nelson v. State, — Tex. Cr. App. —, 206 S. W. 361.

44. Port v. Port, 70 Ill. 484.

relations, pointing to honest intentions, before their alliance can be regarded as converted into either a formal or an informal marriage;[45] but the mere fact that the relationship was meretricious in the beginning will not prevent the establishment of a common-law marriage.[46]

Nor is the issue between informal marriage and illicit intercourse to be concluded by the conduct of the pair towards society. They may, for convenience or decency's sake, hold themselves out to third persons as man and wife, while yet sustaining at law, and intentionally, a purely meretricious relation.[47]

And yet a proper regard for the real intention of the cohabiting pair encourages often the presumption of innocence and good faith, even where the relation assumed was an illegal one. Supposing two persons to have made an informal marriage, in the mistaken belief that the former spouse of one of them was already dead, or that some sentence of divorce left them, in like manner, free to unite. This case should be distinguished from that of some original understanding for a mere carnal commerce. And if the impediment becomes removed in the course of their cohabitation under such circumstances, and the pair live continuously together as man and wife, no new ceremony, agreement, or visible change in their relation would probably be deemed requisite to establish matrimonial consent subsequent to the removal of the impediment; for here the original intention continues, but in the case of carnal commerce necessarily changes, in order that an honest relation may be presumed.[48]

Disbelief in ceremonials, or conscientious scruples, may be

45. See Floyd v. Calvert, 53 Miss. 37; Duncan v. Duncan, 10 Ohio St. 181; Hunt's Appeal, 86 Penn. St. 294; Williams v. Williams, 46 Wis. 464; Barnum v. Barnum, 42 Md. 251. Cohabitation and reputation afford no presumption of marriage under such circumstances. Appeal of Reading Fire Ins. & Trust Co., 113 Penn. St. 204. Perhaps the Scotch law is less emphatic on this point. It is stated in Breadalbane's Case, L. R. 1 H. L. Sc. 182, that a connection beginning as adulterous may, on ceasing to be so, become matrimonial by consent, and evidenced by habit and repute, without a public act. Thompson v. Clay, 120 Miss. 190, 82 So. 1; Gorden v. Gorden, 283 Ill. 182; 119 N. E. 312; Wilson v. Burnett, 172 N. Y. S. 673.

46. Knecht v. Knecht, — Pa. St. —, 104 A. 676; Schaffer v. Krestovnikow, — N. J. —; 105 A. 239, 103 A. 913, 102 A. 246.

47. Howe's Estate, Myrick Probate, 100.

48. See De Thoren v. Attorney-General, 1 H. L. App. 686, where the impediment followed divorce; here it was held, in conformity with the rule above stated, that matrimonial consent after the marriage impediment was removed might be presumed.

alleged in support of an informal marriage, by way of preference, where such latter marriage is held lawful, and the parties mutually contracted with the view of a lawful union.[49]

§ 27. Same Subject; Informal Celebration.

Words of present promise, in order to constitute an informal marriage, must contemplate a present, not a future, assumption of the status. And herein lies a difficulty: that of discriminating between actual marriage and what we now commonly term an engagement. If the agreement be by words of present promise,— as if the parties should say, "We agree to be henceforth man and

49. See Bissell v. Bissell, 55 Barb. 325. *Aliter,* where statutes positively require a ceremonial marriage. See *post,* § 28.

An interesting Scotch case illustrates the painful uncertainty which hangs about these informal marriages. A baronet of forty, and a bachelor, whose dissolute habits were notorious, had somewhat intimate relations with the family of a man who made fish-tackles. Entertained at the latter's house on a birthday occasion, with a champagne supper, after which allusion was made by the host to the bad name he was getting with having the baronet so much among his daughters, the titled guest offered to shut people's mouths; he was poor and could not marry now, he said, but would marry after Scotch fashion. Then, kneeling before one of the daughters, a damsel of sixteen, he took a ring from his pocket, placed it upon her third finger, and said to her, "Maggie, you are my wife before Heaven, so help me, O God!" and the two kissed each other. The daughter said, "Oh, Major!" and put her arms around his neck. The baronet and the daughter were then "bedded" according to the old Scotch fashion. They lived together for some weeks after this celebration, and met at various times, but there appears to have been no continuous habitation. In about thirteen months Maggie had a boy, whom she registered as illegitimate; and some eighteen months later still, the baronet died. The parties to this hasty and apparently unpremeditated union had not meantime represented themselves as husband and wife; and as for the baronet, he denied to others that such relation existed, until, when lying at the point of death in delirium tremens, he seemed doubtfully to admit it. Now, here was an informal marriage, with words of suitable import, solemn and precise, followed by consummation. Supposing this ceremony to have been with marriage intention, there was no reason for disputing its validity; nor, indeed on the girl's behalf, provided she took all in seriousness, even though the baronet himself jested. To be sure, he might have been maudlin at the moment; on which point, however, the case did not turn. The British House of Lords reversed the decision of the Scotch Court of Sessions, mainly upon circumstantial proof that both parties by behavior subsequent to the ceremony repudiated its force, and that neither, in fact, had been in earnest. The present issue involved the inheritance of the baronet's estate at some lapse from his death. Both parents of the girl were now dead; the baronet had begotten illegitimate offspring during his life elsewhere; and instead of asserting upon his death, as she might, that this boy was his lawful child, Maggie had at first claimed only a bastard's support for him. Steuart v. Robertson, L. R. 2 H. L. Sc. 494.

wife," — the marriage is perfect. The form of expression is not material.[50] And Swinburne says that though the words should not of themselves conclude matrimony, yet the marriage would be good if it appeared that such was the intent.[51] The proposal of one must be actually accepted by the other; yet such acceptance may be indicated by acts, such as a nod or courtesy. The mutual consent may be expressed orally or in writing.[52] Written promises are of course unnecessary; though the reported cases show frequently letters or other writings interchanged, from which the intent was gathered. And in the celebrated Scotch case of *Dalrymple* v. *Dalrymple*, a marriage promise was established from the successive united acknowledgments of the parties as man and wife, the writings having been preserved by the lady and produced by her at the trial. In this case the principle was sustained, that words importing secrecy or alluding to some future act or public acknowledgment, when superadded to words of present promise, do not invalidate the agreement.[53] More uncertainty arises in matrimonial contracts where a condition inconsistent with marriage is superadded; as if parties should agree to live together as man and wife for ten years; but *bona fide* intent may be fairly presumed where there are no special circumstances to throw light upon the conduct of the parties.[54]

Marriage by words of future promise is consummated when two persons agree to marry at some future period and afterwards actually do cohabit. The foundation of this doctrine is the presumption that the parties meant right rather than wrong, and hence that copulation was permitted on the faith of the marriage promise. But in this class of cases it is requisite that the promise *de futuro* should be absolute and mutual and in good faith. Mere courtship

50. Bishop, Mar. & Div., 5th ed., §§ 227, 229; 1 Fraser, Dom. Rel. 145-149.

51. Swinb. Spousals, 2d ed., 87.

52. See Sapp v. Newsom, 27 Tex. 537, where marriage by means of mutually executing a bond or contract is sustained under the old law, which was of Spanish origin. But cf. State v. Miller, 23 Minn. 352.

53. Dalrymple v. Dalrymple, 2 Hag. Con. 54; 4 Eng. Ec. 485; McInnes v. More, Ferg. Consist. Law Rep. 33; Hoggan v. Craigie, McLean & Rob. 942.

54. See 1 Bishop, Mar. and Div., 5th ed., §§ 245-250; Currie v. Turnbull, Hume, 373; 1 Fraser, Dom. Rel. 154. See Hamilton v. Hamilton, 9 Cl. & F. 327; Hantz v. Sealy, 6 Binn. 405; Robertson v. Cowdry, 2 West. Law Jour. 191; Peck v. Peck, 155 Mass. 479. Bissell v. Bissell, 55 Barb. 325, shows an interesting state of facts, upon which it was decided that the marriage was valid.

does not suffice, though followed by carnal intercourse.[55] Nor in general do words of promise with immoral conditions annexed. It is admitted that no familiarities short of the copula will convert such loose espousals into matrimony.[56] It is not clear whether cohabitation after *verba de futuro* ever raises a conclusive presumption of marriage at law or not; unquestionably the more reasonable doctrine, however, is that it does not, and that the intent of the parties may be shown as in other cases.[57] But innocence will be inferred, if possible, rather than guilt.[58] So it has been said that where a legal impediment exists to a marriage between persons living in licentious intercourse, as the impediment sinks the status rises.[59] It is the promise to marry hereafter on which breach of promise suits are founded, often with accompanying proof that sexual intercourse was permitted on the faith of the promise; here there was no marriage, but an engagement to marry.[60] In New York this doctrine of marriage by words *de futuro* is utterly repudiated; and in other States it is maintained quite broadly that all informal marriages were unknown to the English common law.[61] This last has been long a mooted point in the courts, and will ever remain so; but whatever may have been the historical fact, certain it is that the necessity of a more formal observance of marriage has

55. Reid v. Laing, 1 Shaw, App. Cas. 440; Morrison v. Dobson, 8 Scotch Sess. 347, cited 1 Bishop, § 253; Breadalbane's Case, L. R. 1 H. L. Sc. 182; Stewart v. Menzies, 2 Rob. App. Cas. 547, 591; 1 Fraser, Dom. Rel. 188; Reg. v. Millis, 10 Cl. & F. 534, 780; Peck v. Peck, 12 R. I. 485; Beverson's Estate, 47 Cal. 621; Dumaresly v. Fishly, 3 A. K. Marsh. 368; 1 Bishop, Mar. & Div., 5th ed., §§ 253-265, and other cases cited; Port v. Port, 70 Ill. 484.

56. 1 Bishop, § 253.

57. See Volume II, as to breach of promise. Seduction under breach of promise does not constitute a marriage. See, too, Morrison v. Dobson, 8 Scotch Sess. 347.

58. See Cheney v. Arnold, 15 N. Y. 345; Duncan v. Duncan, 10 Ohio St. 181; and comments of Mr. Bishop, §§ 255-258; Reg. v. Millis, 10 Cl. & F. 534; Swinb. Spousals, 2d ed., 225, 226; Robertson v. State, 42 Ala. 509.

59. 1 Bishop, Mar. & Div., 5th ed., § 248; De Thoren v. Attorney-General, 1 H. L. App. 686.

60. Schouler, Hus. & Wife, §§ 40-51.

61. Cheney v. Arnold, 15 N. Y. 345. But see Bishop, §§ 255-258; Bissell v. Bissell, 55 Barb. 325. And see Denison v. Denison, 35 Md. 361; Holmes v. Holmes, 1 Abb. (U. S.) 525; Duncan v. Duncan, 10 Ohio St. 181; Port v. Port, 70 Ill. 484. The opinion of Lord Stowell, in the case of Dalrymple v. Dalrymple, to which we have alluded, is an admirable exposition of the law of informal marriages. It is a masterpiece of judicial eloquence and careful research. Continuous cohabitation within Scotland establishes marriage in Scotch law, but cohabitation outside Scotland will not constitute marriage. Dysart Peerage Case, 6 App. Cas. 489.

been almost universally recognized; and the very words, "marriage in the sight of God," so familiar to the readers of the Scotch matrimonial law, not only import the peculiar embarrassments which attend the justification of such loosely contracted alliances before the world, but attest the solemn character of this institution.[62]

§ 28. Same Subject; Formal Celebration.

(2) All the learning of informal marriages, if there was ever much of it, was swept out of the English courts when formal religious celebration was prescribed by positive statute. Ceremonials had long been required by those canons upon which the ecclesiastical law was based. Lord Hardwicke's Act, passed in the reign of George II.[63] This act required all marriages to be solemnized in due form in a parish church or public chapel, with previous publication of the banns; and marriages not so solemnized were pronounced void, unless dispensation should be granted by special license. Some harsh provisions of this act were relaxed in the reign of George IV., but soon re-enacted.[64] More recent legislation permits of a civil ceremonial before a register, to satisfy such as may have conscientious scruples against marriage in church,[65] and has legalized marriage in Nonconformist chapels.[66] Such, too, is the general tenor of legislation in this country; the law justly regarding civil observances and public registration sufficient for its own purposes, while human nature clings to the religious ceremonial.[67]

Either celebration before a clergyman or with the participation of some one of such civil officers as the statute may designate is therefore at the option of parties choosing at the present day to marry. This is the law of England and America. And the only controversies ever likely to occur in our courts would be where the language of the statutes in some particular State left it doubtful whether marriages celebrated informally were to be considered abso-

62. For a case arising on an indictment against a man for cohabiting with a woman without formal marriage, but under a special contract for a life-union and joint accumulation of property and care of children, see State v. Miller, 23 Minn. 352. And see Commonwealth v. Munson, 127 Mass. 459.

63. 26 Geo. II., ch. 33 (1753).

64. 3 Geo. IV.; 4 Geo. IV., ch. 76.

65. See 6 & 7 Will. IV., ch. 85 & ch. 88; 7 Will. IV., and 1 Vict., ch. 22, and 3 & 4 Vict., ch. 92.

66. The Marriage Act, 1898 (61 & 62 Vict., ch. 58); 62 & 63 Vict., ch. 27; 1 Edw. VII., ch. 23; 3 Edw. VII., ch. 26.

67. See 2 Kent, Com. 88-90; 1 Bishop, Mar. & Div., 5th ed., § 279; Stimson's Am. Stat. Law, § 6120.

lutely null. It is to be borne in mind that Lord Hardwicke's Act is of too recent a date to be considered as part of our common law. Was, then, marriage *in facie ecclesiæ* essential in England before the passage of this act? It is admitted that the religious marriage celebration was customary previous to the Reformation. It is further allowed that the church, centuries ago, created an impediment, now obsolete, called "precontract," the effect of which was that parties engaged to be married were bound by an indissoluble tie, so that either one could compel the other to submit at any time to the ceremonial marriage. But whether precontract rendered children legitimate, and carried dower, curtesy, and the other incidents of a valid marriage, is not clear. In 1844 the question, whether at the common law a marriage without religious ceremony was valid, went to the English House of Lords, and resulted in an equal division.[68] And, curiously enough, such was the fate of a similar case in this country before the highest tribunal in the land.[69] So that we may fairly consider the law on this point as doubly unsettled.[70]

Among most nations and in all ages has the celebration of marriage been attended with peculiar forms and ceremonies, which have partaken more or less of the religious character. Even the most barbarous tribes so treat it where they hold to the institution at all. The Greeks offered up a solemn sacrifice, and the bride was led in great pomp to her new home. In Rome, similar customs prevailed down to the time of Tiberius. Marriage, it is true, degenerated afterwards into a mere civil contract of the loosest description, parties being permitted to cohabit and separate with

68. Reg. v. Millis, 10 Cl. & F. 534.

69. Jewell v. Jewell, 1 How. (U. S.) 219.

70. See full discussion of this question, with authorities, in note to 2 Kent, Com. 87; also in 1 Bishop, Mar. & Div., §§ 269-282; Cheney v. Arnold, 15 N. Y. 345. The American doctrine is, that the intervention of one *in holy orders* was not essential at common law. This is the view of Chancellor Kent, Judge Reeve, and Professor Greenleaf, as expressed in their respective text-books, also the general current of American decisions. Mr. Bishop confirms these conclusions while suggesting new reasons for such an American doctrine; as for instance, that in these colonies the attendance of one in holy orders, and more especially of an ordained clergyman of the established church, could not always be readily procured. See 1 Bishop, Mar. & Div., 5th ed., §§ 279-282, and decisions collated; 2 Kent, Com. 87; Reeve, Dom. Rel. 195 *et seq.*; 2 Greenl. Ev., § 460.

But in several States the contrary is declared to be the common law. 1 Bishop, *ib.* And statutory forms are declared requisite, and the doctrines of informal marriage denied more or less emphatically, as the foregoing pages have shown. *Supra*, § 26, note 49.

almost equal freedom.[71] The early Christians, there is reason to suppose, treated marriage as a civil contract, yielding, perhaps, to the prevailing Roman law. Yet the teachings of the New Testament and church discipline gave peculiar solemnity to the relation. And religious observances must have prevailed at an early date, for in process of time marriage became a sacrament. In England, centuries later, it needed only Lord Hardwicke's Act to apply statute law to a universal practice; for although, in the time of Cromwell, justices of the peace were permitted to perform the ceremony, popular usage by no means sanctioned the change. Informal marriages are uncommon even in Scotland, where the civil law prevails. In our own country it is not surprising that local jurisprudence should have exhibited some signs of reaction against ancient canon and kingly ordinance. Yet, even with us, the almost universal custom repudiates informal and civil observances; and, secured in the privilege of choosing prosaic and business-like methods of procedure, Christian America yields its testimony in favor of marriage *in facie ecclesiæ*.[72]

A marriage once proven to exist is presumed to continue until the contrary is proved.[73]

§ 29. Same Subject; Formal Celebration.

But, out of consideration for what may be termed the public, or natural and theoretical law of marriage, many American courts have, to a very liberal extent and beyond all stress of necessity, upheld the informal marriage against even legislative provisions for a formal celebration. Marriage being a matter of common right, it is lately held by the highest tribunal for harmonizing the rule of States, that, unless the local statute which prescribes regu-

71. Smith's Dict. Antiq., "Marriage."

72. See 2 Kent, Com. 89, and authorities cited.

We do not mean to imply that marriage is a sacrament, or that religious ceremonies are essential to its due observance. We are speaking only of the universal testimony as to the fitness of peculiar and in general religious observances. Judge Reeve, exhibiting his contempt for "Popish" practices, says, "There is nothing in the nature of a marriage contract that is more sacred than that of other contracts, that requires the interposition of a person in holy orders or that it should be solemnized in church." Reeve, Dom. Rel. 196. At the time he wrote, was not the practice prevailing in New England contrary to his theory, as it was before and as it remains still? And who has ever proposed in modern times to perform a business contract in church?

73. *In re* Caltabellotta's Will, 171 N. Y. S. 82, 183 App. Div. 753.

lations for the formal marriage ceremony positively directs that marriages not complying with its provisions shall be deemed void, the informal marriage by words of present promise must be pronounced valid, notwithstanding statutory directions have been disregarded.[74]

Whether we must absolutely accept this doctrine or not, in its full pernicious extent, and thus put legislators to the use of express words of nullity in statutes which might otherwise as well have been omitted, the main purpose of enforcing upon civilized and populous communities marriage rites appropriate to so solemn an institution being surely desirable, it will be readily conceded that English and American tribunals tend, in construing the marriage acts, to uphold every marriage, if possible, notwithstanding a noncompliance with the literal forms. And this is right; for while formal celebration is a shield to honest spouses and their posterity, rigor in the details of form, especially in inconvenient or trivial details, or those which it is incumbent rather upon third persons to respect, exposes them to new dangers. Thus is it as concerns place;[75] and as to the due proclamation of banns, collateral points concerning ecclesiastical authority are inappropriate.[76] Presumptions cannot be indulged against the continuance of a *bona fide* marriage relation.[77] A consistent reputation of being married carries its full weight as to cohabiting parties, who appear to have lived together as husband and wife,[78] but this presumption

74. Meister v. Moore, 96 U. S. 76, citing this as the rule in Michigan; Hutchins v. Kimmell, 31 Mich. 128; 88 Mich. 279; Londonderry v. Chester, 2 N. H. 268; Hebblethwaite v. Hepworth, 98 Ill. 126; Kitzman v. Kitzman, 167 Wis. 308, 166 N. W. 789 (marriage of epileptic voidable only); Thompson v. Thompson, — Tex. Civ. App. —, 202 S. W. 175, 203 S. W. 939; Melcher v. Melcher, 102 Neb. 790, 169 N. W. 720; see Meagher v. Harjo, — Okla. —, 179 P. 757 (Indian custom).

75. Queen v. Cresswell, 1 Q. B. D. 446. And see Stallwood v. Tredger, 2 Phillim. 287.

76. See Hutton v. Harper, 1 H. L. App. 464; Sichel v. Lambert, 15 C. B. N. S. 781; Prowse v. Spurway, 26 W. R. 116; Cannon v. Alsbury, 1 A. K. Marsh. 76; Askew v. Dupree, 30 Ga. 173; Blackburn v. Crawfords, 3 Wall. 175; Holmes v. Holmes, 6 La. 463; Stevenson v. Gray, 17 B. Monr. 193.

77. Wiseman v. Wiseman, 89 Ind. 479.

78. Lauderdale Peerage, 10 App. Cas. 692; Hynes v. McDermott, 91 N. N. 451. See Bartlett v. Musliner, 28 Hun, 235; Northrop v. Knowles, 52 Conn. 522. The presumption of marriage arising from matrimonial cohabitation, declaration of the parties, and reputation, is not rebutted by proof of a subsequent actual marriage. Betsinger v. Chapman, 88 N. Y. 487.

Marriage certificates and copies of marriage records are treated with especial favor as proof. Homans v. Corning, 60 N. H. 418; State v. Gerrish,

will not arise unless the reputation is public and general, and not where known only to a few people.[79] And though the parties may have failed to observe certain formalities of license or registry, their marriage will generally be held good in both England and this country, even though the magistrate or clergyman be subject himself to a penalty for the irregularity.[80] On the other hand, our ceremonial statutes of marriage, which require fulfillment at all, must, in fundamental respects at all events, be complied with. Thus, the essence of formal marriage seems to consist in the performance of the ceremony by or in the presence of some responsible third person. And hence, unless parties can take refuge in natural law and an informal marriage, they are not permitted to tie their own knot.[81]

Where a proper formal marriage takes place the marriage is legal although there was no coition.[82]

§ 30. Consent of Parents and Guardians.

The consent of parents and guardians is one of those formalities which marriage celebration acts now commonly prescribe in the

78 Me. 20. The testimony of the person who performed the ceremony or of some witness present is otherwise desirable. The presumptions are in favor of *bona fide* marriage, while reputation alone will not establish that no marriage existed. See *In re* Meade's Estate, — W. Va. —, 97 S. E. 127 (presumption rebutted); see Winston v. Morrisette, — Ala. —, 82 So. 135; Bolmer v. Edsall, — N. J. Ch. —, 106 A. 646; Beckermeister v. Beckermeister, 170 N. Y. S. 22; Reynolds v. Adams, — Va. —, 99 S. E. 695.

79. *In re* Hilton's Estate, — Pa. —, 106 A. 69.

80. Upon this point, see, further, Vol. II, Marriage; 1 Bishop, Mar. & Div., §§ 283, 287. There are various local statutes to the effect that where parties consummate a marriage in good faith before a justice of the peace or minister, &c. the marriage shall not be deemed void on account of the want of authority of such person. Stimson, Am. Stat. Law, § 6137. And a marriage among the Friends or the Jews is also allowed to be solemnized after their peculiar customs. *Ib.*, § 6135; Martin v. Otis, — Mass. —, 124 N. E. 294; Julian v. Daniel, 175 N. C. 549, 95 S. E. 907.

81. Commonwealth v. Munson, 127 Mass. 459. And see Milford v. Worcester, 7 Mass. 48; Tholey's Appeal, 93 Penn. St. 36; Norcross v. Norcross, 155 Mass. 425. But in Beamish v. Beamish, 1 Jur., N. S., Part II. 455, it was held in Ireland that a clergyman might marry himself. See 1 Bishop, § 289. A verbal reservation just previous to a marriage ceremony by one of the parties is not readily supposed to invalidate the marriage. Brooke v. Brooke, 60 Md. 524. See Johnson v. Dunlap, — Okla. —, 173 P. 359 (marriage of Indians by Indian customs sustained). *In re* Meade's Estate, — W. Va. —, 97 S. E. 127 (marriage void unless solemnized as required by statute); Meton v. State Industrial Insurance Department, — Wash. — , 177 P. 696.

82. Thompson v. Thopmson, — Tex. Civ. App.—, 202 S. W. 175, 203 S. W. 939 (immediate separation); Martin v. Otis, — Mass. —, 124 N. E. 294.

interest of society, as they do banns or the procurement of a license generally for better publicity. Such consent was not necessary to perfect a marriage at the common law. But Lord Hardwicke's Act made the marriage of minors void without consent of parents or guardians first obtained.[83] This proved intolerable. A *bona fide* and apparently regular marriage was in one instance set aside, after important rights had intervened, for no other cause than that an absent father, supposed to be dead, but turning up unexpectedly, had failed to bestow his permission, and the mother had acted in his stead.[84] Gretna Green marriages, on Scotch soil, became the usual recourse for children with unwilling protectors.[85] Hence the law was afterwards modified, so that, without the requisite consent, marriages, although forbidden, might remain valid;[86] and these features are found to characterize most marriage acts in the different States of this country.[87] Clandestine marriages are doubtless to be discouraged, and the law will willingly inflict penalties upon clergymen, magistrates, and all others who aid the parties in their unwise conduct, the penalty serving in a measure as indemnification to the parent or guardian; but experience shows that legislation cannot safely interpose much further.[88]

Under such statutes (which, however, vary in language and scope in different States), it has been held that if a minor has both parent and guardian, the guardian should consent in preference; though it might appear more proper to consider which has the

83. 26 Geo. II., ch. 33. See 2 Kent, Com. 85; Rex v. Hodnett, 1 T. R. 96; 1 Bishop, Mar. & Div., 5th ed., §§ 293-295, and cases cited.

84. Hayes v. Watts, 2 Phillim. 43.

85. Stat. 19 & 20 Vict., ch. 96, to stop these runaway matches, enacts that no irregular marriage contracted in Scotland shall be valid unless one of the parties had his or her usual residence in Scotland, or lived there for 21 days preceding the marriage. Lawford v. Davies, 39 L. T. N. S. 111.

86. Rex v. Birmingham, 8 B. & C. 29; Shelf. Mar. & Div. 309-322; Stat. 4 Geo. IV., ch. 76.

87. 1 Bishop, Mar. & Div., §§ 341-347, and cases cited; Smyth v. State 13 Ark. 696; Wyckoff v. Boggs, 2 Halst. 138; Bollin v. Shiner, 2 Jones (Pa), 205. And see Wood v. Adams, 35 N. H. 32; Kent v. State, 8 Blackf. 163; Askew v. Dupree, 30 Ga. 173; Fitzpatrick v. Fitzpatrick, 6 Nev. 63; Adams v. Cutright, 53 Ill. 361; State v. Dole, 20 La. Ann. 378. The language of some statutes leaves the point in doubt as to whether marriage without the consent of parents renders the marriage void, or only subjects offending parties, including the person who performs the ceremony, to a penalty. But the latter is, of course, to be presumed rather than the former. People v. Ham, 206 Ill. App. 543; Bays v. Bays, 174 N. Y. S. 212.

88. See further, Vol. II, Marriage.

actual care and government of the minor. One who has relinquished the parental control cannot sue for the penalty; but a father's unfitness is not pertinent to the issue of uniting his minor child in marriage without his leave, nor ground for accepting the mother's sole consent instead. In this class of statutes the minister or magistrate who has made himself amenable to the law cannot in general defend on the plea that he acted in good faith. The expression of consent is in some States made a prerequisite to granting the marriage license.[89]

§ 31. Legalizing Defective Marriages; Legislative Marriage.

Defective marriages, we may further observe, have in some instances been legalized by statute; as where parties within the prohibited degrees of consanguinity or affinity have united. So with marriages before a person professing to be a clergyman or justice of the peace, but without actual authority. On principle, in fact, there seems no reason to doubt that any government, through its legislative branch, may unite a willing pair in matrimony, as well as pass general laws for that purpose;[90] unless, as is sometimes found, the State constitution prohibits such enactments. But though legislative divorces are not unfrequent, a legislative marriage is something unknown, not to say uncalled for. And in this country, peculiar questions of fundamental constraint under a written constitution might arise, even where the cure only of a defective marriage was sought by the legislature; inasmuch as the intervening rights of third persons might thereby be prejudiced.[91]

Parties by their course of conduct may be estopped to claim the illegality of a marriage and to lay claim to property based on such illegality.[92]

89. See Volume II, Marriage. The effort of the legislature is to exercise a salutary supervision by requiring a license to be taken out.

90. Brunswick v. Litchfield, 2 Greenl. 28; Moore v. Whittaker, 2 Harring. 50; Goshen v. Richmond, 4 Allen, 458; 1 Bishop, Mar. & Div., 5th ed., §§ 657-659. As to the effect of a Texas statute, which relaxed old requirements in legalizing an irregular marriage, see Rice v. Rice, 31 Tex. 174. See 47 & 48 Vict., ch. 20, which legalizes the marriages of certain members of the Greek church; Carney v. Chapman, 247 U. S. 102, 38 S. Ct. 449, 158 P. 1125; Gardner v. Gardner, — Mass. —, 122 N. E. 308 ("in good faith" defined).

91. As to the proof of a marriage and legal presumptions, see 1 Bishop, Mar. & Div., 5th ed., § 432 *et seq.*; Schouler, Hus. & Wife, §§ 38, 39; *supra*, § 29.

See also promises to marry, Vol. II.

92. Shrader v. Shrader, — Miss. —, 81 So. 227; *In re* Hilton's Estate, — Pa., 106 A. 69.

§ 32. Restraints upon Marriage.

The policy of restraining marriage is treated with disfavor by our law, which on the contrary seems disposed to encourage the institution, though not to the extent practised by some countries of openly promoting its observance, or forcing private inclination in the conjugal direction. Numerous cases, those particularly which construe the provisions of testamentary trusts, have laid it down that the general restraint of marriage is to be discouraged. Accordingly a condition subsequent, annexed by way of forfeiture to a gift, legacy, or bequest, in case the donee or legatee should marry, will be held void and inoperative, as a restraint upon marriage, and so as to both income and capital.[93] But marriage and remarriage are differently viewed in this respect; and it is well settled that forfeiture by condition subsequent in case a widow shall marry again must be upheld as valid, whether that widow be the beneficiary through her husband or some other person. Does the latter rule apply equally to widow and widower, woman and man? Upon full consideration the English chancery held a few years ago, on appeal (reversing the decision of the lower tribunal), that it does.[94]

The latest English decisions, on the whole, do not strenuously resist these restraints upon marriage in testamentary trusts.[95] And it is doubtful whether the rule discouraging restraint of marriage can extend to devises of land; though on principle there should

93. See Bellairs v. Bellairs, L. R. 18 Eq. 510, and cases cited.

94. Allen v. Jackson, 1 Ch. D. 399, reversing s. c. L. R. 19 Eq. 631. See opinion of James, L. J., and authorities cited,—this interesting point being thus raised for the first time.

Rights are equal as to marrying again, so far as widow and widower are concerned, as all will readily admit. The lower court was probably influenced by considerations which medical men adduce, showing that marriage is more essential to a man's continuous well-being than a woman's, and that a widow, on the whole, is less likely to have sufficient reason for marrying again than a man. But this argument, if sound, is perhaps far-fetched, and James, L. J., on appeal, treated the subject more from the aspect of equal rights, as between the sexes, in the disposal of property. No act of parliament or decision of a court, he observed, established any distinction here between the second marriage of man or woman, and he knew of no reason for making it.

95. It is held that a gift to one's widow on condition that she retire immediately into a convent is upon a good condition precedent. Duddy v. Gresham, 39 L. T. N. S. 48. Also, that it is a good condition subsequent which forfeits a gift to one's brother in case he marries "a domestic servant," or one of lower degree, degrading his own family. Jenner v. Turner, 29 W. R. 99.

be no distinction between devises and gifts or bequests in this respect.[96]

§ 33. Marriage in another State or Country.

Both in England and the United States, the general rule of law is, that marriage contracted elsewhere, if valid where it is contracted, is locally valid. And so strongly is the marriage institution upheld the civilized world over, that even though the marrying parties thereby evade the local law, this rule is locally upheld in both countries; unless, at all events, the local statute asserts local public policy to the extent of declaring such marriages void, or the marriage is one deemed "contrary to the law of nature as generally recognized in Christian countries." [97]

So it is the general rule that the *les loci contractus* governs the capacity of the parties and the form of the marriage,[98] while the remedy affecting marriages and their annulment is governed by the law of the forum.[99]

There is authority that a marriage may be contracted by mail, and where a man sends a woman in another State a written offer of marriage, which the woman accepts, the marriage was contracted, and will be governed by the laws of the State where the woman lived.[1]

96. Jones v. Jones, 1 Q. B. D. 279. And see Hogan v. Curtin, 88 N. Y. 162; Schouler, Wills, § 603.

97. Warrender v. Warrender, 2 Cl. & Fin. 488; Sutton v. Warren, 10 Met. 451; Commonwealth v. Graham, 157 Mass. 75, per Field, C. J. As where, for instance, parties go to another State to evade restrictions as to an infant's marrying age, or restrictions following divorce. Under the English "legitimacy declaration act" (21 & 22 Vict., ch. 93) the marriage of a retired British officer to a Japanese woman in 1886, was held valid in Brinkley v. Attorney-General, 15 P. D. 76, as sufficiently a "Christian marriage," upon proof that in Japan marriage is monogamous, and excludes all other spouses. As to recognizing Indian tribal marriages, see Kobogum v. Jackson Iron Co., 76 Mich. 498; La Riviere v. La Riviere, 97 Mo. 80. Cf. as to informal marriages, Norcross v. Norcross, 155 Mass. 425; Meister v. Moore, 96 U. S. 76; *supra*, § 29.

98. Hastings v. Douglass, U. S. D. C. W. Va., 249, F. 378; Powell v. Powell, 207 Ill. App. 292, 118 N. E. 786; Kitzman v. Kitzman, 167 Wis. 308, 166 N. W. 789; Petras v. Petras, — Del. Super. —, 105 A. 835. *Where residents of New York went to* Pennsylvania where they were married and immediately returned to New York where they consummated the marriage it is governed by the law of New York. Bays v. Bays, 174 N. Y. S. 212; Bolmer v. Edsall, — N. J. Ch. —, 106 A. 646; Ogden v. Ogden, 1908 P. 46.

99. Thompson v. Thompson, — Tex. Civ. App. —, 202 S. W. 175, 203 S. W. 939.

1. Great Northern Ry. Co. v. Johnson, U. S. C. C. A., N. D., 254 F. 683.

CHAPTER II.

EFFECT OF MARRIAGE; PERSON OF THE SPOUSE.

§ 34. Law of Husband and Wife; Order of Examination.

When the parties to a lawful marriage have once completed the ceremony, or, as it is said, have executed the contract of marriage, they are admitted into the marriage relation, and their mutual rights and obligations become at once bounded, protected, and enforced by the general law of husband and wife. What that law is will constitute the topic of discussion in this and most succeeding parts of the work.

Our subject will be most conveniently treated by taking up the common-law doctrine first, and thoroughly examining its principles; then passing to the modern or civil-law doctrine for discussion in like manner. First, then, the rights and disabilities of marriage on the coverture scheme; secondly, the rights and disabilities of marriage on the separate existence scheme.

But since these rights and disabilities have varied little, except as to the wife's property, we may here investigate those general

principles of the common law which concern the person of the spouse once and for all.

§ 35. Person of the Spouse; Common-law Principle of Coverture; Baron and Feme.

The general principle of coverture, as defined by Blackstone and other writers, is this: that by marriage the husband and wife become one person in law; that is to say, the very being or legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband, under whose wing, protection, and *cover* she performs everything; and is therefore called in the law-French a *feme covert, fœmina viro co-operta;* is said to be *covert-baron,* or under the protection and influence of her *baron* or lord; and her condition during her marriage is called her *coverture.*[2] For this reason the term applied to the relation of husband and wife in the old books is *baron and feme.* Upon this fundamental principle depend, at the common law, the general rights, duties, and disabilities of marriage. But this very definition shows inaccuracy, to say nothing of unfairness of application. Here are two conflicting notions: one that the existence of the wife is actually lost or suspended; the other that there is still an existence, which is held in subordination to the will of her lord and master, which last the word *coverture* fitly expresses. It will appear in fact that while some of the wife's disabilities seem based upon the one notion, others are based upon the latter, and probably more correct one. The wife's disabilities are deemed by Blackstone "for the most part intended for her protection and benefit." And he adds, by way of rhetorical period, "so great a favorite is the female sex of the laws of England!" a proposition which his commentators have gravely proceeded to dispute and dissect, and, it must be added, not without good success.[3]

§ 36. Husband Head of the Family at Common Law; Reciprocal Rights and Duties of the Union.

The husband's right of dominion is therefore fully recognized at the common law. And never was the English doctrine, despite

2. 1 Bl. Com. 442; Co. Litt. 112; 2 Kent, Com. 129.

3. 1 Bl. Com. 445, notes by Christian, Hargrave, and others. It is probable that Blackstone used this expression in a strain of playful gallantry, not uncommon with lecturers. Even Chancellor Kent's observations

its failings, set forth in more terse and forcible language than in the words of Sir Thomas Smith: "The naturalest and first conjunction of two towards the making a further society of continuance is of the husband and wife, each having care of the family: the man to get, to travel abroad, and to defend; the wife to save, to stay at home, and to distribute that which is gotten for the nurture of the children and family; which to maintain God has given the man greater wit, better strength, better courage, to compel the woman to obey by reason or force; and to the woman beauty, fair countenance, and sweet words, to make the man obey her again for love. Thus each obeyeth and commandeth the other; and they two together rule the house so long as they remain in one." [4]

In accordance with these principles, and perhaps, too, the laws of nature and divine revelation, the husband is the head of the family, and *dignior persona*. As to the more strictly personal consequences of the marriage union, his rights and duties have suffered no violent change at our modern law. It is for the wife to love, honor, and obey: it is for the husband to love, cherish, and protect. The husband is bound to furnish his wife with a suitable home; to provide, according to his means and condition of life, for her maintenance and support; to defend her from personal insult and wrong; to be kind to her; to see that the offspring of their union are brought up with tenderness and care; and generally to conduct himself, not according to the strict letter of the matrimonial contract, but in its spirit. So long as he does this, his authority is acknowledged at the common law; and if the wife's wishes and interests clash with his own, she must yield.[5]

§ 37. Duty of Spouses to adhere or live together.

Marriage necessarily supposes a home and mutual cohabitation. Each party has therefore a right to the society of the other. They married to secure such society. And the obligation rests upon both to live together — or, as the expression sometimes goes, *to adhere*. This is the universal law.[6] Its observance is essential to the mutual comfort of husband and wife, and the well-being, if not the exist-

are not free from suspicion. See 2 Kent, Com. 182, closing sentence at foot of the page.

4. Commonwealth of England, Book 1, ch. 2, quoted in Bing. Inf. & Cov., p. 184.

5. Lord Stowell observes that the law entrusts the husband not only with a certain degree of care and protection, but also "with authority over his wife. He is to practise tenderness and affection, and obedience to her duty." Oliver v. Oliver, 1 Hag. Con. 361; 4 Eng. Ec. 429.

6. 1 Fras. Dom. Rel. 447, 452.

ence, of their children. But to this rule there are obvious exceptions. The wife is not bound to live with her husband where he is imprisoned, or has otherwise ceased to be a voluntary agent and to perform the duties of a husband. Nor if he is banished. For marriage does not force the parties to share the punishment of one another's crimes. This was the rule of the civil as it is that of the common law.[7] And in general such causes as would justify divorce in any State justify the innocent party in breaking off matrimonial cohabitation likewise. But partial and temporary separation for purposes connected with the husband's profession or trade — as, for instance, where he is an army officer — constitutes no breach of the marriage relation unless continued beyond necessary and reasonable bounds, or accompanied by negligence to provide, while absent, for the maintenance of wife and family. And under some other circumstances cohabitation may be properly allowed to cease for a time without involving the breach of marital obligations.[8]

§ 38. Breach of this Obligation; Desertion.

This subject is most commonly considered where redress is sought because one or the other party deserts; such desertion formerly calling for the restitution of conjugal rights, but in these days furnishing rather a cause of divorce to the injured spouse, not to speak of the enlargement of an abandoned wife's rights and responsibilities, despite the rules of coverture. These matters, and particularly divorce for desertion, will be duly considered in place hereafter, and the duty of matrimonial adherence more fully developed.[9] We observe here that, in conformity to the world's customs and general principle, it is the wife's actual withdrawal from home which admits the less readily of a justifying explanation, and exposes the pair to scandal.[10] But the husband may be at fault by making the home unfit for an honest wife to occupy with dignity, or by turning his wife out, or even by encouraging her to leave it when it was right that she should remain.[11] It happens often that the husband instead forsakes the home, leaving the wife in it, such

7. Co. Litt. 133; 1 Bl. Com. 443; 1 Fras. Dom. Rel. 448; 2 Kent, Com. 154.

8. See 2 Kent, Com. 181; 1 Fras. Dom. Rel. 240 *et seq.*; *Ib.* 447; Chretien v. Husband, 17 Martin (La), 60.

9. See Separation, Divorce, *post*; Vol. II., 1 Bish. Mar. & Div., §§ 771-810.

10. *Ib.*; Starkey v. Starkey, 21 N. J. Eq. 135; Nunn v. Nunn, — Ore. —, 178 Pac. 986.

11. Sutermeister v. Sutermeister, — Mo. App. —, 209 S. W. 955; McCormick v. McCormick, 19 Wis. 172.

withdrawal being rightful or wrongful according to the circumstances.[12]

§ 39. Duty of making Cohabitation Tolerable.

Mere frailty of temper on a wife's part, not shown in marked and intolerable excesses, would hardly justify a husband in withdrawing the protection of his home and society.[13] But it is held that the wife's violent and outrageous behavior justifies a husband in seeking divorce from bed and board, and, seemingly, in leaving her.[14] The moral duty of living together involves, doubtless, the reciprocal obligation of making that life agreeable, according to the true status of the married parties; but the extent of the legal duty is not so easily definable. Upon the point of redress, in fact, codes widely differ; the practical difficulty being, under our laws, that married spouses have little remedy until it comes to the last extremity of divorce.[15] Manifestations of bad temper on one side must necessarily weaken the duty of adherence on the other; extreme cruelty, or cruel and abusive treatment, is now frequently made a legal cause of divorce; yet, at the same time, mutual forbearance and self-sacrifice are essential to the well-being of every household; marriage, when rightly considered, working a harmony of character by the constant attrition to which the two natures are exposed.

Under this head we may add that the duty of cohabitation or adherence is not fulfilled by literal or partial compliance. Thus the refusal of sexual intercourse and the nuptial bed, without good excuse, is a serious wrong which husbands, at all events, are disposed to construe into justifying ground for divorce.[16] Living in the same house, but wilfully declining matrimonial intimacy and companionship, is *per se* a breach of duty, tending to subvert the true ends of marriage. So, too, a husband who unreasonably withdraws cohabitation from his wife may be deemed guilty of legal desertion, even though he continue to support her.[17] But sexual

12. Gollehon v. Gollehon, — Va. —, 96 S. E. 769; McClurg's Appeal, 66 Penn. St. 366. See Divorce for Desertion, *post*.

13. Yeatman v. Yeatman, L. R. 1 P. & D. 489; McNabb v. McNabb, — Tex. Civ. App. —, 207 S. W. 129.

14. Lynch v. Lynch, 33 Md. 328; see Holmes v. Holmes, 44 Mich. 555, 7 N. W. 228.

15. See Divorce for Cruelty, &c., *post*, Vol. II.

16. See Divorce, *post*, Vol. II; Southwick v. Southwick, 97 Mass. 327; 1 Bish. Mar. & Div., 5th ed., § 778.

17. Yeatman v. Yeatman, L. R. 1 P. & D. 489.

Where the husband is old and feeble the refusal of conjugal intercourse is

intercourse, the use of the same chamber, or the occupation of the same bed, should be mutually regulated with considerations of health as well as kindly forbearance; and a husband who wantonly abuses his wife so as to inflict needless pain and injury upon her, and disregards her health and delicate organization, is guilty of legal cruelty.[18]

§ 40. The Matrimonial Domicile.

As there must be a home, so there is also a matrimonial domicile of the parties recognized by universal law. And the husband, as *dignior persona,* has the right to fix it where he pleases. The wife's domicile merges in that of her husband. Grotius says: *"De domicilio constituere jus est marito."*[19] But this applies only to the real domicile of the husband; not to a fictitious place of residence which he may take up for a special purpose, or as an involuntary agent. In a genuine sense the domicile of the husband becomes that of the wife, and wherever he goes she is bound to go likewise; not, however, unless his intent be *bona fide* and without fraud upon her person or property rights.[20]

What is this domicile of the husband, we may ask? Every one has his domicile at the law. And between domicile and residence there is a marked distinction, the former being in law more generic and determining one's municipal forum. Residence, to be sure, is a fixed place of abode, as distinguished from one's mere local situation for temporary purposes; but domicile is more than this, it is a residence which is fixed, whether absent or present, with the idea of a permanent establishment of one's legal status. Domicile and change of domicile depend on the choice of the party. And so free is this choice that one may change his domicile while absent in the military service or traveling from place to place, provided the intent appear.[21] Circumstances and facts evincing this intent and corroborative of, apart from or even contradicting, one's own statement, are conclusive on this point; so that in determining a man's actual domicile, it is always material to consider where his

not conduct justifying divorce. Varner v. Varner, 35 Tex. Civ. App. 381, 80 S. W. 386.

18. Ridley v. Ridley, — Iowa —, 100 N. W. 1122; Gardner v. Gardner, 104 Tenn. 410, 58 S. W. 342, 78 Am. St. Rep. 924; Moores v. Moores, 1 C. E. Green, 275. See Shaw v. Shaw, 17 Conn. 189; criticised in 1 Bish. 760.

19. 2 Kent, Com. 181; 1 Fras. Dom. Rel. 240 *et seq.; Ib.* 447.

20. 1 Fras. Dom. Rel. 447, 448; 1 Burge Col. & For. Laws, 260; Wharton Confl. Laws, §§ 43-47.

21. Mooar v. Harvey, 128 Mass. 219.

wife and children live permanently, and where his establishment is kept up.[22] The facilities of modern travel from country to country give rise to greater uncertainties of fact than formerly. It is said that a man having acquired a domicile of choice may abandon it without its being incumbent on him to acquire a new domicile of choice;[23] and doubtless many persons desiring to travel make themselves citizens of the world after this manner, escaping taxation and disregarding the purposes of domicile. Here, however, our law will find a domicile, when the question arises (as, for instance, upon the settlement of the person's estate after decease), either by refusing to consider the abandonment of the old domicile complete before a new one was acquired, or by holding that the older domicile, the domicile of origin, reverts upon such abandonment: in short, by excluding as far as possible the inference of expatriation, utter and absolute, from dubious circumstances.[24] Every one has, by birth, a domicile of origin, and this domicile of origin is presumed to continue until abandoned for another.[25]

§ 41. Same Subject; Husband establishes the Domicile.

We have said that in the *bona fide* domicile of the husband that of the wife merges. In certain cases the wife may perhaps be said to acquire a domicile or legal forum for divorce and similar purposes.[26] But the exception, if it exist, is limited by the necessity. To a wife living apart from her husband, no separate domicile is conceded for testamentary purposes.[27]. Nor does a change of the wife's abode change the husband's or the matrimonial domicile.[28]

Any contract, therefore, which the husband may make with his wife or her friends, before marriage, not to take her away from the neighborhood of her parents, is void. Public policy repudiates all

22. McHenry v. State, 119 Miss. 289; 80 So. 763; Platt v. New South Wales, L. R. 3 App. 336; Stevenson v. Masson, L. R. 17 Eq. 78; Hayes v. Hayes, 74 Ill. 312; Hindman's Appeal, 85 Penn. St. 466; Long v. Ryan, 30 Gratt. 718.

23. Jessel, M. R., in King v. Foxwell, 3 Ch. D. 518, citing Udny v. Udny, L. R. 1 H. L. Sc. 518. But cf. Kellogg v. Winnebago, 42 Wis. 97.

24. See Von Hoffman v. Ward, 4 Redf. Surr. 244; King v. Foxwell. Ch. D. 518; Gardner v. Gardner, — Mass. —, 122 N. E. 308.

25. *Ib.* And see elementary works on Domicile.

26. Merritt v. Merritt, 41 Nev. 243, 164 P. 644, 160 P. 22; Wacker v. Wacker, 139 N. Y. S. 78, 154 App. Div. 495. See Divorce, *post.*

27. Paulding's Will, 1 Tuck. (N. Y.) 47.

28. Porterfield v. Augusta, 67 Me. 556; Scholes v. Murray Iron Works Co., 44 Ia. 190; Johnson v. Johnson, 12 Bush, 485.

contracts in restraint of such marital rights. There might be circumstances under which such a promise would be reasonable, but at best it can create a moral obligation only. The husband has the right to establish his domicile at any time, wherever he pleases, and the wife must follow him through the world.[29] If she refuses to go with him, his own conduct being upright and honorable in the premises, she places herself in the wrong, and while she persists he is not bound to support and maintain her.[30] The husband has the exclusive right to fix the matrimonial domicile, to which the wife must follow him, if he acts in good faith.[31] If he changes it she must follow and live with him in the new domicile.[32] But where she is abandoned or leaves him for cause, she may acquire a separate domicile. In California the rule is established by statute.[33].

§ 42. Same Subject; Modifications in Wife's Favor; Recent Instances.

But the courts of our day hesitate to apply a rule so apparently harsh as that announced in the last sentence. With the increasing regard for female privileges has grown up a strong disposition to reduce the husband's right over the matrimonial domicile to a sort of *divisum imperium*. The question is not new, whether reasonable exceptions to this rule may not exist; as, for instance, where the husband proposed to take the wife into an enemy's country while war was waging, or on a journey perilous to her life.[34] Such exceptions may be justified, it is generally admitted, on the ground that the wife would be thereby exposed to bodily harm. But,

29. Hair v. Hair, 10 Rich. Eq. 163; McAfee v. Kentucky University, 7 Bush, 135.

30. Babbitt v. Babbitt, 69 Ill. 277.

31. Bailey v. People, 54 Col. 337, 130 P. 832; Donaghy v. State, 6 Del. Boyce's, 467, 100 A. 696, 99 A. 720; Hunt v. Hunt, 61 Fla. 630, 54 So. 390; State v. Beslin, 19 Ida. 185, 112 P. 1053; Birmingham v. O'Neil, 116 La. 1085, 41 So. 323; Birmingham v. O'Neil, 116 La. 1085, 41 So. 323; Ware v. Flory, 199 Mo. App. 60, 201 S. W. 593; Price v. Price, 75 Neb. 552, 106 N. W. 657; Purnell v. Purnell (N. J. 1908), 70 A. 187; Monahan v. Auman, 39 Pa. Super. Ct. 150; Bennett v. Bennett, — Vt. —, 99 A. 254; Buchholz v. Buchholz, 63 Wash. 213, 115 P. 88.

32. Isaacs v. Isaacs, 71 Neb. 537, 99 N. W. 268. It is not the policy of the law to encourage the living apart of husband and wife while the marital relation exists in force. Cunningham v. Cunningham, 48 Pa. Super. 442; But where she is abandoned or leaves him for cause, she may acquire a separate domicile.

33. Kessler v. Kessler, 2 Cal. App. 509, 83 P. 257.

34. Boyce v. Boyce, 23 N. J. Eq. 337.

whether the apprehension be that of personal violence, or ill health from the fatigue of a journey or the change of climate, little favor seems to have been shown to the wife either at the English or Scotch law, unless the circumstances rendered a change of domicile on her part equivalent to a moral suicide.[35] At the present day, a rule less stringent would doubtless be applied. A husband would not be permitted to remove his wife to some remote and undesirable place for the sake of punishing or tormenting her, or so as to compel her to stay alone where he did not mean to reside himself; for this would not be fixing the matrimonial domicile with honest intent.[36] His choice must be without unnecessary parsimony or stubborness[37] and must not imperil her health and safety.[38] Nay, more, there are several recent decisions in this country which point to an obligation on the husband's part to show reasonable cause why his wife should follow him when he changes his abode.[39]

This later uncertainty in the law is unfortunate. Where a pair disagree in the choice of a home, either the right of decision must belong to one of them, or the court should sit as umpire. No one has suggested that the wife should choose the domicile, nor can judicial interference be well called in, except to divorce the parties. Yet, without a home in common, of what avail is matrimony? We cannot but regret that any of our courts should seem to legalize domestic discord; that there should be good American authority to sanction the wife's refusal to accompany her husband on any such trivial pretext as "the dislike to be near his relatives."[40] However, although the husband has the right to fix the family domicile, still this must be done fairly and with due regard for the comfort and happiness of the wife, and the husband may be refused a divorce on account of the wife's refusal to live in a house with his relative with whom she had quarreled[41] or in proximity with his relatives.[42] One seeking a divorce cannot obtain the benefit of his

35. See 1 Fras. Dom. Rel. 448.

36. Clark v. Clark, 19 Kans. 522.

37. Spafford v. Spafford, 199 Ala. 300, 74 So. 354, L. R. A. 1917D, 773; Klein v. Klein, 29 Ky. Law Rep. 1042, 96 S. W. 848. A husband cannot create a domicile for his wife in a foreign State by deserting her and residing there. Commissioner of Public Charities v. Patterson, 169 N. Y. S. 316.

38. Winkles v. Powell, 173 Ala. 46, 55 So. 536.

39. Bishop v. Bishop, 30 Penn. St. 412; Gleason v. Gleason, 4 Wis. 64; Powell v. Powell, 29 Vt. 148. See Moffatt v. Moffatt, 5 Cal. 280; Cutler v. Cutler, 2 Brews. (Pa.) 511.

40. Powell v. Powell, 29 Vt. 148.

41. Hall v. Hall, 69 W. Va. 175, 71 S. E. 103, 34 L. R. A. (N. S.) 758, citing text, Husband and Wife, 460.

42. Powell v. Powell, 29 Vt. 148.

own wrong and the courts will not allow their use to obtain a benefit founded directly upon a breach of duty to provide the wife with a suitable home.

The English rule as to the wife's duty of adherence still continues strict. A wife petitioned for divorce on the ground of her husband's desertion. The facts showed that shortly after her marriage she went with her husband to Jamaica, where he held an appointment from which he derived not more than £100 a year, and in consequence of his slender income she had to put up with some hardship. Her health suffered, and in less than a year, namely, in 1846, she returned to England. Her husband continued abroad, during the greater part of the time at Jamaica, where he succeeded in getting a more lucrative appointment. When she left him for England he acted kindly to her, promised to allow her £30 a year, but made no arrangement for a permanent separation. Their correspondence continued until 1851, when the husband asked her to return, and provided funds for her passage, but she wrote that her health would not permit her to do so. Here all correspondence and intercourse ceased until 1856, when an allowance was again effected through the intervention of a relative; this the husband continued until 1860, and then stopped it. He appears to have led a loose life after the wife's refusal to return. The court held that these circumstances did not constitute desertion on the husband's part, nor entitle her to divorce.[43]

§ 43. Domicile relative to Alien and Citizen.

As corollary of the general proposition already announced, it is held that an alien woman marrying with a citizen of the United States becomes, by virtue of such marriage, a citizen also, with the usual capacity as to purchase, descent, and inheritance;[44] and that of aliens intermarried, if the husband becomes a naturalized citizen, the wife in like manner is naturalized, even though she has not yet migrated from her native country.[45]

§ 44. Woman's Name changed by Marriage.

Marriage at our law does not change the man's name, but it confers his surname upon the woman. Until a decree of divorce,

43. Keech v. Keech, L. R. 1 P. & D. 641 (1868). Adultery being proved, however, divorce was granted on that ground.

44. Luhrs v. Eimer, 80 N. Y. 171; Kelly v. Owen, 7 Wall. 496.

45. Kelly v. Owen, 7 Wall. 496; Headman v. Rose, 63 Ga. 458.

giving a married woman leave to resume her maiden name, goes into full effect, or widowhood is succeeded by a new marriage and another husband, she goes by her former husband's surname. This is English and American usage. And with this actual marriage name, it would appear that a wife can only obtain another name by reputation.[46] But in consideration of the rule that a person has the right to be known by any name he or she chooses, proceedings under the assumed name of a married woman have been upheld after judgment.[47]

§ 45. Husband's Duty to render Support.

This subject will be considered later in treating of the wife's necessaries, when it will also appear that our married women's acts tend to certain changes, not so much of principle as application, by extending the liability for family supplies to property such as wives now hold to their separate use. The general rule of law is that the husband, the spouse who holds and fills the purse, is bound to provide the family support and means of living. The style of support requisite — of lodging, food, clothing, and the like — is such as befits his means and condition of life. A wife is not usually justified in leaving her husband and the common home so long as the husband treats her kindly, and provides to the extent of his ability, even though retrenchment in the style of living may be needful from one cause or another.[48] No reducing the wife's comforts needlessly, and from sinister motives, she may justly complain of.[49]

The common-law duty to support a wife cannot be extended except by express statute, plainly so intended,[50] and the wife cannot bind herself by a release of her right to support.[51]

A husband must furnish his wife with reasonable support whether she is able to support herself or not[52] if he is able to do

46. Fendall v. Goldsmied, 2 P. D. 263; Carroll v. State, 53 Neb. 431, 73 N. W. 939; Ratcliffe v. McDonald, 123 Va. 97, 97 S. E. 307.

47. Clark v. Clark, 19 Kan. 522.

48. See Skean v. Skean, 33 N. J. Eq. 148.

49. Boyce v. Boyce, 23 N. J. Eq. 337. And see Necessaries, *post;* also Divorce for Desertion, Cruelty, etc.

50. Richardson v. Stuesser, 125 Wis. 66, 103 N. W. 261, 69 L. R. A. 829.

51. *In re* Ryan's Estate, 134 Wis. 431, 114 N. W. 820; *In re* Simonson's Estate, 164 Wis. 590, 160 N. W. 1040.

52. The duty of the husband to provide for the wife is a public and moral duty, as well as a duty by contract. Clisby v. Clisby, 160 Ala. 572, 49 So. 445; Ortman v. Ortman, — Ala. —, 82 So. 417; McKee v. Cunningham, 2 Cal. App. 684, 84 P. 260.

so.[53] His lack of means may excuse him temporarily.[54] The fact that she was unchaste before marriage does not affect the duty.[55] Nor is he relieved by the fact that she is quarrelsome after marriage.[56] He must do the same for the rest of his family.[57]

The nature of the support must be in keeping with his station and circumstances[58] and is usually to be furnished at the matrimonial domicile selected by him.[59] He may be obliged to support his wife at some other place where he refuses to do so at the domicile, or where they live apart by his consent[60] or where she leaves him because of his cruelty[61] or for other justifiable cause.[62] The

Kessler v. Kessler, 2 Cal. App. 509, 83 P. 257. A wife's right of maintenance is within the protection of Civ. Code, § 3439, making transfers to delay or defraud creditors void as against them. Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360; Poole v. People, 24 Col. 510, 52 P. 1025, 65 Am. St. Rep. 245; Paquin, Limited, v. Westervelt, — Conn. —, 106 A. 766; American Mill. Co. v. Industrial Board of Illinois, 279 Ill. 560, 117 N. E. 147; H. G. Goelitz Co. v. Industrial Board of Illinois, 278 Ill. 164, 115 N. E. 855; Brown v. Moudy, 199 Ill. App. 85; *In re* Carroll, — Ind. App. —, 116 N. E. 844; Kemp v. Kemp, — La. —, 81 So. 221; Boehm v. Boehm, — N. J. Ch. —, 101 A. 423; Feiner v. Boynton, 73 N. J. Law, 136, 62 A. 420; Ball v. Lovett, 98 N. Y. S. 815; Jones v. Bernstein, 177 N. Y. S. 155; Stevens v. Hush, 176 N. Y. S. 602; Finkelstein v. Finkelstein, 161 N. Y. S. 166, 174 App. Div. 416; Taylor v. Taylor, 54 Ore. 560, 103 P. 524; Knecht v. Knecht, — Pa. —, 104 A. 676; *In re* Kvist's Estate, 256 Pa. 30, 100 A. 523; Merriam v. Merriam, 75 Wash. 389, 134 P. 1058. Where there is no relation that legally imposes the duty of the wife's maintenance on the husband, the law gives no power to make him maintain her. Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461; Clifton v. Clifton, — W. Va. —, 98 S. E. 72.

53. McCaddin v. McCaddin, 116 Md. 567, 82 A. 554,

54. Furth v. Furth (N. J.), 39 A. 128.

55. Slate v. Hill, 161 Ia. 279, 142 N. W. 231.

56. Irwin v. Irwin, — N. J. —, 103 A. 1052, 102 A. 440.

57. Carey v. Carey, 8 App. D. C. 528.

58. De Brauwere v. De Brauwere, 203 N. Y. 460, 96 N. E. 722, affirming order 129 N. Y. S. 587, 144 App. Div. 521, which affirms judgment (1910), 126 N. Y. S. 221, 69 Misc. Rep. 472; State v. McPherson, 72 Wash. 371, 130 P. 481.

59. In re Baurens, 117 La. 136, 41 So. 442; State v. Baurens, *Id.*

60. McKee v. Cunningham, 2 Cal. App. 684, 84 P. 260. By express statute in California a husband is not liable for the support of his wife when she is living separate from him by agreement. Barefoot v. Barefoot, 83 N. J. Eq. 685, 93 A. 192; Clothier v. Sigle, 73 N. J. Law, 419, 63 A. 865; W. & J. Sloane v. Boyer, 95 N. Y. S. 531; Richardson v. Steusser, 125 Wis. 66, 103 N. W. 261.

61. State v. Baurens, 117 La. 136, 41 So. 442; Randall v. Randall, 37 Mich. 563.

62. Kientz v. Kientz, 104 Ark. 381, 149 S. W. 86; Baker v. Oughton, 130 Ia. 35, 106 N. W. 272; Appeal of Brookland Bank, — S. C. —, 100 S. E. 156.

facts raising such a duty must, however, appear affirmatively.[63] To relieve him of the duty of supporting the wife while living apart from him, his notice that he will not be responsible for her debts must appear to have been actually known to the person furnishing the support.[64]

The duty is not conditioned on her living with and making a home for him,[65] and where a husband is first guilty of adultry, her subsequent adultery will not relieve him of the duty.[66] Where she leaves him without justifiable cause, he is relieved of the duty.[67] By statute in California a husband need not support a wife who leaves him without justifiable cause.[68] Statutes sometimes make the wife liable to third persons for family necessaries.[69]

A statute which renders void an assignment of future wages as security for a small loan unless recorded and assented to by the wife interferes with the rights of the parties but is constitutional as an exercise of the police power to protect the wife in her right of support.[70]

§ 46. Criminal Liability for failure to Support.

It is now universally provided by statute that a husband who fails in his duty to support his wife and family is criminally liable and criminal prosecution with recognizance is found to aid the common law in compelling a competent husband to support his family.[71]

It has been held, where a husband was prosecuted on his recognizance, that if he offered to support his wife and children in his father's house, having no other house, and no means of his own, and she refused to go there on the ground that the father was in-

63. Hass v. Brady, 96 N. Y. S. 449, 49 Misc. Rep. 235; Hass v. Brady, 96 N. Y. S. 449, 49 Misc. Rep. 235.

64. W. & J. Sloane v. Boyer, 95 N. Y. S. 531.

65. Sturm v. Sturm, 141 N. Y. S. 61, 80 Misc. Rep. 277.

66. People v. Shrady, 58 N. Y. S. 143, 40 App. Div. 460, 14 N. Cr. R. 149.

67. State v. Newman, 91 Conn. 6, 98 A. 346; State v. Hill, 161 Ia. 279, 142 N. W. 231; Isaacs v. Isaacs, 71 Neb. 537, 99 N. W. 268; Pearson v. Pearson, 176 N. Y. S. 626; Pearson v. Pearson, 173 N. Y. S. 563; Wirth v. Wirth, 172 N. Y. S. 309.

68. Kessler v. Kessler, 2 Cal. App. 509, 83 P. 257.

69. Perkins v. Morgan, 36 Col. 360, 85 P. 640; Taylor v. Taylor, 54 Ore. 560, 103 P. 524.

70. Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, 43 L. R. A. (N. S.) 746.

71. See Commonwealth v. Jones, 90 Penn. St. 431; People v. Bartholf, 31 N. Y. Supr. 272.

temperate and abusive, he could not be held liable for neglecting to support her.[72]

Modern criminal statutes punishing a husband for failure to support his wife have been commonly upheld and it is held for example that the obligation of the husband to support the wife is not a debt within a constitutional provision forbidding imprisonment for debt. Society as a whole is interested that families be supported and the penalty is for the husband's failure to obey society's law, made for society's subsistence, and[73] hard labor in the penitentiary is not such cruel or unusual punishment as to render a statute unconstitutional which provides it as a penalty for failure to support the wife.[74] But a statute is void as *ex post facto* which makes desertion and abandonment of the wife without provision for support a felony, when applied to a case where the abandonment occurred before the enactment of the statute although the failure to support continued till the time of bringing the action since the statute required both abandonment and nonsupport and was *ex post facto* as to the abandonment which occurred before the statute was enacted.[75]

Application for support of a wife under a statute providing that support shall be given when the wife is "in necessitous circumstances" means that support shall be given when the wife is lacking in those things proper to her condition in life. It is not limited to the bare necessities of food, clothing and shelter, as in a poor statute, but includes such articles of food, wearing apparel and use, such medicines, means for education of children and such social protection and opportunity as comport with the health, comfort and well-being of human beings according to present standards of civilization considering the husband's own means, earning capacity and station in life.[76]

Where a husband leaves his wife and family to find a home for them in another State which he does and they join him there and live together until a quarrel, when the wife returns to the former State with the family he cannot be extradited from the State of his present residence to answer a charge of non-support in the

72. People v. Pettit, 74 N. Y. 320.

73. State v. English — S. C. —, 85 S. E. 721, L. R. A. 1915 F. 977.

74. State v. Gillmore, 88 Kan. 835, 129 Pac. 1123, 47 L. R. A. (N. S.) 217

75. People v. Albright, 161 Mich. 400, 126 N. W. 432.

76. State v. Waller, 90 Kan. 829, 136 Pac. 215, 49 L. R. A. (N. S.) 588.

other State, where his wife now resides.[77] He committed no crime whatever in that State and it is now settled that no extradition will be allowed unless guilt was incurred in the State which asks for extradition,[78] but where the husband deserts the wife and removes his domicile to another State and returns to the first State to be a witness he may be there arrested on a warrant charging non-support in the first State under a statute passed since he left it. He can be tried for failure to support her in the place where he deserted her following the general rule that the husband is properly tried in the jurisdiction where the wife becomes dependent, regardless of his non-residence, for that is the place where the duty of support should be discharged, and consequently the the proceeds of a beneficiary insurance policy as a dependent.[80]

A woman who marries a man knowing that he has a wife living cannot claim to be dependent on him for support as he is under no legal duty to support her and so she cannot claim to be entitled to the proceeds of a beneficiary insurance policy as a dependent.[80]

A conviction for abandonment of the wife constitutes a bar to a later conviction for the same offense, but where the offense described in the statute is failure to maintain the wife a prior conviction and sentence is no bar to another conviction for later failing to maintain her. The later neglect and refusal after he had served his former sentence constitutes a new, separate and distinct violation of the statute.[81]

§ 47. Wife's Duty to render Services.

The wife's obligation to render family services is at least coextensive with that of the husband to support her in the family, these services and the comfort of her society being in fact the legal equivalent of such support.[82] Hence, as it is held, the wife of an insane man cannot claim special compensation out of his estate for taking care of him, even though such were the express contract between herself and the guardian.[83] Doubtless it would

77. Taft v. Lord, 92 Conn. 539, 103 Atl. 644, L. R. A. 1918 E. 545.

78. Strassheim v. Daily, 221 U. S. 280, 31 Sup. Ct. Rep. 558.

79. State v. Gillmore, 88 Kan. 835, 129 Pac. 1123, 47 L. R. A. (N. S.) 217.

80. Duenser v. Supreme Council of R. A., 262 Ill. 475, 104 N. E. 801, 51 L. R. A. (N. S.) 726.

81. State v. Morgan, — Ia. —, 136 N. W. 521, 40 L. R. A. (N. S.) 615.

82. Randall v. Randall, 37 Mich. 563, per Cooley, J.; Grant v. Green, 41 Ia. 88.

83. Grant v. Green, 41 Ia. 88.

be bad policy to permit marital services on either side, however meritorious, to become a matter for money recompense, and to strike a just balance is impossible.

Services rendered by a wife in the home of her husband to a lodger residing with them, even though they consist largely of the personal attendance of the wife, and include the nursing of the lodger when sick, are within the range of her domestic duties and without an express contract or promise made by the lodger to the wife, the latter cannot maintain an action against him for the recovery of compensation for such services. The implied contract which the law raises in such a case is that the person to whom such services are rendered will make reasonable compensation therefor to the husband and not to the wife.[84]

§ 48. Right of Chastisement and Correction.

Though either spouse may be the more dangerous companion, because of greater physique, daring, recklessness, or depravity, nature gives the husband the usual advantage. In a ruder state of society the husband frequently maintained his authority by force. The old common law recognized the right of moderate correction, which, according to Blackstone, was deemed a privilege by the lower orders in his day.[85] The civil law went still further, permitting, in certain gross misdemeanors, violent flogging with whips and rods.[86] But since the time of Charles II. the wife has been regarded more as the companion of her husband; and this right of chastisement may be regarded as exceedingly questionable at the present day. The rule of persuasion has superseded the rule of force. Few cases of importance are to be found on this subject. In England, where a wife sought divorce from bed and board for cruelty, it was shown that the husband had spit upon her, pushed and dragged her about the room, and once slapped her face; and upon this proof the divorce was granted.[87] The right to inflict

84. Stevenson v. Akarman, 83 N. J. L. 458, 85 Atl. 166, 46 L. R. A. (N. S.) 238.

85. 1 Bl. Com. 444, 445. In Adams v. Adams, 100 Mass. 365, Chapman, C. J., states the old form of the writ of *supplicavit* for protection of the wife against her husband; viz., that the husband should not do other damage to her person "than what reasonably belongs to her husband for the purpose of the government and chastisement of his wife lawfully."

86. *Flagellis et fustibus acriter verberare uxorem.* See 1 Bl. Com. 445.

87. Saunders v. Saunders, 1 Rob. Ec. 549. And see Divorce for Cruelty, etc., *post*, Vol. II.

corporal punishment upon the wife has never been favored in this country, and its exercise would now generally justify proceedings for a divorce. Indeed, our decisions emphatically deny that the right longer exists either in England or this country.[88] It may be added that the wife should not chastise her husband; nor provoke harsh treatment by her own violence, foul abuse, and misconduct.[89]

But either spouse may use force in self-defense. And the husband may restrain his wife from acts of violence against others as well as himself in person or property,— most certainly wherever the law makes him answerable in damages for her misbehavior,[90] and may prevent her unwarrantable interference with the due exercise of his parental authority.[91]

§ 49. Husband's Right of Gentle Restraint.

The right of gentle restraint over the wife's person rests upon better authority than that of chastisement. This right, however, depends upon the proposition that the husband is *dignior persona.* And its exercise is often to be justified in the courts on the same grounds; namely, that the husband must answer to others for his wife's conduct. Blackstone says that in case of any gross misbehavior the husband can restrain his wife of her liberty. The later

88. Johnson v. Johnson, 201 Ala. 41, 77 So. 335; Lawson v. State, 115 Ga. 578, 41 S. E. 993; Carpenter v. Commonwealth, 92 Ky. 452, 18 S. W. 9, 13 Ky. Law Rep. (abstract) 998; McKay v. McKay (Mo.), 182 S. W. 184 (helpless if her husband keeps her in a place where he has withdrawn all care and protection from her and allows her to suffer gross indignities); Jones v. Jones, 173 N. C. 279, 91 S. E. 960; Gholston v. Gholston, 31 Geo. 625; Pillar v. Pillar, 22 Wis. 658; Edmonds' Appeal, 57 Penn. St. 232; Fulgham v. State, 46 Ala. 143; Owen v. State, 7 Tex. App. 329; Gorman v. State, 42 Tex. 221. In State v. Rhodes, 1 Phill. (N. C.) 453, the right of moderate correction was claimed. But the opposite rule is announced in the later case of State v. Oliver, 70 N. C. 60. Corporal chastisement is not justified, though the wife be drunk or insolent. Commonwealth v. McAfee, 108 Mass. 458; Pearman v. Pearman, 1 Swab. & T. 601. *It is a criminal offence* to imprison or beat her (Brown v. Brown, 88 Conn. 42, 89 A. 889), but he cannot be compelled to give bond not to illtreat her, except under statute. Bread's Case, 2 Bland (Md.) 562, *n.*

89. Knight v. Knight, 31 Ia. 451, and cases *supra;* Prichard v. Prichard 3 Swab. & T. 523; Trowbridge v. Carlin, 12 La. Ann. 882.

90. 2 Kent, Com. 181; People v. Winters, 2 Parker (N. Y. Cr.), 10; 1 Bl. Com. 445; Richards v. Richards, 1 Grant, 389.

91. *A husband has the right* to use physical force to put his wife from the room, when she interferes with his training of their child, the right of gentle restraint where she clings to him and screams and the right of using force necessary for self-defence. Barber v. Barber, 153 N. Y. S. 256, 168 App. Div. 212.

expression of Kent is that he may resort to "gentle restraint."[92] Strong instances for the exercise of this right occur where the wife has eloped with a libertine, and the husband wishes to bring her home; or where she purposes an elopement, and he seeks to prevent it; or, perhaps, where she goes recklessly into lewd company.[93] Restraint may also be justified where the wife becomes insane, threatens the husband with danger, or wantonly destroys the property.[94] So, too, the husband, by virtue of his marital authority over his own household, might be allowed, if not by physical force, at least by moral coercion, to regulate her movements so as to prevent her from going to places, associating with people, or engaging in pursuits, disapproved by himself on rational grounds. This doctrine has been asserted in England; and Mr. Fraser carries it to the extent of forbidding her relatives to visit her; "for," he observes, "though the wife may be very amiable, her connections may not be so."[95] But this rule is to be laid down with great caution, and it may be considered especially unpopular in America. Mr. Justice Coleridge, in an English case, observes that the husband's right must not be exercised unnecessarily or with undue severity; and that the moment the wife, by her return to conjugal duties, makes the restraint of her person unnecessary, such restraint becomes unlawful.[96]

Our modern doctrine is that force, whether physical or moral, systematically exerted to compel the submission of a wife in such a manner, and to such a degree, and during such a length of time, as to injure her health and threaten disease is legal cruelty.[97]

A husband has no right over the protest of the occupant to enter the house of another for the purpose of talking with his wife who has taken refuge there and of persuading her to return to him. Any person has a right to defend his home against intrusion even to homicide, if necessary, to accomplish the purpose of defence.

92. 2 Kent, Com. 181, 1 Bl. Com. 445.

93. So strongly does the common law detest conjugal unfaithfulness, that the husband who kills his wife or her paramour in the act of adultery is only guilty of manslaughter. See Regina v. Kelly, 2 Car. & K. 814.

94. Mr. Lifter's Cafe, 8 Mod. 22; Pitt v. Coney, 1 Stra. 477; Price, *in re*, 2 Fost. & F. 263; State v. Craton, 6 Ire. 164. And see 1 Bish., Mar. & Div., § 756.

95. 1 Fras. Dom. Rel. 459. This observation was made by Lord Stowell in Waring v. Waring, 2 Hag. Con. 153; 1 Eng. Ec. 210.

96. Cochrane, *in re*, 8 Dowl. P. C. 631.

97. Kelly v. Kelly, L. R. 2 P. & D. 31; Bailey v. Bailey, 97 Mass. 373. See Divorce for Cruelty, *post*, Vol. II.

The person of the wife is as sacred now as the husband's and the husband has no right against her will to control her movements.[98]

§ 50. Wife's Right to Submit to Surgical Operation.

A wife in full possession of her faculties is as much entitled, both morally and legally, to determine whether she shall submit herself to an operation as is the husband in respect to an operation on himself, and where she consents to an operation which is skillfully performed, the surgeon is not liable to the husband in damages. The husband has no power to withhold from the wife the medical assistance that the case may require. The consent of the wife and not of the husband is necessary.[99]

§ 51. Right of Action for Death.

Statutes giving a right of action for death being in derogation of the common law should be strictly construed and will not be held to apply to the surviving spouse unless expressly named.[1]

A statute giving a right of action for death should be strictly construed as to the class of persons covered by it and a statute referring to men, their widows or children and then amended by other provisions in general terms referring to persons does not give a right of action to the children of a woman for her death.[2]

Damages may be assessed against one who has negligently caused the death of a husband and father although the wife and child did not know where he was at the time of his death and he had deserted them and had never supported them. The jury should be allowed to assess the loss of support and it cannot be presumed that the wife would never find the husband and force him to support her. The question will be, what if any sum might the widow and child be expected reasonably to receive from the deceased and this question should be submitted to the jury.[3]

98. Bailey v. People, — Col. —, 130 Pac. 832, 45 L. R. A. (N. S.) 145.

99. Burroughs v. Crichton, 48 D. C. App. 596, 67 Wash. Law Rep. 283, 4 A. L. R. 1529.

1. Flash v. Louisana Western R. Co., 137 La. 352, 68 So. 636, L. R. A. 1916E 112.

2. Whittlesey v. Seattle, — Wash. —, 163 Pac. 193, L. R. A. 1917D 1084.

A husband of a woman who left children by a former marriage may recover for her death. Crown Williamette Paper Co. v. Newport, 260 Fed. 110.

3. Ingersoll v. Detroit & Mackinac R. Co., 163 Mich. 268, 128 N. W. 227, 32 L. R. A. (N. S.) 362.

§ 52. Regulation of Household, Visitors, &c.

From the common-law relation of husband and wife it follows, as our last section indicates, that the general regulation of a household is the privilege of the husband, who is its lawful head. The wife in this respect is to be viewed as his representative or executive officer, properly entrusted with domestic details, and particularly with the supervision of female menials and their work. Husbands are sometimes blameworthy in the course of such regulation for pettiness, meanness, and inconsiderateness towards their wives. And yet households differ, and legal cruelty cannot readily be predicated of such conduct further than that in divorce suits misbehavior of this kind is frequently alleged in aggravation of actual cruelty otherwise practised, and so as to give body to the latter charge. It cannot be called cruelty or a breach of marital duty justifying legal interference, for a married householder, however large his establishment, to take the settlement of the little bills upon himself,[4] or the hiring and discharging of the servants.

As to the question how far the wife is bound to observe the husband's directions in entertainment, the choice of visitors, the arrangement of the rooms, and so on, the English rule is still strict; or, rather, permissive of the husband's sway. The wife is expected to conform to her husband's habits and tastes, even to his eccentricities, provided her health be not seriously endangered by so doing. And though he should restrict the calling list to a certain set agreeable to himself alone, or interdict intercourse with her family, or prevent her from paying a visit to his own relatives, all of which we may well presume to be unkind and unreasonable, yet this alone is not sufficient ground for divorce.[5] Nor, as it has been held in this country, would divorce be granted simply because he had forbade her to attend a particular church of which she was a member.[6] Modern American precedent, however, on all these points is quite scanty. And whether the husband can allege misconduct against his wife, or obtain redress on his part if she rebels against oppressive discipline of this kind, is extremely doubtful. Whims and caprices of the husband, submission to which endangers the wife's health, need not be followed, and may even be relieved

4. Evans v. Evans, 1 Hag. Con. 35, 115.

5. Neeld v. Neeld, 4 Hag. Ec. 263; D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773; Waring v. Waring, 2 Hag. Con. 153; Shaw v. Shaw, 17 Conn. 189; Fulton v. Fulton, 36 Miss. 517.

6. Lawrence v. Lawrence, 3 Paige, 267.

against as legal cruelty;[7] and perhaps the former should be said of constraint upon religious worship as the worshipper's conscience dictates; for the husband's right to manage his house and wife must doubtless be understood to have rational limits.

§ 53. Custody of Children.

The custody of children belonged at common law to the father. Blackstone observes: "A mother, as such, is entitled to no power, but only to reverence and respect." But by an English statute, passed in 1839, the court of chancery is permitted to interfere and award the custody of children to such parents as may be deemed most suitable. Its special object was to enable married women who should be ill-treated by their husbands to assert their rights without fear of being separated from their offspring.[8] In this country the tendency of legislation is to place the wife upon an equal footing with her husband in this respect, so that husband and wife together shall have in their children a joint interest and control, which the courts are to regard as distinct only when the welfare of these tender beings makes judicial intervention necessary.[9]

§ 54. Remedies of Spouses against one another for Breach of Matrimonial Obligations.

As no legal process can safely be enforced to compel husband and wife to live together, against the will of either, so the peace of society forbids that they should sue one another for damages for breach of the marital obligations. Here again is marriage *sui generis*, and not like other contracts. But the failure of the one to perform recognized duties may sometimes absolve the other from certain corresponding obligations. Thus, if the wife leaves her home without justifiable cause, the husband may refuse to support her.[10] If the husband is cruel, or makes his home unfit for a chaste woman to live in (which is a species of cruelty), the wife may leave and compel him to support her elsewhere.[11] This is well-recognized law. In general, however, such violation of marital

7. Kelly v. Kelly, L. R. 2 P. & D. 31; 1 Bish., § 758.

8. 2 & 3 Vict. c. 54; Warde v. Warde, 2 Ph. 786. See *post*, Parent and Child, § 740 *et seq.*

9. See Divorce, *post*, Vol. II.

10. Kent, Com. 147; Manby v. Scott, 1 Mod. 124; 1 Bl. Com. 443.

11. Houliston v. Smyth, 3 Bing. 127. And see *post*, as to wife's necessaries.

obligations is effectually punisheable, not by enforcing them, as in the old English suit for restitution of conjugal rights, which is not recognized in the United States, but by putting an end to the relation altogether.[12] And it is in the modern proceedings for divorce that we now find the subject of marital obligations most frequently discussed, with, however, a bias towards the construction of the divorce statutes themselves.

Husband and wife may be indicted for assault and battery upon each other.[13] This is a means of redress not unfrequently sought against cruel husbands, especially among those of low surroundings, where drunkenness is common, and religion treats divorce for cruelty with disfavor; and a husband who beats his wife inexcusably may be convicted of this offence.[14] So, too, the offending spouse may be bound to keep the peace. For unreasonable and improper checks upon her liberties, the wife may have relief on *habeas corpus*. But the writ is not available for the husband to secure the person of his wife, voluntarily absenting herself from his house.[15].

12. See 1 Bish. Mar. & Div., § 771; 1 Fras. Dom. Rel. 452; Adams v. Adams, 100 Mass. 365; Briggs v. Briggs, 20 Mich. 34; Divorce, *post*.

13. Bradley v. State, Walker, 156; State v. Mabrey, 64 N. C. 592; Whipp v. State, 34 Ohio St. 87.

14. In North Carolina, where the right to moderately chastise has been so reluctantly yielded, it is admitted that if the circumstances involve malice, cruelty, or the infliction of permanent injury upon the wife, the husband may properly be convicted of assault and battery. State v. Oliver, 70 N. C. 60. But in the State trivial complaints are not favored. And a sentence to imprisonment for five years in an aggravated case was lately considered a "cruel and unusual" punishment. State v. Driver, 78 N. C. 423.

15. Sandiland, *Ex parte*, 12 E. L. & Eq. 463. See Adams v. Adams, 100 Mass. 365, as to the old writ of *supplicavit* formerly issued for protection of the wife against her husband.

CHAPTER III.

THE SPOUSE AS A CRIMINAL.

§ 55. Coverture Affecting Private Wrongs and Public Wrongs.

We shall find the doctrine of coverture affecting the liability of a married woman for her fraud or injury, so that her husband must respond to others in damages for her.[16] But here the private wrong and the public wrong stand contrasted. The immunity of the wife does not extend to criminal prosecutions. For, as Blackstone observes, the union is only a civil union.[17] Or, to come more to the point, it would be cruel and unjust to punish one person for the crime of another, or even to compel the two to bear the penalty together; while it would be impolitic, as well as unjust, to allow any relation which human beings, morally responsible, might sustain with one another to absolve either from public accountability. Here coverture as a theory contradicts itself, by leaving the wife answerable alone for her crimes, just as a single woman. The utmost the law can do is to furnish a presumption of innocence in her favor in cases where the coercion of her husband may be reasonably inferred.

§ 56. Presumption of Husband's Coercion and Wife's Innocence.

This indulgence of presumed innocence, it is said, is carried so far as to excuse the wife from punishment for theft, burglary, or other civil offences "against the laws of society," when committed in the presence or by the command of her husband; but not so as to exculpate the wife for moral offences. For *mala prohibita* she is not punished, for *mala in se* she is. Such a distinction is variable and somewhat shadowy; the line seems to be drawn more

16. See § 122, *et seq., post.* 17. 1 Bl. Com. 443.

wisely, if at all, between such heinous crimes as murder and manslaughter, and the lighter offences.[18]

At common law a wife was not guilty of crimes committed in her husband's presence, except treason or murder, but was guilty of those committed in his absence,[19] as a crime committed by a wife in the husband's presence was *prima facie* presumed to be the result of his coercion.[20] The presumption was weak, and slight evidence rebutted it.[21]

The modern married women's acts, however, tend to give married women a separate entity for criminal as well as other purposes, and under such statutes a wife may be convicted of being an idle or disorderly person though supported by her husband or some other person,[22] or may be guilty of maintaining a house of ill-fame though she lives in the house with her husband.[23] A wife cannot be guilty of violating the North Carolina statute prohibiting abandonment of crops on rented land before paying for advances made by the landlord, since the contract was void.[24]

But the mere presence of the wife when her paramour killed her husband when he interrupted them at a lover's meeting is not that aiding or abetting which is required to constitute guilt.[25]

§ 57. Presumption of Wife's Innocence Applied.

The presumption, therefore, that in the less heinous crimes committed by the wife in her husband's presence, the wife acts under the husband's coercion, may in any case be repelled by suitable proof; and when it is, the wife, as one acting *sui juris,* must be

18. 2 Kent, Com., 11th ed., 150; 4 Bl. Com. 28, 29, and Christian's notes; 1 Hawk. P. C. b. 1, ch. 1, § 9; 1 Russ. Crimes, 18-24.

19. Nays v. Taylor, 12 S. D. 488, 81 N. W. 901; Morton v. State, — Tenn. —, 209 S. W. 644.

20. Braxton v. State, — Ala. App. —, 82 So. 657; Trometer v. District of Columbia, 24 App. D. C. 242; State v. Harvey, 130 Ia. 394, 106 N. W. 938; Commonwealth v. Gannon, 97 Mass. 547; State v. Miller, 162 Mo. 253, 62 S. W. 692, 85 Am. St. Rep. 498; State v. Martini, — N. J. —, 78 A. 12; State v. Noell, 156 N. C. 648, 72 S. E.

21. Commonwealth v. Adams, 186 590.

Mass. 101, 71 N. E. 78; People v. Ryland, 2 N. Y. Cr. R. 441; Morton v. State, — Tenn —, 209 S. W. 644; 2 Kent, Com., 11th ed., 150; State v. Parkerson, 1 Strobh. 169; 1 Russ. Crimes, 22; Rex v. Martha Hughes, *coram* Thomson, B., 2 Lew. C. C. 229; Uhl v. Commonwealth, 6 Gratt. 706; Wagener v. Bill, 19 Barb. 321; 1 Greenl. Ev., 10th ed., § 28.

22. Commonwealth v. Tay, 170 Mass. 192, 48 N. E. 1085.

23. Hudson v. Jennings, 134 Ga. 373, 67 S. E. 1037.

24. State v. Robinson, 143 N. C. 620, 56 S. E. 918.

25. State v. Larkin, 250 Mo. 218, 157 S. W. 600, 46 L. R. A. (N. S.) 13.

held responsible for the wrong done by her in her husband's company. This is the true rule. Husband and wife may, therefore, both be indicted and convicted of a crime where it appears that both were guilty of the offence and the wife was not coerced.[26] In most of the latest cases where the wife is indicted, the presumption of coercion has been regarded as something to be easily rebutted,[27] especially in that numerous class of cases which relates to the illegal sale of liquors, a business in which married women frequently engage understandingly. And it has been held that an instruction giving the wife the benefit of the presumption in liquor prosecutions was properly refused.[28] And where the crime is heinous, and the presence and command of the husband do not concur, a jury may readily find the wife independently guilty.[29]

A wife who committed larceny by her husband's bare command, when he was not present, has been held liable therefor;[30] and our present tendency is to refuse exculpation to the wife unless the husband commanded and was near enough besides to exert his marital influence upon her participation in accomplishing the particular crime.[31]

For an indictable offence, not heinous, committed by his wife in his presence, and with his knowledge, the husband may presumably be found guilty.[32] But not, we may well conceive, where it is shown that he tried to prevent his wife from committing the crime. Nor is he liable where the act was done in his absence and apart from his marital influence; still less where it was done while he was away and contrary to his express instructions.[33] And the husband is not liable criminally for her crimes unless he aids,

26. Goldstein v. People, 82 N. Y. 231; Mulvey v. State, 43 Ala. 316; State v. Potter, 42 Vt. 495; People v. Wright, 38 Mich. 744; State v. Camp, 41. N. J. L. 306; Barker v. State, 64 Tex. Cr. 106, 141 S. W. 529.

27. See State v. Cleaves, 59 Me. 298; Commonwealth v. Tryon, 99 Mass. 442; Commonwealth v. Pratt, 126 Mass. 462.

28. State v. Seahorn, 166 N. C. 373, 81 S. E. 687; Commonwealth v. Hand, 59 Pa. Super. Ct. 286.

29. Presumption of coercion rebutted in a murder case, where wife had conspired with her husband to commit robbery. Miller v. State, 25 Wis. 384. In People v. Wright, 38 Mich. 744, where a wife, participating with her husband in a robbery, throttled the victim and told him to keep still, while her husband and a confederate rifled his pockets, a verdict of independent guilt against her was sustained.

30. Seiler v. People, 77 N. Y. 411.

31. State v. Camp, 41 N. J. L. 306; State v. Potter, 42 Vt. 495; Commonwealth v. Lewis, 1 Met. 151; Commonwealth v. Feeney, 12 Allen, 560; Commonwealth v .Munsey, 112 Mass. 287; Edwards v. State, 27 Ark. 493.

32. Hensly v. State, 52 Ala. 10.

33. State v. Baker, 71 Mo. 475.

procures or acquiesces in them.[34] But if the husband is so near his wife, when she commits the crime, that she is under his immediate influence for that offence, his coercion and guilt will be presumed, though he is not actually present.[35]

The presumption did not apply where a house of ill-fame is kept in a house used and occupied by spouses jointly, in which case both are guilty.[36] And a wife may be guilty of perjury while testifying in the presence of her husband.[37]

§ 58. Coercion may extend to a Series of Crimes.

In independent crimes so closely connected as stealing and receiving stolen goods, our law does not readily prosecute the husband for the one offence and the wife for the other, since this would not consist with applying the rule of coercion. Thus, it is held that a wife cannot be convicted of feloniously receiving stolen goods from her husband.[38] Yet in a proper case both husband and wife might be prosecuted, whether this were for receiving stolen goods or for stealing.[39] The husband's coercion may extend, therefore, to a series of crimes perpetrated by means of his wife's agency in pursuance of his own criminal design.

Since at common law spouses were one person, they would not be guilty of conspiracy;[40] but the rule will not avail the wife as a defence to a prosecution for acts in execution of a conspiracy which are in themselves criminal.[41]

§ 59. Offences against the Property of either Spouse.

Public policy forbids that either spouse should molest the person of the other with impunity.[42] But as to the property of a spouse our law pursues a distinction. Accordingly, it is well established that the wife cannot be found guilty of stealing the goods of her husband, inasmuch as she resides with him and has possession of

34. Lumpkin v. City of Atlanta, 9 Ga. App. 470, 71 S. E. 755.

35. Commonwealth v. Munsey, 112 Mass. 287.

36. State v. Gill, 150 Ia. 210, 129 N. W. 821; Barker v. State, 64 Tex. Cr. 106, 141 S. W. 529; State v. Jones, 53 W. Va. 613, 45 S. E. 916.

37. Smith v. Meyers, 54 Neb. 1, 74 N. W. 277.

38. Regina v. Brooks, 14 E. L. & Eq. 580. And see Regina v. Robinson, L. R. 1 C. C. 80. As to stolen goods concealed in a house occupied by both husband and wife, see Perkins v. State, 32 Tex. 109.

39. Goldstein v. People, 82 N. Y. 231.

40. Merrill v. Marshall, 113 Ill. App. 447.

41. Jones v. Monson, 137 Wis. 478, 119 N. W. 179.

42. See, *e. g.*, as to remedies for assault and battery, *supra*, § 54.

the goods by virtue of the marriage relation.[43] And as to the husband, whose legal possession and control of his wife's property during wedlock is far stronger, it is held that, not even upon the ground that a certain building was his wife's separate property, can he be convicted of arson for setting it on fire.[44]

There is much conflict as to the effect of modern statutes granting women separate property, and it is sometimes held that such statutes make the husband liable to larceny of his wife's personal property. In a recent case, however, the wife was held not liable to prosecution for larceny under statutes defining the separate property of husband and wife. The court remarks that statutes abrogating the common law must be strictly construed, and that in the married women's acts no such intent to consider this question appears.[45]

§ 60. Adultery.

The wife's immunity from prosecution for larceny from her husband applies whether she has been guilty of adultery or not.[46] Therefore, it is held that the adulterer who receives from the wife her husband's goods is not guilty of receiving stolen goods.[47] But where the actual or intended adulterer, or, as we may suppose, any person with a guilty purpose, aids the wife in carrying away her husband's goods, or removes them himself, he may be indicted for the larceny.[48] Not even an adulterer is to be deemed guilty of larceny for merely assisting the adulteress in carrying away her necessary wearing apparel [49] or separate property.

A spouse who starts a prosecution for adultery of the other spouse has no absolute right to discontinue it, as this would open wide the door to blackmail, and such a prosecution once begun becomes a public concern, even under a statute providing that only the spouse can institute such a prosecution.[50]

Illicit cohabitation by a man and woman not married to each

43. Queen v. Kenny, 2 Q. B. D. 307; Lamphier v. State, 70 Ind. 317.

44. Snyder v. People, 26 Mich. 106.

45. Hunt v. State, 72 Ark. 241, 79 S. W. 768, 65 L. R. A. 71; Beasley v. State, 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418; *contra*, Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302; State v. Phillips, 85 Ohio St. 317, 97 N. E. 976, 40 L. R. A. (N. S.) 142.

46. Queen v. Kenny, 2 Q. B. D. 307, and cases cited.

47. *Ib.* Compare State v. Banks, 48 Ind. 197.

48. Queen v. Kenny, 2 Q. B. D. 307.

49. State v. Banks, 48 Ind. 197, per Buskirk, C. J.

50. State v. Astin, — Wash. —, 180 Pac. 394, 4 A. L. R. 1335. See, however, People v. Dalrymple, 55 Mich. 519, 22 N. W. 20.

other, but with no public acts of indecency, was not a crime at common law,[51] but is commonly made so by statute in this country. Under such a statute an indictment for unlawful cohabitation need not contain the charge that the acts were "openly, notoriously and scandalously" committed, where it does set out that they were done within the common knowledge of the neighbors and of persons passing and repassing in the street. Under such circumstances they must have been done "openly and notoriously." [52]

§ 61. Separate Penalties for Women.

The modern humane tendency towards studying the needs of the criminal, and trying to reform rather than punish him, has found expression in statutes in many States providing separate and distinct punishments and places of incarceration for men and women. In a recent case it was held that it is not a denial of the equal protection of the laws guaranteed by the constitution to send a woman to a Farm for Women instead of to the State penitentiary. The legislature, as well as the executive and judicial branches, has a right to individualize among criminals.[53]

51. Com. v. Isaacs, 5 Rand. (Va.) 634; State v. Moore, 1 Swan (Tenn.) 136.

52. Adams v. Comm., 162 Ky. 76, 171 S. W. 1006, L. R. A. 1916C 651.

53. State v. Heitman, 105 Kan. 139, 181 Pac. 630. See 33 Harvard Law Review, 449.

CHAPTER IV.

DISQUALIFICATIONS AS WITNESSES.

§ 62. Mutual Disqualification as Witnesses.

One of the most important of the mutual disabilities of the marriage state is the disqualification of husband and wife to testify as witnesses in the courts for or against one another. Blackstone places this prohibition on a technical ground,— unity of the person; for, he says, if they testify in behalf of one another, they contradict the maxim, "*Nemo propria causa testis esse debet;*" and, if against one another, that other maxim, "*Nemo tenetur se ipsum accusare.*" [54] He also suggests interest as another ground for the rule, and this doubtless is a good one. But a more solid reason than either is that of public policy. "The happiness of the married state," says Mr. Greenleaf, "requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures, by providing that it shall be kept forever inviolable; that nothing shall be extracted from the bosom of the wife which was confided there by the husband." [55]

So unyielding is this rule, that mutual consent will not authorize the breach of it.[56] Whether the suit be civil or criminal, in law or at equity, it matters not. Form yields to substance in procedure, for the sake of excluding such testimony. And after coverture has

54. 1 Bl. Com. 443.

55. 1 Greenl. Evid., § 254. See also 2 Kent, Com. 178-180, to the same effect. But apparently Chapman, J., in Peaslee v. McLoon, 16 Gray, 488, prefers to consider that interest, more than policy determined the question at common law.

56. 1 Greenl. Evid., § 340, and cases cited; Lord Hardwicke, in Barker v. Dixie, Cas. temp. Hardw. 264; Davis v. Dinwoody, 4 T. R. 679, per Lord Kenyon; *contra*, Pedley v. Wellesley, 3 Car. & P. 558; 2 Kent, Com. 179.

terminated by death or divorce, still the prohibition lasts as to all which took place while the relation existed.[57] The disability of the husband is in this respect as great as that of the wife.[58] So far, indeed, has the prohibition been carried, that in one case, where the defendant married a witness after she had been summoned into court, she was forbidden to testify.[59] The rule applies alike to evidence of declarations made by husband and wife for or against one another and to their testimony in person.[60] Nor is a wife a competent attesting witness to a will which contains a devise to her husband;[61] nor one claiming, as widow, the right to administer, competent to establish her marriage.[62] Nor are the spouses at common law competent witnesses for or against one another in a suit for divorce on the ground of adultery, nor in proceedings for bigamy against one of them.[63] And it is said that the law guards the marital confidence of silence as well as that of communication.[64]

§ 63. Rule Restricted to Bona Fide Spouses.

This rule of exclusion applies only to persons occupying the *bona fide* relation of husband and wife; not, of course, to a mistress, or parties in immoral cohabitation. But at the same time the courts lean kindly towards *prima facie* marriages, and make no rigid investigation.[65] The policy of the rule is evidently to treat as

57. Monroe v. Twistleton, cited in Averson v. Lord Kinnaird, 6 East, 192; Doker v. Hasler, Ry. & M. 198; Stein v. Bowman, 13 Pet. 223; 1 Greenl. Evid., § 337. See also Terry v. Belcher, 1 Bailey, 568; State v. Jolly, 3 Dev. & Bat. 110; Crose v. Rutledge, 81 Ill. 266; Wood v. Shurtleff, 46 Vt. 525; Barnes v. Camac, 1 Barb. 392. But see Dickerman v. Graves, 6 Cush. 308.

58. See cases cited in 1 Greenl. Evid., § 334. And see Turner v. Cook, 36 Ind. 129; Richards v. Burden, 31 Ia. 305; Rea v. Tucker, 51 Ill. 110; Succession of Wade, 21 La. Ann. 343. The wife is not competent to prove an *alibi* for her husband in a criminal prosecution. Miller v. State, 45 Ala. 24.

59. Pedley v. Wellesley, 3 Car. & P. 558. The authority of this case seems, however, questionable.

60. 1 Greenl. Evid., § 341; Alban v. Pritchett, 6 T. R. 680; Denn v. White, 7 T. R. 112; Kelly v. Small, 2 Esp. 716; Brown v. Wood, 121 Mass. 137. See Cook v. Burton, 5 Bush, 64, as to proof by strangers.

61. Sullivan v. Sullivan, 106 Mass. 474. The Massachusetts rule is contrary to that of New York and Maine. See authorities cited in this case.

62. Redgrave v. Redgrave, 38 Md. 93.

63. Marsh v. Marsh, 29 N. J. Eq. 396; Finn v. Finn, 19 N. Y. Supr. 339; People v. Houghton, 31 N. Y. Supr. 501. But see State v. Bennett, 31 Ia. 24.

64. Goodrum v. State, 60 Ga. 509.

65. 1 Greenl. Evid., § 339, and cases cited; 2 Stark. Evid. 400; Bull N. P. 287; Campbell v. Twemlow, 1 Price, 81. So as to the wife of a freedman. Hampton v. State, 45 Ala. 82. The

privileged communications all that passes between persons supposing themselves lawfully married, and at all events not to prejudice the rights of the innocent party to an invalid marriage; but the rule has not always been carried to such an extent.

§ 64. Common-law Exceptions.

Some exceptions exist to the rule, founded mainly on considerations of public policy. Thus the wife may testify as to her forcible abduction and marriage; but in such cases she is hardly to be considered the wife.[66] High treason also was formerly held an exception to the rule; for the allegiance due to the crown was said to be paramount to all private considerations; but this is not probably good law at the present day.[67] The wife's testimony has been admitted as to some peculiar secret facts.[68] Dying declarations of one are admissible to charge the other with murder.[69]

§ 65. Crimes or Injuries Inflicted by one on the other.

In general, husband and wife can make criminal complaints and testify against one another as to personal injuries, upon a prosecution; for this the rule of self-preservation requires.[70] It is generally conceded that a prosecution for personal violence committed by the husband upon the wife is a prosecution for a crime against the wife,[71] and that a conspiracy to have a wife declared insane involves a crime against the wife [72] such as to make her a competent

rule of exclusion does not extend to a mistress or the husband of one's paramour. Dennis v. Crittenden, 42 N. Y. 542; Mann v. State, 44 Tex. 642; Hill v. State, 41 Ga. 484; Rickerstriker v. State, 31 Ark. 207; State v. Brown, 28 La. Ann. 279.

66. 2 Russ. on Crimes, 605, 606; 1 Bl. Com. 443; 1 Greenl. Evid., § 343, and cases cited in note.

67. 1 Greenl. Evid., § 345, and authorities cited; *contra*, 4 Bl. Com. 29.

68. Rex v. Reading, Cas. temp. Hardw. 79, 82; Ratcliff v. Wales, 1 Hill, 63; 1 Greenl. Evid., § 344. Husband or wife shall not prove the fact of access or non-access. Boykin v. Boykin, 70 N. C. 262.

69. State v. Belcher, 13 S. C. 459. And see State v. Ryan, 30 La. Ann. 1176.

70. See Lord Mansfield, in Bentley v. Cook, 3 Doug. 422; 1 East P. C. 455. But see Lord Thurlow, in Sedgwick v. Walkins, 1 Ves. 49. In a prosecution against a wife and her paramour for adultery, the husband may testify against the wife. State v. Bennett, 31 Iowa 24. Wife allowed to testify against husband for using instrument with intent to procure her miscarriage. State v. Dyer, 59 Me. 303. See also, as to assault, &c., Matthews v. State, 32 Tex. 117; Goodrum v. State, 60 Ga. 509; Whipp v. State, 34 Ohio St. 87; State v. Parrott, 79 N. C. 615.

71. Dill v. People, 19 Colo. 469, 36 Pac. 229.

72. Comm. v. Spink, 137 Pa. 255, 20 Atl. 680.

witness against the husband. The Iowa court has gone further than some others in holding that the crime of incest committed by the husband is a crime against the wife,[73] and so of a prosecution for adultery or bigamy.[74]

There seems to have been a gradual change in the attitude of the courts on the question as to when a wife can testify against the husband, and the rule is certainly tightening against the criminal. At common law a wife could testify only in cases of violence upon her person, and our Supreme Court has said that "Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife." [75] It has been recently held, however, that the wife can testify in a case of bigamy,[76] and a recent decision [77] has gone so far as to hold that the wife might testify against her husband in a prosecution against the husband under the Mann Act for transporting her from place to place for purposes of prostitution. The decision is based on the general principle that a man ought not to avoid criminal liability by marrying his victim. The court remarks that "It cannot be that the common law would protect the wife against a single act of violence and not against a system of assaults; against an act that brought merely mortification and shame, and not against a series of acts which brought degradation and destruction of body and soul; against a single essay at crime, and not against a continuing effort at pre-eminence in infamy."

Statutes commonly provide that in a criminal case the husband and wife shall not be witnesses against each other except in a prosecution for a crime committed by one against the other, and there is some confusion in the cases as to just what is a crime by one against the other. Under such a statute a first wife may testify against the husband in a prosecution against him for bigamy, as this is a crime against her, as she is the individual particularly and directly injured or affected by the crime for which he is prosecuted; [78] or the wife to testify in a prosecution of the hus-

73. State v. Chambers, 87 Ia. 1, 53 N. W. 1090, 43 Am. St. Rep. 349.

74. State v. Bennett, 31 Iowa 24; State Sloan, 55 Iowa 217, 7 N. W. 516; *contra*, Bassett v. United States, 137 U. S. 496, 11 Sup. Ct. Rep. 165, 34 L. Ed. 762.

75. Brewer, J., in Bassett v. United States, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762.

76. Schell v. People, — Colo. —, 173 Pac. 1141, L. R. A. 1918F 954.

77. Denning v. United States, 247 Fed. 463, L. R. A. 1918E 487.

78. Schell v. People, — Colo. —, 173 Pac. 1141, L. R. A. 1918F. 954.

band for non-support of their child, as this is a crime against the domestic relation in which she is interested.[79]

Under such a statute the wife cannot testify where the husband has forged the wife's name. This is not a crime against the wife, as it would not render her liable on the instrument, but is a crime and an attempt to defraud some third person,[80] but a wife is a competent witness against the husband in a prosecution for his perjury in obtaining a divorce against her. The decree of divorce causes ignominy to fall on the wife, and changes her property rights as well as her personal status, and the crime committed was peculiarly injurious to the wife. It is immaterial that the divorce was not obtained through this perjury, but that it was discovered.[81]

§ 66. Adultery.

In a prosecution of a woman for adultery the testimony of her husband as to his marriage with her is competent evidence.[82]

§ 67. Joint Defendants.

Where several are held together for a joint offence, the wife of one is not a good witness against the others, so long as her testimony might affect her husband's case;[83] but if he has already been convicted or acquitted, or is not indicted at all, or the indictment against him is dismissed, or the grounds of defence for each are entirely distinct, the rule is otherwise.[84]

Where a wife is not a competent witness in behalf of her husband in a criminal case, still, where he is one of two joint defendants, she may be allowed to testify in behalf of the other defendant with

79. Hunter v. State, Okla. Crim. Rep. —, 134 Pac. 1134, L. R. A. 1915A 564.

80. Molyneux v. Willcockson, — Iowa —, 137 N. W. 1016, 41 L. R. A. (N. S.) 1213.

81. Dill v. People, 19 Colo. 469 41 Am. St. Rep. 254, 36 Pac. 229; West v. State, — Okla. Crim. Rep. —, 164 Pac. 327, L. R. A. 1917E 1129.

82. State v. Shaw, 73 Vt. 149, 94 Atl. 434, L. R. A. 1915F 1987.

83. Hall, P. C. 301; Dalt. Just. c. 111; 1 Greenl. Evid., § 335, and notes; 1 Phil. Evid., 75 *n.;* Regina v. Williams, 3 Car. & P. 558; Rex. v. Locker, 5 Esp. 107; Blake v. Lord, 16 Gray, 387; State v. Mooney, 64 N. C. 54; Fincher v. State, 58 Ala. 215; Powell v. State, 58 Ala. 362; Ray v. Commonwealth, 12 Bush, 397. As to the wife of an accomplice who testifies against accused, see Blackburn v. Commonwealth, 12 Bush, 181; State v. Ludwick, Phill. (N. C.) 401.

84. As to civil suits, where two or more defendants must rely upon the same defence, so that proof of a good defence as to one establishes a defence as to the other, the wife of one cannot usually be heard in behalf of the other. Stewart v. Stewart, 41 Wis. 624; Mercer v. Patterson, 41 Ind. 440.

a caution to the jury that her evidence is not to affect the case against her husband.[85]

Where there is evidence that the husband and wife were conspirators, the acts and declarations of the wife just before the crime are admissible on the ground of agency as against the husband.[86]

§ 68. Res Gestae or Agency.

The wife's declarations may be given in evidence for or against her husband, where material, as part of the *res gestæ;* as in a suit regarding an insurance policy where she is the party insured; in an action against the husband for her board, he having turned her out of doors; and, in general, within the scope of the agency, wherever she acts purely as his agent.[87] So one who sells bonds as agent for his wife is a competent witness in an action to enforce the contract of sale on the ground of agency.[88] Under a statute prohibiting a husband and wife from testifying for or against each other, except as to matters where one is acting as agent for the other, where a wife sends her husband to find a witness he is not her agent in talking to the witness after he has found him, and cannot testify to the conversation.[89]

In collateral proceedings, only remotely affecting their mutual interests, their evidence is admissible though it may tend to criminate or contradict or subject the other to a legal demand; as in a suit relating to a pauper settlement, where the wife's testimony tends to convict her husband of bigamy.[90] Or, in collateral proceedings, to prove the fact that they were husband and wife at a certain time.[91]

85. Lawson v. Comm., 160 Ky. 180, 169 S. W. 587, L. R. A. 1915D 972.

86. Thompson v. State, — Tex. —, 178 S. W. 1192. See note in 29 Harvard Law Review, 332.

87. Averson v. Lord Kinnaird, 6 East, 188; Walton v. Green, 1 Car. & P. 621; Thomas v. Hargrave, Wright, 595, and other cases cited in note to 1 Greenl. Evid., § 342; Fisher v. Conway, 21 Kan. 18; Chunot v. Larson, 43 Wis. 536; Trepp v. Barker, 78 Ill. 146; Sumner v. Cooke, 51 Ala. 521; Hale v. Danforth, 40 Wis. 382.

88. Rose v. Monarch, 150 Ky. 129, 150 S. W. 56, 42 L. R. A. (N. S.) 660.

89. Muskogee Electric Traction Co. v. McIntyre, 37 Okla. 684, 133 Pac. 213, L. R. A. 1916C 351.

90. 1 Greenl. Evid., § 342; Fitch v. Hill, 11 Mass. 286; Griffin v. Brown, 2 Pick. 308; 2 Stark. Evid. 401; Wood v. Bibbins, 58 Ind. 392; Higbee v. McMullan, 18 Kan. 133; Fraim v. Frederick, 32 Tex. 294.

91. Leaphart v. Leaphart, 1 S. C. (N. S.) 199; Leighton v. Sheldon, 16 Minn. 243; Denison v. Denison, 35 Md. 361.

§ 69. Before or After Termination of the Relation.

Both husband and wife may testify, after the relation has terminated, as to facts which came to each other's knowledge by means equally accessible to any person not standing in that relation; for here the same principle applies as in the case of privileged communications between attorney and client.[92] Thus a divorced wife may testify as to her relations with the defendant in an action for the alienation of her affections if it does not concern any communication between herself and husband during marriage, or which she obtained by virtue of the marital relation, notwithstanding a statute providing that husband or wife shall not testify against each other or concerning any communication between them during marriage.[93] Communications between a divorced couple may be heard in evidence although the divorce was obtained by the fraud of one of them and was subsequently set aside, where they never afterwards recognized each other as man and wife.[94] And the divorced wife may testify against the husband even in a prosecution against him for perjury in obtaining the divorce.[95]

Where the statute forbids the wife from testifying for or against the husband, this includes transactions occurring before marriage of the parties. The statute is based on public policy, and to avoid lack of harmony in the marital relation, and on account of identity of interest and on account of the influence commonly exercised over the wife by the husband and her competency must depend upon the relationship at the time of the trial when she is offered as a witness.[96] So where the defendant has carnal knowledge of a female under the age of consent, and subsequently marries her, she cannot be a witness against him in a prosecution for such carnal

92. 1 Greenl. Evid., § 338; Coffin v. Jones, 13 Pick. 445; Williams v. Baldwin, 7 Vt. 506; Cornell v. Vanartsdalen, 4 Barr, 364; English v. Cropper, 8 Bush, 292; Elswick v. Commonwealth, 13 Bush, 155; Spivey v. Platon, 29 Ark. 603. So as to communications not confidential, but evidently designed to be made public. Crook v. Henry, 25 Wis. 569. As to the wife of a divorced spouse testifying to facts which occurred before or after the divorce, see Crose v. Rutledge, 81 Ill. 266. Husband of plaintiff disqualified even as to matters occurring before marriage, where suit is for breach of promise of marriage. Collins v. Mack, 31 Ark. 684.

93. Merritt v. Cravens, 168 Ky. 155, 181 S. W. 970, L. R. A. 1917F 935.

94. Spearman v. Texas, — Tex. Crim. Rep. —, 152 S. W. 915, 44 L. R. A. (N. S.) 243.

95. Laird v. State, — Tex. —, 184 S. W. 810. See note 30 Harvard Law Review, 87.

96. Sands v. Bradley & Co., — Okla. —, 129 Pac. 732, 45 L. R. A. (N. S.) 396.

knowledge, although he married her solely to defend himself against prosecution and had never lived with her or supported her since the marriage. The case is governed by the common-law rule that one spouse cannot testify against the other over the objection of the latter. There is an exception where the evidence of the wife is necessary to prove personal injuries while the relationship of husband and wife is in existence between them, but this does not include cases occurring before marriage. As here she became a wife by her own consent and because she wanted to marry the defendant, the wrong to her was wholly unconnected with her consent to the marriage, and can in no sense be said to have caused her consent, and by the marriage she became a wife *de jure*.[97]

§ 70. Confidential Communications.

The English Evidence Act of 1853, 16 & 17 Vict. c. 83 (which has been substantially enacted in some parts of this country), renders husbands and their wives competent and compellable witnesses for each other, except in criminal cases and in cases of adultery; but neither shall be compelled to disclose communications made during marriage.[98]

97. Norman v. State, — Tenn. —, 155 S. W. 135, 45 L. R. A. (N. S.) 399.

98. See Ed. note to 10th ed., 2 Kent Com. 181; Stapleton v. Croft, 10 E. L. & Eq. 455; Barbat v. Allen, *ib.* 596; Alcock v. Alcock, 12 *ib.* 354; State v. Wilson, 30 N. J. 77; Farrell v. Ledwell, 21 Wis. 182; Peaslee v. McLoon, 16 Gray, 488; Metler v. Metler, 3 C. E. Green, 270. Some of the later American cases turning largely upon the construction of statutes are Parsons v. People, 21 Mich. 509; State v. Straw, 50 N. H. 460; Stanley v. Stanton, 36 Ind. 445; Noble v. Withers, 36 Ind. 193; Craig v. Brendel, 69 Penn. St. 153; Newhouse v. Miller, 35 Ind. 463; Reeves v. Herr, 59 Ill. 81; Green v. Taylor, 3 Hughes, 400; Haerle v. Kreihn, 65 Mo. 202; State v. Brown, 67 N. C. 470. In an action against both for the wife's slanderous words, the wife is competent in her own behalf, and the husband for himself. Mousler v. Harding, 33 Ind. 176. Notwithstanding our statutes as commonly worded, a prisoner's wife is not a competent witness for or against him upon the trial of an indictment. People v. Reagle, 60 Barb. 527; Wilke v. People, 53 N. Y. 525; Steen v. State, 20 Ohio St. 333. Husband permitted to testify, when a substantial party to the suit, though claiming in right of his wife. Fugate v. Pierce, 49 Mo. 441; Cooper v. Ord, 60 Mo. 420. As to the competency of a wife now to testify, if agent for an absent husband, see Magness v. Walker, 26 Ark. 470; Morony v. O'Laughlin, 102 Mass. 184; Robertson v. Brost, 83 Ill. 116. As to competency under statute in case of tort, see Bunker v. Bennett, 103 Mass. 516; Anderson v. Friend, 71 Ill. 475. Wife of an heir held incompetent, notwithstanding statute, in a suit contesting the validity of a will. Carpenter v. Moore, 43 Vt. 392. Wife not protected under statute from making discovery, though it be against herself. Metler v. Metler, 3 C. E.

It is the universal rule that husband and wife cannot testify to confidential communications made by one to the other when alone, but communications by a wife to a husband in the presence of a third party are admissible and are not privileged.[99] So a letter written by a husband to his wife when the parties were living apart and dealing at arm's length, in which he stated what he would do if she brought divorce proceedings against him, is not a confidential communication, and may be received in evidence.[1]

Green, 270. Husband may prove the speaking of the defamatory words in an action of slander brought by himself and wife. Duval v. Davey, 32 Ohio St. 604; Hawver v. Hawver, 78 Ill. 412. Wife not competent for husband in action by latter against a stranger for carrying away husband's goods. Hayes v. Parmalee, 79 Ill. 563. Testimony under liquor acts, see Jackson v. Reeves, 53 Ind. 231; Snow v. Carpenter, 49 Vt. 426. Wife's testimony may now be that of substantial party in interest as to her property, and testimony of husband that of her agent. Quade v. Fisher, 63 Mo. 325; Wilcox v. Todd, 64 Mo. 388. In statute proceedings to compel support, see People v. Bartholf, 31 N. Y. 272.

As to declarations of deceased spouse proved by the survivor, see Dye v. Davis, 65 Ind. 474; White v. Perry, 14 W. Va. 66.

As to testimony affecting claims against a deceased spouse's estate, see Freeman v. Freeman, 62 Ill. 189; Floyd v. Miller, 61 Ind. 224; Dougherty v. Deeney, 41 Ia. 19; Davis v. Davis, 48 Vt. 502; Barry V. Sturdivant, 53 Miss. 490; Patton v. Wilson, 2 Lea, 101. Or where the adverse party is representative of a deceased person, see Hunter v. Lowell, 64 Me. 572.

A divorced wife allowed to be a competent witness in certain instances; showing her status and competency by the judgment record in the divorce suit. Wottrich v. Freeman, 71 N. Y. 601.

Wife held competent to prove marriage contract between herself and her deceased husband, where the legality of the marriage is in question. Greenawalt v. McEnelley, 85 Penn. St. 352.

As to testimony where the suit related to property held by husband and wife jointly, see McConnell v. Martin, 52 Ind. 434.

A statute providing for the admission of interested parties as witnesses does not *per se* remove the disqualification of husband and wife. Lucas v. Brooks, 18 Wall. 436; Gibson v. Commonwealth, 87 Penn. St. 253; Schultz v. State, 32 Ohio St. 276; Gee v. Scott, 48 Tex. 510.

If one marital party testifies for or against the other, under statute, cross-examination must be permitted, even if it compels the testimony to the opposite direction. Ballentine v. White, 77 Penn. St. 20; Steinberg v. Meany, 53 Cal. 425.

A wife cannot testify against her husband upon his trial for theft of her property. Overton v. State, 43 Tex. 616.

Concerning testimony as to conversations held by married parties when they were alone, the rule of the common law, encouraging their confidence, is presumed to be unchanged unless the statute is positive to that effect. Raynes v. Bennett, 114 Mass. 424; Westerman v. Westerman, 25 Ohio St. 500; Brown v. Wood, 121 Mass. 137; Wood v. Chetwood, 27 N. J. Eq. 311; Stanford v. Murphy, 63 Ga. 410.

99. Pilcher v. Pilcher, — Va. —, 84 S. E. 667, L. R. A. 1915D 902.

1. McNamara v. McNamara, — Neb. —, 154 N. W. 858, L. R. A. 1916B 1272.

In a recent case the court has adhered to the ancient rule in all its purity, that communications between husband and wife, when alone, are privileged, and holds that a wife should not be permitted to show that her deceased husband was mentally unsound by testifying to his habits of intoxication, his hearing of voices, his mutterings while asleep, the delusions which caused him to arm himself with guns and pistols, insults offered her and attempts to take her life. The fact that he had been guilty of similar conduct in the presence of others does not authorize her to testify to conduct and declarations when alone.[2]

Even a statute making husband and wife competent witnesses against each other does not apply to confidential communications between them, and such privileged testimony cannot be divulged by either of them.[3]

Under a statute prohibiting a husband and wife from testifying against each other the wife may be called by the husband and testify to private conversations had between them if they are otherwise material. The statute was intended to protect husband and wife and for their benefit, and cannot be construed to deprive either of them of any rights they otherwise might have.[4]

There is a clear distinction often overlooked between the disqualification of one spouse not to testify for the other and the privilege of one not to have the other testify against him. The privilege generally remains, but the disqualification has been universally removed by statute.[5] When a wife testifies in favor of her husband her testimony may be impeached as in case of any other witness,[6] but where her testimony against her husband in grand jury proceedings has been improperly obtained it cannot be used to impeach her later testimony in favor of her husband before the petit jury.[7]

§ 71. Interest of Witness.

There have been some important changes introduced into the law of evidence in some parts of this country by statute; such as per-

2. Whitehead v. Kirk, — Miss. —, 61 So. 737, 51 L. R. A. (N. S.) 187.

3. Williams v. Betts, — Del. —, 98 Atl. 371; McCormick v. State, — Tenn. —, 186 S. W. 95, L. R. A. 1916F 382; Wilkes v. Wilkes, 115 Va. 886, 80 S. E. 745.

4. Hampton v. State, — Okla. Crim. Rep. —, 123 Pac. 571, 40 L. R. A. (N. S.) 43.

5. Talbot v. United States, 208 Fed. 144. See 33 Harvard Law Review 873.

6. Bell v. State, — Tex. — 213 S. W. 647.

7. Doggett v. State, — Tex. —, 215 S. W. 454.

mitting interested persons to testify in their own suits. Where the old doctrine prevails, the exclusion of the husband, by reason of direct interest, operates to exclude his wife likewise.[8] So the husband cannot be a witness in a controversy respecting his wife's separate estate, though in respect to other parties concerned he might be competent.[9]

Under a statute rendering one incompetent to testify as to a transaction with a deceased person who is interested in the event, the wife of the plaintiff in an action for his services is not incompetent, as she has no direct legal or pecuniary interest, as upon recovery no right growing out of the married relationship would attach to the money recovered. Where the property in controversy is land the wife may be incompetent where her dower may be affected.[10]

On the whole, the prevailing tendency of late years in both England and America is to regard domestic confidence or the bias of a spouse as of little consequence compared with the public convenience of extending the means of ascertaining the truth in all causes; such facilities being increased, it is believed, by hearing whatever each one has to say, and then making due allowance for circumstances affecting each one's credibility. By the modern enlargement of the wife's separate contract and property relations, moreover, the spouses are presented, not so constantly as partakers of one another's confidence, but rather as persons having adverse interests to maintain, or else as principal and agent.

8. Greenl. Evid., § 341; *Ex parte* Jones, 1 P. Wms. 610; and cf. Stat. 6 Geo. IV., ch. 16, § 37.

9. 1 Burr. 424, per Lord Mansfield; 12 Vin. Abr. Evidence B. And see note to 1 Greenl. Evid., § 341, with authorities cited. In various States a spouse, under statute, may be a competent witness to a greater or less extent with reference to wife's separate property. Musser v. Gardner, 66 Penn. St. 242; Northern Line Packet Co. v. Shearer, 61 Ill. 263; Porter v. Allen, 54 Ga. 623; Wing v. Goodman, 75 Ill. 159. As where the husband dealt with the wife's separate property as her agent. Chesley v. Chesley, 54 Mo. 347; Menk v. Steinfort, 39 Wis. 370. But cf. Robison v. Robison, 44 Ala. 227.

10. Helsabeck v. Doub, 167 N. C. 205, 83 S. E. 241, L. R. A. 1917A, 1.

CHAPTER V.

GENERAL INEQUALITIES.

§ 72. What each Spouse yields as to Property.

The property rights of married women are restrained at the common law. The husband yields to his wife no participation whatever in his own property, whether acquired before or during the continuance of the marriage relation, except a certain right of inheritance to his goods and chattels, of which he can generally deprive her by his will and testament, and also dower in his real estate, which is her only substantial privilege. In return for this, she parts with all control, for the time being, over her own property, whensoever and howsoever obtained, by gift, grant, purchase, devise or inheritance; gives him outright her personal property in possession, and allows him to appropriate to himself those outstanding rights which are known as her *choses in action*, or all the rest of her personal property; parts with the usufruct of her real estate, creating likewise a possible encumbrance upon it in the shape of tenancy by the curtesy; and finally takes, if she survives him, only her real estate, such of her personal property as remains undisposed of and unappropriated, with a few articles of wearing apparel and trinkets called *paraphernalia*. She cannot restrain his rights by will. She is not allowed to administer on his personal estate in preference to his own kindred, though the whole of it were once hers; while he can administer on her estate for his own benefit, and exclude her kindred altogether, even from participation in the assets. Thus unequal are the property rights of husband and wife by the strict rule of coverture. We speak not here of recent statutory benefits conferred upon the wife; nor of that relief which equity affords in permitting property to be held to the wife's separate use, and giving her a provision from her *choses in action*, when the husband seeks its aid in appropriating them to

his own use; but of what is to be properly termed the common law of husband and wife.[11]

§ 73. Husband's Liability for Wife's Contracts; Wife's Immunity.

Some recompense is afforded to the wife for the loss of her fortune, in the rule that her husband shall pay her debts contracted while a *feme sole;* that is, unmarried. And while coverture lasts he is liable for all just debts incurred in her support. He has even been held guilty of murder in the second degree when he has suffered her to die for want of proper supplies.[12] The wife cannot make a contract so as to bind herself; but in this, and other cases of express or implied authority, she can bind her husband, and so secure a maintenance. That which cannot be enforced by the wife as a matter of obligation is often attained at the common law in some indirect way.[13] Nor can the wife sue and be sued in her own right.

§ 74. Wife's Immunity, &c., as to Torts.

So, too, the husband is liable civilly for the frauds and injuries of the wife, committed during coverture; being sued either alone or jointly with her, in accordance with the legal presumption of coercion in such cases. And he must respond in damages, whether she brought him a fortune by marriage or not. But as we have seen, this rule does not apply to crimes, except that the law shows the wife a certain indulgence where a similar presumption can be alleged on her behalf. On the other hand, the husband takes the benefit of such injuries as she may suffer, by suing with her and appropriating the compensation by way of damages to himself.[14]

§ 75. When Wife is treated as Feme Sole.

We may add that the wife is relieved at the common law of the disabilities of coverture, and placed upon the footing of a *feme sole,* with the privilege to contract, sue and be sued, on her own behalf, in one instance, namely, where her husband has abjured the realm or is banished; for he is then said to be dead at the law.[15]

11. See 1 Bl. Com. 442-445, and notes, by Christian, Hargrave, and others; 2 Kent Com. 130-143.

12. Reg. v. Plummer, 1 Car. & K. 600.

13. See 1 Bl. Com. 442; 2 Kent, Com. 143-149.

14. 1 Bl. Com. 443; 2 Kent Com. 149, 150.

15. 1 Bl. Com. 443; 2 Kent Com. 154. See Separation, *post.*

154. See Separation, *post,* § 1060 *et seq.*

And the necessity of the case furnishes the strongest argument for this exception. Another exception early prevailed in certain parts of England by local custom,— as that of London,— where the wife might carry on a trade, and sue and be sued in reference thereto as though single.[16]

16. 1 Selw. N. P. 298; Bing. Inf. 261, 262. The modern practitioner is here cautioned that the statement of the common law in this chapter is a statement of doctrines which at the present day are found to be controlled and changed, to a great extent, by modern equity rules and legislation.

CHAPTER VI.

WIFE'S ANTENUPTIAL DEBTS.

§ 76. Rule stated.

One of the immediate effects of marriage at the common law is that the husband at once becomes bound to pay all outstanding debts of his wife,— her debts *dum sola*, as they are called,— of whatever amount. This is a sort of recompense he makes for taking her property into his hands. But whether she brings him a fortune or not, his liability is not affected. She may owe large sums at the time of marriage and have nothing to offset them. She may have studiously concealed the existence of the debts from her affianced husband. But none of these considerations can avail to shield him. When married, she is married with her debts as well as her fortunes. As Blackstone observes, her husband must be considered to have "adopted her and her circumstances together."[17]

This rule is moreover applied without discrimination as to individuals. An infant who marries is bound equally with an adult husband.[18] A second husband is liable for the debts of his wife outstanding at the close of her widowhood, whether contracted prior to her first marriage, or while living separate from her first husband, and upon a separate maintenance, or after the termination of her first coverture and subsequent to the second.[19] On general principles the husband is bound for the debt of his infant

17. 1 Bl. Com. 443; 3 Mod. 186; 2 Kent Com. 143-146; Macq. Hus. & Wife, 39-41; Heard v. Stamford, 3 P. Wms. 409; Cas. temp. Talb. 173; Ferguson v. Williams, 65 Ark. 631, 44 S. W. 1126; Heyman v. Heyman, 19 Ga. App. 634, 92 S. E. 25; Miller v. Kalwey, 4 Ky. Law 362.

18. Roach v. Quick, 9 Wend. (N. Y.) 238; Butler v. Breck, 7 Met. (Mass.) 164.

19. 1 T. R. 5; 7 T. R. 348; Prescott v. Fisher, 22 Ill. 390; Angel v. Felton, 8 Johns. (N. Y.) 149.

wife while sole just as much as though she were an adult, though only to the same extent as she would have been bound. Hence, where the demand is for necessaries furnished her while an infant, the husband, after marriage, becomes bound to pay it, since she would have been liable if she had not married. And the infancy of the husband himself cannot be pleaded against this obligation.[20]

§ 77. Extent and duration of Liability.

The liability of the husband for his wife's debts while sole is limited strictly to legal demands; that is to such as she was bound to pay at the time of her marriage.[21] And if a demand would not be enforceable against her remaining sole, neither is it enforceable against her husband. But the promise or part-payment of the wife cannot take a debt out of the statute of limitations as against her husband, nor can the promise or part-payment of the husband as against his wife. Nor can their admissions charge one another.[22] Their rights in this respect are separately regarded. The husband remains liable for the debts of his wife *dum sola* only so long as coverture lasts. As his liability originated in the marriage, so it ceases with it. Hence if the obligation be not enforced in the lifetime of the wife, the surviving husband retains her fortune (if any) in his hands, and cannot be charged further with her debts either at law or in equity.[23] The wife's *choses in action* still unreduced to possession at the time of her death may, however, be reached by her creditors where he has received them as her administrator, though only to the actual amount of such assets; so that this would afford them but partial relief.[24] Nor can the husband's estate after his death be made liable for the wife's debts contracted while sole.[25] Not even the parol promise made by the husband during coverture to pay his wife's debts *dum sola* will create an

20. Cole v. Seeley, 25 Vt. 220; Anderson v. Smith, 33 Md. 465; Bonney v. Reardin, 6 Bush (Ky.) 34.

21. Cowley v. Robertson, 3 Camp. 438; Caldwell v. Drake, 4 J. J. Marsh. (Ky.) 246.

22. Ross v. Winners, 1 Halst. (N. J.) 366; Sheppard v. Starke, 3 Munf. (Va.) 29; Brown v. Lasselle, 6 Blackf. (Ind.) 147; Moore v. Leseur, 18 Ala. 606; Farrar v. Bessey, 24 Vt. 89; Parker v. Steed, 1 Lea (Tenn.) 206. But see Lord Tenterden, in Humphreys v. Royce, 1 Mood. & Rob. 140, as to admissions of the wife allowable in evidence after her death.

23. 2 Kent Com. 144. See Ch. Ca. 295.

24. Heard v. Stamford, 3 P. Wms. 409; Cas. temp. Talb. 173; Morrow v. Whitesides, 10 B. Mon. (Ky.) 411; Day v. Messick, 1 Houst. (Del.) 328.

25. Woodman v. Chapman, 1 Camp. 189; Curtton v. Moore, 2 Jones Eq. (N. C.) 204.

additional liability for them on his part.[26] If the wife survives her husband, she becomes liable once more on her debts while sole. And this, too, though the means for extinguishing them may have already been squandered by her husband or placed beyond her reach.[27] Here is a third hardship. Coverture, therefore, seems to operate here as a temporary disability, and not so as to utterly merge the wife's identity. The husband becomes liable by marriage, not as the debtor, but as the husband; the remedy being suspended, or rather shifted, during coverture.

§ 78. Hardship of Rule.

The injustice of the rule in certain cases is obvious. Supposing a *feme sole* is worth fifty thousand dollars, and owes at the time of her marriage five thousand dollars. She marries, and dies before her creditors have had time to sue her husband. Thereupon the husband retains for himself the fifty thousand dollars, and the creditors are without a remedy. Such was the character of the argument pressed upon the distinguished Lord Talbot more than a century ago in the case of *Heard* v. *Stamford*.[28] But his reply was as follows: "The question is, whether the husband, as such, be chargeable for a debt of his wife's, after her death, in a court of equity? As, on the one hand, the husband is by law liable to all his wife's debts during the coverture, although he did not get one shilling portion with her, and although her debts should amount to any sum whatever; so, on the other hand, it is as certain that if the debt be not recovered during the coverture, the husband is no longer chargeable as such, let the fortune he received be ever so great. The case, perhaps, may be hard, but the law hath made it so; and the alteration of it is the proper work of the legislature only."

Lord Macclesfield, still later, encountered a different objection to the common-law rule, arising from an opposite state of facts. This he endeavored to answer. It may be hard, he observes, that the husband should be answerable for the wife's debts when he receives nothing from her; but we are to set off against that hardship the rule, that if the husband has received a personal estate with the wife, and happens not to be sued during the coverture, he is not liable. He runs a hazard in being liable to the debts much beyond the personal estate of the wife; and in recompense

26. Cole v. Shurteleff, 41 Vt. 311.

27. Woodman v. Chapman, 1 Camp. N. P. 189, per Lord Ellenborough.

28. Heard v. Stamford, 3 P. Wms. 409.

for that hazard he is entitled to the whole of her personal estate, though far exceeding the debts, and is discharged from the debts as soon as the coverture ceases.[29] Constituting a right by balancing off two wrongs may seem unsatisfactory to the modern reader. Still the court decided aright; for the difficulty was in the common-law itself.

§ 79. Actions to Recover Antenuptial Debts.

All the actions for the wife's debts while sole must be brought against husband and wife jointly, and not against either separately; and judgment obtained by disregarding this rule will be reversed on error.[30] The object is to retain the remedy in hand so that execution may be taken out against the proper party according to circumstances; for, if the husband should die pending the suit, the wife, on her survivorship, would become liable.

If judgment be recovered against a *feme sole* on her debt before she marries, and she dies before execution is taken out, having married in the meantime, her husband will be discharged from liability. But if judgment be recovered against both during coverture, and the wife dies before execution, the husband is still charged, because by the judgment the nature of the debt was altered, and it became his own debt.[31] So, too, when judgment was obtained before coverture, and *scire facias* brought upon it against husband and wife afterwards.[32] When judgment has been obtained for a debt of the wife while sole, and she afterwards marries, execution must in strictness be taken out against her alone, because execution must always follow the judgment.[33] But if the creditor desire to charge a person who was not a party to the record, as the husband in this instance, *scire facias* should be issued so as to make his a party.[34] This rule applies likewise where the wife marries pending the suit. The death of the wife after action has

29. Thomond v. Suffolk, 1 P. Wms. 469; 2 Kent Com. 144.

30. Robinson v. Hardy, 1 Keb. 281; Drue v. Thorn, Alleyn, 72; Angel v. Felton, 8 Johns. (N. Y.) 149; 7 T. R. 348; Gage v. Reed, 15 Johns. (N. Y.) 403; Gray v. Thacker, 4 Ala. 136; Platner v. Patchin, 19 Wis. 333.

31. 2 Bright Hus. & Wife, 3 Burton v. Burton, 5 Harring. (Del.) 441; O'Brien v. Ram, 3 Mod. 186; Sid. 337; Treviband v. Lawrence, 2 Ld. Raym. 1050.

32. O'Brien v. Ram, 3 Mod. 186; Taylor v. Miller, 2 Lea (Tenn.) 153. Mr. Bright seems to have stated this point incorrectly. See 2 Bright Hus. & Wife, 3.

33. Doyley v. White, Cro. Jac. 323; Bull. Ch. P. 23; Benyon v. Jones, 15 M. & W. 566; and see Haines v. Corliss, 4 Mass. 659; Commonwealth v. Philipsburgh, 10 Mass. 78; Triggs v. Triggs, 2 M. & Ry. 126 *n*.

34. 2 Bright Hus. & Wife, 3, 4; Cooper v. Hunchin, 4 East, 521.

been commenced against husband and wife, and before judgment, puts an end to the suit,[35] while, on the other hand, the death of the husband before judgment permits the suit to abate as to him, and proceed against her as survivor.[36]

The rule as laid down in England concerning the wife's personal liability on her debts *dum sola* is that coverture does not wholly relieve her from the consequences of judgment for the time being; for that both may be taken on execution; and when the wife is taken, she shall not be discharged unless it appear that she has no separate property out of which the demand can be satisfied.[37] This rule does not seem to have been recognized with such strictness in this country.[38] But where the wife after marriage pays a portion of her debt contracted while sole from funds derived from her separate property, it is said that the husband will be bound by the act, unless he disaffirms it within a reasonable time.[39]

§ 80. Effect of Bankruptcy.

The English common-law courts hold that if the husband, during coverture, obtains a certificate of discharge in bankruptcy, the wife's debts *dum sola* are wiped out as well as his own.[40] We apprehend the equity doctrine to be that though the husband be discharged, the wife's suspended liability yet remains; and this has been announced in New York.[41] And in Maine the wife's creditors *dum sola* may have a fraudulent conveyance of her property set aside notwithstanding her husband's insolvency.[42]

§ 81. Effect of Contract Between Spouses as to Antenuptial Debts.

So far as the rights of third parties are concerned, the liability of the husband for his wife's debts *dum sola* cannot be affected by any antenuptial contract between the two;[43] nor of course by their agreement during coverture. The special contract of a husband

35. Williams v. Kent, 15 Wend. (N. Y.) 360. For the proper procedure in case of a mortgage executed by the wife *dum sola*, and foreclosed, with a decree ordering personal judgment for a deficiency, see Platner v. Patchin, 19 Wis. 333.

36. Parker v. Steed, 1 Lea (Tenn.) 206.

37. Tidd, Pract., 9th ed., 1026; Sparkes v. Bell, 8 B. & C. 1; Newton v. Roe, 7 Man. & Gr. 329; Evans v. Chester, 2 M. & W. 847.

38. Mallory v. Vanderheyden, 3 Barb. Ch. (N. Y.) 9; 1 Comst. 453.

39. Hall v. Eaton, 12 Vt. 510.

40. Miles v. Williams, 1 P. Wms. 249; Lockwood v. Salter, 5 B. & Ad. 303.

41. Mallory v. Vanderheyden, 3 Barb. Ch. (N. Y.) 9; 1 Comst. 453.

42. Hamlin v. Bridge, 24 Me. 145.

43. Harrison v. Trader, 27 Ark. 288.

with the creditor, relating to his wife's debt *dum sola,* furnishes a different cause of action to the creditor from that which arises out of the debt *dum sola* taken by itself.[44]

§ 82. Effect of Statute.

The husband's legal responsibility for the debts incurred by his wife before marriage being founded in the theory that he had adopted her with her fortunes or misfortunes together, the creation of separate property rights on her behalf places this responsibility in a far more unfavorable light. The English Married Women's Act of 1870 abolishes the husband's liability for his wife's antenuptial debts, and fastens it upon such property, instead, as the wife may hold to her separate use;[45] though this is somewhat modified by a later act which regards certain assets he may have derived from her.[46] So, too, in many of our States, it is now found that the husband's liability for his wife's antenuptial debts is either modified to the extent of the property received through her, or else abolished altogether; her sparate estate, if she have any, being made subject, instead, to their payment.[47] It has been held, however, that the common-law rule has not been abolished by the Arkansas Married Women's Act.[48]

44. Wilson v. Wilson, 30 Ohio St. 365.

The common law as to the wife's antenuptial debts is changed considerably by our modern legislation.

45. Act 33 & 34 Vict. c. 93; *Ex parte* Holland, L. R. 9 Ch. 307; Sanger v. Sanger, L. R. 11 Eq. 470.

46. Act 37 & 38 Vict. c. 50 (1874); De Greuchy v. Wills, L. R. 4 C. P. D. 362. Under this act the creditor may sue the husband, who has the option to plead non-liability, except as the act specifies. Matthews v. Whittle, L. R. 13 Ch. D. 811.

47. Smith v. Martin, 124 Mich. 34; 82 N. W. 662; 7 Det. Leg. N. 104; Johnson v. Griffiths & Co. (Tex.) 135 S. W. 683.

Roundtree v. Thomas, 32 Tex. 286; Shore v. Taylor, 46 Ind. 345; Travis v. Willis, 55 Miss. 557; Wood v. Orford, 52 Cal. 412; Cannon v. Grantham, 45 Miss. 88; Madden v. Gilmer, 40 Ala. 637; Bryan v. Doolittle, 38 Ga. 255; Smiley v. Smiley, 18 Ohio St. 543; Bailey v. Pearson, 9 Fost. (N. H.) 77; Reunecker v. Scott, 4 Greene (Iowa), 185 Curry v. Shrader, 19 Ala. 831; Callahan v. Patterson, 4 Tex. 61. Such abolishing acts are not retrospectively construed. Clawson v. Hutchinson, 11 S. C. 323. But as to Illinois, see Connor v. Berry, 46 Ill. 370, where the old liability is still recognized. So, too, in Ohio. Alexander v. Morgan, 31 Ohio St. 546. And the husband is there held liable for debts of a partnership in which the wife has been engaged before marriage. Alexander v. Morgan, 31 Ohio St. 546. See Mobray v. Leckie, 42 Md. 474.

Where a debt was contracted before marriage, it is held that the remedy against the wife's separate estate becomes suspended during marriage. Vanderheyden v. Mallory, 1 Comst. 452. But see Dickson v. Miller, 11 S. & M. (Miss.) 594.

48. Kies v. Young, 64 Ark. 381, 42 S. W. 669, 62 Am. St. R. 198.

CHAPTER VII.

NECESSARIES.

§ 83. Foundation of Common-Law Doctrine.

On the important principle of the wife's agency rests the liability of the husband, at common law, in contracts made by the

wife for necessaries. It is a clear obligation which rests upon every husband to support his wife; that is, to supply her with necessaries suitable to her situation and his own circumstances and condition in life. Notwithstanding a man married unwillingly, — as, for instance, to avoid a prosecution for seduction or bastardy — he is bound to support her.[49] But though this obligation appears to rest on the foundation of natural justice, the common law assigns, as the true legal reason, that she may not become a burden to the community. So long as that calamity is averted, the wife has no direct claim upon her husband under any circumstances whatever; for even in the case of positive starvation she can only come upon the parish for relief; in which case the parish authorities will insist that the husband shall provide for her to the exent of sustaining life.[50] If a husband fail in this respect, so that his wife becomes chargeable to any parish, the statute 4 Geo. IV., c. 83, § 3, says that "he shall be deemed an idle and disorderly person and shall be punishable with imprisonment and hard labor."[51]

§ 84. Summary of Modern Rule.

The common-law doctrine, as we have seen, makes the ground of the husband's liability for his wife's necessaries essentially that of agency. This agency is stated as an agency of necessity where a deserving wife stands in want of supplies because of her husband's misconduct. But in truth such necessity transcends all the analogies of an authorized representation, and inasmuch as the wife has no property and is legally dependent on her husband, a right to supply her wants upon his credit is inferred from the nature of her situation. When both spouses live together, the wife may pledge her husband's credit for necessaries, unless he supplies them otherwise, and so performs his duty after his own method; if they separate, his liability continues commensurate with his obligation, so that she can only pledge his credit when the fault was not her own, but, being justified in her conduct, the conjugal right to necessaries is perfect, and consequently enforceable in this manner, unless he performs his duty after his own method. The discrepancy of the cases relates chiefly to presumptions in favor of the person who supplies the necessaries; and here, as we have seen, the latest decisions leave it in doubt how strong a presumption

49. State v. Ransell, 41 Conn. 433.
50. Rex v. Flintan, 1 B. & Ad. 227; Reg. v. Wendron, 7 Ad. & El. 819.
51. See Macphers. Inf. 42, 43.

cohabitation as husband and wife furnishes by itself. Formerly it was thought that private arrangements between husband and wife, where they lived together, could not be set up against the seller who had no notice thereof; but latterly the English inclination has been, as we shall see,[52] to limit the implied agency of the wife during cohabitation to those whose dealings have already been recognized by the husband, and who therefore ought to have notice of revocation, which rule of course narrows down the presumption. Whatever presumption of authority may be inferred from cohabitation, separation raises the counter-presumption that the wife has no authority to pledge her husband's credit. Upon the whole, to reconcile the earlier and later decisions, the wife's right of procuring necessaries on her husband's credit may be deducted from these two combined considerations: (1) That where the husband proves remiss in furnishing needful support, the wife has the right to compel such support by pledging his credit, whether they cohabit or dwell apart, so long as misconduct on her part has not absolved him from the conjugal duty,— this rule of compulsion taking largely the place in modern times of the old remedies formerly pursued in the ecclesiastical courts; (2) That any wife may be the agent of her husband and bind him to the extent of her authority, like other representatives. In short the rule of agency and a wife's necessaries is carried far enough in actual practice to make that agency a fiction for the sake of a wife's self-protection against her unfaithful spouse.[53]

We may add that the husband's express contract with others, or his express promise or express sanction comes in aid of such legal inference concerning his liability for supplies furnished his

52. *Post,* § 99.

53. That agency is not the full measure of the wife's power to bind her husband for what she needs is further seen in the decisions upon the point of a wife's legal expenses al- point of a wife's legal expenses later noticed. *Post,* § 111. Here there is some confusion in the decisions; but a disposition very clear is shown by the courts to allow the wife in numerous instances to prosecute or defend in furtherance of her marital rights, even though it be against the husband himself. Inconsistently enough, the fiction of agency and necessaries has been here employed; but the true ground is rather that the wife is permitted to maintain her rights against an unfaithful husband in self-protection.

wife, as may be drawn from any of the matrimonial situations which we have considered.[54]

§ 85. Liability of Husband — Rule stated.

At common law the duty of furnishing necessaries for the family rests on the husband alone.[55] Late cases also hold that if the husband fails to provide necessaries, he will be liable even at law to those furnishing them at the wife's request, even when they cohabit.[56] It makes no difference that she is able to provide for herself.[57] The rule presupposes that the debt is that of the husband, and not of the wife, whose debts he is not generally liable to pay.[58] But the principle is that the husband has the right to decide from whom and from what place the necessaries shall come, and that so long as he has provided necessaries in some way, his marital obligation is discharged, whatever may be the method he chooses to adopt. Accordingly where the spouses dwell together, so long as the husband is willing to provide necessaries at his own home, he is not liable to provide them elsewhere.[59] In general, while the spouses live together, a husband who supplies his wife with necessaries suitable to her position and his own, is not liable to others for debts contracted by her on such an account without his previous authority or subsequent sanction.[60] In determining what is a reasonable expenditure of money for a family, the income of the husband, or his power to produce or earn one, is as important

54. See *e. g.* Daubney v. Hughes, 60 N. Y. 187. Any notice intended to terminate the continuance of an express contract must, in order to be effectual, be appropriate thereto. *Ib.* And see Mickelberry v. Harvey, 58 Ind. 523.

55. Heyman v. Heyman, 19 Ga. App. 634, 92 S. E. 25; Edminston v. Smith, 13 Ida. 64, 92 P. 842; Underhill v. Mayer, 174 Ky. 229, 192 S. W. 14; Noel v. O'Neill, 128 Md. 202, 97 A. 513; *In re* Kosanke's Estate (Minn.), 162 N. W. 1060; Dorrance v. Dorrance, 257 Mo. 317, 165 S. W. 783; Wickstrom v. Peck, 155 App. Div. 523, 140 N. Y. S. 570; May v. Josias, 159 N. Y. S. 820; Weiserbs v. Weiserbs, 169 N. Y. S. 111; Negley v. Stone, 32 Misc. 733, 66 N. Y. S. 449; Stevens v. Hush, 171 N. Y. Supp. 41; Woods v. Kaufman, 115 Mo. App. 398, 91 S. W. 399. Under the civil law sums paid previously to a *dation en paiment* for the support of the family, from all appearances by the husband, will not be charged to the wife on the ground that she is liable for necessaries for the family. Lehman v. Conlon, 105 La. 431, 29 So. 879.

56. Humphreys v. Bush, 118 Ga. 628, 45 S. E. 911; Bonney v. Perham, 102 Ill. App. 634; Wilson v. Thomass, 127 N. Y. S. 474.

57. Ott v. Hentall, 70 N. H. 231, 47 A. 80, 51 L. R. A. 226.

58. Werner v. Werner, 169 App. Div. 9, 154 N. Y. S. 570.

59. Morgan v. Hughes, 20 Tex. 141; Jolly v. Rees, 15 C. B. (N. S.) 628.

60. Seaton v. Benedict, 5 Bing. 28.

as the actual amount expended.[61] The common-law rule has not been changed by the Married Women's Acts in Alabama, Arkansas or New York.[62]

§ 86. To Wife.

A wife's own claim against her husband for moneys expended in procuring necessaries is not favorably regarded. Thus, if she leaves her spouse for good cause, and lives apart from him for many years, she ought either to pledge his credit, leaving the creditor to his own remedies, or else to institute such judicial proceedings as may result in the award of alimony or a separate maintenance; but not to expect to render her husband a debtor to herself.[63] But as respects her right of support she is a creditor, and may subject his property to such right, if rights of others have not intervened.[64] Where a wife lived apart from her husband for eight years she had no claim against him or his estate for money expended for support and maintenance during such period, though she left him for cruelty.[65] If she has used her own earnings, while she has a right to them under a Married Women's Act, to support herself when deserted by her husband, she may recover from him the amount so expended.[66] To maintain such an action she must show not only that she made the payments out of her separate estate, but also that the articles were technically necessaries.[67]

§ 87. To Relatives of Wife.

Policy has regarded parental claims for necessaries furnished to a wife with great distrust. Such claims may doubtless accrue under an express contract.[68] But the law will not ordinarily imply a contract as against a son-in-law, to pay his wife's board while staying at her father's house. "Persons in such a near connection as father and children do not usually live together upon a footing of obligation to account with and pay for attentions and services, or board and lodging. When the parties intend to live in

61. Clark v. Cox, 32 Mich. 204.

62. Ponder v. D. W. Morris & Bro., 152 Ala. 531, 44 So. 651; Sparks v. Moore, 66 Ark. 437, 56 S. W. 1064; Ruhl v. Heintze, 97 App. Div. 442, 80 N. Y. S. 1031.

63. Pierce v. Pierce, 16 N. Y. 50.

64. Chittenden v. Chittenden, 22 Ohio Cir. Ct. 498, 12 O. C. D. 526.

65. Pierce v. Pierce, 9 Hun, (N. Y.) 50.

66. Debrauwere v. Debrauwere, 203 N. Y. 460, 96 N. E. 722; Pearson v. Pearson, 173 N. Y. S. 563.

67. Pearson v. Pearson, 176 N. Y. S. 626.

68. Daubney v. Hughes, 60 N. Y. 187.

that way, it is but reasonable to require that there should be an express understanding between them to that effect."[69] And this principle is extended to the husband's own board; the law implying no contract by which the relation of debtor and creditor arises between father-in-law and son-in-law, either for support on the one hand or services on the other.[70] It is even held that in the absence of the husband's request or promise to pay, the father of a married woman, who has left such husband ready and willing to support her, cannot recover from the husband for her board or necessaries, even though she has brought a libel for divorce;[71] though such claims, when *bona fide,* have been sustained where the wife is shown to have sought refuge at the parental abode, from the husband, upon grounds wholly justifiable.[72] Some of the latest cases, nevertheless, imply a promise on the husband's part to pay his wife's board, where she goes to her parent's house upon a mutual understanding that she may stay there indefinitely, the spouses having quarrelled.[73] With the growing laxity of the marriage union, the parent's intervention on a daughter's behalf against her husband, with the view of procuring her divorce, and boarding her at the husband's cost meantime, is, unhappily, becoming far more common that formerly, and more readily encouraged by the courts.

§ 88. To Third Persons.

Money lent the wife for the purchase of necessaries, or for other purposes however suitable, is not classed with necessaries at the common law; probably because husbands do not often confer an authority liable so easily to abuse.[74] But equity takes a view more consonant to the wants of a distressed wife, and allows the person lending the money to stand in the stead of the tradesman, and to recover if the money was actually used for necessaries; thus leaving him bound, in other words, only to see that his loan is properly

69. Per Court, in Cantine v. Phillips, 5 Harring. (Del.) 428.

70. Sprague v. Waldo, 38 Vt. 139.

71. Catlin v. Martin, 69 N. Y. 393. The wife should, rather, apply for an allowance pending the libel.

72. Biddle v. Frazier, 3 Houst. (Del.) 258. Even though the wife's libel for divorce was prosecuted under her father's direction. Dowe v. Smith, 11 Allen (Mass.) 207.

73. Burkett v. Trowbridge, 61 Me. 251. And see Daubney v. Hughes, 60 N. Y. 187.

74. Walker v. Simpson, 7 W. & S. (Pa.) 83; Stone v. McNair, 7 Taunt. 432; Stevenson v. Hardy, 3 Wils. 388; Knox v. Bushell, 3 C. B. (N. S.) 334.

applied.[75] Therefore, money advanced for and applied to her support, by others, under like circumstances of abandonment, may be recovered of him in equity.[76]

§ 89. For Necessaries of Putative Wife.

Marriage *de facto,* or reputed marriage, is always sufficient to charge the husband with his wife's necessaries. There seem to be three reasons why this should be so; one, that a tradesman cannot be expected to inquire into such matters; another that agency binds any principal; the third, that it is just that a man who holds out a woman to society as his wife should maintain her as such. Hence an agency is to be inferred wherever there is cohabitation of parties as husband and wife; though not, it would appear, where the cohabitation is irregular and calculated to raise a different impression, and strong proof of actual authority bestowed is not furnished. Lord Kenyon used very strong language to this effect in *Watson* v. *Threlkeld,* where it appeared that the tradesman knew that there had been no marriage: "It is certain that if a man has permitted a woman to whom he was not married to use his name and pass for his wife, and in that character to contract debts, he is liable for her debts; and I am of opinion that he is liable whether the tradesman who furnished the goods knew the circumstances to be so or not. He gives her a credit from his name and cohabitation; and it is not to be supposed that the tradesman could look to the credit of a woman of that description and not to that of the man by whom she was supported."[77] The rule is especially applicable where the parties have gone through a form of marriage.[78] The *dictum* of Lord Ellenborough, in *Robinson* v. *Nahon,* would seem to narrow this rule so as to exclude tradesmen having actual knowledge of the illicit relation of the parties.[79] And the death

75. Harris v. Lee, 1 P. Wms. 482; Walker v. Simpson, 7 W. & S. (Pa.) 83; Kenyon v. Farris, 47 Conn. 510; Deare v. Soutten, L. R. 9 Eq. 151. See Schullhofer v. Metzger, 7 Rob. (N. Y.) 576; De Brauwere v. De Brauwere, 203 N. Y. 460, 96 N. E. 722; Marshall v. Perkins, 20 R. I. 34, 37 A. 301, 78 Am. St. R. 841.

76. Kenyon v. Farris, 47 Conn. 510, 36 Am. R. 86; De Brauwere v. De Brauwere, 203 N. Y. 430, 96 N. E. 722, 38 L. R. A. (N. S.) 508. The rule is not recognized in Massachusetts. Skinner v. Terrell, 159 Mass. 474, 34 N. E. 692, 21 L. R. A. 673; Deare v. Soutten, L. R. 9 Eq. 151.

77. 2 Esp. 637. And see 1 Greenl. Evid., § 207.

78. Frank v. Carter, 219 N. Y. 35, 113 N. E. 549.

79. Robinson v. Nahow, 1 Camp. 245. But reference to the case shows that this doubt is suggested more strongly in the reporter's headnote than in his lordship's opinion. See Jewsbury v. Newbold, 40 E. L. & Eq. 518; Munroe v. De Chemant, 4 Camp. 215.

of the *quasi* husband is held to revoke his authority altogether, so that a subsequent contract is void against his estate, under all circumstances.[80]

§ 90. For Necessaries of Family in general.

The obligation to provide necessaries extends to the whole family, with such modifications as will be more properly noticed in treatises upon the topic of parent and child. If a man marry a widow he is not bound to maintain her children; unless he holds them out to the world as part of his own family,[81] nor to support a child which his wife brings into the family without his consent.[82] But by the statute 4 and 5 Will. IV., c. 76, § 57, the husband is required to maintain, as part of his family, any child or children, till the age of sixteen, legitimate or illegitimate, that his wife may have at the time of entering into the contract.[83] As an agent duly authorized, the wife may doubtless pledge her husband's credit for the necessaries of the children, as well as her own. But upon the doctrine of presumptions and an implied authority from him to do so, the common law is more reserved. "Family necessaries" is an expression of our later statutes which indicates a growing favor in that direction, and modern custom may, of course, extend the implied scope of an agency beyond earlier usage. There never was a doubt, in our law, of the obligation which rests upon the father of maintaining his children,[84] and it has sometimes been considered that in a strong case, where the father neglects his duty, the infant child himself may bind the parent by his contract.[85] We shall examine this point hereafter in the light of modern legislation,[86] but may here remark that a wife's authority is more favored in this respect now than formerly, and that upon circumstances showing that the husband remitted the marital care and custody of children to the wife, she has been treated as an implied agent on his behalf of their necessaries; and even as an agent of necessity.[87]

80. Blades v. Free, 9 B. & C. 167; Stinson v. Prescott, 15 Gray (Mass.) 335. But see Ginochjo v. Porcella, 3 Bradf. Sur. 277.

81. Attridge v. Billings, 57 Ill. 489.

82. Haas v. American Nat. Bank, 42 Tex. Civ. 467, 94 S. W. 439.

83. Tubb v. Harrison, 4 T. R. 118; Cooper v. Martin, 4 East, 76; Stone v. Carr, 3 Esp. N. P. 1; Hall v. Weir, 1 Allen (Mass.) 261. See Schouler Dom. Rel., Parent & Child.

84. *Supra*, § 85. Bazeley v. Forder, L. R. 3 Q. B. 559.

85. See Schouler Dom. Rel., Parent and Child, 327, 328, where this point is considered at length.

86. See Cook v. Ligon, 54 Miss. 368; Powers v. Russell, 26 Mich. 179.

87. As where they have separated upon the mutual understanding that she may take the children with her. Gotts v. Clark, 78 Ill. 229; Clark v. Cox, 32 Mich. 204. Or, perhaps, where

As the obligation of a husband to support does not extend beyond his wife and his own children, nor even to step-children, a wife cannot ordinarily make a binding contract to support her own parent, brother, sister, or near relatives, either at his expense or her own, since she is neither *sui juris* nor presumably his agent for that purpose.[88]

§ 91. For Articles in part Necessaries and in part not.

The reader has perceived that the claim for a wife's necessaries involves two elements: articles furnished must be of the suitable class, such as food, dresses, or medical attendance; and, furthermore, of that class the wife must be destitute of such supply as befits her condition and the means and station of her husband. Hence a blending of law and fact, and hence, moreover, much confusion in laying down the rules, though a tradesman has not always to inquire strictly. Where one has supplied the wife with articles, some of which are necessaries and some are not, some of which were rightly furnished her and some of which were not, he can yet recover for the necessaries, or for what he rightly furnished.[89] But on the other hand, one cannot furnish articles which were not necessaries and not suitable, and recover a fraction of their value on the plea that they might have answered the purpose of other articles which would have been necessaries.[90]

§ 92. For non-necessaries.

A husband is not usually liable for non-necessaries sold to his wife without his authority,[91] and on her sole credit,[92] even though he fails to object when he learns of the transaction.[93] His subsequent

he drives wife and children from home by his misbehavior. Reynolds v. Sweetser, 15 Gray (Mass.) 78;

88. Olney v. Howe, 89 Ill. 556; Attridge v. Billings, 57 Ill. 489; Cf. Schnuckle v. Bierman, 89 Ill. 454.

89. Eames v. Sweetser, 101 Mass. 78; Roberts v. Kelley, 51 Vt. 97.

90. Thorpe v. Shapleigh, 67 Me. 235.

91. Bennett v. Chamberlain (Del.), 5 Har. 391; McBride v. Adams, 84 N. Y. S. 1060.

92. Mattar Bros. v. Wathen, 99 Ark. 329, 138 S. W. 455; Charles v. Strouse, 120 N. Y. S. 736.

93. Richburg v. Sherwood, 101 Tex. 10, 102 S. W. 905.

promise to pay, in such case, is without consideration.[94] But if sold with his knowledge and consent he will be liable.[95]

§ 93. Agency of Wife to Bind Husband for Necessaries.

To enforce these marital obligations the law takes a circuitous course; and the wife may secure herself from want against a cruel and miserly husband, of ample means to support her, by pledging his credit and making such purchases as are needful, on the strength of an implied authority for that purpose. Here, all other things being equal, it is presumed that she was her husband's agent; and no direct permission need be shown. Indeed, wherever the facts are clear, that those articles were actually needed, and that the husband failed to supply them, this presumption is carried so far as to control even the express orders of the husband himself. The articles for which a wife is allowed to pledge her husband's credit as his presumed agent are designated at common law as necessaries. There is a broad presumption of assent which cohabitation of itself furnishes. The simple circumstance that husband and wife are living together has been generally held sufficient, when nothing to the contrary intervenes, to raise a presumption that the wife is rightfully making such purchases of necessaries as she may deem proper.[96] Whoever then supplies her in good faith,

94. Shuman v. Steinel, 129 Wis. 422, 109 N. W. 74, 7 L. R. A. (N. S.) 1048. A wife purchased a hat, the original price of which was $4, upon which she paid 50 cents, and said that her husband would pay the balance that evening. Later in the day the husband and wife appeared at the store, and the husband gave his wife 50 cents, which she paid on the hat. The husband said that he would come and pay for the hat, or that he would come back next Monday and pay the balance. Held, that there was an assent to or ratification of the wife's purchase by the husband. Landgrof v. Tanner, 152 Ala. 511, 44 So. 397.

95. Jones v. Gutman, 88 Md. 355, 41 A. 792.

96. 2 Bright Hus. & Wife, 6, 7; Bull. N. P. 134; Langfort v. Tyler, Salk. 113; Atkins v. Curwood, 7 Car. & P. 756. See also Dyer v. East, 1 Vent. 42; Beaumont v. Weldon, 2 Vent. 155; Montague v. Benedict, 3 B. & C. 631; Manby v. Scott, 1 Mod. 124; 1 Sid. 109; 1 Roll. Abr. 351, pl. 5; Freestone v. Butcher, 9 Car. & P. 643; Bonney v. Perham, 102 Ill. App. 634; Tuttle v. Hoag, 46 Mo. 38, 2 Am. R. 481; Hamilton v. McEwen, 144 Mo. App. 542, 129 S. W. 39; French v. Burlingame, 155 Mo. App. 548, 134 S. W. 1100; Feiner v. Boynton, 73 N. J. Law, 136, 62 A. 420; Bradt v. Shull, 46 App. Div. 347, 61 N. Y. S. 484; Dixon v. Chapman, 56 App. Div. 542, 67 N. Y. S. 540; Constable v. Rosener, 82 App. Div. 155, 81 N. Y. S. 376 (affd. 178 N. Y. 587, 70 N. E. 1097); Baccaria v. Landers, 84 Misc. 396, 146 N. Y. S. 158; Graham v. Schleimer, 28 Misc. 535, 59 N. Y. S. 689; Jones v. Bernstein, 177 N. Y. S. 155; Best & Co. v. Cohen, 174 N. Y. Supp. 639; McCreery v. Scully, 67 Pa. Super. 524; Geiger v. Blackley, 86 Va. 328, 10 S. E. 43. The implied power

as the law has usually been understood, need inquire no further, but may send his bill to her husband. The rule is a fair one; for it is not to be supposed that a husband will go in person to buy every little article of dress or household provision which may be needful for his family. As Lord Abinger observed, a wife would be of little use to her husband in their domestic arrangements if his interference was always to be deemed necessary.[97] Accordingly, if an action be brought against the husband for the price of goods furnished under such circumstances, it must be taken *prima facie* that these goods were supplied by his authority, and he must show that he is not responsible.[98]

The wife's contract for necessaries will bind the husband to a still greater extent if the evidence warrant the inference that a more extensive authority has in fact been given.[99] Thus the presumption which cohabitation furnishes is strengthened by proof that the wife has been permitted by the husband to purchase other articles of the same sort for the use of the household.[1] But it must be ordinarily things for what may be termed the domestic department, to which the wife's authority to bind her husband is restricted,[2] and she can pledge her husband's credit for necessaries only in case of real necessity.[3]

But we must observe that the question is, after all, one of evidence; it turns upon the question of authority from the husband; and this presumption in the wife's favor may be rebutted by contrary testimony on the husband's behalf.[4] Lord Holt says, "His assent shall be presumed to all necessary contracts, upon the account of cohabiting, *unless the contrary appear.*"[5] And in the leading

of a wife to bind her husband for necessaries, where it exists, is for her own benefit, and not for the benefit of those with whom she may deal. Zent v. Sullivan, 47 Wash. 315, 91 P. 1088, 13 L. R. A. (N. S.) 244.

97. Emmet v. Norton, 8 Car. & P. 506.

98. Watts v. Moffett, 12 Ind. App. 399, 40 N. E. 533; Steinfield v. Girrard, 103 Me. 151, 68 A. 630; Howell v. Blesh, 19 Okla. 260, 91 P. 893; Clifford v. Laton, 3 Car. & P. 15, per Lord Tenterden; Debenham v. Mellon, L. R. 5 Q. B. D. 394.

99. 2 Bright Hus. & Wife, 9; cases cited in note to Filmer v. Lynn, 4 Nev. & Man. 559; M'George v. Egan, 7 Scott Cases, 112.

1. 1 Sid. 128; Jewsbury v. Newbold, 40 E. L. & Eq. 518.

2. Phillipson v. Hayter, L. R. 6 C. P. 38.

3. Dolan v. Brooks, 168 Mass. 350, 47 N. E. 408; Steinfield v. Girrard, 103 Me. 151, 68 A. 630; Eder v. Grifka, 149 Wis. 606, 136 N. W. 154.

4. Lane v. Ironmonger, 13 M. & W. 368.

5. Etherington v. Parrott, 1 Salk. 118. See also, to the same effect, Holt v. Brien, 4 B. & Ald. 252; McCutchen v. McGahay, 11 Johns. 281; and note by Am. editor to Bing. Inf. 187. The

case of *Montague* v. *Benedict,* the court observes: "Cohabitation is presumptive evidence of the assent of the husband, *but it may be rebutted by contrary evidence;* and when such assent is proved the wife is the agent of the husband duly authorized." [6] The presumption is not rebutted by evidence that he told her to get the articles at a different place.[7]

The usual analogies of agency may be transcended, notwithstanding the spouses live together, where the one is truly delinquent, and the other deprived of the support owing her. Wherever the husband neglects to supply his wife with necessaries, or the means of procuring them, she may obtain what is strictly needful for her support, although it be against his wishes, on the pledge of his credit. And the person furnishing the articles may sue the husband notwithstanding he has been expressly forbidden to trust her.[8] But here the law raises a presumption of agency only for the purpose of enforcing a marital obligation. Such an agency is perhaps an agency of necessity.[9] And the tradesman or other party furnishing supplies in this case is bound to show affirmatively and clearly that the husband did not provide necessaries for his wife suitable to her condition in life.[10] It is held in Massachusetts that a town may supply a wife who is in need of relief, through the neglect of her husband, and then sue him for necessaries suitable to the condition of a pauper, and no more.[11] In New York, if the husband be of sufficient ability to support his wife, it would appear that she cannot be supported by the public as a pauper at all.[12] And so in Indiana.[13]

position assumed by Mr. Story, in his work on Contracts, that, as to the wife's necessaries, "the law raises an *uncontrollable* presumption of assent on the part of the husband," is therefore incorrect. Story Contr., 2d ed., § 97. "What the law does infer is, that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife." Willes, J., in Phillipson v. Hayter, L. R. 6 C. P. 38. And see Bovill, C. J., ib., to the same effect.

6. Montague v. Benedict, 3 B. & C. 631.

7. Jones v. Gutman, 88 Md. 355, 41 A. 792.

8. Keeler v. Phillips, 39 N. Y. 351; Cromwell v. Benjamin, 41 Barb. (N. Y.) 558; Woodward v. Barnes, 43 Vt. 330.

9. Pollock, C. B., in Johnston v. Sumner, 3 H. & N. 261, likens the agency under such circumstances to that which the captain of a ship sometimes exercises.

10. Keller v. Phillips, 39 N. Y. 351; Cromwell v. Benjamin, 41 Barb. (N. Y.) 558; Woodward v. Barnes, 43 Vt. 330.

11. Monson v. Williams, 6 Gray (Mass.), 416. And see Rumney v. Keyes, 7 N. H. 571.

12. Norton v. Rhodes, 18 Barb. (N. Y.) 100.

13. Commissioners v. Hildebrand, 1 Carter (Ind.), 555.

§ 94. Rule of Good Faith.

Courts will always regard the rule of good faith in matters relative to the wife's necessaries. Thus if the husband and wife be living apart without the husband's fault, and he wishes to terminate his liability by requesting her to return home, his conduct must show sincerity; though, if his intentions are *bona fide,* and he makes suitable provision at his own home, the wife forfeits all claim to further support by refusing to return.[14] So where a husband expels his wife and afterwards designedly misleads her into the belief that he is dead, whereupon she marries another with honest motives, and leaves him at once on learning that her husband is alive, her husband cannot set up her bigamy as a defence to an action against him for her subsequent necessaries.[15]

§ 95. Effect of Infancy.

An adult husband is bound on the contracts of his minor wife for necessaries.[16] And a minor husband is liable for necessaries furnished his wife, whether she be minor or adult.[17] The ordinary rules of husband and wife, therefore, apply so far as such necessaries are concerned. If old enough to contract marriage, an infant is presumed old enough to pay for his wife's board and lodging as well as his own. And such claims may be enforced against his estate, though he die under age.[18] But with regard to his wife's general contracts it would seem that infancy, which incapacitates him from making contracts in person, also disqualifies him from employing an attorney.

§ 96. Effect of Notice not to Sell to Wife.

As a rule, a husband who furnishes his wife and family with necessaries, in any reasonable manner, has the right to prohibit particular persons from trusting or dealing with her on his account. Notice to this effect, properly given, will be effectual as against any presumption which cohabitation raises.[19] And notice given to a tradesman's servant has been held sufficient notice to the

14. Walker v. Laighton, 11 Fost. (N. H.) 111.

15. Cartwright v. Bate, 1 Allen (Mass.) 514. See Pidgin v. Cram, 8 N. H. 350.

16. Nicholson v. Wilborn, 13 Ga. 467.

17. Cantine v. Phillips, 5 Harring. (Del.) 428. And see Bush v. Lindsey, 14 Ga. 687.

18. *Ibid.*

19. B. Altman & Co. v. Durland, 173 N. Y. S. 62; Hibler v. Thomas, 99 Ill. App. 355; McCutchen v. McGahay, 11 Johns. (N. Y.) 281; Keller v. Phillips, 39 N. Y. 351.

master. But notice given in the newspapers not to trust a wife is held to be of no effect against such as have not had actual notice.[20] Nor is a successful defence against one bill sufficient notice of prohibition against subsequent bills.[21] In order to bind the husband for goods furnished after notice to cease furnishing, the seller must show not only that the articles he furnishes are necessaries, but that the husband failed to supply them properly.[22]

Generally, in such cases, it has been said the burden of proof is upon the husband.[23] Such a statement, however, must be taken with caution. Cohabitation furnishes, as we have seen, a presumption of authority; but the latest English decisions go very far towards annihilating that presumption by insisting that the question of the wife's express or implied authority is purely one of fact according to the circumstances of each case, where the spouses live together. And the English court of appeals for such cases [24] has lately affirmed a lower tribunal,[25] as though to dispense very considerably with the necessity of notice to tradesmen on the part of a husband who means to supply his wife properly, and at the same time prevent her from pledging his credit. The point decided, however, affects only tradesmen and others who have had no previous dealings with the wife, to which the husband's assent was given; and as to such persons it is ruled that the husband being able and willing to supply his wife with necessaries, and having actually forbidden her to pledge his credit, he cannot be held liable for what she buys, even though no notice, express or implied, has been received of the prohibition.[26] This decision, after all, is not directly contrary to the rules of agency, as we apprehend, but operates so as to make the wife a sort of special agent. It disposes of an idea formerly entertained by many, that the wife might pledge her husband's credit for articles termed necessaries to any one, unless the husband, by publication or otherwise, had affected

20. Walker v. Laighton, 11 Fost. (N. H.) 111; W. & J. Sloane v. Boyer, 95 N. Y. S. 531; Menschke v. Riley, 159 Mo. App. 331, 140 S. W. 639

21. Ogden v. Prentice, 33 Barb. (N. Y.) 160.

22. Barr v. Armstrong, 56 Mo. 577.

23. Tebbets v. Hapgood, 34 N. H. 420.

24. Debenham v. Mellon, L. R. 5 Q. B. D. 394. Doubt is thrown by this decision upon Johnston v. Sumner, 3 H. & N. 261.

25. Jolly v. Rees, 15 C. B. (N. S.) 628.

26. Debenham v. Mellon, L. R. 5 Q. B. D. 394. The opinion of Bramwell, L. J., in this case is worthy of careful perusal. The same principle is confirmed in this country by Woodward v. Barnes, 43 Vt. 330. But cf. Cothran v. Lee, 24 Ala. 380.

the seller with notice of his dissent; and it requires those who have had no previous dealings of the kind to make inquiry, at their peril, as to the wife's actual authority or destitute condition before they rely upon it. They who have already furnished supplies to the wife on the husband's credit with his knowledge, and who have come thus within the apparent scope of her agency to bind him, may, we presume, continue doing so, until death or suitable notice of the husband's dissent operates as a revocation of that agency.

§ 97. Effect of giving Credit to Wife or Third Party.

The presumption of an agency on her husband's behalf may be overcome by the fact of a purchase by the wife upon her own or some third person's credit; wherever she is really trusted as principal herself, or as the agent of some one else than her spouse; or where the third person ordered them in person.[27]

In all cases the husband will be discharged from liability where it appears that the goods were not supplied on his credit, but that the party furnishing them trusted the wife individually.[28] She might have separate property, independently of her husband, to which the tradesman looked for payment, or a special allowance of sufficient amount might have been made her by her husband.[29] Thus, where the husband during a temporary absence made an allowance to his wife, he was held not to be liable for necessaries supplied to her, the tradesman having trusted to payment from her allowance.[30] So if credit be given to a third party, the husband is not liable.[31] And, of course, if the tradesman has agreed not to charge him, there is no liability incurred by the husband.[32] Though the wife be without property, the rule is the same; and it would appear that the husband may give permission to trust his wife on her separate credit without incurring liability.[33]

27. Though as to the right of her father or any other third person to stand in place of a tradesman, under proper circumstances of necessity, see *supra*, 87.

28. Metcalfe v. Shaw, 3 Camp. 22; Bentley v. Griffin, 5 Taunt. 356; Pearson v. Darrington, 32 Ala. 227; Stammers v. Macomb, 2 Wend. 454; Moses v. Forgartie, 2 Hill (S. C.), 335; Carter v. Howard, 39 Vt. 106; Bugbee v. Blood, 48 Vt. 497.

29. Levett v. Penrice, 24 Miss. 416; Simmons v. McElwain, 26 Barb. (N. Y.) 420; McMahon v. Lewis, 4 Bush (Ky.), 138; Weisker v. Lowenthal, 31 Md. 413.

30. Holt v. Brien, 4 B. & Ald. 252; Montague v. Benedict, 3 B. & C. 631; Harshaw v. Merryman, 18 Miss. 106; Renaux v. Teakle, 20 E. L. & Eq. 345.

31. Harvey v. Norton, 4 Jur. 42.

32. Dixon v. Hurrell, 8 Car. & P. 717.

33. Taylor v. Shelton, 30 Conn. 122.

That the wife has a separate income, that the invoices are made out to her, that the plaintiff has drawn bills of exchange upon her for part-payment of the amount due, and that she has accepted such bills in her own name, payable at her own banker's from her separate funds,— all these are circumstances which go to repel the presumption of agency and show that the wife was purchasing on her own credit with the tradesman's assent.[34] So is the studious concealment of the purchases from the husband's knowledge, by the tradesman and the wife, and the attempt of the latter to secure the debt by her own promissory note.[35] All these are facts for the jury, and if the husband has been prejudiced in his rights by such proceedings, this is in his favor.[36] The husband is not relieved by the single circumstance that the goods were charged on the shop books to the wife; since *prima facie* the actual credit is always supposed to be given to the husband.[37]

§ 98. Effect of Money Provision for Wife.

Not only is the husband permitted to show that articles in controversy are not such as can be considered necessaries, but he may show that he supplied his wife himself or by other agents, or that he gave her ready money to make the purchase.[38] Some courts hold that where a husband makes a suitable provision of cash to pay for the wife's necessaries, he will not be liable for other goods sold in the absence of evidence that he authorized or ratified the sale,[39] especially where, after making the allowance, he forbids her

34. Freestone v. Butcher, 9 Car. & P. 643; Macq., Hus. & Wife, 135.

35. Mitchell v. Treanor, 11 Geo. 324. But see Day v. Burnham, 36 Vt. 37, which regards such connivance somewhat kindly.

36. Attorney-General v. Riddle, 2 Cr. & Jer. 493; 2 Tyr. 523; Barnes v. Jarrett, 2 Jur. 988.

37. Edministon v. Smith, 13 Ida. 645, 92 P. 842; Warrington v. Anable, 84 Ill. App. 593; Johnson v. Briscoe, 104 Mo. App. App. 493, 79 S. W. 498; Martin v. Oakes 42 Misc. 201, 85 N. Y. S. 387; Best & Co. v. Cohen, 174 N. Y. S. 639; B. Altman & Co. v. Durland, 173 N. Y. S. 62; Wickstrom v. Peck, 163 App. Div. 608, 148 N. Y. S. 596; Jewsbury v. Newbold, 40 E. L. & Eq. 518; Godfrey v. Brooks, 5 Harring. (Del.) 396; Furlong v. Hyson, 35 Me. 332; H. Leonard & Sons v. Stowe, 166 Mich. 681, 132 N. W. 454.

38. Manby v. Scott, 1 Sid. 109; 2 Smith's Lead. Cas. (6th Am. ed). 469; Etherington v. Parrott, 2 Ld. Raym. 1006.

39. James McCreery & Co. v. Martin, 84 N. J. Law, 626, 87 A. 433; Wanamaker v. Weaver, 176 N. Y. 75, 68 N. E. 135, 98 Am. St. R. 621; Frank v. Carter, 219 N. Y. 35, 113 N. E. 549; Stevens v. Hush, 176 N. Y. S. 602; Best & Co. v. Cohen, 174 N. Y. S. 639; Jones v. Bernstein, 177 N. Y. S. 155; Quinlan v. Westervelt, 65 Misc. 547, 120 N. Y. S. 879; Weingreen v. Beckton, 102 N. Y. S. 520; Rosenfield v. Peck, 134 N. Y. S. 392;

to open credit accounts.[40] Where a husband compels his wife to live apart from him by his misconduct, he is liable for her necessaries, notwithstanding the fact that he makes her her allowance, so long as that allowance is insufficient, and she has no proper means of support.[41] Making such a provision for his wife does not relieve him of his duty except where the fact is known to the creditor.[42] Where she habitually clothes herself out of her private estate, it may be deemed a provision which will relieve her husband of liability.[43] In such case it is not material that the creditor did not know of the provision.[44]

§ 99. Effect of Husband's ratification of Wife's unauthorized purchases.

Another point, as we have already suggested, is available by the person who has furnished necessaries, on the general principles of agency; namely, that a husband's subsequent ratification is as good as a previous authority. So, then, if it can be shown that the husband knew his wife had ordered certain necessaries, and yet failed to rescind the purchase; or if there be proof that he knew she wore the articles and yet expressed no disapprobation; the law presumes approval of her contract and binds him.[45] To this principle, perhaps, may be referred the rule which Mr. Roper further states (without, however, citing any authorities), that the husband is liable whenever the goods purchased by his wife come to her or his use with his knowledge and permission, or when he allows her to retain and enjoy them; in other words, that a legal liability

Kenny v. Meislahn, 69 App. Div. 572, 75 N. Y. S. 81.

Where a husband's estate amounted to less than $200,000, and his income was about $20,000, an allowance of $1,200 or $1,300 a month to his wife living expenses was sufficient to relieve him from liability for articles of clothing furnished her and not paid out of her allowance. Oatman v. Watrous, 120 App. Div. 66, 105 N. Y. S. 174; Green v. Karp, 164 N. Y. S. 670; B. Altman & Co. v. Durland, 173 N. Y. S. 62; Lit Bros. v. Hare, 69 Pa. Super. Ct. 372.

40. McCreery v. Martin (N. J.) 87 Atl. 433, 47 L. S. A. (N. S.) 279. It has been held otherwise in Massachusetts as to medical services. Vaughan v. Mansfield, 229 Mass. 352, 118 N. E. 652.

41. Litson v. Brown, 26 Ind. 469; Baker v. Sampson, 14 C. B. (N. S.) 383.

42. Fitzmaurice v. Buck, 77 Conn. 390, 59 A. 415; Cory v. Cook, 24 R. I. 421, 53 A. 315.

43. Dolan v. Brooks, 168 Mass. 350, 47 N. E. 408.

44. Dolan v. Brooks, 168 Mass. 350, 47 N. E. 408; Meyer v. Jewell, 88 N. Y. S. 972.

45. Seaton v. Benedict, 5 Bing. 28; 2 Moo. & P. 74; Parke, B., in Lane v. Ironmonger, 13 M. & W. 368; Day v. Burnham, 36 Vt. 37; Woodward v. Barnes, 43 Vt. 330; Ogden v. Prentice, 33 Barb. (N. Y.) 160.

becomes fixed from the fact that the husband and his household take the benefit of the purchase.[46] But the mere fact that a husband sees his wife wearing articles purchased without authority will not charge him; the question is one of approval or disapproval, assent or dissent, and the presumption against him may be rebutted.[47]

The husband's dissent to his wife's purchase of necessaries should be expressed in an effectual and suitable manner. Mere objection on his part is insufficient. Thus a bill for medical attendance must be paid by him, even though he objected to the visits, as long as he was present and gave no notice to the physician that the latter must look elsewhere for payment.[48] And private arrangements between husband and wife as to the method of payment cannot affect the rights of third parties, who were entitled to notice thereof and failed to receive it.[49] If he means, when sued in assumpsit for necessaries, to defend the action as to part only, it would appear that his proper plea will be that he is not liable beyond a certain amount, and he should pay that amount into court.[50] But if he means to dispute the charge altogether, common honesty dictates that the articles unwarrantably purchased should be restored without delay.[51] He may introduce evidence at the trial to show that the commodities in question were not necessaries, inasmuch as the wife had incurred other similar debts with other parties.[52] In a word, the question is (in the absence of such evidence of necessity as may show an agency in law) whether there was an agency and authority in fact.[53] Where she makes a contract for necessaries, and he afterwards makes payments and an offer of settlement, he is liable.[54]

46. 2 Rop. Hus. & Wife, 112; 2 Bright, Hus. & Wife, 9. Mr. Macqueen (Hus. & Wife, note to p. 132) points out this statement of Mr. Roper with a doubt as to the authority, although he admits the justice of such a rule, on the civil-law maxim that "no one should enrich himself at another's loss."

47. Atkins v. Curwood, 7 Car. & P. 756.

48. Cothran v. Lee, 24 Ala. 380.

49. *Ib.*; Johnston v. Sumner, 3 Hurl. & Nor. 261. We have seen, *supra*, § 96, that the latest English cases considerably reduce the tradesman's right of notice, as formerly understood. Debenham v. Mellon, L. R. 5 Q. B. D. 394.

50. Emmet v. Norton, 8 Car. & P. 506.

51. Macq., Hus. & Wife, 136; Gilman v. Andrus, 28 Vt. 241. See Tuttle v. Holland, 43 Vt. 542.

52. Renaux v. Teakle, 20 E. L. & Eq. 345.

53. Read v. Teakle, 24 E. L. & Eq. 332.

54. Mott v. Grunhut, 8 Daly (N. Y.) 544.

§ 100. Effect of Separation in general.

It has generally been understood that whenever husband and wife separate, under circumstances showing misconduct on the part of either, the presumption of agency changes sides. The fact of their living apart is of itself a caution to all who hold dealings with a married pair. While they cohabit it is usually for the husband to show a want of authority; when they cease to cohabit the seller must prove authority; that is to say, he must prove that the wife was in need of the goods, that the husband failed to supply her, and that the wife was not at fault. *Prima facie,* therefore, a woman living apart from her husband, upon either voluntary or involuntary separation,[55] has no authority to bind him,[56] the separation *prima facie* revoking her agency,[57] especially if he provides for the family notwithstanding the separation.[58] This contrast of presumptions is subject to the new English doctrine lately commented upon, which seems to put all new tradesmen on their guard in their first dealings with a married woman.[59]

Where the husband is merely absent from home for temporary purposes, the wife's presumed authority continues.[60] The husband's liability continues where there is no open separation;[61] and where the fact of sepaartion is not commonly known, or where by occasional visits the husband keeps up the appearance of cohabitation with his wife, he has generally been considered *prima facie* liable as before;[62] though notice of an allowance is notice of his dissent to the wife's contracts.[63] He may agree with the wife's

55. Johnston v. Sumner, 3 Hurl. & Nor. 261, per Pollock, C. B., and authorities there commented upon

56. Etherington v. Parrott, 2 Ld. Raym. 1006; Mainwaring v. Leslie, 1 Mood. & Malk. 18; Montague v. Benedict, 3 B. & C. 631; per Lord Tenterden, Clifford v. Laton, Mood, & Malk. 101; 3 Car. & P. 16; Bird v. Jones, 3 M. & R. 121; Walker v. Simpson, 7 W. & S. (Pa.) 83; Mitchell v. Treanor, 11 Ga. 324; Rea v. Durkee, 25 Ill. 503; Pool v. Everton, 5 Jones (N. C.) 241; Porter v. Bobb, 25 (Mo.) 36; Stevens v. Story, 43 Vt. 327; Sturtevant v. Starin, 19 Wis. 268.

57. Hass v. Brady, 49 Misc. 235, 96 N. Y. S. 449; Hatch v. Leonard, 71 App. Div. 32, 75 N. Y. S. 726. A wive living apart from a husband who is confined in an insane asylum has presumably no authority to pledge his credit even for necessaries. Thedford v. Reade, 25 Misc. 490, 54 N. Y. S. 1007.

58. Robinson v. Litz, 123 N. Y. S. 362; Cory v. Cook, 24 R. I. 421, 53 A. 315.

59. Debenham v. Mellon, L. R. 5 Q. B. D. 394.

60. Frost v. Willis, 13 Vt. 202.

61. Ball v. Lovett, 98 N. Y. S. 815.

62. Rawlins v. Vandyke, 3 Esp. 250, per Lord Eldon.

63. Hinton v. Hudson, Freem. 248; Kimball v. Keyes, 11 Wend. (N. Y.) 33.

tradesman, while living apart from her, that the goods supplied shall not be charged to him; and to such special agreement the tradesman will be held.[64] Where a husband has given his wife express authority to pledge his credit, the power continues till the particular creditor knows of a separation.[65] Notice to a creditor that spouses are separated cannot be inferred from the fact that the separation is generally known in the community.[66] One furnishing a wife necessaries when living apart from him acts at his peril, and must ascertain the facts before giving credit.[67] He has the burden of showing that she left him for cause or that the separation was by consent,[68] and that the husband refused to provide, or that he authorized her to pledge his credit.[69]

§ 101. Effect of Abandonment by Husband.

The rule is that where the husband abandons his wife, turns her away without reasonable cause, or compels her by ill usage to leave him, without adequate provision, he is liable for her necessaries, and sends credit with her to that extent,[70] even though she continues to live in his house, which he leaves,[71] and which she and her family have a right to use for their maintenance in such a case.[72] The wife's faithfulness, on the one hand, to her marriage obligations; on the other, the husband's disregard of his own: these afford the reason of the above rule and suggest its proper limitation. The wife in such cases has an authority; but here what some have called an authority of necessity.[73] Or we may say, rather, that the law, by a fiction, infers an agency without asking evidence

64. Dixon v. Hurrell, 8 Car. & P. 717.

65. Sibley v. Gilmer, 124 N. C. 631, 32 S. E. 964.

66. Sibley v. Gilmer, 124 N. C. 631, 32 S. E. 964.

67. Porter v. Bobb, 25 Mo. 36; Bennett v. O'Fallon, 2 Mo. 69, 22 Am. Dec. 440; Bostwick v. Brower, 22 Misc. 709, 49 N. Y. S. 1046; Allen v. Rieder, 41 Pa. Super. 534.

68. Cline v. Buddemeier, 164 Ill. App. 79; Steele v. Leyhan, 210 Ill. App. 201; Peaks v. Mayhew, 94 Me. 571, 48 A. 172; Clothier v. Sigle, 73 N. J. Law, 419, 63 A. 865.

69. S. E. Olson Co. v. Youngquist, 72 Minn. 432, 75 N. W. 727. A demand on and refusal by a husband to support his wife may be inferred from the manner in which he abandoned her, when such that only a refusal could be expected. Hardy v. Eagle, 23 Misc. 441, 51 N. Y. S. 501, 25 Misc. 471, 54 N. Y. S. 1045; Hass v. Brady, 49 Misc. 235, 96 N. Y. S. 449.

70. Peck v. Gibeson, 83 Ill. App. 92; Prescott v. Webster, 175 Mass. 316, 56 N. E. 577.

71. W. & J. Sloane v. Boyer, 95 N. Y. S. 531.

72. Hollowell v. Adams (Ky.), 119 S. W. 1179.

73. See Pollock, C. B., in Johnston v. Sumner, 3 Hurl. & Nor. 261.

which should show authority in fact, and requires the husband, under these circumstances, to maintain his wife elsewhere.

This rule suggests, then, three cases where the wife may pledge her husband's credit when they are living apart: the first, where he abandons her; the second, where he turns her out of doors without reasonable cause; the third, where his misconduct compels her to leave him. In the first two cases his own acts impose the necessity, and her conduct is involuntary. But in the third her conduct might be considered voluntary, though induced by his misconduct; and the rule here becomes perplexing. The doctrine of *Horwood* v. *Heffer,* an old case, is that the wife is not justified in leaving her husband unless she has been driven from the house by actual violence or apprehension for her personal safety; and in this case the husband was held not to be liable, since she had quitted his house because he placed a profligate woman at the head of the table.[74] This doctrine has been strongly condemned in later times, and the modern cases justly regard such studied insults as capable of legal redress. If, therefore, the husband, by his indecent conduct, renders his house unfit for a modest woman to share it, the rule now is that she may leave him, and pledge his credit elsewhere for her necessaries.[75]

Where the wife is justified on any of the above grounds in living apart from her husband, he is not discharged from liability by showing that her contract was in fact made without his authority and contrary to his wishes. Nor will his general advertisement or particular notice to individuals not to give credit to his wife affect the case.[76] The legal presumption must prevail for the wife's protection.

Nor in such cases can the husband terminate his liability for necessaries supplied his wife during the separation, by a simple request on his part that she shall return.[77] And it is clear that if he only offers to take her back upon conditions which are unreasonable and improper, his liability continues.[78] It is the husband's

74. 3 Taunt. 421.

75. Per Lord Ellenborough, Liddlow v. Wilmot, 2 Stark. 77; 1 Selw. N. P. 298, 11th ed.; per Best, C. J., Houliston v. Smyth, 3 Bing. 127; 10 Moo. 482; 2 Car. & P. 22; Descelles v. Kadmus, 8 Clarke, 51; Hultz v. Gibbs, 66 Pa. 360; Reynolds v. Sweetser, 15 Gray (Mass.) 78; Bazeley v. Forder, L. R. 3 Q. B. 559.

76. Harris v. Morris, 4 Esp. 41; 1 Selw. N. P. 298, 11th ed.; 2 Stra. 1214. See Black v. Bryan, 18 Tex. 453.

77. Emery v. Emery, 1 You. & Jer. 501.

78. Reed v. Moore, 5 Car. & P. 200.

duty, by some positive act, to determine his liability; though if the wife voluntarily returns, his liability for necessaries furnished abroad is discontinued. But in default of any amicable arrangement, he must institute proceedings in the courts with divorce jurisdiction. And until some such unequivocal act is done, a person making a proper claim in a court of law for necessaries supplied to the wife may be entitled to recover against him.[79]

§ 102. Effect of Abandonment by Wife.

Generally a wife living apart from her husband for justifiable cause may pledge his credit for necessaries for herself and his children.[80] If she has cause for leaving her husband she may select her residence if respectable, and if the expense is suited to her husband's financial condition.[81] He is not relieved by showing that when she left him he procured board and lodging for her with a person with whom she refused to live;[82] nor that he asks her to return, and makes promises of kind treatment,[83] or that she seeks a divorce.[84] Where the wife had good reasons for leaving, the husband is not discharged by the fact of her subsequent return from liability for necessaries furnished during her justifiable absence.[85]

But the wife should have weighty and sufficient cause for leaving her husband in order to be permitted to pledge his credit abroad. In general, the same facts suffice as justify divorce from bed and

79. Reed v. Moore, *supra*. See Atkyns v. Pearce, 2 C. B. (N. S.) 763.

80. Bonney v. Perham, 102 Ill. App. 634; Waxmuth v. McDonald, 96 Ill. App. 242; Kirk v. Chinstrand, 85 Minn. 108, 88 N. W. 422; Sultan v. Misrahi, 47 Misc. 655, 94 N. Y. S. 519; Brinckerhoff v. Briggs, 92 Ill. App. 537; *In re* Rudowsky's Estate, 181 Ill. App. 318; Litson v. Brown, 26 Ind. 489; Scott v. Carothers, 17 Ind. App. 673; Arnold v. Brandt, 16 Ind. App. 169, 44 N. E. 936; Rariden v. Mason, 30 Ind. App. 425, 65 N. E. 554; *In re* Newman's Case, 222 Mass. 563, 111 N. E. 359; Beaudette v. Martin, 113 Me. 310, 93 A. 758; East v. King, 77 Miss. 738, 27 So. 608; Ott v. Hentall, 70 N. H. 231, 47 A. 80, 51 L. R. A. 226; Clothier v. Sigle, 73 N. J. Law, 419, 63 A. 865; Hardy v. Eagle, 25 Misc. 471, 54 N. Y. S. 1045, 23 Misc. 441, affd. 51 N. Y. S. 501; Harrigan v. Cahill, 100 Misc. 48, 164 N. Y. S. 1005; Dodge v. Holbrook, 176 N. Y. S. 562; Charles M. Decker & Bros. v. Moyer, 121 N. Y. S. 630; Monahan v. Auman, 39 Pa. Super. 150; 2 Kent, Com. 146, 147; 2 Bright, Hus. & Wife, 10-12; Snover v. Blair, 1 Dutch. (N. J.) 94; Mayhew v. Thayer, 8 Gray (Mass.) 172.

81. Kirk v. Chinstrand, 85 Minn. 108, 88 N. W. 422, 56 L. R. A. 333.

82. Kirk v. Chinstrand, 85 Minn. 108, 88 N. W. 422, 56 L. R. A. 333.

83. Baker v. Oughton, 130 Ia. 35, 106 N. W. 272; Bradish v. Huse, 1 Dane Abr. (Mass.) 355.

84. Gleason v. Warner, 78 Minn. 405, 81 N. W. 206 (funeral expenses).

85. Reynolds v. Sweetser, 15 Gray (Mass.) 78.

board.[86] But where she leaves her husband without sufficient cause and against his will, he is not liable for her maintenance elsewhere, and she cannot bind him; especially if the person furnishing goods knows that cohabitation has ceased, and makes no further inquiries.[87]

Supposing the wife leaves voluntarily and without sufficient cause, against her husband's wishes, and she afterwards returns to her husband, is he bound to receive her; and, if he refuse to receive her, can she make him liable for debts contracted thenceforth for necessaries? The current of authorities is in favor of such a position, provided she conducted herself properly in her absence.[88] Some, however, have suggested doubts as to this doctrine; for, they say, since the wife by her own voluntary act discharged the husband from his obligation to maintain her, by unnecessarily quitting his house without his consent, it is but reasonable to say that his liability to support her afterwards should not be revived by implication without his express concurrence in consenting to his wife's return to his protection, or until cohabitation was restored by mutual agreement, or by the sentence of a court with appropriate matrimonial jurisdiction.[89] This is fair reasoning on general grounds, and applies a mutual doctrine to husband and wife; but the courts appear to have thought otherwise.

There is a *dictum* of Lord Holt to be found in an old case (or

86. Brown v. Patton, 3 Humph. (Tenn.) 135; Hancock v. Merrick, 10 Cush. (Mass.) 41; Caney v. Patton, 2 Ashm. 140; Rea v. Durkee, 25 Ill. 503; Schindel v. Schindel, 12 Md. 294; Stevens v. Story, 43 Vt. 327; Barker v. Dayton, 28 Wis. 367; Thorpe v. Shapleigh, 67 Me. 235.

87. Brown v. Midgett, 40 Vt. 68; Etherton v. Parrott, 2 Ld. Raym. 1006; Manby v. Scott, 1 Sid. 130; Bailey v. Calcott, 4 Jur. 699; Collins v. Mitchell, 5 Harring. 369; Bevier v. Galloway, 71 Ill. 517; Harttman v. Tegart, 12 Kan. 177; Oinson v. Heritage, 45 Ind. 73; Thorne v. Kathan, 51 Vt. 520; Denver Dry Goods Co. v. Jester, 60 Colo. 290, 152 Pac. 903, L. R. A. 1917A 957; Bensyl v. Hughs, 109 Ill. App. 86; Bonney v. Perham, 102 Ill. App. 634; Peaks v. Mayhew, 94 Me. 571, 48 A. 172; Steinfield v. Girrard, 103 Me. 151, 68 A. 630; B. Altman & Co. v. Durand, 173 N. Y. S. 62; Constable v. Rosener, 82 App. Div. 155, 81 N. Y. S. 376, aff'd. 178 N. Y. 587, 70 N. E. 1097; Ogle v. Dershem, 91 App. Div. 551, 86 N. Y. S. 1101; Cline v. Hackbarth, 27 Tex. Civ. 391; Sanger Bros. v. Trammel (Tex.), 198 S. W. 1175.

88. Manby v. Scott, 1 Sid. 129; 1 Mod. 131; Child v. Hardyman, 2 Stra. 875; Rawlins v. Vandyke, 3 Esp. 251; Edwards v. Towels, 5 Man. & Gr. 624; Hindley v. Westmeath, 6 B. & C. 200; Howard v. Whetstone, 10 Ohio 365; McCutchen v. McGahay, 11 Johns. (N. N.) 281.

89. See 2 Bright, Hus. & Wife, 13. But see 2 Bish., Mar. & Div., 5th ed., § 33. The husband should not be deprived of his divorce remedies.

rather in the reporter's note), which sometimes finds its way to the text-books; namely, that if a husband receives back his wife, he becomes liable for her debts contracted during the whole period of her unauthorized absence.[90] This seems very unreasonable, where the fault was on her part. The true doctrine is, doubtless, that after such reconciliation the husband is liable upon her subsequent contracts only. And this is the rule expressly asserted in some American cases.[91] To defeat a wife's claim of support on the ground of her voluntary abandonment of the husband's domicile, the fact of her abandonment must clearly appear.[92] Under the Iowa statute neither spouse can drive the other from the homestead without such other's consent, hence when a husband does this he is bound for the wife's necessaries regardless of the cause of her expulsion.[93]

§ 103. Effect of Separation by Consent.

But besides involuntary separation there is the case of voluntary separation to be considered. This last, now so frequent, the law tolerates, but does not favor. The rule is, that where a husband and wife parted by mutual consent, and a suitable allowance is furnished the wife, the husband is not bound to pay any bills which she may have contracted as his agent.[94] It is enough that the separation be a matter of common reputation where he resides. But to this allowance two things are requisite: first, that it shall be really sufficient for the wife; second, that it shall be regularly paid. If either requirement be wanting,— a fact which the seller must ascertain at his peril,— the wife is not confined to her remedy on the deed of separation, if any, but may pledge her husband's credit. As to the first requirement, the question is not whether the wife consented to accept a certain allowance as sufficient for her support,

90. Robison v. Gosnold, 6 Mod. 171. See Bing. Inf, 190 *n.*, Am. ed.

91. Williams v. Prinee, 3 Strobh. 490; Reese v. Chilton, 26 Mo. 598; Oinson v. Heritage, 45 Ind. 73. See also Chitty Contr., 168; Williams v. McGahay, 12 Johns. (S. C.) 293.

92. Price v. Price, 75 Neb. 552, 106 N. W. 657.

93. Baker v. Oughton, 130 Ia. 35, 106 N. W. 272.

94. Dixon v. Hurrell, 8 Car. & P. 717; Todd v. Stokes, 1 Salk. 116; 1 Ld. Raym. 444; Hindley v. Westmeath, 6 B. & C. 200; Mizen v. Pick, 3 M. & W. 481; Reeve v. Marquis of Conyngham, 2 Car & K. 444; Calkins v. Long, 22 Barb. (N. Y.) 97; Kemp v. Downham, 5 Harring. (Del.) 417; Caney v. Patton, 2 Ashm. 140; Baker v. Barney, 8 Johns. (N. Y.) 72; Mott v. Comstock, 8 Wend. (N. Y.) 544; Willson v. Smith, 1 B. & Ald. 801; Pensyl v. Hughs, 109 Ill. App. 86.

but whether it be actually sufficient in the opinion of the jury.[95] As to the second, the mere covenant or contract of the husband to pay separate maintenance will not discharge him from liability for necessaries; for, as was observed in a leading case, "the common law does not relieve any man from an obligation on the mere ground of an agreement to do something else in the place, unless that agreement be performed."[96] But perhaps it would be held otherwise where articles of separation provide that the wife shall be paid through a trustee, and the trustee squanders or misapplies the allowance which is properly paid into his hands.[97]

If wife and husband part by mutual consent, and there is no allowance to the wife, it may be presumed that the wife has the right to pledge her husband's credit, for he has not relieved himself of his marital obligation.[98] It is immaterial whether the wife's allowance be secured by deed or not, since it is the payment which discharges him.[99]

Here we are compeleld to notice a modern departure of principle growing out of the increasing favor with which separation deeds are held. Allowance of maintenance by a formal separation deed appears under the latest English decisions to be treated with so great respect as to be deemed conclusive of the extent and method of a husband's liability for his wife's support during their separation. In other words, the separation being by mutual consent, and the allowance fixed by mutual assent at a rate which it is covenanted shall suffice for the wife's support, the wife cannot pledge her husband's credit in case that income proves insufficient for her wants.[1]

Allowance of a separate maintenance will not exempt the hus-

95. Bonney v. Perham, 102 Ill. App. 634; S. E. Olson Co. v. Youngquist, 76 Minn. 26, 78 N. W. 870; Thompson v. Harvey, 4 Burr. 2177; Hodgkinson v. Fletcher, 4 Camp. N. P. 70; Pearson v. Darrington, 32 Ala. 227; Liddlow v. Wilmot, 2 Starkie, 77; Emmet v. Norton, 8 Car. & P. 506.

96. Nurse v. Craig, 5 B. & P. 148, per Heath, J.; Hindley v. Westmeath, 6 B. & C. 200; Lockwood v. Thomas, 12 Johns. (N. Y.) 248; Kimball v. Keyes, 11 Wend. (N. Y.) 33.

97. Calkins v. Long, 22 Barb. (N. Y.) 97. But see Burrett v. Booty, 8 Taunt. 343.

98. Ross v. Ross, 69 Ill. 569.

99. Hodgkinson v. Fletcher, 4 Camp. 70; Emery v. Neighbor, 2 Halst. (N. J.) 142; Holden v. Cope, 2 Car. & K. 437. But see Ewers v. Hutton, 3 Esp. 255.

1. Eastland v. Burchell, L. R. 3 Q. B. D. 432. *Qu.* whether the wife has any remedy afforded her under such circumstances for procuring the maintenance which it continues the husband's duty to render. Lush, J., in this case seems to rest the wife's general right to pledge her husband's credit too exclusively upon the doctrine of agency.

band from liabilities caused by his own misconduct.[2] In case of a separation by consent, if the contract did not provide for the support of the children the husband is liable for necessaries for them.[3]

§ 104. Effect of Wife's Adultery.

But, as the reader may have inferred, if the wife elopes and then commits adultery, or if her adultery causes separation, the husband becomes relieved from her support. Her crimes ought to put an end to her authority to bind the injured spouse, and it does.[4] In such case his refusal to take her back again will not revive his obligation to maintain her. But as forgiveness always interposes a bar to legal remedies on behalf of the injured one, he becomes once more liable for her necessaries, where he voluntarily receives her again and forgives her.[5]

There are cases where the marital rights and duties become more confused. Supposing the wife be turned out of doors, or, what amounts to the same thing, be forced by her husband's misconduct to leave; and she afterwards, being beyond that shelter which every wife needs, commit adultery: is he then relieved from supporting her? In *Govier* v. *Hancock* it was held that he was, even though his own adultery caused her departure.[6] This was a very harsh decision. The court, however, admitted that necessaries furnished before her own adultery could be recovered from her husband. And in a subsequent case it was held that adulterous conduct of the wife, with the connivance of the husband, or at least without such a separation of the married pair as to make her misconduct notorious, would not, *per se,* operate as a defence and protect the husband from liability.[7] And more to the point is a case where the husband was held liable, even though the wife had been found guilty of adultery in the divorce court; since it appeared that he also had been found guilty of adultery, so that no divorce was decreed.[8]

2. Turner v. Rookes, 10 Ad. & El. 47.

3. McCarter v. McCarter, 10 Ga. App. 754, 74 S. E. 308.

4. Morris v. Martin, 1 Stra. 647; Manwaring v. Sands, 2 Stra. 707; Hardie v. Grant, 8 Car. & P. 512. And see Rex v. Flintan, 1 B. & Ad. 227; Hunter v. Boucher, 3 Pick. (Miss.) 289; Gill v. Read, 5 R. I. 343; Cooper v. Lloyd, C. B. (N. S.) 519.

5. Harris v. Morris, 4 Esp. 41; Robison v. Gosnold, 6 Mod. 171; Holt v. Brien, 4 B. & Ald. 252; Quincy v. Quincy, 10 N. H. 272; Hall v. Hall, 4 *ib.* 462.

6. Govier v. Hancock, 6 T. R. 603.

7. Norton v. Fazan, 1 B. & P. 226.

8. Needham v. Bremner, L. R. 1 C. P. 583.

But one who harbors another man's wife for illicit purposes is a wrong-doer, and cannot recover for her maintenance, even though she had fled from her own husband's cruelty.[9]

§ 105. Effect of Divorce and Allowance of Alimony.

Where the divorce court takes jurisdiction for the purpose of legalizing a separation of spouses, judicial action upon the wife's support changes the state of the case. Alimony now becomes the regular standard of allowance for necessaries; and hence the payment of alimony, even if actually insufficient for the wife's maintenance, will discharge the husband from further liability for her support.[10] The same is true where the wife has been denied alimony.[11] If the alimony be insufficient, the wife should induce the court to increase it. But the husband is liable for necessaries supplied to the wife before alimony is decreed, even although, as it is held, the decree afterwards direct the alimony to commence from a day preceding the supply of the necessaries.[12] One who sells to a wife living apart is chargeable with knowledge of the allotment of alimony, and this applies to alimony *pendente lite.*[13]

§ 106. Effect of Banishment, Insanity or Imprisonment.

The destitute wife of a lunatic living separate from her in an asylum may yet pledge his credit for necessaries;[14] though not, of course, for what she does not need, as where, for example, she receives sufficient income out of his estate.[15] She cannot pledge, it might seem, where he is banished or in prison, provided the law recognize her as *feme sole;*[16] but as an agent of necessity, and to compel his marital obligation, she ought to be permitted to do so if she desires, and not unfrequently does where he is in jail or prison.[17] If the wife be in an insane asylum, the husband is not

9. Almy v. Wilcox, 110 Mass. 443.

10. Willson v. Smyth, 1 B. & Ad. 801.

11. Simpson v. Dutcher, 123 N. Y. S. 340.

12. Keegan v. Smyth, 5 B. & C. 375; Mitchell v. Treanor, 11 Ga. 324; Dowe v. Smith, 11 Allen (Mass.) 107; Burkett v. Trowbridge, 61 Me. 251.

13. Hare v. Gibson, 32 Ohio St. 33; Malden Hospital v. Murdock, 218 Mass. 73, 105 N. E. 457; Wise Memorial Hospital Ass'n v. Peyton (Neb.), 154 N. W. 838.

14. Reed v. Legard, 4 E. L. & Eq. 523; Shaw v. Thompson, 16 Pick. (Mass.) 198; Badger v. Orr, 1 Ohio App. 293, 34 Ohio Cir. Ct. 328.

15. Chappell v. Nunn, 41 L. T. (N. S.) 287; Richardson v. Du Bois, L. R. 5 Q. B. 51.

16. Reeve Dom. Rel. 86.

17. See Ahern v. Easterby, 42 Conn. 546. The husband is liable for his wife's necessaries, even though she has been declared a *feme sole* trader. Markley v. Wartman, 9 Phila. (Pa.) 226.

the less liable for her support.[18] But not where she is in prison.[19] And it seems that under circumstances of misconduct on the wife's part the husband may compel her to assent, after her release from confinement, to live separate on an allowance, without being chargeable for her support as one who has turned his wife out of doors.[20]

§ 107. Wife's Right to sell property to Obtain Necessaries.

The wife ought not, without authority, to raise money by disposing of her husband's property. And the fact that a wife is left by her husband without means of support does not authorize her to give away household furniture, which he left in her possession, in payment of necessary services to herself.[21] And it was recently held that where a man was sent to jail for four months for an assault upon his wife, by which she was disabled from work, and he took with him all his money, leaving her no means of support, she was justified in selling, in her extremity, for a reasonable price, a cooking-stove belonging to her husband, for the strict purpose of procuring the means for the purchase of necessaries.[22]

Some of the old books raise a curious distinction: namely, that if the wife takes up goods, as silk, and before they are made into clothes, pawns them, the husband shall not pay for them; but that it is otherwise if they are made up and worn, and then pawned; for in the former case they never came to the husband's use, while in the latter they did.[23] We apprehend that the real question in such cases would be whether the articles were or were not in fact necessaries; while at the same time purchases of cloth in quantities, it might be admitted, are not so clearly necessaries as clothing made up for wear and worn. The practical application of this rule is in cases where the wife (being, as we have said, forbidden to borrow money for the purchase, real or ostensible, of necessaries) undertakes to raise funds for her own purposes by purchasing goods and then selling or pawning them. We do not find a modern decision on this precise point.

18. Wray v. Wray, 33 Ala. 187. And see Alna v. Plummer, 4 Greenl. (Me.) 258; Wray v. Cox, 24 Ala. 337; Brookfield v. Allen, 6 Allen (Mass.) 585.

19. 2 Stra. 1122; Bates v. Enright, 42 Me. 105.

20. Wray v. Wray, 33 Ala. 187; Brookfield v. Allen, 6 Allen (Mass.) 585.

21. Edgerly v. Whalan, 106 Mass. 307.

22. Ahern v. Easterby, 42 Conn. 546.

23. Holt, C. J., in Etherington v. Parrott, 1 Salk. 118. See also Reeve Dom. Rel. 84.

§ 108. Liability of Wife.

How far the wife can contract liability for necessaries in her own person, when the husband is discharged by her delinquency, was considered in the case of *Marshall* v. *Rutton.*[24] Lord Kenyon observed that it was not a necessary consequence of the determination of the husband's responsibility that the wife should be at liberty to act as a *feme sole;* but that the contrary was the truth; and that any persons knowing her condition, who chose to trust her, could not complain if they found themselves unable to sue her. But these remarks are very cautiously put; and it seems reasonable to suppose, as Justice Buller expresses himself in the case upon which Lord Kenyon commented, that the wife would become liable therefor; certainly if she represented herself as a single woman.[25] At common law a wife was not liable after her husband's death for necessaries for which he was primarily liable.[26] Under Married Women's Acts a wife may bind herself by an express contract for necessaries,[27] if the creditor so understands the contract.[28] But it must affirmatively appear that she made the purchases on her indi-

24. Marshall v. Rutton, 8 T. R. 547.

25. Cox v. Kitchin, 1 B. & P. 339; Childress v. Mann, 33 Ala. 206; McHenry v. Davies, L. R. 10 Eq. 88.

26. Bazemore v. Mountain, 121 N. C. 59, 28 S. E. 17.

27. Charron v. Day, 228 Mass. 305, 177 N. E. 347; Hazard v. Potts, 40 Misc. 365, 82 N. Y. S. 246; Glenn v. Gerold, 64 S. C. 236, 42 S. E. 155; Adair v. Arendt, 126 Ark. 246, 190 S. W. 445; Bonebrake v. Taner, 67 Kan. 827, 72 P. 521; Hardiman's Adm'r v. Crick, 131 Ky. 358, 115 S. W. 236; Dearing v. Moran, 25 Ky. Law, 1545, 78 S. W. 217; Strawbridge v. Wolff, 66 Pa. Super. 328; Desmond v. Dockery (Tex.), 116 S. W. 114; Metler v. Snow, 90 Conn. 690, 98 A. 322; Bell v. Rosingnol, 143 Ga. 150, 84 S. E. 542; Grandy v. Haddock, 85 App. Div. 173, 83 N. Y. S. 90; Oliver v. Webber, 12 Ga. App. 216, 76 S. E. 1081; Noell v. O'Neill, 128 Md. 202, 97 A. 513; Valois v. Gardner, 122 App. Div. 245, 106 N. Y. S. 808; Wickstrom v. Peck, 179 App. Div. 855, 167 N. Y. S. 408; Speckmann v. Foote, N. Y. S. 380; *In re* Totten, 137 App. Div. 273, 121 N. Y. S. 942; Nathan v. Morgenthau, 114 N. Y. S. 796; Hild v. Hellman (Tex.), 90 S. W. 44; Hall v. Johns, 17 Idaho 224, 105 P. 71; Thomas v. Passage, 54 Ind. 106; Quisenberry v. Thompson, 19 Ky. Law, 1554, 43 S. W. 723; Bradt v. Shull, 46 App. Div. 347, 61 N. Y. S. 484; Anderson v. Davis & Ould, 55 W. Va. 429; Woods v. Kauffman, 115 Mo. App. 398, 91 S. W. 399; Mayer v. Lithauer, 28 Misc. Rep. 171, 58 N. Y. S. 1064; Carter v. Wann, 45 Ala. 343, (overr., Cunningham v. Fontane, 25 Ala. 644); Stevens v. Hush, 104 Misc. 69, 171 N. Y. S. 41; Edminston v. Smith, 13 Ida. 645, 92 P. 842; Weber v. Look, 21 Ky. Law, 1027, 53 S. W. 1034; Hackman v. Cedar, 13 Ohio Cir. Ct. 618, 5 O. C. D. 293; Howe v. North, 69 Mich. 272, 37 N. W. 213; Vanderberg v. Kansas City, Mo., Gas Co., 126 Mo. App. 600, 105 S. W. 17; Sherry v. Littlefield (Mass.), 122 N. E. 300; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820.

28. Goodson v. Powell, 9 Ga. App. 497, 71 S. E. 765.

vidual credit.[29] In such case she will be presumed to intend to charge her separate estate.[30] No such contract can be implied.[31] A wife is not liable for necessaries sold to her husband, where there is no evidence that he was her agent.[32] The fact of such agency must affirmatively appear.[33] Under the California statute a wife is not liable for her own support unless the community property fails, or the husband refuses to support her, but she may consent to his use of her estate for that purpose.[34] The District of Columbia statute providing that the husband shall remain liable for necessaries contracted for by the wife does not relieve her from similar liability.[35] Under the Kentucky statute she is liable where the goods were charged to her though the husband is primarily liable for the same debt.[36] She may be liable in Louisiana where she has reserved to herself the administration of her separate estate.[37] The fact that a husband deserts and does not provide for his family has been held to be a refusal to perform a contract for necessaries under the Michigan statute making a wife liable therefor in such case.[38] Under the Married Women's Act in the same State, enabling the wife to contract as to her separate estate, she is not bound by a contract to pay for medical services rendered to her husband,[39] but under the same statute she is liable for clothes furnished to her minor son under her contract.[40] Under the Nebraska statute the wife is liable for family necessaries where a judgment therefor against the husband has been returned unsatisfied.[41] Under the New York statute a wife is not liable for medical services rendered to her and her child at her request, in the absence of a special agreement,[42] but such an agreement will bind her.[43] In the same State her promise to pay for board and lodging furnished to her under contract made with her husband has been held without con-

29. Feiner v. Boynton, 73 N. J. Law 136, 62 A. 420.

30. Miller v. Brown, 47 Mo. 504, 4 Am. R. 345.

31. Lavoie v. Dube, 229 Mass. 87, 118 N. E. 179.

32. Dillon v. Mandelbaum, 97 App. Div. 107, 89 N. Y. S. 646.

33. Bazemore v. Mountain, 126 N. C. 313, 35 S. E. 542.

34. Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360.

35. Dobbins v. Thomas, 26 App. D. C. 157.

36. Underhill v. Mayer, 174 Ky. 229, 192 S. W. 14.

37. Crotchet v. Dugas, 126 La. 285, 52 So. 495.

38. Carstens v. Henselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. R. 606.

39. Buck v. Patterson, 75 Mich. 397, 42 N. W. 949.

40. Hirshfield v. Waldron, 83 Mich. 116, 47 N. W. 239; Barber v. Eberle's Estate, 131 Mich. 317, 91 N. W. 123, 9 Det. Leg. N. 325.

41. Leake v. Lucas, 65 Neb. 359, 93 N. W. 1019, 62 L. R. A. 190.

42. Richards v. Young, 84 N. Y. S. 265.

43. Flurscheim v. Rosenthal, 112 N. Y. S. 1118.

sideration.[44] Under the North Carolina statute limiting the wife's capacity to contract to her necessary personal expenses or those for the benefit of the family, it was held that she could not contract for the erection of a house on her separate estate.[45] But it was held otherwise as to advances to a tenant to enable him to make a crop which were made by a third person at the wife's request, it appearing that the wife's rents were the sole support of the family.[46] Under a Texas statute empowering a wife to contract for necessaries and for the benefit of her separate estate, it was held that she was not liable on her contract for nursing her husband,[47] but it was held otherwise as to a contract for the commercial education of a daughter, where the husband was absent and where the wife's means justified the expense.[48] In that State a wife who has a separate estate may bind herself by a contract for necessaries,[49] and is bound by a note executed with her husband for necessaries of which she bought only a part.[50] In Wisconsin a wife cannot bind herself by a contract to pay for her board while living with her husband and engaged in no business.[51]

§ 109. What Constitutes Necessaries — in General.

The wife's necessaries are such articles as the law deems essential to her health and comfort; chiefly food, drink, lodging, fuel, washing, clothing, and medical attendance. They are to be determined, both in kind and amount, by the means and social position of the married pair, and must therefore vary greatly among different grades and at different stages of society.[52] The articles furnished must be necessary and proper for a family such as that of the particular husband,[53] and the creditor has the burden of showing that the goods sold are necessaries.[54]

44. Ruhl v. Heintze, 97 App. Div. 442, 89 N. Y. S. 1031.

45. Weathers v. Borders, 124 N. C. 610, 32 S. E. 881 (reh. den., 121 N. C. 387, 28 S. E. 524).

46. Bazemore v. Mountain, 121 N. C. 59, 28 S. E. 17.

47. Flannery v. Chidgey, 33 Tex. Civ. 638, 77 S. W. 1034.

48. Haas v. American Nat. Bank, 42 Tex. Civ. 167, 94 S. W. 439.

49. Palmer v. Coghlan (Tex.), 55 S. W. 1122.

50. Hild v. Hellman (Tex.), 90 S. W. 44.

51. Chickering-Chase Bros. Co. v. L. J. White & Co., 127 Wis. 83, 106 N. W. 797.

52. 2 Bright, Hus. & Wife, 7, 8; Ozard v. Darnford, Sel. N. P. 260; Dennys v. Sargeant, 6 Car. & P. 419; Berreblock v. Michael, Cro. Jac. 257, 258; *n.* to 2 Kent Com., 10th ed., 146; *ib.* 138, 139; 1 Bl. Com. 442.

53. Schwartz v. Cohn, 129 N. Y. S. 464; Wilder v. Brokaw, 141 App. Div. 811, 126 N. Y. S. 932; B. Altman & Co. v. Durland, 173 N. Y. S. 62; Marshall v. Curry, 23 Pa. Super. 143.

54. Frank v. Carter, 219 N. Y. 35, 113 N. E. 549, L. R. A. 1917B, 1288.

§ 110. Illustration.

Groceries purchased by the wife for the family are necessaries,[55] as well as suitable clothing for her.[56] Such clothing must be suitable to the wife's condition in life and must be actually needed.[57] Thus a large milliner's bill might not be deemed necessaries for the wife of a laborer, while a wealthy merchant would be bound to pay it. So, too, necessaries to-day are not what they were fifty years ago. Nor is the ordinary test to be found in the real situation and means of the married parties; for this a tradesman cannot be expected to investigate; but in their apparent situation, the style they assume, and the establishment they maintain before the world; which every husband is supposed to regulate with sufficient prudence.[58] Articles, too, may be of a kind which the law pronounces necessaries, and yet a wife may be so well supplied as not to need the particular articles in question,— a distinction of some consequence. The decisions in the books, relating to necessaries, are therefore somewhat confusing, as might be expected; the more so since the dividing line between law and fact, in such cases, is not marked with distinctness. Sometimes the court decides whether articles are necessary, sometimes a jury. The ordinary rule is that the court shall decide whether certain articles are to be classed as necessaries; while the jury may determine the question of amount, and apply this classification to the facts,[59] but this rule, though seemingly precise, is found difficult in its practical application.

Among the cases we find the following articles classed as necessaries for the wife: Board and lodging,[60] furniture of a house for a wife to whom the court had decreed £380 a year as alimony,[61] watches and jewelry such as befits the style of dress which the husband sanctions, especially if not wholly ornamental,[62] silver fringes to a petticoat and side-saddle (value £94) furnished to the wife of

55. Fischer v. Brady, 47 Misc. 401, 94 N. Y. S. 25.

56. Feiner v. Boynton, 73 N. J. Law, 136, 62 A. 420.

57. Dolan v. Brooks, 168 Mass. 350, 47 N. E. 408.

58. Waithman v. Wakefield, 1 Camp. 120; Gately Outfitting Co. v. Vinson (Mo.) 182 S. W. 133.

59. Renaux v. Teakle, 20 E. L. & Eq. 345; 1 Pars. Contr. 241; Hall v. Weir, 1 Allen (Mass.), 261; Parke v. Kleeber, 37 Pa. 251; Raynes v. Bennett, 114 Mass. 424; Phillipson v. Hayter, L. R. 6 C. P. 38.

60. Harris v. Lee, 1 P. Wms. 438; Mayhew v. Thayer, 8 Gray (Mass.), 172; Cothran v. Lee, 24 Ala. 380; Webber v. Spannhake, 2 Redf. (N. Y.) 258; Spaun v. Mercer, 8 Neb. 357.

61. Hunt v. De Blaquiere, 5 Bing. 550.

62. Cooper v. Haseltine, 50 Ind. App. 400, 98 N. E. 437; Raynes v. Bennett, 114 Mass. 424.

a serjeant-at-law,[63] household supplies reasonable and proper for the ordinary use of a family, although the wife receives the earnings of two daughters living with her,[64] perhaps a piano,[65] a horse worth $45 for the invalid wife of a miller earning $30 per month, in order that she might take exercise as advised by a physician; the question of suitableness, however, being left to the jury.[66]

§ 111. Counsel Fees.

A husband has been held liable for reasonable legal expenses incurred by a wife who had been desereted by her husband, preliminary and incidental to a suit for restitution of her conjugal rights, and in obtaining professional advice as to the proper method of dealing with tradesmen who were pressing their bills,[67] and for reasonable legal expenses in defence of a prosecution instituted against a wife by her husband,[68] and even, in a just cause, for prosecuting him,[69] and the cost of divorce proceedings, including fees of a proctor, where the wife had reasonable ground for instituting them, but not otherwise,[70] especially where necessary for the wife's protection.[71] He has been held liable for such services rendered in committing her to an insane asylum,[72] and for counsel to defend her character in a suit against her.[73] He has been held not liable for the expense of an indictment by the wife for assault,[74] nor for counsel fees in a suit for divorce or to enforce a marriage settlement, whether the wife be plaintiff or defendant.[75] A hus-

63. Skin. 349.

64. Hall v. Weir, 1 Allen (Mass.) 261.

65. Parke v. Kleeber, 37 Pa. 251. But see Chappell v. Nunn, 41 L. T. 287.

66. Cornelia v. Ellis, 11 Ill. 584.

67. Wilson v. Ford, L. R. 3 Ex. 63.

68. Warner v. Heiden, 28 Wis. 517.

69. Shepherd v. Mackoul, 3 Camp. 326; Morris v. Palmer, 39 N. H. 123.

70. Brown v. Ackroyd, 34 E. L. & Eq. 214; Porter v. Briggs, 38 Ia. 166.

71. Maddy v. Prevulsky (Ia.), 160 N. W. 762, L. R. A. 1917C, 335; Wick v. Beck (Ia.), 153 N. W. 836, L. R. A. 1915F, 1162.

72. Moran v. Montz, 175 Mo. App. 360, 162 S. W. 323.

73. Hamilton v. Salisbury, 133 Mo. App. 718, 114 S. W. 563.

74. Grindell v. Godmond, 5 Ad. & El. 755. Especially if the grounds for instituting criminal proceedings did not appear reasonable. Smith v. Davis, 45 N. H. 566.

75. Pearson v. Darrington, 32 Ala. 227; Dow v. Eyster, 79 Ill. 254; McCullough v. Robinson, 2 Ind. 630; Yeiser v. Lowe, 50 Neb. 310, 69 N. W. 847; Morrison v. Holt, 42 N. H. 478, 80 Am. Dec. 120; Wing v. Hurlburt, 15 Vt. 607, 40 Am. Dec. 695; Pearson v. Darrington, 32 Ala. 227; Morrison v. Holt, 42 N. H. 478; Thompson v. Thompson, 3 Head (Tenn.), 527; Coffin v. Dunham, 8 Cush. (Mass.) 404; Shelton v. Pendleton, 18 Conn. 417; Johnson v. Williams, 3 Ia. 97;

band whose wife is living apart from him is not liable for counsel fees incurred by her in defending a prosecution for that offence,[76] nor for services rendered by an attorney who knew of a separation, especially where the court, in a proceeding for separate maintenance, had fixed the wife's allowance,[77] nor in such an action where the parties have become reconciled and have resumed cohabitation,[78] nor for counsel fees in a proceeding against him for divorce, other than the amount allowed by the court,[79] or for legal advice pending such a proceeding,[80] nor for such services in an action brought against both spouses for the construction of a trust deed made by the husband alone.[81]

§ 112. Medical Services.

Medical services rendered to the wife are generally necessaries,[82] but not where such services were rendered on her sole credit,[83] or where she lives apart without justifiable cause.[84] Under the Kentucky statute the husband alone is liable for medical services furnished to the wife, if suitable to her condition in life.[85] Medical

Drais v. Hogan, 50 Cal. 121; Dow v. Eyster, 79 Ill. 254; Whipple v. Giles, 55 N. H. 139; Williams v. Monroe, 18 B. Mon. (Ky.) 514; Ray v. Adden, 50 N. H. 82. Legal expenses and fees are sometimes chargeable against a husband, in cases of this sort, because the statute says so. Thomas v. Thomas, 7 Bush (Ky.), 665; Warner v. Heiden, 28 Wis. 517; Glenn v. Hill, 50 Ga. 94.

Decisions differ; but the weight of authority is that an action at law for his fees cannot be maintained by a solicitor who prosecutes or defends on the wife's behalf against her husband. Fees and retainers for more solicitors than were needful cannot be allowed. See Divorce, *post*, Vol. II.

76. Peaks v. Mayhew, 94 Me. 571, 48 A. 172.

77. Damman v. Bancroft, 43 Misc. 678, 88 N. Y. S. 386.

78. Kuntz v. Kuntz, 80 N. J. Eq. 429, 83 A. 787.

79. Zent v. Sullivan, 47 Wash. 315, 91 P. 1088, 13 L. R. A. (N. S.) 244.

80. Meaher v. Mitchell, 112 Me. 416, 92 A. 492, L. R. A. 1915C, 467.

81. Mulligan v. Mulligan, 161 Ky. 628, 171 S. W. 420.

82. Johnson v. Coleman (Ala.), 69 So. 318; City of Columbus v. Strassner, 138 Ind. 301, 34 N. E. 5; Button v. Weaver, 87 App. Div. 224, 84 N. Y. S. 388; Schneider v. Rosenbaum, 52 Misc. 143, 101 N. Y. S. 529; Thrall Hospital v. Caren, 140 App. Div. 171, 124 N. Y. S. 1038; *In re* Babcock, 169 N. Y. S. 800, 171 N. Y. S. 1078; Davenport v. Rutledge (Tex.), 187 S. W. 988. A husband is not liable to a surgeon who operated on his wife, where the wife did not request the operation, but only passively acquiesced in it, and no person having any power of agency for the husband requested or authorized it. Kennedy v. Benson, 144 N. Y. S. 787.

83. Black v. Clements, 2 Pennewill (Del.), 499; 47 A. 617.

84. Wolf v. Schulman, 45 Misc. 418, 9 N. Y. S. 363; Morgenroth v. Spencer, 124 Wis. 564, 102 N. W. 1086.

85. Towery v. McGaw, 22 Ky. Law, 155, 56 S. W. 727.

attendance rendered, without the husband's assent, by a quack doctor, are not necessaries,[86] but when a husband disputes a bill for medical attendance on the ground of malpractice, or an unnecessary surgical operation, the burden is on him to show it.[87]

§ 113. Dental Services.

Necessaries include a set of false teeth, and reasonable dentistry,[88] and dental services generally.[89]

§ 114. Last Sickness and Funeral Expenses.

A surviving husband is primarily liable for the funeral expenses of his deceased wife,[90] even though she lived apart from him,[91] and has a separate estate,[92] but it is sometimes held that her estate is secondarily liable where he does not pay them.[93] In Massachusetts and New York it is held that her estate is solely liable for her funeral expenses.[94] A third person defraying a wife's funeral expenses may recover from the husband the amount expended.[95] He is also liable for the necessary expense of her last sickness.[96] But a wife is not liable for her husband's funeral expenses, in the absence of statute.[97] Under the Iowa statute the expense of a

86. Wood v. O'Kelly, 8 Cush. (Mass.) 406.

87. McClallan v. Adams, 19 Pick. (Mass.) 333.

88. Clark v. Tenneson (Wis.), 130 N. W. 895, 33 L. R. A. (N. S.) 426; Freeman v. Holmes, 62 Ga. 556; Gilman v. Andrus, 28 Vt. 241.

89. Clark v. Tenneson, 146 Wis. 65, 130 N. W. 895.

90. Carpenter v. Hazelrigg, 103 Ky. 538, 20 Ky. Law, 231, 45 S. W. 666; Bowen v. Daugherty, 168 N. C. 242, 84 S. E. 265; Stack v. Padden, 111 Wis. 42, 86 N. W. 568; Gustin v. Bryden, 205 Ill. App. 204; Scott v. Carothers, 17 Ind. App. 673, 47 N. E. 389; *In re* Skillman's Estate, 146 Ia. 601, 125 N. W. 343; Ketterer v. Nelson, 146 Ky. 7, 141 S. W. 409; Brand's Ex'r v. Brand, 109 Ky. 721, 22 Ky. Law, 1366; Sears v. Giddey, 41 Mich. 590, 2 N. W. 917, 32 Am. R. 168; Bowen v. Daugherty, 168 N. C. 242, 84 S. E. 265; Hatton v. Cunningham, 162 N. Y. S. 1008; George H. Humphrey & Son v. Huff, 3 Ohio App. 111, 35 Ohio Cir. Ct. 117; *In re* Stadtmuller, 110 App. Div. 76, 96 N. Y. S. 1101; *In re* Klingensmith, 58 N. Y. S. 375, 29 Civ. Proc. R. 69; Towery v. McGaw, 22 Ky. Law, 155, 56 S. W. 727.

91. Scott v. Carothers, 17 Ind. App. 673, 47 N. E. 389; Watkins v. Brown, 89 App. Div. 193, 85 N. Y. S. 820.

92. *In re* Conn's Estate, 65 Pa. Super. 511.

93. Carpenter v. Hazelrigg, 103 Ky. 538, 20 Ky. L. 231, 45 S. W. 666.

94. Morrissey v. Mulhern, 168 Mass. 412, 47 N. E. 407; *In re* Stadtmuller, 110 App. Div. 76, 96 N. Y. S. 1101.

95. Stone v. Tyack, 164 Mich. 550, 129 N. W. 694, 17 Det. Leg. N. 1118.

96. Ketterer v. Nelson, 146 Ky. 7, 141 S. W. 409; Long v. Beard, 20 Ky. Law, 1036; Stonesifer v. Shriver, 100 Md. 24, 59 A. 139.

97. Robinson v. Foust, 31 Ind. App. 384, 99 Am. St. R. 269; Hollandsworth v Squires (Tenn.), 56 S. W. 1041; Compton v. Lancaster (Ky.), 114 S. W. 260.

husband's last sickness is a family expense for which the wife is liable, even though the claim against the estate of the husband had been lost by failure to prove within the statutory period.[98] Under the Washington statute a wife is secondarily liable for her husband's funeral expenses after the funds of his estate have been exhausted,[99] and for her husband's medical and hospital expenses, though she was in another State when they were rendered, it appearing that she corresponded with him and after his death secured a decree giving her his estate.[1] Under the Wisconsin statute the wife's estate is primarily liable where the undertaker furnishes the funeral on the credit of her separate estate, independently of the liability of the husband, who ordered it.[2]

§ 115. What are not Necessaries.

The following articles have been held not to be necessaries: Articles of jewelry for the wife of a special pleader,[3] a deed of separation,[4] passage tickets in general to enable the wife to travel, except perhaps for a clearly needful purpose,[5] "religious instruction," or the rent of a church pew,[6] diamond earrings, a watch for the wife's daughter by a former husband, and chain for a servant's lover,[7] a set of "Stoddard's Lectures," [8] apartment decorations furnished and charged to the wife,[9] a sofa cushion, lamp and gown for a wife, the whole bill amounting to $22.25,[10] board at a summer hotel for the period of the summer season at a place away from the family domicile,[11] a horse for use in the wife's separate business.[12] Articles which are extravagant and altogether beyond the husband's circumstances and degree in life are not necessaries.[13] A husband

98. Vest v. Kramer (Ia.), 114 N. W. 886.

99. Butterworth v. Bredemeyer, 74 Wash. 524, 133 P. 1061.

1. Russell v. Grauman, 40 Wash. 667, 82 P. 998.

2. Schneider v. Breier's Estate, 129 Wis. 446, 109 N. W. 99, 6 L. R. A. (N. S.) 917.

3. Montague v. Benedict, 3 B. & C. 631.

4. Ladd v. Lynn, 2 M. & W. 265.

5. Knox v. Bushell, 3 C. B. (N. S.) 334.

6. St. John's Parish v. Bronson, 40 Conn. 75.

7. Otto v. Matthie, 70 Ill. App. 54.

8. Shuman v. Steinol, 129 Wis. 422, 109 N. W. 74, 7 L. R. A. (N. S.) 1048.

9. Proctor v. Woodruff, 119 N. Y. S. 232.

10. Raymond v. Cowdrey, 19 Misc. 34, 42 N. Y. S. 557.

11. Stevens v. Hush, 176 N. Y. Supp. 602.

12. Palmer v. Coghlan (Tex.), 55 S. W. 1122.

13. Caney v. Patton, 2 Ashm. 140. In Phillipson v. Hayter, L. R. 6 C. P. 38, goods, such as a gold pencil-case, cigar-case, glove-box, scent-bottle, guitar, music, and purse, to the value of £20, were held not to be necessaries chargeable against the husband, who was a clerk with a salary of £400 a year.

is not liable for expenses of administering his wife's estate or for an action brought by her representative.[14]

§ 116. Joint Statutory Liability for "Family Expenses."

A contract capacity, involving legal liability from the separate estate, is now quite frequently sustained as to the wife, without requiring her to stand on her old footing of agent for the husband to serve her dire needs.[15] This, as an enlargement of contract power in a married woman, results in part from protecting her separate property, over which it is hardly just that she should enjoy full dominion, without contributing something from its income to the comforts of the matrimonial abode. In many States the husband is still under the common-law obligation to support his wife and family; and primarily this continues almost universally his duty; but great modifications of the old rule have of late been established both in England and America.

Thus, under the English Married Women's Act of 1870, a wife having separate property is rendered liable to the parish for the maintenance of her husband and children.[16] Some of the American married women's acts, too, charge the wife's separate estate distinctly with necessaries or with articles of "family supply," though not unless she contracted for the articles, or unless, at least, her husband was destitute of the means of payment.[17]

14. Long v. Beard, 20 Ky. Law, 1036, 48 S. W. 158.

15. For the coverture doctrine of necessaries and the wife's agency for procuring them, see *supra*, 83.

16. Act 33 & 34 Vict., ch. 93.

17. Covert v. Hughes, 15 N. Y. 305; McCormick v. Muth, 49 Ia. 536; Cunningham v. Fontaine, 25 Ala. 644; Rogers v. Boyd, 33 Ala. 175; Finn v. Rose, 12 Ia. 565. See Sharp v. Burns, 35 Ala. 653; Callahan v. Patterson, 4 Tex. 61. Debt incurred in procuring a substitute for a husband who was drafted is not included among "necessaries" thus chargeable upon the wife. Ford v. Teal, 7 Bush (Ky.), 156. See, further, Lawrence v. Sinnamon, 24 Ia. 80. State aid to a soldier's wife is chargeable as above. Hammond v. Corbett, 51 N. H. 311. Medical attendance, rendered the wife at her request, may be thus charged. Yates v. Lurvey, 65 Me. 221; May v. Smith, 48 Ala. 483. But see Thomas v. Passage, 54 Ind. 106; Webber v. Spannhake, 2 Redf. (N. Y.) 258. Needful servants are thus charged. Pippin v. Jones, 52 Ala. 161.

But in New York, to charge the wife's separate estate for nurses and household expenses not rendered for its benefit, a distinct agreement to that effect must appear on the wife's part. Eisenlord v. Snyder, 71 N. Y. 45.

A husband, under some local statutes, is not liable for municipal expenses incurred in treating his insane wife at a public institution. Delaware County v. McDonald, 46 Ia. 170; Commissioners v. Schmoke, 51 Ind. 416. As to making a husband a pauper, by his wife's receiving pauper

Doubtless a married woman may become bound for her own necessaries, and in a sense for what may be called "family necessaries" to a reasonable and proper extent, contracted on the faith of her separate estate, whether her husband be insolvent or not, or without means, so long as neither he nor his credit were considered in the transaction between herself and the storekeeper; and her separate estate is answerable accordingly in a suit against her under many statutes.[18] Under such a statute both spouses are principals,[19] each holding the other out by the marriage relation as agent to incur family expenses.[20] This, in part at least, upon equity principle, too, as something beneficial to her, and authorized by her upon the express credit of her separate estate.[21] And though the

aid, under laws of settlement, see Lewiston v. Harrison, 69 Me. 504.

As statutory necessaries cannot be charged against the wife's separate property, improvements on real estate, out-houses, and fencing. Lee v. Campbell, 61 Ala. 12. Money of the wife used by her husband, with her consent and knowledge, in payment of ordinary household expenses, and without agreement for its repayment, cannot be recovered by her from his estate. Courtright v. Courtright, 53 Ia. 57. But see Sherman v. King, 51 Ia. 182. As to the wife's check or draft for supplies, see Castleman v. Jeffries, 60 Ala. 380.

Under the Mississippi Code the wife's separate estate is liable for "plantation supplies." Lake v. Dillard, 55 Miss. 63; Wright v. Walton, 56 Miss. 1; Ogden v. Guice, 56 Miss. 330; Grubbs v. Collin, 54 Miss. 368. "Articles of comfort and support for the household" are thus chargeable in Alabama. Baker v. Flournoy, 58 Ala. 650; Jones v. Wilson, 57 Ala. 122; May v. Smith, 48 Ala. 483; Cauly v. Blue, 62 Ala. 77. "Expenses of the family" are thus chargeable under Iowa Code. McCormick v. Muth, 49 Ia. 536; Jones v. Glass, 48 Ia. 345.

18. Gunn v. Samuel, 33 Ala. 201; Catron v. Warren, 1 Cold. (Tenn.) 358; Wylly v. Collins, 9 Ga. 223; Black v. Bryan, 18 Tex. 453; Rigoney v. Neiman, 73 Pa. 330; O'Connor v. Chamberlain, 59 Ala. 431; Labaree v. Colby, 99 Mass. 559; Davidson v. McCandlish, 69 Pa. 169; Campbell v. White, 22 Mich. 178; Craft v. Rolland, 37 Conn. 491; Murdy v. Skyles, 101 Ia. 549, 70 N. W. 714, 63 Am. St. R. 411; Houghteling v. Walker, 100 F. 253 (wife's liabilitiy for rent of house leased by husband) (affd. 46 C. C. A. 512, 107 F. 619); Banner Mercantile Co. v. Hendrick, 24 N. D. 16, 138 N. W. 993; Meier & Frank Co. v. Mitlhner, 75 Ore. 331, 146 P. 796; Dale v. Marvin, 76 Ore. 528, 148 P. 1116, rehearing denied *Id.* 1151.

19. *In re* Skillman's Estate, 146 Ia. 601, 125 N. W. 343.

20. Arnold v. Keil, 81 Ill. App. 237.

21. The wife's equitable separate estate is not, apart from her credit, liable for family board, though the husband be insolvent. Mayer v. Galluchat, 6 Rich. Eq. (S. C.) 1. But when upon credit of her separate estate, equity will enforce it. Priest v. Cone, 51 Vt. 495; Roberts v. Kelley, 51 Vt. 97. But cf. Weir v. Groat, 4 Hun (N. Y.), 193; Sorrel v. Clayton, 42 Tex. 188; Baker v. Harder, 4 Hun, 272; Collins v. Underwood, 33 Ark. 265. For in some States the wife's own benefit, apart from children or husband, is strictly regarded. House rent to a reasonable amount may be thus charged by wife's express procurement. Harris v. Williams, 44

husband be considered still presumably liable, as to supplies for the needful clothing, support, and education of his wife and family, the wife continuing his agent as at the common law, yet for such supplies the wife may, as some States hold, render herself liable, and by her actual consent, express or implied, constitute even the husband himself a purchaser of such supplies as her agent, she being the principal.[22] If there be any good sense in the rule that, where credit is once given to the wife, the husband will not be liable, though the articles purchased be a necessary, it is in cases where the wife has a separate income or separate property of her own, and under her own control.[23] If the expense is for the family within the meaning of the statute it is immaterial whether it was strictly necessaries,[24] if the articles are for and are used by some member of the family,[25] or go to the support or joint benefit of both,[26] or if purchased by a member of the family, though over age, and whether purchased before or after the husband's death.[27] To recover under such a statute the creditor must show that there

Tex. 124; Wright v. Meriwether, 51 Ala. 183. But not without such express procurement. Eustaphieve v. Ketchum, 13 N. Y. 621. Whether a husband's discharge in bankruptcy will relieve the wife's estate from a claim for family necessaries where it is not clear that express credit was given to the wife, see Wilson v. Renshaw, 91 Pa. 224; Jones v. Glass, 48 Ia. 345.

Articles not stricly necessaries have thus been charged upon the wife, she having expressly contracted. Adams v. Charter, 46 Conn. 551; Miller v. Brown, 47 Mo. 505. But not usually what were neither her necessaries nor expressly contracted for. Parker v. Dillard, 50 Ala. 14. Where articles consist partly of enforceable necessaries, and partly of articles not so enforceable, the liability of the former may be enforced, regardless of the latter articles. Parker v. Dillard, 50 Ala. 14; Lee v. Tannenbaum, 62 Ala. 501; Roberts v. Kelley, 51 Vt. 97. No change in the wife's statutory separate estate, existing and liable for the account when it was made, can defeat proceedings to compel payment. Cheatham v. Newman, 59 Ala. 547.

22. Cook v. Ligon, 54 Miss. 368. And see Powers v. Russell, 26 Mich. 179; Wilson v. Herbert, 41 N. J. L. 454; Sherman v. King, 51 Ia. 182; Miller v. Brown, 47 Mo. 505, as to requiring affirmative proof that the wife purchased on her own credit in order to charge her separate estate.

23. Equity, under very strong circumstances of expediency, has required the wife's separate income to be applied towards her support; as where she is insane, and consequently both helpless as a wife and incapable of giving or withholding assent. See Davenport v. Davenport, 5 Allen (Mass.), 464.

24. Berow v. Shields, 48 Utah, 270, 159 P. 538.

25. Gilman v. Matthews, 20 Colo. App. 170, 77 P. 366.

26. Ferrigino v. Keasbey (Conn.), 106 A. 445.

27. Graham & Corry v. Work, 162 Ia. 383, 141 N. W. 428.

was a legal relation of husband and wife.[28] Under the Connecticut statute both spouses are liable for the " reasonable apparel " of the wife, though he has not abandoned her.[29] Under the Illinois statute making a wife liable for family expenses, a wife was held not liable for the expense of caring for a drunken husband, from whom she was separated.[30] Under the Iowa statute making the wife liable for family expenses, a creditor who has a judgment against the husband for such a debt may in equity subject the wife's property to the debt without first obtaining judgment against her.[31] In Louisiana a wife separated from her husband in property should contribute to the family expenses and the education to the extent of her means.[32] Under the Nebraska statute the wife is liable for the husband's support and necessary medical attendance while he is temporarily helpless, if he is a member of the family.[33] In Texas both spouses are liable for her support where he abandons her.[34]

§ 117. Measure of Liability.

Under such a statute the wife's liability is measured by her husband's contract, and payment by him and the statute of limitations both inure to her.[35] Therefore a note which the husband has given for such a debt does not bind either as to the validity of the debt or the amount of it.[36] Her liability cannot be enlarged by his act and should not be extended by construction.[37]

§ 118. Effect of Separation.

Such statutes do not apply where there has been a separation.[38] Where there is a permanent separation the creditor cannot recover under such a statute, there being no " family," within its meaning.[39] Therefore, under such a statute the creditor must show that the goods sued for were within the statute and that the spouses were

28. Rand v. Bogle, 197 Ill. App. 476; Berow v. Shields (Utah), 159 P. 538.

29. Paquin, Limited, v. Westervelt (Conn.), 106 A. 766.

30. Featherstone v. Chapin, 93 Ill. App. 223.

31. Boss v. Jordan, 118 Ia. 204, 89 N. W. 1070.

32. First Natchez Bank v. Moss, 52 La. Ann. 1524.

33. Leake v. Lucas, 65 Neb. 359, 91 N. W. 374, 62 L. R. A. 190 (affd. reh., 65 Neb. 359, 93 N. W. 1019).

34. Palmer v. Coghlan (Tex.), 55 S. W. 1122.

35. Morse v. Minton, 101 Ia. 603, 70 N. W. 691.

36. McCartney & Sons Co. v. Carter, 129 Ia. 20, 105 N. W. 339.

37. McCartney & Sons Co. v. Carter, 129 Ia. 20, 105 N. W. 339.

38. O'Brien v. Galley-Stockton Shoe Co. (Colo.), 173 P. 544.

39. Berow v. Shields, 48 Utah, 270, 159 P. 538 (holding that a temporary separation will not prevent recovery).

in fact living together.[40] Under such statutes the rights of the creditor are not affected by a contemplated separation of which he knows nothing,[41] especially where he has no means of knowledge.[42]

§ 119. House Rent.

Under the Colorado statute making the wife liable for family expenses, where a husband leased a house which the family occupied as a home and where he vacated prior to the determination of the lease, during which the furniture was damaged, it was held that the rent after the family moved out and the damage to the furniture were not family expenses.[43] Under the same statute she was held liable for room rent though her husband rented the room.[44] Under the Illinois statute it was held that the wife was liable for the rent of house leased by the husband, of which she occupied part only, he leasing the remainder to another tenant.[45] Under the Kentucky statute enabling the wife to contract for necessaries it was held that she was not liable on her lease of a hotel purely for profit.[46] Under the same statute the personal property of a tenant's wife cannot be subjected to payment of the rent.[47] Under the Minnesota statute making the spouses jointly liable for "necessary household articles and supplies," she was held not liable for the rent of a house leased by him[48]

§ 120. What constitutes "Family Expenses."

Under such statutes the liability has been held to extend to a diamond shirt stud used by the husband as an ornament,[49] and to a heating stove, wringer, coal and oil can, buggy and carriage kept for the use of the family,[50] and to a honiton and point lace waist

40. Perkins v. Morgan, 36 Colo. 360, 85 P. 640; Gilman v. Matthews, 20 Colo. App. 170, 77 P. 366; Robertson v. Warden, 197 Ill. App. 478.

41. Arnold v. Keil, 81 Ill. App. 237.

42. Stoutenborough v. Rammel, 123 Ill. App. 487.

43. Straight v. McKay, 15 Colo. App. 60, 60 P. 1106.

44. McDonnell v. Solomon (Colo.), 170 P. 951.

45. Barnett v. Marks, 71 Ill. App. 673.

46. Crow v. Shacklett, 18 Ky. Law, 908, 38 S. W. 692.

47. Fite v. Briedenback, 127 Ky. 504, 32 Ky. Law, 400, 105 S. W. 1182.

48. Lewis v. France (Minn.), 163 N. W. 656.

49. Neasham v. McNair, 103 Ia. 695, 72 N. W. 773, 38 L. R. A. 847, 64 Am. St. R. 202.

50. McDaniels v. McClure, 142 Ia. 370, 120 N. W. 1031.

costing $200 for the wife,[51] and to a buggy for family use,[52] and to the medical and hospital expenses of the husband, though the wife was in another State, where she later obtained an order for his estate,[53] and to supplies used for family servants, have been held within it.[54] Under the similar California statute she is liable for medical services furnished to her children.[55] Under the Kentucky statute enabling a wife to contract in writing for necessaries for herself or for any member of the family, she was held liable on a note given in payment for a mule to make a crop for their joint support.[56] Under the Missouri statute making the wife liable for family expenses she is liable for medical attendance furnished to the family, though her husband has given his note for the bill.[57]

§ 121. What are not "Family Expenses."

Under such statutes "family expenses" have been held to exclude the husband's board,[58] beer purchased by him,[59] feed for a horse used by him in his business,[60] and a piano, never received or used by the family,[61] or even if it was used by the family, if the husband has refused to consent to its purchase.[62] Under the Illinois statute making a wife liable for family expenses, she was held not liable for a stanhope frequently used by the husband, a doctor, in his profession, and sometimes by other members of the family.[63] That statute does not include a ring for the personal use of one of the spouses.[64] Under the Iowa statute the expenses of keeping a husband in an insane asylum have been held not within it.[65] Under the Kentucky statute the wife is not liable for the price of a city home to educate her children, where her general estate con-

51. Ross v. Johnson, 125 Ill. App. 65.

52. Houck v. La Junta Hardware Co., 50 Colo. 228, 114 P. 645.

53. Russell v. Graumann, 40 Wash. 667, 82 P. 998.

54. Perkins v. Morgan, 36 Colo. 360, 85 P. 640.

55. Evans v. Noonan, 20 Cal. App. 288, 128 P. 794.

56. Allen v. Long, 19 Ky. Law, 488, 41 S. W. 17.

57. Gabriel v. Mullen, 111 Mo. 119, 19 S. W. 1099 (overrg., Bedsworth v. Bowman, 104 Mo. 44, 15 S. W. 990).

58. Vose v. Myott, 141 Ia. 506, 120 N. W. 58.

59. O'Neil v. Cardinal, 159 Ia. 78, 140 N. W. 196.

60. Martin Bros. v. Vertres, 130 Ia. 175, 106 N. W. 516.

61. Jones-Rosquist-Killen Co. v. Nelson, 98 Wash. 539, 167 P. 1130.

62. Bush & Lane Piano Co. v. Woodard (Wash.), 175 P. 329.

63. Staver Carriage Co. v. Beaudry, 138 Ill. App. 147.

64. Hyman v. Harding, 162 Ill. 357, 44 N. E. 754.

65. Blackhawk County v. Scott, 111 Ia. 190, 82 N. W. 492.

sisted only of a life estate in one hundred acres of land,[66] or on a note given for money advanced to pay interest on a mortgage where it did not appear that the family occupied the mortgaged estate.[67] Under the Oregon statute, neither the expenses of a business conducted by either or both spouses, nor work on a farm or in pruning an orchard, are family expenses.[68]

66. Herr v. Lane, 20 Ky. Law, 1950, 5 S. W. 545.

67. Watts v. Turner, 23 Ky. Law, 279, 62 S. W. 878.

68. Chamberlain v. Townsend (Ore.), 142 P. 782 (affd. reh., 72 Ore. 207, 143 P. 924).

CHAPTER VIII.

LIABILITY FOR TORTS OF WIFE.

§ 122. Sole Liability of Husband — General Rule Stated.

As to private wrongs or torts, the general rule of law is that the husband is liable for the frauds and injuries of the wife, whether committed before or during coverture; if committed under his coercion or by him alone, he, and he alone, is liable; otherwise, both are, for the time being, liable.[69] He is liable for her torts in his presence even though committed against his protest.[70] Where the fraud or injury is committed in his company and by his order, coercion is presumed, and the husband becomes, *prima facie,* the only wrong-doer: and where committed without his order and in his absence, the wife is, in reality, the offending party, while the

69. Horsbaugh v. Murasky, 169 Cal. 500, 147 P. 147; O'Brien v. Walsh, 63 N. J. Law, 350, 43 A. 664; Edwards v. Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. R. 789; Mahoney v. Roberts, 86 Ark. 130, 110 S. W. 225; 2 Kent Com. 149; Bing. Inf. 256, 257; Angel v. Felton, 8 Johns. (N. Y.), 149; Gage v. Reed, 15 Ill. 403; Carl v. Wonder, 5 Watts (Pa.), 97; Whitman v. Delano, 6 N. H. 543; Gray v. Thacker, 4 Ala. 136; McKeown v. Johnson, 1 McCord (S. C.), 578; Benjamin v. Bartlett, 3 Miss. 86; Wright v. Kerr, Addis. 13; Cassin v. Delany, 38 N. Y. 178; Ball v. Bennett, 21 Ind. 427; Marshall v. Oakes, 51 Me. 308; Clark v. Bayer, 32 Ohio St. 299.

70. Gill v. State, 39 W. Va. 479, 20 S. E. 568, 45 Am. St. R. 928, 26 L. R. A. 655. In Nebraska the common-law rule that a husband is liable for his wife's torts committed in his presence and without his participation or instigation, and that solely because of the marriage relation, does not exist. Goken v. Dallugge, 72 Neb. 16, 99 N. W. 818 (mod. 72 Neb. 16, 101 N. W. 244, 103 N. W. 287).

husband has become responsible for her acts by reason of her coverture. In the latter class of cases the husband is properly joined with his wife in the suit; for if the wife alone were sued, his property might be seized without giving him an opportunity for defence; and if the husband alone were sued, he would become chargeable absolutely. In the former class of cases the husband should be sued alone.[71]

A husband is liable in replevin for his wife's unlawful detention of another's chattels under claim of title in herself.[72]

§ 123. Presumption of Coercion.

This presumption of coercion, too, is much the same in civil as in criminal offences. It is said by Chancellor Kent that a wrong committed by the wife "in company with" her husband, or "by his order," renders the husband alone liable; but this statement is too general and should be limited to the case of her acting by his coercion.[73] It is said that the privilege of presumptive coercion extends to no other person than a wife, not even to a servant.[74] The presence of the husband and his direction should usually be concurrent, in order to amount to coercion; and the presumption of a wife's coercion in a tort is, of course, not conclusive, but may be controlled by evidence of the facts.[75]

As to private wrongs the question occurs, why should the husband be made to stand in the wife's place where the offence is considered against an individual, any more than when it is between herself and the State. This seems to be the true answer, as in case of her debts *dum sola;* namely, that the husband adopts her and her circumstances together; that he takes her fortune, if she has one, and

71. Miller v. Busey (Mo.), 186 S. W. 983; Presnell v. Moore, 120 N. C. 390, 27 S. E. 27 (slander); Park v. Hopkins, 2 Bailey, 411; Matthews v. Fiestel, 2 E. D. Smith (N. Y.), 90; Jackson v. Kirby, 37 Vt. 448; Edwards v Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. R. 789 (assault); Huber v. Seeger (Wis.), 152 N. W. 829; Emmons v. Stevane, 73 N. J. Law, 349, 64 A. 1014. That a husband instigated and directed a wife to commit a tort in his absence may be shown by acts of his in execution of the same purpose. Handy v. Foley, 121 Mass. 259, 23 Am. R. R. 270.

72. Choen v. Porter, 66 Ind. 194.

73. Gray, C. J., in Handy v. Foley, 121 Mass. 259; 2 Kent Com. 149.

74. Reeve Dom. Rel. 72; Barnes v. Harris, Busbee, 15; Griffin v. Reynolds, 17 How. (U. S.) 609.

75. Cassin v. Delany, 38 N. Y. 178; Ferguson v. Brooks, 67 Me. 251. Coercion, if relied upon, should be set up in defence. See Clark v. Bayer, 32 Ohio St. 299; Ferguson v. Brooks, 67 Me. 251.

assumes all possible liabilities therefrom. Since the wife is not disabled to commit a tort, the presumption may be rebutted.[76]

§ 124. Necessity of Valid Marriage.

Simple cohabitation will not be enough to make a husband responsible for his wife's civil injuries. Marriage in fact is essential.[77]

§ 125. Extent of Liability.

The husband's liability is after all a limited one, where he, in the first instance, was free from wrong; that is to say, that the death of the wife before the recovery of damages puts an end to his liability altogether. This is correct, not only on the principle announced in the case of the wife's debts *dum sola,* but because wrongs, being personal, die with the person, which last is the common explanation of this rule. If the husband dies before damages are recovered in the suit, the wife alone remains liable.[78] So it would seem that the common law recognizes a liability on her part which continues through the marriage relation; coverture operating, however, so as to suspend the remedy against the married woman, and to bring in as a joint party the custodian of her fortune.

The husband's liability for his wife's torts lasts so long as the relation lasts, even though the married pair be permanently separated; but possibly not if the wife be living in adultery at the time the wrong was committed.[79] A divorced man is not liable to this joint action for a tort committed, while the relation lasted, by the woman from whom he is discovered.[80] Where a husband is liable for a wife's tort he is so liable to the same extent as she.[81]

§ 126. For Torts of Wife Arising from Contract.

There are, however, not only *torts simpliciter,* or simple wrongs at law, but wrongs where the substantive basis of the fraud is the

76. Jones v. Monson, 137 Wis. 478, 119 N. W. 179; Mahoney v. Roberts, 86 Ark. 130, 110 S. W. 225.

77. Overholt v. Ellsworth, 1 Ashm. 200. See Norwood v. Stevenson, Andr. 227.

78. Minor v. Mapes (Ark.), 144 S. W. 219, 39 L. R. A. (N. S.) 214; 2 Bright Hus. & Wife, 22 *n.;* and see Stroup v. Swarts, 12 S. & R. (Pa.) 76.

79. Head v. Briscoe, 5 C. & P. 484. Why adultery *per se* should, on legal principle, affect this liability, it is hard to perceive; but if so, one might infer that wherever the husband has ground for divorce he is relieved, though not actually divorced.

80. Capel v. Powell, 17 C. B. (N. S.) 743.

81. Collier v. Struby, 99 Tenn. 241, 47 S. W. 90; Austin v. Wilson, 4 Cush. (Mass.) 273, 50 Am. Dec. 766.

wife's contract. The common law has been supposed to apply with the same force in both cases, partly because in the latter instance the person injured would be otherwise without a remedy.[82]

This point came directly before the English Court of Exchequer, in 1854, for decision. The circumstances of the case were as follows: A man applied for a loan of £30 to a loan association, upon the security of a promisory note, to be signed by himself and sureties. One of the sureties was a married woman who falsely represented herself to the association as single. The security was accepted and the loan made. Afterwards the loan association, recurring to the sureties for payment of the note, sought to make her husband liable on the note, alleging her fraud. The court decided that the action was not maintainable; on the ground that though the husband is liable for the wife's general frauds, yet when the fraud is directly connected with her contract, and is the means of affecting it and part and parcel of the same transaction, the wife cannot be responsible, nor can the husband be sued for the fraud together with the wife.[83]

In a recent American case, the same doctrine was affirmed where articles had been supplied to a married woman by a tradesman, for which he could not recover payment against the husband under the rule of necessaries, and he attempted to get rid of the rule by charging that the wife procured the articles upon false and fraudulent representations that they were needful.[84] And other decisions are to the same effect.[85] But there are cases where the wife will bind her husbad by her fraudulent representations on the ground of her agency. Thus in *Taylor* v. *Green* an advertisement appeared in a newspaper, offering for sale a baker's shop with the good-will of the business, and misrepresenting the extent of the business. It did not appear that the baker took any part in the transaction, further than to receive the purchase money and pay the broker his commission. The court held, nevertheless, that he was bound by the fraudulent representations of his wife, inasmuch as she was his

82. Macq. Hus. & Wife, 130, 131; Head v. Briscoe, 5 Car. & P. 484, per Tindal, C. J.; Reeve Dom. Rel. 72, 73.

83. Liverpool Adelphi Loan Association v. Fairhurst, 9 Exch. 422. See also Cooper v. Witham, 1 Lev. 247. See *post*, § 128.

84. Woodward v. Barnes, 46 Vt. 332.

85. Keen v. Hartmann, 48 Pa. 497; Barnes v. Harris, Busbee, 15; Carleton v. Haywood, 49 N. H. 314. In this last case the wife had received money under an agreement to keep or loan the same according to her judgment.

agent in managing the shop and finding a purchaser, and that he must respond in damages.[86] Nor is the doctrine of the loan association case as yet broadly applied,[87] while the modern tendency is, of course, to change the whole coverture doctrine on the point of a wife's torts and frauds, nor was the husband usually liable for such torts.[88]

§ 127. For Devastavit by Wife.

The husband of an executrix or administratrix is liable for her *devastavit*, or other wrongful act committed before or during coverture, if his liability be fixed before the death of the wife.[89] And if she survive him, her appointment having been complete in all respects, she becomes liable once more; even for a *devastavit* committed by him when alive.[90] But the husband cannot be sued as an executor *de son tort* for acts of his wife done without his knowledge; though it is otherwise where he advises or aids her in the commission of the wrongful acts; for every one so participating becomes a principal.[91]

§ 128. Sole Liability of Wife.

Where the husband is not liable, the wife is liable for her own torts,[92] but nor for his.[93] At common law the wife was not liable for her torts arising out of contract.[94]

§ 129. Joint Liability of Spouses.

At common law a wife was liable jointly with her husband for her torts.[95] Where the tort is committed by both spouses, and the wife does not act by coercion, both husband and wife may be

86. Taylor v. Green, 8 Car. & P. 316; Macq., Hus. & Wife, 127. And see, as to the wife's *quasi* criminal act, in violation of the excise laws, Attorney-General v. Riddle, 2 Cromp. & Jer. 493.

87. See Wright v. Leonard, 11 C. B. (N. S.) (1861) 258.

88. De Wolff & Co. v. Lozier, 68 N. J. Law, 103, 52 A. 303.

89. 2 Bright Hus. & Wife, 22-36, and cases cited; Bobe v. Frowner, 18 Ala. 89.

90. Soady v. Turnbull, L. R. 1 Ch. 494.

91. Hinds v. Jones, 48 Me. 348. The wife cannot hold such offices during coverture independently of her husband's control, as we shall see hereafter.

92. E. E. Yarbrough Turpentine Co. v. Taylor (Ala.), 78 So. 812.

93. Prentiss v. Bogart, 84 Wash. 481, 147 P. 39.

94. Locke v. Reeves, 116 Ala. 590, 22 So. 850; Brunnell v. Carr, 76 Vt. 174, 56 A. 660; Rowley v. Shepardson (Vt.), 96 A. 374. See *ante*, § 126.

95. Magerstadt v. Lambert, 39 Tex. Civ. 472, 87 S. W. 1068.

jointly sued.[96] Husband and wife are sued together for the libel or slander of the wife;[97] and generally for forfeitures under a penal statute where she participated.[98] So, too, for assault and battery.[99] Or for the forcible removal of a gate.[1] Spouses are jointly liable for conspiracy to alienate a wife's affections, the gist of the wrong being the damages and not the conspiracy.[2] If the tort is committed in the husband's absence, he is jointly liable with her.[3]

The husband has full management of the defence. And we need hardly add that he may compromise without his wife's assent.[4]

Where, during the absence of the husband, the wife, without his knowledge, keeps vicious dogs on the premises for her protection, she is liable for an injury they do to a passerby when she knew of their vicious disposition, as this is her tort not committed in the presence or under the supposed influence of her husband. The husband is jointly liable with her because of their marriage relations.[5]

§ 130. Effect of Statute.

In some states the common-law rule is not affected by Married Women's Acts,[6] particularly as regards personal torts of the wife

96. Rigdon v. Hedges, 12 Mod. 246; Vine v. Saunders, 5 Scott, 359; Marshall v. Oakes, 51 Me. 308; Gray, C. J., in Handy v. Foley, 121 Mass. 259.

97. McElfresh v. Kirkendall, 36 Ia. 224. Exemplary damages may be allowed in such action. Fowler v. Chichester, 26 Ohio St. 9.

98. Austin v. Wilson, 4 Cush. (Mass.) 273; McQueen v. Fulgham, 27 Tex. 463; Baker v. Young, 44 Ill. 42; Enders v. Beck, 18 Ia. 86. As to suits to recovery penalties for usury, see Jackson v. Kirby, 37 Vt. 448; Porter v. Mount, 43 Barb. (N. Y.) 422.

99. Griffin v. Reynolds, 17 How. (U. S.) 609; Roadcap v. Sipe, 6 Gratt. (Va.) 213. See Miller v. Sweitzer, 22 Mich. 391; Tobey v. Smith, 15 Gray (Mass.), 535. For a peculiar state of facts, see Kowing v. Manley, 57 Barb. (N. Y.) 479. And as to suit for the conversion of stolen millinery by the wife, see Heckle v. Lurvey, 101 Mass. 344.

See Gove v. Farmers', &c., Ins. Co., 48 N. H. 41, where a husband, the owner of insured buildings, being guilty of no fraud or gross negligence, was permitted to recover money on the insuranee policy, although his insane wife had set the buildings on fire.

1. Handy v. Foley, 121 Mass. 259.

2. Jones v. Monson, 137 Wis. 478, 119 N. W. 179.

3. Missio v. Williams, 129 Tenn. 504, 167 S. W. 473.

4. Coolidge v. Parris, 8 Ohio St. 594.

5. Missio v. Williams (Tenn.), 167 S. W. 473, L. R. A. 1915A 500.

6. Williams v. Fulkes, 103 Ark. 196, 146 S. W. 480; Jackson v. Williams, 92 Ark. 486, 123 S. W. 751; Crawford v. McElhinney (Ia.), 154 N. W. 310; Poling v. Pickens, 70 W. Va. 117, 73 S. E. 251; Kellar v. James, 63 W. Va. 139; 59 S. E. 939; Minor v. Mapes, 102 Ark. 351, 144 S. W. 219; Graham v. Tucker, 56 Fla. 307, 47 So. 563.

not committed in the management of her separate estate.[7] Other courts have held that the common-law rule is entirely abrogated by Married Women's Acts, vesting the wife with entire control of her separate estate without her husband's interference,[8] and modern policy, in giving the wife her separate property, inclines to hold her responsible, like a single woman, for her civil injuries to others. Hence, numerous local statutes in the United States have recently taken away the husband's legal liability for his wife's private wrongs, committed upon others without his participation and privity, and have fastened it upon her separate estate instead;[9] especially if committed in his absence, [10]or else they have limited his liability for her frauds and injuries to that of a surety.[11]

Hence, as such statutes usually run, the joinder of the husband as defendant is neither necessary nor proper, where one sues for a tort or fraud of the wife committed with reference to her separate estate, and by the wife alone; while the wife, on her part, is liable substantially in the same manner and to the same extent for frauds or torts committed in its management as upon her contracts relating to it.[12]

7. Henley v. Wilson, 137 Cal. 273; 70 Pac. 21, 58 L. R. A. 941; Williams v. Fulkes, 103 Ark. 196, 146 S. W. 480 (slander); Polong v. Pickens, 70 W. Va. 117, 73 S. E. 251.

8. Martin v. Robson, 65 Ill. 129, 16 Am. R. 578; Hagebush v. Ragland, 78 Ill. 40; Norris v. Corkill, 32 Kan. 409, 4 Pac. 862; Lane v. Bryant, 100 Ky. 138, 37 S. W. 584; Culmer v. Wilson, 13 Utah, 129, 44 Pac. 833; Schuler v. Henry, 42 Colo. 367, 94 Pac. 360, Hageman v. Vanderdoes (Ariz.) 138 Pac. 1053, L. R. A. 1915A 491 (assault); Harrington v. Jagmetty, 83 N. J. L. 548, 83 Atl. 880; Fadden v. McKinney (Vt.), 89 Atl. 357; Tanzer v. Read, 160 App. Div. 584 (driving automobile), 145 N. Y. Supp. 708.

9. Teal v. Chancellor, 117 Ala. 612, 23 So. 651; Austin v. Cox, 118 Mass. 58; McCarty v. De Best, 120 Mass. 89; Rici v. Mueller, 41 Mich. 214, 2 N. W. 23; Gustine v. Westenberger, 224 Pa. 455, 73 A. 913; Crouse v. Lubin, 260 Pa. 329, 103 A. 725; Deardorff v. Pepple, 36 Pa. Super. 224; Killingsworth v. Keen, 89 Wash. 597, 154 P. 1096; Burt v. McBain, 29 Mich. 260; Missio v. Williams, 129 Tenn. 504, 167 S. W. 473; Strubing v. Mahar, 46 App. Div. 409, 61 N. Y. S. 799; Fadden v. McKinney, 87 Vt. 316, 89 A. 351; Russell v. Phelps, 73 Vt. 390, 50 A. 1101.

10. Schuler v. Henry, 42 Colo. 367, 94 P. 360, 14 L. R. A. (N. S.) 1009; Murray v. Newmyer (Colo.), 182 P. 888; Radke v. Schlundt, 30 Ind. App. 213, 65 N. E. 770 (negligence); Lane v. Bryant, 100 Ky. 138, 18 Ky. Law Rep. 658, 37 S. W. 584, 36 L. R. A. 709; Miles v. Salisbury, 21 Ohio Cir. Ct. 333, 12 O. C. D. 7 (holding a husband not liable for malicious prosecution for an arrest caused by the wife); Hinski v. Stein, 68 Pa. Super. 441; Pace v. Hoban, 27 Pa. Super. 574 (holding that a husband was not liable for mesne profits where the wife wrongfully assigned to another).

11. Brown v. Kemper, 27 Md. 666..

12. Quilty v. Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521; Hageman v. Vanderdoes, 15 Ariz. 312, 138 P. 1053; Henly v. Wilson, 137 Cal.

Even in States where the husband is not held liable for the torts of the wife committed out of his presence he may be held for her negligence in driving an automobile which he has furnished for her. This is, however, on the theory of agency and not of the matrimonial relation.[13] Under the Missouri statute the husband is exonerated from liability for his wife's antenuptial torts and torts committed in the management of her separate estate, but remains liable for personal torts committed during coverture, like slander and alienation of affection.[14] Under the North Carolina statute the husband is jointly liable with his wife for all her torts committed while the spouses cohabit.[15] Under the South Dakota statute spouses are jointly liable for torts committed by one at the instigation of the other.[16] In Illinois the husband is liable for his wife's torts as his agent,[17] but not for her other torts except where he would have been liable if the marriage did not exist.[18]

§ 131. Wife's Liability under Statute.

For injuries disconnected with her separate property she, and not her husband, is held liable under some Married Women's Acts. Thus, she is to be sued alone for wilfully setting fire to her own insured house to another's injury;[19] for careless driving;[20] for

273, 70 P. 21, 92 Am. St. R. 160, 58 L. R. A. 941; Davidson v. Manning, 168 Ky. 288, 181 S. W. 1111; Boutell v. Shellaberger (Mo), 174 S. W. 384, 387; Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947; Bruce v. Bombeck, 79 Mo. App. 231; Harrington v. Jagmetty, 83 N. J. Law 548, 83 A. 880; Tanzer v. Read, 160 App. Div. 584, 145 N. Y. S. 708; Baum v. Mullen, 47 N. Y. 577; Rowe v. Smith, 55 Barb. (N. Y.)417; Lansing v. Holdridge, 58 How. Pr. (N. Y.) 449; Ferguson v. Brooks, 67 Me. 251; Moore v. Doerr, 199 Mo. App. 428, 203 S. W. 672; Aronson v. Ricker, 185 Mo. App. 528, 172 S. W. 641; Claxton v. Pool, 182 Mo. App. 13, 167 S. W. 623, 197 S. W. 349.

13. Hutchins v. Haffner (Colo.) 167 Pac. 966; Lemke v. Ady (Ia.) 159 N. W. 1011; Stowe v. Morris, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224; Missell v. Hayes, 86 N. J. L. 348, 91 Atl. 322; Moon v. Matthews, 227 Pa. 488, 76 Atl. 219, 29 L. R. A. (N. S.) 856; Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020. See, *contra,* Van Blaricom v. Dodgson, 220 N. Y. 111, L. R. S. 1917F 363, 115 N. E. 443; McFarlane v. Winters, 47 Utah, 598, 155 Pac. 437, L. R. A. 1916D 618.

14. Boutell v. Shellaberger (Mo.) 174 S. W. 384, L. R. A. 1915D 847; Taylor v. Pullen, 152 Mo. 434, 53 S. W. 1086; Nichols v. Nichols, 147 Mo. 407, 48 S. W. 947.

15. Brittingham v. Stadiem, 151 N. C. 299, 66 S. E. 128.

16. Bebout v. Pense (S. D.), 150 N. W. 289.

17. McNemar v. Cohn, 115 Ill. App. 31 (negligence); Vannett v. Cole (N. D.), 170 N. W. 663.

18. Christensen v. Johnston, 207 Ill. App. 209.

19. Lansing v. Holdridge, 58 How. Pr. (N. Y.) 449.

20. Ricci v. Mueller, 41 Mich. 214.

trespass;[21] for obstructing a neighbor's enjoyment of his own premises;[22] for carelessly injuring property bailed to her;[23] for a slander by her of which her husband is not cognizant,[24] and the like. Provided, in all fit cases, that, by demand or otherwise, the wife be put in the position of wrong-doer, as under the ordinary law of torts.[25]

For her frauds, too, the wife is usually held responsible in many States. As where she represents herself as a single woman, and obtains false credit.[26] But where property is conveyed to the wife in fraud of her husband's creditors, she is not liable usually to a judgment *in personam,* nor are her executors; but the only remedy available to the injured parties is to pursue the property.[27]

The wife may be liable to one who is injured in the husband's house simply on the ground that she promised the plaintiff to leave a certain light burning when she extinguished the light and the plaintiff in the exercise of her duties of nurse was injured thereby.[28] Under the New Jersey, Vermont and West Virginia Married Women's Acts she is liable for her torts committed in the management of her separate estate.[29] We here assume that the husband has not connived at or abetted the wife's tort. If he be a party to the fraud or injury, he is answerable on his own part like any one *sui juris.* As to the married woman herself, courts still disincline to hold her liable upon any theory of principal employing agents, or where the wrongful act was committed without her personal knowledge and sanction.[30] And where the husband appears to have compromised his wife in some transaction, es-

21. Ferguson v. Brooks, 67 Me. 251; Carpenter v. Vail, 36 Mich. 226; Dailey v. Houston, 58 Mo. 361. The rule of the wife's liability for trespass of her stray animals is strictly enforced in New York. Rowe v. Smith, 45 N. Y. 230.

22. Austin v. Cox, 118 Mass. 58.

23. Hagebush v. Ragland, 78 Ill. 40; Gilbert v. Plant, 18 Ind. 308.

24. McClure v. McMartin, 104 La. 496, 29 So. 227 (slander).

25. Campbell v. Quackenbush, 33 Mich. 287; Jansen v. Varnum, 89 Ill. 100.

26. Goulding v. Davidson, 26 N. Y. 604. But as the contract capacity of a married woman is not fully admitted by legislators, frauds relating to her general contracts are not always thus punishable. See Felton v. Reid, 7 Jones (N. C.) 269.

27. Phipps v. Sedgwick, 95 U. S. 3.

28. McLeod v. Rawson, 215 Mass. 257, 102 N. E. 429, 46 L. R. A. (N. S.) 547.

29. De Wolff & Co. v. Lozier, 68 N. J. Law, 103, 52 A. 303; Russell v. Phelps, 73 Vt. 390, 50 A. 1101; Leros v. Parker, 79 W. Va. 700, 91 S. E. 660.

30. See Jansen v. Varnum, 89 Ill. 100.

pecially one relative to business or property, whose wrongfulness he was likely to have understood more readily than herself, or where he coerced or misinformed her, and agency on his part, which shall charge her with the mischief, should not readily be assumed. Hence, as it is said, perhaps broadly, a wife shall not be held liable for the tort of her husband by reason of a prior assent, advice, or authorization by her, or a passive acquiesence, if she does not participate as an actor, and has not profited or obtained benefit for her separate estate thereby.[31] For a joint trespass or wrong by husband and wife, it may be presumed still that the latter was under the former's coercion,[32] though, such presumption being far from conclusive, a wife is now held responsible, under statute, for wrongs she commits deliberately in her husband's company, and, like other parties not under disability, for what she plainly and understandingly authorizes and ratifies to another's injury.[33]

§ 132. For Torts of her Agent.

Under Married Women's Acts a wife may be liable for the torts of her agent within the scope of his authority.[34] Thus she has been held liable for her husband's fraud in exchanging her property as her agent,[35] but not for his negligence in operating her automobile in her absence and without her consent.[36]

§ 133. Damages.

A husband is not liable for exemplary damages even when such damages are assessed against her,[37] if the tort was without his knowledge or participation.[38] The fact that the husband is made responsible by the fact of coverture, and did not commit the wrong in person, cannot go in mitigation of damages.[39]

31. Vanneman v. Powers, 56 N. Y. 39.

32. See Dailey v. Houston, 58 Mo. 361.

33. Ferguson v. Brooks, 67 Me. 251; Sherman v. Hogland, 73 Ind. 472.

34. Manson v. Dempsey, 88 S. C. 100 Ky. 361, 18 Ky. Law, 792, 38 S. W. 494 (false representation), Shane representation), 38 S. W. 494; Shane v. Lyons, 172 Mass. 199, 51 N. E. 976, 70 Am. St. R. 261 (negligence); Long v. Rucker, 177 Mo. App. 402, 164 S. W. 170.

35. Firebaugh v. Trough (Ind.), 107 N. E. 301.

36. Brenner v. Goldstein, 171 N. Y. S. 579.

37. Price v. Clapp, 119 Tenn. 425, 105 S. W. 864.

38. Price v. Clapp, 119 Tenn. 425, 105 S. W. 864.

39. Austin v. Wilson, 4 Cush. (Mass.) 273.

§ 134. English Rule in Equity.

In England, where the coverture doctrine appears still to prevail in this respect, settlements to the wife's separate use, under a restraint of anticipation, cannot be evaded or set aside; that clause strictly operating even in case of the wife's gross fraud to another's injury.[40] And the rule strictly obtains in courts of chancery, that the separate estate of a married woman is not liable for her torts or breach of trust.[41]

40. Stanley v. Stanley, 7 Ch. D. 589. Eq. 321; Marler v. Tommas, L. R. 17
41. *Ib.;* Wainford v. Heyl, L. R. 20 Eq. 8.

CHAPTER IX.

THE WIFE AS AGENT OF THE HUSBAND.

§ 135. General Considerations.

Although the wife, as such, has no power to make a contract, she is allowed at the common law to bind her husband in certain cases as his agent. Her authority may be general or special, express or implied. Blackstone says that the power of the wife to act as attorney for her husband implies no separation from, but is rather a representation of, her lord.[42] Whenever the husband expressly empowers his wife to make a contract for him, he will be bound as in the case of any other principal. And he may bind himself in like manner for any unauthorized contract proceeding from his wife as agent, by subsequent conduct on his part amounting to ratification. But greater difficulty arises in determining his liability upon contracts where the authority is not express, but only implied. How far does the law go in presuming against the husband, and what are the proper limits of an implied authority in the wife to bind him by her contracts? This is an important inquiry which we shall presently consider.

But let us premise, as a suitable conclusion from the preceding sections, that the husband may be bound in one of two ways, either upon his own contract or upon that made by the wife as his agent; and hence he may be held liable because the debt or obligation was his own, or because his wife represented him. The natural effect of his joining with her in executing a contract or instrument would be to render it his individual obligation, since he is *sui juris*;[43]

42. 1 Bl. Com. 442; 2 Man. & Gr. 172; Mizen v. Peck, 3 M. & W. 481.
43. Dresel v. Jordan, 104 Mass. 497.

while if she executed alone and without a suitable agency on his behalf, the obligation would be altogether void.

§ 136. When Wife may bind Husband as Agent.

The usual cases in which a wife binds the husband on contracts not for necessaries may be reduced to two classes; the one where the nature of his employment is such that the wife is expected to share in it; the other where he is absent from home and some one must carry on the household and small business matters.[44] Instances of the first class are those of farmers, victuallers, and small shopkeepers.[45] While, on behalf of married women, extended authority is to be implied from the fact of a husband's absence, as in our second class, every wife will readily be regarded as her husband's representative in the ordinary household purchases, such as provisions and furniture, although the articles may not be strictly included among her personal necessaries. They might be called household necessaries. But where the husband is a laboring man, or in general a person obliged to be absent from his home much of the time, the presumption of the wife's agency would be stronger and extend further. If the occupation be that of carrying on a farm, or if small bills are to be collected, such as he and his wife have always attended to, her powers in his absence take a still wider scope; and this too seems reasonable. Usage will go far in determining such questions. But since persons carrying on a large business, totally distinct from their household occupation, are not in the habit of employing their wives to manage it for them, strong proof of agency for such transactions should be required to warrant a wife's interference during her husband's absence; the more so if he has left other competent agents of his own to manage the business for him. So, too, in large pecuniary affairs, of whatever nature, her agency is not readily inferred; while it often is in collecting small rents and paying small bills; such payments and receipts being permitted to bind her husband. And although a wife may, by actual authority from her husband,

44. *Qu.* whether the wife's power to dispose of her husband's property for necessary purposes may arise by implication from the fact of his absconding. Butts v. Newton, 29 Wis. 632. The doctrine of some such extended agency where the husband was in jail might support the decision in Ahern v. Easterby, 42 Conn. 546. From the absence of a husband in distant military or naval service may be inferred an enlargement of the wife's authority. Buford v. Speed, 11 Bush (Ky.) 338.

45. See Webster v. McGinnis, 5 Binn. (Pa.) 235; Roteh v. Miles, 2 Conn. 638.

indorse his notes, mortgage and dispose of his personal property, conduct his business as a trader, and even borrow money for carrying on his business on the pledge of his credit, signing the notes and securities in his behalf,—for all this is sometimes done,—such authority requires strict proof; or at least conduct on the part of the husband showing his own approval of such hazardous proceedings on her part.[46] The difficulty of laying down a more positive rule on this subject is shown by two cases which came before the courts of two of our neighboring States, not many years since, on a presentation of facts almost identical, but where the respective decisions were precisely opposite. A farmer was absent from home. His wife had been left in charge of the farm, but without express authority from him. A creditor attached the real estate and crops; and she permitted the hay, after attachment, to be used by the officer; to the advantage of the creditor, or at least to her husband's detriment. In the Vermont case it was held that the wife had a *prima facia* authority to bind her husband; in the Connecticut case it was held that she had not. Neither of these tribunals erred in their statement of leading principles; but their duty here being rather an application of broad rules to facts, than a clearly legal deduction, they differed just as two men would have done, sitting upon a jury.[47]

46. Church v. Landers, 10 Wend. (N. Y.) 79; Gates v. Brower, 5 Seld. (N. Y.) 205; Leeds v. Vail, 15 Pa. 185; Alexander v. Miller, 16 Pa. 215; Burk v. Howard, 13 Mo. 241; Godfrey v. Brooks, 5 Harring. 396; Savage v. Davis, 18 Wis. 608; Krebs v. O'Grady, 23 Ala. 726; Sawyer v. Cutting, 23 Vt. 486; Shaw v. Emery, 38 Me. 484; Spencer v. Tisue, Addis. 316; Green v. Sperry, 16 Vt. 390; Reakert v. Sandford, 5 Watts & Serg. (Pa.) 164; Abbott v. Mackinley, 2 Miles, 220; Mayse v. Biggs, 3 Head (Tenn.), 36; Shoemaker v. Kunkle, 5 Watts, 107; Gilbert v. Plant, 18 Ind. 308.

47. Felker v. Emerson, 16 Vt. 653; Benjamin v. Benjamin, 15 Conn. 347. A third person may be sued on a contract made with a married woman after she had performed her part, although she had no right to make it. Ham v. Boody, 20 N. H. 411; Lowry v. Naff, 4 Cold. (Tenn.) 370. See 1 Greenl. Evid., § 185; Plimmer v. Sells, N. & M. 422; Dodd v. Acklom, 6 M. & Gr. 673; Thrasher v. Tuttle, 22 Me. 335; Hopkins v. Mollineaux, 4 Wend. (N. Y.) 465; Filmer v. Lynn, 4 N. & M. 559; Taylor v. Green, 8 Car. & P. 316; Gulick v. Grover, 4 Vroom (N. J.) 463, as to the rule of evidence sufficient to show the wife's authority to manage her husband's business. The principles of ordinary agency generally apply to such cases. See also Wharton v. Wright, 1 Car. & K. 585; Clifford v. Burton, 1 Bing. 199; Petty v. Anderson, 3 Bing. 170; Emerson v. Blouden, 1 Esp. 142.

In some States a wife acting as her husband's agent is a competent witness as to matters within the scope of such agency. Chunot v. Larson, 43 Wis. 536.

§ 137. Extent of Power as Agent.

If he authorizes her to act for him in a particular matter, she has similar authority to act in all things pertaining to such matter.[48] so where in order to purchase goods it is necessary to give a mortgage, she may bind him by such a mortgage.[49] And where her agency extends only to the performance of certain specific acts of a general transaction, she cannot bind him by her acts and admissions respecting other matters connected with the general transaction.[50] Her agency may be inferred from his acts and conduct respecting her; and the general rule applies that such agency is to be measured by the scope of the usual employment.[51] In accordance with the principles we have stated, it is held that where a husband permits his wife to carry on a certain business in his name, and to draw in his name checks and notes to be used in the course of the business, she cannot make him liable as surety for loans to third persons, or upon accommodation paper, merely because of such an agency.[52]

§ 138. Evidence of Agency.

In order to bind a husband by his wife's contracts made in his name it must appear that he has held her out as his agent,[53] or that he has given her express authority to act as such,[54] and the person seeking to hold the husband on such a contract has the burden of proof.[55] A written contract by the wife as agent, given as a promisory note should show her authority on its face.[56] Her

48. A. A. Fielder Lumber Co. v. Smith (Tex.), 151 S. W. 605.

49. Mosley v. Stratton (Tex.), 203 S. W. 397.

50. Goodrich v. Tracy, 43 Vt. 314.

51. Cox v. Hoffman, 4 Dev. & Batt. (N. C.) 180; Mackinley v. McGregor, 3 Whart. 369; Camelin v. Palmer Co., 10 Allen (Mass), 539; Ruddock v. Marsh, 38 E. L. & Eq. 515; Pickering v. Pickering, 6 N. H. 124; Abbott v. Mackinley, 2 Miles, 220; Gray v. Otis, 11 Vt. 628; Miller v. Delamater, 12 Wend. (N. Y.) 433; Hughes v. Stokes, 21 Hayw. 372; Mickelberry v. Harvey, 58 Ind. 523, Henry v. Sargent, 54 Cal. 396; Williams v. Douglas, 139 La. 922; 72 So. 455 (notes for loan largely in excess of authority).

52. Gulick v. Grover, 2 Vroom (N. J.) 182; 4 Vroom (N. J.) 463.

53. Martin v. Oakes, 42 Misc. 201, 85 N. Y. S. 387. Evidence that plaintiff told defendant that planitiff's wife would meet defendant at the county clerk's office, and receive certain money due, authorized defendant to pay the money to the wife. Peacock v. Newton, 144 Ky. 552, 139 S. W. 791; Auringer v. Cochrane, 225 Mass. 273, 114 N. E. 355; Proctor v. Woodruff, 119 N. Y. S. 232; Balkema v. Grolimund, 92 Wash. 326, 159 P. 127; James McCreery & Co. v. Martin, 84 N. J. Law, 626, 87 A. 433.

54. Hays v. Cox (Mo.), 185 S. W. 1164; Stevens v. Hush, 172 N. Y. S. 258; *In re* Van Denburgh, 178 App. Div. 237, 164 N. Y. S. 966.

55. McBride v. Adams, 84 N. Y. S. 1060.

56. Neward v. Mead, 7 Wend. (N. Y.) 68; Galuska v. Hitchcock, 29 Barb. (N. Y.) 193, 2 Man. & Gr. 172.

agency may be inferred from the circumstances.[57] Statements made by the wife as to her authority have been held not binding on the husband.[58] Less evidence may sustain a finding of agency than in ordinary cases, owing to the intimacy of the relation.[59]

§ 139. Wife's agency under Express Power.

The wife may bind her husband for other contracts than those for necessaries, where an agency in the premises, express or implied, can be shown. The natural incapacities of her sex superadded to those of the marriage state, the practical difficulties which persons dealing through such an agent must encounter, particularly where they find she has exceeded her authority, and yet cannot hold her liable in person, her own exposure to fraud, deceit, and coercion,— all these combine to render the wife an undesirable business representative; and cases of this sort come rarely before the courts. But this wife may be delegated an attorney, even under a sealed instrument. And on principle there is little reason to doubt her capacity to bind her husband in all general transactions where he has given her express authority.[60] Where the husband gives his wife express authority as his agent he may be bound by her contract as given though she disregards his instructions.[61] He may be bound by her indorsement of commercial paper in his name with his authority,[62] but not by her execution of a note as maker where he authorized only an indorsement for accommodation.[63] He may be bound by her promises, if made with his knowledge and request.[64]

§ 140. Wife's agency under Implied Power.

Although nothing in the marital relation prevents a wife from being her husband's agent,[65] at common law no authority to her

57. Proctor v. Woodruff, 119 N. Y. S. 232; Howe v. Finnegan, 61 App. Div. 610, 70 N. Y. S. 19; Lilly v. Yeary (Tex.), 152 S. W. 823.

58 Butler v. Davis, 119 Wis. 166, 96 N. W. 561.

59. French v. Spencer, 23 Pa. Super. 428.

60. Goodwin v. Kelly, 42 Barb. (N. Y.) 194; Presnall v. McLeary (Tex.), 50 S. W. 1066.

61. Stevens v. Hush, 176 N. Y. S. 602; Hamill v. Samuels (Tex.), 135 S. W. 746.

62. Billington v. Hamomnd, 3 Willson, Civ. Cas. (Tex.) 295.

63. Cuyler v. Merrifield, 5 Hun (N. Y), 559.

64. Cook v. Newby, 213 Mo. 471, 112 S. W. 272.

65. James McCreery & Co. v. Martin, 84 N. J. Law 626, 87 A. 433; Greenberg v. Palmieri, 71 N. J. Law 83, 58 A. 297; Brownell v. Moorehead (Okla.), 165 P. 408; Parrott v. Peacock Military College (Tex.), 180 S. W. 132.

to act as such is implied from the mere fact of the relation.[66] It has sometimes been held otherwise where the husband was unable to care for his property.[67] The husband may, by suitable conduct, make his wife his agent for receiving settlement of claims due him while absent;[68] or for employing legal assistance as incidental to managing his affairs.[69]. The wife has no implied agency to make changes in her husband's contracts,[70] or to find him by a lease of real estate,[71] or to receive his wages,[72] or to pledge his property.[73] or to draw his money from the bank,[74] or to pass title to his sewing machine, though used only by herself.[75]

§ 141. In Household matters and Care of Husband's Property.

In the absence of the husband the wife has a general agency to act for the husband in all household matters, such as the care of furniture, etc.,[76] and for his property generally, unless he has appointed another agent;[77] but not for its general improvement, without his express authority or knowledge.[78] Thus she may rescind a contract for meat wich turned out to be bad.[79] The facts that she has acted for him in his absence will not empower her to sell his property when he absconds.[80] It is otherwise when he places his property in her hands before leaving.[81]

§ 142. As to Real Estate.

The wife may be her husband's agent as to his real estate, not only for the purpose of collecting rents and making small repairs,

66. Brown v. Woodward, 75 Conn. 254, 53 A. 112; Essington v. Neill, 21 Ill. 139; McNemar v. Cohn, 115 Ill. App. 31; Peaks v. Mayhew, 94 Me. 571, 48 A. 172; Stevens v. Hush, 176 N. Y. S. 602; Baker v. Whitten, 1 Okla. 160, 30 P. 491.

67. Buford v. Speed, 11 Bush (Ky.) 338 (retaining counsel for husband absent in Confederate army); Tradewell v. Chicago & N. W. Ry. Co., 150 Wis. 259, 136 N. W. 794.

68. Stall v. Meek, 70 Pa. 181. See Meader v. Page, 39 Vt. 306, where a wife, in contracting a loan, was held to have acted within the scope of her apparent agency.

69. Buford v. Speed, 11 Bush (Ky.) 338.

70. Ross v. Dunn, 130 Mich. 443, 90 N. W. 296, 9 Det. Leg. N. 112; Trawick v. Trussell, 122 Ga. 320, 50 S. E. 86.

71. Ivy Courts Realty Co. v. Lockwood, 140 N. Y. S. 374.

72. Husche v. Sass, 67 Ill. App. 245.

73. Souther v. Hunt (Tex.), 141 S. W. 359.

74. Allen v. Williamsburg, &c., Bank, 2 Abb. N. C. (N. Y.) 342.

75. Wheeler & Wilson Mfg. Co. v. Morgan, 29 Kan. 519.

76. Tyler v. Mutual District Messenger Co., 17 App. D. C. 85; Heyert v. Reubman, 86 N. Y. S. 797.

77. People v. Horton, 4 Mich. 67.

78. Thompson v. Brown, 121 Ga. 814, 49 S. E. 740.

79. Haberman v. Gasser, 104 Wis. 98, 80 N. W. 105.

80. *In re* Thomas, 199 F. 214.

81. Evans v. Crawford County Farmers' Mut. Fire Ins. Co., 130 Wis. 189, 109 N. W. 952.

but in the more important transactions. But as deeds and written instruments are here commonly requisite, and formalities must be followed, little can be left to inference. Such authority presupposes usually a husband's long absence. Thus the management of a farm in a husband's absence, with the care of the stock, is not unfrequently entrusted to the wife.[82] It is not to be presumed that a wife can revoke her husband's license on his premises, given to a third person,[83] nor grant an irrevocable license thereon.[84]

The wife may represent her husband, not only in the general management of his own lands, so as to bind him, but, under certain circumstances, with reference to her real estate in which he has the usual marital rights, or lands owned partly by her and partly by him.[85] Where he has been away for a long period, she may bring an action to protect his land from trespass.[86] She has no implied authority to sell his real estate.[87]

§ 143. Effect of Contract by Wife in her own name.

It has been held that he cannot bind himself by a ratification where the wife contracts in her own name,[88] and if she contracts in her name for improvements on his property, not acting as agent, he does not become liable by paying for part of the work.[89] In North Carolina it has been held that the fact that goods purchased by a wife were charged to her will not make it her contract where the evidence shows that she acted as agent.[90] The Maryland statute providing that a husband shall not be liable on contracts made by the wife in her own name and on her own responsibility does not apply to her contracts as his agent or for necessaries.[91]

§ 144. Effect of Husband's Ratification of Wife's Unauthorized Acts.

Ratification by the husband is not essential where the scope of the wife's agency was sufficient without it, but it cures acts of doubtful

82. Chunot v. Larson, 43 Wis. 536; McAfee v. Robertson, 41 Tex. 355. As to putting a lightning-rod on a man's house in his absence, see Meiners v. Munson, 53 Ind. 138.

83. Kellogg v. Robinson, 32 Conn. 335.

84. Nelson v. Garey, 114 Mass. 418.

85. Cheney v. Pierce, 38 Vt. 515; Dresel v. Jordan, 104 Mass. 497.

86. Gore v. Whiteville Lumber Co. (S. C.), 96 S. E. 683.

87. Evans v. Crawford County Farmers' Mut. Fire Ins. Co., 130 Wis. 189, 109 N. W. 952.

88. Shuman v. Steinel, 129 Wis. 422, 109 N. W. 74, 7 L. R. A. (N. S.) 1048.

89. Thompson v. Brown, 121 Ga. 814, 49 S. E. 740.

90. Sibley v. Gilmer, 124 N. C. 631, 32 S. E. 964.

91. Noel v. O'Neill, 128 Md. 202, 97 A. 513.

authority so as to bind him.[92] The wife's sale or gift of her husband's personal property, even without authority, or her purchase on his behalf, may be confirmed by his subsequent acts amounting to ratification; and one mode of ratification is to accept knowingly the benefits of her transaction.[93] The husband ratifies by expressing approval of the transaction afterwards;[94] or by promising to pay the amount due,[95] or by bringing an action to recover his money loaned by his wife without authority, if the action is based on the theory of a loan made by him,[96] or by making payments on the contract which was charged to him and statements sent him.[97] Where he has once ratified her acts as agent, he will be bound by future purchases from the same vendor until he notifies them that the authority is withdrawn.[98] Where a wife makes a contract for her husband in his presence his failure to object will amount to a ratification.[99] Where a father authorized his wife to indorse a note for accommodation in his name and she executes it as joint principal, the father's statements to the holder that the other joint principal was good and would do the right thing is not a ratification.[1] Acts done by the wife in relation to her husband's property, without authority, should of course be promptly disavowed by him within a reasonable time, if he wishes to escape responsibility.[2] Nor can a husband stand by and see his wife use the proceeds of a sale of his property sold by her with his knowledge, and afterwards reclaim the property.[3]

92. See McAfee v. Robertson, 41 Tex. 355; Montgomery v. Kirkpatrick, 162 Ill. App. 59; Hewling v. Wilshire, 22 Ky. Law, 1702, 61 S. W. 264; Grant v. White, 42 Mo. 285.

93. Mechanics' Bank v. Woodward, 74 Conn. 689, 51 A. 1084; Repetti v. Repetti, 127 N. Y. S. 229; Wright v. Couch (Tex.), 113 S. W. 321; Dunnahoe v. Williams, 24 Ark. 264; Mickelberry v. Harvey, 58 Ind. 523; Pike v. Baker, 53 Ill. 163; Shaw v. Emery, 38 Me. 484. Even a trifling gift from the wife by way of charity has been upheld, though without the husband's permission. Spencer v. Storrs, 38 Vt. 156.

94. Nagler v. L'Esperance, 126 N. Y. S. 655. Merely saying, "My wife is boss. Anything as far as the wife goes that's all right," has been held not a ratification. Syring v. Zelenski, 77 N. J. Law, 406, 71 A. 1119.

95. Shuman v. Steinel, 129 Wis. 422, 109 N. W. 74, 7 L. R. A. (N. S.) 1048.

96. Kowal v. Lehrman, 128 N. Y. S. 968.

97. Ventress v. Gunn, 6 Ala. App. 226, 60 So. 560.

98. Bonwit, Teller & Co. v. Lovett, 102 N. Y. S. 800.

99. Stotts v. Bates, 73 Ill. App. 640.

1. Cuyler v. Merrifield, 5 Hun (N. Y.), 559.

2. Auringer v. Cochrane, 225 Mass. 273, 114 N. E. 355; Evans v. Crawford County Farmers' Mut. Fire Ins. Co., 130 Wis. 189, 109 N. W. 952; Hill v. Sewald, 53 Pa. 271; Ness v. Singer Mfg. Co., 68 Minn. 237, 70 N. W. 1126.

3. Delano v. Blanchard, 52 Vt. 578; Huff v. Price, 50 Mo. 228.

CHAPTER X

EFFECT OF COVERTURE UPON THE WIFE'S PERSONAL PROPERTY.

§ 145. Effect of Marriage — Operation as Gift to Husband.

In general it may be premised that the wife's personal property goes to the husband, whether belonging to her at the time of mar-

riage, or acquired afterwards by gift, bequest, or purchase; whether actually or beneficially possessed; whether principal fund or income. So her earnings belong to her husband. Marriage, therefore, operates in this respect as a gift to the husband, but the gift is only qualified, so far as things in action are concerned.[4] Her compensation is deemed to be her dower.[5] Therefore, at common law a wife's personal property belonged to the husband *jure mariti,* whether acquired before or during coverture[6] without her concurrence, and without a transfer,[7] his right is restrained by her deed before marriage, or by the instrument whereby she takes title.[8] It is a matter of course that the wife's property should be hers in her own right, in order that the husband's title may attach. For property may come to her with restrictions upon the husband's rights, such as the giver has seen fit to impose.[9] In equity she may hold personal property apart from him.[10] Since the husband's title to his wife's personal property at the common law is either absolute or qualified, according as the particular property belongs to the one class or the other, we shall, therefore, treat of, *first,* the wife's things or personal property in possession; *second,* her things or personals in action.

4. 1 Bright, Hus. & Wife, 34, 35; Co. Litt. 305 *a,* 351 *b;* 2 Kent, Com. 130 &c.; Campbell v. Galbreath, 12 Bush (Ky.) 459; Thompson's Admrx. v. Elam's Ex'x, 11 Ky. Law, 455, 12 S. W. 1134; Miltenberger v. Keys, 25 La. Ann. 287; Hart v. Leete, 104 Mo. 315, 15 S. W. 976; Boyer v. Davis, 17 Ohio Cir. Ct. 191, 9 O. C. D. 526; Blakely v. Kanaman (Tex.), 168 S. W. 447; Prewitt v. Bunch, 101 Tenn. 723, 50 S. W. 748.

5. Goldstein v. Goldstein, 86 N. J. Ch. 351, 98 A. 835.

6. Leslie v. Bell, 73 Ark. 338, 84 S. W. 491; Ellington v. Harris, 127 Ga. 85, 56 S. E. 134; Carpenter v. Hazelrigg, 103 Ky. 538, 20 Ky. Law 231 45 S. W. 666; Moreland v. Myall, 14 Bush (Ky.) 474; Gay v. Botts, 13 Bush (Ky.) 299; Fowler v. Fowler, 138 Ky. 326, 127 S. W. 1014; Benne v. Schnecko, 100 Mo. 250, 13 S. W. 82; Otto F. Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67, L. R. A. 1918C, 1009; Snyder v. Jett, 138 Tenn. 211, 197 S. W. 488; Williford v. Phelan, 120 Tenn. 589, 113 S. W. 365. Where personalty has become the property of the husband by virtue of his marriage and is brought into this State and is sold, and the proceeds invested in land, and the title taken in the name of the husband, and he dies in possession, title to the land on his death vests in his heirs, and not in the heirs of the wife. Ellington v. Harris, 127 Ga. 85, 56 S. E. 134.

7. Birmingham Waterworks Co. v. Hume, 121 Ala. 168, 25 So. 806, 77 Am. St. R. 43 (shares of stock).

8. Endsley v. Taylor, 143 Ga. 607, 85 S. E. 852; Coatney v. Hopkins, 14 W. Va. 338.

9. Co. Litt. 351; Thompson v. Pinchell, 11 Mod. 178.

10. Botts v. Gooch, 97 Mo. 88, 11 S. W. 42, 10 Am. St. R. 286; White v. Clasby, 101 Mo. 162, 14 S. W. 180.

§ 146. Exception to Rule — Personal Property held by Wife in Trust.

Property held by the wife in a representative capacity at the time of marriage cannot vest in the husband; for here she has no beneficial interest which the law can transfer to her husband.[11] Any other rule would operate a fraud upon creditors and *cestuis que trust*. But if the wife be executrix or administratrix at the time of her marriage, the husband is entitled to administer in her right, by way of partial offset to his liability for her frauds and injuries in such capacity. As incidental to this authority, he may release and compound debts, and dispose of the effects, and reduce outstanding trust property into possession, as his wife might have done before coverture.[12] He is accountable for all property which came to her possession, whether actually received by him or not.[13] A married woman cannot become executrix or administratrix without her husband's concurrence; so long, at least, as he remains liable for her acts;[14] nor will payments made to her in such capacity without his assent be valid.[15] It is to be generally observed in cases of this kind that the right of disposition which the husband exercises is strictly the right of performing the trust vested in his wife, it being assumed that she cannot perform it consistently with her situation as a *feme covert*. His position is a fiduciary one, so that he cannot purchase from a coadministratrix without consent of all beneficiaries in interest.[16]

11. Co. Litt. 351; Thompson v. Pinchell, 11 Mod. 178; 1 Bright, Hus. & Wife, 39, 40.

12. *Ib.;* Jenk. Rep. 79; Woodruffe v. Cox, 2 Bradf. Sur. (N. Y.) 153; Keister v. Howe, 3 Ind. 268; Claussen v. La Franz, 1 Ia. 226; Dardier v. Chapman, L. R. 11 Ch. D. 442. And may foreclose a mortgage with a coexecutrix. Buck v. Fischer, 2 Col. T. 709.

13. Scott v. Gamble, 1 Stockt. (N. J.) 218. For a case in which the husband put money of his own into a bank where the wife had an account as executrix, see Lloyd v. Pughe, L. R. 8 Ch. 88.

14. Administration has been granted to a wife living apart from her husband under a deed of separation with apt provisions. Goods of Hardinge, 2 Curt. 640.

15. 1 Salk. 282; Lover v. Lover, 6 Jur. 156; Bubbers v. Hardy, 3 Curt. 50; cases cited in 2 Redf. Wills, 78. As to the indorsement of a note payable to the wife as administratrix, see Roberts v. Place, 18 N. H. 183. And see Murphree v. Singleton, 37 Ala. 412. Statutes sometimes require the husband to join in the wife's bond as executrix. See Airhart v. Murphy, 32 Tex. 131; Cassedy v. Jackson, 45 Miss. 397. Wife made sole executrix with her husband's consent. Stewart, *In re*, 56 Me. 300.

16. Pepperell v. Chamberlain, 27 W. R. 410.

An administrator cannot sue in his representative character upon contracts made after the death of the intestate merely in the course of carrying on the intestate's business. Hence the husband must sue alone, for goods supplied by husband and wife, in carrying on the business of the wife's father, whose administratrix the wife was; and the joinder of the wife is improper.[17]

By marriage with a female guardian, too, the husband becomes responsible for the moneys with which she may then or afterwards during coverture be chargeable in such capacity; the responsibility extending while she continues to act, whether it were proper for her to so continue or not.[18]

§ 147. What Law Governs.

As between husband and wife, their rights in the wife's chattels are governed by the law of the domicile when the properfty is received.[19] The same rule applies to future acquisitions where there is no change in domicile, but where there is such change the law of the actual and not the matrimonial domicile will govern.[20] Where a husband acquires title to his wife's property in one State, his title is not devested by removal into a State where such property would have been the wife's separate estate, and where he would have taken no title.[21] Therefore it was held that in Illinois a wife could not recover for rents of her real estate in Canada without showing that she was entitled to them by the law of Canada.[22] Under the Missouri Married Women's Act the property of the

17. Bolingbroke v. Kerr, L. R. 1 Ex. 222.

18. Allen v. McCullough, 2 Heisk. (Tenn.) 174.

19. Metler v. Snow, 90 Conn. 690, 98 A. 322; Sencerbox v. First Nat. Bank, 14 Ida. 95, 93 P. 369; *In re* Mesa's Estate, 172 App. Div. 467, 159 N. Y. S. 59; Birmingham Water Works Co. v. Hume, 121 Ala. 168, 25 So. 806, 77 Am. St. R. 43; Reddick v. Walsh, 15 Mo. 519; A v. De Lea, 14 N. M. 442, 95 P. 131; Northwestern Mut. Life Ins. Co. v. Adams, 144 N. W. 1108, 155 Wis. 335. Where a husband and wife resided in a State, a statute of which gave him all of her choses in action if he reduced them to possession, the husband cannot claim as his own, in the courts of another State, choses in action of the wife not reduced to possession. Miller v. Miller, 156 Ky. 267, 160 S. W. 923. Property rights of husband and wife are, in New Mexico, except as modified by statute, to be judged by the Spanish law in force in New Mexico at the date of its acquisition from Mexico. Reide v. De Lea, 95 P. 131.

20. Fisher v. New Orleans Anchor Line, 15 Mo. 519; Miller v. Miller, 156 Ky. 267, 160 N. W. 923; Northwestern, &c., Ins. Co. v. Adams, 155 Wis. 355, 144 N. W. 1108; McClain v. Abshire, 72 Mo. App. 390.

21. Ellington v. Harris, 127 Ga. 85, 56 S. E. 134.

22. Dempster v. Stephen, 63 Ill. App. 126.

wife coming into the husband's hands is held in trust for her, and when removed by him into another State becomes subject to the laws of that State.[23]

§ 148. Extent of Husband's Right — Effect of Divorce.

Where the husband has acquired his wife's personal property it remains his until the title has been legally devested,[24] or as long as the marriage relation continues, even though he be living apart from his wife in adultery, and she acquire the property by her own labor,[25] or by bequest.[26] Neither divorce from bed and board, nor separation, takes away his right.[27] But divorce from the bonds of matrimony, or the death of either party, puts an end to the gifts of coverture, leaving open the adjustment of the rights of the respective parties with one another, or between the survivor and the representatives of the deceased, on other principles to be hereafter explained.

§ 149. Choses in Possession — In General.

Now to take the broad division of the common law as applied to all the wife's personal property.

First, as to the wife's *choses* or personals in possession, or corporeal personal property. To these the husband's right at common law is immediate and absolute. He may dispose of them as he sees fit during his life, whether with or without his wife's consent: he may bequeath them by will; and after his death such property is regarded as assets of his estate, the title passing to his executors and administrators, to the exclusion of the wife, though she survive him.[28]

If the wife's interest in personal property be that of a tenant in

23. Brown v. Daugherty, 120 F. 526.

24. Ellington v. Harris, 127 Ga. 85, 56 S. E. 134.

25. Russell v. Brooks, 7 Pick. (Mass.) 65; Turtle v. Muney, 2 J. J. Marsh. (Ky.) 82; Armstrong v. Armstrong, 32 Miss. 279.

26. Vreeland v. Ryno, 26 N. J. Eq. 160.

27. Glover v. Proprietors of Drury Lane, 2 Chitty, 117; Washburn v. Hale, 10 Pick. (Mass.) 429; Prescott v. Brown, 23 Me. 305; 1 Roll. Abr. 343. But see Divorce, Vol. II, *post.*

28. Co. Litt. 300, 351 *b*; 2 Kent, Com. 143; Legg v. Legg, 8 Mass. 99; Lamphir v. Creed, 8 Ves. 599; Winslow v. Crocker, 17 Me. 29; Bing. Inf. & Cov. 208, cases cited by Am. ed.; Hoskins v. Miller, 2 Dev. (N. C.) 360; Hyde v. Stone, 9 Cow. (N. Y.) 230; Morgan v. Thames Bank, 14 Conn. 99; Hawkins v. Craig, 6 Mon. (Ky.) 257; Caffee v. Kelly, 1 Bush. 48; Skillman v. Skillman, 2 Beasley, 403; Hopkins v. Carey, 23 Miss. 54; Cropsey v. McKinney, 30 Barb. (N. Y.) 47; Carleton v. Lovejoy, 54 Me. 445.

common, the husband becomes a tenant in common in her stead.[29] So corporeal chattels of a female ward, in the hands of her guardian, being legally hers at the time of marriage, become her husband's, and his marital rights attach at once, notwithstanding the guardian retains possession longer.[30] The wife's vested remainder in personal estate goes to the husband on termination of the particular estate; and where both husband and wife die during the continuance of the particular estate, the husband's representatives, and not the wife's, are held to take such remainder.[31] But the husband cannot be considered a purchaser by marriage for a valuable consideration against a legal title admitted to be valid by his wife before marriage.[32]

Chattels bequeathed to the wife, without restriction, pass to the husband at once like her other things in possession.[33] So all her movables, such as jewels, household goods, furniture, and the like, also cash in her hands, go to him absolutely and at once, whether owned by the wife at the time of marriage or nominally vesting in her at some period of her coverture. Money paid by a married woman upon a bond to convey land to her is *prima facia* her husband's, and may be recovered by him.[34] And proceeds of the sale of a widow's dower vest in her second husband.[35] But circumstances in all such cases favor a resulting trust in the wife's favor. Since a lease for years is a chattel, if such a lease is made to a wife without limitation to her separate use, it belongs, at common law, to the husband.[36]

29. Hopper v. McWhorter, 18 Ala. 229.

30. Sallee v. Arnold, 32 Mo. 532; Chambers v. Perry, 17 Ala. 726; McDaniel v. Whitman, 16 Ala. 343; Miller v. Blackburn, 14 Ind. 62. And a guardian, having no right to convert the ward's personalty into real estate, cannot defeat the husband's right by investing thus just before the female ward marries. Davis's Appeal, 60 Pa. 118; Schouler, Dom. Rel., 466.

31. Tune v. Cooper, 4 Sneed (Tenn.) 296.

32. Willis v. Snelling, 6 Rich. (S. C.) 280.

33. Shirley v. Shirley, 9 Paige (N. Y.), 363; Newlands v. Paynter, 4 M. & C. 408; Crane v. Brice, 7 M. & W. 183; Rex v. French, R. & R. C. C. 491.

34. Casey v. Wiggin, 8 Gray (Mass.) 231.

35. Ellsworth v. Hinds, 5 Wis. 613; Bartlett v. Janeway, 4 Sandf. Ch. (N. Y.) 396 (N. Y. Stat.) In Barber v. Slade, 30 Vt. 191, it is held that where husband and wife agree with the makers of a promissory note given to the wife for her lands deeded to them, that they should furnish her family with goods, and apply them upon the note; goods so delivered constitute a part-payment; but *aliter* as to goods delivered by the husband's order to persons not members of the family. Reduction of such note by husband requires a positive act.

36. Myers v. Marcus, 1 Ky. Law 416.

§ 150. Personal Apparel of Wife.

Her *paraphernalia* follow a rule somewhat peculiar.[37]

As to the wife's personal apparel, the doctrine of *paraphernalia* will be found to reserve to her a needful right in the most delicate instance where controversy can arise. Otherwise it would appear that her apparel belongs to her husband at common law. Such apparel purchased from their joint earnings is certainly his in such sense that he only can sue others for its loss. She cannot sell or give her clothing away, probably, except by virtue of an agency; which agency, however, might be readily inferred from circumstances. But the wife's reasonable clothing belongs to the husband for the wife's use, like her victuals and other necessaries, and he must not wantonly deprive her of it so as to leave her destitute. Even if he allows her to leave him on an agreement of separation, it may be presumed that he gives her the right to the clothing she takes with her.[38] Happily such petty controversies seldom occur between husband and wife.

A tacit mortgage attaches in Louisiana in favor of the wife on her husband's property for the price of paraphernal property sold by him.[39] Under the Spanish law the husband would not alienate the wife's paraphernal property without her consent.[40] The New Jersey Married Women's Act has not changed the common-law rule that the wearing apparel and ornaments received by a wife from her husband during coverture remain his property.[41]

§ 151. Money.

At common law if the husband received his wife's money he was presumed to take it as his own,[42] and in legal contemplation money paid to her is paid to him.[43] Thus, the money held by the wife for the support of herself and her children was the husband's property.[44] The true test of the husband's title is this; whether

37. See *infra*, Vol. II, as to rights upon death of a spouse.

38. See Delano v. Blanchard, 52 Vt. 578.

39. Walker v. Duverger, 4 La. Ann. 569.

40 Boyle v. Graham, 32 Mo. 66.

41. Farrow v. Farrow, 72 N. J. Eq. 421, 65 A. 1009.

42. Jesser v. Armentrout's Exr., 100 Va. 666, 42 S. E. 681.

43. Parker, Jones & Steele v. Parker, 25 Ky. Law, 2193, 80 S. W. 209; Lithgow v. Kavenagh, 9 Mass. 161; Downs v. Miller, 95 Md. 602, 53 A. 445.

44. Com. v. Manly, 12 Pick. (Mass.) 172; Pierce v. Thompson, 17 Pick. (Mass.) 391; Ames v. Chew, 5 Mete. (Mass.) 320; Commonwealth v. Davis, 9 Cush. (Mass.) 283.

the personal property in question was or was not technically a thing in possession.

Money actually received from the sale of the wife's land, or as proceeds arising from her inheritance, becomes, as personal property, apart from equity rules, the absolute property of the husband,[45] whether in money or other personal property.[46] And if he invests the same in his own name, no resulting trust will arise in the wife's favor.[47]

§ 152. Earnings of Wife.

Earnings of the wife belong to the husband. The rule of the common law is that he takes all the benefits of her industry,[48] unless by some clear and distinct act he evidences an intention to hold them in trust for her,[49] the reason being that he was bound to support her.[50] It was otherwise where she lived separate from him.[51]

Independently, therefore, of statutes which plainly secure to married women their separate earnings under the circumstances, it is held that an agreement between the wife, with the knowledge and consent of her husband, and a third person, for nursing and attention, the stipulation being that she shall be paid what her services are reasonably worth, gives to the wife no title as against her husband.[52] He alone can give a discharge for any demand which may arise from her services. He may of course constitute her his agent for receiving the pay to herself; but, without evi-

45. Plummer v. Jarman, 44 Md. 632; Lichtenberger v. Graham, 50 Ind. 288.

46. Mahoney v. Bland, 14 Ind. 176.

47. Thomas v. Chicago, 55 Ill. 103. It is here assumed that equity does not impress the proceeds with the character of the original property from reasons such as will sometimes occur.

48. Snickles v. City of St. Joseph, 155 Mo. App. 308, 136 S. W. 752; Missouri, K. & T. Ry. Co. v. Holman, 15 Tex. Civ. 16; Knippenberg v. Morris, 80 Ind. 540; Standen v. Pennsylvania R. Co., 214 Pa. 189, 63 A. 467; Klapper v. Metropolitan St. Ry. Co., 34 Misc. 528, 69 N. Y. S. 955; Macq., Hus. & Wife, 44, 45; Reeve, Dom. Rel., 63; McDavid v. Adams, 77 Ill. 155; Yopst v. Yopst, 51 Ind. 61. Thus money received by the wife from a boarding-house belongs to him. Briggs v. Devoe, 89 App. Div. 115, 84 N. Y. S. 1063, 14 N. Y. Ann. Cas. 201.

49. Small v. Pryor, 72 N. J. Eq. 939, 73 A. 1118.

50. Vose v. Myott, 141 Ia. 506, 120 N. W. 58.

51. Greve v. Echo Oil Co., 8 Cal. App. 275, 96 P. 904.

52. Woodbeck v. Havens, 42 Barb. (N. Y.) 66. And this, even though the husband makes of his house a sort of hospital, and his wife assists him. Reynolds v. Robinson, 64 N. Y. 589. And see Elliott v. Bently, 17 Wis. 591; Duncan v. Roselle, 15 Ia. 501; McKavlin v. Bresslin, 8 Gray (Mass.), 177.

dence of some such authority, the person who employs her, as a nurse for instance, cannot protect himself by showing her separate receipts.[53] For these earnings the husband sues alone, and in his own name.[54] She cannot maintain a separate action,[55] even after the husband's death, if the services sued for were performed in his lifetime.[56]

A crop produced on land of which the husband is lessee, by labor employed and paid by the wife, must still presumptively belong to the husband. And, on the other hand, the product of his own skill and labor on her land belongs presumptively to her as an accretion.[57] The husband may waive his right and permit her to retain her earnings.[58] He may consent that they be her own, but that right rests upon his consent.[59] His consent may be oral,[60] but that consent cannot be exercised in disregard of his existing creditors.[61] This rule applies to money earned, and to other produce

53. Offley v. Clay, 2 Man. & Gr. 172; and see Glover v. Drury Lane, 2 Chitt. 117; Russell v. Brooks, 7 Pick. (Mass.) 65. But see Starrett v. Wynn, 17 S. & R. (Pa.) 130.

54. Hensley v. Tuttle, 17 Ind. App. 253, 46 N. E. 594. A wife's duty to render family services is co-extensive with the husband's duty to support. Randall v. Randall, 37 Mich. 563; Gould v. Carlton, 55 Me. 511; McDavid v. Adams, 77 Ill. 155.

55. See Beau v. Kiah, 6 Thomp. & C. (N. Y.) 464.

56. McClintic v. McClintic, 111 Ia. 615, 82 N. W. 1017.

57. Hamilton v. Booth, 55 Miss. 60; Bottoms v. Corley, 5 Heisk. (Tenn.) 1.

58. Pribble v. Hall, 13 Bush (Ky), 61; Dowling v. Dowling, 116 Mich. 346, 74 N. W. 523, 4 Det. Leg. N. 1168. Where, by consent of the husband, the wife keeps boarders on her own account, and invests the accumulated board money in land in her own name, it is not subject to her husband's debts. Ehlers v. Blumer, 129 Ia. 168, 105 N. W. 406. Where circumstances forced a wife to become the executive and working head of a family, and the husband for years recognized her right to earn and disburse money, he himself doing business with her as with a stranger, and she has sought to acquire for their sons a business in which they could earn their living and has exercised good judgment in seeing to it that the husband did not interfere in the management thereof, he is not entitled to the ownership of the earnings of the wife. Pearll v. Pearll Advertising Co., 17 Det. Leg. N. 543, 127 N. W. 264.

59. Georgia R. & Banking Co. v. Tice, 124 Ga. 459, 52 S. E. 916. See *post*, as to wife's power to trade, etc., Cotter v. Gazaway, 141 Ga. 534, 81 S. E. 879; Mock v. Neffler (Ga.), 95 S. E. 673; Roberts v. Haines, 112 Ga. 842, 38 S. E. 109; Georgia R. & Banking Co. v. Tice, 124 Ga. 459, 52 S. E. 916; Central of Georgia Ry. Co. v. Cheney, 20 Ga. App. 393, 93 S. E. 42; Patterson v. Franklin, 168 N. C. 75, 84 S. E. 18; Monahan v. Monahan, 77 Vt. 133, 59 A. 169, 70 L. R. A. 939; Rockwell v. Robinson's Estate, 158 Wis. 319, 148 N. W. 868.

60. Gage v. Gage, 78 Wash. 262, 138 P. 886.

61. Cramer v. Redford, 2 C. E. Green (N. J.), 367; Post-Nuptial Settlements, *post*, § 520 *et seq.*; Glaze v. Blake, 56 Ala. 379.

of the wife's earnings,[62] and to property purchased with such earnings.[63] If her earnings are not reduced to possession by him in his lifetime, they survive to her at his death.[64] But even under Married Women's Acts she is still obliged to render services in care of the household.[65]

§ 153. Property Purchased with Wife's Earnings.

Equity does not raise a resulting trust in the wife's favor, where she contracted, with the consent of her husband, for the purchase of a lot of land, conveyed to him, though she paid off the mortgage, given for part of the purchase-money, from her own earnings,[66] provided no agreement be shown, antenuptial or postnuptial, that the wife shall hold these earnings in her own right; nor where even the deed is made out to a trustee for the wife's benefit, can she hold it against her husband's creditors.[67]

§ 154. Bank Deposits.

Whether money at her banker's follows this same principle may depend upon a distinction first taken by Sir William Grant in *Carr* v. *Carr*.[68] He there says that a balance at a banker's is a debt and not a deposit. But if the money were delivered to the banker in a sealed bag, it would then be truly a *depositum*. It would then have what is called an ear-mark; in other words, it would be a specific chattel, and, as such, would vest by the marriage in the husband as his absolute property.[69] Therefore, should the husband die without recovering such specific chattels or goods, they would belong to his representatives, and not to the wife by right of survivorship.[70]

§ 155. Slaves.

At common law the title to the wife's slaves vested in the husband,[71] and if she had only a life estate, he took what estate she

62. Bucher v. Ream, 68 Pa. 421; Hawkins v. Providence R., 119 Mass. 596.

63. *In re* Diamond, 158 F. 370.

64. Bailey v. Gardner, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. R. 847.

65. Larisa v. Tiffany (R. I.), 105 A. 739.

66. Skillman v. Skillman, 15 N. J. Ch. 478.

67. Campbell v. Bowles, 30 Gratt. (Va.) 652.

68. Carr v. Carr, 1 Mer. 543, *n*.

69. Per Sir William Grant in Carr v. Carr, 1 Mer. 543; Hill v. Foley, 1 Phill. 404. Money deposited with a banker in the usual way is money lent to the banker, with the obligation superadded that it be repaid when called for. Pott v. Cleg, 11 Jur. 289.

70. Hawkins v. Providence R., 119 Mass. 596.

71. Ordinary v. Geiger, 2 Nott & McC. (S. C.) 151, note; Taylor v. Yarbrough, 13 Grat. (Va.) 183.

had.[72] Where she had a remainder only, he took title on the termination of the life estate.[73]

§ 156. Proceeds of Joint Labor of Spouses.

The proceeds of the joint labor of husband and wife belong at common law to the husband; as where, for instance, they raise cotton together;[74] or carry on a hotel or boarding-house or private hospital together.[75] Money, or cotton, the proceeds, or things personal or land bought with such proceeds, all are the husband's, if he acts consistently with his rights.[76]

§ 157. Choses in Action — What Constitutes in General.

At common law a husband is entitled *jure mariti* to his wife's choses in action.[77] It becomes important, therefore, to distinguish the wife's things in action from her things in possession. To the class of things in action belong such property as rests upon obligation, contract, or other security, for payment; and not only rights presently vested and capable of immediate reduction to possession, but those which are contingent upon some event or reversionary upon some prior interest.[78] Debts owing the wife, arrears of rents, of profits, and of income, also outstanding loans, are plainly *choses in action.*[79] Money due on mortgage is, before foreclosure, a *chose in action,* and even though lent before coverture with covenants running to the wife's heirs or executors, it must follow the usual rule.[80] So are bonds and certificates of stock.[81] Income of a *chose in action* is as much a *chose* as the principal itself; and according to the ordinary rule the wife becomes entitled to it by survivorship.[82] A devise of land to be sold and proceeds to be divided among certain persons, gives to each a *chose in action.*[83]

72. Garland v. Denny, 3 B. Mon. (Ky.) 125.

73. Terrill v. Boulware, 24 Mo. 254.

74. Bowden v. Gray, 49 Miss. 547.

75. Shaeffer v. Sheppard, 54 Ala. 244; Reynolds v. Robinson, 64 N. Y. 589.

76. Hawkins v. Providence R., 119 Mass. 596; Carleton v. Rivers, 54 Ala. 467.

77. Arnold v. Limeburger, 122 Ga. 72, 49 S. E. 812; McKay v. Mayes, 16 Ky. Law, 862, 29 S. W. 327.

78. See Bell Hus. & Wife, 52.

79. 1 Bright Hus. & Wife, 36; Clapp v. Stoughton, 10 Pick. (Mass.) 463.

80. Perkins v. Clements, 1 Pat. & H. (Va.) 141; Bell Hus. & Wife, 52; *contra*, Turner v. Crane, 1 Vern. 170; Rees v. Keith, 11 Sim. 388.

81. Johnson v. Hume, 138 Ala. 564, 36 So. 421; Stanwood v. Stanwood, 17 Mass. 57; Jackson v. Parks, 10 Cush. (Mass.) 552; Slaymaker v. Bank, 10 Pa. 373; Wells v. Tyler, 5 Fost. (N. H.) 340.

82. Wilkinson v. Charlesworth, 11 Jur. 644.

83. Smilie's Estate, 22 Pa. 130.

Bills of exchange and promissory notes, unlike many *choses in action* in being legally transferable by simple indorsement, are now considered *choses in action* of a peculiar nature, though it was formerly thought that they vested absolutely in the husband by marriage,[84] and bank checks, certificates of deposit,[85] and public securities of a negotiable character may be placed in the same class.[86] A note made payable to order of "A. B. (a married woman), or to A. B. and her husband" in the alternative, constitutes the husband the payee.[87] The husband acquired title to the wife's notes whether made before [88] or during coverture.[89]

Legacies and distributive shares are sometimes treated as though they vested absolutely in the husband without reduction into possession; but unquestionably the better opinion is that they are *choses in action* (especially if no decree of distribution has been rendered, or the estate is unsettled), in which case the creditor of the husband ought not to be allowed to attach them before the latter has done some act disaffirming his wife's title.[90] Therefore

84. Gaters v. Maddeley, 6 M. & W. 423; Nash v. Nash, 2 Madd. 133; 1 Roper Hus. & Wife, 211; 1 Bright Hus. & Wife, 37 *a*, 38; Richards v. Richards, 2 B. & Ad. 447; Scarpellini v. Acheson, 7 Q. B. 864; 9 Jur. 827; Phelps v. Phelps, 20 Pick. (Mass.) 556; Hayward v. Hayward, *ib.* 525; Lenderman v. Talley, 1 Houst. (Del.) 523.

85. Rodgers v. Pike County Bank, 69 Mo. 560.

86. Such, for instance, as United States bonds. Brown v. Bokee, 53 Md. 155.

87. Wildman v. Wildman, 9 Ves. Jr. 174; Twisden v. Wise, 1 Vern. 161; Ryland v. Smith, 1 M. & C. 53.

88. Holland v. Moody, 12 Ind. 170.

89. Commonwealth v. Manley, 12 Pick. (Mass.) 173; Wilbur v. Crane, 13 Pick. (Mass.) 284.

90. 2 Kent Com. 135; cases cited in Am. editor's notes to Bing. Inf. & Cov. 209; Carr v. Taylor, 10 Ves. Jr. 574, 578; Lamphir v. Creed, 8 *ib.* 509; Palmer v. Trevor, 1 Vern. 261. See Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 196; Curry v. Fulkinson, 14 Ohio, 100; Wheeler v. Moore, 13 N. H. 478; Harper v. Archer, 8 Sm. & M. (Miss.) 229; Probate Court v. Niles, 32 Vt. 775; Hooper v. Howell, 50 Ga. 165; Jacks v. Adair, 31 Ark. 616; Chappell v. Causey, 11 Ga. 25; Gillet v. Camp, 19 Mo. 404; Johnson v. Spaight, 14 Ala. 27; Gallego v. Gallego, 2 Brock. 285; Revel v. Revel, 2 Dev. & Batt. (N. C.) 272; Wallace v. Talliaferro, 2 Call (Va.), 447; Clifton v. Haig, 4 Des. (S. C.) 330. See *contra*, Albee v. Carpenter, 12 Cush. (Mass.) 382; Wheeler v. Bowen, 20 Pick. (Mass.) 563; Griswold v. Penniman, 2 Conn. 564; Holbrook v. Walters, 19 Pick. (Mass.) 354. But even in Massachusetts, where the doctrine prevails which is disapproved in the text, it is held that if the husband die before judgment in the suit by creditors, his wife's survivorship is not barred. Strong v. Smith, 1 Met. (Mass.) 476. See Parks v. Cushman, 9 Vt. 320, which allows the wife's share to be attached in trustee process by the husband's creditors after a decree of distribution.

legacies and distributive shares vest absolutely in the husband by reduction to possession, but not before.[91]

It is held that where an estate in personalty vests in the wife under a will, and becomes a legal interest by the executor's assent, and goes into possession of the person in whom was vested the precedent particular estate, and no adverse possession is shown, such estate passes to the husband by virtue of his marital rights.[92] Where a will bequeathed a life estate in money to a wife to be paid to her at twenty-one, the will taking effect at a time when such a bequest did not create a separate estate, the husband's marital rights attached and entitled him to use it for his life, on reducing it to possession.[93] He might after her death maintain an action to recover a legacy to which she became entitled during coverture.[94] The wife's *choses in action* must not be confounded with her goods or specific chattels in the hands of third parties, which, unlike her *choses in action,* vest in the husband absolutely by the marriage.[95]

Money rights or claims generally, as for instance a claim for damages growing out of a tort committed upon the person or character of the wife, fall under our present head.[96] Where a wife is a reversioner in land after an estate in dower, he must reduce her right to possession before his rights attach.[97] And where a wife is entitled to a portion of the assets of her first husband's estate, and then remarries, her second husband must reduce this portion into possession during coverture, or it will survive to her.[98]

§ 158. Necessity of Reduction to Possession.

The husband's right to his wife's incorporeal personal property — or at least to her *choses in action,* as they are commonly called — is qualified.[99] Reduction into possession offers many very nice distinctions, involving conflicting rights of considerable magnitude. Courts of equity, which have taken this subject under their especial

91. Brown v. Daugherty, 120 F. 526; Hart v. Leete, 104 Mo. 315, 15 S. W. 976.

92. Walker v. Walker, 41 Ala. 353.

93. Crawford v. Clark, 110 Ga. 729, 36 S. E. 404; Brantley v. Porter, 111 Ga. 886, 36 S. E. 970.

94. Norse v. Ray, 1 Dane Abr. (Mass.) 351; Hapgood v. Houghton, 22 Pick. (Mass.) 480; Mason v. Homer, 105 Mass. 116.

95. 1 Schouler Pers. Prop. 32–37.

96. Anderson v. Anderson, 11 Bush. (Ky.) 327.

97. Arnold v. Limeburger, 122 Ga. 72, 49 S. E. 812.

98. Harper v. Archer, 28 Miss. 212. See also *Ex parte* Norton, 35 E. L. & Eq. 609; Montefiore v. Belireno, L. R. 1 Eq. 171; Wiggins v. Blount, 33 Ga. 409.

99. Powes v. Marshall, 1 Sid. 172; Macq. Hus. & Wife, 19, 20; 1 Bac. Abr. 700, tit. Baron & Feme V.; 1 Roper Hus. & Wife, 169; 1 Vent. 261.

control, seem to lay down variable rules; and it must be confessed that the law of reduction is so built upon exceptions, that one may more readily determine what acts of the husband do *not,* than what acts *do,* bar the wife's survivorship. Another difficulty in dealing with this subject appears from the circumstance that personal property is rapidly growing, and species of the incorporeal sort are developed quite unknown to the old common law; while, on the other hand, the doctrine of the wife's separate estate has expanded so fast as to furnish already new elements of consideration for most of the latest reduction cases, threatening to extinguish at no distant day all the old learning on the subject, even before its leading principles could be clearly shaped out in the courts.

Reduction during the minority of an infant husband is good, though he dies before majority.[1]

§ 159. Effect of Waiver or Failure to Reduce to Possession.

The husband might waive his right and permit her to retain the property,[2] and might bind himself by an agreement that she retain it as her separate estate.[3] Such a waiver was inferable from his conduct,[4] as where he gave her a note payable to her for money received as her distributive share of an estate,[5] or where he allowed her to deal with her personal property as she wished,[6] or where he treated the property as that of the wife.[7] Likewise, the appropriation of the spouse as husband may be negatived by proof of his declarations and acts and conduct when the supposed appropriation took place.[8]

1. Ware v. Ware, 18 Gratt. (Va.) 670. As to reduction by the husband of an infant wife, see Shanks v. Edmondson, 28 Gratt. (Va.) 804.

2. Boldrick v. Mills, 29 Ky. Law, 852, 96 S. W. 524; White v. Clasby, 101 Mo. 162, 14 S. W. 180; Dorland v. Dorland, 59 App. Div. 37, 69 N. Y. S. 179 (where the husband agreed to hold in trust for the wife).

3. Lovewell v. Schoolfield, 217 F. 689, 133 C. C. A. 449.

4. Mere admissions by a husband who has purchased realty with personalty belonging originally to his wife, but which has vested in him by his marriage, that he holds the land for the benefit of the heirs of his wife, will not devest the title of his heirs, unless there has been during the lifetime of the wife a gift to her of the chattels, title to which the husband acquired by the marriage, or such a gift of the proceeds of the sale of such chattels before the same were invested in land. Ellington v. Harris, 127 Ga. 85, 56 S. E. 134; Smith v. Farmers' & Merchants' Nat. Bank, 57 Ore. 82, 110 P. 410.

5. Bennett v. Bennett's Adm'r, 134 Ky. 444, 120 S. W. 372; Struss v. Norton, 20 Ky. Law, 1116, 48 S. W. 976.

6. Boynton v. Miller, 144 Mo. 681, 46 S. W. 754.

7. Bidwell v. Beckwith, 86 Conn. 462, 85 A. 682.

8. Moyer's Appeal, 77 Pa. 482; Perry v. Wheelock, 49 Vt. 63.

Marriage operates, not as an absolute gift of such property, but rather as a conditional gift, the condition being that the husband shall do some act, while coverture lasts, to appropriate the *choses* to himself. If he happen to die before he has done so, such *choses,* not having been reduced to possession, remain the property of the wife, and his personal representatives have no title in them.[9] But this applies only to outstanding things in action; for some may have been reduced to possession by the husband during his lifetime, and some may not. If the wife die before the husband has reduced the *chose* to possession, he has no title in it as husband, but it goes, strictly speaking, to her administrator or personal representative,[10] though under our statutes the husband has commonly the right both to administer and inherit a good part of his wife's personal property, and she cannot will otherwise.[11]

With respect to such *choses in action* as may accrue to the wife solely, or to the husband and wife jointly, during coverture, the same doctrine applies. The husband may disagree to his wife's interest and make his own absolute at any time during coverture by recovering in suit in his own name or otherwise reducing them to possession. But until such disagreement, such *choses in action* belong to the wife, and, if not reduced into possession by the husband, will likewise survive to her.[12]

The husband's right to reduce his wife's *choses in action* into possession is one of election merely. He may therefore neglect or refuse to do so, and thus keep the property vested in his wife.[13]

9. Co. Litt. 351; 1 Bright Hus. & Wife, 36; 2 Kent Com. 135 *et seq.,* and cases cited; Scawen v. Blunt, 7 Ves. 294; Fleet v. Perrins, L. R. 3 Q. B. 536; Langham v. Nenny, 3 Ves. 467; Tritt v. Colwell, 31 Pa. 228; Needles v. Needles, 7 Ohio St. 432; Burleigh v. Coffin, 2 Fost. (N. H.) 118; Whiteman v. Whiteman (Del), 105 A. 787; Copeland v. Jordan, 147 Ga. 601, 95 S. E. 13; Cooper v. Walker, 142 Ky. 138, 134 S. W. 171; Smith v. Farmers' & Merchants' Nat. Bank, 57 Ore. 82, 110 P. 410; Williford v. Phelan, 120 Tenn. 589, 113 S. W. 365; Prewitt v. Bunch, 101 Tenn. 723, 50 S. W. 748.

10. Walker v. Walker, 41 Ala. 353; Fleet v. Perrins, L. R. 3 Q. B. 536; Scrutton v. Pattillo, L. R. 19 Eq. 369.

11. See, as to dissolution by death, *post,* Vol. II.

12. Coppin v. ——, 2 P. Wms. 497; Day v. Padrone, 2 M. & S. 396, *n.;* Howell v. Maine, 3 Lev. 403; Wildman v. Wildman, 9 Ves. 174; 1 Bright Hus. & Wife, 37; 2 Kent Com. 135, and cases cited; Wilkinson v. Charlesworth, 11 Jur. 644; Standeford v. Devol, 21 Ind. 404.

13. Southern Bank v. Nichols, 235 Mo. 401, 138 S. W. 881; Hart v. Leete, 104 Mo. 315, 15 S. W. 976; Coffin v. Morrill, 2 Fost. (N. H.) 352; Harris v. Taylor, 3 Sneed (N. H.), 536; Gallego v. Gallego, 2 Brock. 287; Mellingen v. Bansmann, 45 Pa. 522; Stoner v. Commonwealth, 16 Pa. 387; Snowden v. Lindsley, 6 Cold. (Tenn.) 122. See Peacock v. Pembroke, 4 Md.

This becomes a very important principle in determining the rights of his creditors. For, supposing him to be embarrassed in his affairs, can they attach the unreduced *choses in action* of his wife as his property? It is settled that they cannot.[14] But if he once makes the property his own, they can reach it; and he cannot transfer it again to his wife in prejudice of their pre-existing rights, even though it vested in him but for a brief time. Of course his own expressions of regret cannot avail against the husband's actual and complete appropriation of his wife's *choses in action.*[15] And even his subsequent promise to refund that which he has once made absolutely his own is a promise without legal consideration, and the wife or her representative cannot enforce it.[16]

§ 160. Effect of Bankruptcy, Insolvency and Assignment for Benefit of Creditors.

A general assignment in bankruptcy or insolvency passes at law the wife's property; and by way of partial recompense, as it would appear, the husband's discharge has been allowed to operate upon the wife's debts *dum sola* as well as his own. But in equity the assignees are permitted to take the same interest in the wife's *choses in action* as the husband possessed, and no more; and unless they reduce them into possession during her husband's lifetime she will be entitled to them by survivorship.[17] Indeed, in Pennsylvania a voluntary assignment of the husband to trustees for wife and child, so as to defeat his creditors, has been upheld by a court of equity against such creditors on the ground that it was for the benefit of his wife and child.[18]

280. It is held in Georgia that his right to reduce his wife's property to possession is not affected by the enactment of a statute changing the common-law rule. Arnold v. Limeburger, 122 Ga. 72, 49 S. E. 812.

14. *In re* Hill, 190 F. 390; Southern Bank of Fulton v. Nichols, 235 Mo. 401, 138 S. W. 881.

15. Nolen's Appeal, 23 Pa. 37.

16. Fletcher v. Updike, 3 Hun (N. Y.), 350.

17. Sherrington v. Yates, 12 M. & W. 855; Miles v. Williams, 1 P. Wms. 249; Mitford v. Mitford, 9 Ves. 87; 2 Kent Com. 138; Van Epps v. Van Deusen, 4 Paige, 64; Outcalt v. Van Winkle, 1 Green Ch. (N. J.) 516; Moore v. Moore, 14 B. Mon. (Ky.) 259; 1 Bright Hus. & Wife, 79, 83, and cases cited; Hay v. Bowen, 5 Beav. 610; Poor v. Hazleton, 15 N. H. 564; Mann v. Higgins, 7 Gill (Md.), 265.

18. Siter v. Jordan, 4 Rawle (Pa.), 468. See also Andrews v. Jones, 10 Ala. 400; *contra,* Dold v. Geiger, 2 Gratt. (Va.) 98; O'Conner v. Harris, 81 N. C. 279.

§ 161. What Constitutes reduction to Possession — In General.

What acts on the husband's part amount to an appropriation of his wife's *choses in action,* or in other words constitute reduction into possession so as to bar her rights by survivorship, may here be fitly considered. Mere intention on his part is not sufficient. The purpose must be followed by some positive act asserting an ownership.[19] The cases show, in short, that there should always exist both the intent to appropriate to his own use and the act of appropriation. Thus there may be a resulting trust implied from various circumstances connected with the case. Thus, where the husband receives the proceeds of a sale of the wife's lands or of her landed inheritance, under an agreement to treat the same as a loan to himself or to reinvest it for her benefit, or to hold it as her trustee or attorney, the disposition of the courts is very strong to rule against a full reduction into possession. And such disposition must be the stronger where a full reduction would convert real into personal property, and thereby disturb the usual property rights.[20] He must intend to acquire title.[21]

Any act on the husband's part which amounts to a complete act of exclusive ownership over his wife's *chose in action,* such act of ownership extending to the whole fund in question — is an effectual reduction into his own possession. The rule is, that if he recovers her debt by a suit in his own name, or if he releases the debt, or novates the debt by taking a new security in his own and not in his wife's name,— in all these cases, upon his death and the dissolution of the marriage relation, the right of survivorship in the wife to the property is found to have ceased.[22] But the mere assertion of title thereto by a disposition under the husband's will does not amount to a reduction during his lifetime or while coverture lasts.[23]

An agreement to sell the fund is not a reduction into possession.[24] Nor is a fund reduced by being set off against the husband's debt, no money having passed nor releases having been interchanged. At least this is the doctrine of some cases. Thus in *Harrison* v.

19. Blount v. Bestland, 5 Ves. Jr. 515.

20. See Drury v. Briscoe, 42 Md. 154.

21. Johnson v. Hume, 138 Ala. 564, 36 So. 421; Southern Bank of Fulton v. Nichols, 235 Mo. 401, 138 S. W. 881.

22. 2 Kent Com. 137, 138. See Hanson v. Miller, 14 Sim. 22; 8 Jur. 209, 352; Burnham v. Bennett, 2 Coll. C. C. 254; Scott v. Hix, 2 Sneed (Tenn), 192.

23. Grebill's Appeal, 87 Pa. 105; Scrutton v. Pattillo, L. R. 19 Eq. 369.

24. Harwood v. Fisher, 1 Younge & Coll. 110; 1 Bright Hus. & Wife, 52.

Andrews, a testator gave a legacy to the wife; the husband being indebted to the testator in an equal amount, the husband and wife agreed to set off the debt against the legacy, and signed a legacy receipt for the amount; but it was held that these acts constituted no reduction.[25]

§ 162. Effect of Insanity of Husband.

It is held in England that, where the husband was a lunatic, payment into court of the wife's *chose in action* to the credit of the lunacy amounted to a reduction into possession.[26] But in New Hampshire a singular doctrine is laid down; namely, that the husband's right of reduction is so far personal to him that it cannot be exercised by his guardian if he be insane.[27]

§ 163. Effect of Possession by Husband.

Possession of a wife's property by the husband is usually sufficient to show title in him,[28] but actual possession of her *chose in action* is not a sufficient reduction *per se,* for the husband's intention may be to hold it in the right of another. Thus he may take the property in trust for his wife; and if so he is accountable like any other trustee.[29] So he may receive it as a loan from his wife, in which case he shall refund it like any other borrower. That reduction into possession which makes the *chose* absolutely as well as potentially the husband's is a reduction into possession, not of the thing itself, but of the title to it.[30]

And where the makers of a promissory note, payable to the wife or bearer, and given as the proceeds of sale of her real estate, hand the note to the husband, who immediately delivers it to the wife, in whose separate possession it thereafter continues, no reduction takes place.[31] But it would be otherwise, we apprehend, if the husband had placed the note among his own effects, never given it to his wife, nor admitted a trust on his part, and in all other respects acted as the owner of the property.

25. Harrison v. Andrews, 13 Sim. 595. So Sir Wm. Grant in Carr v. Taylor, 10 Ves. Jr. 574. See other cases cited in *n.* to 1 Bright, Hus. & Wife, 52.

26. *In re* Jenkins, 5 Russ. 183.

27. Andover v. Merrimack County, 37 N. H. 437.

28. Williford v. Phelan, 120 Tenn. 589, 113 S. W. 365.

29. Smith v. Haire (Tenn.), 181 S. W. 161; Baker v. Hall, 12 Ves. Jr. 497; Estate of Hinds, 5 Whart. 138; Mayfield v. Clifton, 3 Stew. (N. J.) 375; Resor v. Resor, 9 Ind. 347; Bell Hus. & Wife, 57.

30. Strong, J., in Tritt's Admr. v. Caldwell's Admr., 31 Pa. 233.

31. Barber v. Slade, 30 Vt. 191; Hall v. Young, 37 N. H. 134; Barron v. Barron, 24 Vt. 375.

If the husband places the wife's *chose* in an envelope, with a memorandum that it be disposed of as directed by his will, keeps it in his possession, and then leaves a will disposing of it, the reduction is complete.[32]

The property must come under the actual control of the husband, *quasi* husband, and not as trustee or attorney for the wife; though a husband's appointment as trustee will not deprive him of the same right to reduce the trust fund to his own possession, which he would have were a third person the trustee.[33] All this, however, does not prevent a full reduction from taking place upon suitable evidence.[34]

§ 164. Constructive Possession.

Constructive possessions are not favored in law when they tend to defeat the wife's survivorship. Yet reduction into possession of the wife's *chose in action,* unexplained by other circumstances, is *prima facie* evidence of conversion to the husband's use, and is therefore effectual.[35] And reduction of a fund may be sufficient upon the happening of a condition annexed to it.[36]

§ 165. By Release.

There seems to be no reason for a distinction between releases and assignments from the husband, so far as the effect upon the wife's survivorship is concerned. But in one case it was observed that the husband's release might amount to reduction as against the wife.[37] A later decision, however, puts releases and assignments on the same footing.[38] And in this country no distinction is made between the two modes of transfer.[39]

§ 166. By Pledge.

It has been held that a pledge of her property is a good reduction to possession.[40]

32. Dunn v. Sargent, 101 Mass. 336.

33. Wall v. Tomlinson, 16 Ves. 413; Dunn v. Sargent, 101 Mass. 336; Ryland v. Smith, 1 My. & Cr. 53; Burnham v. Bennett, 2 Coll. 254; Barron v. Barron, 24 Vt. 375; Savage v. Benham, 17 Ala. 119. But see Rees v. Keith, 11 Sim. 388.

34. Thomas v. Chicago, 55 Ill. 103.

35. Johnston v. Johnston, 1 Grant Cas. 468. Lapse of time may raise a presumption of reduction in the husband's favor. Harper v. Archer, 28 Miss. 212.

36. Dunn v. Sargent, 101 Mass. 336.

37. Hore v. Becher, 12 Sim. 465, 6 Jur. 94, Shadwell, V. C.

38. Rogers v. Acaster, 11 E. L. & Eq. 300; 14 Beav. 445.

39. Needles v. Needles, 7 Ohio St. 432; Kenny v. Udall, 5 Johns. Ch. (N. Y.) 464.

40. Birmingham Water Works Co. v. Hume, 121 Ala. 168, 25 So. 806, 77 Am. St. R. 43.

If the husband pledges his wife's *chose in action* not already reduced to possession, or assigns it as collateral security, it would appear that on the redemption of such pledge or security the *chose* is placed *in statu quo,* and remains the property of the wife until further reduction. Whether the same can be said of a chattel mortgage is not certain.[41] The language of the instrument in describing the parties might aid in determining the question of intention whenever it arises. Certainly, whatever may be the technical difference between a pledge and a chattel mortgage, the latter operates a defeasible title only in the mortgagee. As to money secured by a mortgage to the wife, it is held that, if the debt has been once paid to the husband, reduction is completed, even though he die before executing a reconveyance of the property. Under such circumstances equity will actually compel the wife to reconvey and perfect the title without allowing her any benefits from the property.[42]

§ 167. By Suit or Arbitration.

The wife's outstanding *choses* may be recovered by a suit so as to prevent them from going back to her in case she be the survivor. The general rule is that for property accruing to the wife *before* marriage, the wife must be joined in the suit, although the husband during coverture may alter the debtor's liability, as by changing the security, or giving time on a promise to himself, and may then sue alone,[43] in which case, perhaps, the reduction into possession is effected by the alteration of the debt and not by the suit. Where, however, property accrues to the wife *after* marriage, the husband may elect either to sue alone or to join his wife as the meritorious cause.[44] Such being the state of the law, there is a distinction between suits brought in the husband's name alone, and suits in the name of both husband and wife. In the former case he elects to disaffirm his wife's title, and bringing the suit operates as a reduc-

41. Latourette v. Williams, 1 Barb. (N. Y.) 9; Hartman v. Dowdel, 1 Rawle (Pa.), 279. There is a *dictum* of Chancellor Kent (2 Kent Com. 137; also in Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 196) to the effect that the mortgage of a *chose in action* is of itself a sufficient reduction into possesion. We find no authorities to support this statement. But see Tritt v. Colwell, 31 Pa. 228, a recent case which recognizes a distinction in this respect between a pledge and a mortgage.

42. Rees v. Keith, 11 Sim. 388; Bosoil v. Brander, 1 P. Wms. 458; Bates v. Dandy, 2 Atk. 208.

43. Yard v. Ellard, 1 Salk. 117, pl. 8; Carth. 463; Sid. 299.

44. See Bright Hus. & Wife, 61–66; Chitty Pl. 32–38, 7th ed.

tion.[45] In the latter he admits her possible title by survivorship, and the reduction is ineffectual until the debt is collected on execution or otherwise.[46] Thus the institution of a suit to recover a legacy accruing to the wife is not *sua vi* a reduction when brought in the name of both parties,[47] and even a recovery of judgment is insufficient.[48] But payment to the husband or his attorney, after judgment, operates a reduction.[49] Wherever practice recognizes a separate right in the wife, a judgment which may be considered as obtained at her wishes, or for her benefit, is inconclusive evidence of reduction.[50]

In chancery proceedings both husband and wife are made parties; and, as we shall presently see, equity compels a settlement upon the wife before entering a decree in the husband's favor. It is said that decrees in chancery so far resemble judgments at law that until the money be ordered to be paid, or declared to belong to the husband, the wife's rights will remain undisturbed. A decree in the joint names of husband and wife is insufficient reduction.[51] But an order for payment of money to the husband vests it in him free from the wife's right by survivorship.[52]

As to the submission to arbitration it is said that the original claim is extinguished by the award and a new duty thereby created.[53] If the money awarded be *to the husband,* and he die before payment, it will go to his personal representatives, and not his wife.[54] So much has been decided. Some are of the impression

45. Oglander v. Baston, 1 Vern. 396, 2 Ves. Sen. 677, 12 Mod. 346. See Pierson v. Smith, 9 Ohio St. 554, as to insufficiency of judgment in husband's favor where he sued for destroying wife's separate property.

46. Bond v. Simmons, 3 Atk. 21. The exception formerly made in favor of bills of exchange and promissory notes does not now exist. See cases *supra,* § 153. The husband must therefore follow the above rules of suit. Sherrington v. Yates, 12 M. & W. 855, 1 Dowl. & L. 1032.

47. Knight v. Branner, 14 Md. 1; Harris v. Taylor, 3 Sneed (Tenn), 536; Hall v. McLain, 11 Humph. (Tenn). 425.

48. Crittenden v. Alexander, 15 Gray (Mass.), 432. An order for the proceeds of the judgment collected in a suit may be so treated by the husband that the wife's right survives, even though the husband's administrator collects it. Perry v. Wheelock, 49 Vt. 63.

49. Alexander v. Crittenden, 4 Allen (Mass.), 342.

50. Pike v. Collins, 33 Me. 38; Pettengill v. Butterfield, 45 N. H. 195.

51. Mason v. McNeill, 23 Ala. 201; Lowery v. Craig, 30 Miss. 19.

52. Edgarton v. Muse, Dud. Eq. (S. C.) 179. See Nanney v. Martin, Eq. Cas. Abr. 68, 3 Atk. 726; Macaulay v. Phillips, 4 Ves. 19; Heygate v. Annesley, 3 Bro. C. C. 362; 1 Bright Hus. & Wife, 67–69; Lowery v. Craig, 30 Miss. 19.

53. Reeve Dom. Rel. 21. But see Hunter v. Rice, 15 East, 100; Thorpe v. Eyre, 1 Ad. & El. 926, 3 Nev. & M. 211.

54. Oglander v. Baston, 1 Vern. 396.

that in other respects the wife's interest will depend upon the stage of proceedings reached at the time of the husband's death, and that neither the submission to arbitration, nor the award itself, unless in the husband's favor, operates as a reduction into possession.[55]

§ 168. By Assignment.

This brings us to a very perplexing branch of the present subject; namely, that of the husband's reduction into possession by assignment. *Choses in possession* are capable of assignment. *Choses in action,* however, with the exception of negotiable instruments, such as bills of exchange, checks, and promissory notes (to which we may doubtless add coupon bonds[56]), cannot be assigned at law; but in equity they may.[57] The assignment, however, to be effectual, should be without reservation. And the husband's agreement to assign is likewise sustainable in equity, on the principle that what one agrees to do shall be considered as done.[58] A joint assignment by husband and wife appears to have been sustained as something stronger than the husband's sole assignment, where the wife herself has not sought to avoid it afterwards.[59] But whether the husband's assignment of itself will bar the rights of the wife by survivorship, and constitute reduction into possession, is quite another thing.

If the assignment of the wife's *choses in action* be purely voluntary and without consideration, it does not bind the wife.[60] As, for instance, where a husband, pending divorce proceedings against him, makes a pretended transfer for the purpose of barring her rights to the property. Nor does a voluntary assignment for the benelt of creditors carry them.[61]

55. See 1 Bright Hus. & Wife, 70; Macq. Hus. & Wife, 52. The wife will not be bound by her agreement pending suit. Macaulay v. Phillips, 4 Ves. 15. But why should not the husband be allowed to disaffirm his wife's title by submitting the *chose* to arbitration as his own as well as in suing alone?

56. See Thomson v. Lee County, 3 Wall. (U. S.) 327.

57. Crouch v. Martin, 2 Vern. 595; Honner v. Morton, 3 Russ. 65.

58. Druce v. Dennison, 6 Ves. 394; Steed v. Craig, 9 Mod. 43.

59. McCaleb v. Crichfield, 5 Heisk. (Tenn.), 288.

60. Wright v. Rutter, per Ld. Alvanley, 2 Ves. Jr. 673; Burnett v. Kinnaston, 2 Vern. 401; Sir Wm. Grant, in Mitford v. Mitford, 9 Ves. 87; Sir Thomas Plumer, in Johnson v. Johnson, 1 Jac. & Walk. 472; Jewson v. Moulson, 2 Atk. 417; 2 Kent Com. 137; Hartman v. Dowdel, 1 Rawle (Pa.) 279.

61. Cases *supra;* Wright v. Rutter, 2 Ves. Jr., 673; 1 Bright Hus. & Wife, 81.

But the equity rule as to assignments of the wife's *choses in action* to individuals for valuable consideration is very capricious. It was formerly maintained that the husband's assignment of his wife's *chose in action* for a valuable consideration would bar not only a present interest of the wife, but also a contingent interest, or the possibility of a term or a specific possibility.[62] Sir William Grant threw doubt upon this doctrine by the objection that this would give the assignee a greater right than the husband himself.[63] It remained for Sir Thomas Plumer to break it down completely, and to place all assignments upon the same footing. This he attempted in the celebrated case of *Purdew* v. *Jackson,*[64] where the question arose as to the effect of an assignment by husband and wife of her vested interest in remainder. In an elaborate opinion he maintained that whatever the nature of the assignment, whether in bankruptcy, to trustees for payment of debts, or to a specific purchaser for value, it could pass the husband's interest and no more; that the assignee must afterwards reduce the property to possession during the husband's lifetime; and that no assignment was possible of the wife's reversionary interest, so as to bar her as survivor, provided the interest continued reversionary. Afterwards Lord Lyndhurst, while approving this doctrine to the extent of the actual decision, suggested a distinction between the cases where the husband can completely appropriate, at the time of the assignment, and those where he cannot; and thought that the assignment might stand in the former instance as an agreement to appropriate or a sort of equitable reduction into possession.[65] The later English cases seem to follow this suggestion.[66] So that the present doctrine in England is understood to be that the husband's assignment for value to a specific purchaser will bar the wife's survivorship, provided the husband has during coverture the right of reducing into his own possession; but that he cannot assign, so as to bar the wife's survivorship, unless such reduction becomes possible before his death.[67]

62. See Chandos v. Talbot, 2 P. Wms. 601; Bates v. Dandy, 2 Atk. 207; Hawkins v. Obin, *ib.* 549; *n.* to 2 Kent Com., 138.

63. Mitford v. Mitford, 9 Ves., 87. And see Hornsby v. Lee, 2 Madd. Ch., 16.

64. Russ. 1-71 (1823). In Ashby v. Ashby, 1 Coll. 553, this rule was fully approved. See, too, Ellison v. Elwin, 13 Sim. 309.

65. Honner v. Morton, 3 Russ. 65.

66. Per Lord Brougham, Stanton v. Hall, 2 Russ. & My. 175; Elliott v. Cordell, 5 Madd. Ch. 149.

67. Tidd v. Lister, 17 E. L. & Eq. 567; s. c., on appeal, 3 De G., M. & G. 857.

In this country the rule is far from uniform. The Pennsylvania courts, repudiating this modern chancery doctrine altogether, maintain that the assignment to a specific purchaser for value bars the wife's right of survivorship.[68] For, it is said, the husband by marriage gains a full power of disposal over his wife's property, and any distinction between vested and contingent interests in respect to the marital dominion and power of transfer is unsound.[69] This doctrine has received approval in some other States.[70] But the doctrine of *Purdew* v. *Jackson* has been more frequently approved by our courts; probably, if the question should now arise again, with the qualifications which Lord Lyndhurst introduced.[71]

§ 169. By Delivery to Agent of Husband.

Reduction into possession may be effected through the medium of a third person duly empowered to act for that purpose.[72] And the receipt of the wife's distributive share by an agent appointed under a power of attorney executed by the wife to her husband is a sufficient reduction by the husband, and enables the latter to sue the attorney for the proceeds.[73] Even where husband and wife together appoint an agent to receive the wife's legacy, and he receives it and does not pay it over, his receipt is a conversion of the fund, and the husband may treat the property as his, and sue accordingly.[74] But where A. receives money for the use of a mar-

68. Shuman v. Reigart, 7 W. & S. (Pa.), 169; Siter's Case, 4 Rawle (Pa.), 468; Webb's Appeal, 21 Pa. 248; Smilie's Estate, 22 Pa. 130.

69. See Siter's Case, *supra*, per Gibson, C. J.

70. Manion v. Titsworth, 18 B. Mon. (Ky.), 582; Turtle v. Fowler, 22 Conn. 58; Hill v. Townsend, 24 Tex. 575.

71. Bugg v. Franklin, 4 Sneed (Tenn.), 129; George v. Goldsby, 23 Ala. 326; Arrington v. Yarborough, 1 Jones Eq. (N. C.), 72; Lynn v. Bradley, 1 Met. (Ky.), 232; O'Connor v. Harris, 81 N. C. 279; Smith v. Atwood, 14 Ga. 402; State v. Robertson, 5 Harring. (Del.), 201; Needles v. Needles, 7 Ohio St. 432; Bryan v. Spruill, 4 Jones Eq. (N. C.), 27. The husband's assignee may avail himself of fraud upon the husband's marital rights. Joyner v. Denny, Busbee Eq. 176. In Stiffe v. Everett, 1 M. & C. 37, Lord Cottingham suggests what may be at the foundation of the present distinction in the English equity rule as to assignees for value, namely, that neither the husband alone, nor the husband and wife together, can dispose of the wife's life-interest in a fund, beyond the duration of coverature. See Macq., Hus. & Wife, 58, 59.

72. Roll. Abr., 342, 350; 1 Bright, Hus. & Wife, 53.

73. Turton v. Turton, 6 Md. 375; Alexander v. Critenden, 4 Allen (Mass.), 342.

74. *Semble* such reduction by agent is of itself a reduction by the husband. Dardier v. Chapman, L. R. 11 Ch. D., 442. No instruction were given to the agent to collect in the wife's right.

ried woman, and writes to her that he holds the money at her disposal, this constitutes an attornment to the wife, and not to the husband; and the latter must do something more in order to make the fund his own.[75] And where husband and wife empower an attorney to collect and receive on the wife's account, or the agent in question receives the fund, not by way of reducing on the husband's behalf, the husband's right remains unexercised.[76]

§ 170. Joint or Sole Receipt.

The receipt of the husband and wife jointly for the wife's *chose in action* does not constitute sufficient reduction by the husband, for this is the proper form of receipt given to third parties when the fund is placed in the wife's hands.[77] But the sole receipt of the husband with intent to appropriate constitutes a complete reduction, the property having been delivered to him instead of the wife.[78] The same is true of a joint order by both spouses that her property be applied to his debt.[79] A married woman's fund held subject during coverture, not to the husband's sole drafts, checks, or orders, but to the order of both husband and wife,[80] or to the order of either,[81] must, as to the residue not drawn when coverture ceases, be considered as never reduced to the husband's possession. A receipt of the fund subject to the order of either spouse, or their joint order, cannot be set up against the wife or her representative; nor is a transfer of stock to the joint names of husband and wife;[82] nor the receipt and indorsement of a check payable to the order of husband and wife, which the husband does not deposit or use for his sole account.[83]

§ 171. As to Commercial Paper.

As to bills and notes, there is a conflict between the earlier and later cases, from the fact that negotiable instruments were not

75. Fleet v. Perrins, L. R. 3 Q. B. 536.

76. Hill v. Hunt, 9 Gray (Mass.), 66; Chappelle v. Olney, 1 Sawyer (U. S.), 401.

77. Timbers v. Katz, 6 W. & S. (Pa.) 290.

78. Roll. Abr. 342, 350; 1 Bright, Hus. & Wife, 53; Lowe v. Cody, 29 Ga. 117.

79. Luccarello v. Randolph (Tenn.), 58 S. W. 453.

80. Scrutton v. Pattillo, L. R. 19 Eq. 369.

81. Scrutton v. Pattillo, L. R. 19 Eq. 369; Brown v. Bokee, 53 Md. 155; Parker v. Leehmere, 41 L. T. 152.

82. Nicholson v. Drury Buildings Estate Co., L. R. 7 Ch. D. 48.

83. Parker v. Leehmere, 41 L. T. 152.

formerly regarded as *choses in action* at all.[84] Assuming them to be such, however, the indorsement and transfer of the husband is a sufficient reduction into possession. Hence, if a note be made payable to the order of a *feme sole*, and she afterwards marries, her husband may transfer the note to himself or others by his own indorsement.[85] The receipt of partial payment, it would seem, is only a reduction *pro tanto*.[86] The wife cannot indorse over a note payable to her order, even with authority from her husband, where it does not appear that the indorsement was made for value received by the husband from the indorsee, or as a gift from the husband to the indorsee; if she does so, it does not bar her rights by survivorship.[87]

It is clear that the receipt of interest due on a bond or note is not a sufficient reduction of the latter, nor of future instalments, although it constitutes a reduction of the particular interest instalment itself.[88] Her indorsement without his assent is *prima facie* had.[89] If a note be negotiable, the husband alone can transfer it.[90] What evidence irrespective of indorsement and transfer by the husband suffices to show reduction into possession — as for instance where the note is payable to bearer — is not quite clear from the authorities. But reduction of the wife's notes into possession is not effected by the husband, merely because he keeps them, for safety and at her request, with his own papers; it certainly is not while he consistently treats them as hers, asserting no claim to them;[91] nor does the fact that her whole property consisted of such notes, and that at her request and because they were not due, he provided the wedding dress and furnished the house, give the

84. See Scarpellini v. Acheson, 7 Q. B. 864; 9 Jur. 827; Gaters v. Maddeley, 6 M. & W. 423; McNeilage v. Holloway, 1 B. & Ald. 218; Sherrington v. Yates, 12 M. & W. 855; 1 Pars. Bills & Notes, 87. If a note be payable to husband *and* wife, it would clearly survive to the latter. Richardson v. Daggett, 4 Vt. 336; Draper v. Jackson, 16 Mass. 480.

85. Mason v. Morgan, 2 Ad. & El. 30; Evans v. Secrest, 3 Ind. 545. And the wife's signature is mere surplusage where both indorse the note. *Ib.*

86. Nash v. Nash, 2 Madd. 133.

87. Scarpellini v. Acheson, 7 Q. B. 864.

88. Howman v. Corrie, 2 Vern. 190; Hart v. Stephens, 6 Q. B. 937; Stanwood v. Stanwood, 17 Mass. 57; Burr v. Sherwood, 3 Bradf. Sur. (N. Y.), 85.

89. Wall v. Tomlinson, 16 Ves. Jr., 413; Hemmingway v. Matthews, 10 Tex. 207; Tryon v. Sutton, 13 Cal. 490; James v. Groff, 157 Mo. 402, 57 S. W. 1081.

90. Evans v. Secrest, 3 Ind. 545.

91. Miller v. Aram, 37 Wis. 142.

husband a lien upon them, or amount to a reduction.[92] A collection of the wife's notes would be a reduction into possession; and so probably would be transfer and delivery, with intent to pass the property.

Where real estate of the wife is sold, and notes are given payable to her, the property changes its character, and becomes personal property in the shape of a *chose in action*.[93] So, if the notes taken for the purchase-money are in the husband's own name, the reduction is held complete.[94]

§ 172. As to Legacies or Destributive Shares.

At common law the husband was entitled to his wife's legacies.[95] The husband may assign a legacy or distributive share like any other *chose*.[96] Reduction of a legacy has been considered complete where the husband takes a quitclaim deed from the testator's residuary devisee upon condition that he shall pay this and the other legacies.[97] But some distinct act of ownership on the husband's part is necessary; and it is doubtful whether his right is complete even after a decree of distribution, the decree itself effecting no reduction. The share or legacy should be actually severed from the bulk of the estate whence it was derived.[98] The husband may then reduce into possession as in other cases. And if the executor or other party making the sale pays the cash proceeds into the husband's hands, the money belongs to him absolutely, and his receipt extinguishes all claims of his wife.[1]

92. Holmes v. Holmes, 28 Vt. 765. And see Lenderman v. Talley, 1 Houst. 523. A negotiable note given to a third party by a husband before marriage is not extinguished by the mere fact of its purchase from such party by the wife, by money belonging to her before marriage, not reduced to possession by the husband. Russ v. George, 45 N. H. 467.

93. Taggart v. Boldin, 10 Md. 104; McCrory v. Foster, 1 Iowa, 271. See Peacock v. Pembroke, 4 Md. 280; Ramsdale v. Craighill, 9 Ohio, 199.

94. Dixon v. Dixon, 18 Ohio 113; Talbot v. Dennis, 1 Carter (Ind.), 471; McCrory v. Foster, 1 Ia. 271. When secured by mortgage, the mortgage also ought to be in the husband's name. But cf. language of court in McCullough v. Ford, 96 Ill. 439.

95. Brock v. Sawyer, 39 N. H. 547.

96. Bryan v. Spruill, 4 Jones Eq. (N. C.), 27; Weems v. Weems, 19 Md. 334.

97. Howard v. Bryant, 9 Gray (Mass.), 239.

98. Short v. Moore, 10 Vt. 446; Probate Court v. Niles, 32 Vt. 775; Lewis v. Price, 3 Rich. Eq. (S. C.) 172; Walker v. Walker, 25 Mo. 367; Vanderveer v. Alston, 16 Ala. 494. As to whether the husband's note given for purchase at the administrator's sale can be set off against the wife's claim for distributive share, see Roberts v. Adams, 2 S. C. (N. S.) 337, which holds that it cannot.

1. Johnson v. Bennett, 39 Barb. (N. Y.) 237; Thomas v. Chicago, 55 Ill. 103; Plummer v. Jarman, 44 Md. 632.

Where chattels are delivered to T. on behalf of himself and the other next of kin, of whom Mrs. W. is one, and Mr. W. sells to T. his wife's share, and receives and appropriates the purchase-money, this is a clear reduction of possession.[2] Merely claiming a legacy due to his wife, if not paid before his death, is insufficient,[3] or is mere possession as administrator of an estate of her distributive share of it.[4] Where he causes a distributive share to be paid to him, there is a good reduction.[5]

§ 173. As to Money.

The following have been held good reductions of a wife's property to possession: using her money as his own,[6] investing her money in land in his own name,[7] and collection of her money, not acting as agent or trustee.[8]

§ 174. As to Shares of Stock.

The conversion of stock dividends or coupons on securities[9] is not of itself a good reduction of the stock to possession. Nothing short of the transfer of stock standing in the wife's name to the husband's name seems to be a sufficient reduction of such stock into possession;[10] the transfer to their joint names is insufficient.[11] A sale and delivery of his wife's certificate of stock, assigned to him by her in writing, has been held a good reduction to possession.[12]

Since stock which stands in the wife's name does not belong to her husband until reduced to possession by him, it follows that he cannot be made personally liable in respect to the fund where he has failed to so reduce it.[13]

2. Widgery v. Tepper, 7 L. R. 7 Ch. D., 423.

3. Donaldson v. West Branch Bank, 1 Pa. 286.

4. Hauser v. Murray, 256 Mo. 58, 165 S. W. 376.

5. Shanks v. Edmondson, 28 Grat. (Va.) 804.

6. Tucker v. Tucker's Adm'r, 165 Ky. 306, 176 S. W. 1173.

7. Miller v. Blackburn, 14 Ind. 62; Alford v. Guffy (Ky.), 115 S. W. 216; Neel's Ex'r v. Noland's Heirs, 166 Ky. 455, 179 S. W. 430; Ahlering's Ex'r v. Speckman, 30 Ky. Law, 940, 99 S. W. 973; Williams v. Keef, 241 Mo. 366, 145 S. W. 425.

8. Hart v. Leete, 104 Mo. 315, 15 S. W. 976.

9. Dunn v. Sargent, 101 Mass. 336.

10. Arnold v. Ruggles, 1 R. I. 165; 2 Bright, Hus. & Wife, 54; Slaymaker v. Bank, 10 Pa. 373; Brown v. Bokee, 53 Md. 155.

11. Nicholson v. Drury Buildings Estate Co., L. R. 7 Ch. D. 48.

12. Johnson v. Hume, 138 Ala. 564, 36 S. 421.

13. Dodgson v. Bell, 3 E. L. & Eq. 542. And see Matter of Reciprocity Bank, 22 N. Y. 9.

§ 175. Wife's Equity to Settlement — In General.

The wife's equity to a settlement, which constitutes an important branch of the English chancery jurisprudence, is closely connected with the husband's right of reduction into possession. Whenever the husband or his representative has to seek the aid of a court of chancery in order to recover his wife's property, he must submit to its order of a suitable settlement from the fund. This settlement, which is made upon the wife for the separate benefit of herself and the children as a provision for their maintenance and comfort, is known as the wife's equity.[14] Thus chancery, by a stretch of power somewhat arbitrary, interferes to do an act of justice. The doctrine seems to rest upon two grounds: first, that whoever comes into equity must do equity; second, that chancery is the special champion of women and children.[15]

The rule is the same whether the thing to be reduced into possession be a debt, legacy, or distributive share belonging to the wife, or any other *chose in action.*[16] Chancery will also restrain the husband, by injunction, from proceeding to recover a fund in the ecclesiastical or probate courts until a like provision is made; for the reason that it has a concurrent or appellate jurisdiction in the settlement of estates.[17] In this country a court of equity has sometimes gone so far as to lay hold of property for which recovery is sought in the courts of common law.[18] But the English cases do not warrant such an exercise of power.[19] The blending of equity and common-law functions in American tribunals might here jus-

14. 2 Kent, Com. 139-143, and cases cited; 1 Bright, Hus. & Wife, 230-265; 2 Story Eq. Juris., § 635.

15. Meals v. Meals, 1 Dick. (N. J.) 373; Peachey Mar. Settl., 158, 159. This jurisdiction appears to have been exercised from the earliest period. Sturgis v. Champneys, 5 M. & C. 103, per Lord Chancellor Cottenham.

16. Campbell v. Galbreath, 12 Bush (Ky.), 459; Kenney v. Udall, 5 Johns. Ch. (N. Y.) 464, 3 Cow. (N. Y.) 590; Durr v. Bower, 2 McCord. Ch. (S. C.) 368; Duvall v. Farmers' Bank of Maryland, 4 Gill & Johns. (Md.) 282; Barron v. Barron, 29 Vt. 375, 391; Abernethy v. Abernethy, 8 Fla. 243; Haviland v. Bloom, 6 Jones Ch. (N. C.) 178; Smith v. Kane, 2 Paige (N. Y.), 303.

17. Jewson v. Moulson, 2 Atk. 419; Robinson v. Robinson, L. R. 12 Ch. D. 188; Dumond v. Magee, 4 Johns. Ch. (N. Y.) 318.

18. Van Epps v. Van Deusen, 4 Paige (N. Y.), 64; note to 2 Kent, Com. 140; 2 Kent, Com. 141, 142; Corley v. Corley, 22 Ga. 178; Dearin v. Fitzpatriek, Meigs, 551. But see Matter of Miller, 1 Ashm. 323; Parsons v. Parsons, 9 N. H. 309-336; Allen v. Allen, 6 Ired. Eq. (N. C.) 293.

19. 1 Roper, Hus. & Wife, 263; Jacob's notes to 1 Roper, Hus. & Wife, 257, 258; Oswell v. Probert, 2 Ves. Jr. 682; Sturgis v. Champneys, 5 M. & C. 105; Jewson v. Moulson, 2 Atk. 419. And see Jackson v. Hill, 25 Ark. 223. According to the latest

tify a departure from the parent system, while there are doubtless States which follow the English rule in this respect.[20] Where the husband received a large fortune through his wife, and has squandered nearly the whole of it, the remaining fund may be placed where it will accumulate for her benefit or the income may be paid for her support. So if he maltreats her or otherwise conducts himself shamefully. And if he becomes insolvent the wife may have a reasonable provision secured to her out of her life estate.[21]

§ 176. Nature of Right.

But though the wife's equity to a settlement is recognized as due herself and her children, the right is so far personal to herself that it cannot be exercised by any one else, and it expires if she die pending proceedings, though there may be children surviving her.[22] The husband in such case takes the proceeds as in other cases. In fact, the latest cases show a clear disposition on the part of the court to leave a dutiful husband's interest in any such fund unimpaired, except so far as may be necessary to provide for the wife and for all children she may possibly have; for which reason a fund will be limited, after the death of the husband and in default of children of the wife, to the husband, whether he survives her or not.[23]

§ 177. Effect of Divorce or Separation.

The wife's adultery is a complete bar to the equity; and other misconduct would certainly reduce the amount if not extinguish

English decisions, the wife's equity does not extend to a reversionary interest. No settlement can be asked until the fund falls into possession; *i. e.*, until the husband has a right to receive it. Osborn v. Morgan, 8 E. L. & Eq. 192.

20. Wiles v. Wiles, 3 Md. 1.

21. Bond v. Simmons, 3 Atk. 20. As to insolvency where husband has not taken benefit of bankrupt acts, see *Ex parte* Cosegayne, 1 Atk. 192; Pryor v. Hill, 4 Bro. C. C. 142; Oswell v. Probert, 2 Ves. 682; Bell, Hus. & Wife, 121.

22. Delagarde v. Lempriere, 6 Beav. 344, per Lord Langdale; Baldwin v. Baldwin, 5 De G. & S. 319; *contra*, Steinmetz v. Halthin, 1 G. & J. 67. See Peachey, Mar. Settl., 166, 167. But not, according to the English equity practice, if she die after a certain advanced stage of the proceedings. See Rowe v. Jackson, 2 Dick. (N. J.) 604; Murray v. Elibank, 10 Ves. 92; Lloyd v. Mason, 5 Hare, 149; Bell, Hus. Wife, 128, 129; Peachey, Mar. Settl., 168, and cases cited; Baldwin v. Baldwin, 15 E. L. & Eq. 158. In Hobgood v. Martin, 31 Ga. 62, the children were allowed to file a supplemental bill after the wife's death.

23. Walsh v. Wason, L. R. 8 Ch. 482; *In re* Suggitt's Trusts, L. R. 3 Ch. 215; Croxton v. May, L. R. 9 Eq. 404.

the equity altogether.[24] But it does not follow that in case of the wife's adultery the fund would be decreed absolutely and at once to the husband; the court might wait until the anomalous relationship of the parties had been legally determined by divorce.[25] Notwithstanding a separation between husband and wife under a deed, if they come together again, and the provisions of the separation deed do not dispose meantime of the fund, the wife may claim her equity.[26] And the wife's stinginess in dealing with her separate estate, the absence of misconduct on the husband's part, and the fact that she has ample means of her own, irrespective of any allowance which might be made from the new fund, are also circumstances which may debar her from receiving an equity therein, where she and her husband are living separate.[27]

§ 178. Effect of Antenuptial Settlement or Jointure.

The husband may become the purchaser of his wife's fortune where he has made a competent settlement upon her before marriage. Regarding him in this light, chancery will in such a case not only refuse to allow the wife a settlement from the fund in litigation, but will let in his representatives after his death to make the reduction complete.[28] Lord Eldon said, however, that in order to bar the wife's equity the articles of marriage settlement should expressly state that it was in consideration of the wife's fortune, or else the contents must import it as clearly as if expressed.[29] A jointure is not an adequate settlement, for this is merely a bar of her possible dower. But any adequate settlement, *eo nomine*, seems to be an effectual bar to the wife's equity. A covenant to settle must be performed by the husband before he can be regarded as a purchaser.[30] And the cases admit that a marriage settlement

24. Ball v. Montgomery, 2 Ves. 191; Carr v. Eastabrooke, 4 Ves. 146; Peachey, Mar. Settl., 174-176; Carter v. Carter, 14 S. & M. 59; Fry v. Fry, 7 Paige (N. Y.), 462.

25. Barrow v. Barrow, 18 Beav. 529. This rule has been modified in extreme cases, however, so as to grant equity even after adultery. *In re* Lewin's Trusts 20 Beav. 378; Greedy v. Lavender, 13 Beav. 64; Ball v. Coults, 1 Ves. & B. 302.

26. Ruffles v. Alston, L. R. 19 Eq. 539.

27. Giacometti v. Prodgers, L. R. 14 Eq. 253; L. R. 8 Ch. 338. As to equity of settlement on foreclosing a mortgage see Hill v. Edmonds, 15 E. L. & Eq. 280.

28. Kent, Com., 143; Cleland v. Cleland, Prec. in Ch. 63; Poindexter v. Jeffries, 15 Gratt. (Va.) 363.

29. Druce v. Denison, 6 Ves. 395. See Salway v. Salway, Amb. 692; Carr v. Taylor, 10 Ves. 574; Doe v. Ford, 2 El. & B. 970.

30. Bell, Hus. & Wife, 413, and cases cited; Holt v. Holt, 2 P. Wms. 647; Pyke v. Pyke, 1 Ves. Sen. 376.

is not presumed to cover property accruing during coverture, but is to be confined to such as belongs to the wife at the time of settlement, unless apt words are used to indicate a different intent of the parties thereto.[31]

§ 179. Effect of Waiver.

The wife may waive her equity to a settlement; for, unlike her right of survivorship, it is the mere creature of equity. But her consent must be formally taken under the direction of the court, and apart from her husband.[32] The court will not receive the wife's consent until her share is ascertained,[33] and an order made with the wife's consent may afterwards be set aside if prejudicial to her interests.[34] If a wife who has funds in chancery be not of full age, she is incapable of giving consent to its disposition; and hence her waiver during minority will not be permitted, but the court will protect her interests as justice may require.[35]

§ 180. Effect of Fraud of Wife.

A married woman may also be precluded by her own fraud from claiming her equity against purchasers. Thus, where a married woman wrote out an assignment of her reversionary interest in a trust fund, dating it before marriage and signing it in her maiden name, in order to enable her husband to borrow money upon it, and afterwards gave to the purchasers a letter to one of the trustees of the fund, stating that she had before her marriage assigned her interest in the same to her husband,— it was held, notwithstanding some evidence of coercion in the first instance, that she was debarred from claiming a settlement.[36]

§ 181. As to Property in Hands of Third Persons.

The wife's equity does not attach to her property while in the hands of third persons. They may, if they choose, defeat it by

31. Note to 2 Kent, Com., 143. See Marriage Settlements, *post*, § 490 *et seq.*

32. 1 Dan. Ch. Pract. 95; Set. on Decrees, 255, 256; Macq., Hus. & Wife, 75; Coppedge v. Threadgill, 3 Sneed (Tenn.), 577; Ward v. Amory, 1 Curt. (U. S.) 419. See Campbell v. French, 2 Ves. 321; May v. Roper, 4 Sim. 360. Waiver by wife may be established by acts and conduct. *Ex parte* Geddes, 4 Rich. Eq. (S. C.) 301; Clark v. Smith, 13 S. C. 585.

33. Jernegan v. Baxter, 6 Madd. 32; Peachey, Mar. Settl., 181.

34. Watson v. Marshall, 19 E. L. & Eq. 569; 17 Jur. 651. See Tobin v. Dixon, 2 Met. (Ky.) 422.

35. Abraham v. Newcome, 12 Sim. 566; Phillips v. Hassel, 10 Humph. (Tenn.) 197; Cheatham v. Huff, 2 Tenn. Ch. 616; Shipway v. Ball, L. R. 16 Ch. D. 376.

36. *In re* Lush's Trusts, L. R. 4 Ch. 591. And see Sharpe v. Foy, L. R. 4 Ch. 35.

placing the fund directly in the husband's hands without the intervention of a suit. Thus, where an executor pays over a legacy accruing to the wife, taking a proper receipt from the husband, a court of equity will not call it back from the husband to enable a settlement to be enforced,[37] but it is otherwise if the executor pays the legacy over after proceedings are commenced. For as soon as the bill is filed the court becomes the trustee of the fund.[38]

As to assignees and legal representatives of the husband, the rule is the same. Their application to the court is treated as the husband's would have been; especially if the assignment in question has not effected a complete reduction so as to bar the wife's survivorship; a topic which has already been sufficiently discussed.[39] The court disregards the party who asks equity, and fastens the obligation upon the property itself.[40]

But the wife's right of equity to a settlement is something distinct from her right of survivorship; that is, her right upon her husband's death to property not reduced by him.[41] And even if the husband has assigned the fund, the court will protect such equity upon due application.[42] The husband's assignee for valuable consideration takes subject to the wife's equity, although her survivorship may have been barred by the assignment.[43] She may ask for such settlement out of her *choses* which the husband's

37. Glaister v. Hewer, 8 Ves. 205; Murray v. Ellibank, 10 Ves. 90; Bell, Hus. & Wife, 115; Pool v. Morris, 29 Ga. 374. It has been held in Missouri that where her choses have been fully vested in the husband, a court cannot devest them to make a settlement for her. Hart v. Lette, 104 Mo. 315, 15 S. W. 976.

38. Murray v. Elibank, 10 Ves. 90; Delagarde v. Lempriere, 6 Beav. 347; Wiles v. Wiles, 3 Md. 1; Crook v. Turpin, 10 B. Mon. (Ky.) 243. But see Dearin v. Fitzpatrick, Meigs. 551.

39. Oswell v. Probert, 2 Ves. Jr. 679; Jacobson v. Williams, 1 P. Wms. 382; Jewson v. Moulson, 2 Atk. 417; Earl of Salisbury v. Newton, 1 Eden, 370; Bosvil v. Brander, 1 P. Wms. 458; Kenney v. Udall, 5 Johns. Ch. (N. Y.) 464; McCaleb v. Crichfield, 5 Heisk. (Tenn.) 288; 2 Bright, Hus. & Wife, 236. See discussion of Purdew v. Jackson, and other cases, *supra;* Carter v. Carter, 4 S. & M. (Miss.) 59.

40. Aguilar v. Aguilar, 5 Mad. 414; Taunton v. Morris, L. R. 11 Ch. 779; Osborne v. Edwards, 3 Stockt. (N. J.) 73. See 2 Story, Eq. Juris., § 1414; Wiles v. Wiles, 3 Md. 1; Guild v. Guild, 16 Ala. 121.

41. Norris v. Lantz, 18 Md. 260; Hall v. Hall, 4 Md. Ch. 283.

42. Osborne v. Edwards, 3 Stockt. (N. J.) 73.

43. Moore v. Moore, 14 B. Mon. (Ky.) 259; 2 Story, Eq. Juris., § 1412, and cases cited. In McCaleb v. Crichfield, 5 Heisk. (Tenn.) 288, the assignee was held entitled to the residuary interest under a will assigned by husband and wife jointly, no proceedings having been set on foot by the latter during her life to avoid the assignment or enforce her equity.

assignee in insolvency has reduced to possession, if she acts before the estate is distributed.[44] But the wife's antenuptial debts must first be provided for.[45] An equity may be allowed the wife out of land in controversy purchased by an insolvent husband with her personalty not reduced to possession by him, where a creditor seeks to compel a conveyance to himself of the land.[46]

§ 182. As to Vested Estate.

As to all vested interests, whether acquired by gift, devise, or inheritance, before or during coverture, the rule of equity is that the property is subject to the settlement of a suitable provision for her support, unless expressly waived by her, or forfeited through her misconduct; and this settlement will be protected equally against the husband, his creditors or his assignees, with or without value, so far as chancery can properly exercise jurisdiction in the premises.[47]

§ 183. As to Life Estates and Reversions.

A distinction seems to have been made, however, in the English chancery courts, between cases in which the wife takes an absolute interest, and those in which she takes a life interest only. In cases where the wife takes an absolute interest the provision is for her and her children. But where her interest is only for life the provision is for her separate benefit alone; and it is impossible in such cases to make any provision for children; the question consequently is one between the husband and wife simply. So, too, where the wife's interest is absolute, her right to a provision for herself and children is independent of the conduct of her husband; but where she takes a mere life interest, her right arises from the non-fulfilment of his obligations. Finally, where the wife has an absolute interest, the purchaser takes subject to a settled equity; but where the wife takes for life only, such equity may not exist.[48] This reasoning, however, which is somewhat artificial, does not commend itself to the latest authorities; for it is recently held in

44. Davis v. Newton, 6 Metc. (Mass.) 537; Hinckley v. Phelps, 2 Allen (Mass.), 77; Gardner v. Hooper, 3 Gray (Mass.), 398; James v. Gibbs, 1 Pat. & H. (Va.) 277.

45. Barnard v. Ford, L. R. 4 Ch. 247.

46. Sims v. Spalding, 2 Duv. 121.

47. Poindexter v. Jeffries, 15 Grat. (Va.) 363; Barron v. Barron, 24 Vt. 375.

48. Tidd. v. Lister, on Appeal, 3 De G., M. & G. 857; s. c. 10 Hare, 152; Peachey, Mar. Settl., 162-164; cases of Stanton v. Hall, 2 Russ. & M. 175, and other cases, commented upon in Tidd v. Lister, *ib.*

the English Chancery that the wife is entitled to her equity to a settlement out of property in which she has only a life interest, as out of property to which she has an absolute interest, and that no distinction between the two cases is tenable.[49]

Where the fund is payable in terms for the benefit of husband and wife during their joint lives, it is inconsistent with such a trust to allow the wife an equity therein.[50]

The wife's equity to a settlement does not extend to a reversionary interest. The settlement of such a fund cannot be asked for until it falls into possession; that is, until the husband has a right, subject to the wife's equity, to receive it.[51] Where part of a reversionary fund falls into possession, the wife's equity may be settled upon her from such part, with liberty to apply upon the remaining portion of the fund falling into possession.[52]

§ 184. As to Property in Litigation.

Where the interest claimed by the husband in right of his wife is merely equitable, or where, though in its nature legal, it becomes from collateral circumstances the subject of a suit in equity, the wife has a right to a provision out of the fund. As where, for example, it is vested in trustees who have the legal estate, the wife, or rather the husband in her right, having only the equitable or beneficial interest.[53] But the wife's equity attaches only to such property as her husband was entitled to receive in his marital right.[54] The smallness of a fund is no bar to a settlement.[55] Nor matters it that a fund is not actually distributable; for a wife may proceed for her equity pending administration; and the more so if reasons press, such as her delicate health and her husband's insolvency.[56]

Equity courts will generally preserve the wife's portion from the

49. Taunton v. Morris, L. R. 8 Ch. D. 453, and cases cited; L. R. 11 Ch. D. 779.

50. Ward v. Ward, L. R. 14 Ch. D. 506.

51. Osborn v. Morgan, 8 E. L. & Eq. 192; 9 Hare, 432.

52. Marshall v. Fowler, 15 E. L. & Eq. 430.

53. Macq., Hus. & Wife, 69; *Ex parte* Blagden, 2 Rose, 251; Oswell v. Probert, 2 Ves. Jr. 680; Sturgis v. Champneys, 5 M. & C. 103.

54. Knight v. Knight, L. R. 18 Eq. 487. Here an executor, who was husband of a legatee, was indebted to the testator, and was unable to discharge his indebtedness; and it was held that the wife had no equity.

55. *In re* Kincaid's Trusts, 17 E. L. & Eq. 396. A strong instance of the liberality of the court of equity is afforded in Scott v. Spashett, 16 Jur. 157, 9 E. L. & Eq. 265.

56. Robinson v. Robinson, L. R. 12 Ch. H. D. 188.

capital of the fund which is made the subject of equity proceedings, and the husband will be allowed to appropriate the income of the fund without hindrance.[57] But a liberal discretion is exercised by the court, according to the circumstances; even, it may be, to the disadvantage of the husband's creditors.[58]

§ 185. Amount of Settlement.

There is no definite rule fixed as to the proportion which the wife should receive for her equity, but such settlement should be reasonable and equitable in amount, either the whole or part of the property, in the discretion of the court.[59] Where a husband lives with and supports his wife, her settlement may be made to take effect at his death or when he ceases to support her, but where he is insolvent or unable to furnish support, it may be made to take effect at once.[60]

Such awards regard both wife and children. The amount is regulated at discretion and will depend upon a variety of circumstances, such as the extent of the fund, the husband's income from other sources, the funds he may have already received through his wife, the extent of former settlements, the size of his dependent family, and the marital conduct of both parties.[61] Where the husband is shown to be cruel, dissolute, or improvident, or where he has abandoned his family and neglected to provide for their support, a court of chancery will not hesitate to set apart at least the greater part of the fund for the benefit of the wife and children.[62] So, if he be insolvent, the wife is favored, to the exclusion, if necessary, of his creditors. In one case it was observed by Alderson, B., that the wife and children ought to have the whole fund as against the husband's assignee in insolvency, and he said that if he was bound by the practice of the court to take out any part of it, he would take out one shilling.[63] In later instances the

57. Bond v. Simmons, 3 Atk. 20; Elliott v. Cordell, 5 Madd. 156; Vaughan v. Buck, 13 Sim. 404.

58. Seigel v. Quigley, 119 Mo. 76, 24 S. W. 742; Montefiore v. Behrens, L. R. 1 Eq. 171.

59. Poindexter v. Jeffries, 15 Gratt. (Va.) 363.

60. Poindexter v. Jeffries, 15 Grat. (Va.) 363.

61. 2 Bright, Hus. & Wife, 240, 241, and cases ctied; Freeman v. Fairlee, 11 Jur. 447; Gardner v. Marshall, 14 Sim. 575; Green v. Otte, per Sir J. Leach, 1 S. & S. 254; Farrar v. Bessey, 24 Vt. 89; Bagshaw v. Winter, 11 E. L. & Eq. 272; Cutler's Trust, 6 E. L. & Eq. 97; McVey v. Boggs, 3 Md. Ch. 94; Beeman v. Cowser, 22 Ark. 429.

62. Coster v. Coster, 9 Sim. 597.

63. Brett v. Greenwell, 3 Y. & C. Eq. Ex. 230. But see Pugh, *Ex parte*, 12 E. L. & Eq. 350.

whole of a small fund has been set apart for wife and children where the husband was insolvent or guilty of gross misconduct.[64]

64. Most frequently one half has been allowed the wife as her equity under ordinary circumstances. 2 Bright, Hus. & Wife, 241, and cases cited; Peachey, Mar. Settl., 176, 177. Where the wife has been allowed a divorce for adultery, the whole fund was settled upon her, the court justly observing that if adultery of the wife barred her from receiving, adultery of the husband ought to bar him equally. Burrows v. Burrows, 12 E. L. & Eq. 268. See rule as stated in *Re* Suggitt's Trusts, L. R. 3 Ch. 215; White v. Gouldin, 27 Gratt. (Va.) 491. In Spirett v. Willows, L. R. 1 Ch. 520, L. R. 4 Ch. 407, three fourths of the fund were settled on wife and children, the husband being a bankrupt. See form of settlement there prescribed. The whole fund was settled on the wife and children in White v. Cordwell, L. R. 20 Eq. 644, the husband being insolvent and destitute. And see Taunton v. Morris, L. R. 8 Ch. D. 453; L. R. 11 Ch. D. 779, where it is held that as between life estate and absolute interest there ought to be no distinction concerning the amount of property to be settled.

CHAPTER XI.

EFFECT OF COVERTURE UPON WIFE'S CHATTELS REAL AND REAL ESTATE.

§ 186. Wife's Chattels Real; In General.

Chattels real, such as leases and terms for years, have many of the incidents of personal property. But as between husband and wife they differ from personal chattels. The title acquired therein

by the husband is of a somewhat anomalous nature; for upon them marriage operates an executory gift, as it were, the husband's title being imperfect unless he does some act to appropriate them before the wife's death. He may sell, assign, mortgage, or otherwise dispose of his wife's chattels real without her consent or concurrence,[65] excepting always such property as she may hold by way of settlement or otherwise as her separate estate.[66] Chattels real, unappropriated during coverture, vest in the wife absolutely, if she be the survivor. In all these respects they resemble *choses in action.* But if the husband be the survivor, such chattels will belong to him *jure mariti,* and not as representing his wife. And in this respect they resemble *choses in possession.*

As to the wife's chattels real, therefore, husband and wife are in possession during coverture by a kind of joint tenancy, with the right of survivorship each to the other; not, however, like joint tenants in general, but rather under the title of husband and wife; since husband and wife are, in contemplation of law, but one person, and incapable of holding either as joint tenants or tenants in common.[67]

§ 187. Nature of Husband's Interest.

They may also be bequeathed by the husband by will executed during marriage, or by other instrument to take effect after his death; with, however, this result: that if the wife dies first the bequest will be effectual, not having been subsequently revoked by the husband; while, if the husband dies first, the wife will take the chattel in her own right, unaffected by any will which he may have made, or by any charge he may have created.[68]

It would appear that any assignment of a chattel real by the husband will completely appropriate it, even though made without consideration.[69] And if a single woman has a decree to hold and enjoy lands until a debt due her has been paid,— known at the old law as an estate by *elegit*.— and she afterwards marries, her husband may make a voluntary assignment so as to bind her.[70] The

65. Co. Litt. 46c; 2 Kent. Com. 134; Sir Edward Turner's Case, 1 Vern 7; Whitmarsh v. Robertson, 1 Coll. New Cases, 570. As to what are chattels real, see 1 Schouler Pers. Prop. 29, 45-73.

66. Tullett v. Armstrong, 4 M. & C. 395; Draper's Case, 2 Freem. 29; Bullock v. Knight, Ch. Ca. 266.

67. 2 Kent Com. 135; Co. Litt. 351b; Butler's note 304 to Co. Litt. lib. 3; 351a.

68. Co. Litt. 351a, 466; Roberts v. Polgrean, 1 H. Bl. 535.

69. Cateret v. Paschall, 3 P. Wms. 200. But see note to 1 P. Wms. 380.

70. Merriweather v. Brooker, 5 Litt. 256; Paschall v. Thurston, 2 Bro. P. C. 10.

right of appropriating the wife's chattels real is, therefore, to be distinguished from the right of reducing things in action into possession. The husband's interest in his wife's chattels real may be called an interest in his wife's right, with a power of alienation during coverture; and an interest in possession, since such chattels are already in possession, but lying in action.[71]

As the husband is entitled to administer in his wife's right when she is executrix or administratrix, he may release or assign terms for years or other chattels real vested in her as such.[72] But if he be entitled to a term of years in his wife's right as executrix or administratrix, and have the reversion in fee in himself, the term will not be merged; for, to constitute a merger, both the term and the freehold should vest in a person in one and the same right.[73]

An exception to the husband's right by survivorship to his wife's chattels real occurs in case of joint tenancy. If a single woman be joint tenant with another, then marries and dies, the other joint tenant takes to the exclusion of her husband surviving her; for the husband's title is the newer and inferior one.[74]

Where, during coverture, a lease for years is granted to the wife, adverse possession, which commences during coverture, may be treated as adverse either to the wife or to the husband.[75]

When the husband succeeds to his wife's chattel real upon surviving her, or appropriates it during coverture, he takes it subject to all the equities which would have attached against her. In other words, being not a purchaser for a valuable consideration, he can claim no greater interest than she had. Thus, where the wife's chattel interest is subject to the payment of an annuity, the husband must continue to make payment so long as the incumbrance lasts. And though he may not in all cases be bound on her covenant to make new leases, yet if he does so the equity of the annuity will attach upon them successively.[76]

The wife's chattels real may be taken on execution for the debts of the husband while coverture lasts, by which means the title becomes transferred by operation of law to the creditor, and the wife's right, even though she should survive her husband, is gone.[77]

71. Mitford v. Mitford, 9 Ves. 98.

72. Arnold v. Bidwood, Cro. Jac. 318; Thrustout v. Coppin, W. Bl. 801.

73. Co. Litt. 338b; 1 Bright, Hus. & Wife, 97, and cases cited.

74. Co. Litt. 185b.

75. Doe v. Wilkins, 5 Nev. & M. 435.

76. Moody v. Matthews, 7 Ves. 183; Rowe v. Chichester, Amb. 719. On the question of contribution by annuitants, see Winslowe v. Tighe, 2 Ball & B. 204; Hubbs v. Rath, 2 *ib.* 553.

77. 2 Kent Com. 134; Miller v. Williams, 1 P. Wms. 258.

§ 188. Husband's Right to Alienate.

The law enables the husband during coverture to defeat his wife's interest by survivorship by an absolute alienation or disposition of the whole term, either with or without consideration.[78] And the same rule applies to the wife's trust terms as to her legal terms.[79] In order to make it effectual, the right of the party in whose favor the disposition is made must commence *in interest* during the life of the husband; but it is not necessary that it should commence *in possession* during that period. Thus the husband, though he cannot bequeath these chattels by will, as against the wife's right by survivorship, may grant an underlease for a term not to commence until after his death; and this act will divest the right of the wife under the original lease so far as the underlease is prejudicial to such right.[80] Nor need his disposition cover the whole chattel, since the disposition necessarily operates *pro tanto*.[81] Nor need it be absolute, since a conditional disposition is good if the condition subsequently takes effect.[82] And the law enables the husband to dispose not only of the wife's interest in possession, but also of her possibility or contingent interest in a term, unless where the contingency is of such a nature that it cannot happen during his life.[83]

A distinction is, however, made between cases where the disposition is intended of the whole or of part of the property, and where it is intended as a collateral grant of something out of it. In the latter case the transaction will not bind the wife; for if she survive her husband, her right being paramount, and her interest in the chattel not having been displaced, she will be entitled to it absolutely free from such incumbrance.[84]

§ 189. What will bar Wife's Rights.

The husband may by other acts than express alienation divest his wife's title, and defeat her rights by survivorship in her chattels real. Thus, if the husband, holding a term in right of his wife,

78. 1 Bright, Hus. & Wife, 98; Grute v. Locroft, Cro. Eliz. 287; Jackson v. McConnell, 19 Wend. (N. Y.) 175.

79. Tudor v. Samyne, 2 Vern. 270 (incorrectly reported, according to note, 1 Bright, Hus. & Wife, 99); Sir Edward Turner's Case, 1 Ch. Ca. 307; Packer v. Windham, Prec. in Ch. 412.

80. Grute v. Locroft, Cro. Eliz. 287; Bell, Hus. & Wife, 104, 105.

81. Sym's Case, Cro. Eliz. 33; Lofteris's Case, *ib.* 276; Riley v. Riley, 4 C. E. Green (N. J.) 229.

82. Co. Litt, 46b. But see 4 Vin. Abr. 50, pl. 14.

83. Doe d. Shaw v. Steward, 1 Ad. & El. 300; 1 Bright, Hus. & Wife, 100. And see Donne v. Hart, 2 Russ. & My. 360.

84. Co. Litt. 184b; 1 Bright, Hus. & Wife, 103.

grant a lease of the lands covered by the term, for the lives of himself and his wife, the wife's term will thereby merge, and her right in it be defeated.[85] Or if, while in possession, under a lease to himself and the wife, the husband should accept from the lessor a feoffment of the lands leased, the term would be extinguished and the wife's right along with it; for the livery would amount to a surrender of the term.[86]

On the other hand, there are acts by the husband, which, although they amount to the exercise of an act of ownership, yet, as they do not pass the title, will not defeat the wife's right by survivorship. An instance of the latter is that of the husband's mortgage of his wife's chattels real; or, what is the same thing in equity, a covenant to mortgage. This is in reality a disposition as security, and until breach of condition the mortgagee has no further title. But, in order to protect the mortgagee's rights, equity treats the mortgage or covenant as good against the wife to the extent of the money borrowed; that once paid, the chattels will continue hers.[87] After breach of condition, the mortgagee's estate becomes absolute; or, at least, he can make it so by foreclosure; and the alienation of the term being then completed at law, the wife's legal right by survivorship is defeated; subject, however, to the equity of redemption, where the husband has not otherwise disposed of that likewise.[88] So, too, transactions, not constituting mortgages in the ordinary sense of the term, may yet be so construed in equity where such was their substantial purport. And while the intention of the husband to work a more complete appropriation will be justly regarded by the court, the mere circumstance of a proviso in the conveyance for redemption, pointing to a mode of reconveyance not in conformity with the original title, will not, it seems, debar the wife from asserting her rights by survivorship.[89]

As to the wife's equity for a settlement, however, it is held that where a husband mortgages the legal interest in a term of years belonging to him in right of his wife, no such equity arises on a

85. 2 Roll. Abr. 495, pl. 50.

86. Downing v. Seymour, Cro. Eliz. 912. And see Lawes v. Lumpkin, 18 Md. 334.

87. Bates v. Dandy, 2 Atk. 207; Bell, Hus. & Wife, 107; 1 Bright, Hus. & Wife, 106.

88. See Pitt. v. Pitt, T. & R. 180; 1 Prest. on Estates, 345.

89. Clark v. Burgh, 9 Jur. 679. And see *In re* Betton's Trust Estates, L. R. 12 Eq. 553; Pigott v. Pigott, L. R. 4 Eq. 549.

claim to foreclose this mortgage against the husband and wife as defendants.[90]

Among the miscellaneous acts of the husband, which will defeat the wife's survivorship to her chattels real, are the following: A disseverance of his wife's joint tenancy during coverture.[91] An award of the term to the husband, if carried into effect.[92] The husband's criminal acts; such as attainder.[93] So, too, his alienage.[94] Lord Coke considered that ejectment recovered by the husband in his own name would work appropriation; but he was probably in error.[95] Waste operates as a forfeiture of a term.[96] And finally, the husband's creditors may sell the wife's chattels real on execution, and by their own act determine her interest altogether.[97] But it is held that the wife's survivorship is not defeated by such acts of her husband as erecting buildings on the leasehold premises; and making a mortgage, sale, or lease of part bars the wife only so far.[98]

§ 190. Effect of Deed to Wife.

Independently of statute, a wife may take by gift, grant or devise,[99] or by descent.[1] In New Hampshire it is held that a deed to a *feme covert*, made with her own and her husband's assent, vests the title legally in her.[2] In Pennsylvania, if land conveyed to her be incumbered, it passes to her subject to that incumbrance.[3] And in Vermont it has been held that a deed of gift to a wife during coverture, if accepted by her husband, is accepted by her, and that her refusal apart from him is of no consequence.[4]

And since in the tenure of lands and the mode of conveyance the law in this country has always varied considerably from that of England, the rights of married women in other respects may be

90. Hill v. Edmonds, 15 E. L. & Eq. 280.

91. Co. Litt. 185b; Plow. Com. 418.

92. Oglander v. Baston, 1 Vern. 396; note of Jacob to 1 Roper, Hus. & Wife, 185, and cases commented upon.

93. Co. Inst. 351a; 4 Bl. Com. 387; Steed v. Cragh, 9 Mod. 43.

94. 2 Bl. Com. 421; 4 Bl. Com. 387.

95. See Jacob's note to 1 Roper Hus. & Wife, 185; Co. Litt. 46b; 4 Vin. Abr. 50, pl. 18.

96. Co. Litt. 351.

97. Miles v. Williams, 1 P. Wms. 258; Co. Litt. 351.

98. Riley v. Riley, 4 C. E. Green (N. J.) 229.

99. Sanguinett v. Webster, 127 Mo. 32, 29 S. W. 698; Shoptaw v. Ridgeway's Adm'r, 22 Ky. Law, 1495, 60 S. W. 723; Brunette v. Norber, 130 Wis. 632, 110 N. W. 785.

1. Glasgow v. Missouri Car & Foundry Co., 229 Mo. 585, 129 S. W. 900.

2. Gordon v. Haywood, 2 N. H. 402. See Leach v. Noyes, 45 N. H. 364.

3. Cowton v. Wickersham, 54 Pa. 302.

4. Brackett v. Wait, 6 Vt. 411.

different. Thus it would seem that the joint assent of husband and wife in accepting a title should be as good as in granting one.[5] In Texas a wife may, with the consent of her husband, settle on and purchase public land.[6]

§ 191. Husband's Right in Real Estate of Wife; General Rule Stated.

Now, as to the effect of coverture on the wife's real estate. By marriage, the husband becomes entitled to the usufruct of all real estate owned by the wife at the time of her marriage, and of all such as may come to her during coverture. He is entitled to the rents and profits during coverture. His estate is, therefore, a freehold. But it will depend upon the birth of a child alive during coverture, whether his estate shall last for a longer term than the joint lives of himself and wife, or not; that is to say, whether he acquires the right of curtesy initiate, to be consummated on the death of the wife leaving him surviving.[7] Before issue born the spouses are seized jointly of a freehold for life in her land.[8] Where the husband is tenant by the curtesy initiate, her right is that of reversioner,[9] or remainder man.[10] After her death, if he survived her, he takes an estate for life, with remainder to her heirs.[11]

In the event of birth of living issue, his interest lasts for his own life, whether his wife dies before him or not. If there be no child born alive, his interest lasts only so long as his wife lives. In either case, he has not an absolute interest, but only an estate for life, and his right is that of beneficial enjoyment. When his estate has expired, the real estate vests absolutely in the wife or

5. 1 Washb. Real Prop. 280.

6. McClintic v. Midland Grocery & Dry Goods Co. (Tex.), 154 S. W. 1157; Barnett v. Murray (Tex.), 54 S. W. 784; Lee v. Green, 24 Tex. Civ. 109, 58 S. W. 847.

7. State *ex rel.* Armour Packing Co. v. Dickmann, 146 Mo. App. 396, 124 S. W. 29; Gale v. Oil Run Petroleum Co., 6 W. Va. 200; Chilton v. Hannah, 107 Va. 661, 60 S. E. 87; Dotson v. Dotson, 172 Ky. 641, 189 S. W. 894; Wiggins v. Johnson, 12 Ky. Law, 276, 1 S. W. 643; Evans v. Kunze, 128 Mo. 670, 31 S. W. 123; Otto f. Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67, L. R. A. 1918C, 1009; Bishop v. Readsboro Chair Mfg. Co., 85 Vt. 141, 81 A. 454. See *post*, Dissolution by Death, as to Curtesy.

8. Brooks v. Hubble (Va.), 27 S. E. 585.

9. Winestine v. Liglatzki-Marks Co., 77 Conn. 404, 59 A. 496; Hudgins v. Chupp, 103 Ga. 484, 30 S. E. 301; De Hatre v. Edmunds, 200 Mo. 246, 98 S. W. 744; Breeding v. Davis, 77 Va. 639, 46 Am. R. 740; P. Ballantine & Sons v. Fenn, 88 Vt. 166, 92 A. 3.

10. Powell v. Bowen (Mo.), 214 S. W. 142.

11. *In re* Riva, 83 N. J. Eq. 200, 90 A. 669.

her heirs, and the husband's relatives have no further concern with it.[12]

While, therefore, the husband has the beneficial enjoyment of his wife's freehold property during coverture, at the common law, the ownership remains in the wife. Herein, her right becomes suspended, not extinguished, by her marriage. The inheritance is in her and her heirs.

Consequently, the husband may collect and dispose of the rents.

Besides the rents and profits during coverture, the husband, if the survivor, is entitled to all arrears accrued up to the time of his wife's death. Such property is not treated like the wife's *choses in action,* not reduced to possession. Accordingly, he may maintain suit after coverture to recover all rents and profits which had accrued while coverture lasted. And where the wife joins her husband in a lease, the covenant for payment of rent is for the husband's benefit alone while the usufruct continues.[13] But it would appear to be otherwise where rent is reserved to husband and wife, and *her* heirs and assigns.[14]

In all cases, emblements or growing crops go to the husband or his representatives at the termination of his estate.[15] Where spouses occupy her land jointly, he is not liable for rent in the absence of a special agreement,[16] since in such case he occupies as tenant as distinctly as though a lessee.[17] The same is true where he continues to occupy after her death, being then tenant in common with her heirs.[18]

The freehold which the husband acquires in his own right in the real estate of his wife during her coverture is a subject upon which

12. Co. Litt. 351a; 2 Kent Com. 130; 1 Bac. Abr. 286; Junction Railroad Co. v. Harris, 9 Ind. 184; Clarke's Appeal, 79 Pa. 376; Rogers v. Brooks, 30 Ark. 612. The husband's rights and liabilities attach to property bought by himself and held in his name as trustee for his wife. Pharis v. Leachman, 20 Ala. 662. But not, as will be seen hereafter, to his wife's separate real estate.

13. 1 Washb. Real Prop. 44; Co. Litt. 351b; Jones v. Patterson, 11 Barb. (N. Y.) 572; Matthews v. Copeland, 79 N. C. 493.

14. Hill v. Saunders, 4 B. & C. 529. The wife need not be joined in such suits for rent. Clapp v. Houghton, 10 Pick. (Mass.) 463; Beaver v. Lane, 2 Mod. 217; Shaw v. Partridge, 17 Vt. 626; Edrington v. Harper, 3 J. J. Marsh. (Ky.) 360; Bailey v. Duncan, 4 Mon. (Ky.) 260.

15. Reeve Dom. Rel. 28, and cases cited; Weems v. Bryan, 21 Ala. 302; Spencer v. Lewis, 1 Houst. (Del.) 223.

16. Davis v. Watts, 90 Ind. 372; Coleman v. Dallam, 7 B. Mon. (Ky.) 323.

17. Rowe v. Kellogg, 54 Mich. 206, 19 N. W. 957.

18. Kirchgassner v. Rodick, 170 Mass. 543, 49 N. E. 1015.

the wife's devise cannot operate, more than her conveyance, independently of his permission.[19]

§ 192. What Law Governs.

A Married Women's Act cannot take away or impair marital rights of a husband which vested before its enactment.[20] The courts of Missouri will enforce the vested rights of a spouse in the estate of the other acquired under the law of another State where the spouses resided before coming to Missouri, though such rights could not have been acquired under its law.[21]

§ 193. As to Estates in Expectancy.

At common law the marital rights of the husband do not attach to realty in which the wife has only a remainder or reversion expectant upon the termination of a precedent life estate.[22] Mere contingencies of the wife, which cannot happen before the death of either spouse, cannot be attached, therefore, by creditors of the husband;[23] nor landed expectancies in general while continuing expectant.[24]

§ 194. As to Life Estates and Joint Tenancies.

If the wife at the time of her marriage has a life estate in lands, her husband becomes seised of such estate in the right of his wife, and he is entitled to the profits during coverture. So if it were granted to a trustee for her own use. And the same rule applies whether the estate be for the life of the wife or of some other person. If the estate be for the wife's own life it terminates at her death, and the husband has no further interest in it. But if it be an estate for the life of another person who survives her, the husband takes the profits during the remainder of such person's life as a special occupant of the land. The husband's representatives in either case take crops growing on the land at the time of his death.[25] But the husband might, at common law, take a release or confirmation to enlarge his life estate.[26]

19. Clarke's Appeal, 79 Pa. 376. Murray v. Murray, 102 Kan. 184, 170 P. 393; Dietrich v. Deavitt, 81 Vt. 160, 69 A. 661.

20. Rutledge v. Rutledge (Mo.), 119 S. W. 489.

21. Rice v. Shipley, 159 Mo. 399, 60 S. W. 740.

22. Doane v. Black, 132 Ga. 451, 64 S. E. 646.

23. Shores v. Carey, 8 Allen (Mass.) 425; Baker v. Flournoy, 58 Ala. 650; Horusby v. Lee, 2 Madd. Ch. 16; Allen v. Scurry, 1 Yerg. (Tenn.) 36; Sale v. Saunders, 24 Miss. 24.

24. Osborne v. Edwards, 3 Stockt. (N. J.) 73; Baker v. Flournoy, 58 Ala. 650.

25. Kent Com. 134; 1 Bright, Hus. & Wife, 112, 113.

26. Co. Litt. 299.

A husband acquires, by his marriage, the right to use and occupy, during coverture, lands held by his wife in joint tenancy.[27]

§ 195. As to Property in Possession of Third Person.

The rule seems to be general that the husband's marital rights do not attach to property which is in the actual and rightful possession of another, and of which he cannot obtain possession during coverture without becoming a trespasser; notwithstanding the wife may have rights therein after his death,[28] nor, if she was a widow when married to him, to her dower under a former marriage till it was allotted.[29] Lands continuing undisposed of, and belonging to an unsettled estate in which the wife acquires an undivided interest, the husband cannot reduce to possession to his wife's exclusion.[30]

§ 196. Rights of Husband's Creditors.

The husband's interest in his wife's real estate is liable for his debts, and may be taken on execution against him. But nothing more than the husband's usufruct is thereby affected; nor can the attachment or sale affect the wife's ultimate title.[31] The rule in Massachusetts is to allow the purchaser to take the rents and profits for a definite period, or the whole life estate, at an appraisal of the value founded on a proper estimate of the probability of human life. But where the whole life estate is of more value than the amount of the execution, the more proper, and perhaps the only mode, is the former.[32] It has been held that the husband, under a *bona fide* deed of separation, without trustees, executed before judgment, may relinquish to his wife all interest in her lands, and thus avoid the demands of his creditors upon the property, even though an annuity be reserved to himself.[33] And it is certain that

27. Bishop v. Blair, 36 Ala. 80; Royston v. Royston, 21 Ga. 161.

28. Doane v. Black, 132 Ga. 451, 64 A. 646; Arnold v. Limeburger, 122 Ga. 72, 49 S. E. 812; Hair v. Avery, 28 Ala. 267.

29. Smith v. Cunningham, 79 Miss. 425, 30 So. 652 (second husband).

30. Hooper v. Howell, 50 Ga. 165.

31. 2 Kent Com. 131; Babb v. Perley, 1 Me. 6; Mattocks v. Stearns, 9 Vt. 326; Perkins v. Cottrell, 15 Barb. (N. Y.) 446; Brown v. Gale, 5 N. H. 416; Canby v. Porter, 12 Ohio, 79; Williams v. Morgan, 1 Litt. 168; Nichols v. O'Neill, 2 Stockt. (N. J.) 88; Montgomery v. Tate, 12 Ind. 615; Lucas v. Rickerich, 1 Lea (Tenn.), 726; Sale v. Saunders, 24 Miss. 24; Cheek v. Waldrum, 25 Ala. 152; Schneider v. Starke, 20 Mo. 269. But see Jackson v. Suffern, 19 Wend. (N. Y.) 175. And see Rice v. Hoffman, 35 Md. 344, as to the liability extending to the husband's interest as tenant by the curtesy.

32. Litchfield v. Cadworth, 15 Pick. (Mass.) 23.

33. Bonslaugh v. Bonslaugh, 17 S. & R. (Pa.) 361. But see Bowyer's Appeal, 21 Pa. 210.

the sheriff's deed cannot convey a greater interest than the defendant has at the time of attachment or of levy and sale.[34] Such a sale will pass only the husband's possessory right.[35] Therefore, where a statute allows the husband a distinctive share in his wife's lands in the event of his survivorship, no such interest passes to the purchaser of lands sold on execution for his debts during her life.[36] Since the husband's life interest is liable for his own debts, it is liable for the debts of the wife *dum sola.*[37] And it is held in Pennsylvania that where a husband has conveyed his life estate in fraud of his creditors, they may levy upon the growing crops.[38] It is held that land purchased by a married woman with the proceeds of a legacy which the husband has declined to reduce into possession, is not liable for the husband's debts.[39]

§ 197. Husband's Power to Alienate Fee.

The husband alone has power at common law to bind or alienate the wife's lands during coverture. This right lasts, at any rate, during their joint lives (provided the parties are not in the meantime divorced); and if the husband becomes a tenant by curtesy, it lasts during his whole life. But the husband's power is commensurate with his estate. He cannot incumber the property beyond the period of his life interest, nor prevent his wife, if she survives him, or her heirs after his death, from enjoying the property free from all incumbrances which he may have created.[40] Under the ancient law of tenures the husband could transfer the property so as to vest it in the grantee, subject to the wife's entry by writ *sui in vita;* for his act amounted to a discontinuance. Statute 32 Hen. VIII. c. 28, was remedial in its effect, so far as to give the wife her writ of entry, notwithstanding her husband's conveyance. Copyhold lands followed a different rule, not being considered within the letter or the equity of this statute. But by the more recent statutes of 3 & 4 Will. IV. c. 27, and c. 74, and 8 & 9 Vict. c. 106, fines and recoveries have been abolished and feoffments deprived of their tortious operation; and it is enacted

34. Williams v. Amory, 14 Mass. 20; Johnson v. Payne, 1 Hill (N. Y.) 111; Rabb v. Aiken, 2 McC. Ch. (S. C.) 119.

35. Hall v. French, 165 Mo. 430, 65 S. W. 769.

36. Starke v. Harrison, 5 Rich. (S. C.) 7.

37. Moore v. Richardson, 37 Me. 438.

38. Stehman v. Huber, 21 Pa. 260.

39. Coffin v. Morrill, 2 Fost. (N. H.) 352. And see Sims v. Spalding, 2 Duv. 121.

40. Boyle v. Graham, 32 Mo. 66; 2 Kent Com. 133.

that no discontinuance or warranty made after the 31st day of December, 1833, shall defeat any right of entry or action for the recovery of land. At the present day there is, therefore, no mode of conveyance in the English law by which the husband can convey more than his own estate in his wife's lands.[41]

These latter statutes are not, *per se,* of force in this country, for they were passed in England after the colonization of America. But the same result has been very generally reached in this country through a different process. In Massachusetts, the statute of 32 Hen. VIII. is still in force as a modification and amendment to the common law.[42] In other States, ejectment or other summary process may be resorted to.[43] The Universal doctrine, whatever may be the form of remedy, prevails, that the husband can do no act nor make any default to prejudice his wife's inheritance. And while his own alienation passes his life estate, it can do no more; and the wife, notwithstanding, may enter after his death and hold possession.[44]

§ 198. Husband's Power to Mortgage Fee.

The husband's mortgage of his wife's real estate is effectual to the same extent as his absolute conveyance; that is to say, it will operate upon his life estate or the joint life estate of himself and his wife, as the case may be, and no further. And his lease of the wife's lands for a term of years, for the purpose of creating an incumbrance in the nature of a mortgage, is treated in equity as a mortgage; and the wife's acceptance of rent after his death cannot make such a lease other than void on the termination of his life estate.[45]

§ 199. Husband's Power to Lease Fee.

So far as the effect of the husband's lease was concerned, the statute 32 Hen. VIII. c. 28, changed the old common law. By

41. 1 Bright, Hus. & Wife, 162-168, and authorities cited; Bell, Hus. & Wife, 195; Robertson v. Norris, 11 Q. B. 916; Woodruff v. Detheridge, 6 J. J. Marsh. (Ky.) 368 (rule changed by statute).

42. Bruce v. Wood, 1 Met. (Mass.) 542.

43. Miller v. Shackleford, 4 Dana (Ky.), 264; N. Y. Rev. Stats., 4th ed., vol. 2, p. 303; 2 Kent Com. 133, *n.*

44 2 Kent Com. 133, *n.;* 1 Washb. Real Prop. 279; Butterfield v. Beall, 3 Ind. 203; Huff v. Price, 50 Mo. 228; Jones v. Carter, 73 N. C. 148.

45. Bell, Hus. & Wife, 193, 194; Goodright v. Straphan, 1 Cowp. 201; Drybutter v. Bartholomews, 2 P. Wms. 127. The husband's mortgage, in this country also, passes only his life estate, under the like circumstances. Miller v. Shackleford, 3 Dana (Ky.), 291; Barber v. Harris, 15 Wend. (N. Y.) 615; Railroad Co. v. Harris, 9 Ind. 184; Kay v. Whittaker, 44 N. Y. 565.

this statute, husband and wife are permitted to make a joint lease of the wife's real estate for a term not exceeding three lives or twenty-one years. There were, however, some restrictions placed upon the operation of this statute. Thus, it was further declared that things which lie *in grant,* such as franchises, should be excepted; though tithes followed the general principle. And the old lease must have been surrendered either in writing or by operation of law within one year from making the new lease. Property in possession might be leased under the statute, but not property in reversion. The lease would not exempt the tenant from responsibility for waste. And the rent reserved should not be less than the average rent of the preceding twenty years. This statute has been strictly construed both in the common law and equity courts of England.[46]

But the husband's lease of the wife's lands, whether alone or jointly with her, may be good at the common law, though not made in compliance with the statute. In such case the wife may affirm or disaffirm the lease at the expiration of coverture. And the same right may be exercised by her issue, or by others claiming under her or in privity with her. So, too, where she marries again after her husband's death, her second husband has the privilege of election in her stead. But one who claims by paramount title to the wife, as, for instance, a joint tenant surviving her, cannot exercise this right,[47] though on general principle it is hard to see why, save for her coverture, she should not have been.

Some acts of the wife, on being released from coverture, will amount to an affirmance of her husband's informal lease. Thus acceptance of rent from the tenant, after her husband's death, will confirm the lease.[48] But parol leases of the wife's real estate are affected by the statute of frauds; and not even acceptance of rent can bind the wife surviving: the lease will be treated as utterly void at the husband's death, and not voidable only.[49] Whether acceptance of rent by the wife after the husband's death would

46. Bell, Hus. & Wife, 179-181; 1 Bright, Hus. & Wife, 193-219; Darlington v. Pulteny, Cowp. 267.

47. Bell, Hus. & Wife, 175, 177; Jeffrey v. Guy, Yelv. 78; Smalman v. Agborow, Cro. Jac. 417; Anon., 2 Dyer, 159. See also Toler v. Slater, L. R. 3 Q. B. 42, where the lessee was held bound on his covenant to pay rent. Under the Texas statute, a husband cannot lease his wife's land for more than a year. Dority v. Dority, 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 941.

48. Doe v. Weller, 7 T. R. 478.

49. Bell, Hus. Wife, 178. And see Winstell v. Hehl, 6 Bush (Ky.), 58.

confirm a lease in writing, made by the husband alone, is a question on which the authorities are not agreed.[50]

A distinction, however, is sometimes made between leases for life and leases for terms of years, when made by the husband alone. The former, it is said, being freehold estates and commencing by livery of seisin, could only be avoided by entry; while the latter became void absolutely on the husband's death. But according to the better authority both kinds of leases follow the same principle, and are not void but voidable at the husband's death.[51] The husband's lease in right of his wife operates so far in the tenant's favor as to entitle the latter to emblements.[52] The rule is the same whether the husband be tenant by the curtesy or not. No action, therefore, can be maintained by the wife in such cases.

§ 200. Effect of Husband's Contract to Convey Fee.

By the old law of England it appears that if a husband agreed to convey real estate belonging to his wife, he might be compelled to execute the contract by getting her to levy a fine.[53] This rule no longer holds good in that country.[54] Even where the agreement has been made, not by the husband, but by the wife herself before her marriage, the agreement cannot now be enforced against the wife.[55] But it is nevertheless binding upon the husband; though where the purchaser has not been misled, the husband cannot be made to convey his partial interest and submit to an abatement of the price, because of the wife's refusal to convey her real estate which he and she had promised to convey.[56]

50. Bell, Hus. & Wife, 177, and cases cited; Preamble to Stat., 32 Hen. VIII., ch. 28; Jordan v. Wikes, Cro. Jac. 332; Bac. Abr. Leases, C. 1. See Wolton v. Hele, 2 Saund. 180, *n.* 10; Bro. Abr. Acceptance, 1; Dixon v. Harrison, Vaugh. 40; Goodright v. Straphan, 1 Cowp. 201; Perry v. Hindle, 2 Taunt. 180; Hill v. Saunders, 2 Bing. 112.

51. Bell, Hus. & Wife, 177, 178, and cases cited; *contra*, notes to 2 Kent Com. 133, and authorities referred to, including note of Sergt. Williams to Wolton v. Hele, 2 Saund. 180.

52. Rowney's Case, 2 Vern. 322; Gould v. Webster, 1 Vt. 409.

53. 2 Bright Hus. & Wife, 47; Macq. Hus. & Wife, 32.

54. Frederick v. Coxwell, 3 Y. & J. 514; Emery v. Ware, 8 Ves. 505; Sug. V. & P., 4th ed., 231; 2 Story Eq. Juris. 49-53; Martin v. Mitchell, 2 Jac. & W. 413; Thayer v. Gould, 1 Atk. 617; Daniel v. Adams, 1 Amb. 495. But see Davis v. Jones, 4 B. P. 267; Betcher v. Rinehart, 106 Minn. 380, 118 N. W. 1026.

55. Per Lord Ch. Cottenham, Jordan v. Jones, 2 Phill. 170. See Rowley v. Adams, 6 E. L. & Eq. 124.

56. Griffin v. Taylor, Tothill, 106; Hall v. Hardy, 3 P. Wms. 187; Morris v. Stephenson, 7 Ves. 474; Castle v. Wilkinson, L. R. 5 Ch. 534.

§ 201. Husband's Right to Dissent from Purchase, Gift or Devise to Wife.

Nor on principle should he be permitted to dissent to any purchase, gift, or devise to the wife's separate use, by the terms of which his own interest as life tenant is legally excluded. Subject to the husband's dissent and the wife's disagreement after her coverture ends, a conveyance to the wife in fee is always good.[57]

The husband may dissent from a purchase, gift, or devise of real estate to his wife during coverture; since otherwise he might be made a life tenant to his own disadvantage. But by such dissent he cannot and ought not to defeat her ultimate title as heir.[58]

§ 202. Effect of Conversion.

If the real estate of the wife be converted into personalty during her life by a voluntary act of the parties, the proceeds become personal estate, and the husband may reduce into his own possession or otherwise take the proceeds. This principle has already been noticed.[59] But where conversion takes place by act of law, independently of husband and wife, the rule is not so clear. In New York, however, it is held [60] that where the real estate of a married woman has been converted into personalty by operation of law during her lifetime, it will be disposed of by a court of equity, after her death, in the same manner as if she had herself converted it into personal property previous to her death.[61] So, too, in some States, conversion of real estate, under partition proceedings, into personalty has been held complete where equity decreed partition, and the wife died after a final confirmation of the sale in court, all terms of sale having been complied with, and all formalities duly observed.[62]

57. Co. Litt. 3a, 356b; 2 Bl. Com. 292, 293; 2 Kent Com. 150. The wife's privilege of disagreement to purchase extended to her heirs. *Ib.*

58. Co. Litt. 3a; 1 Dane Abr. (Mass.) 388; 4 *ib.* 397; 1 Washb. Real Prop. 280.

59. *Supra*, § 156; Hamlin v. Jones, 20 Wis. 536; Watson v. Robertson, 4 Bush (Ky.), 37; Tillman v. Tillman, 50 Mo. 40; Sabel v. Slingluff, 52 Md. 132; Humphries v. Harrison, 30 Ark. 79.

60. Graham v. Dickinson, 3 Barb. Ch. (N. Y.) 170. In this case, Flanagan v. Flanagan, 1 Bro. C. C. 500, appears to have been disapproved.

61. Graham v. Dickinson, 3 Barb. Ch. (N. Y.) 170.

62. Jones v. Plummer, 20 Md. 416; Cowden v. Pitts, 2 Baxt. (Tenn.) 59. Where an administrator's sale of the wife's land is irregular, the husband cannot, apart from the wife, confirm it, even though he has received the purchase-money. Kempe v. Pintard, 32 Miss. 324. See also Ellsworth v. Hinds, 5 Wis. 613; Osborne v. Edwards, 3 Stockt. (N. J.) 73. But a husband may demand and reduce into

On the other hand, the rule is announced that where a married woman is entitled to a legacy, and land is given her in lieu thereof, the husband having effected no prior reduction of the legacy, it is to be held as hers and for her sole benefit. A case of this sort was lately decided in Pennsylvania.[63]

§ 203. Effect of Alienage or Attainder of Husband, and Statute of Limitation.

A husband's life estate may be barred by a statute of limitations like other freehold interests.[64] At the common law, attainder of treason or other felony worked a forfeiture or escheat of real estate to the government. And corruption of blood affected the inheritance in such cases. But as regarded the wife's real estate, nothing more could be taken than the husband's life interest: the freehold continued in the wife as before. For the same reason, where the wife was at common law attainted of felony, the lord might enter to the lands by escheat, and eject the husband whenever the crown had had its prerogative forfeiture of a year and a day's waste.[65] The common law of attainder is of no force in this country so far as forfeiture and corruption of blood is concerned; but it probably applies to the husband's life interest in his wife's lands.[66]

Where the husband was an alien he could not acquire an interest in his wife's real estate at the common law.[67] But the disability is now removed in great measure by statute.[68]

§ 204. Effect of Divorce.

The rule that emblements or growing crops go to the husband or his representatives at the termination of his estate was extended

possession his wife's legacy, even though it be made payable, by the terms of a will, from proceeds of the sale of the testator's real estate. Thomas v. Wood, 1 Md. Ch. 296. Conversion takes place where husband and wife convey to trustees to sell and dispose for payment of debts, balance to be paid them as they shall direct or appoint. Siter v. McClanachan, 2 Gratt. (Va.) 80.

63. Davis v. Davis, 46 Pa. 342. But see Davis' Appeal, 60 Pa. 118, as to female ward's real estate treated as personalty, the guardian's mere change of investment having effected no conversion of the fund.

64. Kibbie v. Williams, 58 Ill. 30.

65. Bell, Hus. & Wife, 149, 150; 2 Bl. Com. 253, 254. As to the wife's right of dower in such cases, see 2 Bl. Com. 253, and notes by Chitty and others.

66. See Const. U. S., Art. III., § 3.

67. Washb. Real Prop. 48, and cases cited; Bell, Hus. & Wife, 151; Co. Litt. 31b; Menvill's Case, 13 Co. 293; 2 Bl. Com. 293; 2 Kent Com. 39-75.

68. See note to 1 Washb. Real Prop. 49, giving statutory changes. And see Bell, Hus. & Wife, 151, 241. Stat. 7 & 8 Vict., ch. 66, removes disabilities as to dower for the most part.

at the common law to cases of divorce *causa precontractus.*[69] But it does not apply to divorce for the husband's misconduct under modern statutes.[70]

§ 205. Husband's Liability for Waste.

The wife's remedy for waste deserves a passing notice. Waste consists in such acts done by a tenant for life or years to the estate he holds, as injure or impair the inheritance. Since the husband holds his wife's real estate as a life tenant only, it would seem on principle that he ought to be held liable for waste like other life tenants. A difficulty occurs, however, in applying the remedy; and since the common-law action of waste is founded on the privity of parties competent to sue one another, no such suit can be technically maintained as between husband and wife.[71] But if the husband conveys to a third party, and such third party commits waste, the action will lie. So when waste is committed by the husband's creditor who has taken his freehold interest on execution.[72] As the husband cannot commit waste, it follows that he cannot sell growing timber on her land except to a very limited extent.[73] The heir of the wife can sue the husband for waste; though it would seem that he cannot sue the husband's assignee for want of privity.[74] The wife is not without remedy against her husband, however, for chancery will interfere on her behalf by injunction, and stop him from committing waste upon her land; and this is now the usual remedy against life tenants.[75] And at the common law the husband was said to forfeit his term by such misconduct.[76]

§ 206. Effect of Statute.

In many States the *jus mariti* in the wife's lands has been abolished by statute.[77] The Rhode Island Married Women's Act

69. Orland's Case, 5 Coke, 116a.

70. See Vincent v. Parker, 7 Paige (N. Y.), 65, per Chancellor Walworth; Jenney v. Gray, 5 Ohio St. 45.

71. 2 Kent Com. 131, 132; 1 Washb. Real Prop. 118-124; 1 Bright, Hus. & Wife, 110.

712. Babb v. Perley, 1 Me. 6; Mattocks v. Stearns, 9 Vt. 326.

73. Stroebe v. Fehl, 22 Wis. 337; Porch v. Fries, 3 C. E. Green (N. J.), 204.

74. Walker's Case, 3 Coke, 59; Bates v. Shraeder, 13 Johns. (N. Y.) 260.

75. See 1 Washb. Real Prop. 125; *ib.* 281.

76. Co. Litt. 351; 1 Bright, Hus. & Wife, 110, 169.

77. Davis v. Clark, 26 Ind. 424, 89 Am. Dec. 471; Harris v. Whiteley, 98 Md. 430, 56 A. 823; Lancaster v. Lancaster (N. C.), 100 S. E. 120; Deutsch v. Rohlfing, 22 Colo. App. 543, 126 P. 1123; Humbird Lumber Co. v. Doran, 24 Ida. 507, 135 P. 66; Burns v.

is not retroactive so as to take away a husband's vested right *jure mariti* to the rents and profits of her real estate till she has terminated those rights by a previous statute.[78]

Under the New York Married Women's Act the wife retains complete possession of her separate real estate as though *sole*, though her husband lives with her on it, pays taxes and keeps it in repair.[79] But he is not an "intruder or squatter," whom she may eject under another statute.[80] Under the Vermont statute in force in 1853 the husband could not, without her joinder, convey the rents and profits of her land, which the statute provided should be secured to her.[81]

§ 207. Effect of Adverse Possession; Generally.

Though there can be no adverse public user against a wife,[82] title by adverse possession may be obtained against her at common law,[83] and when the statute has once begun to run, coverture will not interrupt it.[84] Where a sale of a wife's land is by the husband alone, the statute will not run against her during coverture.[85] She may also acquire title by adverse possession,[86] but while she

Bangert, 92 Mo. 167, 4 S. W. 677; Howard v. Tenny, 87 Ky. 52, 10 Ky. Law, 94, 7 S. W. 547; Buckel v. Auer (Ind.), 120 N. E. 437; Sipe v. Herman, 161 N. C. 107; 76 S. E. 556; Nelson v. Nelson (N. C.), 96 S. E. 986; Pocomoke Guano Co. v. Colwell (N. C.), 98 S. E. 535; Teckenbrock v. McLaughlin, 246 Mo. 711, 152 S. W. 38; King v. Davis, 137 F. 222 (affd., 157 F. 676, 85 C. C. A. 348; McGuire v. Cook, 98 Ark. 118, 135 S. W. 840; Woodard v. Woodard, 148 Mo. 241, 49 S. W. 1001; Bowen v. Bettis (Tenn.), 48 S. W. 292; Henderson Grocery Co. v. Johnson (Tenn.), 207 S. W. 723; Vance v. Richards' Adm'r, 39 W. Va. 578, 20 S. E. 603; Maxwell v. Jurney, 151 C. C. A. 502, 238 F. 566; Turner v. Heinburgh, 30 Ind. App. 615, 65 N. E. 294; Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510. Under the Tennessee statute the husband has now only a bare right to rent the wife's land and collect rents for the benefit of the family as its head and not for himself individually. Henderson Grocery Co. v. Johnson (Tenn.), 207 S. W. 723.

78. Cranston v. Cranston, 24 R. I. 297, 53 A. 44.

79. Mygatt v. Coe, 152 N. Y. 457, 46 N. E. 949, 57 Am. St. R. 521.

80. Cipperly v. Cipperly, 172 N. Y. S. 351.

81. Peck v. Walton, 26 Vt. 82.

82. School Dist. No. 84 v. Tooloose (Mo.), 195 S. W. 1023.

83. Medlock v. Suter, 80 Ky. 101, 3 Ky. Law, 587; Mounts v. Mounts, 155 Ky. 363, 159 S. W. 818; Covey v. Porter, 22 W. Va. 120; Whittaker v. Thayer (Tex.), 123 S. W. 1137; Sabine Valley Timber & Lumber Co. v. Cagle (Tex.), 149 S. W. 697; Parker v. Smith, 6 Ky. Law, 301.

84. Hoeneke v. Lomax (Tex.), 118 S. W. 817 (writ of error den., 102 Tex. 487, 119 S. W. 842).

85. Webber v. Gibson, 8 Ky. Law, 125; Garrett v. Weinberg, 48 S. C. 28, 26 S. E. 3.

86. Hitt v. Carr (Ind.), 109 N. E. 456; Big Blaine Oil & Gas Co. v. Yates (Ky.), 206 S. W. 2; Holton v. Jackson (Ky.), 212 S. W. 587.

lives with her husband and has no claim in her own right to land, she cannot acquire title to it as her separate estate by adverse possession.[87] The Arkansas and Texas statutes of limitation do not run against a wife during coverture in regard to real estate.[88] The same was true in North Carolina prior to 1899.[89]

§ 208. By Husband.

Spouses in joint occupation of land are presumed so to occupy in subordination to the title under which possession was acquired, and not in hostility to each other.[90] The presumption may be rebutted.[91] In Georgia, where spouses are in joint occupation of land, the possession is presumed to be that of the husband.[92] It is generally held that a husband cannot hold adversely to his wife so as to get title by prescription.[93] Therefore, where he buys a tax title against her land, he cannot hold adversely under it,[94] nor is his possession adverse where he holds her land *jure maritis*,[95] or by paying taxes on it.[96] Therefore an easement cannot be acquired by prescription by a spouse who owns premises adjoining that of the other spouse.[97] Where a wife elected to take land instead of

87. Madden v. Hall, 21 Cal. App. 541, 132 P. 291; Mattes v. Hall, 21 Cal. App. 552, 132 P. 295; Wills v. E. K. Wood Lumber & Mill Co., 29 Cal. App. 97, 154 P. 613.

88. Taylor v. Leonard, 94 Ark. 122, 126 S. W. 387; People's v. Aydelott, 125 Ark. 50, 187 S. W. 671; Hays v. Hinkle (Tex.), 193 S. W. 153; Sibley v. Sibley, 88 S. C. 184, 70 S. E. 615.

89. Norcum v. Savage, 140 N. C. 472, 53 S. E. 289; Berry v. W. M. Ritter Lumber Co., 141 N. C. 386, 54 S. E. 278; Bond v. Beverly, 152 N. C. 56, 67 S. E. 55.

90. Evans v. Russ, 131 Ark. 335, 198 S. W. 518; Doherty v. Russell, 116 Me. 269, 101 A. 305; Garrison v. Taff (Mo.), 197 S. W. 271; McPherson v. McPherson, 75 Neb. 830, 106 N. W. 991; Noble v. Noble, 151 Ia. 698, 130 N. W. 114.

91. Grantham v. Wester, 136 Ga. 17, 70 S. E. 790.

92. Coursey v. Coursey, 141 Ga. 65, 80 S. E. 462.

93. Tumlin v. Tumlin (Ala.), 70 So. 254; First Nat. Bank v. Guerra, 61 Cal. 109; Bias v. Reed, 169 Cal. 33, 145 P. 516; Skinner v. Hale, 76 Conn. 223, 56 A. 524; Carpenter v. Booker, 131 Ga. 546, 62 S. E. 983; Hays v. Marsh, 123 Ia. 81, 98 N. W. 604; Bader v. Dyer, 106 Ia. 715. 77 N. W. 469, 68 Am. St. R. 332; Bowling v. Little (Ky.), 206 S. W. 1; Gambrell v. Gambrell, 167 Ky. 734, 181 S. W. 328; Green v. Jones, 169 Ky. 146, 183 S. W. 488; McPherson v. McPherson, 75 Neb. 830, 106 N. W. 991, 121 Am. St. R. 835; Hovorka v. Havlik, 68 Neb. 14, 93 N. W. 990; Battle v. Claiborne (Tenn.), 180 S. W. 584; Hayworth v. Williams, 102 Tex. 308, 116 S. W. 43; Smith v. Cross, 125 Tenn. 159, 140 S. W. 1060; Anderson v. Cercone (Utah), 180 P. 586.

94. Biggins v. Duffiey, 262 Ill. 26, 104 N. E. 180; Blair v. Johnson, 215 Ill. 552, 74 N. E. 747; Ward v. Nestell, 113 Mich. 185, 71 N. W. 593, 4. Det. Leg. N. 279.

95. Watkins v. Watkins (Tex.), 119 S. W. 145.

96. Reagle v. Reagle, 179 Pa. 89, 36 A. 191

97. Graves v. Broughton, 185 Mass. 174, 69 N. E. 1083.

money, in presence of the husband and with his assent, his subsequent entry into possession of the land must be regarded as an entry under the wife's title and not adverse to it.[98] Where a husband conveys his homestead to his wife for a consideration, his possession of it thereafter is not adverse to her.[99] A husband's possession cannot become adverse until the death of the wife,[100] or until after divorce.[1] Where a party claiming adverse possession is the husband of the person against whom the possession is held, a degree of proof of such adverse possession will be required stricter than in the usual case.[2]

Where a husband is in possession of land with a claim of title, his title will not be affected by the act of a third person who pretends to put his wife into possession.[3]

§ 209. Effect of Wife's Agreement to Convey or Purchase.

An agreement by a *feme covert* for the sale of her real estate, the same not being her separate property, cannot be enforced at law or in equity against her.[4] And Sugden considers it doubtful whether a married woman, having a power of appointment, can thus bind herself.[5]

But following the English doctrine, the wife's executory agreement to convey real estate, whether expressed by bond or simple instrument, is in this country held void in the absence of enabling statutes, like her general contracts, though made with her husband's assent; and specific performance cannot be enforced against her.[6]

98. Shallenberger v. Ashworth, 25 Pa. 152.

99. Hunter v. Magee, 31 Tex. Civ. 304, 72 S. W. 230.

100. Horn v. Hetzger, 234 Ill. 240, 84 N. E. 893; Watt v. Watt, 19 Ky. Law, 25, 39 S. W. 48; Timmermann v. Cohn, 70 Misc. 327, 128 N. Y. S. 770.

1. Kenady v. Gilkey, 81 Ark. 147, 98 S. W. 969; Madden v. Hall, 21 Cal. App. 541, 132 P. 291; Ferring v. Fleischman (Tenn.), 39 S. W. 19.

2. Shermer v. Dobbins (N. C.), 97 S. E. 510.

3. Powell v. Felton, 11 Ired. (N. C.) 469.

4. Macq. Hus. & Wife, 32; Emery v. Ware, 5 Ves. 846; Sug. V. & P., 11th ed., 230.

5. Sug. V. & P., 11th ed., 231. She certainly cannot in some States. Kennedy v. Ten Broeck, 11 Bush (Ky.), 241. But the wife cannot use her privilege in this respect unfairly, where the purchaser has become bound on his part. See Cross v. Noble, 67 Pa. 74.

6. 2 Kent Com. 168; Butler v. Buckingham, 5 Day (Conn.), 492; Dankel v. Hunter, 61 Pa. 382; Stidham v. Matthews, 29 Ark. 650; Moseby v. Partee, 5 Heisk. (Tenn.) 26; Holmes v. Thorpe, 1 Halst. Ch. (N. J.) 415; Lane v. McKeen, 15 Me. 304. We make, of course, no reference here to the wife's *separate property*, or to her rights under the "married women's acts," to be considered *post*, § 247 *et seq.* See Blake v. Blake, 7 Ia. 46. A contract to convey, made by husband and wife, may be good

And as she cannot bind herself to convey, neither can she be bound by her agreement to purchase.[7] Nor will the law coerce her into fulfilling her agreement by granting exemplary damages against her husband.[8]

§ 210. Effect of Wife's Power of Attorney to Convey.

At common law a wife's power of attorney was void.[9] So it has been held in Vermont that the wife cannot, either separately or jointly with her husband, execute a valid power of attorney to convey her lands.[10] Under the Kentucky statute only a non-resident wife may so bind herself.[11] This rule was altered by an early statute in South Carolina.[12] A joint power of attorney granted by spouses to a third person to mortgage her separate estate is valid as her power of attorney as well as his.[13] Thus where attorneys authorized by such a joint power convey only in the name of the wife, without inserting or subscribing the name of the husband in the deed, the act is valid even where the statute requires the joinder of the husband in the deed, where the intent to execute the power is apparent, and where the consideration is paid to and retained by the spouses.[14]

Under the Minnesota statute a power of attorney from either spouse to the other to sell such spouse's land is void, but a person making such a contract with a wife through her husband as agent cannot evade the contract on the statutory ground where she is

against the husband, though void as to the wife. Steffey v. Steffey, 19 Md. 5; Johnston v. Jones, 12 B. Mon. (Ky.) 326; 2 Kent Com. 168. Upon the strict assent of husband and wife, equity has sometimes decreed a sale under the wife's title bond. Moseby v. Partee, 5 Heisk. (Tenn.) 26. As to the wife's ratification of the husband's unauthorized contract for the sale of her land, see Ladd v. Hildebrandt, 27 Wis. 135.

7. Robinson v. Robinson, 11 Bush (Ky.), 174. But though coverture is a good defence to a suit for specific performance the wife will not be permitted to refuse a deferred payment of purchase-money and at the same time retain the land. Staton v. New, 49 Miss. 307.

8. Burk v. Serrill, 80 Pa. 413.

9. McCreary v. McCorkle (Tenn.), 54 S. W. 53; Jenkins v. Crofton's Adm'r, 10 Ky. Law, 456; State v. Clay, 100 Mo. 571, 13 S. W. 827; Shanks & March v. Michael, 4 Cal. App. 553, 88 P. 596; Duffy v. Currence, 66 W. Va. 252, 66 S. E. 755; Wright v. Begley, 31 Ky. Law Rep. 53, 101 S. W. 342.

10. Sumner v. Conant, 10 Vt. 1; Gillespie v. Worford, 2 Cold. (Tenn.) 632; Hardenburgh v. Lakin, 47 N. Y. 109.

11. Swafford v. Herd's Adm'r, 23 Ky. Law, 1556, 65 S. W. 803.

12. Guphill v. Isbell, 2 Bailey (S. C.), 349.

13. Linton v. National Life Ins. Co., 104 F. 584, 44 C. C. A. 54.

14. Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433.

ready to perform.[15] Under the Iowa statute providing that neither spouse shall have an interest in the estate of the other which may be the subject of contract between them, it was held that her power of attorney to sign for her conveyance of real estate allotted to him under their separation agreement was void.[16]

§ 211. Form and Requisites of Wife's Conveyance in General.

In some States the separate conveyance of a married woman, or her execution jointly with her husband, but without observance of the full statute formalities, is void.[17] But in others such irregularities are not held fatal to the instrument, and she is furthermore bound on the usual principles, even though her deed be separate from that of her husband and executed at a different time.[18] The question in such cases is mainly one of statute construction, and as to formalities a distinction may be taken between mere errors of description, or literal informalities of execution or acknowledgment on the one hand, and, on the other, the disregard of some statutory requirement, so as to substantially violate public policy, such, for instance, as her separate acknowledgment, or her declaration before the magistrate that she executed freely and understandingly for the purpose specified.[19]

It is held a good deed of husband and wife where they are both named at the commencement of the deed as parties of the first part, and afterwards the parties of the first part are named as grantors.[20]

15. Stromme v. Rieck, 107 Minn. 177, 119 N. W. 948.

16. Sawyer v. Briggart, 114 Ia. 489, 87 N. W. 426.

17. Trimmer v. Heagy, 16 Pa. 484; Scarborough v. Watkins, 9 B. Mon. (Ky.) 540; Dow v. Jewell, 18 N. H. 340; Kerns v. Peeler, 4 Jones (N. C.), 226; Wentworth v. Clark, 33 Ark. 432; Cincinnati v. Newell, 7 Ohio St. 37; Pratt v. Battles, 28 Vt. 685; Boyle v. Chambers, 32 Mo. 46; Berry v. Donley, 26 Tex. 737; Jewett v. Davis, 10 Allen (Mass.), 68; Baxter v. Bodkin, 25 Ind. 172; Bressler v. Kent, 61 Ill. 426

18. Albany Fire Ins. Co. v. Bay, 4 Comst. (N. Y.) 9; Card v. Patterson, 5 Ohio, 319; Smith v. Perry, 26 Vt. 279; Strickland v. Bartlett, 51 Me. 355; Hornbeck v. Building Association, 88 Pa. 64. In some States the wife must join, it is said, but she need not execute until years later, when it will take effect. Stiles v. Probst, 69 Ill. 382.

As to barring an estate tail in case of a married woman, see Lippitt v. Huston, 8 R. I. 415. The wife's title to lands vested in her under an unrecorded deed cannot be divested by her parol consent to its cancellation, and a new deed to her husband. Wilson v. Hill, 2 Beasl. (N. J.) 143.

19. See Hamar Medsker, 60 Ind. 413; Little v. Dodge, 32 Ark. 453; Laughlin v. Fream, 14 W. Va. 322; Staton v. New, 49 Miss. 307; Rice v. Peacock, 37 Tex. 392; Marsh v. Mitchell, 26 N. J. Eq. 497; Wannell v. Kem. 57 Mo. 478; Thayer v. Torrey, 37 N. J. L. 339; Smith v. Elliott, 39 Tex. 201; Allen v. Lenoir, 53 Miss. 321.

20. Thornton v. National Exchange Bank, 71 Mo. 221.

But a deed of the husband only where both execute and the husband alone is named as grantor in the body of the deed is invalid(?)[21]

Usually a conveyance of land owned by the husband in fee should be made separated from that of land owned by the wife in fee. But under the statutes of some States it is held that lands of both descriptions may be embraced in a single conveyance; the wife making but one acknowledgment for the combined purpose of releasing dower in her husband's lands and conveying title in her own.[22] Where both spouses have undivided interests in the same property, her mere signature to his deed purporting to convey his property will not pass her interest, where her name does not appear in the body of the deed.[23] The conveyance of the wife's life estate follows the usual statute rule as to her conveyances.[24]

As concerns the wife's life estate in her real or personal property, the English chancery courts have followed out exceptions to the doctrines of equitable assignment already noticed, with their limitations.[25]

The deed of a married woman as trustee is good against her heirs, claiming adversely to the trust, even though given without the assent of her husband. And a like deed executed under a power of attorney, granted by her alone, is equally valid.[26] And a deed, in order to bind the wife's heirs, must have been delivered as well as executed, during her lifetime,[27] but a wife's deed executed before majority, but delivered after majority and marriage, is valid.[28] A husband cannot, after his wife's decease, as against her heirs, confirm a conveyance which was fatally irregular on her part.[29]

Alteration of the deed, after execution, without the wife's consent, vitiates it as to those chargeable with knowledge of the fact.[30] In the absence of statute the assignment by a wife of a certificate of purchase issued by the receiver of the land office is void, and

21. McFadden v. Rogers, 70 Mo. 421; Heaton v. Fryberger, 38 Ia. 185.

22. Barker v. Circle, 60 Mo. 258.

23. Cordano v. Wright, 159 Cal. 610, 115 P. 227.

24. Henning v. Harrison, 13 Bush (Ky.), 723.

25. See Purdew v. Jackson, 1 Russ. 1.

26. Gridley v. Wynant, 23 How. (U. S.) 500; Holleman v. De Nyse, 51 Ala. 95; Lew. Trusts and Trustees, 89, 90; Sug. Pow. 192, 196; Reese v. Cochran, 10 Ind. 195.

27. Thoenberger v. Zook, 34 Pa. 24. But see Ackert v. Pults, 7 Barb. (N. Y.) 386; Somers v. Pumphrey, 24 Ind. 231.

28. Sims v. Smith, 99 Ind. 469, 50 Am. R. 657.

29. Dow v. Jewell, 1 Fost. (N. H.) 470.

30. Stone v. Lord, 80 N. Y. 60.

any person interested in the title may take advantage of its invalidity.[31]

§ 212. Joinder of Husband.

In this country the custom of a wife's joining her husband in a deed of conveyance of her lands has prevailed from a very early period. In most, if not all, of the States, there are statutes existing as to the mode of execution, which contemplate the joinder of husband and wife in the conveyance, and an acknowledgment by one or both of the parties,[32] where he does not renounce his marital rights,[33] even though he is an infant.[34] The rule was the same where the property was derived from a former husband, where she sought to convey it during a second coverture.[35] At common law a wife could not convey her land without her husband's consent and joinder in the deed as grantor.[36] The assent or joinder of the husband is in some States permitted to be subsequent instead of concurrent, the wife not having sought to invalidate the deed meantime.[37] And even where the deed of the wife's land is expressed as hers alone, the husband's solemn execution and acknowledgment is held to fulfil requirements if her execution be in due form.[38]

31. Bland v. Windsor & Cathcart, 187 Mo. 108, 86 S. W. 162.

32. Kentucky Stave Co. v. Page (Ky.), 125 S. W. 170; McAnulty v. Ellison (Tex.), 71 S. W. 670; Kellett v. Trice, 95 Tex. 160, 66 S. W. 51; Davis v. Bowman (Tenn.), 46 S. W. 1039; Drescher v. Benika, 20 Ky. Law, 344, 46 S. W. 16; Bohannon v. Travis, 94 Ky. 59, 14 Ky. Law, 912, 21 S. W. 354; Mounts v. Mounts, 155 Ky. 363, 159 S. W. 818; Shumaker v. Johnson, 35 Ind. 33; 1 Washb. Real Prop. 281, and cases cited; Davey v. Turner, 1 Dall. 15; Jackson v. Gilchrist, 15 Johns. (N. Y.) 109; Page v. Page, 6 Cush. (Mass.) 196; 2 Kent Com. 151-155, and notes, showing custom in different States; Albany Fire Ins. Co. v. Bay, 4 Const. (N. Y.) 9; Ford v. Teal, 7 Bush (Ky.), 156; Mount v. Kesterson, 6 Cold. (Tenn.) 452; Tourville v. Pierson, 39 Ill. 446; Deery v. Cray, 5 Wall. (U. S.) 795; Alabama, etc., Ins. Co. v. Boykin, 38 Ala. 510; Lindley v. Smith, 46 Ill. 523; Tubbs v. Gatewood, 26 Ark. 128. The privy examination of a wife for ascertaining that she executes the deed freely and without undue influence or compulsion of her husband is a feature of the legislation in many States; and the validity of her conveyance often turns upon a compliance with such a rquiree ment. Tubbs v. Gatewood, *supra;* Richardson v. Hittle, 31 Ind. 119; McCandless v. Engle, 51 Pa. 309; Tapley v. Tapley, 10 Minn. 448; Andola v. Picott, 5 Ida. 27, 46 P. 928 Vicroy v. Vicroy, 20 Ky. Law, 47; Camp v. Carpenter, 52 Mich. 375, 18 N. W. 113; Comings v. Leedy, 114 Mo. 454, 21 S. W. 804.

33. Blondin v. Brooks, 83 Vt. 472, 76 A. 184.

34. Zimpleman v. Portwood, 48 Tex. Civ. 438, 107 S. W. 584; Tippett v. Brooks, 95 Tex. 335, 67 S. W. 512.

35. Griner v. Butler, 61 Ind. 362, 28 Am. R. 675.

36. Reese v. Cochran, 10 Ind. 195; Kennedy v. Ten Broeck, 74 Ky. 11 Bush (Ky.), 241.

37. Wing v. Schramm, 79 N. Y. 619; Call v. Perkins, 65 Me. 439.

38. Thompson v. Lovrein, 82 Pa. 432.

Although estoppel may prevail against a husband in so many instances where the wife is not bound, his assent or joinder is of such importance in conveyances of the wife's land, where statutes do not permit her sole conveyance, that a deed by a man and wife of the wife's land, made when the husband is insane, is absolutely void.[39]

Where husband and wife do not execute the deed of the wife's lands simultaneously, and simultaneous execution of their joint deed is not requisite, the deed cannot be regarded as delivered until after the wife has executed.[40] A deed which is void because of the failure of the husband to join can be ratified after his death only by a second deed executed as required by law, and no informal acts or words will be sufficient.[41] In Vermont by statute a court of chancery has power to confirm the deed of a wife in which the husband does not join and compel the husband to execute confirmatory instruments.[42]

§ 213. Acknowledgment.

If a certificate of acknowledgment be defective, the magistrate should have the deed reacknowledged.[43] But contrary to the strict rule of most acts concerning the wife's acknowledgment, it is now permitted in some States, in case of a defective certificate, to prove due execution otherwise on her part.[44] Where the official certificate shows that the wife acknowledged her execution after the statutory form, this is held to be in the nature of judicial evidence,[45] and again it is pronounced only *prima facie* evidence of the separate examination and explanation requisite,[46] but from either aspect it is not readily to be impeached by extraneous evidence, especially after the lapse of time, nor can the certificate be contradicted by parol

39. Leggate v. Clark, 111 Mass. 308.

40. Stiles v. Probst, 69 Ill. 382.

41. Buford's Adm'r v. Guthrie, 14 Bush (Ky.), 677; McReynolds v. Grubb, 150 Mo. 352, 51 S. W. 822, 73 Am. St. R. 448.

42. Dietrich v. Hutchinson, 73 Vt. 134, 50 A. 810, 87 Am. St. R. 698.

43. Merritt v. Yates, 71 Ill. 636; Cahall v. Building Association, 60 Ala. 232. Proceedings for amending an officer's omission in the acknowledgment is permitted under some statutes. Kilbourn v. Fury, 26 Ohio St. 153.

44. Terry v. Eureka College, 70 Ill. 236.

45. Kerr v. Russell, 69 Ill. 666; Pribble v. Hall, 13 Bush (Ky.), 61.

46. Hughes v. Coleman, 10 Bush (Ky.), 246; Marsh v. Mitchell, 26 N. J. Eq. 497. Contents may be communicated by the magistrate through an interpreter. Norton v. Meader, 4 Sawyer (U. S.), 603. The wife may be examined privily and apart, even though the door was not shut. Kavanaugh v. Day, 10 R. I. 393.

testimony.[47] And even if the deed be defectively acknowledged, a married woman who has received consideration for the sale and dealt with the property has been estopped from availing herself of the defect afterwards; so that a bill in the nature of a bill to quiet title was entertained.[48]

So where the acknowledgment omitted the statement, which the statute required, that the grantor wished not to retract, the acknowledgment is still binding after fifty years, and a stranger to the deed, a trespasser, cannot attack it where the grantor had lived near the land for a long time and had never objected to the validity of the conveyance.[49]

A statute requiring a deed by a husband and wife to contain an acknowledgment certifying the marital relation is directory merely and its omission does not vitiate the deed of a married woman in which her husband has actually joined. So where a husband is trustee holding the legal title to land in trust for his wife, and joins her in the execution of a deed therefor, it will be presumed that he thereby consented as husband to her making the deed. Being both trustee and husband, it is inconceivable that he should have joined his wife as trustee for the purpose of conveying land in which his wife had the complete equity and not thereby have intended to express his consent in the latter capacity, which was indispensable to the validity of the wife's conveyance. It was not necessary for him to designate the capacity in which he signed in order to give effect to his signature in whatever capacity it was necessary for him to act.[50]

§ 214. Privy Examination of Wife.

Some of the States require a separate acknowledgment of the wife apart from her husband, and even a privy examination by the magistrate, so as to make sure that she is acquainted with the contents of the deed and acts freely and understandingly; but in this and other respects the laws are not uniform. There is less formality in general than under the English statute. Thus, then, does the wife pass title to her real estate.

47. Willis v. Gattman, 53 Miss. 721; Leftwich v. Neal, 7 W. Va. 569. An officer who has properly taken a married woman's acknowldgment may make the certificate out at any time while he remains in office; intervening rights, however, being protected. Harmon v. Magee, 57 Miss. 410.

48. Shivers v. Simmons, 54 Miss. 520.

49. Spivy v. March (Tex.), 151 S. W. 1037, 45 L. R. A. (N. S.) 1109.

50. Wehrle v. Price (W. Va.), 94 S. E. 477.

Where the statute requires a privy examination of the wife to make her deed good, and a certificate of that fact by the notary, the examination is not complete until these mandatory requirements are complied with. So where the wife, after signing a deed and being examined by the notary, cancels her signature before he has made his certificate or her husband has signed, the deed is void.[51]

The statutory requirement of a privy examination of the wife to give validity to her deed is not dispensed with by Married Women's Acts emancipating her from all disabilities and allowing her to dispose of her property as if *sole*. The privy examination is a part of the execution of the deed. It is the wife's examination, and not her signature, which gives it validity.[52] A separate examination is, under some codes, more insisted upon than a separate acknowledgment.[53]

Where the statute provides that the officer taking the wife's acknowledgment shall examine her privily and apart from her husband as to her voluntary execution of the deed, and satisfy himself that she signed it voluntarily and shall so satisfy, this contemplates an examination in his presence and cannot be done by telephone, especially where the statute was passed before telephones were invented. This officer cannot determine the matter judicially out of her presence, because her appearance, manner, and demeanor may become more potent factors in ascertaining the truth of this than mere formal answers to questions.[54]

In Virginia it is held that such a certificate cannot be attacked collaterally or directly, except in equity for fraud.[55] Where a deed of a wife is declared void because not acknowledged after a privy examination as required by the North Carolina statute, it is held that the wife is not liable personally for the consideration, which can only be recovered *in rem* against the specific money received, or any property into which it can be traced.[56] A substantial compliance with the Virginia statute requiring a privy examination of a wife as a part of her acknowledgment of her deed will suffice if all the requirements are substantially complied with, none being omitted.[57]

51. Eldridge v. Hunter (Tenn.), 143 S. W. 892, 40 L. R. A. (N. S.) 628.

52. Roach v. Francisco, 138 Tenn. 357, 197 S. W. 1099, 1 A. L. R. 1074.

53. Kenneday v. Price, 57 Miss. 771.

54. Roach v. Francisco, 138 Tenn. 357, 197 S. W. 1099, 1 A. L. R. 1074.

55. Murrell v. Diggs, 84 Va. 900.

56. Smith v. Ingraham, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878.

57. Hockman v. McClanaham, 87 Va. 33, 12 S. E. 230.

§ 215. Effect of Abandonment.

Where a wife is abandoned her husband's joinder in her deed is not necessary to validate it,[58] no matter what was the cause of the separation.[59] This rule is established by statute in North Carolina.[60] Temporary separations of the spouses do not amount to an abandonment within the meaning of the rule,[61] nor is a separation by consent such an abandonment.[62]

§ 216. Effect of English Statute.

Modern statutes which permit the wife to convey with the observance of certain formalities often permit her generally to contract, to convey, and to incumber her lands.

Under the modern statute of 3 & 4 Will. IV. c. 74, which took effect in England from the end of the year 1833, married women are permitted to alienate or incumber their real estate by conveyances executed with their husbands pursuant to its provisions. This important law, with its later modifications, unfettered property which had long been fast bound.[63] The statute requires the concurrence of the husband in such conveyances: also that the wife shall make an acknowledgment before certain judicial officers designated by the act, apart from her husband, to the effect that her own consent is freely and voluntarily given.[64]

§ 217. Validity of Wife's Mortgage.

In this country, a married woman may mortgage as well as alienate her real estate by joining her husband in the conveyance

58. Buford v. Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. R. 854; Witty v. Barham, 147 N. C. 479, 61 S. E. 372; Therriault v. Compere (Tex.), 47 S. W. 750; Fairchild v. Creswell, 109 Mo. 29, 18 S. W. 1073; Radford v. Carwile, 13 W. Va. 572; Bieler v. Dreher, 129 Ala. 384, 30 So. 22; Bachelor v. Norris, 166 N. C. 506, 82 S. E. 839; Heagy v. Kastner (Tex.), 138 S. W. 788; Stewart v. Profit (Tex.), 146 S. W. 563.

59. Spangler v. Vermillion, 80 W. Va. 75, 92 S. E. 449.

60. Pardon v. Paschall, 142 N. C. 538, 55 S. E. 365.

61. Nelson v. Brown (Tex.), 111 S. W. 1106.

62. Witty v. Barham, 147 N. C. 479, 61 S. E. 372.

63. See 8 & 9 Vict., ch. 106.

64. See Macq. Hus. & Wife, 28-32; *ib.* Appendix, 1-47, where the provisions of this act, the rules of court made in pursuance, and leading decisions on the construction of different sections, are fully given. And see *In re* Dowling, 18 C. B. (N. S.) 233. We have not thought it worth while to embody them in this work, as they have only a local application. There are many cases constanly arising in the English courts as to the interpretation of this statute, with its amendments; but they seem chiefly confined to the effect of the wife's acknowledgment. Previous to the statute of 3 & 4 Will. IV., ch. 74, the wife could convey her interest only by levying a fine, which, as well as suffering recoveries, is abolished by that statute. 1 Washb. Real Prop. 280; 1 Wms. Real Prop. 88.

and making due acknowledgment; and this, too, though no consideration pass to her thereby.[65] Where the wife joins her husband in a conveyance in the nature of a mortgage, she subjects her real estate to the risk of complete alienation by foreclosure for her husband's debt, or by sale under a power of sale thereby conferred. She is estopped by her own acts from denying the validity of the mortgage.[66] She may covenant that *scire facias* may issue in default of payment.[67] She may create a valid power in the mortgage to sell in default of payment.[68] And in general she may convey upon condition and prescribe the terms.[69] But independently of an express statute permission, and as our statutes generally run, the wife's mortgage without her husband's joinder or assent is void.[70] And so is her assignment of a mortgage.[71] The property actually mortgaged by her, and not her property in general, is thus subjected to the payment of her husband's note; and she cannot be held personally liable for any deficiency under the foreclosure sale.[72]

65. Eaton v. Nason, 47 Me. 132; Swan v. Wiswall, 15 Pick. (Mass.) 126; Whiting v. Stevens, 4 Conn. 44; 1 Hill. Mort. 272; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 144; 2 Kent Com. 167; Siter v. McClanachan, 2 Gratt. (Va.) 280; Philbrooks v. McEwen, 29 Ind. 347; Moore v. Titman, 33 Ill. 358; McFerrin v. White, 6 Cold. (Tenn.) 499; American, etc., Ins. Co. v. Owen, 15 Gray (Mass.) 491; Newhart v. Peters, 80 N. C. 186.

66. McCullough v. Wilson, 21 Pa. 436.

67. Black v. Galway, 24 Pa. 18.

68. 2 Kent Com. 167; Vartie v. Underwood, 18 Barb. (N. Y.) 561; Barnes v. Ehrman, 74 Ill. 402.

69. Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129; 2 Kent Com. 167. So, too, in England. Pybus v. Smith, 1 Ves. Jr. 189; Essex v. Atkins, 14 *ib.* 542. See Gilbert v. Mayford, 21 Ill. 471; Ruscombe v. Hare, 2 Bligh, 192; Bird v. Davis, 1 McCart. 467.

70. Weed Sewing Machine Co. v. Emerson, 115 Mass. 554; Bressler v. Kent, 61 Ill. 426; Yager v. Merkle, 26 Minn. 429; Herdman v. Pace, 85 Ill. 345.

71. Moore v. Cornell 68 Pa. 320.

72. See Wolf v. Van Metre, 23 Ia. 397; Logan v. Thrift, 20 Ohio St. 62; Howe v. Lemon, 37 Mich. 164; Hobson v. Hobson, 8 Bush (Ky.), 665. Her equity will be barred by regular sale under a power of sale mortgage, as under a sale by decree of chancery. Strother v. Law, 54 Ill. 413. Deed with certain simultaneous agreements may create, as against the wife, the relation of mortgagor and mortgagee, on the usual principles. Ragan v. Simpson, 27 Wis. 355. A mortgage executed in blank by the wife was held to be invalid in Simms v. Hervey, 19 Ia. 273. And in general the statute formalities relating to conveyances must have been complied with. Hait v. Houle, 19 Wis. 472. As to agreements for extension, see Belloc v. Davis, 38 Cal. 242. See further, Holmes v. McGinty, 44 Miss. 94. And as to the wife's equities in such mortgage, see also Dissolution of Marriage by Death, *post*, Vol. II.

§ 218. Wife's Liability on Covenants.

The rights of the wife are treated with great consideration in our courts.[73] In all cases the wife, who joins her husband in a mortgage of her own property to secure his debts or the payment of money loaned to him, is merely the surety of her husband, and is entitled to all the rights and privileges of a survey. This rule is well settled.[74] And the fact that, by the terms of a mortgage, the surplus is to be paid to the husband after satisfying the mortgage debt, and not to the wife or to the mortgagors jointly, will not repel the idea that the wife was or intended to be a surety.[75]

A wife is not bound by her warranty in a deed which she executes. Nor by any covenants contained therein. This is the general common-law rule in England and America.[76] For this accords with the principle that married women are incapable of binding themselves by contract; and the effect of her conveyance under the statute is simply that she passes whatever title she had in the lands conveyed. Yet the husband may be bound on his part, where he joins her, notwithstanding.[77] In England, where the wife formerly passed her real estate by suffering a fine, it was held long ago that if the grantee were evicted by a paramount title, the wife could be sued on her covenant of warranty after her husband's death.[78] So, too, it was formerly said that the wife should be held bound on the covenants contained in a lease of her lands executed during coverture, with her husband, and affirmed by herself after his death, by such acts as the acceptance of rent;[79] and this doctrine is certainly not unreasonable so far as a subsequent breach of

73. See Bayler v. Commonwealth, 40 Pa. 37. "Will a court of equity interfere in favor of one who is an assignee or covenantee, but not for value, to enforce a wife's engagement to pay an old debt of her husband? The answer is plain. If it will not decree the performance of an ordinary agreement, not founded on a valuable consideration much less will it enforce such a contract against a *feme covert*." Per Strong, J.; *ib.*, p. 44.

74. Neimeewicz v. Gahn, 3 Paige (N. Y.), 614; Hawley v. Bradford, 9 Paige (N. Y.), 200; Vartie v. Underwood, 18 Barb. (N. Y.) 561.

75. Vartie v. Underwood, 18 Barb. (N. Y.) 561. But see Dean v. Phillips, 17 Ind. 406.

76. 2 Kent Com. 167, 168; Fowler v. Shearer, 7 Mass. 21, per Parsons, C. J.; Falmouth Bridge Co. v. Tibbetts, 16 B. Mon. (Ky.) 637; Den v. Demarest, 1 Zab. (N. J.) 525; Rawle Cov. 573, 574; Botsford v. Wilson, 75 Ill. 133.

77. Buell v. Shuman, 28 Ind. 464; Griner v. Butler, 61 Ind. 362.

78. Wotton v. Hele, 2 Saund. 177; 1 Mod. 290. Chancellor Kent justly observes that this was a very strong case to show that she might deal with her land by fine as a *feme sole*. 2 Kent Com. 167.

79. 2 Saund. 80, note 9.

covenant is concerned. But further than this courts would not probably go at this day.[80] And in this country the wife's covenants in a conveyance executed jointly with her husband are considered binding upon her only by way of estoppel; and not so as to subject her to suit for damages.[81] And as she is not answerable for a breach of covenant, neither are her heirs or devicees.[83] Indeed, in New York, the wife's privilege in this respect is carried much further, for she is permitted to execute a conveyance of land with her husband, containing a covenant of warranty on her part, and then to defeat the title by acquiring an adverse interest afterwards.[83]

§ 219. Effect of Fraud or Duress.

Fraud and deception used by the husband in procuring the wife's signature, or the failure of the officer to perform his duty according to the statute form of the acknowledgment and his own certificate, will not vitiate the deed as to the grantee and those claiming under him, in the absence of evidence tending to charge with seasonable notice thereof.[84]

A husband who stands by and deceives a grantee of his wife so that such grantee believes that the husband has no interest in the land cannot afterward attack the validity of the deed, nor can his heirs do so.[85] But duress is of course good ground for avoiding the wife's deed, as against all who are chargeable with complicity or seasonable notice; such duress being established as to the particular execution.[86]

§ 220. Effect of Estoppel.

We may observe, on the whole, that, while modern statutes greatly vary in this country, as to the requisites attending a married

80. Her covenant for quiet enjoyment in the lease of her lands will not bind her. Foster v. Wilcox, 10 R. I. 143.

81. Nash v. Spofford, 10 Met. (Mass.) 192; Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167; Dean v. Shelly, 57 Pa. 426; Hyde v. Warren, 46 Miss. 13.

One's subsequent promise as widow to be answerable for a breach of covenant committed during her coverture is without consideration. State Nat. Bank v. Robidoux, 57 Mo. 446.

82. Foster v. Wilcox, 10 R. I. 443.

83. Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167; Carpenter v. Schermerhorn, 2 Barb. Ch. (N. Y.) 314. And see Shumaker v. Johnson, 35 Ind. 33. *Contra,* Colcord v. Swan, 7 Mass. 291; Hill v. West, 8 Ohio, 225; Massie v. Sebastian, 4 Bibb (Ky.), 436; Nash v. Spofford, 10 Met. (Mass.) 192. And see 4 Com. Dig. 79b.

84. Pool v. Chase, 46 Tex. 207; White v. Graves, 107 Mass. 325.

85. Stewart v. Profit (Tex.), 146 S. W. 563.

86. Freeman v. Wilson, 51 Miss. 329; Kennedy v. Ten Broeck, 11 Bush (Ky.) 241.

woman's conveyance of her lands, and, as we shall notice hereafter, concerning her legal dominion over her lands, the disposition is to construe those requisites more strictly in the case of her general or common-law real estate than where she owns land as her statutory separate estate. Hence a distinction, which modern legislation tends all the while to obliterate, between the conveyance of the wife's general land and of her separate land. As to the latter, estoppel *in pais* is sometimes applicable; but not so, usually, with the former. In the one case the wife's own conduct during coverture, by way of affirmance or receiving benefits, may bind her in spite of some defective method of conveyance; in the other and present case it does not.[87]

Where the general disabilities of a married woman have not yet been removed, and the statute only confers the power to make certain specific contracts or conveyances, and requires certain formalities in the making of these contracts or conveyances, a married woman cannot be estopped at least in the absence of positive fraud; but where her general disabilities as a married woman have been removed she can be estopped by her conduct, though as to the particular matter the law may require a contract or conveyance to be evidenced by certain formalities. In the one case the right to contract by observing the formalities is to create a right the woman would not otherwise have had; in the other the requirement of the formality is a restriction on her general power.[88]

§ 221. Avoidance.

The wife's irregular deed, if fatally defective, under the statute, on the face of it, should as a rule, like the deed of her land in the absence of statutes, be treated as a nullity, incapable of confirmation, and unenforceable against her either in law or equity;[89] while she on her part, during coverture, or within a reasonable time after, may institute proceedings to regain possession,[90] this rule having reference to the wife's lands held under common-law tenure, and not by way of the modern separate estate.

87. Wood v. Terry, 30 Ark. 385; Oglesby Coal Co. v. Pasco, 79 Ill. 164; Sims v. Everhardt, 102 U. S. 300, opinion of court.

88. Brusha v. Board of Education, 41 Okla. 595, 139 Pac. 298, L. R. A. 1916C 233.

89. See Trimmer v. Heagy, and other cases cited in this section, *supra*. The informal deed of her land cannot be enforced as an equitable mortgage. Whiteley v. Stewart, 63 Mo. 360.

90. She may sue during overture by next friend; though independently of statute she ought not to sue without her husband. McCallum v. Petigrew, 10 Heisk. (Tenn.) 394.

If her conveyance be void, a note given in part-payment of the price is necessarily without consideration.[91]

A deed of the wife's real estate, executed by husband and wife while the latter is under age, may be avoided by the wife within reasonable time after discoverture, though more than twenty years have elapsed,[92] for this is analogous to the conveyance of an infant *feme sole* in respect of validity.[93] But not, as it is held, where the wife, being apparently of full age, made oath that she was of age.[94] As to the lapse of time permitted a wife for disaffirming the deed executed by her during infancy, the rule appears to be that a reasonable time should be allowed her after coverture has terminated by the death of her husband or their complete divorce, even though twenty or thirty years may meantime have elapsed since her attainment to majority.[95] Under the Louisiana statute proceedings to avoid a wife's purchase of land for invalidity can be instituted only by the husband or wife or their heirs.[96]

§ 222. Actions.

The husband may sue in his own name for injury to the profits of his wife's real estate; as where growing crops are destroyed or carried off; for this relates to his usufructuary interest. But for injuries to the inheritance, such as trespass, by cutting trees, burning fences, and pulling down houses, and generally in actions for waste, the wife must be joined; and if the husband dies before recovering damages, the right of action survives to the wife. And if the wife survives her husband, she may commence such suits without joining his personal representatives.[97]

It is held that the husband can sue intruders alone for digging

91. Warner v. Crouch, 14 Allen (Mass.), 163.

92. Yourse v. Norcross, 12 Mo. 549. And see Porch v. Fries, 3 C. E. Green (N. J.), 204; Dodd v. Benthal, 4 Heisk. (Tenn.) 601; Williams v. Baker, 71 Pa. 476.

93. Dixon v. Merrett, 21 Minn. 196.

94. Schmitheimer v. Eiseman, 7 Bush (Ky.), 298. *Sed qu.*, where the lond belongs to the wife's general, and not her separate, estate. Sims v. Everhardt, 102 U. S. 300, commenting upon Scranton v. Stewart, 52 Ind. 68.

95. Sims v. Everhardt, 102 U. S. 300. And see Harrer v. Wallner, 80 Ill. 197.

In re Sheehy, 119 La. 608, 44 So. 315.

97. Jones v. Ducktown Sulphur Copper & Iron Co., 109 Tenn. 375, 71 S. W. 821; Hux v. Russell, 138 Tenn. 272, 197 S. W. 865; Bishop v. Readsboro Chair Manufacturing Co. (Vt.), 81 Atl. 454, 36 L. R. A. (N. S.) 1171; 2 Kent Com. 131; Weller v. Baker, 2 Wils. 423, 424; Beaver v. Lane, 2 Mod. 217; Bac. Abr., tit. Baron & Feme, K.; 1 Chit. Pl. (6th Am. ed.) 85; 1 Bl. Com. 362; Illinois, etc., R. R. Co. v. Grable, 46 Ill. 445; Thacher v. Phinney, 7 Allen (Mass.), 146.

up the soil and carrying it away,[1] or generally for forcibly entering the premises.[2] The wife cannot, during coverture, maintain such an action alone.[3] She is a proper party only where she has the meritorious cause of action, or where the right of action survives to her if he dies before the damages are received.[4] But the husband cannot prosecute such an action alone after his wife's death during the pendency of the suit.[5] The husband is the proper plaintiff even where the estate was held by the entirety.[6] Husband and wife are properly joined as plaintiffs in a bill to protect and secure the permanent rights and interests to her real estate.[7] At common law only the husband could maintain ejectment for the wife's land.[8]

Where, pending an action of ejectment brought by husband and wife to recover possession of land to which they were entitled in right of the wife, the husband dies, the right to the rent current and in arrear, and also to damages for waste, survives to the wife; and as to rents accruing after the wife dies also, these go to her heirs and devisees.[9]

Where land vests in a wife before the Married Women's Acts, she cannot maintain an action against a third person for possession during her husband's lifetime,[10] nor can she recover her land from him in his lifetime in ejectment, he being entitled to possession,[11] and where after his death she brings ejectment, she cannot recover damages for its detention during his lifetime.[12]

In Vermont, where spouses are jointly seized of the wife's land not held to her separate use, she must, to maintain ejectment, join him as a party, but her failure to do so will not defeat the action

1. Tallmadge v. Grannis, 20 Conn. 296.

2. Alexander v. Hard, 64 N. Y. 228.

3. Bishop v. Readsboro Chair Mfg. Co., 85 Vt. 141, 81 A. 454.

4. City of Wheeling v. Trowbridge, 5 W. Va. 353.

5. Buck v. Goodrich, 33 Conn. 37.

6. Niagara Oil Co. v. Jackson, 48 Ind. App. 238, 91 N. E. 825; Sharp v. Baker, 51 Ind. App. 547, 96 N. E. 627; West v. Aberdeen & R. R. Co., 140 N. C. 620, 53 S. E. 477. Under the Married Women's Act in Missouri it is held that a wife may maintain an action for the whole damage done to an estate by the entirety by a trespasser who entered without her consent. Cox v. St. Louis, M. & S. E. Ry. Co., 123 Mo. App. 356, 100 S. W. 1096.

7. Wyatt v. Simpson, 8 W. Va. 394.

8. Harris v. Sconce, 66 Mo. App. 345; Evans v. Kunze, 128 Mo. 670, 31 S. W. 123; Bryant v. Freeman (Tenn.), 173 S. W. 863.

9. King v. Little, 77 N. C. 138.

10. Powell v. Bowen (Mo.), 214 S. W. 142; Westlake v. City of Youngstown, 63 Ohio St. 249, 56 N. E. 873; Vanata v. Johnson, 170 Mo. 269, 70 S. W. 687.

11. Smith v. White, 165 Mo. 590, 65 S. W. 1013.

12. Smith v. White, 165 Mo. 590, 65 S. W. 1013.

where the error is not seasonably objected to.[13] Under statute a wife may now maintain action for damages to her real estate without joining her husband,[14] and the husband can no longer maintain such actions,[15] In Virginia a wife may maintain ejectment even where the legal title is in her husband, if she has the equitable title.[16]

13. Reynolds v. Bean (Vt.), 99 A. 1013.

14. Independence Sash, Door & Lumber Co. v. Bradfield, 153 Mo. App. 527, 134 S. W. 118; McKenzie v. Ohio River R. Co., 27 W. Va. 306; Quinn v. Van Raalte (Mo.), 205 S. W. 59.

15. Anderson v. Todesca, 214 Mass. 102, 100 N. E. 1068.

16. Lynchburg Cotton Mills v. Rives, 112 Va. 137, 70 S. E. 542.

CHAPTER XII.

EFFECT OF COVERTURE ON WIFE'S CONTRACTS IN GENERAL.

§ 223. Wife's Disability to Contract — Common-Law Rule Stated.

In respect to her disability to contract, the wife may be considered, as Mr. Bingham has remarked, worse off at the common law than infants; for the contracts of an infant are for the most part voidable only, while those of married women are, with few exceptions, absolutely void. But the disabilities incident to these two conditions rest upon different grounds. For the disabilities attached to infancy are designed as a protection for the inexperienced against the fraudulent; while those incident to coverture are the simple consequence of that sole or paramount authority which the law vests in the husband.[17] Common sense teaches that married women have sufficient discretion to act for themselves, and stand on a different footing from young children; this the English law fully recognizes, irrespective of equity rules, by empowering all women to contract up to the very moment of their marriage and from the time when coverture ceases. At most it could only be said that a woman, while living in the married state, was peculiarly subject to influence from the other sex, which might be exerted to her disadvantage.

The husband may make in his own right such contracts as he pleases, as well during coverture as before. He is never presumed to act under the wife's influence.[18] But with certain exceptions her incapacity at the common law is total,[19] whether she contracts

17. See Bing. Inf. & Cov. 181, 182, Am. ed.; 2 Kent. Com. 150; Schouler Dom. Rel. Infancy.

18. City Council v. Van Roven, 2 McCord (S. C.), 465.

19. 1 Selw. N. P. 298; Bing. Inf. 261, 262; Hall v. Johns, 17 Ida. 224, 105 P. 71; Eberwine v. State, 79 Ind. 266; Candy v. Coppock, 85 Ind. 594; Warner v. Warner, 235 Ill. 448, 85 N. E. 630; Forsyth v. Barnes, 228 Ill. 326, 81 N. E. 1028; McKee v. Sypert,

solely or as joint principal,[20] especially where the contract is executory.[21] She is permitted to pass her real estate by joining in a deed with her husband; but her separate conveyance (except by some matter of record) was of no effect whatsoever.[22]

On the same principle it is held that a married woman cannot bind herself by her contract to convey estate which is devised to her in trust for sale.[23] Such contracts are also void as to the other contractor,[24] and will not be enforced even in equity.[25]

The executory and unacknowledged contract of a married woman, being void as a contract, cannot be supported as against her on the ground of estoppel.[26] A sheriff's sale of her land upon her judgment note, given as security for her husband, may be set aside as void.[27] In all these cases the wife is considered as under the husband's dominion, and unable to act for herself.[28]

§ 224. What Law Governs.

A wife's contract is governed by the law in force when it was made.[29] Therefore Married Women's Acts giving the wife a right

6 Ky. Law, 518; Lyell v. Walbach, 113 Md. 574, 77 A. 1111; Taylor v. Swafford, 122 Tenn. 303, 123 S. W. 350; Major v. Holmes, 124 Mass. 108; *In re* Carroll's Estate, 219 Pa. 440, 68 A. 1038; Blakely v. Kanaman (Tex.), 168 S. W. 447 Crockett v. Doriot, 85 Va. 240, 3 S. E. 128; Stewart v. Conrad's Adm'r, 100 Va. 128, 4 Va. Sup. Ct. R. 49, 40 S. E. 624. A wife cannot bind herself by a purchase of land at a trustee's sale, though she consented in court to its confirmation. Robinson v. Robinson, 11 Bush (Ky.), 174; Caldwell v. Scott Bros. (Tex.), 143 S. W. 1192.

20. Cole v. Temple, 142 Ind. 498, 41 N. E. 942.

21. Graham v. Graham, 22 Ky. Law, 123, 56 S. W. 708; Cunningham v. Fischer, 20 Ky. Law, 1167, 48 S. W. 993; Crawford v. Hazelrigg, 117 Ind. 63, 18 N. E. 603, 2 L. R. A. 139; Wilson v. Dearborn (Tex.), 179 S. W. 1102.

22. 2 Bl. Com. 293, 351, 364, and notes by Chitty and others; Robinson v. Robinson, 11 Bush (Ky.), 174; Ferguson v. Reed, 45 Tex. 574; Botsford v. Wilson, 75 Ill. 133; 2 Kent Com. 150-154; *Ib.* 167, 168. Rule applied to a land patent signed by husband and wife. Shartzer v. Love, 49 Cal. 93.

23. Avery v. Griffin, L. R. 6 Eq. 606.

24. Shirk v. Stafford, 31 Ind. App. 247, 67 N. E. 542.

25. Atkins v. Atkins, 195 Mass. 124, 80 N. E. 806.

26. Wood v. Terry, 30 Ark. 385; Oglesby Coal Co. v. Pasco, 79 Ill. 164. But cf. Norton v. Nichols, 35 Mich. 148; Bishop v. Bourgeois, 58 N. J. Eq. 417, 43 A. 655.

27. Doyle v. Kelly, 75 Ill. 574.

28. Marshall v. Rutton, 8 T. R. 545; 11 East, 301; 2 B. & P. 226; 3 B. & C. 291; Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167; Benjamin v. Benjamin, 15 Conn. 347; Ayer v. Warren, 47 Me. 217; Young v. Paul, 2 Stockt. (N. J.) 401; Stillwell v. Adams, 29 Ark. 346; Stockton v. Farley, 10 W. Va. 171; Savage v. Davis, 18 Wis. 608; Williams v. Coward, 1 Grant Cas. 21.

29. Campbell v. Virginia Iron, Coal & Coke Co., 31 Ky. Law, 1110, 104 S. W. 770; Levis Lukoski Mercantile

to contract are prospective only and cannot validate contracts made before their enactment.[30] Where a wife's contract is void where made, it is not enforceable anywhere.[31] It is generally held that a wife is liable on a contract which is valid by the law of the State where it is made, though void by the law of her domicile.[32] Such a contract may be generally enforced in another State even though its public policy prohibits such contracts,[33] but not in Louisiana.[34] The law of the place of performance does not affect the contract of a wife if such contract was valid where made, unless it appears from the contract that the parties intended to contract according to the law of the place of performance.[35] Promissory notes made by a wife in a State where such notes were void is not liable thereon though payable in a State where they would have been valid.[36] The same is true as to accommodation indorsements by a wife.[37] It is otherwise where the note is delivered and consummated in a State where the wife may validly contract, in which case it is a contract of that State.[38] In Kentucky it is held that an intention

Co. v. Bowers, 105 Tenn. 138, 58 S. W. 287; Clark v. Eltinge, 38 Wash. 376, 80 P. 556, 107 Am. St. R. 858.

30. Stephens v. Hicks, 156 N. C. 239, 72 S. E. 313, 36 L. R. A. (N. S.) 354.

31. Nichols & Shepard Co. v. Marshall, 108 Iowa, 518, 79 N. W. 282 (suretyship).

32. Burr v. Beckler, 264 Ill. 230, 106 N. E. 206; Mayer v. Roche, 77 N. J. Law, 681, 75 A. 235; Bowles v. Field, 78 F. 742; Law v. Smith, 68 N. J. Eq. 81, 59 A. 327; Poole v. Perkins (Va.), 101 S. E. 240; Alexander v. Shillaber, 64 How. Prac. (N. Y.) 530; Young v. Hart, 101 Va. 480, 44 S. E. 703.

33. Bowles v. Feld, 78 F. 742; Meier & Frank Co. v. Bruce, 30 Ida. 732, 168 P. 5; Robison v. Pease, 28 Ind. App. 610, 63 N. E. 479; Garrigue v. Keller, 164 Ind. 676, 74 N. E. 523, 108 Am. St. R. 324, 69 L. R. A. 870; Young's Trustee v. Bullen, Ky. Law, 1561, 43 S. W. 687; Marks v. Germania, &c., Bank, 110 La. 659, 34 S. 725; Baer v. Terry, 105 La. 479, 29 So. 886; Farmers' State Bank v. Burtler (Nev.), 164 Pac. 562; International Harvester Co. of America v. McAdam, 142 Wis. 114, 124 N. W. 1042.

34. National City Bank v. Barringer (La.), 78 So. 134; Freret v. Taylor, 119 La. 307, 44 So. 26; First Nat. Bank v. Hinton, 123 La. 1018; 49 So. 692.

35. Burr v. Tobey, 182 Ill. App. 228; F. B. Hauck, &c., Co. v. Sharpe, 83 Mo. App. 385.

36. Appeal of Freeman, 68 Conn. 533, 37 A. 420, 57 Am. St. R. 112, 37 L. R. A. 452; Hager v. National German American Bank, 105 Ga. 116, 31 S. E. 141; Thompson v. Taylor, 65 N. J. Law, 107, 46 A. 567; Union Nat. Bank v. Chapman, 169 N. Y. 538, 62 N. E. 672, 88 Am. St. R. 614, 57 L. R. A. 513. Putting a note in the mail, thus parting with its control, has been held such a delivery as to make it a contract of the State where it was mailed. Burr v. Beckler, 264 Ill. 230, 106 N. E. 206, L. R. A. 1916A, 1049.

37. Chemical Nat. Bank v. Kellogg, 183 N. Y. 92, 75 N. E. 1103, 111 Am. St. R. 717, 2 L. R. A. (N. S.) 299.

38. Walker v. Arkansas Nat. Bank, 256 F. 1; R. S. Barbee & Co. v. Bevins, Hopkins & Co., 176 Ky. 113, 195 S. W. 154; First Nat. Bank v. Shaw, 109 Tenn. 237, 70 S. W. 807, 97 Am. St. R. 840, 59 L. R. A. 498.

of a wife to remove to another State, followed by such removal, will render her property subject to the law of such other State.[39] The courts of States other than Illinois will not enforce against a wife a contract made by her husband in Illinois while the spouses were temporarily residing there, and without her knowledge, though the goods purchased were of a kind for which she would have been liable under the law of that State as family expenses.[40]

§ 225. Exceptions to Rule.

The wife may contract as though *sole,* even at common law, where her husband is *civiliter mortuus,* and in certain localities where the separate trade custom applied. The same is true where her husband is an alien or has never been in the United States,[41] and where he abandons her and abjures the realm,[42] and where there is a total renunciation of the marriage relation by the husband, or facts from which such renunciation can be inferred.[43] The absence of a husband in a distant State may capacitate a wife to contract, whether he has abandoned her or not.[44]

§ 226. Extent of Disability.

So far is this doctrine of the wife's contract disability carried, that the agreement of a widow, after her husband's death, to pay a debt which she had contracted during coverture, and which consequently was not binding upon herself, but, if at all, upon her husband, has been treated as void, on the ground that the promise was without consideration and only morally binding.[45] But in another case it was held a sufficient consideration to support a widow's promissory note that it had been given by her, out of respect for her late husband's memory, to secure a debt due by him.[46] As a rule, of course, the widow cannot be compelled to

39. Lee v. Belknap, 163 Ky. 418, 173 S. W. 1129.

40. Mandell Bros. v. Fogg, 182 Mass. 582, 66 N. E. 198, 94 Am. St. R. 667.

41. Levi v. Marsha, 122 N. C. 565, 29 S. E. 832.

42. Sanborn v. Sanborn, 104 Mich. 180, 62 N. W. 371.

43. Gregory v. Pierce, 4 Metc. (Mass.) 478.

44. Golden v. City of Galveston, 20 Tex. Civ. 584, 50 S. W. 416.

45. Virginia-Carolina Chemical Co. v. Fisher, 58 Fla. 377, 50 So. 504; Robinson v. Robinson, 11 Bush (Ky.), 174; Holloway's Assignee v. Rudy, 22 Ky. Law, 1406, 60 S. W. 650; Weathers v. Borders, 121 N. C. 387, 28 S. E. 524; Saulsbury v. Corwin, 40 Mo. App. 373; Meyer v. Haworth, 8 Ad. & El. 467; Waul v. Kirkman, 25 Miss. 609; Lennox v. Eldred, 1 Thomp. & C. 140.

46. Ridout v. Bristow, 1 Cr. & J. 231; Tyr. 84. See also Nelson v. Searle, 3 Jur. 290.

make good an engagement or fulfil a contract which she entered into while under the disability of coverture.[47]

Lord Nottingham, in a case mentioned in the old reports, once refused to absolve a husband, after his wife's death, from payment for goods which she had purchased prior to the marriage, but never paid for, there being proof that he had actually received the goods, the debt being antenuptial. His lordship declared with earnestness that he would change the law on that point.[48] But in this case it appears that the goods did not actually come to the husband's hands until after the wife's death. And the authority of this decision has since been greatly impaired.[49] In equity the creditors of the first husband may, where his wife was administratrix, follow the assets in the hands of a second husband, although the wife be dead; and at law during her life.[50]

The contract of a married woman, being void, is likewise unenforceable against her after divorce, notwithstanding her subsequent promise, when once more *sui juris;* for such promise is without consideration.[51] The same is true where her disability has been removed by a Married Women's Act.[52] But after the death of her spouse, or her divorce from him, her promise, founded on a new consideration, may be enforced against her.[53] A complete acceptance of all the benefits of such a contract after the disability has been removed will suffice to bind her.[54]

§ 227. Removal of Disability.

In some States chancery has the power to remove a wife's common-law disability to contract.[55] The Married Women's Act in Kentucky by implication repealed the earlier statute of this nature in that State.[56]

47. Putnam v. Tennyson, 50 Ind. 456; Ross v. Singleton, 1 Del. Ch. 149.

48. Freeman v. Goodham, Cha. Ca. 295.

49. Cha. Ca. 295; 1 Eq. Cas. Abr. 60.

50. Cha. Ca. 80; 1 Vern. 309; 2 Vern. 61, 118; 1 Eq. Cas. Abr. 60, 61; Cro. Car. 603; 1 Roll. Abr. 35. See Magruder v. Darnell, 6 Gill (Md.), 269.

51. Putnam v. Tennyson, 50 Ind. 456.

52. Thompson v. Minnich, 227 Ill. 430, 81 N. E. 336; Bragg v. Israel, 86 Mo. App. 338; Dempsey v. Wells, 109 Mo. App. 470, 84 S. W. 1015; Horton v. Troll, 183 Mo. App. 677, 167 S. W. 1081.

53. Ruppel v. Kissel, 24 Ky. Law, 2371, 74 S. W. 220; Cheves v. Glover, 4 Ky. Law, 360; Bagby v. Bagby, 10 Ky. Law, 540; Lyell v. Walbach, 113 Md. 574, 77 A. 1111.

54. Warner v. Warner, 235 Ill. 448, 85 N. E. 630.

55. Troy Fertilizer Co. v. Lachry, 114 Ala. 177, 21 So. 471; Reich v. Rosselin, 26 La. Ann. 418; Lane v. Traders Deposit Bank, 19 Ky. Law, 1357, 43 S. W. 442.

56. Fowler v. Fowler, 138 Ky. 326, 127 S. W. 1014.

§ 228. Effect of Ratification.

A wife's liability on a contract which she has power to make is governed by the ordinary law of contracts.[57] In such case she may be bound by an adoption of a contract she does not sign.[58]

§ 229. Effect of Married Women's Acts.

The Married Women's Acts in some States now permit a wife to contract to the same extent as a single woman,[59] even though she has no separate estate or business.[60] And even though the contract is in the name of the husband,[61] except where expressly restrained by the statute.[62] And, in Missouri and Vermont, except with her husband.[63] The Indiana and Pennsylvania Married Women's Acts permit a wife to contract as *sole*, with the exception that they restrain her right to convey or mortgage her land and prohibit her becoming a surety.[64] The New Jersey Married Women's Acts permit a wife to make all contracts except those of suretyship and accommodation indorser.[65]

57. McKell v. Merchants' Nat. Bank, 62 Neb. 608, 87 N. W. 317.

58. McBride v. Seney, 192 Ill. App. 18.

59. Granath v. Johnson, 90 Ill. App. 308; Augusta's Nat. Bank v. Beard's Ex'r, 100 Va. 687, 42 S. E. 694; Farmers' State Bank v. Keen (Okla.), 167 P. 207; Busch v. Klein, 38 App. Div. 624, 55 N. Y. S. 917; Commonwealth v. Abbott, 168 Mass. 471, 47 N. E. 112; Voss v. Sylvester, 203 Mass. 233, 89 N. E. 241; Ames v. Foster, 3 Allen (Mass.), 541; Chapman v. Foster, 6 Allen (Mass.), 136; Stewart v. Jenkins, 6 Allen (Mass.), 300; Freeman v. Fowler, 6 Allen (Mass.), 303, note; Easterbrook v. Earle, 97 Mass. 302; Laboree v. Colby, 99 Mass. 559; Fiske v. McIntosh, 101 Mass. 66; Gordon v. Dix, 106 Mass. 305; Faucett v. Currier, 109 Mass. 79; *id.*, 115 Mass. 20; Ellis v. Cribb, 55 S. C. 328, 33 S. E. 484. The husband may thus become in legal contemplation the wife's agent in such transactions. See Wilder v. Richie, 117 Mass. 382; Miller v. Brown, 47 Mo. 505; Hinkson v. Williams, 41 N. J. L. 35; Taylor v. Shelton, 30 Conn. 122; Gilbert v. Plant, 18 Ind. 308; Herrington v. Robertson, 71 N. Y. 280; Adams v. Charter, 46 Conn. 551.

60. Minners v. Smith, 40 Misc. 648, 83 N. Y. S. 117; Wyeth v. Sorchan, 38 Misc. 173, 77 N. Y. S. 263; Harrington v. Lowe, 73 Kan. 11, 84 P. 570, 4 L. R. A. (N. S.) 547; Peck v. Marling's Adm'r, 22 W. Va. 708.

61. Wuertz v. Braun, 113 App. Div. 459, 99 N. Y. S. 340.

62. Bogie v. Nelson, 151 Ky. 443, 152 S. W. 250.

63. Niemeyer v. Niemeyer, 70 Mo. App. 609; Huss v. Culver, 70 Mo. App. 514; Barron v. Dugan's Estate (Vt.), 92 A. 927; Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 A. 285; Seaver v. Lang (Vt.), 104 A. 877.

64. Druckamiller v. Coy, 42 Ind. App. 500, 85 N. E. 1028; Anderson v. Citizens' Nat. Bank, 38 Ind. App. 190, 76 N. E. 811; Tuell v. Homann (Ind), 108 N. E. 596; Townsend v. Huntzinger, 41 Ind. App. 223, 83 N. E. 619; Peter Adams Paper Co. v. Cassard, 206 Pa. 179, 55 A. 949; Scott v. Collier (Ind.), 77 N. E. 666, affd., 166 Ind. 644, 78 N. E. 184.

65. First Nat. Bank v. Rutter, 91 N. J. Law, 424, 106 A. 371.

Legislative changes in England and America, as well as modern equity decisions, apply more universally to contracts beneficial to herself, or to such as were made with reference to her separate trade, or involving liabilities expressly charged by her upon her separate property.[66]

In Nebraska a wife can only contract solely with reference to and on the faith of her separate estate,[67] and with reference to property owned at the time of contract.[68] Her contract can be enforced only against such property.[69]

In Alabama, North Carolina and Pennsylvania the husband's consent is required in some cases to validate the wife's contract.[70]

66. Bank of Commerce v. Baldwin, 12 Ida. 202, 85 P. 497; Cooper v. Burel, 129 Ark. 261, 195 S. W. 356; Meier v. Frank Co., 30 Ida. 732, 168 P. 5; June v. Labardie, 132 Mich. 135, 92 N. W. 937, 9 Det. Leg. N. 541; Jenne v. Marbel, 37 Mich. 319; Kenton Ins. Co. of Ken. v. McClellan, 43 Mich. 564, 6 N. W. 88; Edwards v. McEnhill, 51 Mich. 160, 16 N. W. 322; Mut. Benefit Life Ins. Co. v. Wayne Co. Sav. Bank, 68 Mich. 116; 35 N. W. 853; Hirth v. Hirth, 98 Va. 121, 34 S. E. 964; Kriz v. Peege, 119 Wis. 105, 95 N. W. 108; Slack v. Norton, 111 Mich. 213, 69 N. W. 497, 3 Det. Leg. N. 629; Agar v. Streeter (Mich.), 150 N. W. 160; Orr & Rolfe Co. v. Merrill (N. H.), 98 A. 303. Thus it was held in Wisconsin that she could not bind herself by a contract to pay an annuity for life to her husband's parents. Ludwig v. Ludwig (Wis.), 172 N. W. 726. Under that statute it was held that she could enforce a contract made with her in consideration of her executed release of dower. Lyttle v. Goldberg, 131 Wis. 613, 111 N. W. 718. Where a wife receives no benefit from a contract made during coverature, her promise to pay, made after coverature has ceased, will not bind her. Thompson v. Hudgins, 116 Ala. 93, 22 So. 632. Liability for the wife's debts is confined chiefly to cases where the wife intended to deal with her separate estate and the contract was reasonably adapted to better such estate. Kantrowitz v. Prather, 31 Ind. 92; Hasheagan v. Specker, 36 Ind. 413; McCormick v. Holbrook, 22 Iowa, 487; Stilwell v. Adams, 29 Ark. 346. And so with protection of the property against the husband's creditors. Seeds v. Kahler, 76 Penn. St. 262.

67. Grand Island, &c., Co. v. Wright, 53 Nebr. 574, 74 N. W. 82; Stenger, &c., Assn. v. Stenger, 54 Nebr. 427, 74 N. W. 846; Westervelt v. Baker, 56 Nebr. 63, 76 N. W. 440; Citizens', &c., Bank v. Smout, 62 Nebr. 223, 86 N. W. 1068; Burns v. Cooper, 72 C. C. A. 25, 140 F. 273; Farmers' Bank v. Boyd, 67 Nebr. 497, 93 N. W. 676; Union State Bank v. McKelvie, 91 Nebr. 728, 136 N. W. 1021.

68. Parratt v. Hartsuff, 75 Nebr. 706, 106 N. W. 966. The authority granted to a wife by the Nebraska Married Women's Act to contract as to her separate estate does not include the right to contract as to property which she expects to inherit, as such a mere hope of succession is not property. Koeher v. Cornell, 59 Nebr. 315, 80 N. W. 911.

69. Parratt v. Hartsuff, 75 Nebr. 706, 106 N. W. 966.

70. State v. Robinson, 143 N. C. 620, 56 S. E. 918; Wood v. Potts & Potts, 140 Ala. 425, 37 So. 253; Vann v. Edwards, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461; Bartholomew v. Allentown Nat. Bank, 250 Pa. 509, 103 A. 954.

But his making a contract as her agent for the sale of her land has been held a sufficient consent.[71] In North Carolina she must also acknowledge the contract, after a privy examination.[72] In the same State his assent is not necessary where he has abandoned her,[73] or where he has been declared an idiot or a lunatic.[74] The North Carolina statute as to contracts between spouses does not apply to a contract between a wife and a third person.[75] Under such statutes contracts not within them are void,[76] so that one seeking to hold a wife on a contract must plead and affirmatively show that the contract sued on is within the statute.[77] Although under the Virginia Married Women's Act a personal judgment may be had against a wife on her contract, the judgment can affect only that part of property owned at the time of contract which is still owned at the time the lien of the judgment and execution attaches.[78]

71. Bell v. Jones, 151 N. C. 85, 65 S. E. 646.

72. Ball & Sheppard v. Paquin, 140 N. C. 83, 52 S. E. 410.

73. Vandiford v. Humphrey, 139 N. C. 65, 51 S. E. 893.

74. Lancaster v. Lancaster, — N. C. —, 100 S. E. 120.

75. Jackson v. Beard, 162 N. C. 105, 78 S. E. 6.

76. Green v. Page, 80 Ky. 368, 4 Ky. Law, 192; Foxworth v. Magee, 44 Miss. 430; Mercantile Nat. Bank v. Benbow, 150 N. C. 781, 64 S. E. 891; Thompson v. Morrow (Tex.), 147 S. W. 706; Lilly v. Yeary (Tex.), 152 S. W. 823; Thompson v. Stark, 25 Ky. Law, 1882, 79 S. W. 202.

77. Warner v. Hess, 66 Ark. 113, 49 S. W. 489; Bott v. Wright, Tex. Civ. App. 1910, 132 S. W. 960.

78. Duval v. Chelf, 92 Va. 489, 23 S. E. 893.

CHAPTER XIII.

EFFECT OF COVERTURE ON PARTICULAR CONTRACTS OF WIFE.

§ 230. Promissory Notes — As Maker or Indorser.

At common law a wife could not, either jointly with her husband or alone, make or indorse a promissory note, so as to bind herself.[79] A wife's note is still void in Florida,[80] unless she has been made a free dealer.[81] Under the Texas statute a wife's note is void where the husband does not join.[82] In Louisiana a certificate from a judge, after statutory proceedings, will alone validate a wife's note.[83] Where the statute makes a wife's notes as surety void, they are void even in the hands of a holder for value without notice.[84] Renewals of such a note did not affect defences as to the original note.[85]

79. Mason v. Morgan, 2 Ad. & El. 30; Snider v. Ridgeway, 49 Ill. 522; O'Daily v. Morris, 31 Ind. 111; Dollner v. Snow, 16 Fla. 86; Robertson v. Wilburn, 1 Lea (Tenn.), 633; Brown v. Orr, 29 Cal. 120; Tracy v. Keith, 11 Allen (Mass.), 214; Gunn v. A. L. Wilson Co., 19 Ga. App. 701, 92 S. E. 232; Heiney v. Lontz, 147 Ind. 417, 46 N. E. 665; Underhill v. Mayer, 174 Ky. 229, 192 S. W. 14; Cheves v. Glover, 4 Ky. Law, 360; Boughner v. Laughlin's Ex'x, 23 Ky. Law, 1166, 64 S. W. 856 (affd., 25 Ky. Law, 869, 76 S. W. 519); Heburn v. Warner, 112 Mass. 271, 17 Am. R. 86; Nourse v. Henshaw, 123 Mass. 96; Harrington v. Thompson, 9 Gray (Mass.), 65; Foxworth v. Magee, 44 Miss. 430; J. B. Newton & Sons v. Peunte (Tex.), 131 S. W. 1161; Hall v. Decherd (Tex.), 121 S. W. 1133; First Nat. Bank of Bertoli, 88 Vt. 421, 92 A. 970; Red River Nat. Bank v. Ferguson (Tex.), 192 S. W. 1088.

80. Virginia-Carolina Chemical Co. v. Fisher, 58 Fla. 377, 50 So. 504.

81. First Nat. Bank v. Hirschkowitz, 46 Fla. 588, 35 So. 22.

82. Shaw v. Proctor (Tex.), 193 S. W. 1104.

83. Dayries v. Lindsly, 128 La. 259, 54 So. 791.

84. Leschen v. Guy, 149 Ind. 17, 48 N. E. 344.

85. Lackey v. Boruff, 152 Ind. 371, 53 N. E. 412; First Nat. Bank v. Bertoli, 87 Vt. 297, 89 A. 359; Gilbert v.

Where a wife's note for her husband's debt was merely voidable when given, a note to renew such note, given after the enactment of a statute enabling the wife to be a surety, binds her.[86] Generally a wife is now liable on her note,[87] especially one given before marriage,[88] even though given for a community debt,[89] even where the loan is negotiated by her husband, if the lender in good faith intends to give credit to the wife,[90] and even if she intends to pay her husband's debt with the proceeds,[91] even though the lender knows that such is her intention.[92]

In several States a wife is not liable on her note where the money obtained was obtained for her benefit, or for the use and benefit of her separate estate.[93] In Nebraska, in order to bind a wife on her note, it must appear that she had a separate estate at the time of giving the note,[94] and that the note was made with reference to or on the faith of such estate.[95] She is not relieved from paying her part of a note by the fact that it is usurious and that the other part

Brown, 123 Ky. 703, 29 Ky. Law, 1248, 7 L. R. A. (N. S.) 1053, 97 S. W. 40.

86. Walker v. Arkansas Nat. Bank, 256 F. 1.

87. Bowles v. Field, 83 F. 886; Mahana v. Van Alstyne (Cal.), 178 P. 853; Swearingen's Executor & Trustee v. Tyler, 132 Ky. 458, 116 S. W. 331; Dennis v. Grove, 4 Pa. Super. 480; McKinney v. Peters (S. D.), 170 N. W. 132; Cummings v. Irvin (Tenn.), 59 S. W. 153; Northern Bank & Trust Co. v. Graves, 79 Wash. 411, 140 P. 328; Kennedy v. Harris, 3 Ind. T. 487, 58 S. W. 567; City Bank & Trust Co. v. Atwood (Mich.), 163 N. W. 941; Security Sav. Bank v. Smith, 38 Ore. 72, 62 P. 794, 84 Am. St. R. 756; Becker v. Noegel (Wis.), 160 N. W. 1055; Siemers v. Kleeburg, 56 Mo. 196; Colonial Building & Loan Ass'n v. Griffin, 85 N. J. Eq. 455, 96 A. 901; Italo-French Produce Co. v. Thomas, 31 Pa. Super. 503.

88. Conrad v. Howard, 89 Mo. 217, 1. S. W. 212.

89. Churchill v. Miller, 90 Wash. 694, 156 P. 851.

90. Longley v. Bank of Parrott, 19 Ga. App. 701, 92 S. E. 232.

91. Cline v. Milledgeville Banking Co., 131 Ga. 611, 62 S. E. 984; Iona Sav. Bank v. Boynton, 69 N. H. 77, 39 A. 522.

92. Rood v. Wright, 124 Ga. 849, 53 S. E. 390.

93. Parvis v. Williams Co., 1 Marv. (Del.) 325, 40 A. 1123; Scott v. Collier, 166 Ind. 644, 78 N. E. 184; Coats v. McKee, 26 Ind. 223; Standard Brewery v. Lacanski (Ind.), 111 N. E. 80; McDaniel v. Jonesboro Trust Co., 127 Ark. 61, 191 S. W. 916; Dutton v. Million (Ark.), 169 S. W. 1183; Vandeventer v. Davis, 92 Ark. 604, 123 S. W. 766; Schlatterer v. Nichodemus, 51 Mich. 626, 17 N. W. 210; National Lumberman's Bank v. Miller, 131 Mich. 564, 91 N. W. 1024, 9 Det. Leg. N. 435, 100 Am. St. R. 623; Crampton v. Newton's Estate, 132 Mich. 149, 93 N. W. 250, 9 Det. Leg. 570; First Sav. Bank & Trust Co. v. Flournoy (N. M.), 171 P. 793; Fisher v. Scherer (Tex.), 169 S. W. 1133; Noel v. Clark, 25 Tex. Civ. 136, 60 S. W. 356.

94. McKell v. Merchants Nat. Bank, 62 Nebr. 608, 87 N. W. 317.

95. T. G. Northwall Co. v. Osgood, 80 Nebr. 764, 115 N. W. 308.

is that of her husband.[96] Under such statutes the holder has the burden of showing that the consideration passed to her,[97] and was for the benefit of her separate estate.[98]

In Michigan, where a wife can contract only as to her separate estate, it was held that a holder of a joint note against spouses for goods used by both in their business could not be enforced except on proof that the holder believed that the wife was the sole owner of the property, and had good reason for the belief, based on her statements, and that he looked to her for payment.[99] One taking a note from a woman known to be married is chargeable with knowledge of the statutory limitations on her power to contract,[1] there being no presumption that she intended to bind her separate estate by the note.[2] Such a note can be enforced against her only to the extent to which it is for her benefit.[3] In Connecticut it has been held that a wife's note given to induce the payee not to sue the husband was binding.[4] In Louisiana a note given for fees for legal services was held not enforceable where the maker was a wife and where part of the services were rendered to the husband, who retained the attorney.[5] In Massachusetts, where a wife may contract as *sole*, she is bound by the provisions of a statute providing parties appearing on a note are *prima facie* such for value.[6] In Michigan a wife is not bound on a joint note with her husband for the price of a horse purchased jointly.[7] She is not liable on a note secured by mortgage

96. Lanier v. Olliff, 117 Ga. 397, 43 S. E. 711.

97. Culberhouse v. Hawthorne, 107 Ark. 462, 156 S. W. 421; Pyles v. Farmers' Bank (Ark.), 176 S. W. 141; Jaeckel v. Pease, 6 Ida. 131, 53 P. 399; Ensign v. Dunn, 181 Mich. 456, 148 N. W. 343; Russell v. People's Sav. Bank, 39 Mich. 671, 33 Am. R. 444; Buhler v. Jennings, 49 Mich. 538, 14 N. W. 488; Marx. v. Bellel, 114 Mich. 631, 72 N. W. 620, 4 Det. Leg. N. 723; Harris v. Gates, 121 Mich. 163, 79 N. W. 1098, 6 Det. Leg. N. 406; Whittier v. Wenner, 96 Nebr. 228, 147 N. W. 460; Bishop v. Bourgeois, 58 N. J. Eq. 417, 43 A. 655; First State Bank v. Tinkham (Tex.), 195 S. W. 880; Citizens' State Bank of Shawano v. Cayouette (Wis.), 172 N. W. 320; Fisk v. Mills, 104 Mich. 433, 62 N. W. 559; Benjamin v. Youngblood (Tex.), 207 S. W. 687.

98. Hallock v. De Munn, 2 Thomp. & C. (N. Y.) 350.

99. Chamberlain v. Murrin, 92 Mich. 361, 52 N. W. 640.

1. First Nat. Bank v. Short, 15 Pa. Super. 64.

2. Dodge v. Healey (Nebr.), 170 N. W. 828; Grand Island Banking Co. v. Wright, 53 Nebr. 574, 74 N. W. 82; State Nat. Bank v. Smith, 55 Nebr. 54, 75 N. W. 51.

3. Equitable Trust Co. v. Torphy, 37 Ind. App. 220, 76 N. E. 639.

4. Markel v. De Francesco (Conn.), 105 A. 703.

5. Rawlings v. Brandon, Man. Unrep. (La.) Cas. 178.

6. Harvey v. Squire, 217 Mass. 411, 105 N. E. 355; Wilder v. Ritchie, 117 Mass. 382; Stewart v. Jenkins, 6 Allen (Mass.), 300; Freeman v. Fowler, 6 Allen (Mass.), 300.

7. Caldwell v. Jones, 115 Mich. 129, 73 N. W. 129, 4 Det. Leg. N. 795.

where she joins in the note and mortgage merely to release dower and homestead.[8] Under the Missouri statute a wife giving a note and mortgage of real estate of which she is seized in her own right, she is not liable for the debt, but her land is bound, and the debt may be collected by foreclosure.[9] Under the North Carolina statute a note signed by a wife with her husband without privy examination is not enforceable against her separate estate.[10]

§ 231. As Accommodation Party.

In Kansas, Massachusetts and New Mexico a wife may now bind herself as an accommodation party on a note.[11] In New Jersey a wife is not bound by her accommodation note,[12] whether payable to the order of the husband or to hers and indorsed by her before delivery,[13] unless she receives a benefit to herself or her separate estate thereby.[14] In several States the statute forbids a wife to become accommodation indorser or surety on a note.[15] Even where such a statute exists, she may validly bind herself by a renewal of a note given before the enactment where it appears that parties intended a mere continuation of the original obligation.[16] In Delaware a wife is not liable as accommodation indorser of her husband's note where she received no benefit from the transaction.[17]

§ 232. For Husband's Debt.

In Massachusetts a wife's note for her husband's debt is valid.[18] In Pennsylvania such a note is valid when given as an original

8. Simons v. McDonnell, 120 Mich. 621, 79 N. W. 916, 6 Det. Leg. N. 309.

9. Hagerman v. Sutton, 91 Mo. 519, 4 S. W. 73.

10. Harvey Blair & Co. v. Johnson, 133 N. C. 352, 45 S. E. 644.

11. State Bank v. Maxson, 123 Mich. 250, 82 N. W. 31, 6 Det. Leg. N. 1034, 81 Am. St. R. 196; First Sav. Bank & Trust Co. v. Fournoy (N. M.), 171 P. 793; Middleborough Nat. Bank v. Cole, 191 Mass. 168, 77 N. E. 781.

12. Eastburn v. Vliet, 64 N. J. Law, 627, 46 A. 735, 1061; People's Nat. Bank v. Schepflin, 73 N. J. Law, 29.

13. People's Nat. Bank v. Schepflin, 73 N. J. Law, 29, 62 A. 333.

14. Newark Trust Co. v. Curtiss, 85 N. J. Law, 491, 89 A. 990; Central Sav. Bank Co. v. Barber (N. J.), 105 A. 22; First Nat. Bank v. Shumard (N. J.), 103 A. 1001; Eastburn v. Vliet, 64 N. J. Law, 627, 46 A. 735, 1061.

15. Mackintyre v. Jones, 9 Pa. Super. 543; Henry v. Bigley, 5 Pa. Super. 503; *In re* Good's Estate, 150 Pa. 307, 24 Atl. 623; Class, &c., Co. v. Rago, 240 Pa. 470, 87 Atl. 704; National Bank of Tifton v. Smith, 142 Ga. 663, 83 S. E. 526, L. R. A. 1915B, 1116; Warden v. Middleton, 110 Ark. 215, 161 S. W. 151; Wright v. Parker & Williams, 2 Hardesty (Del.), 66; John C. Groub Co. v. Smith, 31 Ind. App. 685, 68 N. E. 1030.

16. Harrisburg Nat. Bank v. Bradshaw, 178 Pa. 180, 35 A. 629, 34 L. R. A. 597.

17. Schmid v. Spicer (Del.), 92 A. 991.

18. Willard v. Greenwood, 228 Mass. 549, 117 N. E. 823.

undertaking and for a valuable consideration passing directly to her.[19] In Georgia a wife's note for her husband's debt is not illegal, but voidable against the original payee.[20] In Arkansas, Michigan, New York and Texas such a note is void,[21] even in the hands of a holder for value,[22] in the absence of representations by her that it was for her benefit.[23]

§ 233. What Law Governs.

Where a wife domiciled in one State gives a note to pay for goods purchased in another, where such note is valid, it cannot be presumed that the note was void in the State of the domicile.[24] A note made by the husband payable to the wife and indorsed by her for accommodation in New Jersey, is presumed to be a New Jersey contract where there is no evidence of authority to deliver it in another State,[25] but where it is discounted in good faith in a State where it would have been valid if made there, she is estopped to get up its invalidity where the holder had no notice of that fact.[26] In Kentucky if the consideration of a joint note of spouses moves to the wife she is liable, even though she intends to act merely as a surety in a State where her acts as a surety are not binding.[27]

§ 234. Suretyship — In General.

At common law a wife cannot bind herself as surety for another.[28] In some states she is still without power to bind herself by such a contract,[29] no matter what form the transaction may

19. Joseph McGarrity & Co. v. McMahon, 240 Pa. 553, 87 A. 781.

20. Jones v. Harrell, 110 Ga. 373, 35 S. E. 690; Booth v. F. Mayer Boot & Shoe Co., 18 Ga. App. 247, 89 S. E. 186.

21. Burnham-Hanna-Munger Dry Goods Co. v. Carter, 52 Tex. Civ. 294, 113 S. W. 782; Johnson v. Holland (Tex.), 204 S. W. 494; Waterbury v. Andrews, 67 Mich. 281, 34 N. W. 575; McCarthy v. People's Savings Bank, 108 Ark. 151, 156 S. W. 1023; Hover v. Magley, 48 Misc. 430, 96 N. Y. S. 925.

22. Ensign v. Dunn, 181 Mich. 456, 148 N. W. 343.

23. Schmidt v. Spencer, 87 Mich. 121, 49 N. W. 479.

24. Wheeler v. Constantine, 39 Mich. 62, 33 Am. Rep. 355.

25. Basilea v. Spagnuolo (N. J.) 77 A. 531.

26. Chemical Nat. Bank v. Kellogg, 183 N. Y. 92, 75 N. E. 1103.

27. Longnecker v. Bondurant, 173 Ky. 427, 191 S. W. 286.

28. Swing v. Woodruff, 41 N. J. L. 469; Gosman v. Kruger, 69 N. Y. 87; Westervelt v. Baker, 56 Nebr. 63, 76 N. W. 440; Shores-Mueller Co. v. Bell, 21 Ga. App. 194, 94 S. E. 83.

29. Coffee v. Ramey, 111 Ga. 817, 35 S. E. 641; Fisk Rubber Co. v. Muller, 42 App. D. C. 49; Milton v. Setze, 146 Ga. 26, 90 S. E. 469; Union Nat. Bank v. Finley, 180 Ind. 470, 103 N. E. 110; Columbia Bldg. Loan & Savings Ass'n's Assignee v. Gregory, 129 Ky. 489, 33 Ky. Law, 1011, 112 S. W. 608; Wiltbank v. Tobler, 181 Pa. 103, 37 A. 188; *In re* Good's

take,[30] but if she voluntarily pays such an obligation she cannot recover back the money.[31] The Indiana statute prohibiting a wife from binding herself as surety intends to avoid every such contract, in whatever form, and whether operating in her real or personal property.[32] By statute in some States she may now validly make such a contract.[33] Under the Kentucky statute she may bind herself as surety if the estate sought to be bound shall have been set apart for the purpose by mortgage or other conveyance.[34] In Louisiana a wife can bind herself as surety only with the authority of her husband or the court.[35] In Nebraska a wife may bind herself as a surety within her general contractural powers,[36] but such a contract is void if not in reference to and on the faith of her separate estate, or if she has no separate estate.[37]

§ 235. For Her Husband.

At common law a wife could not bind herself as surety for her husband.[38] In several States the wife is still without power to bind

Estate, 150 Pa. 307, 24 Atl. 623; Bank of Commerce v. Baldwin, 14 Ida. 75, 93 P. 504; Harley v. Leonard, 4 Pa. Super. 431, 40 W. N. C. 225; Hazelton Nat. Bank v. Kintz, 24 Pa. Super. 456; Hester v. Dreyer & Hinson, 19 Ga. App. 816, 92 S. E. 299; Hill Bros. v. Bazemore (Ga.), 86 S. E. 397; Thompson v. Wilkinson, 9 Ga. App. 367, 71 S. E. 678; Patterson v. Bank of Lennox, 11 Ga. App. 235, 75 S. E. 15; Weil v. Waterhouse, 46 Ind. App. 690, 91 N. E. 746; Neighbors v. Davis, 34 Ind. App. 441, 73 N. E. 151; Ft. Wayne Trust Co. v. Sihler, 34 Ind. App. 140, 72 N. E. 494; Daviess County Bank & Trust Co. v. Wright, 129 Ky. 21, 33 Ky. Law, 457, 110 S. W. 361; H. C. Hines & Co. v. Hays, 26 Ky. Law, 967, 82 S. W. 1007; Yeany v. Shannon, 256 Pa. 135, 100 A. 527; Goldsleger v. Carracciolo, 63 Pa. Super. 72; Class & Nachod Brewing Co. v. Rago, 240 Pa. 470, 87 A. 704.

30. Third Nat. Bank v. Tierney, 128 Ky. 836, 33 Ky. Law, 418, 110 S. W. 293.

31. Booth v. Merchants' Bank of Valdosta, 9 Ga. App. 650, 72 S. E. 44.

32. Goff v. Hankins, 11 Ind. App. 456, 39 N. E. 294.

33. Warder, Bushnell & Glessner Co. v. Stewart, 2 Marv. (Del.) 275, 36 A. 88; Temple v. State (Okla.), 178 P. 113; Nat. Exch. Bank v. Cumberland Lumber Co., 100 Tenn. 479, 47 S. W. 85; Browning'e Ex'r v. Browning (Va.), 36 S. E. 108 (aff. 36 S. E. 525; Kittitas County v. Travers, 16 Wash. 528, 48 P. 340; Patton v. Merchants' Bank of Charleston, 12 W. Va. 587; Barrett v. Davis, 104 Mo. 549, 16 S. W. 377.

34. Third Nat. Bank v. Tierney, 128 Ky. 836; 33 Ky. Law, 418; 110 S. W. 293; Travers v. Wood, 30 Ky. Law, 1819, 50 S. W. 60.

35. State *Ex rel.* Mt. Calvary M. E. Church v. St. Paul, 111 La. 71, 35 So. 389.

36. First Nat. Bank v. Stoll, 57 Nebr. 758, 78 N. W. 254.

37. McKell v. Merchants' Nat. Bank, 62 Nebr. 608, 87 N. W. 317; Smith v. Bond, 56 Nebr. 529, 76 N. W. 1062; Kershaw v. Barrett, 3 Nebr. (Unof.) 36, 90 N. W. 764.

38. Barlow Bros. Co. v. Parsons, 73 Conn. 696, 49 A. 205.

herself by such a contract,[39] even though the money borrowed is used to improve her land.[40] The statute will avoid the transaction no matter what form it takes, if colorable,[41] looking always at its real substance,[42] even if there is nothing in the obligation to show that she is a surety,[43] even if her name appears first on the obliga-

39. Vinegar Bend Lumber Co. v. Leftwich (Ala.), 72 So. 538; People's Bank v. Steinhart (Ala.), 65 So. 60; Staples v. City Bank & Trust Co. (Ala.), 70 So. 115; Price v. Cooper, 123 Ala. 392, 26 So. 238; Elkins v. Bank of Henry, 180 Ala. 18, 60 So. 96; Spencer v. Leland, 178 Ala. 282, 59 So. 593; Waters v. Pearson, 39 App. D. C. 10; Bank of Eufaula v. Johnson, 146 Ga. 791, 92 S. E. 631; McLeod v. Poe, 142 Ga. 254, 82 S. E. 663; McDaniel v. Akridge, 5 Ga. App. 208, 62 S. E. 1010; Kelley v. York, 183 Ind. 628, 109 N. E. 772; Hall v. Hall, 118 Ky. 656, 82 S. W. 269, 26 Ky. Law, 553; Kentucky Title Savings Bank & Trust Co. v. Langan, 144 Ky. 46, 137 S. W. 846; Brady v. Equitable Trust Co. of Dover, 178 Ky. 693, 199 S. W. 1082; Skinner v. Lynn, 21 Ky. Law, 185; 51 S. W. 167; Magoffin v. Boyle Nat. Bank, 24 Ky. Law, 585, 69 S. W. 702; Planters' Bank & Trust Co. v. Major, 25 Ky. Law, 702, 76 S. W. 331 (reh. den., 26 Ky. Law, 234, 80 S. W. 1089); Bowron v. Curd, 28 Ky. Law, 58, 88 S. W. 1106; People's State Bank v. Francis, 8 N. D. 369, 79 N. W. 853; First Nat. Bank v. Hunton, 69 N. H. 509, 45 A. 351; Stewart v. Stewart, 207 Pa. 59, 56 A. 323; Stahr v. Brewer, 186 Pa. 623, 40 A. 1016, 65 Am. St. R. 883, 42 W'kly Notes Cas. 356; McCrea v. Sisler, 17 Pa. Super. 175; First Nat. Bank v. Short, 15 Pa. Super. 64; Collins v. Hall, 55 S. C. 336, 33 S. E. 466; Red River Nat. Bank v. Ferguson (Tex.), 192 S. W. 1088; Union Trust Co. v. Grosman, 245 U. S. 412, 38 S. Ct. 147, 62 L. Ed. 368; Horton v. Hill, 138 Ala. 625, 36 So. 465; Goldsmith Bros. Smelting & Refining Co. v. Moore, 108 Ark. 362, 157 S. W. 733; Wright v. Parvis & Williams Co., 1 Marv. (Del.) 325, 40 A. 1123; Lewis v. Howell, 98 Ga. 428; Exchange Bank of Valdosta v. Newton (Ga.), 99 S. E. 705; Merchants' & Laborers' Bldg. Ass'n v. Seanlan, 144 Ind. 11, 42 N. E. 1008; Smith v. McDonald, 49 Ind. App. 464, 97 N. E. 556; Pabst Brewing Co. v. Schuster, 55 Ind. App. 375, 103 N. E. 950; Cook v. Landrum, 26 Ky. Law, 813, 82 S. W. 585; Bowron v. Curd, 28 Ky. Law, 58, 88 S. W. 1106; Milburn v. Jackson, 21 Ky. Law, 700, 52 S. W. 949; Hall v. Johnson, 41 Mich. 286, 2 N. W. 55; First Nat. Bank v. Hunton, 70 N. H. 224, 46 A. 1049; Bauer v. Ambs, 128 N. Y. S. 1024; Sibley v. Robertson, 212 Pa. 24, 61 A. 426; Riland v. Schaeffer, 45 Pa. Super. 636; Red River Nat. Bank v. Ferguson (Tex.), 206 S. W. 923; Seaver v. Lang (Vt.), 104 A. 877; *In re* Skillman's Estate, 146 Ia. 601, 125 N. W. 343; Farmers' & Merchants' Bank v. Shorb, 137 Cal. 685, 70 P. 771; Crawford v. Hazelrigg, 117 Ind. 63, 18 N. E. 603, 2 L. R. A. 139; Lingenfelter Bros. v. Bowman, 156 Ia. 649, 137 N. W. 946; Mitchell v. Wheeler, 122 Ia. 368, 98 N. W. 152; *In re* Succession of Maloney, 124 La. 672, 50 So. 647; Richards v. Prober, 44 Mich. 96, 6 N. W. 115; Walton v. Bristol, 125 N. C. 419, 34 S. E. 544; Maas v. Rettke (N. D.), 170 N. W. 309.

40. Richardson v. Stevens, 114 Ala. 238, 21 So. 949.

41. Ginsberg v. People's Bank, 145 Ga. 815, 89 S. E. 1086; Johnson v. A. Leffler Co., 122 Ga. 670, 50 S. E. 488; Third Nat. Bank v. Tierney, 128 Ky. 836, 110 S. W. 293, 33 Ky. Law, 418; Byerley v. Walker, 118 La. 265, 42 So. 931.

42. Lucas v. Hagedorn, 158 Ky. 369, 164 S. W. 978.

43. Taylor v. Acom, 1 Ind. T. 436, 45 S. W. 130.

tion,[44] and even if she expressly describes herself as principal.[45-46] Married Women's Acts in Arkansas, Missouri, North Carolina, Oklahoma and West Virginia, and the law of Mexico now permit her to bind herself as surety for him,[47] but until the enactment of a recent statute the law was otherwise in Arkansas.[48] In New Jersey such a contract is not binding unless the wife received something of value to herself or to her separate estate, as a consideration for making the obligation.[49]

§ 236. Guaranty.

Where a wife is still under the disability of coverture her contract of guaranty will not bind her.[50] A wife who is a stockholder in a corporation cannot bind herself to pay its debts.[51] In Nebraska a wife is liable on her guaranty of a note payable to her order, though the purchaser does not inquire as to her purpose in disposing of the procedds.[52] The New Jersey Married Women's Act, which does not enable a wife to guarantee the debt of another without consideration, applies to and invalidates a contract made in that State by a non-resident wife.[53] Under the Pennsylvania statute a wife cannot bind herself as guarantor.[54]

§ 237. Contracts for Services.

At common law a wife cannot earn money for herself.[55] Under most Married Women's Acts a wife may now make and in her own

44. Farmers' Bank v. Beck (Ky.), 114 S. W. 1189; Planters' Bank & Trust Co. v. Major, 25 Ky. Law, 702, 76 S. W. 331 (reh. den., 26 Ky. Law, 234, 80 S. W. 1089).

45-46. Postell v. Crumbaugh, 23 Ky. Law, 2193, 66 S. W. 2193; Crumbaugh v. Postell, 20 Ky. Law, 1366, 49 S. W. 334; Foster v. Davis, 175 N. C. 541, 95 S. E. 917.

47. Walker v. Arkansas Nat. Bank, 256 F. 1; Holland v. Bond, 125 Ark. 526, 189 S. W. 165; United States Banking Co. v. Veale, 84 Kan. 385, 114 P. 229; McCollum v. Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L. R. 480; James W. Scudder & Co. v. Morris, 107 Mo. App. 634, 82 S. W. 217; Bruegge v. Bedard, 89 Mo. App. 543; Grandy v. Campbell, 78 Mo. App. 502; Royal v. Southerland, 168 N. C. 405, 84 S. E. 708; Cooper v. Bank of I. T., 4 Okla. 632, 46 P. 475; Duty v. Sprinkle, 64 W. Va. 39, 60 S. E. 882.

48. Chittim v. Armour Co., 125 Ark. 408, 188 S. W. 809; Goldsmith Bros. Smelting & Refining Co. v. Moore, 108 Ark. 362, 157 S. W. 733.

49. Mawhinney v. Cassio, 63 N. J. Law, 412, 43 A. 676.

50. Wagner v. Mutual Life Ins. Co., 88 Conn. 536, 91 A. 1012; Klotz v. Bates, 83 Mo. App. 332.

51. Allen v. Beebe, 63 N. J. Law, 377, 43 A. 681.

52. Kitchen v. Chapin, 64 Nebr. 144, 89 N. W. 632, 97 Am. St. R. 637, 57 L. R. A. 914.

53. Union Trust Co. of New Jersey v. Knabe, 122 Md. 584, 89 A. 1106.

54. *In re* Good's Estate, 150 Pa. 307, 24 Atl. 623; Class, &c., Co. v. Rago, 240 Pa. 470, 87 Atl. 904.

55. Offley v. Clay, 2 Man. & Gr. 172.

name enforce contracts to render services to a third person,[56] if the contractor is not a member of her family,[57] as well as to furnish board,[58] and to act as broker in the sale of real estate for a commission.[59] Under the Michigan statute the husband's consent is necessary to validate such contracts,[60] but when given, it need not be known to the party contracting for such services by the wife.[61]

§ 238. Confession of Judgment.

In the absence of statute, a wife has no power to confess judgment.[62] She may now do so where she may validly make the contract to which the warrant of attorney is attached.[63] In Pennsylvania a wife's confession of judgment is *prima facia* valid, the binder to show its invalidity being on the party asserting such invalidity.[64] In Louisiana the consent of the husband or a court is required.[65] In Nebraska, where given in a note whereon she is surety, such contract is invalid, not being for the benefit of her separate estate.[66]

§ 239. Contracts for Sale of Land.

At common law a wife could not bind herself by a title bond, or executory contract to convey land.[67] By statute in some states such a contract is now binding, even without the husband's assent,[68]

56. Randall v. Daniel, 12 Ga. App. 550, 77 S. E. 832; Jones v. Adams, 81 Ill. App. 183; Kennedy v. Swisher, 34 Ind. App. 676, 73 N. E. 724; Baker v. Jewel Tea Co., 152 Ia. 72, 131 N. W. 674; Trogdon v. Hanson Sheep Co. 49 Mont. 1, 139 P. 792; Von Carlowitz v. Bernstein, 28 Tex. Civ. 8, 66 S. W. 464.

57. Lodge v. Fraim, 5 Pen. (Del.) 352, 63 A. 233.

58. Gerdes v. Niemeyer, 193 Ill. App. 574; Elliott v. Atkinson, 45 Ind. App. 290, 90 N. E. 779; Lindsey v. Lindsey, 116 Ia. 480, 89 N. W. 1096.

59. Garver v. Thoman, 13 Ariz. 38, 135 P. 724.

60. Benson v. Morgan, 50 Mich. 77, 14 N. W. 705.

61. *In re* Smith's Estate, 152 Mich. 197, 115 N. W. 1052, 15 Det. Leg. N. 146.

62. Henchman v. Roberts, 2 Har. (Del.) 74.

63. Crosby v. Washburn, 66 N. J. Law, 494, 49 A. 455; Stephan v. Hudock, 4 Pa. Super. 474; Good Hope Building Assn. v. Amweg, 22 Pa. Super. 143.

64. Jaquett v. Allabaugh, 16 Pa. Super. 557; Wilson v. Fitzgerald, 25 Pa. Super. 633; Atkins v. Grist, 44 Pa. Super. 310; Hirschlau v. Krechman, 20 Pa. Super. 227.

65. Mulling v. Jones (La.), 76 So. 720.

66. Kershaw v. Barrett, 3 Neb. (Unof.) 36, 90 N. W. 764.

67. Stidman v. Matthews, 29 Ark. 650; Oglesby Coal Co. v. Pasco, 79 Ill. 164; Nalle v. Farrish, 98 Va. 130, 34 S. E. 985.

68. Dunn v. Stowers, 104 Va. 290, 51 S. E. 366; Everett v. Ballard, 174 N. C. 16, 93 S. E. 385; Warren v. Dail, 87 S. E. 126; Wolff v. Meyer (N. J.), 70 A. 1103; Jenkins v. Pittsburg & C. R. Co., 210 Pa. 134, 59 A. 823.

but in others such assent is required to validate it.[69] But must be given by signing the contract.[70] In some states acknowledgement is necessary to validitate her contract to convey land.[71] In West Virginia such a contract cannot be specifically enforced unless the husband joins and acknowledges, or unless she is separated from him.[72] In that State a wife can only bind herself by a contract executed and acknowledged as required by the statute.[73] Where the statute prescribes the manner in which a wife may convey land, a title bond not executed in accordance with it is not binding.[74] In Kentucky a wife's contract to sell real estate, followed by a deed in pursuance of the contract, the husband joining in the deed, is valid.[75] Under the Alabama statute requiring the husband's joinder as grantor to validate his wife's deed, it was held that a deed which he merely signed and acknowledged was a valid contract to convey, vesting an equitable title in the grantees.[76] In New Jersey it is held that a contract to establish a wife's title to real estate for a reasonable compensation to secure which an assignment of an interest in the recovery is provided, though not executed by the husband, or by her separate and apart from him, has the effect, in connection with the establishment of the title, to invest the beneficiary with an equity, by reason of which equity will create a lien in his favor.[77] In Virginia specific performance may be had of a wife's contract to sell land.[78] Where a wife's contract to convey land is not binding because of failure to execute it as required by the statute, the contractee cannot enforce it even against one who takes the land with notice of the contract.[79]

69. Fortier v. Barry, 111 La. 776, 35 So. 900; Bartlett v. Williams, 27 Ind. App. 637, 60 N. E. 715; Shirk v. Stafford, 31 Ind. App. 247, 67 N. E. 542; Davis v. Watson, 89 Mo. App. 15; Connell v. Nickey (Tex.), 167 S. W. 313; Blakely v. Kanaman (Tex.), 168 S. W. 447; Blakely v. Kanaman (Tex.), 175 S. W. 674; Isphording v. Wolf, 36 Ind. App. 250, 75 N. E. 598.

70. Knepper v. Eggiman, 177 Ind. 56, 97 N. E. 161.

71. Gilbough v. Stahl Bldg. Co., 16 Tex. Civ. 448, 41 S. W. 535; Ten Eyck v. Saville, 64 N. J. Eq. 611, 54 A. 810.

72. Rosenour v. Rosenour, 47 W. Va. 554, 35 S. E. 918; Slaven v. Riley, 73 W. Va. 76, 79 S. E. 1024; Shumate v. Shumate, 78 W. Va. 576, 90 S. E. 824.

73. Wiseman v. Crislip, 72 W. Va. 340, 78 S. E. 107.

74. Kidd v. Bell (Ky.), 122 S. W. 232.

75. Hoffman v. Colgan, 25 Ky. Law, 98, 74 S. W. 724.

76. Rushton v. Davis, 127 Ala. 279, 28 So. 476; Wood v. Lett, 195 Ala. 601, 71 So. 177.

77. Adams v. Schmidtt, 68 N. J. Eq. 168 A. 345.

78. Dunn v. Stowers, 104 Va. 290, 51 S. E. 366.

79. Ten Eyck v. Saville, 64 N. J. Eq. 611, 54 A. 810.

§ 240. Sealed Instruments.

At common law a wife could not bind herself by a bond or other instrument under seal.[80] Under the Delaware statute a wife may now bind herself by a bond.[81] In Pennsylvania her bond is valid though the mortgage securing it is void for the non-joinder of the husband.[82] Under the Indiana Married Women's Act a wife may bind herself by a recognizance of replevin bail for a stay of execution and for payment thereof,[83] and in Texas by a replevy found in sequestration proceedings.[84]

§ 241. Releases.

A wife's release was void at common law.[85] Under the Rhode Island Married Women's Act a wife may release a cause of action for personal injuries, though action therefor could not have been maintained without the joinder of the husband as a party plaintiff.[86] Where a wife taking up a note on which she was accommodation indorser, contracted to release a prior party, she was held bound although the consideration passed to a third person, such contract being not forbidden by the New Jersey Married Women's Act.[87]

§ 242. Covenants.

At common law a wife was not bound by her covenants in a mortgage of her husband's property,[88] nor in his deed, in which she joins,[89] nor by her covenants in deeds generally.[90] Where she has power to convey her separte estate she is now generally bound

80. Whitworth v. Carter, 43 Miss. 61; Huntley v. Whitner, 77 N. C. 392.

81. Warder Bushnell & Glessner Co. v. Stewart, 36 A. 88, 2 Marv. (Del.) 275 (holding that a sealed writing requiring the obligees to pay money was within the statute).

82. Randal v. Gould, 225 Pa. 42, 73 A. 986.

83. Eberwine v. State, 79 Ind. 266.

84. Wandelohr v. Grayson County Nat. Bank, 102 Tex. 20, 112 S. W. 1046.

85. Stewart v. Conrad's Adm'r, 100 Va. 128, 4 Va. Sup. Ct. 49, 40 S. E. 624.

86. Cooney v. Lincoln, 20 R. I. 183, 37 A. 1031.

87. Headley v. Leavitt, 64 N. J. Eq. 748, 55 A. 731.

88. Kitchell v. Mudgett, 37 Mich. 81,

89. Couch v. Palmer, 57 Fla. 57, 48 So. 995; Webb v. Holt, 113 Mich. 338, 71 N. W. 637, 4 Det. Leg. N. 309.

90. French v. Slack, 96 A. 6; Johnson v. Blum, 28 Tex. Civ. 10, 66 S. W. 461; State Nat. Bank v. Robidoux, 57 Mo. 446; Nichol v. Hays, 20 Ind. 264 Ill. 219, 106 N. E. 262; Menard v. Campbell, 180 Mich. 583, 147 N. W. 556; Vineyard v. Heard (Tex.), 167 S. W. 22; Wing v. Deans, 214 Mass. 546, 102 N. E. 313; Bell v. Bair, 28 Ky. Law 614, 89 S. W. 732; Sorrells v. Sorrells, 105 Ga. 36, 31 S. E. 119; White v. Grand Rapids & I. Ry. Co. (Mich.), 155 N. W. 719.

by covenants in her deed,[91] or lease of such estate,[92] as well as in her husband's deed, in which she joins.[93] In Maryland she is liable on covenants only when the deed relates to her separate estate,[94] and in Indiana her liability is limited to covenants of title.[95] In Nebraska her liability on such covenants is limited to the property conveyed and will not pass after acquired property.[96] Under the Idaho Married Women's Act she is not liable on such covenants in a deed which she joins merely to release dower and homestead.[97] In Michigan it is held that she will be liable on the covenants in a joint deed where she receives the consideration, the covenants being joint in that case.[98] In Massachusetts the wife is not liable on covenants in a joint deed conveying her property, except where the covenants operate as an estoppel.[1] In Utah she is liable on such covenants to the immediate grantee only, her covenants being personal, and not running with the land.[2] The liability of a wife on covenants in a deed which she joins to release dower or homestead is governed by the law of the State where the land lies though the deed is executed in another State.[3]

91. McGuigan v. Gaines, 71 Ark. 614, 77 S. W. 52.

92. Winestine v. Liglatski-Marks Co., 77 Conn. 404, 59 A. 496.

93. Fisher v. Clark, 8 Kan. App. 483, 54 P. 511; Bolinger v. Brake, 4 Kan. App. 180, 45 P. 950 (affd., 57 Kan. 663, 47 P. 537); Security Bank of Minnesota v. Holmes, 68 Minn. 538, 71 N. W. 699; Wasserman v. Carroll, 2 Pa. Super. 551.

94. Pyle v. Gross, 92 Md. 132, 48 A. 713.

95. Miller v. Miller, 140 Ind. 174, 39 N. E. 547.

96. Decree (C. C.; Burns v. Cooper, 140 F. 273.

97. Humbird Lumber Co. v. Doran, 24 Ida. 507, 135 P. 66; Village of Western Springs v. Collins, 98 F. 933, 40 C. C. A. 33.

98. Agar v. Streeter (Mich.), 150 N. W. 160.

1. Wing v. Deans, 214 Mass. 546, 102 N. E. 313.

2. H. T. & C. Co. v. Whitehouse (Utah), 154 P. 950.

3. Village of Western Springs v. Collins, 98 F. 933, 40 C. C. A. 33; Hunter v. Conrad, 94 F. 11.

CHAPTER XIV.

THE WIFE'S PIN-MONEY.

§ 243. The Wife's Pin-Money; Nature and Origin.

The wife's pin-money constitutes a feature of English marriage settlements in modern times. Pin-money may be defined as a certain provision for the wife's dress and pocket, to which there is annexed the duty of expending it in her "personal apparel, decoration, or ornament."[4]

Upon a somewhat enlarged construction, pin-money is in the nature of an annuity to pay the wife's ordinary personal expenses; and is rather the privilege of the wealthy than the poor. A person in an humble station of life pays his wife's bills as he pays his own. A person in a station rather higher is accustomed to make, for common convenience, an allowance to his wife of so much for housekeeping expenses, if she takes charge of them, and so much over for her own dress and the dress of children. A person in a still higher station makes a general arrangement, which probably extends over years, if not over the whole coverture. But a person in a yet more elevated station makes a special stipulation by the marriage settlement, which is, as it were, saying, "You, the wife, shall not be reduced to the somewhat humiliating necessity of disclosing to me every want of a pound to keep in your pocket, or of taking my pleasure and obtaining my consent every time you want to go to the milliner's shop to order your dress; but you shall have so much, consistent with my estate and my income, which you shall retain apart from me and exempt from my control." And this supply, as Lord Brougham remarks, is the wife's pin-money.[5]

The exact period when pin-money was first introduced into England is not known. Lord Brougham inclines to ascribe it to the feudal times.[6] But there is equally good authority for fixing the date at the Restoration; and the lawyers resort to Addison's

4. Per Lord Langdale, Jodrell v. Jodrell, 9 Beav. 45; Howard v. Digby, 2 Cl. & Fin. 654.

5. Howard v. Digby, 2 Cl. & Fin. 654.

6. *Ib.* 676.

"Spectator" in proof of the latter supposition.[7] The popular name of this provision scarcely suggests its real significance; for, so far from being a petty allowance, it is often of the most liberal amount imaginable.[8] The subject of the wife's pin-money seems to have received little attention in this country.[9] And in England few cases of the sort have ever arisen. It is found more convenient in marriage contracts to setle a cerain allowance upon the wife by way of separate estate, which allowance is subject to the usual incidents of separate property. Decisions as to pin-money and separate estate are frequently confounded.[10]

§ 244. Separate Estate and paraphernalia distinguished.

The wife's pin-money differs from her separate estate in being a gift subject to conditions, and not at her absolute disposal. It differs from her *paraphernalia* in being subject to her control during marriage, and not awaiting the husband's death.[11]

§ 245. Arrears.

The leading English case on this subject is *Howard* v. *Digby*, which went to the House of Lords in 1834, and whose main decision was to the effect that the personal representatives of the wife could not recover arrears.[12] The correctness of its principle has been questioned by some writers.[13] In general, the usual equity rule against claiming more than one year's arrears appears to apply to separate estate and pin-money alike.[14] In other ways, too, the wife's claim may be barred.[15]

§ 246. Housekeeping Allowance.

The wife was formerly supposed also to gain a title to savings out of her housekeeping allowance.[16] So where the husband allowed the wife to make profit of butter, eggs, poultry, and other farm produce, which allowance he called her pin-money, it was held that

7. Spectator, 295. See Peachey Mar. Settl. 300; Sugd. Law Prop. 165.

8. In one reported English case, by no means recent, £13,000 a year was secured to the wife as her pin-money. See 2 Russ. 1, and *n.* to Macq. Hus. & Wife, 318.

9. But see Miller v. Williamson, 5 Md. 219.

10. See Lord Brougham, in Howard v. Digby, 2 Cl. & Fin. 670, commenting upon 2 Roper, Hus. & Wife, 133. In this case the whole subject receives ample discussion.

11. Macq. Hus. & Wife, 318; Peachey, Mar. Settl. 298.

12. 2 Cl. & Fin. 670.

13. Sugd. Law Prop. 170. See Peachey, Mar. Settl. 307; Macq. Hus. & Wife, 319, *n.*

14. See Peachey, Mar. Settl. 303, and cases cited.

15. Arthur v. Arthur, 11 Ir. Eq. 511.

16. Paul Neal's Case, Prec. in Ch. 44, 297. But see Tyrrell's Case, Freem. 304.

she acquired a separate ownership therein.[17] But these cases rest upon questionable authority.[18] And more recently it has been decided that, where the wife of a farmer, with his knowledge and sanction, deposited the produce of the surplus butter, eggs, and poultry with a firm in her own name, and he called it "her money," and on his death-bed gave his executor directions to remove the money, and do the best he could with it for his wife, such evidence was insufficient to establish a gift between them, and that the husband had made neither the firm nor himself trustee for his wife.[19]

In all cases of this sort the husband's permission, he not having deserted her, constitutes an important element of the wife's title. And the mere fact that a wife is in the use and enjoyment of clothing, or other personal property, is held insufficient to establish her right to a separate estate therein.[20]

17. Slanning v. Style, 3 P. Wms. 337.

18. See Macq. Hus. & Wife, 320.

19. Mews v. Mews, 15 Beav. 529. See McLean v. Longlands, 5 Ves. 78, cited herein with approval. And see Rider v. Hulse, 33 Barb. (N. Y.) 264, for a similar American decision.

20. State v. Pitts, 12 S. C. 180; Paraphernalia, *post*, Vol. II.

CHAPTER XV

WIFE'S EQUITABLE SEPARATE ESTATE.

§ 247. Origin, Nature and History; In England.

Emerging from coverture and the common law, we come out into the light of equity; and here all things assume a new aspect. The married woman is no longer buried under legal fictions. She

ceases to hold the strange position of a being without an existence, one whose identity is suspended or sunk in the *status* of her husband; she becomes a distinct person, with her own property rights and liabilities. Her condition is not as independent as before marriage; this the very idea of the marriage relation and the disabilities of her sex forbid. But she is dependent only so far as the laws of nature and the forms of society make her so; while her comparative feebleness renders her the special object of chancery protection, whenever the interests of herself and her husband clash together. She may contract on her own behalf; she may sue and be sued in her own name; she may hold lands, goods, and chattels in her own right, which property is known as the wife's separate estate, or estate limited to the wife's separate use.

The doctrine of the wife's separate estate originated in the spreading conviction that it was expedient for the interests of society that means should exist by which, upon marriage, either the parties themselves by contract, or those who intended to give bounty to a family, might secure property without that property being subject to the control of the husband.[21] Therefore, the equitable doctrince of a separate estate was devised to prevent the acquisition of the wife's personal property by the husband and the rents and profits of her real estate during coverture,[22] and to protcet her from the harsh and unjust dogmas of the common law as to the marital rights of her husband.[23] In England that doctrine was established more than a century ago, and to the equity courts belong the credit of the invention.[24] The equity to a settlement, which we have fully discussed, is part of that doctrine.[25] While at common law the separate existence of the wife was neither known nor contemplated, equity considered that a married woman was capable of possessing property to her own use, independently of her husband; and the courts gradually widened and developed this principle until it became fully settled that, however the wife's property might be acquired, whether through contract with her husband before marriage, or by gift from him or from any stranger independently of such contract, equity would protect it, if duly set

21. Rennie v. Ritchie, 12 Cl. & Fin. 234; Peachey, Mar. Settl. 259; Hatch v. Hatch (Utah), 148 P. 1096; Williford v. Phelan, 120 Tenn. 589, 113 S. W. 365.

22. Radford v. Carwile, 13 W. Va. 572.

23. Littleton v. Sain (Tenn.), 150 S. W. 423, 41 L. R. A. (N. S.) 1118.

24. Harvey v. Harvey, 1 P. Wms. 124; Woodmeston v. Walker, 2 R. & M. 205; Tullett v. Armstrong, 1 Beav. 21.

25. *Supra*, § 175.

apart as her separate estate, no matter though the husband himself must be held as the trustee to support it.[26]

This great change in the jurisprudence of England was effected by a few great men without any help from the legislature. The court of chancery in this as in other respects recognized its true function of making the law work justice by accommodating its operation to the altered circumstances of society.[27] Obscure and doubtful indications of the wife's separate estate are found as early as the reign of Queen Elizabeth. It seems to have been plainly recognized by Lord Nottingham, Lord Somers, and Lord Cowper. In Lord Hardwicke's time is was perfectly established; and Lord Thurlow, in sanctioning the clause against anticipation, prevented the wife herself from destroying the fabric which had been reared for her benefit.[28]

§ 248. In the United States.

The doctrine of the wife's separate estate is one of peculiar growth and development in this country, though doubtless originating in the maxims of the English chancery, and deriving much of its strength from the splendid accomplishments of Langdale, Thurlow, and Eldon, in their own land. What such men and their successors effected by judicial policy we have carried into our statutes; nay, we have gone further. In England the equitable rights of married women are the triumph of the bench; with us the early efforts of the bench have been eclipsed by the later achievements of the legislature, and the judge follows the lawgiver to restrain rather than enlarge. There, in historical sequence, it was proper to study first the equitable doctrine of separate property; here the statutory doctrine may well take precedence.

When this country was first settled, the separate use was but little understood in England. Its development there was gradual, and its final establishment of a later date. Our ancestors brought over the common law with them; but for equity they had little respect. True, it cannot be said that, by the jurisprudence of a single State, property bestowed upon a married woman to her separate use, free from the control and interference of her husband, would remain subject, notwithstanding, to his marital dominion; but prior to the late Married Women's Acts there were, in many

26. Tullett v. Armstrong, 1 Beav. 21; Peachey, Mar Settl. 260, and cases cited.

27. Macq. Hus. & Wife, 284.

28. See Pybus v. Smith, 4 Bro. C. C. 485; Tullett v. Armstrong, per Lord Langdale, 1 Beav. 22; Macq. Hus. & Wife, 285.

States, no judicial precedents to combat such an assumption. That such trusts might be created was not denied; but whether there were courts with authority to enforce them appeared frequently doubtful.[29] In the New England States scarcely a vestige of the separate use was to be found.[30] New York, with such eminent chancellors as Kent and Walworth, took the lead in building up an equity system parallel with that of England; and in the reports of this State are to be found most of the leading cases and the ablest discussions of what may be termed American chancery doctrines. New Jersey recognized the separate use, and her chancery court exercised liberal powers. In Pennsylvania the doctrine was recognized to some extent. The courts of Maryland, Virginia, and the Southern States generally, had frequent occasion to apply the separate-use doctrine; none more so than those of North and South Carolina. And it may be remarked that the aristocratic element of society in that section of the country, also a prevalent disposition for family entails, marriage settlements and fetters upon the transmission of landed property, aided much in developing therein the English chancery system. So was it in Kentucky and Tennessee, States founded upon like institutions. But as to Ohio, Indiana, Illinois, and the other States erected from what was formerly known as the Northwest Territory, society was modelled more after New England, and we find no clear recognition of the wife's equitable separate use. Louisiana, and such contiguous States as were originally governed by French and Spanish laws, had more or less of the civil or community system; and to these States English equity maxims had at best only a limited application. Such, then, is the wife's separate use, viewed in the light of judicial precedents, as known in the United States until very nearly the middle of the

29. It is true that the general recognition here of the wife's separate use has been presumed by our text-writers. See 2 Kent, Com. 162; Reeve Dom. Rel. 162; 2 Story Eq. Juris., § 1378 *et seq.* We confine our observations to judicial precedents. What Chancellor Kent has to say on the American equity doctrines in his work must be taken by the general student with some qualifications, inasmuch as the learned writer draws largely upon his judicial opinions rendered in a State which especially favored chancery jurisprudence. The want of a general recognition of the wife's separate use, as unfolded in England, aids in explaining the curious fact that our States were legislated into a system which the English chancery had felt competent to rear unaided.

30. Jones v. Ætna Ins. Co., 14 Conn. 501, intimated that the married woman could not, in Connecticut, be the independent owner of property. But see Pinney v. Fellows, 15 Vt. 525 (1843).

nineteenth century.[31] When recognized and enforced at all, the strict American rule was borrowed from that of England, and such, too, has been the later development, as we shall show hereafter.[32] Equitable separate estates are still possible in the United States even where there is a Married Women's Act.[33]

§ 249. Statutory Separate Estate Distinguished.

We may observe that there is an equitable doctrine on the subject of the wife's separate property and a statutory doctrine. The equitable doctrine is the prior in point of time, and is chiefly the work of English chancery courts; while the statutory doctrine, which is of later date, is founded in the Married Women's Acts, now familiar in our several States, and their judicial construction. The equitable doctrine is more purely English; the statutory doctrine more purely American,— though each country has come, ere this day, to borrow in this respect from the other. American cases frequently distinguish still between an equitable separate estate and a statutory separate estate in favor of a wife; but so sweeping is the latest legislation in most States that such a distinction becomes of comparatively little consequence.

In the present chapter, and with reference to Great Britain, our concern is almost exclusively with the remarkable development of an equitable doctrine of separate property. A conveyance or trust duly created for a married woman's separate benefit and duly expressed, is to be regarded as her equitable rather than her statutory estate.[34]

§ 250. When Separate Estate Cognizable in Courts of Law.

Although the wife's separate use is the creature of equity, and specially consigned to its watchful keeping, courts of law will sometimes afford it protection. This seems to be, however, only in cases where a trustee is interposed to hold the legal estate; for, since

31. See U. S. Eq. Dig. Hus. & Wife, 12; Reade v. Livington, 3 Johns. Ch. (N. Y.) 481; Meth. Ep. Church v. Jaques, 1 Johns. Ch. (N. Y.) 65; Rogers v. Rogers, 4 Paige (N. Y.) 516; Vernon v. Marsh, 2 Green Ch. (N. Y.) 502; Steel v. Steel, 1 Ired. Eq. (N. C.) 452; Jackson v. McAliley, Speers Eq. 303; Boykin v. Ciples, 2 Hill Ch. (N. Y.) 200, 204; Hunt v. Booth, 1 Freem. Ch. 215; Warren v. Haley, 1 S. & M. Ch. (Miss.) 647; Hamilton v. Bishop, 8 Yerg. (Tenn.) 33; Griffith v. Griffith, 5 B. Mon. (Ky.) 113; McKennnn v. Phillips, 6 Whart. 571; Gray v. Crook, 12 Gill & J. (Md.) 236; Howard v. Menifee, 5 Pike, 668.

32. See *post*, as to equitable separate property, § 263.

33. Travis v. Sitz (Tenn.), 185 S. W. 1075.

34. Pepper v. Lee, 53 Ala. 33; Musson v. Trigg, 51 Miss. 172.

the common-law courts maintain their own maxims, there should be some person designated to hold the fund for the wife; and such person will be considered as the legal owner so as to save the property from attachment and sale for the husband's debts.[35]

§ 251. Effect of Renunciation by Wife.

A single woman, having a gift expressed to be to her separate use, may renounce such separate use upon her marriage. This will be readily admitted. Yet the courts construe an act of this sort strictly.[36] The evidence must be clear in all cases, that a single woman marrying has renounced her separate use; for it will not be presumed that she means, by the mere fact of matrimony, to relinquish her control of the property. But antenuptial settlements may be made on reasonable terms by the parties contemplating marriage. And there is nothing to prevent the operation of a trust for separate use from being confined to a particular coverture, where all concerned are so minded. In such cases, however, the wife marrying again can always stipulate for her separate use.[37]

§ 252. Effect of Fraud, Insolvency or Bankruptcy.

The wife cannot be debarred of her separate estate through the fraud of others; it must be a fraud to which she is a party, that will bar her beneficial title.[38] Nor will the insolvency of her husband affect her acquisition through a third party.[39] Nor can the bankruptcy of the husband, although it suspends the legal remedy against the wife during coverture, afford any ground for proceeding in equity to charge her separate estate.[40]

§ 253. When Separate Estate may be Ambulatory.

An equitable separate estate cannot exist until the wife is married,[41] but it does not depend on her living with her husband.[42] But it may sometimes have an ambulatory operation, so as to be

35. See Izod v. Lamb, 1 Cr. & J. 35; Davison v. Atkinson, 5 T. R. 434; Dean v. Brown, 2 Car. & P. 62; Macq. Hus. & Wife, 291.

36. Johnson v. Johnson, 1 Keen, 648; Macq., Hus. & Wife, 306.

37. Macq. Hus. & Wife, 307. See Knight v. Knight, 6 Sim. 121; Bradley v. Hughes, 8 Sim. 149; Benson v. Benson, 6 Sim. 126.

38. Jackson v. McAliley, Speers Eq. 303.

39. Holthaus v. Hornbostle, 60 Mo. 439. It is not essential that the words in a deed designed to create a separate estate for a married woman appear in the granting clause or the *habendum* clause. Morrison v. Thistle, 67 Mo. 596.

40. *Ib.*; Peace v. Spierin, 2 Desaus. (S. C.) 460.

41. Travis v. Sitz (Tenn.), 185 S. W. 1075.

42. Woodward v. Woodward, 148 Mo. 241, 49 S. W. 1001.

effectual according as the woman happens at the time to be covert or sole. Supposing, then, a gift be made to the separate use of a woman who is single at the time the gift takes effect, it is clear that she shall enjoy the gift absolutely and without restraint. But if she afterwards marries, will the separate use operate? It will, unless by the terms of her marriage settlement she expressly renounces it.[43] Supposing, however, she outlives her husband, the separate use ceases as in other cases, since it can only be effectual during coverture. But if she marries again, the separate use, consistently with its intention, revives once more; and so onward, from time to time, ceasing and reviving alternately, upon each alteration of her personal condition,[44] with, however, this reservation, that if confined by intendment to a particular husband or a particular coverture, the separate use ceases to operate when that marriage ends.[45]

As in England, our courts permit an estate to be so settled on an unmarried female as to exclude the marital rights of any future husband.[46] Consistently with its intent, the separate use may have an ambulatory operation, ceasing when the wife becomes a widow, and, if left undisposed of, reviving, supposing she marries again.[47] Where the trust for a wife's sole benefit is expressed to be free from the control of "any present or future husband," equity will not set the trust aside on the death of a husband.[48] And where, by a will, personal estate was given to a trustee, in trust, to pay over the profits to a daughter of the testator, a married woman, semi-annually, for her sole benefit during her life, the will containing no provision for a second marriage of the daughter, it has been held in North Carolina that upon the death of the husband the separate use ends, and does not revive upon the remarriage of the beneficiary; but that on the contrary the second husband's marital rights attach upon the property.[49]

43. Tullett v. Armstrong, 1 Beav. 1; Anderson v. Anderson, 2 Myl. & K. 427; Macq. Hus. & Wife, 305; Duke's Heirs v. Duke's Devisees, 81 Ky. 308, 4 Ky. Law Rep. 293.

44. Macq. Hus. & Wife, 306; Tullett v. Armstrong, 1 Beav. 1, affd. by Lord Cottenham, 4 Myl. & Cr. 377; Hawkes v. Hubback, L. R. 11 Eq. 5.

45. 2 Perry Trusts, §§ 652, 653, and cases cited; Benson v. Benson, 6 Sim. 26; 1 Ch. Ca. 307; Newcomb v. Bonham, 1 Vern. 7; Moore v. Harris, 4 Dr. 33.

46. Beaufort v. Collier, 6 Humph. (Tenn.) 487; O'Kill v. Campbell, 3 Green Ch. (N. J.) 13. As to a settlement upon several daughters free from the liabilities and control of their respective husbands, see Ordway v. Bright, 7 Heisk. (Tenn.) 681.

47. *Post*, § 268.

48. O'Kill v. Campbell, 3 Green Ch. (N. J.) 13.

49. Miller v. Bingham, 1 Ired. Eq. (N. C.) 423.

Conformably to Pennsylvania precedents, it is also held in that State that, unless at the time the trust was created the woman was married, or unless in direct contemplation of marriage, a separate use for her benefit cannot be created, so as to take effect if she marries subsequently.[50] But, as we have seen, the English rule is to the contrary; or in other words that a trust for separate use may be effectually created, notwithstanding the woman is unmarried, and contemplates no particular marriage, and that the trust, meantime remaining suspended, will assert itself on her marriage,[51] no disposition thereof having taken place. This same ambulatory operation appears to prevail usually in the United States.[52]

§ 254. Creation in General.

Prima facie the legal ownership of property which is in his wife at the time of marriage, or comes to her during coverture, vests in the husband under his marital right. It is therefore necessary that the intention to establish a separate use be clearly manifested, else courts of equity will not interpose against him. No technical formalities or expressions are required; but the purpose must appear beyond the reach of reasonable controversy, in order to entitle the wife to claim the property as her own in derogation of the common law.[53] An intention clearly manifested to create a separate estate has always been deemed necessary in our courts, in order to exclude the husband's marital rights. The mere intervention of a trustee is insufficient.[54] Our courts of equity will sometimes overlook informalities in order to give effect to the wife's separate use. As where a deed of trust to a commissioner

50. Snyder's Appeal, 92 Pa. 504, and cases cited in opinion.

51. Tullett v. Armstrong, 1 Beav. 1.

52. Bercy v. Lavretta, 63 Ala. 374; 2 Perry Trusts, §§ 652, 653, and cases cited.

53. Haymond v. Jones, 33 Grat. (Va.) 317; Duke v. Duke, 81 Ky. 308; Bank of Louisville v. Gray, 84 Ky. 565, 2 S. W. 168; Gatzwuler v. MacGrew, 46 Mo. 94; Hart v. Tate, 104 Mo. 315, 15 S. W. 976; Coatney v. Hopkins, 14 W. Va. 338; Richardson v. De Giverville, 107 Mo. 422, 17 S. W. 974, 28 Am. St. R. 426; Macq. Hus. & Wife, 307; Tyler v. Lake, 2 Russ. & M. 183; Kensington v. Dollond, 2 M. & K. 184; Moore v. Morris, 4 Drew. 37; Peachey, Mar. Settl. 279.

54. Hunt v. Booth, 1 Freem. Ch. 215; Evans v. Knorr, 4 Rawle (Pa.), 66; Graham v. Graham, Riley, 142; Taylor v. Stone, 13 S. & M. (Miss.) 653; Lenoir v. Binney, 15 Ala. 667. In Georgia a husband may be held liable in equity as a trustee *sub modo*, where he recognized the property as the separate property of his wife, even though the language was insufficient *per se*. Mounger v. Duke, 53 Ga. 277.

has been ordered by the court, but never executed, and the commissioner gives possession to the husband in the meantime.[55] Or where a deed has not been recorded in compliance with the statute.[56] So a trust may be enforced, although the details of the arrangement cannot be ascertained by the most stringent proof.[57] As a wife is only made a party to a suit instituted by her husband on the alleged ground of her having separate estate, in regard to which she is a *feme sole,* the husband, by making her a party, admits it to be her separate estate.[58] Provisions for the sole and separate use, support, and maintenance of a wife and children are frequently sustained, though the trust does not vest their respective interests consecutively.[59] Prior to the Married Women's Acts a conveyance by the husband to the wife created an equitable separate estate in her.[60]

§ 255. By Parol Gift.

In Vermont, it is decided that a third person may create a parol trust for a married woman's exclusive benefit; except as to landed property, which falls within the statute of frauds. Thus in a case where it appeared that the father of a married woman had intimated to her and her husband, in conversation, that he was about to make her an advance in money, which he wished to have invested for the benefit of herself and her children, and that he had subsequently enclosed in a letter to her husband, a check for $1,000, payable to his daughter, or brearer, expressing in the letter a wish that the money might be invested for the mutual benefit of his daughter and her heirs, leaving the mode to be determined by her and her husband, on consultation between them; also, that she had at the time of the suit three children; the court considered that there had been a trust created for the exclusive benefit of the donor's daughter and her children; and the husband was taken to be the trustee, as against his own creditors who had attached certain bank stock which he purchased in his own name with such funds; the evidence showing that the creditors had received notice that the stock was held in trust.[61]

55. Jackson v. McAliley, Speers Eq. 303.

56. Hamilton v. Bishop, 8 Yerg. (Tenn.) 33.

57. Sledge v. Clopton, 6 Ala. 589.

58. Earl v. Ferris, 19 Beav. 69.

59. Good v. Harris, 2 Ired. Eq. (N. C.) 630; Hamilton v. Bishop, 8 Yerg. (Tenn.) 33; Anderson v. Brooks, 11 Ala. 953.

60. Neville v. Cheshire, 163 Ala. 399, 50 So. 1005.

61. Porter v. Bank of Rutland, 19 Vt. 410. Mr. Macqueen suggests the opinion that a parol trust would be good in England, though admitting

There are other American decisions in which (independently of gifts or settlements from the husband himself) a separate estate in personal property is held to be created in a married woman by a parol gift, where evidence to establish it is clear and satisfactory.[62]

§ 256. By Contract.

A married woman cannot by contract acquire any property to her separate use; but the benefit of her contract, if any, enures to her husband.[63] Where, however, a married woman, with her husband's consent, purchases lands which she was the meritorious cause of acquiring, and takes a deed to another, it is held in Vermont that a trust results in her favor.[64] On the other hand, if a testator gives a legacy to trustees for the use of a daughter, and directs that it may be invested in real estate for her use, if she should desire it, and that the trustees should take the title in the name of the daughter only, though married, the trustees must follow his directions, and they cannot take a title in any other name, though by taking it in the name of the daughter, the property might be subjected to the husband's debts.[65]

§ 257. By Instrument Vesting Power of Appointment in Wife.

Property limited to such uses as a married woman shall appoint is not separate estate. There is a difference between property subject merely to her power of appointment, and property settled to her sole and separate use. In the former instance she may dispose of the estate by executing an instrument according to the strict letter of her authority. In the latter, she is invested with a beneficial interest and enjoyment, however restricted may be the dominion allowed her by the donee. A power of appointment is much the same as any other special power, and on such a principle, not upon the ground that she is a *feme sole* as to the property, the courts both of equity and of law recognize her right to execute without joining her husband. And indeed in some cases, under her trust, she may pass the absolute property in a chattel by gift and manual delivery without writing at all, because she has been

that he finds no decision of the question. Marriage settlements, however, may be affected by the statute of frauds. Macq. Hus. & Wife, 203.

62. Betts v. Betts, 18 Ala. 787; Watson v. Broaddus, 6 Bush (Ky.), 328; Spaulding v. Day, 10 Allen (Mass.), 96.

63. Lansier v. Ross, 1 Dev. & Bat. Eq. (N. C.) 39.

64. Pinney v. Fellows, 15 Vt. 525. And see Pulliam v. Pulliam, 1 Freem. Ch. 348.

65. Vernon v. Marsh, 2 Green Ch. (N. J.) 502.

so empowered. She cannot, by virtue of a mere power of appointment as to a certain fund, charge the property with her debts or affect it by her general contracts, any more than she can other property which is not hers.[66] On the other hand, the wife's disposition of her separate estate does not arise from the exercise of a power, but it is the exercise of a dominion over that estate, unknown to the common law and created by a court of equity, whose rules provide not only for her dominion over it, but also for the rights of those in favor of whom that dominian shall be exercised.[67] A power of appointment given to a married woman, and a trust for her separate use, are then perfectly distinct, even when they affect succeeding interests in the same property.

A married woman may, however, be expressly authorized to appoint by will and not by deed, and the exercise of such power in favor of volunteers may render the appointed funds assets for the satisfaction of debts properly chargeable against her separate estate.[68] In general, equity permits a married woman to dispose of property according to the mode, if any, prescribed by the instrument under which the separate use is created.[69] And it is held by the English chancery that if a power be given to a married woman to be exercised in relation to the separate fund, an absolute interest therein being given her in default of the exercise of the power, she may decline to exercise the power, and thereby acquire the right to sell it as a single woman.[70]

§ 258. Gift of Income of Fund as Gift of Capital.

A gift of the produce of a fund is to be considered a gift of that produce in perpetuity; hence, it is a gift of the fund itself, nothing appearing to show a different intention. Therefore, a bequest of a fund to a woman, with the interest thereon, to be vested in trustees,— the income arising therefrom to be for her separate use and benefit,— vests the capital for her separate use.[71] Where a testator simply directs the investment of a fund in trustees, for the

66. Vaughan v. Vanterstegen, 2 Drew. 378. See Farrington v. Parker, L. R. 4 Eq. 116.

67. Digby v. Irvine, 6 Ir. Ch. 149. See Peachey, Mar. Settl. 276; Brown v. Bamford, 1 Ph. 620; Shattock v. Shattock, L. R. 2 Eq. 182; Hanchett v. Briscoe, 22 Beav. 496.

68. *Re* Harvey, 28 W. R. 73.

69. McChesney v. Brown, 25 Gratt. (Va.) 393; Knowles v. Knowles, 86 Ill. 1; Jaques v. Methodist Episcopal Church, 17 Johns. (N. Y.) 548. And see *post*.

70. Barrymore v. Ellis, 8 Sim. 1; 1 Bro. Ch. 532.

71. Adamson v. Armitage, 19 Ves. 416; Macq Hus. & Wife, 311; Troutbeck v. Boughey, L. R. 2 Eq. 534.

benefit of a married woman, independent of the control of her husband, this is enough to carry the whole fund to her separate use.[72] So it is held that where stock was given to trustee upon trust, to pay the dividends to a married woman for her separate use, and there was no limitation of a life interest, an absolute interest in the capital passed to her, which she could dispose of as a *feme sole*.[73]

It is fair to suppose that in equity the wife's separate use binds the produce of the fund as well as the fund itself. There are some cases decided in the courts of common law where the contrary has been maintained, and to this effect, that, although a wife may be entitled to separate property, the dividends arising therefrom vest in her husband.[74] This is no reason, however, why the equity doctrine should not be as we have stated; indeed, if it were otherwise, as an English writer has observed, the object of separate use would be in many instances frustrated.[75] It must only be observed that income or produce of the fund, if once in the husband's hands, may readily be presumed to have been bestowed upon him by the wife either for himself or the family expenses.

§ 259. Savings from Wife's Income.

What the wife saves out of her separate income, too, if its identity be properly preserved, is in equity her separate estate.[76] And property purchased with such savings belongs to her continues subject to the same rules.[77] But furniture purchased by the wife with the income of her separate estate, and mixed with the furniture of the husband, becomes presumably the property of the husband, unless it was understood between them, at the time of the purchase, that the property should be kept by him as her trustee merely;[78] for

72. Simons v. Howard, 1 Keen, 7, per Lord Langdale.

73. Elton v. Shephard, 1 Bro. C. C. 532; Haig v. Swiney, 1 Sim. & Stu. 487.

74. Tugman v. Hopkins, 4 Man. & Gr. 389; Carne v. Brice, 7 M. & W. 183.

75. See Macq. Hus. & Wife, 291, and *n*. And see *dictum* of Sir Lancelot Shadwell, in Molony v. Kennedy, 10 Sim. 254 (quoted *ib*.), which intimates that this is the equity doctrine; per Lord Hardwicke, Churchill v. Dibbin, 9 Sim. 447, *n*. *Contra*, Peachey, Mar. Settl. 263, where cases are cited which do not support the statement in the text.

76. Barraek v. McCulloch, 3 Kay & J. 110; Brooke v. Brooke, 4 Jur. (N. S.) 472.

77. Merritt v. Lyon, 3 Barb. (N. Y.) 110; Hort v. Sorrell, 11 Ala. 386. See Kee v. Vasser, 2 Ired. Eq. (N. C.) 553.

78. Shirley v. Shirley, 9 Paige (N. Y.), 363.

it is both natural and proper that the wife should bestow her income so as to follow the common-law rule, thus helping to defray the family expenses and maintain the household establishment.

§ 260. Necessity of Trustee.

In England, where property comes to the wife's separate use, it is treated in equity as trust estate, of which she is *cestui que trust*. Yet it is not actually necessary that the instrument constituting the separate use should itself make an appointment of trustees. Formerly the rule was otherwise; but at the present day equity makes the husband a trustee where no other holds possession, and thus supports the trust.[79] And where a trustee, regularly appointed, in breach of his duty, and without the privity of the wife, pays the trust-money over to the husband, equity follows the money into the husband's hands, and makes him likewise accountable as his wife's trustee.[80] It impresses a trust upon the wife's separate estate wherever such estate may be found. But while the appointment of third persons as trustees is not essential to give the wife a separate estate, or a separate interest in any particular estate, it is certainly desirable on many accounts, and there is in it this marked advantage, that the property is made thereby more secure, because such influence of the husband over the wife is prevented as might induce her to abandon the property to him.[81]

Doubtless the American Married Women's Acts have given a fresh impulse to the equitable protection of married women's property, which, as we have stated, had been quite sparingly exercised in the United States prior to the first legislative enactments on this subject. Where the separate use has been recognized and enforced at all, the strict American rule was always borrowed from that of England. And the cases show an increasing liberality to the wife in our courts of equity. Thus it has been frequently said that the wife's separate estate requires no trustee to sustain it.[82] For

79. Evans v. Bethune, 99 Ga. 582, 27 S. E. 277; Brandau v. McCurley, 124 Md. 243, 92 A. 540, L. R. A. 1915C, 767; Bennett v. Davis, 2 P. Wms. 316; Davison v. Atkinson, 5 T. R. 435; Messenger v. Clarke, 5 Exch. 393; Peachey, Mar. Settl. 260; Fox v. Hawks, L. R. 13 Ch. D. 822.

80. Rich v. Cockell, 9 Ves. 375. See also Izod v. Lamb, 1 Cr. & J. 35.

81. Newlands v. Paynter, 10 Sim. 377; s. c. on appeal, 4 M. & Cr. 408; Humphrey v. Richards, 25 L. J. Eq. 444; s. c. 2 Jur. 433; Peachey, Mar. Settl. 260; Macq. Hus. & Wife, 291. Equity can sanction, on behalf of a married woman, the compromise of a suit to make a trustee liable for breach of trust in the fund. Wall v. Rogers, L. R. 9 Eq. 58.

82. McKennan v. Phillips, 6 Whart. 571; Thompson v. McKusick, 3

when no other trustee is interposed the courts of chancery are prepared to treat the husband as such by virtue of his possession and control of the fund.[83] And one may, by his acts, make himself a trustee *sub modo* to support the wife's separate use.[84] Even a purchaser, still more a volunteer, taking possession of the trust property, with a notice of the trust, will be made a trustee in chancery.[85] No informality as to trustee need, of course, injuriously affect the wife's interest.[86]

Upon a bill by husband and wife to recover her separate property, the court may decline to make the husband trustee, and order payment to be made to some third person as trustee for her.[87] And where real estate is conveyed in trust for a married woman, and to such person as she shall appoint, it is not necessary that the husband should join in the appointment.[88]

§ 261. Construction of Instrument Creating Estate.

On the whole, it is apparent that there is much contrariety in the decisions, so far as relates to technical expression. Courts of equity, as such, will not deprive the husband of his legal rights

Humph. (Tenn.) 631; Fellows v. Tann, 9 Ala. 999; Trenton Banking Co. v. Woodruff, 1 Green Ch. (N. J.) 117; Dezendorf v. Humphreys, 95 Va. 473, 28 S. E. 880.

83. Boykin v. Ciples, 2 Hill Ch. (N. Y.) 200; Hamilton v. Bishop, 8 Yerg. (Tenn.) 33; Wallingsford v. Allen, 10 Pet. (U. S.) 583; Porter v. Bank of Rutland, 19 Vt. 410; Pepper v. Lee, 53 Ala. 33; Richardson v. Stodder, 100 Mass. 528; Wilkinson v. Cheatham, 45 Ala. 337. And see Wood v. Wood, 83 N. Y. 575; *Re* O'Brien, 11 R. I. 419; Harkins, v. Coalter, 2 Port. 463; Franklin v. Creyon, 1 Harp. Ch. 243; Freeman v. Freeman, 9 Mo. 763; Holthaus v. Hornbostle, 60 Mo. 439. A court of general equity jurisdiction has power to appoint a husband to be trustee in a trust for the wife's separate benefit, and such appointment is valid. Ely v. Burgess, 11 R. I. 115. But in ordinary cases there are reasons against selecting the husband. *Ib.*

84. Sledge v. Clopton, 6 Ala. 589.

85. Jackson v. McAliley, Speers Eq. 303; Fry v. Fry, 7 Paige Ch. (N. Y.), 461.

86. Jackson v. McAliley, Speers Eq. 303. And as to estopping a husband by his admissions of a separate use, though the language was insufficient, see Mounger v. Duke, 53 Ga. 277; Fry v. Fry, 7 Paige Ch. (N. Y.) 461; Sledge v. Clopton, 6 Ala. 589.

87. Boykin v. Ciples, 2 Hill Ch. (N. Y.) 200.

88. Thompson v. Murray, 2 Hill Ch. (N. Y.) 204; 4 Kent Com. 318.

See Wallace v. Holmes, 9 Blatchf. 67; *supra.* Humphrey v. Buisson, 19 Minn. 221. A guardian cannot, in South Carolina, sell and assign his ward's bond and mortgage of real estate without judicial sanction. McDuffie v. McIntyre, 11 S. C. 551. *Aliter*, probably, in many States; though the right to assign real estate security is more doubtful than that of assigning a simple note or bond upon personal security or without security. See preceding section; Mack v. Brammer, 28 Ohio St. 508. General guardians do not represent their

upon any doubtful construction of language,[89] nor unless the words of themselves leave no doubt of the intention to exclude him.[90] But the question relates rather to intention, to substance, and not literal expression; and any language is now deemed usually sufficient, whatever the technical words, which clearly expresses the intent to create a separate estate for the wife, independent of her husband's control.[91]

The form of expression will go far towards determining whether property is or is not limited to the wife's separate use. Vice-Chancellor Wigram, in a case before him not many years ago, was forced to admit that while ruling out certain property from the wife's separate use, on account of the testator's insufficient language, he had a strong opinion that he decided against the real intention of the testator.[92] The limitation to separate use may either be in express words,[93] or may appear by necessary implication.[94] It must, however, be gathered from a construction of the whole instrument if there is one.[95] Some courts hold that the intention may be shown by evidence *aliunde* the writing.[96] The intention of excluding the husband's marital rights may be inferred from the nature of the provisions attached to the gift; as where, for example, the direction is that the property shall be at the wife's disposal, or there is some other clear indication that such was the donor's intention.[97]

In the courts of this country, moreover, the statute policy is found to supplement equity. As a general rule an equitable trust by instrument requires the construction of that instrument to operate. But this does not necessarily conclude the wife. For, while an equitable separate estate is created, where the intent to exclude the marital rights of the husband clearly and unequivocally

infant wards in foreclosure proceedings. Sheahan v. Wayne, 42 Mich. 69.

89. Buck v. Wroten, 24 Gratt. (Va.) 250; Bowen v. Lebree, 2 Bush (Ky.), 112.

90. Peachey, Mar. Settl. 281; Tyler v. Lake, 2 Russ. & M. 188; Massey v. Parker, 2 M. & K. 181; Macq. Hus. & Wife, 309.

91. Travis v. Sitz (Tenn.), 185 S. W. 1075, L. R. 1917A 671; Holiday v. Hively, 198 Pa. St. 335, 47 A. 988. See Prout v. Roby, 15 Wall. (U. S.) 471; Gaines v. Poor, 3 Met. (Ky.) 503.

92. Blacklow v. Laws, 2 Hare, 49.

93. Coquard v. Pearce, 68 Ark. 93, 56 S. W. 641; Campbell v. Galbreath, 12 Bush (Ky.), 459.

94. Hart v. Leete, 104 Mo. 315, 15 S. W. 976; Coatney v. Hopkins, 14 W. Va. 338.

95. Miller v. Miller's Adm'r, 92 Va. 510, 23 S. E. 891.

96. Wagner v. Mutual Life Ins. Co. of New York, 88 Conn. 536, 91 A. 1012; Bank of Louisville v. Gray, 84 Ky. 565, 8 Ky. Law, 664, 2 S. W. 168.

97. Prichard v. Ames, Turn. & Russ. 223; Peachey, Mar. Settl. 279.

appears from the force and certainty of the terms employed, the local statute may intervene where the intent is doubtful, equivocal, or open to speculation, and fix the character of the estate as the wife's separate statutory and legal estate.[98] A legacy added by a codicil to the legacy given by a will is subject to the incidents of the original legacy; and the separate use may be extended by construction from the will to the codicil.[99] Where an instrument intended to create a statutory separate estate, but grants powers or imposes restrictions not consonant with the statute, the courts will construe the instrument as creating an equitable separate estate where its terms are consonant with equity.[1]

§ 262. What Words are Sufficient to Create Estate; In England.

As to the words which in themselves indicate the intention of creating a separate use, there have been numerous decisions in England. Among them the following expressions are held sufficient: "For her full and sole use and benefit," [2] "her own sole use and benefit," [3] "for her sole use," [4] "for her sole and separate use and benefit," [5] "for her sole and separate use," [6] "for her sole use and benefit," [7] "for her own sole use, benefit, and disposition," [8] "for her sole and absolute use," [9] "for her own use, and at her own disposal," [10] "to be at her disposal, and to do therewith as she shall think fit," [11] "solely and entirely for her own use and benefit," [12] "for her own use, independent of any husband," [13] "not subjected to the control of her husband," [14] "for her own use and benefit, independent of any other person," [15] "for her livelihood," [16] "as her separate estate," [17] "to receive the rents while she lives, whether married or single." [18] Lord Thurlow

98. Short v. Battle, 52 Ala. 456.

99. Day v. Croft, 4 Beav. 561.

1. Jones v. Jones' Ex'r, 96 Va. 749, 32 S. E. 463; Ellison v. Straw, 116 Wis. 207, 92 N. W. 1094.

2. Arthur v. Arthur, 11 Ir. Eq. 511.

3. *Ex parte* Killick, 3 Mon. D. & De G. 480.

4. Lindsell v. Thacker, 12 Sim. 178.

5. Archer v. Rorke, 7 Ir. Eq. 478.

6. Parker v. Brooke, 9 Ves. 583; Adamson v. Armitage, 19 Ves. 415.

7. —— v. Lyne, Younge, 562.

8. *Ex parte* Ray, 1 Madd. 199.

9. Davis v. Prout, 7 Beav. 288.

10. Prichard v. Ames, Turn & Russ. 222.

11. Kirk v. Paulin, 9 Vin. Abr. 96, pl. 43.

12. Inglefield v. Coghlan, 2 Coll. 247.

13. Wagstaff v. Smith, 9 Ves. 520.

14. Bain v. Lescher, 11 Sim. 397.

15. Margetts v. Barringer, 7 Sim. 482.

16. Darley v. Darley, 3 Atk. 399. And see Peachey, Mar. Settl. 279, 280; Macq. Hus. & Wife, 308, 309.

17. Fox v. Hawks, L. R. 13 Ch. D. 822.

18. Goulder v. Camm, De G. F. & J. 146.

once decided that a direction "that the interest and profits be paid to her, and the principal to her or to her order by note, or writing under her hand," created a trust for the wife's separate use.[19] So in the judgment of Sir William Fortescue, Master of the Rolls, did the words "that she should enjoy and receive the issues and profits of the estate.[20] And Lord Loughborough gave a like effect to a direction that certain property should be delivered up to a married woman "whenever she should demand or require the same."[21] A similar construction has also been applied to the words, "to be laid out in what she (the wife) shall think fit."[22] And a legacy to a married woman, "her receipt to be a sufficient discharge to the executors," has been held sufficient.[23] It has been held that a gift to the wife's separate use was good, although the support and education of children was annexed as a charge upon it.[24] The expression "her intended husband" may apply to a second husband, where there are words limiting income to the wife's separate use during her life, for this latter expression controls the former.[25]

§ 263. In the United States.

In the United States it is held that the language employed, if language be necessarily relied on, must be suitable. Thus in North Carolina, the words, "for her use," have been held sufficient to exclude the husband't dominion.[26] So, too, the words, "for the entire use, benefit, profit, and advantage."[27] In Kentucky, the words, "for her own proper use and benefit," are held sufficient.[28] Such, too, seems to have been the rule in Mississippi.[29] The words, "to the use and benefit," are held sufficient in Tennessee.[30] So in Alabama, words importing enjoyment, "without let,

19. Hulme v. Tenant, 1 Bro. C. C. 16.

20. Tyrrell v. Hope, 2 Atk. 561. "For to what end should she receive it," says this judge, "if it is the property of the husband the next moment?"

21. Dixon v. Olmius, 2 Cox, 414.

22. Atcherley v. Vernon, 10 Mod. 518. See Blacklow v. Laws, 2 Hare, 52.

23. Warwick v. Hawkins, 13 E. L. & Eq. 174.

24. Cape v. Cape, 2 You. & Coll. Exch. 543. And see *n.* to Macq. Hus. & Wife, 310.

25. Hawkes v. Hubback, L. R. 11 Eq. 5.

26. Steel v. Steel, 1 Ired. Eq. (N. C.) 452; Good v. Harris, 2 Ired. Eq. (N. C.) 630.

27. Heathman v. Hall, 3 Ired. Eq. (N. C.) 414.

28. Griffith v. Griffith, 5 B. Mon. (Ky.) 113.

29. Warren v. Halsey, 1 S. & M. Ch. (Miss.) 647.

30. Hamilton v. Bishop, 8 Yerg. (Tenn.) 33.

hindrance, or molestation whatever." [31] And where one clause of a will applies the words, "in trust for the separate use," to certain property, and another applies to certain property the words "in trust" only, the separate use may by construction embrace the whole.[32] The word "exclusively" in the wife's favor is held to exclude the husband.[33] So, too, "to be hers and hers only." [34] A trust, to pay income to a wife [35] "for and during the joint lives of her and her husband, taking her receipt therefor," is held to give her a sole and separate estate in the income,[36] and a trust to the "exclusive use, benefit, and behoof," is held sufficient to create a separate use.[37] So, too, "for her own use and benefit, independent of any other person." [38] So, too, "absolutely," in a suitable connection.[39] So, too, "to be for her own and her family's use during her natural life." [40] Or, "for the use and benefit of the wife and her heirs." [41] Or, "not to be sold, bartered, or traded by the husband." [42]

The words, to the wife's "sole and separate use," are most commonly applied.[43] Or, "solely for her own use." [44] Or, "for the sole use and benefit of." [45] And "to have for her sole and separate use during life," [46] or by a will providing that a daughter and her husband should reside on testator's estate until other real

31. Newman v. James, 12 Ala. 29. And see Clarke v. Windham, *ib.* 798.

32. Davis v. Cain, 1 Ired. Eq. (N. C.) 304. See further, as to words which constitute a separate estate, Wilson v. Bailer, 3 Strobh. Eq. (S. C.) 258; Clark v. Maguire, 16 Mo. 302; Goodrum v. Goodrum, 8 Ired. Eq. (N. C.) 313; Denson v. Patton, 19 Ga. 577; Bradford v. Greenway, 17 Ala. 797.

33. Gould v. Hill, 18 Ala. 84.

34. Ellis v. Woods, 9 Rich. Eq. (S. C.) 19; Ozley v. Ikelheimer, 26 Ala. 332.

35. As to income, increase, and profits, see *supra*, § 258.

36. Charles v. Coker, 2 S. C. (N. S.) 122.

37. Williams v. Avery, 38 Ala. 115.

38. Williams v. Maull, 20 Ala. 721; Ashcraft v. Little, 4 Ired. Eq. (N. C.) 236.

39. Brown v. Johnson, 17 Ala. 232; Short v. Battle, 52 Ala. 456.

40. Heck v. Clippenger, 5 Pa. 385; Hamilton v. Bishop, 8 Yerg. (Tenn.) 33.

41. Good v. Harris, 2 Ired. Eq. (N. C.) 630.

42. Woodrum v. Kirkpatrick, 2 Swan, 218; Clarke v. Windham, 12 Ala. 798.

43. See § 319 *et seq.;* Robinson v. O'Neal, 56 Ala. 541; Swain v. Duane, 48 Cal. 358; Short v. Battle, 52 Ala. 456.

44. *Ib.:* Snyder v. Snyder, 10 Pa. 423; Jarvis v. Prentice, 19 Conn. 273; Goodrum v. Goodrum, 8 Ired. Eq. (N. C.) 313; Griffith v. Griffith, 5 B. Mon. (Ky.) 113; Stuart v. Kissam, 3 Barb. (N. Y.) 494.

45. Blakeslee v. Mobile Life Ins. Co., 57 Ala. 205; Miller v. Vose, 62 Ala. 122.

46. Dezendorf v. Humphreys, 95 Va. 473, 28 S. E. 880.

estate should be purchased for them as provided by the will.[47] A deed by a husband to a trustee for a wife and her children, with power to her to sell or exchange the land with the trustee's consent, creates an equitable and not a statutory separate estate.[48]

§ 264. What Words are Insufficient to Create Estate; In England.

A mere trust to pay the income of a fund to a certain married woman, or to her and her assigns, is in England held not sufficient to prevent the marital rights from attaching.[49] Nor is a devise to a certain widow's sole use and benefit without reference to a future husband.[50] Even a gift to a wife "for her use" has been held not a sufficiently unequivocal declaration of an intention to create a trust for the separate use of the wife.[51] Some words have greater efficacy than others. Thus it has been said that the word "enjoy" is very strong to imply a separate use.[52] And much controversy has arisen in the English chancery courts over the use of the word "own" as synonymous with "sole," the result of which is to establish that there is a substantial distinction between a gift to a wife "for her sole use" and a gift "for her own use," or "for her own use and benefit."[53] And it having been decided that the word "own" had no exclusive meaning, it was next determined that a trust to pay the proceeds of real estate into the proper hands of a married woman for her own use and benefit was not a gift to the wife's separate use, the word "proper" being the Latin form of the word "own," and therefore payment into the wife's proper hands signifying the same thing as into her own hands.[54] Lord Brougham thus in effect overruled a decision of Lord Alvanley, who had held that the use of the word "proper" would create a separate use.[55] This later construction, coming from a jurisdiction so conclusive, has since prevailed, though not without some expressions of dissatisfaction in the lower courts.[56] And

47. Russell v. Andrews, 120 Ala. 222, 24 So. 573.

48. Jones v. Jones' Exr., 96 Va. 749, 32 S. E. 463; Rutledge v. Rutledge (Mo.), 119 S. W. 489.

49. Lumb v. Milnes, 5 Ves. 517; Brown v. Clark, 3 Ves. 166; Spirett v. Willows, 11 Jur. (N. S.) 70.

50. Gilbert v. Lewis, 1 De G. J. & M. 38.

51. Jacobs v. Amyatt, 1 Madd. 376, *n.*; Wills v. Sayers, 4 Madd. 411; Roberts v. Spicer, 5 Madd. 491.

52. Sir William Fortescue, in Tyrrell v. Hope, 2 Atk. 558.

53. See Lord Brougham's judgment in Tyler v. Lake, 2 Russ. & M. 187; Johnes v. Lockhart, 3 Bro. C. C. 383, *n.*; Peachey, Mar. Settl. 282.

54. Tyler v. Lake, 2 Russ. & M. 187.

55. Hartley v. Hurle, 5 Ves. 545.

56. See Vice-Chancellor Wigram, in Blacklow v. Laws, 2 Hare, 49; Macq. Hus. & Wife, 309; Peachey, Mar. Settl. 282.

again, language of the donor, expressive of his intent to limit property to the wife's separate use, may be controlled by other words or provisions so as to negative such a supposition. This principle was applied to the wife's disadvantage in a case where others were made the objects of the bounty with her.[57]

Whether the word "sole" is of itself sufficient to create a separate use is doubtful. Different opinions have been expressed on this point. But in a case before Vice-Chancellor Kindersley the word "sole" was deemed insufficient, in a devise of property to a female, her heirs, executors, administrators, and assigns, "for her and their own sole and absolute use and benefit," to create a separate estate; since the word "sole," as here used, had reference not only to the female herself, but to her heirs, executors, administrators, and assigns, who certainly could not be considered beneficiaries under any such trust.[58]

§ 265. In the United States.

There is authority in the United States against permitting such expressions as these to create the separate use, and the following have been held insufficient: "For the use and benefit of,"[59] "in her own right,"[60] "for the joint use of husband and wife,"[61] "to her and the heirs of her body and to them alone," and similar expressions,[62] or where, instead of restraint of husband's right of disposition, is stated a mere exemption from liability for his debts,[63] or where a will provided that the executor "can" sell certain land and divide it among the testator's married daughters, his sons-in-law not to "interfere" in any manner with the property,[64] or, to some one's wife, without further exclusive descrip-

57. Wardle v. Claxton, 9 Sim. 524. And see Gilchrist v. Cator, 1 De G. & S. 188.

58. Lewis v. Mathews, L. R. 2 Eq. 177. And see Troutbeck v. Boughey, L. R. 2 Eq. 534. See also, as to property to husband and another in trust, *Ex parte* Beilby, 1 Glyn & Jam. 167; *n.* to Peachey, Mar. Settl. 283.

59. Clevestine's Appeal, 15 Pa. 499; Fears v. Brooks, 12 Ga. 198; Tenant v. Stoney, 1 Rich. Eq. (S. C.) 222; Prout v. Roby, 15 Wall. (U. S.) 471; Merrill v. Bullock, 105 Mass. 486; Guishaber v. Hairman, 2 Bush (Ky.), 320.

60. Leete v. State Bank of St. Louis, 141 Mo. 574, 42 S. W. 1074.

61. Geyer v. Branch Bank, 21 Ala. 414. Cf. Charles v. Coker, 2 S. C. (N. S.) 122. See *post* as to conveyances to husband and wife, § 564 *et seq.*

62. Clevestine's Appeal, 15 Pa. 499; Bryan v. Duncan, 11 Ga. 67; Foster v. Kerr, 4 Rich. Eq. (S. C.) 390.

63. Harris v. Harbeson, 9 Bush (Ky.) 397; Gillespie v. Burlinson, 28 Ala. 551. But see Young v. Young, 3 Jones Eq. (N. C.) 266.

64. Schwarz v. Griffith's Exr., 7 Ky. Law Rep. (abstract) 532.

tion.[65] In South Carolina, the words, for "the use of his wife," are held insufficient.[66] A gift or bequest to "a married woman and her children, born and thereafter to be born," does not invest her with an estate to her sole and separate use, but makes her a tenant in common (joint-tenancy having been abolished) with her children.[67] And it would appear, in general, that where property is given for the use and support of two or more together, one of them being a married woman, it cannot be considered as vesting a separate estate in the married woman; for exclusiveness of enjoyment is an important element in such estates.[68] This doctrine is not inconsistent with the well-established right of a donor to make a trust first to the wife's separate use, then over to some one else, provided the instrument uses apt language for that purpose.[69] In Illinois it is held that the disabilities of coverture are not so far removed by the separate property act as to take married women out of the saving clause of the statute of limitations.[70]

§ 266. Necessity of Preserving Identity of Estate.

As to mingled funds generally, the rule applies that equity will not interfere where a fund set apart for the wife's sole benefit has become mixed with other funds beyond the possibility of identification.[71]

But, on the other hand, the proceeds of a transfer of the wife's separate property, which it is understood shall be the wife's, may be followed by her in equity, provided she can trace the identity, and has acted consistently with her claim of title, even though the husband takes the title in himself.[72]

In Missouri it is held that a separate equitable estate in the wife is created where the title to property bought with her funds is taken in the name of the husband.[73]

65. Moore v. Jones, 13 Ala. 296; Fitch v. Ayer, 2 Conn. 143; Shirley v. Shirley, 9 Paige (N. Y.), 364.

66. Tennant v. Stoney, 1 Rich. Eq. (S. C.) 222; McDonald v. Crockett, 2 McC. Ch. (S. C.) 130.

67. Dunn v. Bank of Mobile, 2 Ala. 152.

68. Harkins v. Coalter, 2 Port. 463; Clancy, Hus. & Wife, 269; Inge v. Forrester, 6 Ala. 418. A provision that three daughters shall "enjoy their respective portions as they see fit," does not exclude their husbands. Wood v. Polk, 12 Heisk. (Tenn.) 220. But cf. Metropolitan Bank v. Taylor, 53 Mo. 544.

69. See Warren v. Haley, 1 S & M. Ch. (Miss.) 647.

70. Morrison v. Norman, 47 Ill. 477.

71. Buck v. Ashbrook, 59 Mo. 200.

72. Dula v. Young, 70 N. C. 450; Haden v. Ivey, 51 Ala. 381.

73. Donovan v. Griffith, 215 Mo. 149, 114 S. W. 621. Thus, where a husband so holds the legal title, the title held by him merges in her equitable title at her death and vests the title in her heirs. Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868, 105 Am. St. 629.

A distinction may sometimes be requisite between the case where a wife asserts her equitable title against her husband, and that where her title is claimed against *bona fide* purchasers from the husband, having neither actual nor constructive notice of her title.[74]

Where the wife's separate estate is sold for a debt of the ancestor from whom it descended, it has been held in New York that the surplus belongs to the husband.[75] And where a wife joins with her husband in the conveyance of her land, without any understanding or agreement that the proceeds are to be applied to her separate use, such proceeds vest absolutely in him discharged of all claims on her part.[76] For the presumption in such cases is that she voluntarily abandons her separate use in his favor; though the question after all is one of evidence.[77]

§ 267. Separate Estate as Trust Fund for Payment of Wife's Debts.

The separate estate of a married woman is in suitable instances to be treated as a trust fund for the payment of her separate debts. How far this doctrine should be carried, the authorities are not agreed.[78] But it rests apparently upon the assumption that, by virtue of her right to dispose of such property (of which we shall speak more at length in this chapter), she has contracted expressly or by implication with reference to her separate estate, the creditor reposing his faith accordingly. And hence it is held that where a stranger advanced moneys for the support of a wife living separate from her husband and in destitute circumstances, her separate estate, after her death, will be bound thereby and also for her needful burial and funeral expenses.[79] Nor, in the absence of an intention on the wife's part to make such estate liable, can it be subjected to her general debts contracted during coverture.[80] But in Mississippi a disposition has been manifested to overturn

74. See *post*, § 272.

75. Wood v. Genet, 8 Paige (N. Y.), 137.

76. Chester v. Greer, 5 Humph. (Tenn.) 26; Temple v. Williams, 4 Ired. Eq. (N. C.) 39.

77. Temple v. Williams, 4 Ired. Eq. (N. C.) 39.

78. 2 Story, Eq. Jur., § 1398, *n.*; Norton v. Turvill, 2 P. Wms. 144. Vaughan v. Walker, 8 Ir. Ch. 458, questions this rule, which case in turn is disapproved by Hodgson v. Williamson, 42 L. T. 676.

79. Hodgson v. Williamson, 42 L. T. 676.

80. Dickson v. Miller, 11 S. & M. (Miss.) 594; Knox v. Picket, 4 Desaus. (S. C.) 92; Gee v. Gee, 2 Dev. & Bat. (N. C.) 103; Haygood v. Harris, 10 Ala. 291; Curtis v. Engel, 2 Sandf. Ch. (N. Y.) 287.

this doctrine, and to establish a new and fairer rule in equity; and it is held that the wife's separate property, owned before marriage, may be thus subjected to the payment of necessaries furnished her while *sole* and a minor,[81] and a similar rule prevails in some other States.[82]

§ 268. Duration of Estate.

In England the quality of separate estate ceases on the death of the wife; and if her husband survives her, he becomes entitled to the property as though it had never been settled to her separate use. For the separate use was created only for the marriage state, and was not designed to extend beyond the dissolution of marriage, or when the necessity of the trust should be no longer felt. Thus *choses in possession* settled to the wife's separate use vest in the husband absolutely upon his survivorship.[83]

In the United States, as in England, the separate estate in equity continues only during the marriage state, with probably similar qualifications.[84] The estate of the trustee, as such, terminates on the wife's death.[85] Where a conveyance is made in trust for the separate use of a married woman, or for such person as she should direct, and she makes no appointment, it is held in Pennsylvania that the trustee after her death is entitled to recover the property for her representatives.[86]

§ 269. Husband's Rights on Wife's Decease.

The wife's separate *choses in action* may be recovered by the husband on her death in his right as her administrator.[87] So, doubtless, her separate chattels real go to the husband as survivor. In short, the wife's separate property, upon the wife's death, is freed from its peculiar incidents, and becomes like any other estate

81. Dickson v. Miller, 11 S. & M. (Miss.) 594. "In marriage," observes Mr. Justice Thacher, "although a husband runs the hazard of becoming liable for his wife in an amount greater than the value of the estate he receives by her, he also has the chance of receiving by her an amount far exceeding her debts. But where the whole estate of a wife, notwithstanding coverture, continues separate to her, there is no such recompense to the husband for his obligation for his wife's debts, but on the contrary, there may be a certainty of his becoming indebted on behalf of his wife, with no possibility of his receiving an amount even equal to her debts." *Ib.*

82. Cater v. Eveleigh, 4 Desaus. (S. C.) 19; Young v. Smith, 9 Bush (Ky.) 421. Upon this subject, from the statutory point of view, see *post.*

83. Molony v. Kennedy, 10 Sim. 254.

84. *Supra,* § 253.

85. Bercy v. Lavretta, 63 Ala. 374.

86. Dinsmore v. Biggert, 9 Pa. 133.

87. Proudley v. Fielder, 2 Myl. & K. 57; Drury v. Scott, 4 You. & Coll. Ch. 264; Stead v. Clay, 1 Sim. 294.

of hers which may remain at her decease.[88] And it seems clear that the husband may be tenant by the curtesy, as usual, if not expressly excluded from all marital interest.[89] The husband surviving his wife has the same rights in her separate estate, as in her other property, even though another be appointed administrator.[90] And yet if the husband, on survivorship, is entitled to his wife's separate personal estate by virtue of his marital rights, he must, in order to obtain it from others, and have a firm title against creditors, take out letters of administration, as American cases hold,— at least where ante-nuptial debts of the wife have not been recovered during marriage.[91]

§ 270. What Will Bar Husband's Rights.

The wife may defeat her husband's claim after her death by exercising her power of disposition during her lifetime,— a power which is recognized in a married woman so far as her separate property is concerned.[92] So, too, by the terms of the trust, the husband's rights on her decease may be prevented from attaching. Thus, where a wife entitled to separate property for life, under a settlement which directed that all the trust property and all the income thereof "remaining unapplied" at her death should go in a certain manner, left her husband some years before her death; and the trustees received the income regularly, and paid it into a bank in their own names, with her privity, making remittances to her as she required money; and upon the wife's death the sum of £888 was found among her effects, and a balance of £2,049 accumulated income stood to the credit of the trustees in the bank; it was held by the Vice-Chancellor of England that the former went to the surviving husband by virtue of his marital right, while the latter was bound by the trusts of the deed as the result of income "remaining unapplied" at her death.[93]

88. Macq. Hus. & Wife, 285; Peachey, Mar. Settl. 278; Sloper v. Cottrell, 6 El. & Bl. 501; Bird v. Pegrum, 13 C. B. 650; s. c., 17 Jur. 579.

89. Lushington v. Sewell, 1 Sim. 548; Roberts v. Dixwell, 1 Atk. 606, per Lord Hardwicke; Macq. Hus. & Wife, 287; Appleton v. Rowley, L. R. 8 Eq. 139; Cooper v. Macdonald, L. R. 7 Ch. D. 288. Otherwise, where by the terms of the separate use the husband is excluded from curtesy. Moore v. Webster, L. R. 3 Eq. 267.

90. Spann v. Jennings, 1 Hill Ch. (N. Y.) 325; Good v. Harris, 2 Ired. Eq. (N. C.) 630; McKay v. Allen, 6 Yerg. (Tenn.) 44. And see Cooney v. Woodburn, 33 Md. 320, where wife left no issue surviving.

91. McKay v. Allen, 6 Yerg. (Tenn.) 44.

92. Macq. Hus. & Wife, 285. This will presently be considered further.

93. Johnstone v. Lumb, 15 Sim. 308.

§ 271. Effect of Estate on Husband's Marital Obligations.

It would appear to be the English doctrine that the marital obligations of the husband are not essentially altered by her right to separate property. Thus, it is held that the wife is not bound to maintain her husband out of her separate fortune, nor to bring any part of it into contribution for family purposes.[94] And there seems to be no legal authority to support the notion that the husband's liabilities on her general debts are thereby altered during their joint lives.[95] The common-law liabilities of the husband, to be sure, rest in great measure upon his right to his wife's property; yet we may admit that it would be difficult to adjust any new rule except upon partnership principles. If one marries a rich wife, therefore, who chooses to hoard her savings by herself, bequeath all to others, and compel him, a poor man, to pay for everything she or the children need, all their lives, he assuming her antenuptial debts besides, it is possible that even equity will deny him relief. We here suppose that neither legislation nor the wife's own disposition of her separate property affects the question.

Moreover, the wife is not bound to maintain, educate, or provide for her children out of her separate property; and even though she elope from her husband, equity will not lay hold of her estate for that purpose. This is a settled point in England, unless the legislature shall change the law hereafter; for the House of Lords so decided in *Hodgden* v. *Hodgden*, on appeal from the lower court of chancery, and under the advice of Lord-Chancellor Cottenham.[96]

And yet, whenever a settlement of the wife's equity is decreed, where the husband or his legal representative seeks to recover for himself her *choses in action*, the children of the marriage are included within its benefits; though, to be sure, the wife may waive the claim altogether without reference to them.[97]

The English doctrine that the wife's separate estate is not necessarily liable for her own general or antenuptial debts is also admitted in the United States. Thus it is held in New York that the only ground on which the wife's separate property can be reached for her antenuptial debts is that of appointment; that is, some act of hers after marriage which indicates an intention to charge the property.[98]

94. Lamb v. Milnes, 5 Ves. 520.

95. See Macq. Hus. & Wife, 288. *In re* Baker's Trusts, L. R. 13 Eq. 168.

96. 4 Cl. & Fin. 323, reversing the decree of the court below.

97. See *supra*, as to the wife's equity to a settlement, § 175.

98. Vanderheyden v. Mallory, 1 Comst. 452.

In general the husband's obligation to maintain his wife and family remains unaffected by the fact that the wife holds separate property. This rule is fully asserted in New York. For it is declared that, though by a marriage settlement the wife's whole property is secured to her separate use, her husband is nevertheless bound to maintain her, and cannot make the expenses a charge on her separate estate. Nor can the admissions of the wife, during coverture, that the expenses were to be borne by her separate estate, be set up by the husband to impair her right, under the settlement.[99] "The utmost I can do in this case," observed Chancellor Kent, "is to allow the husband to be credited with any necessary reparations bestowed by him on any part of her estate, and with any particular specific appropriation of her property (not being for the ordinary maintenance of her or his family) which may have been made by her special assent and direction in the given case, and apparently for her benefit." [1]

§ 272. Rights of Bona Fide Purchasers from Husband.

It is possible that a provision for the wife's separate use may fail, as against third parties, *bona fide* purchasers, wherever the husband can dispose of the property without their having notice of the trust.[2]

§ 273. Restraint on Anticipation or Alienation.

The clause of restraint upon anticipation is an important element in the doctrine of the wife's separate use, as administered in England. This clause was sanctioned by Lord Thurlow,[3] and is frequently to be met with in modern conveyances; and is pronounced by Mr. Macqueen, and by eminent English jurists, a salutary clause which takes from the wife the power of bringing ruin upon herself; though it is manifestly in form a fetter upon the trust estate, while the wisdom of its establishment in any case depends upon the folly of the beneficiary.[4] With a perfect liberty of disposal, the danger arose that the wife might be persuaded to part with, or charge her separate property, even against her better

99. Meth. Ep. Church v. Jaques, 1 Johns. Ch. (N. Y.) 450.

1. *Ib.* It may be said that the above case arose out of an antenuptial contract between husband and wife, and that the court merely restrained the husband from setting aside his own bargain.

2. Parker v. Brooke, 9 Ves. 583; Macq. Hus. & Wife, 291.

3. Miss Watson's Case. See Pybus v. Smith, 3 Bro. C. C. 340, *n.* This doctrine was afterwards affirmed in Jackson v. Hobhouse, 2 Mer. 487, by Lord Eldon.

4. See Macq. Hus. & Wife, 312.

judgment, through the secret and subtle influences which her husband might bring to bear upon her. But by the clause against anticipation, the wife's hands are tied up; she has not the power of alienating or encumbering the property; and the donor can place his gift beyond the possibility of matrimonial contention. The restraint upon anticipation not only applies to personal property, but extends even to landed property, notwithstanding the common-law methods by which the wife may ordinarily alienate and encumber such estate; so that a person may now devise lands to a married woman in fee-simple in such a manner as to disable her during coverture from making any sale, mortgage, charge, or encumbrance whatever to take effect against it.[5] It applies equally to estates for life or in fee.[6]

The name of this important clause originates in the circumstances under which it was first applied.[7] The general purport of this expression is that the wife shall be prohibited the anticipation of the income of her separate property or the anticipation of the capital of the fund. Yet the word "anticipation" need not be used in clauses of this sort, nor is any particular form of expression necessary.[8] This restraint will not prevent a husband from receiving his wife's separate income, nor render his estate liable for more than one year's income, nor, in general, interfere with arrears of income; but it prevents anticipating income on her part, and subjecting to her dominion or her liabilities the capital or income which is not yet payable.[9]

Like the separate use itself, this clause of restraint on anticipation exists only in the marriage state; and property vested in a single woman she may dispose of absolutely, despite such limita-

5. Bagget v. Meux, 1 Phil. 627, per Lord Lyndhurst; 1 Coll. 138; Macq. Hus. & Wife, 312; Peachey, Mar. Settl. 284. Nor can she join her husband in a power of attorney to receive or sue for moneys tied up by this clause. Kendrick v. Wood, L. R. 9 Eq. 333.

6. *Ib.*

7. See Pybus v. Smith, 3 Bro. C. C. 340; Jodrell v. Jodrell, 9 Beav. 59.

8. Per Lord Cranworth, *In re* Ross's Trust, 1 Sim. 199; Doolan v. Blake, 3 Ir. Ch. 349; Peachey, Mar. Settl. 287. See further, Moore v. Moore, 1 Coll. 57; Tullett v. Armstrong, 1 Beav. 1; Macq. Hus. & Wife, 314, *n.*; Steedman v. Poole, 6 Hare, 193; Parkes v. White, 11 Ves. 222; Clark v. Pister, 3 Bro. C. C. 346, cited in Pybus v. Smith; Barrymore v. Ellis, 8 Sim. 1; Brown v. Bamford, 1 Phil. 620; Field v. Evans, 15 Sim. 375; Baker v. Bradley, 2 Jur. (N. S.) 104; Peachey, Mar. Settl. 287, 288, and cases cited; Harrop v. Howard, 3 Hare, 624; Harnett v. McDougall, 8 Beav. 187; Acton v. White, 1 Sim. & Stu. 429.

9. See Rowley v. Unwin, 2 K. & J. 138; *Re* Brettle, 2 De G. J. & S. 79; Lewin Trusts, 556, 5th ed.

tion, so long as she remains unmarried; but upon her coverture, while retaining such property, the separate use and the restraint upon anticipation attach and become effective together, cease together upon her widowhood, and revive together upon her remarriage.[10]

But the restraint on anticipation does not exempt a married woman from the ordinary consequences of lapse of time and acquiescence.[11] That fetter upon alienation was imposed for her protection against her husband, but was not intended to exonerate her from the obligation of asserting her claim within a reasonable period. Indeed, it is but reasonable that, as a court of equity creates and models the separate estate, the estate so created and modelled should be subject to the ordinary rules of the court.[12] But the court cannot mould at will the restraint upon anticipation, though the language used by some of the earlier judges would seem to indicate otherwise; nor get rid of it even where alienation would be advantageous for the married woman; moreover, while the power to impose restraint on anticipation is a mere creature of the court, the restraint itself is always imposed by the author, the settlor of the gift.[13] It is held in this country that if a married woman having a separate estate survives her husband, the restraints upon the disposal of the estate, inconsistent with its general character, cease with the coverture.[14] Moreover, in Pennsylvania it is held that they do not revive on her second marriage,[15]

10. Tullett v. Armstrong, 1 Beav. 1; 4 Myl. & Cr. 377; Macq. Hus. & Wife, 313; Clarke v. Jaques, 1 Beav. 36; Dixon v. Dixon, 1 Beav. 40.

11. Restraint on anticipation is bad when it tends to a perpetuity. Buckton v. Hay, 27 W. R. 527.

12. Derbyshire v. Home, 3 De G. M. & G. 113.

13. Robinson v. Wheelwright, 21 Beav. 220; s. c. on appeal, 6 De G. M. & G. 535; 2 Jur. (N. S.) 554. See Peachey, Mar. Settl. 289; Fitzgibbon v. Blake, 3 Ir. Ch. 328. Income which a wife is restrained from anticipating will not be applied to make good the consequences of her fraud. Arnolds v. Woodhams, L. R. 16 Eq. 29.

A separate trust may be rendered forfeitable on assignment; as, for instance, a wife's pension. *Re* Peacock's Trusts, L. R. 10 Ch. D. 490. An ingenious attempt was lately made in English chancery to allow a married woman, restrained from anticipation, to anticipate. Pike v. Fitzgibbon, L. R. 14 Ch. D. 837. It failed on appeal, and the strict rule was reasserted. s. c., app. 29 W. R. 551. As to whether restraint on anticipation may bar an entail and deprive husband of curtesy, see Cooper v. Macdonald, L. R. 7 Ch. D. 288.

14. Smith v. Starr, 3 Whart. 62; Pooley v. Webb, 3 Cold. (Tenn.) 599; Thomas v. Harkness, 13 Bush (Ky.), 23.

15. Hamersley v. Smith, 4 Whart. (Pa.) 126.

though this is contrary to the general rule of equity, unless the trust was plainly confined to a particular husband or particular coverture.[16]

American courts have seldom to consider clauses of restraint against anticipation or alienation,[17] a subject which the English chancery courts have considered at much length. Restraining a wife's power to deal with her separate property seems, in American policy, too much like denying her a separate property. Yet there are good grounds for such constraint; and in various instances our State courts find occasion to recognize such clauses. The restraint is held, as in England, to apply equally to real or personal property, and to estates in fee or for life.[18] It will come into operation, like the separate use to which it is attached, where a woman marries; but it exists only in the marriage state, since one *sui juris* is unrestrainable by any such means from exercising the ordinary rights of ownership, whether widow or maiden.[19] And while she may be restrained by language of the instrument under which her title is acquired, amounting to a clause restraining antitcipation, for instance, yet the intention to restrain her must be clearly expressed; or else she may deal with the property as she pleases, either by acts *inter vivos* or by testamentary appointment.[20]

The clause of anticipation, which is such a favorite in English chancery, under instruments drawn for the creation of a separate use, is seldom applied in American cases;[21] but in absence of all such technical clauses, our general rule is that the wife, unless specially restrained by the terms of the trust under which she acquired her equitable separate property, may dispose of it at pleasure. *Jaques* v. *Methodist Episcopal Church* went so far as to rule that, though a particular mode of disposition be specifically pointed out in the instrument, this will not preclude the wife from

16. Shirley v. Shirley, 9 Paige (N. Y.), 364; Beaufort v. Collier, 6 Humph. (Tenn.) 487; Waters v. Tazewell, 9 Md. 291; 2 Perry Trusts, § 652.

17. *Supra.*

18. Freeman v. Flood, 16 Ga. 528; *dicta* in Wilburn v. McCalley, 63 Ala. 436; Burnett v. Hawpe, 25 Gratt. (Va.) 481.

19. Wells v. McCall, 64 Pa. 207; Parker v. Converse, 5 Gray (Mass.), 336.

There must be a clear and unequivocal expression of intent to restrain the *jus disponendi.* A declaration that the property shall not be liable for her debts, etc., is insufficient. Witsell v. Charleston, 7 S. C. 88; Radford v. Carwile, 13 W. Va. 572.

20. Rich v. Cockell, 9 Ves. 639; Moore v. Morris, 4 Drew. 38; Darkin v. Darkin, 17 Beav. 581; Caton v. Rideout, 1 Mac. & Gord. 601.

21. *Post,* § 490 *et seq.*

adopting any other mode of disposition unless she has been, by express language of the trust, specially restrained to that particular mode.[22] In this latter doctrine Chancellor Kent (whose judgment in the lower court had been reversed[23]) did not concur,—adopting the more conservative view with reference to such restrictions. The distinction is rather a nice one, and successive American decisions in other States have generally sustained the Chancellor's views, which seem indeed most consonant to reason and the intent of such trusts; but the cases are, on the whole, conflicting, and not very conclusive.[24]

Both English and American precedents agree in the converse principle, that if, by the terms of the trust, the wife is expressly restrained to a particular mode of dealing with the separate fund,

22. Jaques v. Methodist Episcopal Church, 17 Johns. (N. Y.) 548; Methodist Episcopal Church v. Jaques, 1 Johns. Ch. (N. Y.) 450; 3 *ib.* 77.

23. 3 Johns. Ch. (N. Y.) 77. The point contended for by the Chancellor, but disapproved on appeal, was, that if a wife has power expressly conferred to dispose by deed in concurrence with her husband, or by will without it, her receipt "alone" to be a sufficient discharge as to rents, issues, and profits; the wife cannot appoint by deed, or charge the property by her sole bond, note, parol promise, etc.

Hoar, J., in Willard v. Eastham, 15 Gray (Mass.), 328, observes, by way of *dictum*, that "the general current of American authorities supports the principle that a married woman has no power in relation to her separate estate but such as is *expressly conferred* in the creation of the estate; and that her separate estate is not chargeable with her debts or obligations, *unless where a provision for that purpose is contained in the instrument creating the separate estate.*" If by this is meant that the wife's power of disposition must be expressly conferred in order to operate the statement appear very far from accurate, and is by no means what Chancellor Kent contended for in the above case. In 2 Perry Trusts, §§ 655-663, the same idea is expressed, probably upon the authority of the Massachusetts court.

24. See Tullett v. Armstrong, 1 Beav. 1, at length, for the English doctrine. For American authorities, see 2 Kent Com. 165, 166, and cases cited in last edition; also the following which appear to favor Chancellor Kent's rule: Shipp v. Bowmar, 5 B. Mon. (Ky.) 163; Tarr v. Williams, 4 Md. Ch. 68; Nix v. Bradley, 6 Rich. Eq. (S. C.) 53; Wylly v. Collins, 9 Ga. 233; Doty v. Mitchell, 9 Sm. & M. (Miss.) 435; Morgan v. Elam, 4 Yerg. (Tenn.) 375; McClintic v. Ochiltree, 4 W. Va. 249; Lancaster v. Dolan, 1 Rawle (Pa.), 231; Sherman v. Turpin, 7 Cold. (Tenn.) 382; Metcalf v. Cook, 2 R. I. 355; Porcher v. Reid, 12 Rich. Eq. (S. C.) 349; Harris v. Harris, 7 Ired. Eq. (N. C.) 111; Hume v. Hord, 5 Gratt. (Va.) 374; Hicks v. Johnston, 24 Ga. 194; Andrews v. Jones, 32 Miss. 274; Leaycraft v. Hedden, 3 Green Ch. (N. J.) 512; Penn. Co. v. Foster, 35 Pa. 134; Chew v. Beall, 13 Md. 348. But Kimm v. Weippert, 46 Mo. 532; Machir v. Burroughs, 14 Ohio St. 519, bear in favor of the more liberal rule of the New York appellate court. As to a deed which limits the wife's power to mortgage, see Maurer's Appeal, 86 Pa. 380.

she cannot, even by proceedings in equity, be enabled to pursue any other inconsistent mode.[25]

§ 274. Wife's Power to Dispose of or Charge Separate Estate in General; In England.

The right to enjoy property carries with it, universally, as a necessary incident, the right of its free disposal. All other things then being equal, we shall expect to find that married women, when allowed to hold estate to their separate use, are permitted to sell, convey, give, grant, bargain, or otherwise dispose of it; and further, to encumber it with their debts as they please. Public policy may, however, restrain their dominion. We shall treat of the English equity rule on this subject, noting, as we proceed, whether the American equity rule differs in any respect. In short, our first discussion relates to the wife's dominion over her equitable separate property. The wife's dominion over statutory separate property, or that held under our Married Women's Acts, will be reserved for a later chapter.

The clause of restraint upon anticipation or alienation, and its important effect upon the wife's power of disposal, we have already dwelt upon. Apart from this, in England it is the general rule, so far at least as concerns personal property, that from the moment the wife takes the property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it; for, upon being once permitted to take personal property to her separate use as a *feme sole,* she takes it with all its privileges and incidents, including the *jus disponendi.*[26]

Her power of disposition is not confined to interests vested in possession, but extends to reversionary interests settled to her separate use.[27] While the property continues to be for her sole and separate use, she is entitled to the same protection against her husband's interference that a single woman would have against a stranger, and this right passes to her assignee under any assignment excluding her husband's dominion which she may have rightfully made.[28]

25. Ross v. Ewer, 2 Atk. 156; 2 Perry Trusts, § 655.

26. Fettiplace v. Gorges, 1 Ves. Jr. 48; 3 Bro. C. C. 9; Peachey, Mar. Settl. 261, 262. See 20 & 21 Vict., ch. 57, the "reversionary act."

27. 2 Bright, Hus. & Wife, 222; Macq. Hus. & Wife, 295; Sturgis v. Corp, 13 Ves. 192; Headen v. Rosher, 1 McCl. & Y. 89; Donne v. Hart, 2 Russ. & M. 360.

28. Allen v. Walker, L. R. 5 Ex. 187.

§ 275. In the United States.

In this country, whenever the wife's separate use has been admitted as a doctrine of equity, independently of statute, her right of dominion has also been recognized. The celebrated New York case of *Jaques* v. *Methodist Episcopal Church,* which may justly be placed foremost among the very few important American chancery decisions of this class, established that a *feme covert,* with respect to her separate estate, and especially her personal property, was to be regarded in equity as a *feme sole,* so that she might dispose of it at pleasure, except so far as expressly denied or restrained by the terms of the instrument which created the trust.[29] Numerous American cases also rule, comformably with English precedents, that a married woman may, by her contracts or engagements, bind her separate property, it being sufficient that there was an intention to charge her separate estate; and further, that by contracting a debt during coverture she furnishes a presumption of that intention, since otherwise her contract must have been worthless to her creditor.[30] In general, however, it is to be observed that the American equity doctrine of the wife's power to charge her separate estate, independently of the Married Women's Acts, has fluctuated somewhat, as have likewise the English cases, and that not only do American courts find difficulty, like those of England, in encountering cases where the liability incurred was disadvantageous to the wife, and at the same time not clearly charged by her on her separate property; but this further source of perplexity appears moreover, namely, that local legislation, in these later years, places the rights of married women on quite a novel footing. Some States favor a stricter rule; in few States, indeed, did the subject receive much development prior to the second half of this century; while the policy of the Married Women's Acts themselves, in most jurisdictions, must be opposed to making such legislation disadvantageous to her interests. Hence

29. Jaques v. Methodist Episcopal Church, 17 Johns. (N. Y.) 548; Methodist Episcopal Church v. Jaques, 1 Johns. Ch. (N. Y.) 450; 3 *ib.* 77; 2 Kent. Com. 164; McChesney v. Brown, 25 Gratt. (Va.) 393; Patton v. Charlestown Bank, 12 W. Va. 587; Wells v. Thorman, 37 Conn. 319; Leaycraft v. Hedden, 3 Green Ch. (N. J.) 512; Newlin v. Freeman, 4 Ired. Eq. (N. C.) 312; Fears v. Brooks, 12 Ga. 200; Braford v. Greenway, 17 Ala. 805; Shipp v. Bowmar, 5 B. Mon. (Ky.) 163; Kirwin v. Weippert, 46 Mo. 532.

30. 2 Kent Com. 164, and cases cited; Fire Ins. Co. v. Bay, 4 Comst. 9; Vanderheyden v. Mallory, 1 Comst. 452; 2 U. S. Eq. Dig. Hus. & Wife, 19; Dallas v. Heard, 32 Ga. 604; Withers v. Sparrow, 66 N. C. 129.

a course of precedents, of later years, hardly less abstruse and irreconciliable than those of the English chancery, but somewhat independent of them. This doctrine may better be studied at length in a later chapter, in connection with legislative changes affecting the wife's right of disposition in this country. To this extent, however, American courts occupy sure and uniform ground, namely, that while a married woman may not be bound personally by her contract, the rule under the statutes and independently of them [31] is, that when services are rendered her by her procurement, or she contracts a debt generally, on the credit and for the benefit of her separate estate, there is an implied agreement and obligation springing from the nature of the consideration, which the courts will enforce by charging the amount on her separate property as an equitable lien.[32]

In American chancery courts, in fact, the charging of the wife's separate estate by equity proceedings is presented with reference sometimes to her equitable, and sometimes to her statutory, separate estate. In some States the complete jurisdiction of trusts for separate use is the creature of recent statute.[33] In others, the rule is deliberately admitted, in chancery, to differ as to statutory and equitable separate estate.[34] In others, once more, chancery seeks, and with true consistency, to apply one and the same principle where it takes jurisdiction of separate estate at all. The discrepancy of all these American authorities relates chiefly (1) to determining the liability of the wife's equitable or statutory separate estate for debts and engagements not beneficial to the wife herself, or to the estate, but, if at all, for her husband's or a stranger's benefit, and (2) to fixing the nature of the evidence of intention required for such charges. The equitable rule in the United States, more common prior to the Married Women's Acts, appears to have been, that the wife's separate estate would be held liable for all debts which she, by implication or expressly, by writing or by parol, charged thereon, even if not contracted directly for the benefit of the estate.[35] But such is by no means the rule

31. Wilson v. Jones, 46 Md. 349; Cozzens v. Whitney, 3 R. I. 79; Harshberger v. Alger, 31 Gratt. (Va.) 52.

32. Whitesides v. Cannon, 23 Mo. 457; Owen v. Cawley, 36 N. Y. 600; Ballin v. Dillaye, 37 N. Y. 35; Armstrong v. Ross, 5 C. E. Green (N. J.) 109; Buckner v. Davis, 29 Ark. 444; Dale v. Robinson, 51 Vt. 20; Eliott v. Gower, 12 R. I. 79.

33. See Hoar, J., in Willard v. Eastham, 15 Gray (Mass.), 328.

34. Musson v. Trigg, 51 Miss. 172; Robinson v. O'Neal, 56 Ala. 541.

35. 2 Kent, Com. 164; 2 Story Eq. Juris., §§ 1398, 1401, and cases cited; Ballin v. Dillaye, 37 N. Y. 35.

today. And her separate estate will be bound by any debt properly contracted by her, even though her husband should be the creditor.[36] The estate may be disposed of by the wife in her will, free from curtesy rights.[37]

§ 276. Necessity of Concurrence of Trustees.

Consistently with the wife's right of dominion over her separate estate, the rule, both in English and American chancery courts, is, that the concurrence of the trustee of the fund is not essential to the validity of her disposition thereof,[38] if the wife is given complete powers of control by the instrument which creates the estate.[39] On the contrary, if she has the absolute beneficial enjoyment of the fund by the terms of the trust (there being no clause in restriction of her power), or in such manner, if it be real estate, that the statute of uses would execute the title or use in her, she can compel the trustee to make immediate conveyance or transfer to her of the trust fund, and if they refuse they are liable to costs.[40] Even if the gift be to her husband or for his benefit, the trustee must transfer and give legal effect to the alienation, as in other instances of disposition on her part, reserving, of course, the right to show bad faith or undue influence affecting the validity of the transfer or conveyance, and so defeating it.[41]

But if, on the other hand, the instrument requires the written approval of the trustee expressed in a certain manner, that requirement must be complied with to make even the joint conveyance of husband and wife effectual,[42] and it is incumbent on every trustee to see that all restrictions on the wife's dominion over the fund are duly respected.[43]

36. Gardner v. Gardner, 7 Paige (N. Y.), 112.

37. Kiracofe v. Kiracofe, 93 Va. 591, 25 S. E. 601.

38. Essex v. Atkins, 14 Ves. 552; Corgell v. Dunton, 7 Pa. 532; Jaques v. Methodist Episcopal Church, 17 Johns. (N. Y.) 548.

39. Frank v. Lilienfeld, 33 Grat. (Va.) 377.

40. Clerk v. Laurie, 2 Hurl. & Nor. 199; Peachey, Mar. Settl. 292; 2 Perry, Trusts, § 667; Taylor v. Glanville, 3 Mad. 179; North American Coal Co. v. Dyett, 7 Paige (N. Y.), 1; Gibson v. Walker, 20 N. Y. 476. And see Lewis v. Harris, 4 Met. (Ky.) 353. But see Noyes v. Blakeman, 2 Seld. (N. Y.) 567; s. c., 3 Standf. 531, as to the effect of New York statute relative to the declaration of trusts.

41. Essex v. Atkins, 14 Ves. 542; Marrick v. Grice, 3 Nev. 52; Standford v. Marshall, 2 Atk. 69; Knowles v. Knowles, 86 Ill. 1.

42. Lindell Real Estate Co. v. Lindell, 142 Mo. 61, 43 S. W. 368; Gelston v. Frazier, 26 Md. 329. See, as to lapse of time, Frazier v. Gelston, 35 Md. 298.

43. Hopkins v. Myall, 2 R. & M. 86; McClintic v. Ochiltree, 4 W. Va. 249. Under strong circumstances of equity,

§ 277. Form and Requisites of Deed.

In most parts of the United States a married woman can only dispose of her real estate, whether legal or equitable, by a conveyance according to statute, which the husband executes in token of assent; a partial reason for this being that the husband has his rights of curtesy even in lands settled to his wife's separate use.[44]

§ 278. Of Real Estate.

Where the wife's separate property consists of real estate, her power of disposition is affected by technical difficulties as to the method of executing conveyances.[45] But it has been suggested in England that, according to the principle of modern equity cases, the heir ought to be treated as a trustee, in case the wife had conveyed her beneficial interest by deed executed by herself alone, and that thus her sole conveyance would be allowed to operate.[46]

§ 279. Of Income or Profits.

The same principle applies to the income and profits and rents of the wife's separate property. The wife has the same control over her savings out of her separate estate as over the separate estate itself; "for," to use the somewhat involved metaphor of Lord Keeper Cowper, so often quoted, "the sprout is to savor of the root, and to go the same way."[47]

Following this general doctrine, the wife, if unrestricted by the terms of the trust, may anticipate and encumber rents settled apart for her separate use.[48] But where the trust, by suitable expres-

and in order to the convenient enjoyment of her separate property, equity will allow the wife to enter into the personal enjoyment of rents and profits. Horner v. Wheelwright, 2 Jur. (N. S.) 367.

44. Shipp v. Bowmar, 5 B. Mon. 163; Radford v. Carwile, 13 W. Va. 572; 2 Perry, Trusts, § 656; *supra*, §§ 175-180; McChesney v. Brown, 25 Gratt. 393; Koltenback v. Craeraft, 36 Ohio St. 584; Miller v. Albertson, 73 Ind. 343. But in New York, by way of an appointment, a married woman may convey such interests without the joinder of her husband. Albany Fire Ins. Co. v. Bay, 4 Comst. 9. See Armstrong v. Ross, 5 C. E. Green, 109.

45. 2 Roper, Hus. & Wife, 182; 1 Bright, Hus. & Wife, 224. See *Ex parte* Ann Shirley, 5 Bing. 226, cited in Macq. Hus. & Wife, 296. See also Peachey, Mar. Settl. 267; Harris v. Mott, 14 Beav. 169.

46. Macq. Hus. & Wife, 296, 297; 2 Story, Eq. Juris., § 1390, and cases cited; 3 Sugd. V. & P. App. 62; Newcomen v. Hassard, 4 Ir. Ch. 274; Burnaby v. Griffin, 3 Ves. 266; Peachey, Mar. Settl. 268. The statute referred to as raising technical difficulties in real estate is 3 & 4 Will. IV., ch. 74.

47. Gore v. Knight, 2 Vern. 535; s. c., Prec. in Ch. 255. See also Messenger v. Clarke, 5 Exch. 392; Peachey, Mar. Settl. 262; Newlands v. Paynter, 10 Sim. 377; s. c. on appeal, 4 M. & Cr. 408; Humphery v. Richards, 2 Jur. (N. S.) 432.

48. Cheever v. Wilson, 9 Wall. (U. S.) 108.

sion, restrains the wife from anticipation, permitting her only to receive the income from her trustee from time to time as it falls due, she cannot anticipate and encumber her income.[49]

Rents and profits of her separate land, or an annuity charged upon land, follow the more liberal rule of personal property held as her separate estate,[50] unless afterwards converted into land.[51]

§ 280. Contracts Relating to Separate Estate in General.

As a corollary to our proposition the wife may enter into contracts with reference to her separate property in like manner, and with nearly the same effect, as a *feme sole*. Formerly it was otherwise; and for a long period the English courts of equity refused to married women having separate estate the power to contract debts.[52] But the unfairness of permitting a wife to hold and enjoy her separate property after she had incurred debts specifically upon the faith of it soon became evident, as well as the inconvenience she suffered in being unable to find credit where she meant to deal fairly. So the courts felt compelled, after a while, to admit that she might in equity charge her separate estate by a written instrument, executed with a certain degree of formality, such as a bond under her hand and seal.[53] One precedent in the right direction leads to another, and soon less formal instruments were brought one after another under this rule; promissory notes, bills of exchange, and lastly written instruments in general.[54] Even here the court could not safely intrench itself; for the inconsistency of drawing distinctions between the different sorts of engagements of a married woman having separate estate could be readily shown; but it made a halt. The doctrine of an

49. Chancellor Kent, in Jaques v. Methodist Episcopal Church, 3 Johns. Ch. (N. Y.) 77.

50. Cheever v. Wilson, 9 Wall. 108; Vizoneau v. Pegram, 2 Leigh, 183; Major v. Lansley, 2 R. & M. 355.

51. McChesney v. Brown, 25 Gratt. 393.

52. Vaughan v. Vanderstegen, 2 Drew. 180; Peachey, Mar. Settl. 269; Newcomen v. Hassard, 4 Ir. Ch. 274.

53. Biscoe v. Kennedy, 1 Bro. C. C. 17; Hulme v. Tenant, 1 Bro. C. C. 16 Norton v. Turvill, 2 P. Wms. 144; Tullett v. Armstrong, 4 Beav. 323. This applies, whether the bond is executed by the wife alone, or with her husband or a stranger, apart from evidence of fraud or coercion. *Ib.*

54. See Murray v. Barlee, per Lord Brougham, 3 Myl. & K. 210; Bullpin v. Clarke, 17 Ves. 365; Stuart v. Lord Kirkwall, 3 Madd. 387; Master v. Fuller, 1 Ves. Jr. 513; Gaston v. Frankum, 2 De G. & Sm. 561; s. c. on appeal, 16 Jur. 507; Peachey, Mar. Settl. 270, and cases cited; Tullett v. Armstrong, 4 Beav. 323; Owen v. Homan, 4 H. L. Cas. 997. Taking a lease and agreeing to pay rent comes within the rule. Gaston v. Frankum, *supra.*

equitable appointment was alleged to support the new distinction.[55] Sound reasoning at last proved too strong an antagonist; this position was abandoned; and it became at length the settled doctrine of the equity courts of England that the engagements and contracts of a married woman, whether general or relating specifically to her separate property, are to be regarded as constituting debts, and that her property so held is liable to the payment of them, whether the contract be expressed in writing or not; and all the more so if she lives apart from her husband, and the debt could only be satisfied from her separate property.[56] "Inasmuch as her creditors have not the means at law of compelling payment of those debts," says Lord Cottenham, "a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied."[57]

As a general rule, in England, it became settled, therefore, that wherever a married woman, having property settled to her separate use, enters into any contract by which it clearly appears that she intends to create a debt as against herself personally, it will be assumed that she intended that the money should be paid out of the only property by which she could fulfil the engagement.[58] Thus, in a case before Lord Brougham, the question came up for the first time, whether a married woman could bind her separate estate for legal expenses incurred by her, upon her retainer and promise to pay, there having been no reference to her separate estate in the agreement; and it was held that she could, and that the bill must be paid from her separate estate.[59] But on the other hand, in contracts where the husband is the interested party, the court will not make the wife's separate property liable, if that fact be made plain; notwithstanding she may have had some agency in the transaction.[60] Nor is her separate estate liable for the expenses of litigation incurred for the children as her husband's agent.[61]

55. Field v. Sowle, 4 Russ. 112.

56. Peachey, Mar. Settl. 271, 272, and cases cited; Vaughan v. Vanderstegen, 2 Drew. 184; Owens v. Dickenson, Craig & Phil. 48; Macq. Hus. & Wife, 303; Picard v. Hine, L. R. 5 Ch. 274. But see Newcomen v. Hassard, 4 Ir. Ch. 274; 1 Sugd. Pow. 206 7th ed.

57. Owens v. Dickenson, Craig & Phil. 48.

58. Earl v. Ferris, 19 Beav. 69.

59. Murray v. Barlee, 3 Myl. & K. 209. And see Waugh v. Waddell, 16 Beav. 521; Bolden v. Nicholay, 3 Jur. (N. S.) 884.

60. Tullett v. Armstrong, 4 Beav. 319.

61. *In re* Pugh, 17 Beav. 336.

We need hardly add, therefore, that, in English chancery, a married woman, having separate estate, without a clause restraining her right of disposition, may charge and encumber it in any manner she chooses, either as security for her husband's debts, her own, or those of a stranger; provided she does not appear to have been imposed upon in the transaction.[62] And where she mortgages it, the court will regard the true nature of the transaction.[63]

A married woman may bind the corpus of her separate property by her compromise of a suit which she has instituted by her next friend.[64-65] She may also contract for the purchase of an estate, and, even though the contract makes no reference to her separate property, it will be bound by her agreement.[66] It would still appear that in England a married woman may, upon her separate credit, not only give her banker a lien for her overdrafts,[67] but employ a solicitor, or a surveyor, or a builder, or a tradesman, or hire laborers or servants, all on the credit or for the immediate benefit of her separate property,[68] and that her corporation shares are liable to assessment.[69] Where a married woman contracts any such debt which she can only satisfy out of her separate estate, her separate estate will, in equity, be made liable to the debt.[70]

62. Clerk v. Laurie, 2 Hurl. & Nor. 199; Peachey, Mar. Settl. 292. See Horner v. Wheelwright, 2 Jur. (N. S.) 367. The same rule applied in the United States; Short v. Battle, 52 Ala. 456; Armstrong v. Ross, 5 C. E. Green (N. J.), 109.

63. Gray v. Dowman, 6 W. R. 571.

64-65. Wilton v. Hill, 25 L. J. Eq. 156.

66. Dowling v. Maguire, Lloyd & Goold, temp. Plunket, 1; Crofts v. Middleton, 2 Kay & Johns. 194, reversed on appeal.

67. London Bank of Australia v. Lempriere, L. R. 4 P. C. 572, 594.

68. See Lord Justice James, in London Bank of Australia v. Lempriere, *supra;* Lord Justice Turner, in Johnson v. Gallagher, 3 De G. F. & J. 494.

69. Matthewman's Case, L. R. 3 Eq. 787. Kindersley, V. C., rules in this case that if a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which, if she were a *feme sole*, would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in this manner must depend upon the facts and circumstances of each case.

70. Picard v. Hine, L. R. 5 Ch. App. 274.

The wife cannot be adjudicated a bankrupt in respect of debts incurred during marriage, even though having separate property. *Ex parte* Jones, 40 L. T. 790.

§ 281. Contracts not Beneficial to Wife.

But in the later English decisions a new turn — and that towards the better protection of wives having separate property against their own imprudent disposition thereof — is indicated, which we may attribute in some measure to the late legislative changes concerning married women's rights, agitated on both sides of the ocean, and the influence of contemporaneous American equity decisions evoked by the prior legislation of our respective States upon the subject. In *Johnson* v. *Gallagher,* decided in 1861 by the English Court of Appeal in Chancery, the court checked the loose disposition to fastening liabilities of a married woman, no matter how improvidently incurred, upon her separate estate, on the mere faith of an implied engagement.[71] A married woman living apart from her husband, and having separate estate, carried on a trade; and, after her husband's death, tradesmen who had supplied her with goods for such trade filed a bill against her and her trustee to obtain an account of her separate estate and payment of it for their demands. She, pending the suit, mortgaged this separate estate, for valuable consideration, to an extent exceeding its value and probably so as to evade their demands. The court sustained her against the creditors; and Lord Justice Turner, after a very ample range of the whole learning upon the subject of charging a married woman's estate in equity, in the course of which he admitted that English precedent to this point had settled that the wife's separate estate must be held liable for her general engagements,[72] concluded that to such a doctrine there were limitations. He was not prepared, he observed, to go the length of saying that the separate estate would, in all cases, be affected by a mere general engagement; but to affect it there must be something more than the mere obligation which the law would create in the case of a single woman; and what that something more might be must depend in each case upon circumstances.

71. Johnson v. Gallagher, 3 De G. F. & J. 494. And see the prior English cases very fully cited in the opinion of Lord Justice Turner.

72. "The weight of authority, therefore, seems to me to be in favor of the liability. I think, too, that the principle on which all the cases proceed that a married woman, in respect of her separate estate, is to be considered as a *feme sole,* is also in favor of it, and upon the whole, therefore, I have come to the conclusion that not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estates, except as the Statute of Frauds may interfere where the separate property is real estate." Johnson v. Gallagher, 3 De G. F. & J. 494, 514.

"According to the best opinion which I can form of a question of so much difficulty," he added, "I think that, in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to, and upon the faith or credit of, that estate, and that whether it was so or not is a question to be judged of by this court upon all the circumstances of the case.[73]

These remarks of Lord Justice Turner, in the foregoing case, have been commended in still later English decisions, and by text-writers of authority.[74] Doubt is thrown upon the extent of the binding force of engagements not for the wife's benefit; and, on the whole, the test in chancery seems to be settling, at the present day, towards regarding whether the transaction out of which the demand arose had reference to, or was for the benefit of, the wife's separate estate; and, on the whole, unsatisfactory as may be this abstruse discussion, circumstances are likely to determine the decision of each case, with perhaps a growing partiality in favor of a married woman's rights, and a growing indisposition to make her suffer.

§ 282. Mortgage or Pledge to Secure Husband's Debts.

In the exercise of her right of dominion, the wife may also, in American chancery, unless specially restrained by the trust, bestow her separate property upon her husband, give him the use and income thereof, or bind it for his debts,[75] subject to the qualifications already noticed.[76] It is also well settled, both under the Married Women's Acts of our respective States, and independently of them, that a married woman may execute a mortgage jointly with her husband to secure his debts, in which case she is to be regarded as his surety; and this applies to lands held in her right, whether conveyed to her separate use or not, provided the conveyance be executed by husband and wife jointly after the usual manner of such instruments under the statute, and no duress was

73. Johnson v. Gallagher, 3 De G. F. & J. 494, 514.

74. London Bank of Australia v. Lempriere, L. R. 4 P. C. 572, 594, approves as stated in the text; also Butler v. Cumpston, L. R. 7 Eq. 20, 21; Matthewman's Case, L. R. 3 Eq. 781; Lewin Trusts, 5th Eng. ed. 546.

75. 2 Kent. Com. 111, and cases cited; 2 U. S. Eq. Dig. Hus. & Wife, 18; Dallam v. Walpole, Pet. C. C. 116; Charles v. Coker, 2 S. C. (N. S.) 123. The husband may be purchaser at a sale properly made under order of chancery, though the trustee of his wife. Norman v. Norman, 6 Bush (Ky.), 495.

76. *Supra*, § 281.

imposed upon her.[77] And she may pledge her separate personal property as security in like manner.[78]

§ 283. Gifts and Transfers to Husband.

A married woman, save so far as she is restrained from anticipation by the terms of the trust, may bestow her separate property upon her husband by virtue of her right of disposal; although at common law no such thing is known as a gift between husband and wife. She may likewise transfer it to him for a valuable consideration.[79] But acts of this sort are very closely scrutinized; and undue influence on the part of the husband, or the fraud of both husband and wife upon creditors of either, will often explain the motive of such transactions, and suffice for setting them aside in equity.[80] The fact that the husband receives the capital of his wife's separate property raises the inference, not of a beneficial transfer to him, but of a transfer to him as her trustee.[81] A gift to him requires clear evidence, such as acts of dominion, or the use of the property for his business or to execute his marital obligations.[82]

When the wife has made a gift to her husband, she will be precluded, after his death, from charging his estate with what he so received.[83] So long as her transfer of separate property to her husband remains incomplete, she can revoke her consent to the gift.[84] And where a wife joins her husband in encumbering her separate estate partly for his benefit and partly for her own, it will not readily be presumed that she designed to give the whole of the proceeds to him; for which reason the trustee employed by them should not treat the money as that of the husband alone.[85]

77. Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129; Van Horne v. Everson, 13 Barb. (N. Y.) 526; Vartie v. Underwood, 18 Barb. (N. Y.) 561; Bartlett v. Bartlett, 4 Allen (Mass.), 440; Short v. Battle, 52 Ala. 456; Young v. Graff, 28 Ill. 20; Watson v. Thurber, 11 Mich. 457; Eaton v. Nason, 47 Me. 132; Spear v. Ward, 20 Cal. 659; Ellis v. Kenyon, 25 Ind. 134; Green v. Scranage, 19 Ia. 461; Wolff v. Van Meter, 19 Ia. 134. A power to mortgage, reserved in a trust which settles land to the wife's separate use, will support a mortgage to secure the husband's debt. New York statutes permit it. Leavitt v. Peel, 25 N. Y. 474.

The method of conveying the wife's general lands under our modern local statutes is shown *post*, § 458.

78. Witsell v. Charleston, 7 S. C. 88.

79. Lyn v. Ashton, 1 Russ. & M. 190; Macq. Hus. & Wife, 297.

80. Pybus v. Smith, 1 Ves. 189.

81. Rich v. Cockell, 9 Ves. 369; Richardson v. Stodder, 100 Mass. 528.

82. Shirley v. Shirley, 9 Paige (N. Y.), 363; Rowe v. Rowe, 12 Jur. 909.

83. Paulet v. Delavel, 2 Ves. Sen. 663; 2 Roper, Hus. & Wife, 220; 1 Madd. Ch. 472.

84. Penfold v. Mould, L. R. 4 Eq. 562.

85. Jones v. Cuthbertson, L. R. 7 Q. B. 218.

The wife's bond, executed to her husband, has accordingly been sustained in the English chancery.[86] A gift or conveyance by a wife to her husband, if fraudulently or forcibly procured by him, will be set aside in equity upon her representation; so, too, where it was intended for his security, but taken out as absolute;[87] but if the rights of a *bona fide* purchaser without notice of the fraud or force have intervened, her own rights may be impeded in the latter's favor.[88]

§ 284. Enforcement.

While the contract for payment of money made by a married woman having separate estate creates a debt, it is, practically considered, only a debt *sub modo* when compared with the debt of a man or an unmarried woman. It cannot be enforced against her at law; and Lord Cottenham's language indicates that it is enforceable in equity, not on the ground that she incurred a personal obligation, but because there is property upon which the obligation may be fastened. Hence it is said that there can in no case be a decree against a married woman *in personam;* the proceedings are simply against her separate property *in rem.*[89] And though she is a necessary party to a suit to enforce payment against her separate estate, yet, if that estate be held in trust for her separate use, the suit must be against the trustees in whom that property is vested; the decree in such case being rendered, not against her, but against the trustees, to compel payment from her separate estate. Moreover, if the wife survive her husband, although the creditors may still enforce their demand in equity against her separate estate, yet her person and her general property remain as completely exempted from liability at law and in equity as in other cases of debts contracted by her during coverture.[90]

Here, however, the fictions of equity create a new practical difficulty. For if the wife be a *feme sole* at all, with reference to

86. Heatley v. Thomas, 15 Ves. 596.

87. Stumpf v. Stumpf, 7 Mo. App. 272; Fargo v. Goodspeed, 87 Ill. 290.

88. O'Hara v. Alexander, 56 Miss. 316.

89. Hulme v. Tennant, 1 Bro. C. C. 16; Ashton v. Aylett, 1 Myl. & Cr. 111; Maeq. Hus. & Wife, 304; Peachey, Mar. Settl. 273. But see Keogh v. Cathcart, 11 Ir. Ch. 285.

90. Vaughan v. Vanderstegen, 2 Drew. 184; Peachey, Mar. Settl. 273; Mac. Hus. & Wife, 304. But her promissory note, given during coverture so as to bind her separate estate, is a good consideration for another promisory note given after her husband's death for a balance then due, though the former note be barred by the statute of limitations. Latouche v. Latouche, 3 Hurl. & Colt. 576.

her separate property, must she not have power to bind himself personally? In *Stead* v. *Nelson* a husband and wife undertook, for valuable consideration, by writing under their hands, to execute a mortgage of her separate estate. The husband died. Lord Langdale held that the surviving wife was bound by the agreement, and ordered a specific performance.[91] Certainly the ground of this decision must have been that the obligation was not upon her property alone, but upon her person. At the same time it is readily admitted that there are reasons of policy why the wife should be exempted from personal execution during coverture. This latter view accords with the common-law practice in analogous cases.[92] Perhaps, then, the more consistent view of the subject would be that the wife incurs a personal obligation, morally and legally, on such contracts, express or implied, as she may make during coverture with reference to her separate property; but that the general disabilities of coverture interpose obstacles to the enforcement of remedies by a creditor, which obstacles the courts of equity feel bound to regard; and hence that they confine the remedies to her separate estate, upon the faith of which, it may reasonably be presumed, the creditor chose to rely. And this conclusion is that preferred on the whole by the courts. For, as recent writers on the law of trusts express it, there are two conflicting principles in these equity decisions: one that the engagements of the wife are charges equivalent to so many assignments or equitable appointments to operate each in order; the other, and that now generally adopted, that the wife's contracts are not charges, but create a liability against the person, which, since the debtor is married, cannot be made available against her personally; and hence the court permits a sort of equitable execution to issue in favor of the creditor against her separate property.[93] So her contract to sell or mortgage her life interest in her separate estate will be specifically enforced against her.[94]

But a married woman, one of several devisees in trust for sale, cannot bind herself to convey; and upon such a contract on her part specific performance will not be enforced against her.[95] Nor

91. Stead v. Nelson, 2 Beav. 245; Macq. Hus. & Wife, 304.

92. Sparkes v. Bell, 8 B. & C. 1.

93. 2 Perry Trusts, §§ 655-663; Lewin Trusts, 5th Eng. ed. 542, 543. The doctrine of equitable appointment seems to be exploded. Lord Justice Turner in Johnson v. Gallagher, 3 De G. F. & J. 494; *supra*, § 241.

94. Wainwright v. Hardisty, 2 Beav. 363.

95. Avery v. Griffin, L. R. 6 Eq. 606.

can a married woman consent to some future loan to her husband so as to be compelled to execute, but her consent must go with the act;[96] nor bind herself by an executory contract for the sale of her real estate.[97] Both she and her husband must be parties to a suit concerning her separate property,[98] and it is all the more requisite that the husband be joined as a party defendant where he claims an interest or any of his acts are called in question.[99]

§ 285. Estoppel to Claim Property.

The separate estate of married women may be affected, and their rights barred, by active participation in breaches of trust.[1] But on the other hand, to preclude the wife from the right to relief simply because she has improperly permitted her husband to receive the trust funds, would be to defeat the very purpose for which the trust was created,— namely, the protection of the wife against her husband. Hence, according to the latest and best authorities, the court must be satisfied that the husband has not in any degree influenced her acts and conduct, before it holds her separate estate to be affected; and this upon the most jealous investigation.[2] For the wife to stand by in silence while the husband represents himself as owner of what really is the wife's separate property, by way of inducing credit, will not necessarily charge that estate.[3] If the instrument contains no clause against anticipation, and the wife misapplies part of the trust property, her other interests under the same instrument may be held to make good the loss.[4]

Where her husband and the trustee of the fund, by way of fraudulent collusion to deprive her of her property, make an improper transfer thereof out of her separate use, her assent will not be readily presumed to the transaction from circumstances,

96. Taylor v. Taylor, 4 Jur. (N. S.) 1218.

97. Miller v. Albertson, 73 Ind. 343.

98. Holmes v. Penney, 3 Kay & Johns. 91. And see Peachey, Mar. Settl. 293-296, and cases cited; Macq. Hus. & Wife, 297.

99. See Clarkson v. De Peyster, 3 Paige (N. Y.), 336; Stuart v. Kissam, 2 Barb. (N. Y.) 493; Bradley v. Emerson, 7 Vt. 369; Wilson v. Wilson, 6 Ired. Eq. (N. C.) 236.

1. Peachey, Mar. Settl. 276; Ryder v. Bickerton, 3 Swanst. 80. *n.*; Lord Montford v. Lord Cadogan, 19 Ves. 635.

2. Per Sir Geo. Turner, Hughes v. Wells, 9 Hare, 773. And see authorities, *supra;* Kellaway v. Johnson, 5 Beav. 319; Cocker v. Quayle, 1 Russ. & M. 535; Fargo v. Goodspeed, 87 Ill. 290; Brewer v. Swirles, 2 Sm. & Gif. 219. *Contra*, Whistler v. Newman, 4 Ves. 129, doubted in Parkes v. White, 11 Ves. 223.

3 Carpenter v. Carpenter, 27 N. J. Eq. 502.

4. Clive v. Carew, 1 John. & Hem. 199.

while she remained in ignorance of it.[5] If a wife allows her husband to use her separate property, without making a claim to it, or permits him to receive her separate income and apply it to the wants of the family, she will in general be presumed to have assented to the arrangement.[6] But if the circumstances do not warrant the inference that the wife has assented to, or acquiesced in, the husband's receiving her income, or in his mode of applying it, she will be entitled to reimbursement out of his estate.[7]

By the ordinary rule of the English chancery courts a wife is precluded from recovering the arrears of income on her separate estate for more than a year, upon the ground of a supposed gift to her husband.[8] As to whether one year's income can be recovered or not there is much discrepancy in the English cases; but the better opinion, even here, is, that the husband has been allowed by the wife presumably to receive and appropriate her income from year to year, unless, by a consistent course of dissent, the wife, on her part, rebuts such presumption, in which case her will must be respected. If the wife is insane and incapable of assenting, or the income has not actually come to her husband's hands, and under the trust, moreover, the income is not payable to the husband, the income will belong to her; though here the inclination of equity is to allow reasonable offsets to the husband.[9]

5. Dixon v. Dixon, L. R. 9 Ch. D. 587.

6. Square v. Dean, 4 Bro. C. C. 326; Beresford v. Archbishop of Armagh, 13 Sim. 643; Bartlett v. Gillard, 3 Russ. 149; Carter v. Anderson, 3 Sim. 370.

7. Parker v. Brooke, 9 Ves. 583; Macq. Hus. & Wife, 298; Dixon v. Dixon, L. R. 9 Ch. D. 587.

8. Peachey, Mar. Settl. 291, and cases cited; Rowley v. Unwin, 2 Kay & Johns. 142; Arthur v. Arthur, 11 Ir. Ch. 513. And see Dalbiac v. Dalbiac, 16 Ves. 116; Parker v. Brooke, 9 Ves. 583; Caton v. Rideout, 1 Mac. & Gord. 599; Beresford v. Archbishop of Armagh, 13 Sim. 643; Howard v. Digby, 2 Cl. & Fin. 634.

9. Lewin Trusts, 550; 2 Perry Trusts, § 665, and cases ctied.

CHAPTER XVI.

MARRIED WOMEN'S ACTS.

§ 286. Tendency and Purpose in General.

Aside from woman's political relations, and those social and business opportunities not peculiar to the marriage state, which are now extended to her sex, we may observe, both in England and the United States, a liberal disposition of court and legislature within the last century to bring her nearer to the plane of manhood, and advance her condition from obedient wife to something like co-equal marriage partner. Man makes the concessions, step by step, out of deference to woman's wishes, and in token of her influence; and thus does the coverture theory of marriage gradually fade out of our jurisprudence. The liberal tendencies of modern civilization favor this change; moreover, that love of justice and individual liberty which always characterized our Saxon race, and the steadfast disposition of English and American courts both to administer the written law impartially and to extend and adapt its provisions to the ever-changing wants of society.

Our preceding pages have shown, in respect to the person of the spouses, their matrimonial domicile, the conjugal restraint and correction of the wife, the custody of the offspring; again, as to the wife's power to bind as agent, her necessaries, or, in respect of property, her equity to a settlement, and modern modes of conveying her lands; a modern disposition to so construe and apply or modify the old law that she may enjoy a very fair share of freedom and consideration in the household, and maintain her dignity under all circumstances. Husband and wife cease to be one; they are two distinct persons with distinct and independent rights. At the same time the idea of unity in the domestic government —

of domestic government at all — becomes weakened; the cruel or dissolute husband having less power for ill, and the just and faithful one, too, finding his legal authority over a high-tempered companion exceedingly precarious. Modern legislation accomplishes even more than judicial construction towards this result, especially in the United States; and indeed, as to the Married Women's Acts and Divorce Acts of this day, it may be truly said that England borrows more from this country than does this country from England.

The American Married Women's Acts are modern; still, they are constantly undergoing local change, and immense labor has been necessarily bestowed by local courts in expounding them. We shall seek to place before the reader such legal results as may be thought to have passed into principles; as for the rest, it is a chaos of uninteresting rubbish, from which the practitioner selects only that which obtains in his own jurisdiction.

All this legislation regarding the rights of married women should be harmonized and simplified as soon as practicable. This is not easy with so many independent States, each carving out its own career. And the difficulty is aggravated from the fact that the Married Women's Acts had no common origin; there was no model found to work from, English or American, and the results were necessarily discordant. Yet should public sentiment once set in the right direction, much might be accomplished. If, too, the married women's codes of this country are to serve as a guide to other nations, they should bear the impress of a clear and well-defined purpose. Either the ultimate object should be to place the wife on an independent footing, and enable her to maintain herself against the world, or else, providing honorably, faithfully, and generously against all possible misfortune, to teach her still to lean upon the stronger arm of her husband, and look to man for guidance. But our legislators sometimes appear to attempt both systems together. Laws which invite married women to embark in separate trade tend plainly to the wife's independence. Laws, on the other hand, which class widows and orphans together as subjects for special protection, preserve homestead exemptions, permit of settlements against the husband's creditors, are founded on the policy of the wife's dependence. It is not to be presumed that frank and straightforward discussion is inappropriate to any topic where radical changes are demanded; nor can the fundamental relation of the sexes and the balance of society be lightly disturbed.

Equality and freedom are precious words; but if the respective spheres of man and woman are equally honorable, equally useful, equally free, need they be precisely identical? Does not inequality manifest itself when the two seek to run the same circuit? As a logical proposition, if woman in her pursuits has the right to become a man, man has no less the right to become a woman. Whether the change would be expedient and wise, however, is another question. Certain it is that woman cannot claim the privileges of the two sexes; if she would grasp at civil honors, she must surrender her time-honored tribute of chivalrous homage. Elevated to the pedestal of honor, and made the object of reverent esteem, if not idolatry, the wife stands perhaps as securely as she ever can upon the prosaic ground of legal equality.

The changes to which we shall proceed to direct the reader's inquiry, under our main heading, must be studied as by way of supplement or supersedure to the coverture doctrine already set forth. As before, these changes affect the wife's debts and contracts, her injuries and frauds, and her personal and real property. They are partly of equitable and partly of statutory origin. But, most of all, they impair the old doctrine which treated the husband as absolute or temporary owner, controller, and manager of his wife's property and acquisitions, by virtue of the marriage, and create in favor of the wife what is commonly known in these days as her separate property. Here, therefore, as on most points relating to the law of husband and wife, one must first examine the old common-law or coverture doctrine, and then perceive how far modern equity rules or the local legislation may have varied that law. Such changes date back not much farther than a century and a half, the most radical of them being less than a century old; the equitable changes being for the most part of earlier, and the statutory changes of later date, and the law of England and this country harmonizing on the whole subject, at the independence of the American colonies, as at their first settlement. The instances will be found rare at the present day, where an important common-law principle respecting the wife's contracts, torts, property, and the formalities of suit, is not at this day essentially changed.

To attempt a minute analysis of the Married Women's Acts would require more space than out plan will permit. Nor would it profit the reader. The independent legislation of distinct communities, without uniformity of plan or principle, involving, as it does, the most interesting and yet the most perplexing of social

problems, must necessarily produce results which cannot be reconciled. It is too early yet to generalize from the decisions. Even though the hand of innovation should be stayed for a while, and public attention centre in the work of blending these results into harmony, it would be many years before our courts, applying civil codes and the traditions of the English common law and equity jurisprudence to the discordant mass of material before them, could hope to set up a consistent and thorough American system. As one of our own jurists well remarks,[10] wherever the line may be drawn, it will be long before the public will understand and recognize the point where the power of a married woman to bind herself by her bargains ceases, and frauds upon the thoughtless and inconsiderate must often occur.

The ultimate scope of all this legislation must, however, be either, regarding the wife as peculiarly exposed to coercion and subtle influence, if not mastery by main force, from the natural necessities of her position in the conjugal partnership, as one of the weaker sex, to afford that legal protection and shelter which she has always claimed, and which our law in a strait could never deny her; or else, as though no such necessities exist in a state of nature, but her disabilities have been rather created by municipal law, and enforced by tyrannical men, to treat her as *sui juris*, and make her bear the full responsibility of her own legal engagements, be they prudent or foolish, like one discovert.

A careful review of the latest decisions shows that the married woman is still far from being bound, or desirous of being bound, to the latter alternative. She is seen setting up in the courts, not her own ignorance alone, for the avoidance of her contracts, and the retention of her separate property against strangers, but her own fraud, her own deliberate and wilful misstatements to others, her own connivance with her husband in dishonest schemes. We shall not inquire whether all this is the effect more of evil intention on her part, or evil advice; but in the courts, certainly, the wife does not yet appear sounder in rectitude and regard for honorable dealings with the great world than her husband.

§ 287. History of American Married Women's Acts.

The wife's separate use, as an American system, or rather as the system of certain American States, had thus progressed when our local legislatures took the whole subject actively in hand.

10. Bell, C. J., in Ames v. Foster, 42 N. H. 381.

The American equity courts had followed the English precedents pretty closely, but without displaying the same vigor and boldness. None of our reported decisions on the subject of the wife's equitable separate property had attracted popular attention or served to bring out the discussion of strong leading principles, though covering a period of sixty years down to nearly the middle of the last century. During the twenty-five years preceding 1848, a change in public opinion had been gradually wrought in this country and in England, though with us more rapidly than abroad. The married women of America turned to the legislature rather than the courts of her State for a more complete marital independence, for the right to control her own property, for freedom from the burdens of coverture. In shaping popular sentiment, doubtless, the annexation of territory lately governed by the principles of Roman law had considerable influence, particularly in the States adjacent to Louisiana; still more in a national sense did our rapid advancement as a self-governed nation, and the spread of public education, of independence in life and manners, and of equal social intercourse of the sexes, help on the new reform.

The year 1848 saw a wondrous revolution effected in the foremost States of this Union as to the property rights of married women; and this revolution has since extended to every section of the country. The influence of these changes has also been felt abroad; and a like reform was pressed in the English Parliament about 1870, whose immediate result was the statute to which we have already alluded.[11]

In 1821 the legislature of Maine had authorized the wife, when deserted by her husband, to sue, make contracts, and convey real estate as if unmarried, prescribing the mode of procedure in such cases. A like law prevoiusly existed in Massachusetts.[12] These appear to have been the earliest of the Married Women's Acts, properly so called: the first-fruits of the modern agitation on woman's rights. The example of Massachusetts and Maine in this respect was soon imitated elsewhere. New Hampshire, Vermont, Tennessee, Kentucky, and Michigan all passed important laws of a similar character before 1850. The independence of married women whose husbands were convicts, runaways, and profligates

11. See 3 Juridical Society Papers (1870), part 17; Act 33 & 34 Vict. c. 93, 1870.

12. See Rev. Sts. Maine (1840), p. 341; Rev. Sts. Mass. (1836), pp. 485, 487.

became thus the first point gained in the new system. In Massachusetts and Rhode Island the wife's separate use in life-insurance contracts for the benefit was an object of special solicitude; then, in 1845, the former State turned its attention further to a public recognition of marriage settlements and trusts for the wife's separate benefit, extending the equity jurisdiction of its courts for that purpose.[13] The right of a married woman to dispose of her property by will was legalized in Illinois, Pennsylvania, Michigan, and Connecticut about the same time. In Connecticut, Ohio, Indiana, and Missouri, the first reforms appear to have been directed towards exempting the wife's property from liability for her husband's debts, rather than giving her a complete dominion over it.[14]

The Roman principle of an independent estate in the wife, as modified by the more modern French and Spanish community law, prevailed in Louisiana at the time of its admission into the Union; and like traces appear in the legislation of Florida, Arkansas, Texas and other adjacent States formerly under French and Spanish rule. So was the doctrine of separate estate promulgated by Mississippi statute as early as 1839.[15] And in other Southern States, as Alabama and North Carolina, where chancery jurisprudence was well established, appeared laws investing the courts with larger powers in matters of this sort.[16] Alabama and Mississippi appear to have first postponed the husband's liability for his wife's antenuptial debts to her separate estate.[17]

It should be said that both Maine and Michigan had enacted laws in 1844, giving enlarged powers to the wife to hold and dispose of separate property; thus anticipating some of the statutory changes both in New York and Pennsylvania.[18]

13. A New Hampshire act in 1846 copied these provisions; and a statute of Rhode Island in 1844 made similar enactments. These are indications of what the text has already stated; that trusts for separate use and equity jurisdiction on the wife's behalf were little recognized in that section when the married women's agitation commenced in the United States.

14. See 2 Bright, Hus. & Wife, Am. ed. 1850, p. 627 *et seq.*, where married women's acts are cited by Mr. Lockwood; 2 Kent Com. 130, *n.*

15. See Bright, *ib.* The influence of a large commercial city like New Orleans was doubtless felt in the sparsely settled territory surrounding it. The codes of these States were all disfigured by "chattel" provisions, which detracted much from the merits of a policy otherwise humane to the wife.

16 2 Bright, *ib.*

17. Cf. (1846).

18. Rev. Stat. Mich. (1846), p. 340; Maine Statutes, March 22, 1844.

From 1848 forth the revolution became rapid, and has since extended to all the States, Virginia being the last to yield. And the work of legislative change still goes on. Scarcely a year passed between 1850 and 1870 without some new Married Women's Acts added to the local statute books,[19] and with regard to woman in general, the constant tendency has been to enlarge her freedom of action, and open to her sex pursuits hitherto closed against it.

§ 288. New York and Pennsylvania Married Women's Acts of 1848.

The sweeping changes effected by the legislature of New York in 1848 deserve more than a passing notice. The debates of the constitutional convention of that State in 1846 evinced the growing desire for a radical reform in the property rights of married women; and the advocates of the movements, failing in their attempt to secure an article of amendment to the State constitution on their behalf, next addressed themselves to the legislature, and with success. On the 7th of April, 1848, was enacted a law "for the more effectual protection of married women," which provided that the real and personal property of any female already married, or who may hereafter marry, which she shall own

19. The acts now in force, many of them perplexing, which need not here be detailed, will be found summarized up to the date of 1878 in Wells's Separate Property of Married Women, Part I. More or less liberality is shown in different States in the legislative grant of separate property, but the tendency on the whole is to place the married woman on the footing of a *feme sole* in respect of property and kindred rights of suit and contract.

In the Southern Law Review, vol. 6, p. 633, will be found an instructive article by Professor Henry Hitchcock, commenting upon marital property rights as defined by American statutes in force in 1880. Detailing the statutory changes which have occurred, the author calls attention to the fact that in Connecticut, beginning with the act of 1845, there were eleven successive statutes passed at intervals during the twenty-one years ending in 1866. And see Jackson v. Hubbard, 36 Conn. 10, on this point. Afterward another statute was passed in this State in 1869, and still another in 1872, and then at the general revision of the statutes in 1875 a further amendment took place. This is a marked, but not exceptional, instance of State innovations in the law of Husband and Wife. Between 1850 and 1860 inclusive, notes the writer, the following States began their married women's legislation, some boldly, others timidly: Indiana, Missouri, New Jersey, Kansas; Ohio, and Illinois followed in 1861, and other States successively in subsequent years. In 1869 Congress enacted, for the benefit of married women in the District of Columbia, one of the most radical laws on the subject. The last State to fall into line was Virginia, in 1877.

at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property as if she were a single female; and that any married female may lawfully receive and hold property in like manner from any person other than her husband, whether by gift, grant, devise, or bequest. This statute, passed at such a time by the foremost State in the Union,— a State thoroughly northern in its institutions, while the recognized champion of chancery principles,— could not fail to make a deep national impression.[20]

A parallel movement had meanwhile progressed in Pennsylvania; and in that State an act of the legislature, dated only four days later, conferred substantially the same rights of property upon married women, though expressed in different language. This act, still more remarkable in its general provisions than that of New York, not only recognized the wife's separate use in her own property as a legal right, but at the same time gave her the power to dispose of such estate by will, made it liable for family necessaries in failure of attachable property belonging to the husband, admitted children to the inheritance of separate personal estate in common with the surviving husband, and exempted the husband from all liability for his wife's antenuptial debts. It further provided that the wife's separate property should be absolutely liable for her general contracts and torts, and that only her formal consent, given in the manner therein specified, could bring the property under subjection for the husband's debts, or effect a lawful transfer.[21]

§ 289. English Married Women's Act of 1870.

In England the Married Women's Property Act of 1870, with its later amendments, indicates some change of parliamentary policy in the same practical direction. But the English courts still incline, as would the American under statutes of dubious import, to render the separate property of the wife liable by subjecting her to the ordinary process of law and equity.[22] The wife cannot be sued alone in respect of her separte estate in the com-

20. We give the substance rather than the language of this statute. See 2 Bright, Hus & Wife, Am. ed., 1850, Lockwood's note, 581 *et seq.* This statute was afterwards considerably modified by Acts of 1849, c. 375, and 1860, c. 90, § 1.

21. Bright, *ib.*, p. 648; Laws Pa. 1848, pp. 536, 537, 538.

22. *Ex parte* Holland, L. R. 9 Ch. App. 307.

mon-law courts, under the act of 1870, for the price of goods sold her during coverture, but, as formerly, the husband must be joined.[23]

It is held, under the English statute, that where husband and wife join in signing a joint and several promissory note, though for money lent him, and the husband becomes bankrupt, the wife's separate estate must be held liable.[24] Under this statute it is made the duty of a company to register stock in the name of a married woman entitled to her separate use; and this duty is enforceable by mandamus.[25] This same statute makes other important changes, with the view of creating a statutory separate estate in married women, which, however, do not as yet attract much judicial comment.[26]

§ 290. Scope and Validity.

The main principles touching the acquisition of a statutory separate property by the wife, as an American system of positive law, we shall now consider as fairly as circumstances permit. And, first, it may be remarked in general that these American Married Women's Acts are designed for women's benefit, and that they do not limit, but rather extend, her right to beneficially hold separate property. Thus it is held that the wife's equity to a settlement from her *choses in action* remains as before; for the legislature intended to offer her what was supposed to be a more valuable right, leaving it to her election to claim the benefit of the act or to assert her equity to a settlement without regard to its provisions.[27]

23. Hancocks v. Lablache, 26 W. R. 402; Davies v. Jenkins, L. R. 6 Ch. D. 728. See Noel v. Noel, L. R. 13 Ch. D. 510. The right of counter-claim on the wife's behalf, in place of the former cross-bill, is now admitted under English practice. Hodson v. Mochi, L. R. 8 Ch. D. 569.

24. Davies v. Jenkins, L. R. 6 Ch. D. 728.

25. Queen v. Carnatic R. R. Co., L. R. 8 Q. B. 299; Act 33 & 34 Vict. c. 93.

26. See Act 33 & 34 Vict. ch. 93 (1870). This act declares that wages and earnings of a married woman shall be her separate property; also her deposits in savings banks (with a proviso); also, upon the observance of certain formalities, her property in the funds, joint-stock companies, &c.; personal property coming to her not exceeding £200; rents and profits of her freehold property; policies of insurance for benefit of wife (trusts for benefit of wife and children being also permitted).

This moderate act is doubtless the result of influences such as were first manifested in the United States. The American legislation on this subject long antedates the English. Other provisions are found in this act, whose appropriate consideration belongs to a later chapter.

27. Blevins v. Buck, 26 Ala. 292.

Where she is held to be restricted by the statute at all, it is generally with reference to the right of disposition, and in order that others may not subject it to the fulfilment of her engagements.[28] The provision of the North Carolina Constitution that a wife may convey her lands with the written assent of her husband does not prevent the legislature from regulating the manner in which such assent may be given,[29] nor the manner in which the deed shall be executed and acknowledged.[30] So the constitutional provision in Arkansas that a wife's property shall not be subject to the debts of her husband is not violated by the Married Women's Act empowering her to contract and to sue and be sued as though sole.[31]

The doctrines of an equitable separate estate in the wife are generally invoked at this day as furnishing a system available for her advantage wherever (as rarely happens) the statutory privileges, in any particular instance, prove less adequate for establishing her independent property relations; the main policy of the Married Women's Acts being not to supersede the wife's equitable rights, but to enlarge her legal status, and correct the old anomaly which left her a person in equity but none in law.

How great the change which modern equity and legislation have wrought, and modern legislation especially, in marital rights and duties as defined by the common law, will further appear from the miscellaneous changes, to be noticed in this final chapter. These changes, which concern contracts, torts, property of the wife, and suits by or against her, may be specified as chiefly relating: (1) to the wife's antenuptial debts; (2) to the wife's general disability to contract; (3) to the necessaries of wife and family; (4) to torts committed by the wife; (5) to torts committed upon the wife; (6) to torts or crimes committed by one spouse and affecting the other; (7) to the wife's property; (8) to actions by a married woman, her arbitration, &c.

28. See Davis v. Foy, 7 S. & M. (Miss.) 64; Pond v. Carpenter, 12 Minn. 430; Pippen v. Wesson, 74 N. C. 437. The subject of the wife's right of disposition is discussed in a later chapter, Chapter XII.

29. Hensley v. Blankinship (N. C.), 94 S. E. 519.

30. Council v. Pridgen, 153 N. C. 443, 69 S. E. 404.

31. Holland v. Bond, 125 Ark. 526, 189 S. W. 165.

§ 291. Construction.

Married Women's Acts should be liberally construed,[32] as they are remedial, and should be construed so as to effect their objects.[33]

Statutes enlarging the capacity of a wife to contract will not in equity be construed by a Federal court to abolish exceptions in her favor, in the absence of authoritative decisions by the State court to that effect.[34]

§ 292. What Law Governs in General.

These statutes are not subject to mere technical construction, but the will of the legislature should be fairly interpreted. The legislative will is not presumed to be so exerted as to operate retrospectively. "A retrospective statute, affecting and changing vested rights," observes Chancellor Kent, "is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void,"[35] and Married Women's Acts are in general prospective and not retroactive in their operation.[36] The effect of a previous conveyance of land to husband and wife jointly is not changed in respect of survivorship.[37] The whole current of American decisions confirms that statement; and thus is it with our Married Women's Acts, for they necessarily reduce the property rights of the husband as prevalent under the common law of coverture. The respective rights of a husband and wife, duly married, in property acquired in any State, before fundamental law or appropriate legislation therein has changed the old rule, must be governed by the rules of the common law.[38]

32. De Vries v. Conklin, 22 Mich. 255; Wilk v. Jones, 13 App. D. C. 482; Kriz v. Peege, 184 Mo. 508, 83 S. W. 481; Stephens v. Hicks, 156 N. C. 239, 72 S. E. 313.

33. Clow v. Chapman, 125 Mo. 101, 28 S. W. 328, 46 Am. St. R. 468, 26 L. R. A. 412. *It is held otherwise in Tennessee*, on the ground that such acts are in derogation of the common law. Mayo v. Bank of Gleason (Tenn.), 205 S. W. 125.

34. Hunter v. Conrad, 94 F. 11.

35. 1 Kent Com. 455. Various national and State constitutional provisions—as, *e. g.*, that no one shall be deprived of property "without due process of law," and against impairing the obligation of contracts—have a similar bearing.

36. Cook v. Walling, 117 Ind. 9, 19 N. E. 532, 2 L. R. A. 769, 10 Am. St. R. 17; Levering v. Shockey, 100 Ind. 558; *In re* Scully's Estate (Mich.), 165 N. W. 68; Smoot v. Judd, 184 Mo. 508, 83 S. W. 481; Akin v. Thompson (Tex.), 196 S. W. 625; Bennett v. Hutchens (Tenn.), 179 S. W. 629; Neville v. Cheshire, 163 Ala. 390, 50 So. 1005; Booker v. Castillo, 154 Cal. 672, 98 P. 1067; Hetzel v. Lincoln, 216 Pa. 60, 64 A. 866.

37. Almond v. Bonnell, 76 Ill. 536.

38. Carter v. Carter, 14 S. & M. (Miss.) 59; Eldridge v. Preble, 34 Me. 148; Maynard v. Williams, 17 Ala. 676; Snyder v. Snyder, 3 Barb. (N. Y.) 621; Perkins v. Cottrell, 15 Barb. (N. Y.) 446; Rateliffe v. Dougherty, 24 Miss. 181; Jenney v.

Married Women's Acts do not change the marital relations between spouses,[39] nor permit them to defraud even others.[40]

§ 293. As to Rights of Husband.

The wife's personal property already in possession or reduced to possession by the husband remains his after the passage of a Married Women's Act.[41] Also any interest, accruing subsequently to the Married Women's Act, on property previously vested in the husband, continues his.[42] And, to go still further, in her *choses in action*, or unreduced personality which he is already at liberty to reduce, there is a valuable existing interest capable of assignment and transfer,— a vested right in the husband, which a subsequent statute or State constitutional provision cannot deprive him of, according to the better opinion.[43] Where a complete legal estate

Gray, 5 Ohio St. 45; Roby v. Boswell, 23 Ga. 51; Burson's Appeal, 22 Pa. 164; Tally v. Thompson, 20 Mo. 277; Peck v. Walton, 26 Vt. 82; Tyrson v. Mattair, 8 Fla. 107; Quigley v. Graham, 18 Ohio St. 42; Farrell v. Patterson, 43 Ill. 52; Coombs v. Read, 16 Gray (Mass.), 271. See Love v. Robertson, 7 Tex. 6. So, rights acquired subsequently under a foreign government. Dubois v. Jackson, 49 Ill. 49; Morrison v. Morrison, 113 Ky. 507, 69 S. W. 1102; Vanata v. Johnson, 170 Mo. 269, 70 S. W. 687; Leete v. State Bank, 141 Mo. 574, 42 S. W. 1074; Houston Belt & Terminal Ry. Co. v. Scheppelman (Tex.), 203 S. W. 167; Hockaday v. Sallee, 26 Mo. 219; Harvey v. Wickam, 23 Mo. 112.

39. Citizens' St. Ry. Co. v. Twiname, 121 Ind. 375, 23 N. E. 159, 7 L. R. A. 352.

40. Bickel v. Bickel, 25 Ky. Law, 1945, 79 S. W. 215.

41. Buchanan v. Lee, 69 Ind. 117.

42. Ryder v. Hulse, 33 Barb. (N. Y.) 264; s. c. on appeal, 24 N. Y. 372. See Savage v. O'Neill, 42 Barb. (N. Y.) 374.

43. See Dunn v. Sargent, 101 Mass. 339; Westervelt v. Gregg, 12 N. Y. 202; Ryder v. Hulse, 24 N. Y. 372; Stearns v. Weathers, 30 Ala. 712; Kirsey v. Friend, 48 Ala. 276. Such is the rule with reference to a legacy bequeathed to a wife, and taking effect before the passage of an act vesting all such property in the married woman: Norris v. Beyea, 13 N. Y. 273, 288; or her distributive share, accruing previously, in an estate: *Ib.;* Kidd v. Montague, 19 Ala. 619; Sperry v. Haslam, 57 Ga. 412; or her stock, mortgages, and incorporeal property generally.

In Mississippi the rule was laid down differently, upon the fallacious idea that the husband's right to reduce was a mere qualified right upon a condition precedent which the statute might intercept. Clark v. McCreary, 12 S. & M. (Miss.) 347, 354. But to this may be opposed the reasoning of Edwards, J., in Westervelt v. Gregg, *supra.* "A right to reduce a *chose in action* to possession," he observes, "is one thing, and a right to the property which is the result of the process by which the *chose in action* has been reduced to possession is another and different thing. But they are both equally vested rights. The one is a vested right to obtain the thing, with the certainty of obtaining it by resorting to the necessary proceedings, unless there be a legal defence; and the other is a vested right to the thing after it has been obtained." But see Goodyear v. Rumbaugh, 13 Pa. 480; Mellinger

in the wife's lands has already vested in the husband, it is not taken away from him.[44]

The interest of a husband in remainder in property already bequeathed to his wife on the contingency of surviving a life-tenant is held to be a vested right in such a sense that it cannot be taken away by a Married Women's Act passed before the contingency happens.[45] And, in general, an interest vested in the husband, though in a certain sense contingent, which is not a mere expectancy or bare possibility, like that of an heir from his living ancestor who may yet disinherit him by will, but is an interest already created and existing, which is descendible, transmissible, and capable of transfer, is not to be taken away by subsequent legislation in the wife's favor.[46]

In like manner the husband's vested life estate by way of courtesy initiate in his wife's lands cannot be taken away by legislative enactment, any more than the wife's inchoate right of dower in her husband's lands.[47] Nor can any interest which a husband, before the passage of the act, has in his wife's real estate, be thus devested.[48]

In other words, while the husband's vested rights arising under a marriage cannot be constitutionally disturbed by an alteration of the law, his mere expectancy, or the possibility of some future acquisition by right of marriage, is subject to any change which the legislature may choose to make prior to the vesting of a right in the husband.[49]

v. Bausman, 45 Pa. 522; White v. Waite, 47 Vt. 502; Henry v. Dilley, 1 Dutch. (N. J.) 302,—which favor the Mississippi rule.

44. Keith v. Miller, 174 Ill. 64, 51 N. E. 151; Struss v. Norton, 20 Ky. Law, 1116, 48 S. W. 976; Tucker v. Tucker's Adm'r, 165 Ky. 306, 176 S. W. 1173; Powell v. Powell, 267 Mo. 117, 183 S. W. 625, 188 S. W. 795; Rezabek v. Rezabek, 196 Mo. App. 673, 192 S. W. 107; Bouknight v. Epting, 11 S. C. 71. And hence the husband's interest therein can be taken and sold on execution. *Ib.*

45. Dunn v. Sargent, 101 Mass. 336.

46. Gray, J., in Dunn v. Sargent, 101 Mass. 336; Shaw, C. J., in Gardner v. Hooper, 3 Gray (Mass), 398.

47. Rose v. Sanderson, 38 Ill. 247; Dayton v. Dusenbury, 25 N. J. Eq. 110. Rents of the wife's land, too, accruing before her death and prior to the new constitutional provision as to married women's rights, go with the curtesy, and not to the wife's heirs. Matthews v. Copeland, 79 N. C. 493.

48. Burson's Appeal, 22 Pa. 164; Prall v. Smith, 31 N. J. L. 244; Wythe v. Smith, 4 Sawyer (U. S.), 17. The increase of domestic animals purchased by the husband before the passage of the married woman's act, belongs to him, and not to his wife. Hazelbaker v. Goodfellow, 64 Ill. 238.

49. Cooley, Const. Limitations, 360-362; Holliday v. McMillan, 79 N. C. 315; Gray, J., in Dunn v. Sargent, 101 Mass. 336; Hill v. Chambers, 30 Mich. 422.

§ 294. As to Rights of Wife.

In some States constitutional perplexities are obviated by legislation which embraces simply such property as may be held or acquired by women marrying after the passage of the act.[50] But the Married Women's Acts or constitutional amendments usually operate upon parties occupying already the conjugal relation as the statute language shows, and upon those who as a fact are likely each to have married with some reference to the pecuniary expectations of the other. To protect a husband's interests to any such extent, however, on any constitutional suggestion on his behalf, the courts appear uniformly to decline; for, as it has been observed, the marriage contract does not imply that the husband shall have the same interest in the future acquisitions of the wife that the law gives him in the property she possesses at the time of the marriage, but rather that she shall have whatever interest the legislature, before she is invested with them, may think proper to prescribe.[51] The question whether a contingent remainder devised to a wife is her separate estate or not depends on when it vests in possession and not when the will took effect.[52] Where a State Constitution grants a wife power to dispose of her property the legislature cannot take it away.[53] And whatever a married woman may have acquired subsequently to the passage of an appropriate act by gift, devise, bequest, and so on, becomes her statutory separate estate, and all parties concerned must govern themselves accordingly,[54] no matter when she was married.[55]

A corresponding rule of constitutional limitations applies to the rights and liabilities of the wife under these acts, as to her title by gift or purchase, and as to her dominion over her property generally,[56] of which we are to speak hereafter.

In Mississippi it is held that property purchased by the husband, after the passage of the act, with money acquired by the

50. See Maclay v. Love, 25 Cal. 367. Such is not the Oregon rule; but women married before the constitutional change are entitled to its benefits. Rugh v. Ottenheimer, 6 Ore. 231.

51. Sleight v. Read, 18 Barb. (N. Y.) 159; Southard v. Plummer, 36 Me. 64.

52. Sehon v. Bloomer, 72 W. Va. 316, 78 S. E. 105.

53. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461.

54. Cherokee Lodge v. White, 63 Ga. 742. A legacy bequeathed to a married woman, and taking effect subsequently to the act, ought not to be paid to the husband without her authority. Nevins v. Gourley, 95 Ill. 206.

55. Hurt v. Cook, 151 Mo. 416, 52 S. W. 396.

56. Bryant v. Merrill, 55 Me. 515; Clark v. Clark, 20 Ohio St. 128; Lee v. Lanahan, 58 Me. 478.

wife by gift or labor before it, even though bought expressly for the wife's benefit and in her name, belongs to the husband.[57] In New York, judgments recovered against a husband prior to the Married Women's Act are not a lien upon the wife's subsequently acquired property.[58] In Missouri, the act exempting property of the wife from liability for the husband's debts does not affect debts contracted prior to the passage of the act and after the wife came into possession of the property.[59] In Ohio it is held that real estate, inherited by a married woman since the enactment making the same her separate property, cannot be charged with a liability incurred by her prior to the passage of the act.[60]

In New York it is held that the legislature may fasten upon the wife's separate bank stock a personal liability to the extent of such stock.[61] Under the Alabama statute property conveyed to the wife by a voluntary conveyance prior to the statute is her separate estate, as between the parties,[62] and the Tennessee and Maryland statutes relating to the disposition of the separate estate of a wife applies both to estates created before and after the passage of the statute.[63]

§ 295. Changes made by Married Women's Acts in General.

As to changes affecting the wife's property, the chapters upon separate estate and separate trading may in general suffice. While the wife's equity to a settlement is still recognized, by way, at least, of election on her part to claim the benefit of a Married Women's Act,[64] and perhaps on the further behalf of children by the marriage, it cannot be asserted for the wife's undue advantage; as for instance, to compel, against a mortgagee, that provision be made out of the property which she has lawfully mortgaged for a specified security.[65]

In some States the husband's life interest in his wife's real es-

57. Sharp v. Maxwell, 30 Miss. 442. But on money of the wife, received by the husband after the act took effect, she is entitled only to the interest accruing the year last preceding the accounting. Thomson v. Hester, 55 Miss. 656.

58. Sleight v. Read, 18 Barb. (N. Y.) 159.

59. Cunningham v. Gray, 20 Mo. 170.

60. Fallis v. Keys, 35 Ohio St. 265.

61. Matter of Reciprocity Bank, 29 Barb. (N. Y.) 369.

62. Milam v. Coley, 114 Ala. 535, 39 So. 511.

63. Jackson v. Everett (Tenn.), 58 S. W. 340; Martin v. Fort, 83 F. 19, 27 C. C. A. 428; Beinbrink v. Fox, 121 Md. 102, 88 A. 106.

64. Blevins v. Buck, 26 Ala. 292.

65. Allen v. Lenoir, 53 Miss. 321. See *supra*, § 175, as to the wife's equity to a settlement.

tate[66] is protected from attachment during marriage; and this interest is generally, though not uniformly, preserved under the Married Women's Acts, as well as his tenancy by the curtesy;[67] the husband being allowed, however, to dispose of it to the exclusion of his creditors.[68] Under the Tennessee Married Women's Act of 1913 a wife is completely emancipated from common-law disabilities,[69] but in Vermont she is still under common-law disability as to property held by both spouses in her right.[70]

66. For coverture doctrine, see *supra*, § 186, *et seq.*

67. Bachman v. Chrisman, 23 Pa. 162; Van Note v. Downey, 4 Dutch. 219; Rose v. Sanderson, 38 Ill. 247. In some States curtesy consummate is protected, while the husband's usufruct during his wife's life is taken away. Porch v. Fries, 3 C. E. Green (N. J.), 204. And see Lynde v. McGregor, 13 Allen (Mass.), 182; Montgomery v. Tate, 12 Ind. 615. See also in general, as to tenancy by the curtesy, *post*, Vol. II.

68. Teague v. Downs, 69 N. C. 280.

69. Morton v. State (Tenn.), 209 S. W. 644; Moffat v. Schenck (Tenn.), 210 S. W. 157.

70. Fadden v. Fadden (Vt.), 103 A. 1020.

CHAPTER XVII

WIFE AS SOLE TRADER, PARTNER AND STOCKHOLDER.

§ 296. As Sole Trader; Early English Doctrine.

The wife's power to carry on a separate trade is another topic, known long ago to the law of England; and in this respect our American legislation of the present day seems to have been somewhat anticipated. The wife's lawful power to carry on a trade on her own account, independently of her husband, like most of her other separate privileges, is founded at the common law upon contracts made with her in derogation of the husband's marital rights. It appears that a wife, desiring to go into business on her own account, makes an agreement with her husband. When the agreement is made before marriage, it will bind the husband and his creditors; when made during the coverture, it binds the husband only, and is void against his creditors.[71] This species of

71. Macq. Hus. & Wife, 321; 2 Bright, Hus. & Wife, 292; Lavie v. Phillips, 3 Burr. 1783; 2 Roper, Hus. & Wife, 165, 175, and cases cited. See Antenuptial and Postnuptial Settlements, *post*, § 490 *et seq.*

contract seems to have been recognized in the common-law tribunals.

If, for the purpose of enabling a married woman to carry on her separate trade, property be vested in trustees before the marriage, the wife will at law be considered their agent, and in that character will have the benefit of the property, and enjoy its increase and profits independently of her husband, and free from liability in respect of his debts.[72] The law here considers the wife as the agent of her own trustee, and her possession as his possession.

The question whether the trade be carried on solely by the wife, or jointly with her husband, is a question of fact for the jury. If they find that it is a joint business, the stock in trade will be subject to the husband's obligation.[73] So the husband will be liable for the debts, if it appear that he participated with the wife in the benefits.[74] Notwithstanding these provisions of the law, it does not appear that separate trading in England, prior to the innovations introduced with the Married Women's Act of 1870, was ever very common. No modern equity cases are to be found on this subject.[75] The difficulties in the way of establishing credit, and of negotiating securities on the wife's sole behalf, were probably found insurmountable, even though married women might be found anxious to assume the responsibilities of trade, with its incidental imprisonment for debt. The judicial evidence of this separate trading is supplied chiefly by the misfortunes such trade entailed upon the women who embarked in it. Even where the wife lived apart from her husband (a very important consideration[76]), and, having her separate estate, carried on a trade, it was doubted, in an important case of which we have spoken elsewhere, whether the tradesmen furnishing supplies had any demands upon that estate which equity could recognize.[77]

§ 297. By Custom of London.

Separate trading was also permitted the wife by the "custom of London;" and herein she was regarded as liable to arrest and

72. Jarman v. Wooloton, 3 T. R. 618; Macq. Hus. & Wife, 321; 2 Bright, Hus. & Wife, 297.

73. Barlow v. Bishop, 1 East, 432; Macq. Hus. & Wife, 322; 2 Bright, Hus. & Wife, 297.

74. Petty v. Anderson, 2 Car. & P. 38; Macq. Hus. & Wife, 322.

75. But see the recent cases of Talbot v. Marshfield, L. R. 3 Ch. 622; *Re* Peacock's Trusts, L. R. 10 Ch. D. 490; Ashworth v. Outram, L. R. 5 Ch. 923. See comments in Macq. Hus. & Wife, 323, on the cases cited in 2 Roper, Hus. & Wife, 172, 173.

76. See Separation, *post*. § 1060.

77. Cf. Bruce & Turner, Lord Justices, in Johnson v. Gallagher, 3 De G. F. & J. 494.

imprisonment for debt without her husband, and, moreover, might be declared a bankrupt.[78] If the husband had any concern in the business, the wife was no longer to be treated as a *feme sole* in respect of it,[79] and "for conformity" it was needful to join the husband in such suits, even though the wife were alone liable, being herself the substantial party proceeded against.[80] In Pennsylvania, and doubtless in most other States, the wife is not permitted to be a *feme sole* trader upon any temporary inability of the husband or his mere involuntary failure to support her, nor upon any theory of a mere custom, while they live together.[81] But in one or two Southern States it would appear as if the London custom had been adopted and recognized within certain limits, by virtue of old local statutes or otherwise, so as to render it immaterial whether or not husband and wife live together. Thus, in South Carolina a *feme sole* trader is held bound to a third person by her indorsement to him of a note drawn by her husband payable to herself,[82] and in that State have been numerous decisions, early in the last century, requiring the wife to be engaged in trade or commerce, but permitting her to keep boarders, and so on.[83]

§ 298. Under Civil Law Codes.

By the Civil Code of France, the wife may carry on a trade independently of her husband.[84] So the wife may be a separate trader under the custom of Paris.[85] And a similar right is recognized by the laws of Spain and other European countries.[86]

From the civil, rather than the common law, are derived those

78. Beard v. Webb, 2 B. & P. 97. See 2 Roper, Hus. & Wife, 124.

79. 2 Bright, Hus. & Wife, 77, 78; Lavie v. Phillips, 3 Burr. 1776.

80. The *Liber Albus*, in the town clerk's office, stated that "where a *feme covert* of the husband useth any craft in the said city on her sole account, whereof the husband meddleth nothing, such a woman shall be charged as a *feme sole* concerning everything that toucheth the craft; and if the husband and wife be impleaded, in such case the wife shall plead as a *feme sole;* and, if she be condemned, she shall be committed to prison till she have made satisfaction, and the husband and his goods shall not, in such case, be charged nor impeached." 2 Bright, Hus & Wife, 77.

81. King v. Thompson, 87 Pa. 365; Jacobs v. Featherstone, 6 W. & S. (Pa.) 346. In this State there appears to have been an old statute of 1718 on the subject, as well as the later one of 1855.

82. Wilthaus v. Ludicus, 5 Rich. (S. C.) 326. And see Stimson v. White, 20 Wis. 562.

83. McDaniel v. Cornwall, 1 Hill (S. C.), 428; Dial v. Neuffer, 3 Rich. (S. C.) 78; Newbiggan v. Pillans, 2 Bay (S. C.), 162.

84. Code Civil, art. 220; 1 Burge, Col. & For. Laws, 219.

85. 1 Burge, Col. & For. Laws, 218.

86. *Ib.* 226, 420, 698.

property rights of married women which are recognized in Louisiana, California, and others of the South-western States, originally colonized by the Spanish and French. Thus the Louisiana code recognizes the capacity of the wife to carry on separate trade, or, as it is said, to constitute herself a public merchant, provided she act *bona fide,* and have an active agency in the concern.[87]

§ 299. View that Wife Cannot be Separate Trader at Common Law.

On the other hand, in North Carolina the whole doctrine of separate trading is expressly repudiated,[88] and it is there held that it is the function of the legislature to say when and how a wife may become a free trader.[89] Indeed, our earlier American cases seem to have regarded with very little favor the doctrine that the wife, while living with her husband, could carry on a business of her own, without rendering her husband liable and subjecting her stock in trade to his debts.[90] And the same may be said of States whose legislatures have not freely conceded the right of married women to incur great risks.[91]

§ 300. Under Antenuptial Agreement.

This doctrine of the wife's power to trade comes up in the United States, with our policy in favor of the independence of married women. And the rule seems, apart from legislation, to be well established in the United States, that the husband, in pursuance of a marriage contract, antenuptial or postnuptial, may confer upon his wife the right to trade for her exclusive benefit.[92] Nor have the American cases uniformly insisted upon formal contracts for this purpose between husband and wife; seemingly regarding the question as one of mutual and *bona fide* intention merely.

87. La Code, art. 128; Christensen v. Stumpf, 16 La. Ann. 50. And see Camden v. Mullen, 29 Cal. 564; Reading v. Mullen, 31 Cal. 104; Community Doctrine, *post,* § 579, *et seq.*

88. McKinnon v. McDonald, 4 Jones Eq. (N. C.) 1. As to Alabama, see Newbrick v. Dugan, 61 Ala. 251.

89. Scott-Sparger Co. v. Ferguson, 152 N. C. 346, 67 S. E. 750.

90. McKinley v. McGregor, 3 Whart. (Pa.) 378, and cases cited.

91. Godfrey v. Brooks, 5 Harring. (Del.) 396; Woodcock v. Reed, 5 Allen (Mass.), 207.

92. Richardson v. Merrill, 32 Vt. 27; Tillman v. Shackleton, 15 Mich. 447; Wieman v. Anderson, 42 Pa. 311; Duress v. Horneffer, 15 Wis. 195; James v. Taylor, 43 Barb. (N. Y.) 530; Wilthaus v. Ludicus, 5 Rich. (S. C.) 326; Uhrig v. Horstman, 8 Bush (Ky.), 172 Cowan v. Mann, 3 Lea (Tenn.), 229.

§ 301. American Equity Doctrine.

The equity rule in Vermont is that the wife shall hold the result of her earnings, in every case, against the husband and his heirs, and generally against his creditors, so long as he allows her to keep the property separate from the general mass of his own estate; and this, although his own name may be used in the formal conduct of the business; unless, in the case of creditors, this should lead to a false credit on the part of the husband.[93] And in one case the stock in a millinary shop, resulting from the wife's credit and her earnings under the sanction of her husband, was treated as her separate property, and held liable for demands affecting it.[94]

In Virginia, a married woman owning a separate property, is allowed, on equity principles, to engage in trade with her husband's consent, either on her sole account or in partnership with a third person; and by doing so she subjects her separate estate to payment of the business debts. And, as against the husband and his creditors, she is entitled to the profits, so far, at least, as they did not accrue from labor, skill, or capital bestowed by himself.[95]

So in Michigan the wife is permitted to keep a boarding-house as her own separate business, and upon her own account; and the same is said of other pursuits, though the courts of that State seem disposed to restrict her to the exercise of such business as is usually carried on by females and consists largely and almost necessarily of female labor.[96] In Pennsylvania, it is decided that a wife may trade with merchandise acquired in her own right, and with the proceeds of sales buy other goods to be held and traded with, which continue exempt from seizure for her husband's debts.[97]

In Wisconsin, where a married woman, with the assent of her husband, engages in business as a sole trader, and contracts a debt for goods to carry it on, verbally pledging the faith of separate estate, her whole separate estate must answer for it.[98] But earnings acquired from his business managed in his absence are not

93. Per Redfield, C. J., in Richardson v. Merrill, 32 Vt. 27.

94. Partridge v. Stocker, 36 Vt. 108.

95. Penn v. Whitehead, 17 Gratt. (Va.) 503.

96. Tillman v. Shackleton, 15 Mich. 447; Glover v. Alcott, 11 Mich. 471.

97. Wieman v. Anderson, 42 Pa. 311; Manderbach v. Mock, 29 Pa. 43. But see Hoffman v. Toner, 49 Pa. 231.

98. Todd v. Lee, 16 Wis. 480.

hers independently of his gift.[99] And in Indiana it is said that while, as an abstract proposition, the law may not authorize a married woman to enter into a contract of partnership, yet if she does make such contract, and in pursuance thereof places her separate funds in the firm of which she is by contract a partner, such funds cannot, while there, be made subject to her husband's debts.[1] The conclusion to be drawn from this class of cases is that, modern policy having once conferred upon the wife large powers both as to the acquisition and enjoyment of separate property, as well as the right to invest and reinvest the same, including their rights under marriage settlements, married women naturally sought business opportunities with their capital; and thus the modern courts, confronted with the practical results, and aided by precedents from old local customs or old legislation, were drawn into the practical concession of trading privileges, and hence of trading liabilities, while professing to deny to the wife on general principles the right to engage in mercantile pursuits without more explicit statute provisions to that effect, and while requiring the assent of the husband to appear.

Where it is clearly for the wife's advantage to reap the benefits of her business, the disposition of the law to yield them must be strong; but where, as must often be the case, she speculates imprudently and becomes deeply involved, the court is perplexed, though doubtless anxious to relieve her. The Vermont equity rule in this respect, indicated in this section,[2] perhaps not an unreasonable one, goes beyond all the English precedents cited to support it; though in the leading Virginia and Vermont cases, and perhaps in others upon this point, we find the married woman who has subjected her property to the demands of her husband's creditors permitted to stand in equity, where the business fails, as a sort of preferred creditor, for her manifest benefit.[3] Whether a creditor's claim for moneys due from the wife on account of supplies to carry on the separate business can be enforced against her is under the rule as to a beneficial dominion set forth in another chapter,[4] of at least doubtful equity,[5] such indebtedness

99. Stimson v. White, 20 Wis. 562.

1. Mayhew v. Baker, 15 Ind. 254.

2. *Supra*, p. 327.

3. Penn v. Whitehead, 17 Gratt. (Va.) 503; Richardson v. Merrill, 32 Vt. 27; Cowan v. Mann, 3 Lea (Tenn), 229. See Bellows v. Rosenthal, 31 Ind. 116.

4. *Supra*, § 223 *et seq.*

5. Johnson v. Gallagher, 3 De G. F. & J. 494; Copeland v. Cunningham, 31 Ind. 116. But see Todd v. Lee, 16 Wis. 480; Partridge v. Stocker, 36 Vt. 108.

must usually be pronounced void at law;[6] while even equity will decline to enter a decree establishing a charge on the wife's estate, unless the husband, or some other trustee for the wife, is properly before the court.[7]

If equity, unaided by legislation, preserves the separate capital thus invested in trade, that the wife may enjoy its benefits, it is otherwise with profits which may have accrued beyond the interest of such capital. These, it is declared in various cases which regard the separate trade with disfavor, belong to the husband like other separate earnings of the wife, so as to remain liable for his debts; being in fact as much the earnings of the wife as any other income or product by her labor and skill.[8] And, of course, the avails of the wife's labor in her husband's business belong as a rule to him, like her earnings, and property purchased therewith in her name cannot be held by her against his creditors.[9]

§ 302. Necessity of Proceedings to enable Wife to become Sole Trader.

In order to become a free trader in Idaho, a wife must be adjudged such as provided by the statute.[10] A similar statute exists in Pennsylvania;[11] under which a wife can only acquire powers to contract as to matters connected with her trade, not necessarily including a right to bind her separate estate.[12] Under a former statute in Kentucky, special authority to trade must first have been conferred by the chancellor.[13] Such requirements not being complied with, the creditors of the husband might come upon the assets of the business. When a wife had been so empowered as a sole trader, she could contract and be sued as though *sole*.[14] That statute required that certain notice be given to enable the court to grant power as sole trader to the wife.[15] Under it the

6. Conklin v. Doul, 67 Ill. 355.

7. *Ibid.*

8. Jassoy v. Delius, 65 Ill. 469; Jenkins v. Flinn, 37 Ind. 349, and cases cited. But as to the husband's right to confer her earnings upon the wife when not in fraud of his creditors, see *supra*. And see Dumas v. Neal, 51 Ga. 563, applying the rule of the text where the wife took boarders.

9. Clinton Man. Co. v. Hummell, 25 N. J. Eq. 45.

10. McDonald v. Rozen, 8 Ida. 352, 69 P. 125.

11. Petition of Graver, 260 Pa. 186, 103 A. 601; *In re* Coles, 230 Pa. 162, 79 A. 254; *In re* Browarsky's Estate, 252 Pa. 35, 97 A. 91.

12. Harley v. Leonard, 4 Pa. Super. 431, 40 W. N. C. 225; Von Helmold v. Von Helmold, 19 Pa. Super. 217.

13. Uhrig v. Horstman, 8 Bush (Ky.) 172.

14. Hart v. Grigsby, 77 Ky. 14 Bush (Ky.), 542.

15. Hart v. Grigsby, 14 Bush (Ky.), 542; Dunn's Exrs. v. Shearer, 14 Bush (Ky.) 574.

failure to file the proof of notice as required by the statute was not jurisdictional.[16] Such power could not be granted for the sole reason that the husband was insolvent, where it did not appear that the wife had an estate, or any trade or avocation in which she might engage,[17] and whereby she could acquire property.[18] A decree under that statute empowering her to "buy and sell, contract," etc., was held broad enough to enable her to hold and enjoy the proceeds of her own land.[19]

§ 303. Necessity of Assent of Husband.

The husband's assent is in general necessary, provided they live together; and if they do not, different considerations apply. It is held in New York that the husband's assent does not carry with it an implied authority to make an assignment for the benefit of creditors of that business,[20] though in New Jersey a wife, who has been permitted by her husband to trade, may transfer her stock in payment of notes given for the purchase-money.[21] And apart from statute, it would appear to be the general rule, that unless the husband's consent that the wife carry on business in her own name is based upon a sufficient consideration, he may withdraw it at any time and assert his common-law rights.[22]

In Indiana it is stated, in conformity with various precedents, that where a wife engages in business with the knowledge and consent of the husband, the business is regarded as that of the husband, with the wife as his agent, and he is bound for the performance of contracts which she may make relating to such business,[23] but that where the wife incurs the indebtedness, and the credit is given to her exclusively, and where, therefore, there can be no presumption that she was acting merely as the agent of the husband, the husband is not liable.[24]

16. Mann v. Martin, 14 Bush (Ky.), 763.

17. Moran v. Moran, 12 Bush (Ky.), 301.

18. Clarkson v. Clarkson, 4 Ky. Law, 901.

19. Wiggins v. Johnson, 12 Ky. Law, 276, 1 S. W. 643.

20. Cropsey v. McKinney, 30 Barb. (N. Y.) 47.

21. Green v. Pallas, 1 Beasl. 267.

22. Conklin v. Doul, 67 Ill. 355; Cropsey v. McKinney, 30 Barb. (N. Y.) 47; Todd v. Lee, 16 Wis. 480; Richardson v. Merrill, 32 Vt. 27; Partridge v. Stocker, 36 Vt. 108; Penn v. Whitehead, 17 Gratt. (Va.) 503; King v. Thompson, 87 Pa. 365.

23. 2 Bright, Hus. & Wife, 300, § 20; Jenkins v. Flinn, 37 Ind. 349, and cases cited; Switzer v. Valentine, 4 Duer (N. Y.), 96.

24. Tuttle v. Hoag, 46 Mo. 38; Jenkins v. Flinn, 37 Ind. 349, and cases cited; 5 Taunt. 356.

The Alabama statute permits a wife to engage in business only with her husband's consent,[25] but she may without such consent acquire sufficient title to goods bought as to maintain trespass when they are attached as his.[26] Under a similar Illinois statute it has been held that a sufficient consent is given where the husband engages in such business as her agent.[27] Where a wife's debts as sole trader were not binding because of the want of her husband's consent, as required by the Alabama statute, her subsequent promise to pay, without a new consideration, was held not binding, though signed by the husband.[28]

§ 304. English Statutory Rule.

But the doctrine of a wife's separate trading is at this day to be considered under the combined influence of modern equity decisions as to the wife's *jus disponendi,* and the recent Married Women's Acts. And first, to study these decisions from the English standpoint, the act of 1870 declares that wages and earnings of a married woman shall be her separate property.[29] Under construction of this act, the English chancery has sustained the right of a butcher's wife to carry on her husband's business upon her separate resources, he being incapacitated through delirium tremens, and, while at home, offering no obstruction to her course; notwithstanding neither a positive assent to the trade on his part appeared, nor his abandonment;[30] and the apparent effect of this decision was to treat the meat the wife bought as her statutory separate property, protected as hers against her husband's debts as well as purchasable on her separate credit. Again, both under the act of 1870 and independently of it, chancery protected the widow's interest as against the husband's administrator, after his death, in a fruit-preserving business, which she had commenced while single, then continued, after her marriage in 1874, to carry on in her maiden name, her husband consenting, and not interfering with it; and, by means of her own capital and efforts, finally establishing it on a large wholesale basis.[31]

25. Horton v. Hill, 138 Ala. 625, 36 So. 465.

26. Reeves v. McNeill, 127 Ala. 175, 28 So. 623.

27. Taylor v. Minigus, 66 Ill. App. 70.

28. Horton v. Hill, 138 Ala. 625, 36 So. 465.

29. Act 33 & 34 Vict., ch. 93.

30. Lovell v. Newton, L. R. 4 C. P. D. 7. If his assent was not clearly shown to his wife's trade, there would appear to have been a pretty fair inference, from the facts, that he gave it.

31. Ashworth v. Outram, L. R. 5 Ch. 923.

A partnership of two single women in England having been dissolved by the marriage of one of them, and the stock, good-will, and business having been bought in by the woman remaining single, chancery, upon the ordinary construction of such sales, refused recently to grant an injunction in favor of the married woman and her husband, who had commenced a new business together in Paris, to restrain the single woman from carrying on her business in London under the old firm style.[32]

§ 305. Under American Married Women's Acts in General.

The Married Women's Acts in many of the United States have enlarged and more fully established the wife's power to trade on her own account; and the profits of her business are thus secured to her sole and separate use.[33] Under the Oklahoma statute the wife has the same capacity as her husband to engage in trade.[34] The wife, under such statutes, is found engaged on her separate account, as milliner and dressmaker,[35] farmer,[36] boarding-house keeper,[37] army sutler,[38] operator of a mill,[39] saloon-keeper,[40] tavern-keeper,[41] or in whatever other business she may choose to carry on with her own capital. Under the New York Married Women's Act a wife may trade and bind herself by a purchase of property therefor, whether she has a separate estate or not. In Louisiana goods purchased by a wife as sole trader must be shown

32. *Re* Peacock's Trusts, L. R. 10 Ch. D. 490.

33. Persica v. Maydwell, 102 Tenn. 207, 52 S. W. 145. Such statutes are to be found in New York, Maine, New Hampshire, Massachusetts, Connecticut, Kansas, New Jersey, Iowa, California, Wisconsin, Illinois, Arkansas, Mississippi, and other States. And see Mitchell v. Sawyer, 21 Ia. 582. "Free dealer" and "sole trader," are words used in this connection: Newbrick v. Dugan, 61 Ala. 251; though strict trade is not always regarded in the acts referred to. And as to *feme sole* trader, see Separation, *post;* Porter v. Gamba, 43 Cal. 105. Private acts are sometimes passed to this effect. Halliday v. Jones, 57 Ala. 525. Pennsylvania has a *feme sole* trader act not aplicable to the ordinary case of a husband's insolvency while he remains at home. King v. Thompson, 87 Pa. 365. In Kentucky the separate trading acts are limited in this direction by judicial construction. Moran v. Moran, 12 Bush (Ky.), 301.

34. Farmers' State Bank v. Keen (Okla.), 167 P. 207.

35. Jassoy v. Delius, 65 Ill. 469; Tuttle v. Hoag, 46 Mo. 38.

36. Kouskop v. Shontz, 51 Wis. 204; Snow v. Sheldon, 126 Mass. 332.

37. Bartholomew v. Adams, 143 Ia. 354, 121 N. W. 1026; Harnden v. Gould, 126 Mass. 411; Dawes v. Rodier, 125 Mass. 421.

38. Swasey v. Antram, 24 Ohio St. 87.

39. Cooper v. Ham, 49 Ind. 393.

40. Nispel v. Laparle, 74 Ill. 306.

41. Silveus v. Porter, 74 Pa. 448; Aitken v. Clark, 16 Abb. Prac. (N. Y.), 328, *note.*

to be in the line of her trade, and not for the use of her husband, in order to bind her by the contract.[42]

§ 306. Massachusetts and Pennsylvania Statutory Rule.

The statutes of Massachusetts require the married woman to first register her intention, thus affording a very reasonable safeguard against fraud and imposition upon the public and herself, besides requiring that the act be a deliberate one,[43] and the husband will be held liable on her contract where the certificate is not duly filed.[44] The certificate is required even where the creditor knows that she is trading on her own account,[45] but is not required where the wife's place of business is removed from one street to another in the same city.[46] In case of such default, the liability of the spouses for her debts incurred in carrying on the business is several and not joint.[47] Where a wife owned real estate whereon a business was conducted by her husband without paying rent, and where she owned all his stock in trade, she was held to be conducting business on her own account.[48] Where a wife conducts a boarding house, debts due for board are part of the property employed in the business, within the meaning of that statute, in default of which such debts are liable to attachment for the husband's debts.[49] The statute has been held inapplicable, as a matter of law, to cord wood, cut and piled on her wood lot, ten miles from her farm, though she was managing the farm on her separate account and intended to sell the wood,[50] nor to a case where a wife in her lifetime had conducted a separate business without filing a certificate, which business her administrator did not continue, the action against her husband being brought after

42. Carroll v. Barriere, Man. Unrep. Cas. (La.) 436.

43. Mass. Stats. 1862, ch. 198. This statute requirement does not apply to keeping a colt for use, nor to buying materials to build a house for the family. Proper v. Cobb, 104 Mass. 589. But it applies to the boarding-house business. Harnden v. Gould, 126 Mass. 411. And the farming business. Snow v. Sheldon, 126 Mass. 132. See also, as to removing to a new town, Dawes v. Rodier, 125 Mass. 421. It does not to other property than personal. Bancroft v. Curtis, 108 Mass. 47. Nor where both spouses were not domiciled within the State. Hill v. Wright, 129 Mass. 296. It need not specify property. Long v. Drew, 114 Mass. 77.

44. Feran v. Rudolphsen, 106 Mass. 471.

45. Parsons v. Henry, 197 Mass. 504, 83 N. E. 1110.

46. Lowell Trust Co. v. Wolff, 223 Mass. 168, 111 N. E. 798.

47. Browning v. Carson, 163 Mass. 255, 39 N. E. 1037.

48. Desmond v. Young, 173 Mass. 90, 53 N. E. 151.

49. Dawes v. Rodier, 125 Mass. 421; Harnden v. Gould, 126 Mass. 411.

50. Ayer v. Bartlett, 170 Mass. 142, 49 N. E. 82.

her death.[51] A similar statutory rule prevails in Pennsylvania. The effect of filing such a certificate under the Pennsylvania statute is defeated by a reconciliation as far as her will is concerned, and in such case the husband may take as though there was no will.[52]

§ 307. What Constitutes Sole Trading.

That the business under such statutes should be pursued as a continuing and substantial employment. And hence the mere renting of a room or two by a married woman in the house in which she lives with her husband is not "carrying on business" within the meaning of such an act.[53] The word "business," in the Nebraska statute empowering a wife to engage in trade or business, is used in a popular sense, including an employment or profession followed as a means of livelihood.[54] In the North Carolina statute the words "contract and deal" refer to ordinary bargains and trades incident to business enterprises and do not include conveyances of real estate.[55]

§ 308. Validity of Wife's Trading Contracts in General.

Under these American statutes permissive of the wife's separate trade, it is a general rule that the wife's contracts regarding her separate trade or business are binding on her separate property, and that the husband is not answerable for her solvency. With reference thereto she may make contracts, and sue and be sued, as if sole, except (as such statutes usually run) that where she is sued the remedy is to be enforced against her separate property only, and not against her person. She may make contracts of sale, and sue for goods sold and delivered to her customers.[56] And what she thus purchases, in the exercise of her trading discretion, is to be held and treated as her sole and separate property as against her husband and his creditors.[57] Where, too, the married woman

51. Allen v. Clark, 190 Mass. 556, 77 N. E. 691.

52. *In re* Flanagan's Estate, 59 Pa. Super. 61; *In re* Hellwig's Estate, 59 Pa. Super. 233.

53. Holmes v. Holmes, 40 Conn. 117.

54. Dr. S. S. Still College & Infirmary of Osteopathy v. Morris, 93 Neb. 328, 140 N. W. 272.

55. Council v. Pridgen, 153 N. C. 443, 69 S. E. 404.

56. Porter v. Gamba, 43 Cal. 105; Netterville v. Barber, 52 Miss. 168; Trieber v. Stover, 30 Ark. 727. The contracts of married women, made by virtue of such statute capacity, should not be viewed with hesitation or suspicion by the courts, but should be fully enforced. Netterville v. Barber, 52 Miss. 168.

57. Tallman v. Jones, 13 Kan. 438; Meyers v. Rahte, 46 Wis. 655; Sammis v. McLaughlin, 35 N. Y. 647; Silveus v. Porter, 74 Pa. 448; Dayton v. Walsh, 47 Wis. 113.

keeps a separate bank account, with reference to such business, the check which she draws against it and the fund itself are available to her business creditors.[58] What she borrows by way of capital to commence the business she is required to refund.[59]

The power to do business implies, too, the power to purchase goods, fixtures, and stock for it, and execute the needful instruments of purchase; and hence the wife's contracts for such purchase on credit, her notes, bills, security, or simple indebtedness therefor, must be deemed obligatory and enforceable by suit or otherwise.[60]

On general principles, equity will enjoin a married woman who sells out a business and its good-will, which she has carried on for her separate account, from violating her own agreement with the purchaser in restraint of future competition or interference; for in this respect a married woman should not be regarded more favorably than others who dispose of their business to *bona fide* purchasers.[61]

§ 309. Effect of Estoppel.

Married women, as it is well observed, to the extent and in the matters of business in which they are by law permitted to engage, owe the same duty to those with whom they deal, and to the public, and may be bound in the same manner as if they were unmarried. To the extent of their enlarged capacity to transact business as conferred by statute, they may be estopped by their acts and declarations, and made subject to all the presumptions which the law indulges against the other sex.[62]

§ 310. Effect of Bankruptcy of Wife.

A married woman's firm, trading under a permissive local statute, has been adjudged bankrupt in this country.[63] But it is

58. Nash v. Mitchell, 15 N. Y. 471.

59. Frecking v. Rolland, 53 N. Y. 442. As to purchasing fixtures or real estate for carrying on the business, see *Ib.;* Dayton v. Walsh, 47 Wis. 113. The rule of contract liability (apart from any statute of frauds as to conveyances) is the same, whether the evidence of the wife's contract be oral or written. Kouskop v. Shontz, 51 Wis. 204.

60. Nispel v. Laparle, 74 Ill. 306; Kouskop v. Shontz, 51 Wis. 204; Dayton v. Walsh, 47 Wis. 113; Wheaton v. Phillips, 1 Beasl. 221; Guttman v. Scannell, 7 Cal. 455; Camden v. Mullen, 29 Cal. 564; Reading v. Mullen, 31 Cal. 104.

61. Morgan v. Perhamus, 36 Ohio St. 517. And see *Re* Peacock's Trusts, L. R. 10 Ch. D. 490.

62. Bodine v. Killeen, 53 N. Y. 93; Parshall v. Fisher, 43 Mich. 529; Leland v. Collver, 34 Mich. 418.

63. *Re* Kinkhead, 3 Biss. (U. S.) 405.

held in England that a married woman having no separate property cannot be adjudged a bankrupt upon a judgment against her for an indebtedness which does not concern a separate trade.[64]

§ 311. Liability of Husband.

It follows that under such legislation the husband is not liable on the wife's contracts and liabilities incurred in the pursuit of her separate business, unless he participates in it.[65] But his participation will not unfrequently be found in the modern cases; and hence arises legal uncertainty, and often a suspicion of fraudulent arrangements against one another's creditors. Does the proof, we must ask, under any such circumstances, show that the wife carried on no separate trade, but was her husband's agent? or that she did, and the husband was her agent? or that they were in partnership together?

In Massachusetts, where the statutory doctrine of the wife's power to trade and acquire separate earnings has already received a considerable exposition in the courts, it is held that where a married woman carries on the business of keeping boarders on her sole and separate account, and has purchased goods to be used in her business on her sole credit, she alone is liable, although her husband lived with her when the goods were purchased; and her own acts and admissions in reference to the business are competent evidence against her.[66] In Maine the husband cannot be sued for goods and chattels furnished his wife by third persons in the course of her business, even though such purchases were made by her with his knowledge and consent, and although she appropriated part of the proceeds to the support of her husband and family.[67]

But where the purchase and sales are made with the husband's knowledge and consent, and he participates in the profits of the business, knowing them to be such, and that she professed to act for him, it may be inferred in general that the purchases were made on the husband's credit.[68] Where the separate business, however, is carried on against the husband's consent and without his concurrence, he assuredly is not liable.[69]

64. *Ex parte* Holland, L. R. 9 Ch. 307.

65. Parker v. Simonds, 1 Allen (Mass.), 258; Colby v. Lamson, 39 Me. 119; Trieber v. Stover, 30 Ark. 727; Tuttle v. Hoag, 46 Mo. 38.

66. Parker v. Simonds, 1 Allen (Mass.), 258. As to husband's liability on a lease, though professing to underlet for a wife's business, see Knowles v. Hull, 99 Mass. 562.

67. Colby v. Lamson, 39 Me. 119.

68. Oxnard v. Swanton, 39 Me. 125.

69. Tuttle v. Hoag, 46 Mo. 38; Jenkins v. Flinn, 37 Ind. 349. See Smith v. Thompson, 36 Conn. 107, where the married woman had no power to trade as a *feme sole*.

The husband who does not participate in his wife's business is not usually held liable under our separate trading acts; and hence cannot be sued with his wife for her store rent.[70]

Apart from statutes giving a contrary scope to the rule, a single woman engaged in trade or business is legally engaged therein; if she marries, the disability of coverture puts an end to the trade, and dissolves her business copartnership if there be one; and thereupon the husband, by virtue of the common law, becomes liable for the business, even the partnership debts, having a corresponding right to recover her share in the assets on a winding up.[71]

§ 312. Effect of Participation of Husband as Agent.

In New York, as against her husband's creditors, the wife may make him managing agent and let him conduct the business in her name, while she furnishes capital from her own means and takes the profits to herself; paying the managing agent what she thinks best, without subjecting the stock in trade to his debts.[72] So it is held that a wife, by allowing chattels belonging to her, and which remain *in specie,* to be employed by her husband in carrying on a business for their common benefit, does not devote them to her husband, so as to render them liable for his debts.[73] The courts of that State intimate, however, that there should be no fraud in such transactions; which otherwise the reader might doubt, from finding such latitude given to the wife's business dealings. We should add that it is deemed a question of fact for the jury, whether upon evidence a business is in trust the wife's, with the husband acting merely as her agent, or this agency is a cover for the husband's business to keep his property from his own creditors.[74] And that under some circumstances a husband's agency from the wife will be considered revoked and the business subsequently carried on for his benefit, and not hers alone.[75] But the employment of her husband in carrying on her separate business of farming does not make him the wife's agent in the business, unless he contributed money or services as partner,[76] nor his employment as salesman in the wife's store,[77] or as operative or manager in his wife's mill.[78] Proof that a husband signed notes

70. Jaycox v. Wing, 66 Ill. 182.

71. Alexander v. Morgan, 31 Ohio St. 546.

72. Buckley v. Wells, 33 N. Y. 518.

73. Sherman v. Elder, 24 N. Y. 381; Barton v. Beer, 35 Barb. (N. Y.) 78.

74. Abbey v. Deyo, 44 N. Y. 343.

75. Hamilton v. Douglas, 46 N. Y. 318.

76. *Ibid.*

77. Ploss v. Thomas, 6 Mo. App. 157.

78. Cooper v. Ham, 49 Ind. 393.

for goods in a shop leased to him is not conclusive proof that the goods did not belong to the wife's separate business,[79] for a husband might sign as an agent and render her business liable.[80] A change in the mutual relations of the spouses regarding the business ought, on the usual principles of both agency and partnership, to be brought home to the knowledge of creditors with whom business relations continue uninterrupted.[81]

Where a married woman manages a separate trade or business by agents, the usual doctrine of agency must apply. The wife cannot avoid the usual liabilities on the plea that she made her husband her agent.[82] The scope of the agency, too, must be considered as in other cases, and the agency, as actually conferred, is not the full test of responsibility for the agent's dealings with third parties, for those clothed with apparent authority may bind their principals as though really authorized.[83] A husband conducting his wife's separate business as agent cannot recover for his services without a special contract to pay for them.[84] Where a husband became insolvent and money was loaned to his wife to continue the business on condition that the services of the husband were retained, he being paid a salary therefor, it was held that the profits acquired thereby were not subject to his debts.[85]

§ 313. Rights of Husband's Creditors.

All purchases or contracts of purchase for commencing or prosecuting the wife's separate business must have been made in good faith and not as a means of fraudulently placing the husband's property beyond the reach of his creditors.[86]

But transactions which are tainted with fraud upon the rights of creditors and others must not be permitted to stand. Capital placed by a wife in her husband's hands, and by him so embarked in business with her assent that credit is obtained upon it, are not, with the increase, the wife's separate property, as against his creditors who have trusted accordingly, but rather his property.[87]

79. Mason v. Bowles, 117 Mass. 86.

80. Freiberg v. Branigan, 18 Hun (N. Y.), 344. But as to a judgment rendered against the agent himself, see Smiley v. Meyer, 55 Miss. 555.

81. Bodine v. Killeen, 53 N. Y. 93.

82. Taylor v. Angel, 162 Ind. 670, 71 N. E. 49; Porter v. Gamba, 43 Cal. 105.

83. Bodine v. Killeen, 53 N. Y. 93.

84. Hood v. Rodgers, 99 Ga. 271, 25 S. E. 628; Paull v. Parks, 20 Ky. Law, 241, 45 S. W. 873; Penn v. Whitehead, 17 Grat. (Va.) 503, 94 Am. Dec. 478.

85. Kendall v. Beaudry, 107 Wis. 180, 93 N. W. 314.

86 Dayton v. Walsh, 47 Wis. 113.

87. Patton v. Gates, 67 Ill. 164; Kouskop v. Shontz, 51 Wis. 204. Or possibly like that of a firm in which both were partners.

And while, in general, the husband's gift may sustain the wife's claim of profits accruing from her separate trade, yet the better opinion is, upon either equity or statute consideration, that a business carried on by a husband and wife in co-operation, his labor and skill united with hers, must be considered as his business so far as his creditors are concerned, and fails accordingly of protection for her especial benefit,[88] though it might, perhaps, be well ruled in some States, that there is a partnership whose liabilities should be adjusted on partnership principles; highly objectionable as the jurist may well regard all such partnerships upon principle. Even though the trade be unsuitable to her sex, fraud upon the husband's creditors will not be conclusively presumed.[89]

§ 314. As Copartner; Generally.

At common law a wife could not bind herself as a partner,[90] but Married Women's Acts in several States now permit her to do so,[91] the power being predicated, in some cases, on her statutory right to contract.[92] In Alabama, where only the joint property of partners is bound by a judgment against the partnership, it is no defence to an action against it that one of the partners is a wife,[93] In Florida, only a wife who has been lawfully declared a free trader may be a partner,[94] but her separate estate cannot be charged with debts contracted by her partner.[95] Under the Georgia Married Women's Act a wife may be a partner with any person except her husband.[96] In South Carolina a wife cannot bind her-

88. See National Bank v. Sprague, 5 C. E. Green (N. J.), 13; Oxnard v. Swanton, 39 Me. 125; Cramer v. Reford, 2 C. E. Green (N. J.), 383. But see Penn v. Whitehead, 17 Gratt. (Va.) 503; Partridge v. Stocker, 36 Vt. 108.

89. Guttman v. Scannell, 7 Cal. 455.

90. Nadel v. Weber Bros. Shoe Co. (Fla.), 70 So. 20; Bryan v. Inman, 10 Ky. Law, 542; Foxworth v. Magee, 44 Miss. 430; Little v. Hazlett, 197 Pa. 591, 47 A. 855; Cleveland v. Spencer (Tex.), 50 S. W. 405; Keith v. Aubrey (Tex.), 127 S. W. 278.

91. Norwood v. Francis, 25 App. D. C. 463; Stone Co. v. McLamb & Co., 153 N. C. 378, 69 S. E. 281; First Nat. Bank v. Rice, 22 Ohio Cir. Ct. 183, 12 O. C. D. 121; Loeb v. Mellinger, 12 Pa. Super. 592, 17 Lanc. Law Rev. 129; Elliott v. Hawley, 34 Wash. 585, 76 P. 93, 101 Am. St. R. 1016.

92. Vail v. Winterstein, 94 Mich. 230, 53 N. W. 932, 18 L. R. A. 515; Kutcher v. Williams, 40 N. J. Eq. 436, 3 A. 257.

93. C. S. Yarbrough & Co. v. Bush & Co., 69 Ala. 170; O'Neil v. Birmingham Brewing Co., 101 Ala. 383, 13 So. 576.

94. Porter v. Taylor, 64 Fla. 100, 59 So. 400; Virginia-Carolina Chemical Co. v. Fisher, 58 Fla. 377, 50 So. 504.

95. Nadel v. Weber Brothers Shoe Co. (Fla.), 70 So. 20, L. R. A. 1916D, 1230.

96. Butler v. Frank, 7 Ga. App. 655, 67 S. E. 884.

self by a partnership not affecting her separate estate.[97] Under the Virginia statute she may be a partner with the consent of her husband.[98] In West Virginia a wife living with her husband cannot be a partner.[99]

§ 315. With Husband.

As to all agencies and partnerships one rule may apply in adjusting rights as between themselves, and another as to creditors whose confidence has been invited. And, on the whole, it would still appear to be the general rule, notwithstanding the late statutes, that a wife may not, as against the world, become her husband's partner, nor even join her labor and capital to his in one and the same business enterprise.[1] In Massachusetts, while the statute permitted the wife to form a copartnership with third parties, this exception the court so strictly enforced as to hold her transactions as a member of any firm in which the husband was interested as a partner utterly void, whether to her advantage or injury, inasmuch as a married woman cannot legally contract with her husband singly or jointly.[2]

But under the New York statutes it is held that a husband and wife may not only enter into a valid partnership together for business, but carry it on under the name "A. & Co." (the "Co." representing the wife) without violating the law which forbids persons to transact business under fictitious names,[3] and that hence they can sue and recover in their joint names for goods sold and delivered by their firm.[4] In Illinois, too, as it would appear, a wife may enter into a partnership with her husband, and when she does this it will be presumed, in the absence of different proof, that she contributed her share of the capital, and that her time, skill, and earnings went into the business; and such a partnership has been actually adjudged bankrupt.[5] In California not only is the husband not forbidden to become a partner, but the plain intention of the Code is that he may furnish part of the capital

97. Collins v. Hall, 55 S. C. 336, 33 S. E. 466.

98. Penn v. Whitehead, 17 Gratt. (Va.) 503, 94 Am. Dec. 478.

99. Carey v. Burruss, 20 W. Va. 571, 43 Am. R. 790; Ringold v. Suiter, 35 W. Va. 186, 13 S. E. 46.

1. Wilson v. Loomis, 55 Ill. 352; Montgomery v. Sprankle, 31 Ind. 113; Lord v. Parker, 3 Allen (Mass.) 127.

2. Lord v. Parker, 3 Allen (Mass.), 127; Edwards v. Stevens, 3 Allen (Mass.), 315; Plumer v. Lord, 7 Allen (Mass.), 481.

3. Zimmerman v. Erhard, 8 Daly (N. Y.), 311.

4. *Ibid.*

5. *Re* Kinkead, 3 Biss. (U. S.) 405. As to bankruptcy, cf. *Ex parte* Holland, L. R. 9 Ch. 307.

stock. The wife may sue alone in such business, and may employ her husband to manage it. In some Southwestern States[6] separate trading seems to be permitted on similar principles.[7] The Maine Married Women's Act does not remove the wife's common-law disability to be her husband's partner, and bind her by partnership debts.[8] The same is true in South Carolina.[9]

§ 316. With Third Persons.

By the wife's business copartnership with third persons, and particularly with those of the opposite sex apart from her husband, she entangles her separate property disadvantageously, and incurs the risk of personal affiliations, besides, quite perilous to domestic concord and the mutual confidence which marriage demands. In Massachusetts the legislature permitted a married woman to form a copartnership in business with third parties, though not with her husband; but, after some ten years' experience, repealed, in 1874, that permission.[10] Most other States deny her such a right as separate and exclusive of her husband's interest,[11] though in some parts of the Union such copartnerships are sustained,[12] and she is not unfrequently found connected with business firms as a partner in place of her deceased husband;[13] sometimes, too, he is her successor, or else participates with her and third persons in the concern.[14]

Where a married woman enters legally into a copartnership she becomes personally liable, to the extent of her separate property, for the partnership debts, like any other partner.[15]

In Ohio it is held that where a married woman, assuming to carry on a partnership business unconnected with her separate property, is assisted by her husband, he, and not she, is to be regarded in law as the partner; and that accordingly a firm creditor may proceed against the husband and the other members, not

6. Camden v. Mullen, 29 Cal. 564; Reading v. Mullen, 31 Cal. 104; Guttmann v. Scannell, 7 Cal. 455.

7. See Atwood v. Meredith, 37 Miss. 635; Oglesby v. Hall, 30 Ga. 386.

8. Haggett v. Hurley, 91 Me. 542, 40 A. 561, 41 L. R. A. 362.

9. Collins v. Hall, 55 S. C. 336, 33 S E. 466.

10. Todd v. Clapp, 118 Mass. 495. Such a law, not being interpreted retroactively, was held constitutional. *Ib.*

11. See Bradford v. Johnson, 44 Tex. 381; Bradstreet v. Baer, 41 Md. 19; Howard v. Stephens, 52 Miss. 239.

12. See Newman v. Morris, 52 Miss. 402.

13. Preusser v. Henshaw, 49 Ia. 41.

14. Bitter v. Rathman, 61 N. Y. 512; Swasey v. Antram, 24 Ohio St. 87.

15. Preusser v. Henshaw, 49 Ia. 41; Newman v. Morris, 52 Miss. 402.

including the wife, even though, on dissolution of the firm, the other partners had transferred the property to her, she agreeing to pay all the firm debts.[16] And where, again, a firm composed of two women put the husband of one in absolute charge of the business, who, with his wife's knowledge and consent made purchases on credit, and acted as if he instead of his wife were one of the partners, it was held in Michigan that the husband and the other partner must be concluded by such conduct, as to creditors having no knowledge to the contrary, and that, in absence of superior equities, such creditors might treat the firm as composed of the husband and the other woman.[17] These decisions tend to the protection of the wife. And such, too, is the effect of a New York decision, which, admitting that a husband might, perhaps, be deemed the partner as between the wife and himself or his creditors, rules, nevertheless, that where a married woman acting under a secret trust for her husband, becomes a member of a copartnership, she is to be regarded, as between her and her copartner, the owner of the interest she represents, so as to maintain proceedings for a dissolution of the copartnership and for an accounting.[18]

§ 317. As Stockholder.

Married Women's Acts in some States enable a wife to become a stockholder in a corporation, and to be liable as such.[19] In Louisiana a wife separated in property from her husband by a judgment may be a stockholder, and be liable as such,[20] and may be so liable in Florida even where the stock was acquired as a gift.[21]

§ 318. Actions.

Under the statutes of some States which permit the wife to trade separately, the wife's business debts may be collected from her by proceedings in equity for declaring such debts a specific lien on her separate estate.[22] But in other States such proceedings on behalf

16. Swasey v. Antram, 24 Ohio St. 87.

17. Parshall v. Fisher, 43 Mich. 529.

18. Bitter v. Rathman, 61 N. Y. 512.

19. Norwood v. Francis, 25 App. D. C. 463; Meares v. Duncan, 123 N. C. 203, 31 S. E. 476; Smathers v. Western Carolina Bank, 155 N. C. 283, 71 S. E. 345; Good Land Co. v. Cole, 131 Wis. 467, 110 N. W. 895.

20. First Natchez Bank v. Moss, 52 La. Ann. 1524, 28 So. 133.

21. Keyser v. Milton, 228 F. 594, 143 C. C. A. 116.

22. Wheaton v. Phillips, 1 Beasl. (N. J.) 221.

of creditors are not favored, each creditor having, under local statute, the usual remedies at law as though the woman were single.[23] The other members of the firm ought to be made parties where the wife is a copartner.[24] So, too, statutes permit the wife to sue, as if unmarried, the business debtors.[25] Allegation of business, or, in other words, of separate capacity, should usually appear of record in all such suits, whether the married woman be plaintiff or defendant.[26]

23. Meyers v. Rahte, 46 Wis. 655; Nash v. Mitchell, 71 N. Y. 199; Vosburgh v. Brown, 66 Barb. (N. Y.) 421; Heller v. Rosselle, 13 N. Y. 631; Haight v. McVeagh, 69 Ill. 624.

24. Westphal v. Henney, 49 Ia. 542.

25. Rockwell v. Clark, 44 Conn. 534; Smith v. New England Bank, 45 Conn. 416.

26. Nash v. Mitchell, 71 N. Y. 199; Smith v. New England Bank, 45 Conn. 416; Magruder v. Buck, 56 Miss. 314.

CHAPTER XVIII.

WHAT CONSTITUTES WIFE'S STATUTORY SEPARATE ESTATE.

§ 319. Creation of Separate Estate in General.

In Louisiana the right of a wife to acquire property in her own name during coverture, and for her separate paraphernal estate, is

an exception to the general rule established by the statute, and is to be strictly construed.[27] Under the Missouri Married Women's Act a wife may take transfers of property as her separate estate without technical words of limitation.[28]

§ 320. By Written Instrument.

Where a conveyance or other written instrument is needful, the expression must conform to the legislative intent; and even where the language of the statute is broad enough to dispense with such phrases as "sole and separate use," the wife's only safety consists in having her name used as that of grantee or transferee, instead of the husband's.[29] Where it comes to an expression of separate use, under some instrument made on the wife's behalf, an equitable separate use, rather than a statutory separate use, may be said to have been created; though authorities style it under some local acts as a statutory separate estate.[30]

§ 321. By Parol Transfer.

Where the property is such as can pass without a written transfer or conveyance, a gift or sale to the wife, of statutory separate property, may be by parol,[31] although, of course, all proof must consist with the idea that delivery is for her sole and separate use, and not so as to admit the rights of her husband.[32]

§ 322. Necessity of Schedule.

The requirement in a few States is that the wife's separate property shall be scheduled or inventoried in order to receive legal protection for her separate benefit. Considering the fallibility of presumptions and of the usual tests, this plan seems worthy of more extensive introduction in the legislation of the various States relative to married women.[33] Such provisions are sometimes con-

27. Jordy v. Muir, 51 La. Ann. 55, 25 So. 550.

28. Judson v. Walker, 155 Mo. 166, 55 S. W. 1083.

29. Pepper v. Lee, 53 Ala. 33; Slaughter v. Glenn, 98 U. S. 242; Robinson v. O'Neal, 56 Ala. 541; Campbell v. Galbreath, 12 Bush (Ky.), 459. Under the more sweeping local statutes a conveyance to a married woman need not state that she is to hold it to her separate use. Sims v. Rickets, 35 Ind. 181.

30. A conveyance of lands in Alabama to a married woman, "to have and to hold to the sole and proper use, benefit, and behoof of her, her heirs and assigns forever," vests in her, under the laws of that State, a statutory separate estate. Lippincott v. Mitchell, 94 U. S. 767. And see Swain v. Duane, 48 Cal. 358.

31. Tinsley v. Roll, 2 Met. (Ky.) 509.

32. Walton v. Broaddus, 6 Bush (Ky.), 328.

33. Price v. Sanchez, 8 Fla. 136; Humphries v. Harrison, 30 Ark. 79.

strued as mere registry requirements, not essential as against parties having actual knowledge of the wife's title,— a husband, for instance,— and only intended to prevent frauds and impositions as to creditors and purchasers.[34] The mode of acquisition constitutes in such case the actual title to the wife's separate property; but, even with this limited application, the schedule regulation enables the wife to secure her own interests where the possession of personal property, such as household furniture, is essentially that of both husband and wife, so long as they dwell together, and fraudulent credit ought not to be permitted on behalf of either spouse. These schedule provisions are based, doubtless, upon the principle that the property in joint possession of husband and wife under his marital control is presumably his.

The Oregon statute providing that personal property not registered by the wife shall be *prima facie* the property of the husband, does not apply to personal property purchased by her during coverture or acquired by gift from her husband.[35] Under a similar statute in South Dakota it is held that the failure to register does not prevent her from recovering her property taken by her husband, but merely lays on her the burden of proving title affirmatively.[36] The Montana Married Women's Act, providing that a wife's separate property included in the inventory required by the statute shall be exempt from her husband's debts, applies only to property in the exclusive possession of the husband.[37] Such property must be in his possession at the time the debt was contracted in order to subject it to his debts.[38]

§ 323. What Constitutes Separate Estate; Property Acquired Prior to Coverture.

Our Married Women's Codes fairly correspond in permitting the wife (subject to constitutional limitations) to hold, in her sole and separate right, all the property, real or personal, which she had

As to the filing of such a schedule by the woman prior to her marriage, see Berlin v. Cantrell, 33 Ark. 611.

34. Jones v. Jones, 19 Ia. 236; Selover v. Commercial Co., 7 Cal. 266. This registry law, after having called for considerable construction in the courts, appears to have finally been repealed in Iowa. Schmidt v. Holtz, 44 Ia. 448.

35. Noblitt v. Durbin, 41 Ore. 555, 69 P. 685.

36. Anderson v. Medbery, 16 S. D. 324, 92 N. W. 1089.

37. Chan v. Slater, 33 Mont. 155, 82 P. 657.

38. Webster v. Sherman, 33 Mont. 448, 84 P. 878.

at the time of marriage.[39] Gifts made by the husband to the wife prior to coverture and afterwards recognized by him as her separate property are not subject to his marital rights, and must be treated as separate estate.[40] A homestead claim, settled and improved upon by a woman before marriage, is her separate estate, though not patented till after coverture.[41] Where a woman took land under a deed before coverture, and immediately began her assertion of ownership, a title by adverse possession under the occupancy of the spouses after coverture was held to inure to her separate estate.[42]

§ 324. Property Acquired by Gift, Grant, Devise or Bequest during Coverture.

The wife's separate estate includes property which she has acquired thereafter from any person other than her husband, by gift, grant, devise, or bequest. Real estate thus held or acquired is regarded, not as land of which the husband enjoys the beneficial use, but as her separate land. Leasehold property may be thus held and enjoyed by the wife. Her personal property, whether in possession or lying in action, is her own, provided the statute description be fulfilled.

Where a husband purchases land or personalty with his own money, and conveys or transfers it to his wife, the question becomes ordinarily one of post-nuptial settlement or gift, with equitable rules such as we shall consider hereafter; though sometimes the Married Women's Act is broad enough in scope to confer the right of separate property acquisition, as such, from a husband, as well as from third persons. If, on either theory, the title vests in the wife, as of her separate right, the proceeds thereof, or the specific re-investment, is the wife's also. Where the husband appropriates such proceeds or takes other property in his own name, equity and modern statutes between them may preserve the wife's rights; she may, in the usual manner, follow her title into the new property, or else regard her trustee as remiss in duty and indebted to her. But if, at any point of this property manage-

39. Vandevoort v. Gould, 36 N. Y. 639; Prevot v. Lawrence, 51 N. Y. 219; Wellman v. Kaiser Inv. Co. (Mo.), 171 S. W. 370; McKee v. Downing, 224 Mo. 115, 124 S. W. 7; Henderson Grocery Co. v. Johnson (Tenn.), 207 S. W. 723; Williams v. Lord, 75 Va. 390.

40. Young v. Young (Tenn.), 64 S. W. 319.

41. Forker v. Henry, 21 Wash. 235, 57 P. 811.

42. Alford Bros. & Whiteside v. Williams, 41 Tex. Civ. 436, 91 S. W. 636.

ment, it be said that the husband appropriated to himself with his wife's assent, then the beneficial, as well as legal, title vests in him. Here, and in laying down the presumption generally as between husband and wife, is a fruitful source of legal embarrassment and uncertainty, as Married Women's Acts stand at the present day. The husband's opportunities are ample; for no third party, as in a trust settlement, stands between these spouses, so closely united, to preserve the property and the evidence of title to the true owner. Nor are States agreed in the course to pursue, since the policy of some is to emancipate woman from property restraints altogether, while others grudge the change as tending to strip husbands of their matrimonial rights; one regards the woman's right to her own acquisitions as properly the rule, another as properly the exception.

Under most Married Women's Acts gifts of real estate from the husband to the wife are her separate estate,[43] even though he pays taxes and interest on the mortgage,[44] and even though the gift was from their community property, if he is free from debt at the time.[45] The wife's separate estate also includes property acquired by use of the proceeds of such gifts,[46] and property acquired with the proceeds of gifts from his relatives,[47] and property given her by her own relatives,[48] as well as transfers of personal property, whether gifts or as payment for her money or property used by him,[49] even though made by parol,[50] and gifts made by strangers to the wife on the occasion of giving birth to quintuplets.[51] Where a husband, indebted to his wife's father on notes, took one of the notes as her share of the father's estate, it was held that the note so taken was her separate estate.[52] Under the former statute in Texas, providing that the lands owned by the wife at marriage or

43. Hamilton v. Hubbard, 134 Cal. 603, 65 P. 321 (affd., 134 Cal. 603, 66 P. 860).

44. Corbett v. Sloan, 52 Wash. 1, 99 P. 1025.

45. Bank of Orofino v. Wellman, 26 Ida. 425, 143 P. 1169.

46. Smith v. Weed, 75 Wash. 452, 134 P. 1070.

47. Marshall Field & Co. v. McFarlane (Ia.), 84 N. W. 1030.

48. Tanner v. Skinner, 11 Bush (Ky.), 120; Tolley v. Wilson (Tenn.), 47 S. W. 156.

49. Carver v. Carver, 53 Ind. 241; Kelly v. Kelly, 131 La. 1024, 60 So. 671; Mitchell v. Chattanooga Savings Bank, 126 Tenn. 669, 150 S. W. 1141; Cullen v. Bisbee, 168 Cal. 695, 144 P. 968; Baker v. Hedrich, 85 Md. 645, 37 A. 363 (savings bank account).

50. Williford v. Phelan, 120 Tenn. 589, 113 S. W. 365.

51. Lyon v. Lyon, 24 Ky. Law, 2100, 72 S. W. 1102.

52. Hileman v. Hileman, 85 Ind. 1.

afterwards acquired shall be her separate estate, it was held that her interest in a land certificate issued to heirs of her former husband remained her separate estate, and that a subsequent husband took no interest in the certificate.[53] Under the Missouri Married Women's Act money inherited by a wife and received by her husband is her separate estate, unless she consents in writing that he may appropriate it.[54] In Tennessee money inherited by a wife is part of her general estate.[55]

§ 325. Wife's Land in General.

Generally land conveyed to a wife is her separate estate,[56] even of community property,[57] or an undivided interest in land,[58] as well as land conveyed to the wife at the husband's request,[59] or by his relatives without his request,[60] even though no special words of limitation to her separate use are inserted in the deed,[61] especially

53. Laufer v. Powell, 30 Tex. Civ. 604, 71 S. W. 604.

54. Columbia Sav. Bank v. Winn, 132 Mo. 80, 33 S. W. 457.

55. Sanford v. Allen (Tenn.), 42 S. W. 183.

56. Montague v. Buchanan (Tenn.), 211 S. W. 211; Johnson v. Johnson (Tex.), 207 S. W. 202; O'Connor v. Vineyard, 91 Tex. 488, 44 S. W. 477; Martinez v. De Barroso (Tex.), 189 S. W. 740; Harrison v. Mansur-Tibbetts Implement Co., 16 Tex Civ. 630, 41 S. W. 842; Emery v. Barfield (Tex.), 156 S. W. 311; Sharitz v. Moyers, 99 Va. 519, 3 Va. Sup. Ct. R. 359, 39 S. E. 166; Robinson v. Neill, 34 W. Va. 128, 11 S. E. 999; Cropper v. Bowles, 150 Ky. 393, 150 S. W. 380; Kelley v. Grundy, 20 Ky. Law, 1081, 45 S. W. 100; Pearll v. Pearll Advertising Co., 17 Det. Leg. N. 543, 127 N. W. 264; Turner v. Shaw, 96 Mo. 22, 8 S. W. 897, 9 Am. St. R. 319; Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868, 105 Am. St. R. 629; Scruggs v. Mayberry, 135 Tenn. 586, 188 S. W. 207; Barnum v. Le Master, 110 Tenn. 638, 75 S. W. 1045, 69 L. R. A. 353; Johnson v. Johnson (Tex.), 205 S. W. 202; Kahn v. Kahn, 94 Tex. 114, 58 S. W. 825; Cardwell v. Perry, 82 Ky. 129, 6 Ky. Law, 97; Emery v. Barfield (Tex.), 183 S. W. 386; Wilson v. McDaniel (Mo.), 190 S. W. 3; Hill v. Meinhard, 39 Fla. 111, 21 So. 805 Molloy v. Brower (Tex.), 171 S. W. 1079; Bird v. Lester (Tex.), 166 S. W. 112; Kin Kaid v. Lee, 54 Tex. Civ. 622, 119 S. W. 342; Emery v. Barfield (Tex.), 183 S. W. 386; Jones v. Jones (Tex.), 146 S. W. 265; Pfingsten v. Pfingsten, 164 Wis. 308, 159 N. W. 921.

57. Alferitz v. Arrivillaga, 143 Cal. 646, 77 P. 657.

58. Lapique v. Geantit, 21 Cal. App. 515, 132 P. 78.

59. Butler v. Gosling, 130 Cal. 422, 62 P. 596; Rauer's Law & Collection Co. v. Berthiaume, 21 Cal. App. 670, 132 P. 596; Leust v. Staffan, 14 App. D. C. 200; Kent v. Tallent (Okla.), 183 P. 422; Ferguson v. Booth, 128 Tenn. 259, 160 S. W. 67; McKinney v. McKinney (Tex.), 87 S. W. 217.

60. Anderson v. Casey-Swasey Co. (Tex.), 129 S. W. 349.

61. Harlan v. Harlan, 144 Ky. 817, 139 S. W. 1063 Emery v. Barfield (Tex.), 138 S. W. 419; Emery v. Barfield (Tex.), 156 S. W. 311; Merriman v. Blalack, 56 Tex. Civ. 594, 121 S. W. 552; Du Perier v. Du Perier, 126 S. W. 10; Jones v. Humphreys, 39 Tex. Civ. 644, 88 S. W. 403; Thorpe v. Sampson, 84 F. 63; Drake v. Davidson, 28 Tex. Civ. 184, 66 S. W. 889; Hankins v. Columbia Trust Co., 142 Ky. 206, 134 S. W. 498.

where the land is purchased with the wife's funds,[62] and even where the husband gives his note for deferred payments, if the wife agrees to pay the note,[63] and even where payments were made by the husband's checks, if she had given him the money to make them.[64] The same is true where, after taking title, he disclaims title in himself and refers to it as her property.[65] The fact that the husband has fenced and otherwise improved the land does not change its character as a separate estate.[66] Under the Married Women's Acts in California, New Mexico, West Virginia and Wisconsin, all rights in land conveyed to a wife are her separate estate.[67] In Louisiana property so conveyed or transferred to the wife is paraphernal.[68] In the District of Columbia real estate conveyed to a wife in fee simple absolute, free from the control of her husband, becomes hers in equity as though she was unmarried, and she may convey, devise or otherwise dispose of as though sole.[69] Under the Tennessee statute there is no presumption that a wife's property is her separate rather than her general estate, but rather the contrary.[70] In Vermont a wife's land is not her separate estate unless it is made so by some provision in the instrument or decree creating the estate.[71] Under the Washington Married

62. United States Fidelity & Guaranty Co. v. Lee, 58 Wash. 16, 107 P. 870; Green v. Forney, 134 Ia. 316, 111 N. W. 976; Ligon v. Wharton (Tex.), 120 S. W. 930; Johnson v. Johnson (Tex.), 207 S. W. 202; O'Farrell v. O'Farrell, 56 Tex. Civ. 51, 119 S. W. 899; Clark v. Baker, 76 Wash. 110, 135 P. 1025; Nilson v. Sarment, 153 Cal. 524 96 P. 315.

63. Amend v. Jahns (Tex.), 184 S. W. 729.

64. Conron v. Cauchols, 242 F. 909, 155 C. C. A. 497.

65. Black v. Black, 64 Kan. 689, 68 P. 662.

66. Donovan v. Olsen, 47 Wash. 441, 92 P. 276.

67. Hitchcock v. Rooney, 171 Cal. 285, 152 P. 913; Randall v. Washington, 161 Cal. 59, 118 P. 425; Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1, 94 P. 94; Bell v. Wyman, 147 Cal. 514, 82 P. 39; Hammond v. McCollough, 159 Cal. 639, 115 P. 216; Farnum v. Kern Valley Bank, 12 Cal. App. 426, 107 P. 568; Mitchell v. Moses, 16 Cal. App. 594, 117 P. 685; Holmes v. Holmes, 27 Cal. App. 546, 150 P. 793; Bekins v. Dieterle, 5 Cal. App. 690, 91 P. 173; Bekins v. Dieterle, 5 Cal. App. 690, 91 P. 173; Oldershaw v. Matteson & Williamson Mfg. Co., 19 Cal. App. 179; 125 P. 263; Miera v. Miera (N. M.), 181 P. 583; Smith v. New Huntington General Hospital (W. Va.), 99 S. E. 461; Citizens' Loan & Trust Co. v. Witte, 116 Wis. 60, 92 N. W. 443.

68. Dupre v. Jenkins, 52 La. Ann. 1819, 28 So. 321.

69. Leust v. Staffan, 14 App. D. C. 200. To the same effect see Travis v. Sitz (Tenn.), 185 S. W. 1075.

70. City Lumber Co. v. Barnhill, 129 Tenn. 676, 168 S. W. 159.

71. *In re* Rooney, 109 F. 601; Seaver v. Lang (Vt.), 104 A. 877; Dietrich v. Deavitt, 81 Vt. 160, 69 A. 661; Ainger v. Webster (Vt.), 82 A. 666; *In re* Nelson's Will, 70 Vt. 130, 39 A. 750.

Women's Act a deed procured by the husband in the name of the wife creates a separate estate in her where he so conducts himself as to indicate that he makes no claim to the property.[72] Under the Delaware Married Women's Act a wife cannot claim as her separate estate property acquired directly from her husband.[73]

§ 326. Rents, Profits and Issues of Separate Estate.

The natural increase and profits of the wife's statutory separate property, including the progeny of her separate domestic animals and the rents of her separate lands or the crops, are usually to be construed hers and at her disposal during marriage, as well as the property which produced the increase and profits,[74] including profits from the sale of live stock,[75] and the profits of her separate business.[76] The same is true of profits from land held by the husband as trustee for the wife and children, where it does not appear that his services were worth more than he was bound to contribute to the support of the family, or more than the cost of his support.[77] If it were rightly held otherwise, this would be on some construction that the wife had, by her acts and conduct, acquiesced in her husband's assumption of the ownership.[78] In short, all the product and increase of the original property will become the wife's as long as she can follow and identify it,[79] though expenditure of income for authorized family purposes may well be presumed.[80] And since the income of her separate fund is hers, property purchased with her savings from interest arising out of her separate funds belongs to her as her separate property.[81]

72. Lanigan v. Miles (Wash.), 172 P. 894.

73. Whiteman v. Whiteman (Del.), 105 A. 787.

74. Webster v. Sherman, 33 Mont. 448, 84 P. 878; Sullivan v. Skinner (Tex.), 66 S. W. 680; Carle v. Heller, 18 Cal. 577, 123 P. 815; Smith's Exr. v. Johns, 154 Ky. 274, 157 S. W. 21; Dollar v. Busha, 124 Ga. 521, 52 S. E. 615; Featherngill v. Dougherty, 44 Ind. App. 452, 89 N. E. 521; Kelley v. Grundy, 20 Ky. Law, 1081, 45 S. W. 100; Martin v. Davis, 30 Pa. Super. 59; Hester v. Stine, 46 Wash. 469, 90 P. 594; Williams v. McGrade, 13 Minn. 46; Hanson v. Millett, 55 Me. 184; Gans v. Williams, 62 Ala. 41; Hutchins v. Colby, 43 N. H. 159; Stout v. Perry, 70 Ind. 501. But as to products of the land occupied by the family, cf. Moreland v. Myall, 14 Bush (Ky.), 474; Hill v. Chambers, 30 Mich. 422; Williams v. Lord, 75 Va. 390; Harris v. Van de Vanter, 17 Wash. 489, 50 P. 50.

75. Blankinship Bros. v. Knox (Wash.), 178 P. 629.

76. Bourgeois v. Edwards (N. J.), 104 A. 447.

77. Brown v. Brown's Adm'r, 20 Ky. Law, 690.

78. But see peculiar statute construed in Chambers v. Richardson, 57 Ala. 85.

79. Holcomb v. Meadville Savings Bank, 92 Pa. 338.

80. See Chambers v. Richardson, 57 Ala. 85.

81. Merritt v. Lyon, 3 Barb. (N. Y.) 110.

§ 327. Proceeds of Sale of Separate Estate.

Upon a sale and exchange of the wife's separate, as contrasted with her general, lands, the proceeds belong to the wife,[82] even though the labor of the husband contributes to its production,[83] as well as the proceeds of a sale of a wife's separate estate generally,[84] and property purchased with such proceeds.[85] And where her realty, as in partition proceedings, is converted into money, the proceeds stand in lieu of the real estate for her benefit.[86] Where spouses hold land equally in common, a half of a note taken in payment for the land is the wife's separate estate.[87]

Property acquired by exchange for the wife's statutory property is presumably her separate property likewise, as where one horse is exchanged for another.[88] Where spouses occupied land rent free for two years in lieu of $1,000 to which she was entitled from an estate, and where the husband later bought an interest in the land, which he sold and loaned the proceeds on two notes, of which one, for $1,500, was payable to the wife, it was held that the note was her separate estate, where it appeared that the proceeds of the farm, during the free occupation, was equal to the amount of the note.[89] Under the Kentucky statute providing that the proceeds of the wife's land shall belong to her unless otherwise provided in the deed or the obligation of the purchaser, it was held that the fact that notes payable to the husband were taken in payment for such land, coupled with a recital in the deed that the consideration had been paid to him, were sufficient to show his title to the notes.[90] Where a wife acquired separate real estate prior to the Married Women's Act in Missouri, and sold it after the act took effect, the proceeds were held to be her separate estate.[91]

§ 328. Property Purchased at Judicial Sale.

Title to real estate acquired by the wife as purchaser at a foreclosure sale is her separate property, though her husband has a mortgage on the property junior to that foreclosure,[92] and even

82. Brevard v. Jones, 50 Ala. 221.

83. Martin v. Davis, 30 Pa. Super. 59.

84. Carle v. Heller, 18 Cal. 577, 123 P. 815.

85. Lanning v. Fogler, 16 Ohio Cir. Ct. 151, 8 O. C. D. 780.

86. Nissley v. Heisey, 78 Pa. 418; Rice v. Hoffman, 35 Md. 344; Terrell v. Maupin, 26 Ky. Law, 1203, 83 S. W. 591.

87. Isley v. Sellars, 153 N. C. 374, 69 S. E. 279.

88. Pike v. Baker, 53 Ill. 163.

89. Harris v. Harris, 31 Ky. Law, 930, 104 S. W. 387.

90. Skeen v. Scroggins, 20 Ky. Law, 333, 46 S. W. 9.

91. Gordon v. Gordon, 183 Mo. 294, 82 S. W. 11.

92. Potter v. Sachs, 45 App. Div. 454, 61 N. Y. S. 426.

though the land was mortgaged by her husband, where he has parted with his equity of redemption prior to the foreclosure.[93] Under the Washington Married Women's Act she may buy personalty at an execution sale and pledge the property to a bank as security for money loaned by it to pay for the property.[94]

§ 329. Property Held by Husband as Trustee for Wife.

The husband, while the marriage relation lasts, may hence become bound as trustee of his wife's statutory separate estate, not only by express appointment, but through implication, as under the equity rule.[95] In certain States the husband is specially designated by statute as his wife's trustee,[96] — a peculiarity of legislation which is attended with peculiar consequences as to the legal title of such property. And since the opportunities afforded him for mixing up her property with his are very great, in the present raw age of our married women's legislation, we often find her, upon surviving him, a general creditor against his estate, or the claimant of a trust fund, which cannot easily be identified.[97] A husband who is trustee under the Connecticut statute of his wife's personalty remains such though he so intermingles her property with his that its identity is lost.[98] During the husband's life the legal title to property held under such a trust remains in him, but at his death the trust determines and the legal title vests in the wife, giving her absolute title.[99] Unlike the wife's separate estate in equity, the separate property of a married woman under American statutes seems sometimes to retain its qualities after her death, so that her administrator often claims it against her surviving husband.[1] In the absence of a gift, a husband who, without his

93. Field v. Gooding, 106 Mass. 310; dist. Stetson v. O'Sullivan, 8 Allen (Mass.) 321.

94. Main v. Scholl, 20 Wash. 201, 54 P. 1125.

95. Walter v. Walter, 48 Mis. 140; Hall v. Creswell, 46 Ala. 460; Wood v. Wood, 83 N. Y. 575; Patten v. Patten, 75 Ill. 446.

96. Sherwood v. Sherwood, 32 Conn. 1; Marsh v. Marsh, 43 Ala. 677. The personal property of a married woman, which is by the statute vested in the husband as her trustee, is not in legal strictness her sole and separate estate, unless the husband transfers it to the wife or relinquishes his rights with regard to it. Williams v. King, 43 Conn. 569.

The husband may sue, "as trustee of his wife," to recover rents, income, and profits of his wife's statutory separate estate. Bentley v. Simmons, 51 Ala. 165.

97. Martin v. Curd, 1 Bush (Ky.), 327; Hause v. Gilger, 52 Pa. 412; Fowler v. Rice, 31 Ind. 258.

98. Conn. Trust & Safe-Deposit Co. v. Security Co., 67 Conn. 438, 35 A. 342.

99. Pettus v. Gault, 81 Conn. 415, 71 A. 509.

1. Leland v. Whitaker, 23 Mich. 324.

wife's consent, acquires her separate property, holds it as trustee for her.[2] Such an act has been said to be a fraud,[3] but generally it is regarded as a resulting trust.[4] The rule applies to a tax title bought by him against her property,[5] and to any interest acquired by him against her land which he holds *jure mariti*.[6] Where such a trust exists the wife may have an accounting.[7] The rule does not apply where title is conveyed to the spouses jointly and wife has paid but a portion of the consideration,[8] nor where she regards him as a debtor for the money so used.[9] A deed by a husband to his wife providing that neither could dispose of the property in the lifetime of the other, but that he should control and manage it, has been held to create a trust in favor of the wife's separate estate.[10] Where a wife procures her husband to sell her land and receive the proceeds with the intention that he shall immediately reinvest the proceeds in other land, the funds received from the sale do not *ipso facto* become his property and subject to his debts where all parties understood that the wife intended merely to make a substitution of lands.[11]

§ 330. Personal Property in General.

The wife's personal property is generally her separate estate,[12] even though bought on conditional sale,[13] especially where purchased by her,[14] and especially if it is for use in her business,[15] even though the bill of sale does not expressly limit the conveyance to her separate use,[16] and even though she permits the husband to

2. Barber v. Barber, 125 Ga. 226, 53 S. E. 1017; Bohannon v. Bohannon's Adm'x, 29 Ky. Law, 143, 92 S. W. 597; Winn v. Riley, 151 Mo. 61, 52 S. W. 27, 74 Am. St. R. 517; Smith v. Settle, 128 Mo. App. 379, 107 S. W. 430; Farmers' State Bank v. Keen (Okla.), 167 P. 207.

3. McKee v. Downing, 224 Mo. 115, 124 S. W. 7.

4. Heintz v. Heintz, 56 Tex. Civ. 403, 120 S. W. 941.

5. Simon v. Rood, 129 Mich. 345, 88 N. W. 879, 8 Det. Leg. No. 961.

6. Manning v. Kansas & T. Coal Co., 181 Mo. 359, 81 S. W. 140.

7. Stockwell v. Stockwell's Estate (Vt.), 105 A. 30 (trust to lumber, wife's land).

8. Serogin v. Dickison, (Ind.) 107 N. E. 86.

9. Kegerreis v. Lutz, 187 Pa. 252, 41 A. 26; Sparks v. Taylor, 99 Tex. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381.

10. Scruggs v. Mayberry, 135 Tenn. 586, 188 S. W. 207.

11. Aston v. Kindrick, 90 Va. 825, 20 S. E. 827.

12. O'Brien v. McSherry, 222 Mass. 147, 109 N. E. 904.

13. Patterson v. Patterson, 197 Miss. 112, 83 N. E. 364.

14. Reeves v. McNeill, 127 Ala. 175, 28 So. 623; Hoover v. Carver (Minn.), 160 N. W. 249.

15. First Nat. Bank v. Hirschkowitz, 46 Fla. 588, 35 So. 22; Weakley v. Woodard, 2 Tenn. Ch. 586.

16. Meguiar v. Wilson, 9 Ky. Law, 195.

use it,[17] and even if the husband signed the deferred payment notes, and even if the receipts were made out to him.[18] A married woman, transferring stock after marriage from her maiden to her married name, may retain it as her separate property.[19] Notes, bonds, or other evidences of debt, and incorporeal property,[20] animate as well an inanimate property, constitute separate estate,[21] as well as money, which of course is personal property,[22] including money derived from a mortgage of separate estate,[23] and debts.[24] And so may the equity obtained by having purchased land, paid part of the purchase-money, and taken a bond for title on payment in full.[25] Patents taken out in the wife's name for inventions by the husband are her separate property, where she in good faith employs him to devise and perfect the inventions, paying him a salary therefor.[26]

§ 331. Alimony Granted to Wife.

In Massachusetts, alimony granted to the wife is not her separate estate.[27] In Wisconsin it is held that a judgment granting a wife a divorce and a specified amount as a division of the property vests the amount in her as separate estate.[28]

§ 332. Damages Recovered by Wife.

Damages recovered by the wife are usually her separate estate.[29] This rule is established by statute in Louisiana.[30] Under that statute "personal injuries" is held to include injuries to her feelings, resulting from abuse, slander or libel.[31] A husband's

17. Campbell v. Fillmore, 13 Colo. App. 503, 58 P. 790 (horse and wagon).

18. Fox v. Tyrone, 104 Miss. 44, 61 So. 5.

19. Mason v. Fuller, 36 Conn. 160; Salisbury v. Spoford, 22 Ida. 393, 126 P. 400.

20. Clark v. Cullen, 44 S. W. 204; Case v. Espenschied, 169 Mo. 215, 69 S. W. 276, 92 Am. St. R. 633; Selden v. Bank, 69 Pa. 424.

21. Gans v. Williams 62 Ala. 41.

22. Mitchell v. Mitchell, 35 Miss. 114.

23. Sparks v. Taylor, 99 Tex. 411, 90 S. W. 485.

24. Hunt v. Eaton, 55 Mich. 362, 21 N. W. 429.

25. Prout v. Hoge, 57 Ala. 28.

26. Talcott v. Arnold, 55 N. J. Eq. 519, 37 A. 891.

27. Brown v. 222 Mass. 415, 111 N. E. 42.

28. Kistler v. Kistler, 141 Wis. 491, 124 N. W. 1028.

29. Duffee v. Boston Elevated Ry. Co., 191 Mass. 563, 77 N. E. 1036; Hahn v. Goings, 22 Tex. Civ. 576, 56 S. W. 217; Western Union Telegraph Co. v. Rowe, 44 Tex. Civ. 84, 98 S. W. 228.

30. Martin v. Derenbecker, 116 La. 495, 40 So. 849; Robertson v. Town of Jennings, 128 La. 795, 55 So. 375; Hey v. Prime, 197 Mass. 474, 84 N. E. 141.

31. Martin v. Derenbecker, 116 La. 495, 40 So. 849.

release by deed of all interest in land devised to his wife surrenders all claim to damages she may recover for injury to such land.[32]

Land damages under eminent domain proceedings may be her statutory separate property.[33]

§ 333. Proceeds of Insurance Policy on Life or Property of Husband.

Since the wife has an insurable interest in the life of the husband, proceeds of a policy on his life payable to her are her separate estate, if written after the passage of a Married Women's Act,[34] but such act cannot take away the husband's rights in a policy written before its enactment.[35] Money derived from an insurance policy on the life of a woman's first husband is part of her separate estate on her second marriage.[36]

Where a husband takes out a policy of life insurance in favor of his wife which has an endowment feature, she has on the issuance of the policy an interest in it which cannot be divested, and she is entitled to the proceeds even though at the expiration of the period of the endowment feature the husband is still alive.[37]

Where the statute provides that a judgment of divorce restores to the divorced parties the title to such property as either may have obtained from or through the other during marriage, this covers the wife's interest in a paid-up policy of insurance taken out for her benefit by the husband, where the husband paid the premiums, and she had no equitable interest in the policy.[38]

Where the parties are divorced before the time arrives for renewing the policy, and where by agreement with the insurer expressed in the form of a rider on the policy it is not in fact renewed, but merely continued for an additional term, and the wife continues to pay the premiums, the policy remains in force.[39]

Where a policy of beneficiary insurance is taken out by a husband for his wife, who afterwards obtains a divorce from him and continues to pay the premiums on the assurance of the officers of

32. Williford v. Phelan, 120 Tenn. 589, 113 S. W. 365.

33. Sharpless v. West Chester, 1 Grant, 257; State v. Hulick, 33 N. J. 307.

34. Hughey v. Worner, 124 Tenn. 725, 140 S. W. 1058, 37 L. R. A. (N. S.) 582; Judson v. Walker, 155 Mo. 166, 55 S. W. 1083.

35. Boehmer v. Kalk (Wis.), 144 N. W. 182, 49 L. R. A. (N. S.) 487.

36. Hughey v. Warner, 124 Tenn. 725, 140 S. W. 1058.

37. *Re* Desforges (La.), 64 So. 987, 52 L. R. A. (N. S.) 689.

38. Sea v. Conrad, 155 Ky. 51, 159 S. W. 622, 47 L. R. A. (N. S.) 1074.

39. Marquet v. Aetna Life Insurance Co. (Tenn.), 159 S. W. 733, L. R. A. 1915B 749.

the society that she will be the beneficiary of the policy in case of his death, she is entitled to them although the society had a by-law that policies were not payable to divorced wives as the society is estopped to set up that defence.[40]

Under the Tennessee statute empowering a wife to bind herself by her contracts made in her separate business as though *sole*, it was held that money due her on a policy of insurance on her husband's life might, after his death, be subjected to debts contracted as a trader, though contracted in his lifetime and while living with him.[41]

A woman has an insurable interest in the life of the husband with whom she is living as his wife under a formal but illegal marriage, but her interest is cut off by a decree annulling the marriage, and she can recover only the premiums she had paid on the policy.[42]

The wife has not an insurable interest in her husband's property unless she has some contract rights in it or is occupying it, but a widow has an insurable interest by virtue of her dower rights.[43]

Where a wife insured property on which the husband had given her a mortgage in fraud of creditors, it was held that the proceeds of the insurance were here separate property, even against such creditors.[44]

§ 334. Goods bought by Husband on Wife's Credit.

Goods bought by the husband on his wife's credit do not necessarily become part of her statutory separate estate apart from her authority or acquiescence.[45] And, on the other hand, where one furnishes goods, or contracts to render service, or supplies materials, giving credit to the wife alone, and dealing with her or her agent, the husband will not be liable out of his own property, even though he receive some substantial benefit.[46]

40. Snyder v. Supreme Ruler F. M. C., 122 Tenn. 248, 122 S. W. 981, 45 L. R. A. (N. S.) 209.

41. Sam Levy & Co. v. Davis, 125 Tenn. 342, 142 S. W. 1118.

42. Western & S. Life Ins. Co. v. Webster, 172 Ky. 444, 189 S. W. 429, L. R. A. 1917B 375.

43. Tyree v. Virginia Ins. Co., 55 W. Va. 63, 46 S. E. 706, 66 L. R. A. 657, 104 Am St. R. 983; Hawkins v. Southwestern Mutual Fire Insurance Co. (W. Va.), 93 S. E. 873, L. R. A. 1918A 789; Louden v. Waddle, 98 Pa. 243.

44. Murphy v. Nilles, 166 Ill. 99, 46 N. E. 772.

45. Wilder v. Abernethy, 54 Ala. 644; Roberts v. Kelley, 51 Vt. 97.

46. Hanneck v. Hartley, 7 Baxt. (Tenn.) 411.

§ 335. Trust Fund in Bastardy Proceedings.

A trust fund to secure the support of a prosecutrix in bastardy proceedings may be her separate estate under the Wisconsin Married Women's Act, though her control of it is subject to the conditions of the trust.[47]

§ 336. Wife's Earnings in General.

Indeed, the well-settled principle, both at law and equity, is that, in absence of a distinct gift from the husband, all the wife's earnings belong to him and not to herself.[48] But by recent statutes, enacted in many of the United States, married women are allowed the benefits of their own labor and services when performed, or even contracted to be performed, on their sole and separate account, free from all control or interference of a husband,[49] in the absence of an agreement to the contrary.[50] The English Married Women's Act of 1870, moreover, recognizes the wife's right to her separate earnings.[51] These statutes vary somewhat in their terms. Thus, by a Maryland statute, the amount she may so acquire is limited to one thousand dollars over and above her debts. Statutes sometimes discriminate so as to protect simply the wife's earnings derived from labor for another than her husband.[52] Under the Kentucky Married Women's Act her earnings under a contract made with her by him as agent of another were held her separate property as against his creditors, though such a contract was to be scrutinized somewhat closely by the court.[53] Under the Nebraska Married Women's Act, making the

47. Meyer v. Meyer, 123 Wis. 538, 102 N. W. 52.

48. Jones v. Reid, 12 W. Va. 350; Douglas v. Gausman, 68 Ill. 170; Kelly v. Drew, 12 Allen (Mass.), 107; Glaze v. Blake, 56 Ala. 379.

49. De Brauwere v. De Brauwere, 203 N. Y. 430, 96 N. E. 722, 38 L. R. A. (N. S.) 508; Martin v. Davis, 30 Pa. Super. 59; Whiteman v. Whiteman (Del.), 105 A. 787. See latest statutes of New York, Massachusetts, Rhode Island, Maryland, Kansas, and California. And see Cooper v. Alger, 51 N. H. 172; Fowle v. Tidd, 15 Gray (Mass.), 94; Tunks v. Grover, 57 Me. 586; Meriwether v. Smith, 44 Ga. 541; Berry v. Teel, 12 R. I. 267; Attebury v. Attebury, 8 Ore. 224; Larimer v. Kelley, 10 Kan. 298; Jassoy v. Delius, 65 Ill. 469; Whitney v. Beckwith, 31 Conn. 596.

50. Briggs v. Sanford, 219 Mass. 572, 107 N. E. 436.

51. Lovell v. Newton, L. R. 4 C. P. D. 7.

52. Hamilton v. Hamilton's Estate, 26 Ind. App. 114, 59 N. E. 344; Elliott v. Atkinson, 45 Ind. App. 290, 90 N. E. 779; Booth v. Backus (Ia.), 166 N. W. 695; Turner v. Davenport, 63 N. J. Eq. 288, 49 A. 463; Stevens v. Cunningham, 181 N. Y. 454, 74 N. E. 434; Snow v. Cable, 19 Hun (N. Y.), 280.

53. Clark v. Meyers, 24 Ky. Law, 380, 68 S. W. 853.

earnings of a wife from her services her separate property, the practice of osteopathy has been held within the meaning of the word "services."[54] Under the Nevada Married Women's Act an agreement of spouses that she shall have the proceeds of butter, eggs and poultry raised by her makes such earnings her separate estate.[55] A judgment for costs is not earnings by a wife within the meaning of that act.[56] Under the Pennsylvania Married Women's Act it was held that she might recover wages under a contract with her husband to act as cook in his business, outside family relations.[57] Under the Vermont Married Women's Act the wife's earnings from sources other than her separate business belong to the husband.[58] The New Mexico Married Women's Act simply exempts her earnings from his debts, but does not make them her separate estate.[59] The savings of a wife from allowances made by her husband and father for their families, and allowed by her husband to be retained as her own, have been held to be the wages of her own labor, within the Missouri Married Women's Act.[60] The California statute providing that the "accumulations" of a wife living apart from her husband shall be her separate estate has been held to apply to property of her husband put into her possession by him and acquired by her by adverse possession while living separate, the term "accumulation" including every means of acquirement of property.[61] Under the Married Women's Act in the same State she may contract with him for services to be rendered outside the family relation, and her earnings so acquired are her separate property.[62]

§ 337. Principles Applicable.

The presumptions here concerning the wife's title to her earnings seem to be much the same as in other separate property purporting to belong to her.[63] Questions of identity, too, in tracing an investment of earnings, are applicable, as in other cases of

54. Dr. S. S. Still College & Infirmary v. Morris, 93 Neb. 328, 140 N. W. 272.

55. Van Sickle v. Wells, Fargo & Co., 105 F. 16.

56. Adams v. Baker, 24 Nev. 375, 55 P. 362.

57. Nuding v. Ulrich, 169 Pa. 289, 32 Atl. 409.

58. Monahan v. Monahan, 77 Vt. 133, 59 A. 169, 70 L. R. A. 935.

59. Albright v. Albright, 21 N. M. 606, 157 P. 662.

60. Regal Realty & Investment Co. v. Gallagher (Mo.), 188 S. W. 151.

61. Union Oil Co. v. Stewart, 158 Cal. 149, 110 P. 313.

62. Moore v. Crandall, 205 F. 689, 124 C. C. A. 11.

63. Raybold v. Raybold, 20 Pa. 308; Elliott v. Bently, 17 Wis. 591; Laing v. Cunningham, 17 Ia. 510.

separate property. There is, however, apparently less favor shown by our courts to the legislative grant of separate earnings, than to that of acquisitions to a wife's separate use from other sources; and still less, as we shall soon see, to statutes extending the wife's right of acquiring earnings to a permission to embark in business on her own account. The presumption is said to be, that a wife's services, rendered even to her own mother on a basis of compensation, were given on the husband's behalf.[64] And where the proceeds of her earnings have been so mixed up with her husband's property as not to be easily distinguishable, the disposition is to regard the whole as belonging to the husband.[65] The idea, moreover, is not favored, of permitting a wife to forsake the matrimonial domicile, or neglect her household duties, without her husband's consent, for the purpose of acquiring earnings for her separate use, especially if her husband be still legally bound to support her by his own labor.[66] It may be added that, in general, statutes which authorize married women to hold property acquired by gift, grant, or purchase, from any person other than the husband, do not carry the wife's earnings by implication.[67]

But where a statute provides that property acquired by a married woman by her personal services shall be her separate property, and exempt from liability for her husband's debts, money due for her services is protected in the same manner as if the money had been received.[68]

§ 338. In Separate Business.

A wife's profits in her separate business have been held to be her separate estate, though she employs her insolvent husband in such business as her agent, there being no evidence that he had capital invested in it, or that it was a device to defraud his creditors.[69] Where a wife was engaged with her husband in a theatrical performance her compensation was held to be her separate labor, within the meaning of the Missouri Married Women's Act, and therefore her separate estate.[70] Under the Washington Married

64. Morgan v. Bolles, 36 Conn. 175.

65. Quidort v. Pergaux, 3 C. E. Green (N. J.), 472; McCluskey v. Provident Institution, 103 Mass. 300; Kelly v. Drew, 12 Allen (Mass.), 107.

66. Douglas v. Gausman, 68 Ill. 170; Mitchell v. Seitz, 94 U. S. 580.

67. Rider v. Hulse, 33 Barb. (N. Y.) 264; Hoyt v. White, 46 N. H. 45; Merrill v. Smith, 37 Me. 394; Grover v. Alcott, 11 Mich. 470; Baxter v. Prickett, 27 Ind. 490; Bear v. Hays, 36 Ill. 280. But see Duncan v. Cashin, L. R. 10 C. P. 554.

68. Whitney v. Beckwith, 31 Conn. 596.

69. Taylor v. Wands, 55 N. J. Eq. 491, 37 A. 315, 62 Am. St. R. 818.

70. Macks v. Drew, 86 Mo. App. 224.

Women's Act, making the property of a wife acquired by her labor her separate estate, the property affected is not limited to earnings by manual labor, but includes the profits of a mining claim which she worked with another person.[71]

§ 339. In Keeping Boarders.

A wife cannot recover for board furnished to one living in the family of which her husband is the head, in the absence of a contract made with her therefor, with his consent.[72] If he consents she may recover for it.[73] Under the Minnesota Married Women's Act it was held that a contract by the wife of a sheriff with her husband to board the county prisoners for the statutory compensation was valid, and that the money earned thereby was her separate property.[74] Money earned keeping boarders in a house purchased by the wife on her own account was held to be the wages of her labor, within the Missouri Married Women's Act making such wages her separate estate.[75] Under the New Jersey Married Women's Act money earned by the wife keeping boarders is not her separate estate unless she conducts a business independently of her husband.[76] In Pennsylvania such earnings are not subject to her husband's debts.[77]

§ 340. Property Purchased with Earnings.

Property purchased with the earnings of a wife is her separate estate in some States,[78] as well as, in Iowa, property purchased with her earnings keeping a boarding house with her husband's consent.[79] The character of such a separate estate is not affected by the fact that the husband contributes some labor to property so

71. Elliott v. Hawley, 34 Wash. 585, 76 P. 93, 101 Am. St. R. 1015.

72. Kinert v. Kapp, 50 Pa. Super. 222; Brown v. Walker, 81 Ill. App. 396; *In re* Shaw's Estate, 201 Mich, 574, 167 N. W. 885.

73. Morrison v. Nipple, 39 Pa. Super. 184; *In re* Lewis' Estate, 156 Pa. 337, 27 Atl. 35; Arthur Lehman & Co. v. Slat, 208 Ill. App. 39; Perry v. Blumenthal, 119 App. Div. 663, 104 N. Y. S. 127.

74. Bodkin v. Kerr, 97 Minn. 301, 107 N. W. 137.

75. Furth v. March, 101 Mo. App. 329, 74 S. W. 147.

76. Mayer v. Kane, 69 N. J. Eq. 733, 61 A. 374.

77. Martin v. Davis, 30 Pa. Super, 59.

78. Wallace v. Mason, 100 Ky. 560, 18 Ky. Law, 935, 38 S. W. 887; Pitman v. Pitman, 23 Ky. Law, 939, 64 S. W. 514; Dobbins v. Dexter Horton & Co., 62 Wash. 423, 113 P. 1088; Ingals v. Alexander, 138 Mo. 358, 39 S. W. 801; Carson v. Carson, 204 Pa. 466, 54 A. 348.

79. Ehlers v. Blumer, 129 Ia. 168, 105 N. W. 406; Green v. Forney, 134 Ia. 316, 111 N. W. 976.

purchased.[80] It was held otherwise where the husband stayed at home and did the housework while the wife worked away from home.[81] In West Virginia it was held that a wife who invests her earnings from sewing and washing in real estate with her husband's consent, taking a deed to herself and improving the property, does not take it as separate estate, as against his creditors.[82] In Utah it is held that the joint earnings of spouses, he by engaging in business outside and she by housework, when invested in real estate, are the property of the husband.[83] Under the California Married Women's Act property purchased by a wife with her earnings in a business carried on with her husband's consent are her separate property.[84] Under the Missouri statute real and personal property acquired by a wife by means of her separate labor is her separate property and is not subject to her husband's debts.[85]

§ 341. Effect of Waiver of Marital Rights by Husband.

Even on general principles of equity, the husband may, in this country, as in England, create in his wife a separate estate in the proceeds of her own toil; the validity of such a gift, as against creditors, being subject to the same rules which apply to other voluntary conveyances;[86] that is to say, he cannot defeat his existing creditors, but, as to creditors subsequent, may bestow, unless the gift is tainted with a fraudulent design.[87] Such a gift on his part, once made, the husband cannot annul, by a subsequent investment of the proceeds in his own name.[88] So, where a married woman by her industry made money as a basket-maker, thus supplying her family with necessaries; and was in the habit of lending out the surplus money, and collecting it when due, with her husband's knowledge; even a court of law has liberally stretched

80. King v. Wells, 106 Ia. 649, 77 N. W. 338.

81. Scruggs v. Kansas City, Ft. S. & M. R. Co., 69 Mo. App. 298.

82. Bailey v. Gardner, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. R. 847.

83. Anderson v. Cercone (Utah), 180 P. 586.

84. Larson v. Larson, 15 Cal. App. 531, 115 P. 340.

85. Crump v. Walkup, 246 Mo. 266, 151 S. W. 709.

86. Pinkston v. McLemore, 31 Ala. 308; Neufville v. Thompson, 3 Edw. Ch. (N. Y.) 92; Barron v. Barron, 24 Vt. 375; Richardson v. Merrill, 32 Vt. 27; Smart v. Comstock, 24 Barb. (N. Y.), 411; Jones v. Reid, 12 W. Va. 350; Glaze v. Blake, 56 Ala. 379; Peterson v. Mulford, 36 N. J. L. 481. In New York, the wife's right to sue even a firm to which her husband belongs for her labor and service is maintained, under the statutes. Adams v. Curtis, 4 Lans. (N. Y.) 164.

87. See Postnuptal Settlements, where the variations of these rules are noted.

88. Rivers v. Carleton, 50 Ala. 40.

its authority to protect her acts, on the ground of an implied agency from her husband.[89] And with the assent of all concerned, the wife has been allowed to recover compensation for her special services in taking special care of the husband's own father, who lives in the family.[90] In Michigan it has been held that a consent by the husband that his wife might keep boarders if she wished and have whatever she earned covered only earnings from services, and not board and lodging.[91] Under the Washington Married Women's Act, making the earnings of a wife while living with her husband community property, a mere general agreement of the spouses shall be her separate estate is insufficient to make them such, where the agreement has no reference to any particular business or employment.[92]

§ 342. Effect of Husband's Desertion.

There are statutes in England and parts of this country which give to the wife the fruits of her lawful industry, where she is deserted by her husband, or even where he grossly neglects to provide for the support of his family; and here the husband's consent to her sole employment being no element in the case, she is fairly entitled to hold the property thus acquired against all but her own creditors.[93] Even were the statute equivocally expressed, presumptions of the husband's title might properly change; for besides the absence of dissent on his part, or the possible inference of an agency, we are to regard the fact that the husband is at fault, while the wife, on her part, so far from neglecting matrimonial duties or forsaking the common abode, does rather what necessity compels her to do, and therefore ought fairly to have legal protection while she remains a wife. The husband's mere absence from home, his conduct not amounting to desertion, does not, of course, afford her, of itself, such a separate privilege, unless the statute is explicit.[94]

§ 343. Actions to Recover Earnings.

The husband, under some of the late enactments providing for the wife's separate earnings, is debarred from suing with or with-

89. White v. Oeland, 12 Rich. (S. C.) 308.

90. Mason v. Dunbar, 43 Mich. 407.

91. Brackett's Estate v. Burnham's Estate (Mich.), 165 N. W. 665.

92. Sherlock v. Denny, 28 Wash. 170, 68 P. 452.

93. Mason v. Mitchell, 3 Hurl. & Colt. 538; Black v. Tricker, 59 Pa. 13; Berry v. Teel, 12 R. I. 267; Pursell v. Fry, 19 Hun (N. Y.), 595. And see *post*, Separation, § 1060.

94. See Campbell v. Bowles, 30 Gratt. (Va.) 652.

out his wife.[95] Yet, as the wife's right depends upon her intention to exercise it, the rule is still that the husband may maintain his common-law action in his own name for his wife's earnings, if they live together and are mutually engaged in providing for the support of their family, and there is nothing to show an intention on the wife's part to separate her earnings from those of her husband.[96]

§ 344. Presumptions; As Between Spouses in General.

We must here bear in mind that the Married Women's Acts have reference, not to the wife's property in the mass, but to property suitably acquired by her in certain instances by way of exception to the old rule of coverture. Broad, therefore, as they may often appear, these statutes are considerably restrained by judicial construction and the application of presumptions. In some States the presumption is still, in absence of suitable words or circumstances manifesting an intent on the part of those interested to claim the benefits of the statute, that a married woman's property belongs to her husband as at the common law; and his possession of the property, undisputed and unexplained, or even a visible possession thereof in connection with his wife, gives him the marital dominion.[97] In Pennsylvania the courts were at first disposed to rule otherwise, but they, too, finally settled upon the same presumption.[98] On the other hand, the New York courts approve the new system to its widest extent; and it would appear that married women in that State are well-nigh emancipated altogether from marital restraints, so far as concerns their property, while the husband's own rights therein are exceedingly precarious.[99] To ascertain as a fact whether the ownership be in wife or

95. Cooper v. Alger, 51 N. H. 172; Tunks v. Grover, 57 Me. 586.

96. Birkbeck v. Ackroyd, 74 N. Y. 356.

97. Eldridge v. Preble, 34 Me. 148; Smith v. Henry, 35 Miss. 369; Alverson v. Jones, 10 Cal. 9; Farrell v. Patterson, 43 Ill. 52; Reeves v. Webster, 71 Ill. 307; Stanton v. Kirsch, 6 Wis. 338; Smith v. Hewett, 13 Ia. 94: *Contra*, Johnson v. Runyan, 21 Ind. 115; Stewart v. Ball, 33 Mo. 154. While a husband and wife both live on her land held as general estate, the possession of the products is presumptively his. Moreland v. Myall, 14 Bush (Ky.), 474. But cf. Hill v. Chambers, 30 Mich. 422.

98. Cf. Gamber v. Gamber, 18 Pa. 363; Winter v. Walter, 37 Pa. 157; Bear's Adm'r v. Bear, 33 Pa. 525; Gault v. Saffin, 44 Pa. 307; with Goodyear v. Rumbaugh, 13 Pa. 480. And see Curry v. Bott, 53 Pa. 400. Under the law of Tennessee, direct gifts to the wife enure to the husband, unless the separate estate intention is clearly expressed. Ewing v. Helm, 2 Tenn. Ch. 368.

99. Peters v. Fowler, 41 Barb. (N.

husband, evidence of how the matter was understood and treated between the spouses may be quite essential,[1] for a sort of joint possession on their part is often the practical situation of the case.

As the rule is usually expounded, presumptions bear heavily against the wife in contests of title, but more especially where the rights of a husband's creditors are affected by the decision. "Between strangers," it is observed in a Pennsylvania case, "open, visible, notorious, and exclusive possession is the test of title in all cases where the rights of creditors are involved. But this is not possible with reference to the personal goods of a married woman. She cannot have or use her property exclusively, unless she lives apart from her husband. It was not the intention of the legislature to compel a separation in order to save the wife's rights; but if the rule of exclusive possession were adopted, the statute would be inoperative as long as they live together. But this shows how necessary it is to demand the clearest proof of the wife's original right." [2]

In Missouri property acquired by a wife during coverture was formerly presumed to have been paid for by the husband,[3] but the presumption was of little weight,[4] and has been abolished by statute.[5] In other States there is no such presumption,[6] especially where a debt is not in existence at the time when land is conveyed to the debtor's wife.[7] There is now no presumption that chattels found in the joint possession of spouses belong to the husband.[8] A spouse's possession of notes payable to him or her is usually sufficient to raise a presumption of separate ownership,[9] as is the fact that a grocery store was conducted and the bank account kept in the name of the spouse claiming it as separate estate,[10] and the

Y.) 467; Knapp v. Smith, 27 N. Y. 277.

1. Hill v. Chambers, 30 Mich. 422. In this State the obvious inclination is to determine, not by presumptions or inferences, but upon the facts. *Ib.*

2. Gamber v. Gamber, 18 Pa. 363. And see Kenney v. Good, 21 Pa. 349.

3. Smelser v. Meier (Mo.), 196 S. W. 22; Gruner v. Scholz, 154 Mo. 415, 55 S. W. 441; Halstead v. Mustion, 166 Mo. 488, 66 S. W. 238; Ryan v. Bradbury, 89 Mo. App. 665; Clark v. Clark, 21 Tex Civ. 371, 51 S. W. 337; Harr v. Shaffer, 52 W. Va. 207, 43 S. E. 89.

4. Regal Realty & Investment Co. v. Gallagher (Mo.), 188 S. W. 151.

5. Aeby v. Aeby (Mo.), 192 S. W. 97.

6. Farmers' State Bank v. Keen (Okla.), 167 P. 207; Southern States Phosphate & Fertilizer Co. v. Weekley, 107 S. C. 510, 93 S. E. 190.

7. Jones v. Nolen, 133 Ala. 567, 31 So. 945.

8. Booknau v. Clark, 58 Neb. 610, 79 N. W. 159.

9. Bibber-White Co. v. White River Valley Electric R. Co., 175 F. 470.

10. Johnson v. Johnson's Adm'x, 134 Ky. 263, 120 S. W. 303.

fact that a bank account stands in the name of such spouse.[11] As between the parties, hay raised by the husband on the wife's land *prima facie* belongs to her separate estate.[12] The wife's earnings acquired in giving board in the household are presumed to belong to the husband.[13] In Michigan it is held that a check given for realty conveyed by spouses and payable to her is presumed to be her separate estate.[14]

§ 345. As to Property Standing in Name of Husband.

Land or other property bought by the husband with his wife's money, but in his own name, and without any agreement that the purchase shall be to her separate use, or the title taken in her name, will not, as a rule, be treated as her separate property.[15] If certain property be purchased in part from her own funds, and in part from her husband's, whatever the form of the investment, her title extends only to the amount of her investment.[16]

On the other hand, where the husband has kept his wife's funds distinct from his, though changing investments from time to time, and preserved the ear-marks so to speak, her right to claim the property from his estate, upon surviving him, has been strongly asserted.[17] Where by the form of his transaction, as in making out a bill of sale, the title evidently stands in her, her legal right must be respected, even though some partial consideration passed from him.[18] And where there has been no waiver or fault on the wife's part, her title to her statutory separate property will in every instance be protected to the full extent of her interest.[19] The doctrine of merger, operating to the wife's disadvantage because of her husband's acts, is not favored by our legislation.[20]

11. Madgeburg v. Dry Dock Savings Institution, 147 App. Div. 652, 132 N. Y. S. 655.

12. Webster v. Sherman, 33 Mont. 448, 84 P. 878; Foreman v. Citizen's State Bank, 128 Ia. 661, 105 N. W. 163; Sharp. v. Wood, 21 Ky. Law, 189, 51 S. W. 15.

13. Cory v. Cook, 24 R. I. 421, 53 A. 315.

14. Hall v. Wortman, 123 Mich. 304, 82 N. W. 50, 6 Det. Leg. N. 1073.

15. Kidwell v. Kirkpatriek, 70 Mo. 214.

16. Hopkins v. Carey, 23 Miss. 54; Worth v. York, 13 Ired. (N. C.) 206; Haines v. Haines, 54 Ill. 74. Under Maine statutes, property conveyed to a married woman, but wholly or partly paid for by her husband, may be reached by the husband's creditors to the extent of his interest. Call v. Perkins, 65 Me. 439.

17. Fowler v. Riee, 31 Ind. 538; Richardson v. Merrill, 32 Vt. 27.

18. McCowan v. Donaldson, 128 Mass. 169.

19. Barron v. Barron, 24 Vt. 375. See Holthaus v. Farris, 24 Kan. 784.

20. Clark v. Tennison, 33 Md. 85. And see generally, Hutchins v. Colby, 43 N. H. 159; Kirkpatrick v. Bauford, 21 Ark. 268; Teller v. Bishop, 8 Minn. 226; Leland v. Whitaker, 23 Mich.

So discordant is our married women's legislation, however, that in New York, where presumptions lean strongly to the wife's side, it is held that if household furniture belonging to a wife, and acquired from her father, is, with her consent, taken to the common dwelling, mingled with the husband's furniture, and used therewith for the common household purposes, it does not thereby become her husband's property, but the title remains in her.[21] This doctrine, however, is applied as between the wife or her assignee, and the husband himself.[22] A wife may have an equitable right to pursue her funds invested by her husband, while, until this right is asserted, the husband retains a legal title of which a *bona fide* transferee for value may perhaps avail himself by way of a countervailing equity.[23]

Even promissory notes taken in the husband's name are open to explanation; and evidence *aliunde* may show that they belonged to the wife's separate property.[24] Subject, perhaps, to equities of *bona fide* third parties for consideration, without notice of the trust in strong instances, the wife's rights are protected in equity against her husband's misdealings with her fund.[25] She may avail herself of the equity doctrine of resulting trusts, where the title to her invested property has been taken, without her concurrence or default, in his name.[26] Reduction into possession is not favored as formerly, to exclude her rights in her personal property.[27] Under the Massachusetts Married Women's Act it is now held that the money of the wife does not become that of her husband merely by receiving and possessing it as her agent.[28]

§ 346. As to Property Standing in the Name of Third Persons.

A negotiable instrument executed by or taken in the name of

324; Marsh v. Marsh, 43 Ala. 677; Fowler v. Rice, 31 Ind. 258; Pike v. Beker, 53 Ill. 163; Vreeland v. Vreeland 1 C. E. Green (N. J.), 512; Dayton v. Fisher, 34 Ind. 356. The fact that the husband acts as the wife's agent in buying and selling, and investing her money, does not, against her consent, transfer her right of property to him. Holcomb v. Meadville Savings Bank, 92 Pa. 338.

21. Fitch v. Rathbun, 61 N. Y. 579.

22. *Ib.*

23. See Holly v. Flournoy, 54 Ala. 99.

24. Buck v. Gilson, 37 Vt. 653; Conrad v. Shomo, 44 Pa. 193; Baker v. Gregory, 28 Ala. 544; Fowler v. Rice, 31 Ind. 258.

25. Moulton v. Haley, 57 N. H. 184.

26. Postnuptal Settlements. Statutes sometimes extend this equitable right of the wife's. Brooks v. Shelton, 54 Miss. 353; Frielander v. Johnson, 2 Woods (U. S.), 675.

27. Schmidt v. Holtz, 44 Ia. 446; Sumner v. McCray, 60 Mo. 493.

28. Duggan v. Wright, 157 Mass. 228, 32 N. E. 159.

a trustee of a married woman will be regarded in equity as manifesting the trust for her benefit.[29]

§ 347. As Against Husband's Creditors.

The greatest source of perplexity, in truth, in these Married Women's Acts, arises out of the effort at elimination of the husband's control in the wife's statutory property; for here the safeguards usual in equitable trusts are wanting. A married woman, in order to preserve her separate property, should keep it distinct from that of her husband; and especially does the rule hold true in States where presumptions are against her exclusive right. Thus it is held that if a married woman willingly allows what she might have retained as her separate property to be so mixed into a common mass with that of the husband as to be undistinguishable, or acquiesces in leaving it so, it must, as to her husband's creditors, be treated as relinquished to him.[30] Thus, if the husband should invest the wife's legacy money, or other fund belonging to her separately by right, upon an understanding with her that the new investment shall stand in her name, his breach of trust and investment in his own name, though it be of land, will confer upon him no right to her prejudice, available to himself or to his creditors and representatives.[31] As to *bona fide* third parties for value without notice, the assertion of a wife's title as against those who have given credit to a husband in possession requires the nicest discrimination on the part of the court. Property bought by a husband with money belonging to his wife will in general be presumed to be his own until the contrary is shown,[32] and even property bought by the husband with money from the wife, which is placed in his hands for such investment in his name and for his benefit, is liable to seizure for his debts, notwithstanding she borrowed the money.[33] His possession and control of the property must, to avail himself or his creditors, be a proprietor's control, and not in any trust capacity for her sole benefit.[34] And if a husband holds a legal title to land in trust for his wife or family, his sale and transfer of the proceeds to other land, taken

29. Lewis v. Harris, 4 Met. (Ky.) 353.

30. Glover v. Alcott, 11 Mich. 470; Gross v. Reddy, 45 Pa. 406; Kelly v. Drew, 12 Allen (Mass.), 107; Chambers v. Richardson, 57 Ala. 85; Humes v. Scruggs, 94 U. S. 22.

31. Van Dorn v. Leeper, 95 Ill. 35; Davis v. Davis, 43 Ind. 561; Hutchins v. Colby, 43 N. H. 159.

32. Moye v. Waters, 51 Ga. 13.

33. Nelson v. Smith, 64 Ill. 394.

34. Nicholas v. Higby, 35 Ia. 401. *Aliter* in Kentucky. Penn v. Young, 10 Bush (Ky.), 626.

without due consent in his own name, will not enable his general creditors to seize and appropriate it for his debts.[35]

So far is the wife's right to acquire by purchase from third parties favored under our Married Women's Acts, that a conveyance of land for value to a wife has been upheld against her husband's creditors, even though the person who conveyed it had bought it of her husband, so long as he bought *bona fide* and for valuable consideration,[36] nor can a creditor having notice that property standing in the debtor's name is really that of his wife subject the property to his debt.[37] Such is the temptation to making colorable transfers to one's wife in fraud of creditors, that in controversies over title, where the legislation discourages acquisitions from the husband, the wife, as against the husband and his creditors and representatives, has been held quite strictly to her proofs of acquisition from a person other than her husband,[38] unless, at all events, there are writings which run so as suitably to give her the legal title instead.[39]

§ 348. Statutory Presumptions.

In some States by statute there is a presumption that property standing in the name of either spouse is the separate estate of such spouse.[40] Under the California statute a conveyance to spouses jointly is presumed to vest an undivided half in each spouse as separate estate.[41] Under the New Mexico statute property acquired by the wife under the Federal Desert Land Act, for which she has received a patent, will be conclusively presumed in favor of the incumbrancer in good faith to be her separate property.[42] Under a similar California statute the expression, "incumbrancers in good faith and for a valuable consideration," is defined as meaning persons who have taken or purchased a lien or the means of obtaining one, and who have parted with something of value in

35. Shippen's Appeal, 80 Pa. 391; Porter v. Caspar, 54 Miss. 359; McConnell v. Martin, 52 Ind. 434.

36. Evans v. Nealis, 69 Ind. 148.

37. Hayward v. Cain, 110 Mass. 273; Reaves v. Meredeth, 120 Ga. 727, 48 S. E. 199, 123 Ga. 444, 51 S. E. 391.

38. See Reeves v. Webster, 71 Ill. 307; Johnson v. Johnson, 72 Ill. 489.

39. Lyon v. Green Bay R., 42 Wis. 548.

40. Emerson-Brantingham Implement Co. v. Brothers (Tex.), 194 S. W. 608; Alferitz v. Arrivillaga, 143 Cal. 646, 77 P. 657; Peiser v. Bradbury, 138 Cal. 570, 72 P. 165; Cohn v. Smith (Cal.), 174 P. 682; Hale v. Kennedy (Cal.), 183 P. 723; Stockwell v. Stockwell's Estate (Vt.), 105 A. 30.

41. Gilmour v. North Pasadena Land & Water Co. (Cal.), 171 P. 1066.

42. Lukins v. Traylor (N. M.), 160 P. 349; State Nat. Bank v. Traylor (N. M.), 159 P. 1006.

consideration thereof, the payment of money or parting with something of value being essential.[43]

§ 349. Burden of Proof as Against Creditors of Husband.

As against the creditors of the husband, the burden is on the wife, if the property sought to be subjected to the debt is claimed to be her separate estate, to prove the fact[44] by clear,[45] convincing,[46] strong and unequivocal evidence,[47] sufficient to repel all adverse presumptions, but she is not required to show the fact beyond a reasonable doubt.[48] The rule applies whether the apparent title is in the claimant,[49] or in the joint names of the spouses.[50]

§ 350. Questions for Jury as Against Creditors of Husband.

As between creditors of a spouse and the other spouse who claims property seized by the creditor as separate estate, it is the province of the jury to determine the credibility of witnesses,[51] and the question whether the property belong to the debtor or not,[52] even where the property claimed by the other spouse is produce

43. Fulkerson v. Stiles, 156 Cal. 703, 105 P. 966.

44. Davis v. Green, 122 Cal. 364, 55 Pac. 9; Jolly v. McCoy (Cal.), 172 P. 618; Knight v. Kaufman, 105 La. 35, 29 So. 711; Wayne County & Home Sav. Bank v. Smith (Mich.), 160 N. W. 472; Fleming v. Dalton, 201 Mich. 294, 167 N. W. 893; Bartlett v. Smith, 1 Neb. (Unof.) 328, 95 N. W. 661; Heiges v. Pifer, 224 Pa. 628, 73 A. 950; Hunter v. Baxter, 210 Pa. 72, 59 A. 429; Eavenson v. Pownall, 182 Pa. 587, 38 A. 470; Quigley v. Swank, 11 Pa. Super. 602; Ferguson v. Dodd (Tex.), 183 S. W. 391; Erfurth v. Erfurth, 90 Wash. 521, 156 P. 523; Patterson v. Bowes, 78 Wash. 476, 139 P. 225; Eberhardt v. Wahl's Adm'r, 124 Ky. 223, 98 S. W. 994, 30 Ky. Law, 412; Richards v. Parsons, 7 Ohio App. 422.

45. Bennett v. Bennett, 83 Ore. 326, 163 P. 814; *In re* Rhinesmith's Case, 25 Pa. Super. 300.

46. Kanawha Valley Bank v. Atkinson, 32 W. Va. 203, 9 S. E. 175, 25 Am. St. R. 806; Oldershaw v. Matteson & Williamson Mfg. Co., 19 Cal. App. 179, 125 P. 263.

47. Pederson v. Nixon (Ill.), 120 N. E. 323.

48. Hilton v. Liebig Mfg. Co., 59 Pa. Super. 460.

49. Plath v. Mullins, 87 Wash. 403, 151 P. 811; Keith v. Aubrey (Tex.), 127 S. W. 278.

50. Hord v. Owens, 20 Tex. Civ. 21, 48 S. W. 200; Sharp v. Fitzhugh, 75 Ark. 562, 88 S. W. 929.

51. Goppelt v. Burgess, 132 Mich. 28, 92 N. W. 497, 9 Det. Leg. N. 491.

52. Patterson v. Gilliland (Ala.), 82 So. 493; Goldrick v. Lacombe (Mass.), 121 N. E. 67; Parsons v. Kimmel (Mich.), 173 N. W. 539; Caldwell v. Sisson, 150 Mo. App. 547, 131 S. W. 140; Bromley v. Miles, 51 App. Div. 95, 64 N. Y. S. 353; Heiges v. Pifer, 224 Pa. 628, 73 A. 950; Hawley v. Bond, 20 S. D. 215, 105 N. W. 464; Amend v. Jahns (Tex.), 184 S. W. 729; Chalk v. Daggett (Tex.), 204 S. W. 1057; Gambrel v. Hines, 170 Mo. App. 560, 167 S. W. 119; Kroll v. Moritz, 112 Minn. 270, 127 N. W. 1120.

raised on a farm which the debtor spouse conveyed in fraud of creditors.[53]

§ 351. Effect of Estoppel in General.

Where the statute does not permit the wife to bind herself by a contract, she cannot be bound by an estoppel except for fraud.[54] To raise an estoppel against a wife by reason of fraud, she must actively participate in it or reap its fruits.[55] The doctrine of estoppel may be invoked against a wife where public rights are involved.[56] Where she has power to contract, a wife may bind herself by an estoppel.[57] Under Married Women's Acts a wife is estopped by averments in her pleadings as are other persons.[58] She is not estopped to question the title of her husband's landlord,[59] nor by an agreement authorizing commissioners in partition to make a sale.[60] She may be estopped to deny the validity of a contract under which she has received benefits without offering to return the amounts received.[61] Under the Missouri Married

53. Hoover v. Carver (Minn.), 160 N. W. 249.

54. City of Indianapolis v. Patterson, 112 Ind. 344, 14 N. E. 551; Sebrell v. Hughes, 72 Ind. 186; Syck v. Hellier, 140 Ky. 388, 131 S. W. 30; Lewis v. Barnes, 272 Mo. 377, 199 S. W. 212; Sherwin v. Sternberg (N. J.), 74 A. 510; Parker v. Schrimsher (Tex.), 172 S. W. 165.

55. Pool v. Stephenson, 146 Ky. 784, 143 S. W. 419; Floyd v. Mackey, 112 Ky. 646, 23 Ky. Law, 2030, 66 S. W. 518; Henry v. Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. R. 580; Rich v. Morisey, 149 N. C. 37, 47, 62 S. E. 762; Stewart v. Conrad's Adm'r, 100 Va. 128, 4 Va. Sup. Ct. R. 49, 4 S. E. 624; Yock v. Mann, 57 W. Va. 187, 49 S. E. 1019.

56. Town of Johnson City v. Wolfe, 103 Tenn. 227, 52 S. W. 991.

57. Lewis v. Stanley, 148 Ind. 351, 45 N. E. 693; Morgan v. Hoadley, 156 Ind. 320, 59 N. E. 935; Brusha v. Board of Education of Oklahoma City, 41 Okla. 595, 139 P. 298; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. R. 891, 38 L. R. A. 694; Hart v. Church, 126 Cal. 471, 58 P. 910; Wilkins v. Lewis (Fla.), 82 Sp. 762; Woods v. Soucy, 184 Ill. 568, 56 N. E. 1015; Taylor v. Griner, 55 Ind. App. 617, 104 N. E. 607; Townsend v. Woodworth (Ia.), 169 N. W. 752; Holloway v. Louisville, St. L. & T. Ry. Co., 92 Ky. 244, 13 Ky. Law, 481, 17 S. W. 572; Bull v. Sevier, 88 Ky. 515, 11 Ky. Law, 32, 11 S. W. 506; Overcast v. Lawrence, 141 Ky. 25, 131 S. W. 1029; Smith v. Sisters of Good Shepherd of Louisville, 29 Ky. Law, 912, 96 S. W. 549; Roberson v. Goldsmith, 130 La. 255, 57 So. 908; Rauch v. Metz (Mo.), 212 S. W. 357; Stone v. Gilliam Exch. Bank, 81 Mo. App. 9; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; Monarch Gas Co. v. Roy (W. Va.), 95 S. E. 789; Stapleton v. Poynter, 111 Ky. 264, 23 Ky. Law, 76, 62 S. W. 730, 98 Am. St. R. 411, 53 L. R. A. 784.

58. Brooks v. Laurent, 98 F. 647, 39 C. C. A. 201.

59. Shew v. Call, 119 N. C. 450, 26 S. E. 33, 56 Am. St. R. 678.

60. Vanderbilt v. Brown, 128 N. C. 498, 39 S. E. 36.

61. Crosby v. Waters, 28 Pa. Super.

Women's Act a wife is not completely subjected to the doctrine of estoppel *in pais.*[62] That statute does not permit her to bind herself by an estoppel as against her husband.[63] The Indiana statute providing that a wife shall be bound by an estoppel *in pais* like other persons is prospective.[64] Under that statute she is bound by representations as to the contract she proposes to make,[65] and by her representation that money secured on a loan was for her sole use, when it was in reality for the use of her husband,[66] or that it was for their joint use when it was for his sole use,[67] or that she was a partner with him, and that the loan was for the use of the partnership,[68] as well as by her silence while her husband represented himself the owner of property held by the entirety.[69]

§ 352. To Claim Property as Separate Estate in General.

As a natural result of the first modern innovations upon the coverture theory, it may be observed that estoppel does not work against a married woman so readily as against persons *sui juris.* A married woman cannot be debarred of rights of separate property by estoppel *in pais,*[70] except for fraud, or conduct equivalent thereto,[71] or when her assertion of title would work a fraud.[72] Parties may be misled to their injury by her statements and yet have no redress.[73] After a conditional judgment in suitable fore-

559; Edwards v. Stacey, 113 Tenn. 257, 82 S. W. 470, 106 Am. St. R. 831.

62. Blake v. Meadows, 225 Mo. 1, 123 S. W. 868.

63. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 S. W. 754.

64. Wilhite v. Hamrick, 92 Ind. 594; Applegate v. Conner, 93 Ind. 185.

65. Ward v. Berkshire Life Ins. Co., 108 Ind. 301, 9 N. E. 361.

66. Till v. Collier, 27 Ind. App. 333, 61 N. E. 203.

67. Lavene v. Jarnecke, 28 Ind. App. 221, 62 N. E. 510.

68. Anderson v. Citizen's Nat. Bank, 38 Ind. App. 190, 76 N. E. 811.

69. Government Building & Loan Inst. v. Denny, 154 Ind. 261, 55 N. E. 757; McNeeley v. South Penn. Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562.

70. Bemis v. Call, 10 Allen (Mass.), 512. But see Anderson v. Armstead, 69 Ill. 452; Reed v. Kimsey, 98 Ill. App. 364; Powell v. Bowen (Mo.), 214 S. W. 142; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. R. 891, 38 L. R. A. 694; Glaze v. Pullman State Bank, 91 Wash. 187, 157 P. 488; Latham v. Latham, 98 Ga. 477, 25 S. E. 505.

71. Williamson v. Gore (Tex.), 73 S. W. 563; Franklin v. Texas Sav. & Real Estate Inv. Ass'n, 119 S. W. 1166, Gillean v. Witherspoon (Tex.), 121 S. W. 909; King v. Driver (Tex.), 160 S. W. 415; Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. R. 959.

72. Ayer & Lord Tie Co. v. Baker, 138 Ky. 494, 128 S. W. 346.

73. Klein v. Caldwell, 91 Pa. 140.

closure proceedings, a wife cannot show that the mortgage deed was void for want of the husband's assent.[74]

A wife is not estopped from setting up usury in defence to the same extent as her husband.[75] Estoppel may sometimes be well applied in equity against a married woman to prevent her from relying upon coverture in order to retain the inequitable advantage of a transaction,[76] or for denying her own title.[77] And the wife's acts and conduct under suitable circumstances will estop her from denying to others that her husband was her agent in the management of her property.[78] No unauthorized acts of her husband can preclude her from asserting her rights.[79] Where a wife ratifies or authorizes her husband's use of her property to pay his debts, she cannot recover the money from the creditor.[80] In Louisiana a wife who makes a nuncupative will by public act reciting that certain property is the separate estate of her husband is not estopped thereby to assert the contrary.[81] Under the Washington statute requiring the administrator of a deceased partner to inventory the partnership property separately, it was held that the wife of such a partner was estopped to claim a partnership interest in her husband's business where in her verified petition for administration she stated that the property was his, and so inventoried it.[82]

§ 353. By Deed.

Covenants to a deed of land will not, as a rule, estop her from setting up an after-acquired title, if the title were defective,[83] or where the conveyance was void because of coverture.[84] Nor is she

74. Freison v. Bates College, 128 Mass. 464.

75. Campbell v. Babcock, 27 Wis. 512.

76. Patterson v. Lawrence, 90 Ill. 174; Levy v. Gray, 56 Miss. 318; Meiley v. Butler, 26 Ohio St. 535.

77. Norton v. Nichols, 35 Mich. 148; Nixon v. Halley, 78 Ill. 611.

78. Griffin v. Ransdell, 71 Ind. 440; Anderson v. Armstead, 69 Ill. 452.

79. Harle v. Texas Southern Ry. Co., 39 Tex Civ. 43, 86 S. W. 1048.

80. Hollingsworth v. Hill, 116 Ala. 184, 22 S. 460; Alford Bros. & Whiteside v. Williams, 41 Tex Civ. 436, 91 S. W. 636; First Nat. Bank v. Moragne, 128 Ala. 157, 30 So. 628.

81. Succession of Muller, 106 La. 89, 30 So. 329.

82. *In re* Alfstad's Estate, 27 Wash. 175, 67 P. 593.

83. Barker v. Circle, 60 Mo. 258; Morrison v. Balzar, 35 Tex. Civ. 247, 80 S. W. 248; De Haven v. Musselman, 123 Ind. 62, 24 N. E. 171; French v. McMillion (W. Va.), 91 S. E. 538, L. R. A. 1917D 228; Burns v. Womble, 131 N. C. 173, 42 S. E. 573

84. Bland v. Windsor & Catheart, 187 Mo. 108, 86 S. W. 162; Lazzell v. Keenan (W. Va.), 87 S. E. 80; George v. Brandon, 214 Pa. 623, 64 A. 371; Bruce v. Goodbar, 104 Tenn. 638, 58 S. W. 282.

estopped to set up an after-acquired title by covenants in a mortgage of her husband's land in which she joins.[85] It may be otherwise where the wife's claim was in existence when the deed was made. Thus, when a wife joined her husband in a mortgage of land as his, she was held estopped thereafter to set up a homestead title in herself against the mortgagee,[86] or where she joins him in a quitclaim deed reciting that she and he convey all right and title in the property.[87] But the present rule, in some States, whose statutes tend to make the married woman essentially a *feme sole,* is to create an estoppel against the wife and her subsequent grantees, to the same extent as if she were unmarried, so that an after-acquired title under her warranty will enure to the purchaser's benefit.[88]

Where spouses furnished the consideration for a farm in equal shares under an agreement that they should be equal owners, the land remaining in the name of a third person as security for unpaid purchase money, and the third person having given a bond for a deed to a prior purchaser, it was held that the wife was not estopped, as against the husband's creditors, to assert her title, by the fact that when she learned that such bond had been assigned to the husband she merely required his promise that the deed should be made to both, there being no evidence of representations as to the husband's title made to his creditors with her knowledge or consent.[89]

A wife delivering a deed of her separate property to her husband which expressed full consideration but did not recite the relationship, and afterward joining him in a mortgage on the same property, is estopped, as against the mortgagee who did not know the facts, to assert that the deed was without consideration.[90]

Where spouses joined in an agreement to sell land, which agree-

85. Burns v. Cooper, 140 F. 273, 72 C. C. A. 225; Threefoot v. Hillman, 130 Ala. 344, 30 S. 513, 89 Am. St. R. 39; Barker v. Circle, 60 Mo. 258.

86. Martin v. Yager, 30 N. D. 577, 153 N. W. 286.

87. State v. Kemmerer, 15 S. D. 504, 90 N. W. 150.

88. Knight v. Thayer, 125 Mass. 25; King v. Rea, 56 Ind. 1. But see Barker v. Circle, 60 Mo. 258. The wife's acceptance of a deed with its reservations, and the assumption of an incumbrance upon it, may be inferred from such facts as knowing on her part, soon after the deed was recorded, that the land had been conveyed to her, and claiming to be owner, so that she cannot afterwards deny knowledge of its recitals. Coolidge v. Smith, 129 Mass. 554.

89. *In re* Garner, 110 F. 123.

90. Osborne v. Cooper, 113 Ala. 405, 21 So. 320, 59 Am. St. R. 117; Kreps v. Kreps, 91 Md. 692, 47 A. 1028.

ment contains an express undertaking by the wife to release statutory rights, it was held that she could not assert, as against the contractee, her prior mortgage on the same land given her by her husband.[91]

Where land was devised in trust for spouses and their children, it was held that the wife was not estopped to assert her interest under the will after the husband's death by the fact that she joined him in a deed of his interest in consideration that the grantee should reconvey the husband's interest to her for life, her interest to cease at her husband's death.[92]

Where spouses both had life interests in land, it was held that she was estopped after his death to assert her interest as against a mortgagee to whom they jointly conveyed the lot,[93] as well as where she caused her land to be deeded to herself and him jointly, and where he mortgaged it to secure a debt contracted after the conveyance.[94]

Where spouses conveyed land of the wife to one of them on the understanding that it should be reconveyed to the husband, neither spouse understanding the contract, and it was so conveyed, it was held that the wife was not estopped to assert her title as against the husband's creditor who had contracted with him after the conveyance.[95]

Where a wife conveys her separate estate to her husband for a recited consideration of love and affection, and afterwards joins him in a deed to a third person, being present when the purchase money was paid to him and making no objection, she is estopped to set up a secret lien for money which the husband was to have paid her, though the deed to him was executed on a printed form containing a reservation of lien for the purchase money.[96]

§ 354. By Record.

A wife's failure to file a complete inventory of her separate property as required by the Oklahoma statute will not preclude her from claiming it, or give her husband the right to dispose of it.[97] Where she filed a petition in Louisiana that she and certain

91. Cone v. Cone, 118 Ia. 458, 92 N. W. 665.

92. Jackson v. Jackson, 22 Ky Law, 536, 58 S. W. 423, 597.

93. Simmons v. Reinhardt, 25 Ky. Law, 1804, 78 S. W. 890.

94. Yokley v. Superior Drill Co., 26 Ky. Law, 302, 80 S. W. 1153.

95. Kre Huot v. Reeder Bros. Shoe Co., 140 Mich. 162, 103 N. W. 569, 12 Det. Leg. N. 98.

96. Dewey v. Goodman, 107 Tenn. 244, 64 S. W. 45.

97. Caylor Lumber Co. v. Mays (Okla.), 174 P. 521; Bagg v. Shoenfelt (Okla.), 176 P. 511.

co-heirs be put in possession of certain property of their father, she is estopped to assert title to all the property.[98] It is otherwise in California, where in a petition for divorce she had alleged that certain property was community property, in which case she may assert her title to the property as against a purchaser from her husband who did not know of the allegation.[99]

§ 355. By Fraudulent Representations.

In various recent instances it is held, and justly, too, that where married women make agreements by fraudulent means with reference to their separate property, and thus obtain inequitable advantages, a court of chancery will hold them estopped from setting up and relying on their coverture to retain the advantage,[1] or where they have deliberately lied as an inducement to the consideration.[2] Joint representations by spouses to a third party that a transfer by the husband to the wife is "no good," and effect a sham, on which representations the husband obtains credit, have been held to estop the wife from asserting her title.[3]

Where a wife made a lease on property standing in her own name, describing herself as the authorized agent of her husband, it was held that she was not estopped from asserting her title as against the notary who took the acknowledgment of the lease, who two years later loans money to the husband on the supposition that he owned the property.[4]

§ 356. By Silence.

Mere silence or inaction will not preclude a wife from asserting title to real estate,[5] unless her silence is intentional and deceives some innocent person.[6] A wife is not estopped to assert her title to property by the fact that her husband makes statements in her presence adverse to those rights, which she does not deny,[7] nor by her mere presence at the office where the husband is having papers prepared and executed by him assigning her claim, if she

98. Priestly v. Chapman, 130 La. 480, 58 So. 156.

99. Coolidge v. Austin, 22 Cal. App. 334, 134 P. 357.

1. Patterson v. Lawrence, 90 Ill. 174; Coolidge v. Smith, 129 Mass. 554.

2. Read v. Hall, 57 N. H. 482.

3. Thomas v. Butler, 16 Pa. Super. 268.

4. Laing v. Evans, 64 Neb. 454, 9 N. W. 246.

5. Kinsey v. Feller, 64 N. J. Eq. 367, 51 A. 495; Anders v. Roark, 108 Ark. 248, 156 S. W. 1018.

6. Harrop v. Nat. Loan & Inv. Co. (Tex.), 204 S. W. 878.

7. Thomas v. Butler, 24 Pa. Super. 305.

had no knowledge that he claimed to own it, or intended to assign it.[8]

§ 357. By Failure to Assert her Title.

A wife may be barred by laches from assertaing her title.[9] Long delay to call a husband to account for her money which with her knowledge he has applied to his own purpose will estop the wife, as against his creditors, from recovering the money,[10] but not to other property of the same nature not so applied, as where a husband made use of the funds derived from the sale of part of a herd of cattle belonging to the wife.[11] Mere knowledge that her husband has sold her horse to one who has sold it to another will not estop the wife from claiming her property,[12] nor is she estopped where she for a long time fails to assert her title, as against her husband's lessee, where no reliance has been placed on her failure to assert her title.[13] The fact that a wife took possession of land as her husband's administratrix and afterwards delivered it to her successor as such, does not estop her from asserting title to the land.[14] Where a wife without objection permitted a purchase of the interests of her husband's heirs in his land by a third person, it was held that she was estopped to assert her lien for money paid in satisfaction of a mortgage in which she had joined her husband.[15] Where land was conveyed to spouses equally and the husband devised his interest to his wife, for life, with remainder to their daughters, she being ignorant that she took by survivorship, and supposing that she took under the will, it was held that she was not estopped to assert her title as against persons whom she had advised to purchase the interest of the daughters under the will.[16] A wife is not estopped to maintain replevin for her property by the mere fact that she saw it in the possession of one who obtained it from her husband by a bill of sale.[17]

8. Hoshkowitz v. Sargoy, 125 N. Y. S. 913.

9. Kelly v. Kelly (Tenn.), 58 S. W. 870 (30 years' delay).

10. Holter v. Wassweiler, 19 Mont. 169, 47 Pac. 806; Davis v. Yonge, 74 Ark. 161, 85 S. W. 90 (20 years); Ives v. Striker, 69 App. Div. 601, 75 N. Y. S. 135.

11. Harris v. Van De Vanter, 17 Wash. 489, 50 P. 50; Dance v. Craighead, 134 La. 6, 63 So. 604.

12. Carrico v. Shepherd, 26 Ind. App. 207, 59 N. E. 347.

13. Bolitho v. East, 45 Utah, 181, 143 P. 584.

14. Donehoo v. Johnson, 120 Ala. 438, 24 So. 888.

15. Taylor v. Dawson, 65 Ill App. 232.

16. Parkey v. Ramsey, 111 Tenn. 302, 76 S. W. 812.

17. Ingals v. Alexander, 138 Mo. 358, 39 S. W. 801.

§ 358. By Clothing Husband with Apparent Title or Authority.

A wife is also estopped to assert her title against her husband's creditors where she has placed her property in his name and permitted him to obtain credit on the faith of his apparent title,[18] or knowingly permits him to retain a title to land purchased with her money,[19] or where her title is fraudulent as to his creditors,[20] or where the property is kept as a common fund and is used by both,[21] or where she permits her property to become indistinguishably mixed with his,[22] or where, with her knowledge and consent, he deals with her property as his own,[23] even where title is conveyed to him by mistake,[24] where the creditor does not know the facts.[25] She may also permit him to use her land in such fashion

18. Story & Clark Piano Co. v. Kropsch, 231 Ill. 419, 83 N. E. 190; McAdow v. Hassard, 58 Kan. 171, 48 P. 846; Lamb v. Lamb, 18 App. Div. 250, 46 N. Y. S. 219; *In re* Trustees of Board of Publication and Sabbath School Work, 22 Misc. 645, 50 N. Y. S. 171, 27 Civ. Proc. R. 109; Magerstadt v. Schaefer, 213 Ill. 351, 72 N. E. 1063; Riley v. Vaughan, 116 Mo. 169, 22 S. W. 707, 38 Am. St. R. 586; Mertens v. Schlemme, 68 N. J. Eq. 544, 59 A. 808; Beecher v. Wilson, 84 Va. 813, 6 S. E. 209, 10 Am. St. R. 883; Goldberg v. Parker, 87 Conn. 99, 87 Atl. 555, 46 L. R. A. (N. S.) 1097; Martin v. Franklin, 160 Ky. 61, 169 S. W. 540; Hornsby v. City Nat. Bank (Tenn.), 60 S. W. 160; Sliney v. Davis, 11 Colo. App. 480, 53 P. 686; Pahmeyer v. Meyer (Tenn.), 53 S. W. 982; Rosenbaum v. Davis (Tenn.), 48 S. W. 706; Goldberg v. Parker, 87 Conn. 99, 87 A. 555, 46 L. R. A. (N. S.) 1097; Roane v. Hamilton, 101 Ia. 250, 70 N. W. 181; Hobbs v. Frazier, 61 Fla. 611, 55 So. 848; Buchannon v. James, 135 Ga. 392, 69 S. E. 543; Hank v. Van Ingen, 97 Ill. App. 642 (aff., 196 Ill. 20, 63 N. E. 705); Rickett v. Bolton, 173 Ky. 739, 191 S. W. 471; David Adler & Sons Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877; Johnson County v. Taylor, 87 Neb. 487, 127 N. W. 862; Murphy v. Ganey, 23 Utah 633, 66 P. 190; Conron v. Cauchois, 242 F. 909, 155 C. C. A. 497; Robertson v. Schlotzhauer, 243 F. 324, 156 C. C. A. 104; Farish v. Beebe (Ariz.), 179 P. 51; Julius Kessler & Co. v. De Garmo (Ia.), 127 N. W. 988; Holland v. Jones, 48 S. C. 267, 26 S. E. 606; Burkitt v. Moxley (Tex.), 206 S. W. 373; Moran v. McDevitt (R. I.), 83 A. 1013.

19. Krueger v. MacDougald (Ga.), 96 S. E. 867; Ford v. Blackshear Mfg. Co., 140 Ga. 670, 79 S. E. 576; Chaney v. Gauld Co., 28 Ida. 76 152 P. 468; Wilkinson v. Posey, 113 Miss. 274, 74 So. 125; Duncansville Bldg. & Loan Ass'n v. Ginter, 24 Pa. Super 42; Hines v. Meador (Tex.), 193 S. W. 1111; Blake v. Meadows, 225 Mo. 1, 123 S. W. 868.

20. Catlett v. Alsop, 99 Va. 680, 3 Va. Sup. Ct. R. 491, 40 S. E. 34.

21. Steel v. Fitz Henry, 78 Ill. App. 400; McIntyre v. Farmers' & Merchants' Bank, 115 Mich. 255, 73 N. W. 233, 4 Det. Leg. N. 846.

22. *In re* Gorham, 173 N. C. 272, 91 S. E. 950; Kimble v. Wotring, 48 W. Va. 412, 37 S. E. 606.

23. Mitchell v. Smith & Poe, 87 Ark. 486, 111 S. W. 806; Wood v. Yant, 27 Colo. App. 189, 149 P. 854; Arthur Lehman & Co. v. Slat, 208 Ill. App. 39; Farmers' State Bank v. Keen (Okla.), 167 P. 207.

24. Standard Mercantile Co. v. Ellis, 48 W. Va. 309, 37 S. E. 593.

25. Whitehard v. Exchange Nat.

that she will be estopped to deny his title of the crops.[26] The rule applies to a case where a wife permits the husband to hold himself out as owner of her business or property and obtain credit on the faith of such ownership,[27] especially where she clothes him with title to it,[28] and to a case where she permits him to use her separate personal property as owner and accepts the benefit of his sale.[29] and to a case where she permits him to deposit her money in a bank to which he later became indebted.[30] Such an estoppel inures to the purchaser at the execution sale.[31] The rule applies only to those dealing directly with the husband and not to those who take his obligation by assignment.[32] This rule does not hold where the only persons to whom the representations were made were the husband's sureties, hence neither spouse is barred to assert her title against general creditors of the husband, to whom no such representations were made,[33] nor where she is not aware that he has taken title in his own name to property purchased with her money,[34] nor where a bond for the deed had been for a short time in the husband's name,[35] nor where she permits a strip of her land to be used by the tenants of her husband's adjoining land, as against his heir,[36] nor does the rule operate in favor of the husband so as to enable him to rely on conduct by the wife leading him to believe she considered land conveyed to her as community property, where he knew the facts and did not change his position or omit action material to the protection of his interests.[37] The fact that a deed of property to which a wife is entitled was with-

Bank, 15 Ga. App. 190, 82 S. E. 770; Laing v. Evans, 64 Neb. 454, 9 N. W. 246.

26. Sanders v. Standard Warehouse Co., 101 S. C. 381, 85 S. E. 900.

27. Roberts v. Bodman Petitt Lumber Co., 84 Ark. 227, 105 S. W. 258; Haycock v. Tarver, 107 Ark. 458, 155 S. W. 918; Farmers' Oil & Fertilizer Co. v. Hester, 127 Ark. 618, 192 S. W. 890; McClintock v. C. E. Skinner & Co., 126 Ark. 591, 191 S. W. 230; Mack v. Engel, 165 Mich. 540, 131 N. W. 92; Million v. Commercial Bank of Boonville, 159 Mo. App. 601, 141 S. W. 453; Kyle v. Huddlestun, 80 W. Va. 439, 92 S. E. 679.

28. Rioux v. Cronin, 222 Mass. 131, 109 N. E. 898.

29. Smith v. Gott, 51 W. Va. 141, 41 S. E. 175.

30. Talley v. Davis (Ark.), 203 S. W. 685.

31. Wood v. Yant, 27 Colo. App. 189, 149 P. 854.

32. Moore v. Rawlings, 137 Ia. 284, 114 N. W. 1040.

33. Citizens' Bank v. Burrus, 178 Mo. 716, 77 S. W. 748.

34. McKeehan v. Vollmer-Clearwater Co., 30 Ida. 505, 166 P. 256; Mayer v. Kane, 69 N. J. Eq. 733, 61 A. 374; Woolsey v. Henn, 85 App. Div. 331, 83 N. Y. S. 394.

35. Carey v. Wimpee, 217 F. 155.

36. Burns v. Parker (Tex.), 137 S. W. 705.

37. Bias v. Reed, 169 Cal. 33, 145 P. 516.

out her knowledge made to the spouses jointly does not estop her to claim her title even against one who relied on the husband's apparent ownership, even though on learning the facts she took no steps to correct the deed.[38] It has been held that a wife was not estopped to assert title to a piano as her separate estate merely because her husband rented it as her agent.[39] Where a wife before marriage gives negotiable paper to her husband for collection, which he without authority indorses to himself, she is estopped from asserting her title to the notes in the hands of a holder for value if she was informed of the facts before marriage and permitted his retention of the notes, but not if she did not learn the facts till after marriage.[40] Where a wife gave her husband asignments of insurance policies to a bank to be used as security for present and future loans, and left them there without objection for some years till her husband died, during which time the bank kept the policies alive, it was held that she was estopped, as against the bank, to deny his authority to pledge them.[41] In Louisiana a wife's paraphernal property is not liable for debts contracted by the husband where he uses her separate property as his own in administering it as head of the community.[42]

38. Simpson v. Biffle, 63 Ark. 289, 38 S. W. 345.

39. Bagg v. Shoenfelt (Okla.), 176 P. 511.

40. Kempner v. Huddeston, 90 Tex. 182, 37 S. W. 1066.

41. Dewees v. Osborne, 178 Ill. 39, 52 N. E. 942; Little v. Fearon, 252 Pa. 430, 97 A. 578 (securities).

42. Succession v. Sangpiel, 114 La. 767, 38 So. 554.

CHAPTER XIX.

HUSBAND'S POWERS, RIGHTS AND LIABILITIES AS TO WIFE'S STATUTORY SEPARATE ESTATE.

§ 359. Powers, Statutory Limitation of Husband's Right to induce Wife's Property to Possession.

The husband may reduce to possession his wife's outstanding personals in action; but out of regard to her statutory rights, the doctrine now becomes of somewhat novel application, and evidence of the wife's consent is properly required in many States

before the husband's act of appropriation shall be considered complete. For while she may bestow her goods and chattels upon him, under suitable circumstances, he can no longer go to work, as he could at the common law, and make his title complete without reference to her wishes.[43] Under the North Carolina Constitution mere possession of the wife's property will not give the husband title.[44] Under the Ohio Married Women's Act a husband has the burden of showing that his wife's property was received by him with her express consent.[45]

§ 360. Statutory Power to Control Separate Estate.

Under the Married Women's Acts in Colorado, Georgia, Iowa, Michigan and West Virginia, the husband has no control over his wife's property.[46] The same appears to be true in Kentucky.[47] Under the Florida Married Women's Act the property of the wife remains in the control of the husband,[48] but she may terminate that control at her pleasure.[49] In Louisiana a husband may administer his wife's property and appropriate it to his own use in any manner.[50] Under the Connecticut Married Women's Act of 1849, applicable when spouses do not take advantage of the act of 1877, the husband was entitled to possession of the wife's personal estate and its income if not held as separate estate.[51] Under the Idaho Married Women's Act the husband has the management and control of the wife's separate estate.[52] He is a statutory agent. His power as such extends to all her separate estate, whether in

43. Vreeland v. Vreeland, 1 C. E. Green (N. J.), 512; King v. Gottschalk, 21 Ia. 512; Haswell v. Hill, 47 N. H. 407. Under the Missouri Married Women's Act he can reduce her choses to possession so as to get title only with her written consent. Gordon v. Gordon, 183 Mo. 294, 82 S. W. 11. The same is true where she gives him a note indorsed by her with authority to use it as collateral for a particular purpose. Hurt v. Cook, 151 Mo. 416, 52 S. W. 396.

44. Toms v. Flack, 127 N. C. 420, 37 S. E. 471.

45. Yocum v. Allen, 58 Ohio St. 280, 50 N. E. 909.

46. Sharshel v. Smith (Colo.), 181 P. 541; Chicago Bldg. & Mfg. Co. v. Butler, 139 Ga. 816, 78 S. E. 244; Chamberlain v. Brown, 141 Ia. 540, 120 N. W. 334; Agricultural Ins. Co. v. Montague, 38 Mich. 548, 31 Am. R. 326; Hall v. Hyer, 48 W. Va. 353, 37 S. E. 594.

47. McGregor v. Overton's Ex'rs, 29 Ky. Law, 1146, 96 S. W. 1114.

48. McNeil v. Williams (Fla.), 59 So. 562.

49. Florida Citrus Exchange v. Grisham, 65 Fla. 46, 61 So. 123.

50. Miltenberger & Co. v. Keys, 25 La. Ann. 287.

51. Wagner v. Mutual Life Ins. Co., 88 Conn. 536 91 A. 1012.

52. Senecroox v. First Nat. Bank, 14 Ida. 95, 93 P. 369; Bates v. Capital State Bank, 21 Ida. 141, 121 P. 561.

The phrase "management and con-

or out of her possession at marriage. If she has just cause to apprehend that he has mismanaged or will mismanage it, she may have a trustee appointed.[53] Under the Texas Married Women's Act the husband has the sole right to the management and control of the wife's separate estate,[54] but cannot convey it without her express consent or ratification,[55] nor convert it to his own use,[56] nor will his permission validate the appropriation of it by others.[57] His right of management terminates on their permanent separation.[58]

§ 361. Effect of Fraud of Husband.

Fraud, coercion, abuse of marital confidence, can be alleged by the wife against an unworthy husband in support of her title, whether she transferred absolutely, or as security for his debts.[59]

A husband has no right to agree secretly with the purchaser of his wife's separate property for a portion of the real consideration, understanding the nominal consideration to the wife; for this is

trol'' implies the possession of the thing managed or controlled, or the right to possession thereof. Sencerbox v. First Nat. Bank, 14 Ida. 95, 93 P. 369.

53. Sencerbox v. First Nat. Bank, 14 Ida. 95, 93 P. 369; Sencerbox v. First Nat. Bank, 14 Ida. 95, 93 P. 369.

The power of management and control given a husband as to the wife's money gives him the right to its possession, to draw it out of the bank where it is deposited, to reinvest or redeposit it in another bank and to check it out. Sencerbox v. First Nat. Bank, 14 Ida. 95, 93 P. 369.

54. Ochoa v. Edwards (Tex.), 189 S. W. 1022; Coleman v. First Nat. Bank, 17 Tex. Civ. 132, 43 S. W. 938; So. Tex. Nat. Bank v. Tex. & L. Lumber Co., 30 Tex. Civ. 412, 70 S. W. 768. The phrase ''sole management,'' in Rev. Stat. Tex. 1895, art. 2967, providing that during the marriage the husband shall have the ''sole management'' of all his wife's separate property, implies the power of control and possession, as personalty cannot be managed without the power to control and possession thereof to that end. Bledsoe v. Fitts, 47 Tex. Civ. 578, 105 S. W. 1142. The phrase ''during marriage,'' in Rev. Stat. 1895, art. 2967, providing that ''during marriage'' the husband shall have the sole management of all the separate property of his wife, means as long as the marriage relation exists, and at no time during the marriage relation can the wife deprive the husband of his right of control and possession; he being present in the marriage relation. Bledsoe v. Fitts, 47 Tex. Civ. 578, 105 S. W. 1142.

55. Scruggs v. Gage (Tex.), 182 S. W. 696; Givens v. Carter (Tex.), 146 S. W. 623; Ligon v. Wharton (Tex.), 120 S. W. 930; Bledsoe v. Fitts, 47 Tex. Civ. 578, 105 S. W. 1142; Hudspeth v. State, 54 Tex. Cr. 371, 112 S. W. 1069.

56. Heintz v. Heintz, 56 Tex. Civ. 403, 120 S. W. 941.

57. Therriault v. Compere (Tex.), 47 S. W. 750.

58. Dority v. Dority, 30 Tex. Civ. 216, 70 S. W. 338 (affd., 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 941.)

59. Sharpe v. McPike, 62 Mo. 300; Darlington's Appeal, 86 Pa. 512.

a breach of faith as agent or trustee.[60] In Michigan a husband who acted as agent of his wife in selling her land and taking a mortgage for deferred payments, and then became the assignee of the mortgage, has been treated directly as vendor and mortgagee, as to equities growing out of fraud or deceit on his part in the transaction.[61]

§ 362. To Dispose of Real Estate.

A husband cannot sell his wife's separate real estate during her life by his own deed,[62] nor create an easement in her land, permanent or otherwise.[63]

In some States the husband cannot dispose of his life-interest in the wife's lands at all, without the wife's assent.[64]

§ 363. Of Personal Property.

A husband cannot dispose of his wife's personal property — her capital especially — at his own discretion.[65] A purchase of personal property by a husband with his wife's funds, under an agreement to act as her agent, but taking title in his name, vests the title in her.[66] In North Carolina the wife's executor is entitled to possession of her personalty as against her husband, in the same way as though she were a man.[67] Under the Indiana Married Women's Act a husband cannot bind his wife by an investment of her money.[68] In Louisiana the husband may administer the wife's property as mandatory without formal power of attorney,[69] but cannot transfer her right to a note payable to her nor bring or defend a suit respecting it without her.[70] In a credit sale of the wife's paraphernal property, her mortgage attaches only from the date of the receipt of the money and for the amount.[71] If

60. Beaudry v. Felch, 47 Cal. 183.

61. Burchard v. Frazer, 23 Mich. 224.

62. Prater v. Hoover, 1 Cold. (Tenn.) 544.

63. Knoch v. Haizlip, 163 Cal. 146, 124 P. 998; Harrison v. City of Sulphur Springs (Tex.), 67 S. W. 515 (consent to a ditch); Neumeister v. Goddard, 125 Wis. 82, 103 N. W. 241.

64. Coleman v. Satterfield, 2 Head (Tenn.), 259; Jenney v. Grey, 5 Ohio St. 45. *Aliter* in some States. Coleman v. Semmes, 56 Miss. 321.

65. O'Brien v. Foreman, 46 Cal. 80; Klein v. Seibold, 89 Ill. 540; De Witt v. Moore, 19 Ky. Law, 1534, 43 S. W. 697 (piano); Ago v. Canner, 167 Mass. 390, 45 N. E. 754.

66. Jones v. Chenault, 124 Ala. 610, 27 So. 515, 82 Am. St. R. 211.

67. Kilpatrick v. Kilpatrick (N. C.), 96 S. E. 988.

68. Comer v. Hayworth, 30 Ind. App. 144, 96 Am. St. R. 335.

69 *In re* Leeds & Co., 49 La. Ann. 501, 21 So. 617.

70. Sterling v. Johnson, 5 Mart. N. S. (La.) 362.

71. Foster v. Her Husband, 6 La. 22; Robillard v. Poydras, 11 La. 279.

she is separated from him properly she retains the right to recover any amount received by him and converted to his own use.[72]

§ 364. To Bind Separate Estate by Mortgage.

The husband cannot mortgage his wife's separate property for his individual debt,[73] whether such property be land[74] or personalty.[75] In North Carolina a husband cannot mortgage his wife's crops without her joinder in the deed,[76] nor in Florida without her written consent.[77] For it is a general principle that the wife's separate property cannot be made liable for the debts of her husband or others without her assent.[78] In Louisiana a husband cannot incumber his wife's paraphernal property for his debts, either by mortgage or fictitious sale, to obtain the apparent security of a special mortgage and a vendor's lien.[79] A wife is bound by her husband's notes and mortgage of her land under power of attorney from her,[80] or by his pledge of her personal property for his own benefit where he has a general agency for her in all matters.[81] Where a wife directed her husband to purchase stock with her separate estate, she was held bound by his pledge of the stock for his own debt after taking title in his own name, where the pledgee had no notice of her rights.[82] In Louisiana a husband cannot mortgage his wife's property in his own name and to secure his debt without special authority.[83]

§ 365. By Lease.

Under the Minnesota Married Women's Act a husband cannot create a leasehold in the wife's land.[84] Under the New York

72. Lehman v. Conlon, 105 La. 431, 29 So. 879.

73. Patterson v. Flanagan, 1 Ala. (S. C.) 427.

74. Farmer v. American Mortg. Co., 116 Ala. 410, 22 So. 426.

75. Parish v. Austin (Tex.), 76 S. W. 583; Klein v. Frerichs, 127 Minn. 177, 149 N. W. 2; Knight v. Beckwith Commercial Co., 6 Wyo. 500, 46 P. 1094.

76. Rawlings v. Neal, 122 N. C. 173, 29 S. E. 93.

77. Shomaker v. Waters, 59 Fla. 414, 52 So. 586.

78. Hutchins v. Colby, 43 N. H. 159; Hatz's Appeal, 40 Pa. 209; George v. Ransom, 15 Cal. 322; Cheuvete v. Mason, 4 Greene (Ia.), 231; Yale v. Dederer, 18 N. Y. 265; Sharp v. Wickliffe, 3 Litt. 10; Johnson v. Runyon, 21 Ind. 115.

79. Terry v. Gilkeson, 50 La. Ann. 1040, 24 So. 128.

80. Sav. Bank of San Diego County v. Daley, 121 Cal. 199, 53 P. 420; Temple v. Harrington (Ore.), 176 P. 430.

81. Lowy v. Boenert, 110 Ill. App. 16 (affd., 209 Ill. 405, 70 N. E. 901).

82. Anderson v. Waco State Bank, 92 Tex. 506, 71 Am. St. R. 867.

83. Aiken v. Robinson, 52 La. Ann. 925, 27 So. 529.

84. Van Brunt v. Wallace, 88 Minn. 116, 92 N. W. 521.

Married Women's Act a husband cannot bind his wife by a lease of her land, even where she accepts rent under the lease, without her authority.[85] In Texas while spouses live together she is bound by his lease of her land, but if they separate she may have his lease cancelled.[86]

§ 366. With Liability for His Sole Fraud.

In general, if the wife's property is not liable for her husband's debts, much less can it be made so for his frauds regarding such property, without her participation.[87]

§ 367. By Contract.

A husband has no implied authority to consent to the taking of his wife's land by a railroad,[88] or to abide by a public survey of her land,[89] or to bind her by an agreement relating to the maintenance of gates on her land,[90] nor where she has by deed conveyed the right to cut timber, by his agreement to extend the time for removing it,[91] nor by an agreement which restricts to use of land conveyed to her by an arrangement made by him as her agent, where the agreement is no part of the deed, though recorded,[92] nor by his agreement as to boundaries,[93] nor to waive the statute of limitations on her mortgage,[94] or to agree that an overseer employed by him as her agent shall hold his position for a term of years,[95] or to bind her by any agreement as to her land.[96] He cannot of himself bind her estate by employing counsel with reference to it.[97] But a husband has a right to employ counsel to set aside a deed of trust in the joint names of the spouses, where their interests are identical, and there is no fraud or misrepresentation.[98] In Alabama the husband's rights as his wife's managing attorney are declared not to extend to binding her by the submission to

85. Carman v. Fox, 86 Misc. Rep. 197, 149 N. Y. S. 213.

86. Dority v. Dority, 30 Tex. Civ. 216, 70 S. W. 338 (affd., 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 941).

87. See Lawrence v. Finch, 2 C. E. Green (N. J.), 234.

88. Hazard Dean Coal Co. v. McIntosh (Ky.), 209 S. W. 364.

89. Marshall v. Benetti (Ia.), 118 N. W. 918.

90. Bard v. Batsell (Ky.), 211 S. W. 185.

91. Harris v. Free, 6 Ala. App. 113, 60 So. 423.

92. Kurtz v. Potter, 167 N. Y. 586, 60 N. E. 1114

93. Lee v. Wheat, 33 Ky. Law, 724, 111 S. W. 307 (reh. den., 112 S. W. 565).

94. Bradley v. Bradley's Adm'r, 159 Ky. 84, 166 S. W. 773.

95. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88.

96. Wilson v. Shocklee, 94 Ark. 301, 126 S. W. 832.

97. Kerchner v. Kempton, 47 Md. 568.

98. Kennedy v. Security Bldg. & Sav. Ass'n (Tenn.), 57 S. W. 388.

arbitration of questions relating to the *corpus* of her separate estate.[99] A husband cannot, without special authority, bind his wife by a lease under which they occupy land.[1] Where a husband had authority to employ a foreman on a house she was building, and employed such foreman without disclosing his agency, and used his services both on his wife's houses and his own, the foreman doing all his business with the husband and making no distinction in his accounts as to the houses he worked on, it was held that she was not liable for the foreman's services except where rendered on her own house, even though those of her husband were subsequently conveyed to hr.[2] It is held that where the wife's lands are devoted to agriculture, the husband may burden the estate for things necessary to the production of crops.[3]

§ 368. By Lien.

It is the declared rule of many States that the husband cannot of his own act, and without his wife's consent, subject the latter's separate land to debts for improvements, or subject it to a mechanic's lien,[4] or to create any lien for improvements thereon.[5]

§ 369. By Release.

A husband has no implied authority to release his wife's claim for damages for a tort,[6] or to yield or compromise his wife's action.[7] A husband has no authority, by mere implication from the facts that he controls and manages his wife's property, to consent that a judgment in her favor be set aside and a judgment entered in favor of the other party so as to deprive her of a homestead right.[8] The husband's personal receipt of his wife's sepa-

99. Sampley v. Watson, 43 Ala. 377. To the same effect see Oldham v. Medearis (Tex.), 40 S. W. 350.

1. Hooser v. Hooser, 3 Ky. Law, 796.

2. Newell v. Roberts, 54 N. Y. 677.

3. Clopton v. Matheny, 48 Miss. 286; Johnson v. Jones, 82 Misc. 483, 34 So. 83; Pocomoke Guano Co. v. Colwell (N. C.), 98 S. E. 535; McBroom v. McBroom (Ark.) 180 S. W. 210.

4. Briggs v. Titus, 7 R. I. 441; Spinning v. Blackburn, 13 Ohio St. 131; Warren v. Smith, 44 Tex. 245; Pell v. Cole, 2 Met. (Ky.) 252; Selph v. Howland, 23 Miss. 264; Hughes v. Peters, 1 Cold. (Tenn.), 67; Esslinger v. Huebner, 22 Wis. 632; Garnett v. Berry, 3 Mo. App. 197; Holley v. Huntington, 21 Minn. 325. Nor even for necessary repairs. Dearie v. Martin, 78 Pa. 55.

5. Larson v. Carter, 14 Ida. 511, 94 P. 825.

6. Stephens v. Schmidt, 80 N. J. Law, 193, 76 A. 332.

7. Bizzell v. McKinnon, 121 N. C. 186, 28 S. E. 271.

8. Winter v. Texas Land & Loan Co. (Texas, 1900), 54 S. W. 802 (judgment reversed, Texas Land & Loan

rate property in general will not discharge a third party from liability to the wife where the circumstances repel a presumption of agency on the husband's part.[9] His receipt of money payable on her separate account — a legacy for instance — without her consent or authority does not debar her of her legal rights.[10] And, on the other hand, where she is a mortgagee in her own right, the husband cannot alone receive payment and satisfaction and discharge the mortgage.[11]

Nor has the debtor or custodian of the incorporeal property, or the executor or administrator who settles the estate in which the married woman may have a legacy or distributive share accruing to her, the right to recognize the husband as entitled to her exclusion, or to pay over to him on his sole and unauthorized receipt.[12]

§ 370. Rights of Purchasers from Husband.

While the wife may avoid a fraud upon her as against all who participated therein, it is a rule that a valuable creditor's rights cannot be prejudiced by any duress, menace, or other misbehavior of the husband, which procured them the wife's security, if it was without such creditor's instigation, knowledge, or consent.[13] It is

Co. v. Winter, 93 Tex. 560, 57 S. W. 39).

9. Read v. Earle, 12 Gray (Mass.), 423; Anderson v. Gregg, 44 Miss. 170. Possession of the bond or incorporeal chattel by the husband is evidence tending to prove authority to receive the money for his wife, but not conclusive evidence. Yazel v. Palmer, 81 Ill. 82; Carver v. Carver, 53 Ind. 241. And see Nevius v. Gourley, 95 Ill. 206; Windsor v. Bell, 61 Ga. 671.

10. Gore v. Carl, 47 Conn. 291; Nevius v. Gourley, 95 Ill. 206; Read v. Earle, 12 Gray (Mass.), 423; Windsor v. Bell, 61 Ga. 671; Anderson v. Gregg, 44 Miss. 170.

11. Savage v. Winchester, 15 Gray (Mass.), 453; Hanford v. Bockee, 5 C. E. Green (N. J.), 101; Bank of Albion v. Burns, 46 N. Y. 170; Faulks v. Dimock, 27 N. J. Eq. 65; Hubbard v. Ogden, 22 Kan. 363; Purvis v. Carstphan, 73 N. C. 575. But see Zane v. Kennedy, 73 Pa. 182. Where the mortgagee before sale is allowed to enter and take the rents without the wife's consent, he must account to her, and cannot credit the same on the husband's debt. Semple v. British Columbia Bank, 5 Sawyer (U. S.), 394; McKinney v. Hamilton, 51 Pa. 63.

12. *Aliter*, if the husband's receipt was authorized by the wife. Hobensack v. Hallman, 17 Pa. 154. Some of the local statutes are held not to restrain the husband from collecting and reducing to possession his wife's *choses in action*. Clark v. Bank of Missouri, 47 Mo. 17.

13. Childs v. McChesney, 20 Ia. 431; Edgerton v. Jones, 10 Minn. 427; Nelson v. Holly, 50 Ala. 3; Singer Man. Co. v. Rook, 84 Pa. 442; Marston v. Brittenham, 76 Ill. 511; Conn. Life Ins. Co. v. McCormick, 45 Cal. 480; Hull v. Sullivan, 63 Ga. 126.

otherwise if the latter's instigation, knowledge, or consent appear.[14] In such case the wife has the burden of showing that the creditor had knowledge of the fraud on her.[15] But when the husband makes a void transfer as his wife's trustee, it is held that she can follow the investment into other hands.[16] Or she may have him removed from his trusteeship for suitable cause.[17]

§ 371. Notice to Husband as Notice to Wife.

A wife is not generally chargeable with notice of facts merely because her husband has knowledge of them.[18] But she may be so chargeable, especially where she reaps the benefits of his fraud,[19] and where he acts as her agent.[20] In Tennessee it is held that there is a presumption a husband who has knowledge that property conveyed to his wife was burdened with an easement communicated this knowledge to her.[21] Where a husband attended to the shipment of the wife's goods, which were consigned to her, it was held that the carrier properly treated him as the owner, and notified only him of an attachment of the property for his debt.[22] Where a husband caused a deed to be made to his wife, but signs notes with her for the purchase price and makes payments thereon, notice of the assignment of the mortgage was held sufficient where made to him alone.[23] Where on a reconveyance of the wife's land after payment of a loan to her on the security of her conveyance of property, the husband takes a reconveyance in his own name, she

14. Line v. Blizzard, 70 Ind. 23; Haskit v. Elliott, 58 Ind. 493.

15. Sparks v. Taylor, 99 Tex. 411, 90 S. W. 485.

16. George v. Ransom, 14 Cal. 658.

17. Rainey v. Rainey, 35 Ala. 282. So with any other trustee of her separate property. Johnson v. Snow, 5 R. I. 72.

18. Young v. Allen, 207 F. 318, 125 C. C. A. 68; Weightman v. Washington Critic Co., 4 App. D. C. 136; Francis v Reeves, 137 N. C. 269, 49 S. E. 213; Potter v. Mobley (Tex.), 194 S. W. 205; Raleigh v. Lee, 26 Cal. App. 229, 146 P. 696; H. C. Girard Co. v. Lamoureux, 227 Mass. 277, 116 N. E. 572; Thompson v. Harmon (Tex.), 152 S. W. 1161.

19. Cullen v. Veasey (Del.), 95 A. 655; Hamblet v. Harrison, 80 Miss. 118, 31 So. 580; Henry Elias Brewing Co. v. Boeger, 74 Misc. 547, 132 N. Y. S. 286; Tate v. Tate, 19 Ohio Cir. R. 532, 10 O. C. D. 321; Rowley v. Shepardson (Vt.), 99 A. 228; Hathaway v. Ernest A. Arnold Land Co. 157 Wis. 22, 145 N. W. 780.

20. Faireloth v. Taylor, 147 Ga. 787, 95 S. E. 689; Libby v. Pelham, 30 Ida. 614, 166 P. 575; Loveland v. Bump (Mich.), 165 N. W. 855; Graham Paper Co. v. St. Joseph Times Printing & Publishing Co., 79 Mo. App. 504.

21. Parker v. Meredith (Tenn.), 59 S. W. 167; Forsythe v. Brandenburg, 154 Ind. 588, 57 N. E. 247.

22. Furman v. Chicago, R. I. & P. Ry. Co., 62 Ia. 395, 17 N. W. 598.

23. Cox v. Cayan, 117 Mich. 599, 76 N. W. 96, 5 Det. Leg. N. 346, 72 Am. St. R. 585.

having no knowledge of the fact, she is not charged with his knowledge of the fact though he acted as her agent in securing the loan, as he acted against her interest.[24]

§ 372. Rights of Husband's Creditors; In General.

Though it is not against public policy to permit a wife's property to be taken for her husband's debts,[25] yet under most Married Women's Acts property *bona fide* acquired by her in her own name and with her own money will not be subject to such debt,[26] whether acquired before or after the debt was contracted,[27] especially where she had no interest in the property when the debt was contracted,[28] even though it was so acquired from her husband.[29] Thus a gift of real estate to a wife by her father is not subject to her husband's debts because he conveyed it to the father, if the conveyance was in satisfaction of a debt really owed to him.[30] A husband's *bona fide* investment of money in improvements upon his wife's estate cannot be subjected to satisfaction of the claims of his creditors.[31] The basis on which her property may be made liable for his debts is faith placed by a creditor in his apparent ownership of it,[32] therefore, if the title to land is in the wife's

24. Huot v. Reeder Bros. Shoe Co., 140 Mich. 162, 103 N. W. 569, 12 Det. Leg. N. 98.

25. Meier & Frank Co. v. Bruce, 30 Ida. 732, 168 P. 5.

26. Studebaker Bros. Mfg. Co. v. De Moss, 62 Ind. App. 635, 113 N. E. 417; Morin v. Kirkland, 226 Mass. 345, 115 N. E. 414; Stewart v. Stewart, 207 Pa. 59, 56 A. 323; Patterson v. Gilliland (Ala.), 82 So. 493; Rankin v. West, 25 Mich. 195; Hoover v. Carver (Minn.), 160 N. W. 249; Evans v. Cullens, 122 N. C. 55, 28 S. E. 961; Farmers' State Bank v. Keen (Okla.), 167 P. 207; Ernst v. Wagner, 4 Walk. (Pa.) 229; Frost v. Knapp, 10 Pa. Super. 296; Ball v. Penn, 10 Pa. Super. 544; Emerson-Brantingham Implement Co. v. Brothers (Tex.), 194 S. W. 608; Burnham v. Stoutt, 35 Utah, 250, 99 P. 1070; Miller v. McLin, 147 Ky. 248, 143 S. W. 1008.

27. Big Plum Creek Turnpike Co. v. N. L. Walker & Co., 145 Ky. 269, 140 S. W. 304; J. M. Houston Grocer Co. v. McGinnis, 20 Ky. Law, 157; Chilton v. Hannah, 107 Va. 661, 60 S. E. 87.

28. Barker v. Thayer, 217 Mass. 13, 104 N. E. 572.

29. McCormick v. Brown, 97 Neb. 545, 150 N. W. 827; Morris v. Waring (N. M.), 159 P. 1002.

30. First Nat. Bank v. Rice, 22 Ohio Cir. Ct. 183, 12 O. C. D. 121.

31. McFerrin v. Carter, 3 Baxt. (Tenn.) 335. In Texas it is held that a wife's land cannot be subjected to the husband's debts unless the improvements were made with either the husband's or community funds, and with an intent to defraud creditors, in which the wife knowingly participated. Maddox v. Summerlin, 92 Tex. 483, 49 S. W. 1033; Palmer Pressed Brick Works v. Stevenson (Tex.), 185 S. W. 999; Collins v. Bryan, 40 Tex. Civ. 88, 88 S. W. 432.

32. O'Farrell v. Vickrage, 163 Ill. App. 519; Rickett v. Bolton, 173 Ky. 739, 191 S. W. 471; Deacon v. Alsheimer (N. J.), 89 A. 512.

name of record when the debt is contracted, the creditor must take notice, no matter what representations are made by the husband,[33] and she is not bound by his statements to creditors as to her other property.[34] She need not, as against his creditors, show that property conveyed to her was paid for with her separate estate,[35] or show the source of every dollar paid for it.[36] A husband's creditor takes no rights in the wife's property assigned to the debtor by mistake,[37] now in her property in his possession as agent.[38] Where a wife has title to personal property bought with the proceeds of land subject to her husband's debts such personal property may be subjected to the debts,[39] but in such case her other property will not be liable for a deficiency.[40] As against the creditors of a husband who manages a business belonging to a wife empowered to trade as sole, she may be liable for the reasonable, but not for the contract value of his services, if they cannot validly contract with each other.[41] As a broad principle the wife's separate property cannot be taken for her husband's debts or subjected to the demands of his creditors apart from her consent. The wife may enjoin an execution in favor of her husband's creditors, levied on her separate property,[42] and the fact that the husband uses and enjoys some of the benefits of the wife's separate property, and out of it procures the means for the support of his family (a consequence almost inevitable where matrimonial confidence prevails in the household, even though the wife be rich), and consistently liable for the debts of the husband.[43] The crops cannot be attached by his creditors.[44] Nor the betterments, buildings, and rents.[45] Nor is his use upon his wife's farm, of teams

33. Glaze v. Pullman State Bank, 91 Wash. 187, 157 P. 488.

34. McDonnell v. Solomon (Colo.), 170 P. 951.

35. Clark v. Meyers, 24 Ky. Law, 380, 68 S. W. 853.

36. Ambrose v. Noell, 21 Ky. Law 388, 51 S. W. 570.

37. Jones v. Nolen, 133 Ala. 567, 31 So. 945; Smith v. Farmers' & Merchants' Nat. Bank, 57 Ore. 82, 110 P. 410; Smith v. Gott, 51 W. Va. 141, 41 S. E. 175.

38. Tallman v. Jones, 13 Kan. 438; Bohner v. Cummings, 91 Pa. 55.

39. Mertens v. Schlemmo, 68 N. J. Eq. 544, 59 A. 808.

40. Bennett v. Campbell, 43 App. Div. 617, 59 N. Y. S. 326.

41. Smith v. Meisenheimer, 20 Ky. Law, 1718, 49 S. W. 968.

42. Brevard v. Jones, 50 Ala. 221. And see Barclay v. Plant, 50 Ala. 509.

43. Blood v. Barnes, 79 Ill. 437; Yale v. Dederer, 68 N. Y. 329; Primmer v. Clabaugh, 78 Ill. 94.

44. McIntyre v. Knowlton, 6 Allen (Mass.), 565; Lewis v. Johns, 24 Cal. 98; Allen v. Hightower, 21 Ark. 316.

45. White v. Hildreth, 32 Vt. 265; Goss v. Cahill, 42 Barb. (N. Y.) 310; Wilkinson v. Wilkinson, 1 Head (Tenn.) 305; Robinson v. Huffman, 15 B. Mon. (Ky.) 80.

bought with her money, a conversion in any such sense as to render them attachable for his debts.[46] One seeking to subject a wife's separate estate to a debt must aver the debt was hers.[47] A debt due from a husband to a mortgagor cannot be set off against the mortgage which such mortgagor has given to the wife.[48] Where one having claims against both spouses with notice receives the money of the wife he must credit it on her debt.[49] Property conveyed by a husband to his wife is not in his possession, so as to be subject to levy for his debts, her possession being not his.[50] Where under the Michigan Married Women's Act the husband had not given the wife the right to her own earnings, it was held that the mere fact that the wife has paid part of the purchase price of a piano did not give her title as against his creditors.[51] Under the Tennessee statute furniture bought by a husband with money given him by his wife was held subject to his debts, though he gave her the furniture.[52] In Virginia it is held where the compensation of the husband for services in managing the wife's saparate business is more than sufficient to support the family, the excess belongs to his creditors, if there was no contract between the spouses.[53]

§ 373. As to Value of Husband's Services.

It seems to be the well-settled American doctrine that by working upon the wife's land the husband acquires no beneficial interest therein which can be enforced in equity on behalf either of himself or his creditors, in absence of a definite agreement for compensation; unless, possibly, it could be shown to exceed in value the cost of supporting the whole family,[54] nor does she incur

46. Spooner v. Reynolds, 50 Vt. 437.

47. Holt v. Gridley, 7 Ida. 416, 63 P. 188.

48. Cole v. Darling, 123 Mich. 1, 81 N. W. 967, 6 Det. Leg. Notes, 967; O'Donnell v. Bray, 99 Mich. 534, 58 N. W. 475.

49. Chason v. Anderson, 119 Ga. 495, 46 S. E. 629.

50. Wyatt v. Wyatt, 31 Ore. 531, 49 P. 855.

51. Le Blanc v. Sayers (Mich.), 168 N. W. 445.

52. Bynum v. Johnston, 222 F. 659, 138 C. C. A. 183.

53. Catlett v. Alsop, 99 Va. 680, 3 Va. Sup. Ct. R. 491, 40 S. E. 34; Penn v. Whitehead, 17 Grat. (Va.) 503, 94 Ann. Dec. 478; Atkinson v. Solenberger, 112 Va. 667, 72 S. E. 727.

54. Buckley v. Wells, 33 N. Y. 518; Webster v. Hildreth, 33 Vt. 457; Cheuvete v. Mason, 4 Greene (Ia.), 231; Betts v. Betts, 18 Ala. 787; Commonwealth v. Fletcher, 6 Bush (Ky.), 171; Rowe v. Drohen, 245 F. 684; Lister v. Vowell, 122 Ala. 264, 25 So. 564; Martin v. Banks, 89 Ark. 77, 115 S. W. 928 Sharp v. Fitzhugh, 75 Ark. 562, 88 S. W. 929; Alsdurf v. Williams, 196 Ill. 244, 63 N. E.

liability by the fact that she secures his services as agent,[55] nor the fact that she gives him power to sell it for her,[56] nor the fact that he manages her property in his own name, if there is no evidence that the creditor acted on the faith of his supposed title,[57] or that the property is really his own.[58]

With the assent of the husband and father, the labor of the wife and children may be bestowed upon the separate property of the wife, and thus enure to their benefit. There is no known rule of law which requires the husband and father to compel his wife and children to work in the service of his creditors.[59] And it is held that the husband may stipulate, though insolvent, that the product of his own labor shall be appropriated to his wife's separate use.[60] If permitted to be maintained upon his wife's property, he does not necessarily acquire a title to the property or its products merely by bestowing his voluntary labor upon it.[61] And a similar principle may be applied to a wife supported from her husband's property.[62]

But it is held that the husband's occupation and cultivation of his wife's lands with her assent may be considered as bestowed for the common benefit of the family, or so as to give him the

686; Miller v. Beatty, 171 Ill. App. 72; Elliott v. Atkinson, 45 Ind. App. 290, 90 N. E. 779; Wasam v. Raben, 45 Ind. App. 221, 90 N. E. 636; Deere, Wells & Co v. Bonne, 108 Ia. 281, 79 N. W. 59, 75 Am. St. R. 254; Guthrie v. Hill, 138 Ky. 181, 127 S. W. 767; Thompson & Co. v. Taylor (Ky.), 124 S. W. 357; First Natchez Bank v. Moss, 52 La. Ann. 1524, 28 So. 133; Hibbard v. Heckart, 88 Mo. App. 544; Frost v. Knapp, 10 Pa. Super. 296 Martin v. Remington, 100 Wis. 540, 76 N. W. 614, 69 Am. St. R. 941; Oldershaw v. Matteson & Williamson Mfg. Co., 19 Cal. App. 179, 125 P. 263; Pease v. Barkowsky, 67 Ill. App. 274; Patton's-Ex'r v. Smith, 130 Ky. 819, 114 S. W. 315 Davis v. Francis, 22 Ky. Law, 1618; Blackburn v. Thompson, 23 Ky. Law, 1723, 66 S. W. 5, 56 L. R. A. 938; J. E. Hayner & Co. v. McKee, 24 Ky. Law, 1871.

55. Kennard v. Curran, 239 Ill. 122, 87 N. E. 913; McDonald Mfg. Co. Williams, 96 Ill. App. 395.

56. Reed v. Kimsey, 98 Ill. App. 364.

57. Hall v. Warren, 5 Ariz. 127, 48 P. 214; First Nat. Bank v. Rice, 22 Ohio Cir. Ct. 183, 12 O. C. D. 121.

58. Murphy v. Nilles, 166 Ill. 99, 46 N. E. 772.

59. Johnson v. Vail, 1 McCart. 423.

60. Hodges v. Cobb, 8 Rich. (S. C.) 50. But see Penn v. Whiteheads, 12 Gratt. (Va.) 74.

61. Rush v. Vought, 55 Pa. 437; Boss v. Gomber, 23 Wis. 284; Merrick v. Plumley, 99 Mass. 566; Gage v. Dauchy, 34 N. Y. 293; Hazelbaker v. Goodfellow, 64 Ill. 238; Feller v. Alden, 23 Wis. 301.

62. Bureher v. Ream, 68 Pa. 421. See Dean v. Bailey, 50 Ill. 481, as to the liability of a farm and stock, where the husband's control is not of a character inconsistent with the common interests of himself and wife.

right to the products of his own toil like that of any tenant,[63] and that where his own skill and service were the chief source of emolument, the wife ought not to claim all as her own against him.[64] Moreover, if by contract express or implied the wife is indebted to her husband for his services as managing agent, it is held that she is subject to garnishment at the instance of his creditors.[65] And under an agency in the management of the wife's lands the produce or rent of the lands and increase of animals are the wife's property as fully as the original property whence they are derived; and the husband's purchase of lands with such profits, or the raising of a crop thereon under his supervision, does not necessarily subject land or crop to his debts.[66]

§ 374. Effect of Husband's Possession of Separate Estate.

Mere possession of a wife's property by a husband will not subject it to his debts,[67] nor does the fact that he takes title to her land in his name necessarily have that effect,[68] or that he has her property billed for shipment in his own name.[69] If the creditor has reasonable cause to believe that money received from the husband is that of the wife he gets no title to it.[70] If the husband has erroneously returned her property as his for taxation he may, as against his creditor, show the fact.[71] Her right to her property is not affected by the fact that the debtor sends her money to the bank with instructions to credit it to the husband,[72] nor by the fact that she permits a note for the purchase price of her separate estate to be made out to him or her in the alternative, and permits him to keep it,[73] or by the fact that she takes in payment a check payable to her husband's order,[74] or that she permits him to sign checks against her bank account,[75] or that for con-

63. Elijah v. Taylor, 37 Ill. 247.

64. Glidden v. Taylor, 16 Ohio St. 509.

65. Keller v. Mayer, 55 Ga. 406.

66. Bongard v. Core, 82 Ill. 19.

67. Magerstadt v. Schaefer, 110 Ill. App. 166 (affd., 213 Ill. 351, 72 N. E. 1063); State *ex rel.* Smith v. Jones, 83 Mo. App. 151.

68. Gladstone Lumber Co. v. Kelly, 64 Ore. 163, 129 P. 763; Nelson v. Vanden, 99 Tenn. 224, 42 S. W. 5; Raley v. Abright (Tex.), 43 S. W. 538.

69. First Nat. Bank v. Gatton, 71 Ill. App. 323 (affd., 172 Ill. 625, 50 N. E. 121); Glover v. Suter, 18 Ky. Law, 1018, 38 S. W. 869.

70. Macon & B. Ry. Co. v. Lane, 6 Ga. App. 549, 65 S. E. 360.

71. De Loach v. Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441.

72. First Nat. Bank v. Gatton, 172 Ill. 625, 50 N. E. 121.

73. Corry v. Jones, 114 Ala. 502, 21 So. 815.

74. Norton v. Reed (Tenn.), 42 S. W. 688.

75. Kean v. Kean, 172 Ill. App. 183.

venience she takes in payment a note payable to his order, where the creditor was not misled.[76]

§ 375. Transactions in Fraud of Creditors.

Yet the credit the husband may derive from his own business transactions from a use and enjoyment of the wife's separate estate should be well considered where his creditors sue; and it is held upon high authority that purchases of real or personal property, made during coverture by the wife of an insolvent debtor, should be suspiciously regarded and not allowed to prevail in contests between his creditors and her, unless she can show that she paid *bona fide* from her separate means.[77] But the "managing agent" doctrine has it limits, in New York, as elsewhere; and where there is a mere shifting of property from husband to wife, and from wife back to husband as her managing agent; or where the husband, doing business as his wife's agent, obtains goods on credit under false pretences, and then gets her to make an assignment of them, such an artifice for evading his creditors is likely to fail.[78]

§ 376. As Wife's Agent in General.

A wife is not bound by her husband's unauthorized or unratified acts,[79] even for supplies purchased for land of which he had a life estate, and she a remainder held in trust without trustees, even though he assumed to act as "agent or trustee,"[80] but he may now be employed, either with or without compensation, as his wife's agent in the management of her lands,[81] or as to her separate estate generally,[82] without formality other than that required

76. King v. Wells, 106 Ia. 649, 77 N. W. 338.

77. Seitz v. Mitchell, 94 U. S. 580. The uncorroborated testimony of the spouses themselves, on such an issue, is not to be favored. Besson v. Eveland, 26 N. J. Eq. 468.

78. Warner v. Warren, 46 N. Y. 228; Edgerly v. Whalen, 106 Mass. 307; Little v. Willets, 55 Barb. (N. Y.) 125.

79. Blount v. Dugger, 115 Ga. 109, 41 S. E. 270; McMillan v. Wilcox, 12 Ga. App. 721, 78 S. E. 270; Sencerbox v. First Nat. Bank, 14 Ida. 95, 93 P. 369; Meeks v. Indiana Lumber Co. (Ind.), 105 N. E. 947; Baker v. Brundage, 131 Minn. 299, 154 N. W. 1086; Norfolk Nat. Bank v. Nenow, 50 Neb. 429, 69 N. W. 936; Curtis v. Olds, 250 Pa. 320, 95 A. 526.

80. Byne v. Corker, 100 Ga. 445, 28 S. E. 443.

81. Walker v. Carrington, 74 Ill. 446; Bongard v. Core, 82 Ill. 19.

82. Watring v. Gibson (W. Va.), 100 S. E. 68; Marbury Lumber Co. v. Woolfolk (Ala.), 65 So. 43; Magerstadt v. Schaefer, 110 Ill. App. 166 (affd., 213 Ill. 351, 72 N. E. 1063); Taylor v. Minigus, 66 Ill. App. 70; Sutherin v. Chesney, 85 Kan. 122, 116 P. 254; Hunt v. Rhodes Bros. Co., 207 Mass. 30, 92 N. E. 1001; First Com-

in the case of any person *sui juris.*[83] Her death will revoke such an agency.[84] As such he may perform for her all the usual services without compensation, without subjecting her property to his debts.[85] Under the Alabama Married Women's Act, authorizing spouses to dispose of her separate estate by parol, she may authorize him to vote her stock in a corporation.[86] In Missouri she cannot have an agent, even her husband, as to land owned by her in fee.[87]

§ 377. Scope of Agency in General.

The general principles of the law of agency apply to cases where parties are husband and wife,[88] and when she makes him her agent she is bound by his acts within the scope of his authority,[89] whether the fact of agency is disclosed or not.[90] A married woman cannot give to any agent a power which she does not herself possess as to her separate estate.[91] She may give him a power of attorney and require him to pursue its terms carefully.[92] And the wife may employ other agents, who will not be held answerable to him for executing her orders.[93]

mercial Bank v. Newton, 117 Mich. 433, 75 N. W. 934, 5 Det. Leg. N. 276; Rankin v. West, 25 Mich. 195; City of Joplin *ex rel.* Kee v. Freeman, 125 Mo. App. 717, 103 S. W. 130; Stout v. Perry, 152 N. C. 312, 67 S. E. 757; Taplin & Rowell v. Clark (Vt.), 95 A. 491; Dickey v. Vaughn (Ala.), 73 So. 507; Nigh v. Dovel, 84 Ill. App. 228; Wasam v. Raben, 45 Ind. App. 221, 90 N. E. 636; Bazemore v. Mountain 121 N. C. 59; Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. 570; Harris v. Weir-Shugart Co., 51 Neb. 483, 70 N. W. 1118.

83. Stout v. Perry, 152 N. C. 312, 67 S. E. 757; Barber v. Keeling (Tex.), 204 S. W. 139.

84. Strong v. Gambier, 155 App. Div. 294; 140 N. Y. S. 410.

85. Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703; Gibson v. Kimmit, 113 Ill. App. 611.

86. Hoene v. Pollak, 118 Ala. 617, 24 So. 349, 72 Am. St. R. 189.

87. Spurlock v. Dornan, 182 Mo. 242, 81 S. W. 412.

88. Runyoon v. Snell, 116 Ind. 164, 18 N. E. 522, 9 Am. St. R. 839; Roper v. Cannel City Oil Co. (Ind.), 121 N. E. 96

89. Thompson v. Brown, 106 Ia. 367, 76 N. W. 819; Meylink v. Rhea, 123 Ia. 310, 98 N. W. 779; Thomas v. Equitable Building & Loan Assn., 215 Pa. 259, 64 A. 531; Swatts v. Harrison, 19 Ga. App. 217, 91 S. E. 337; Western Carolina Realty Co. v. Rumbough, 18 N. C. 641, 90 S. E. 931; Bank of Kenton v. Preble, 87 Ore. 230, 170 P. 302; Leppel v. Englekamp, 12 Colo. App. 79, 54 P. 403. Where a husband, while collecting rent of his wife's tenant, and in her absence, committed an assault, the wife could not be held liable therefor in the absence of proof that, in appointing her husband her agent, she acted of her own free will. O'Carroll v. Stark, 85 N. J. Law, 438, 89 A. 989.

90. Williamson v. O'Dwyer & Ahern Co., 127 Ark. 530, 192 S. W. 899.

91. Kenton Ins. Co. v. McClellan, 43 Mich. 564.

92. Nash v. Mitchell, 71 N. Y. 199.

93. Southard v. Plummer, 36 Me. 64.

The undoubted right of the wife, on general principles, to treat her husband as the trustee of her separate property, has given rise, under the Married Women's Acts, to perplexing questions as between herself and his creditors. In New York, her privileges in this respect are carried very far; for she may employ her husband as her managing agent to control her property, without subjecting it to the claim of his creditors; the application of an indefinite portion of the income to his support does not impair her title to the property; and neither he nor his creditors will acquire an interest in the property through his services thus rendered.[94] In Illinois, too, it is well recognized that the wife may make her husband her agent to collect debts due her, to receive from others the income of her estate, and, like other agents, to manage and control her separate property in her name.[95] Such, too, is the rule of certain other States, to the practical disadvantage of the husband's creditors, as well as for the wife's protection against her husband.[96] In Maine the husband may sue for damages to his wife's separate estate while managing it for her.[97]

§ 378. Scope of General Agency.

A husband who is general agent for his wife in the construction of her building has implied authority to make changes in the building contract,[98] and may bind her by a note given for money which is expended in grain deals.[1] A husband who has general power to manage his wife's land may bind her by an agreement with other land owners for joint drainage of the lands.[2] A general agency will not bind the wife by his fraud in making a conveyance for her as such agent where their interests are antagonistic.[3] A general power of attorney by a wife to her husband for the sale of her stock does not empower him to apply the proceeds to his debt, or warrant the vendee in doing do,[4] nor to bind her by notes.[5] General authority to manage her property does not

94. Buckley v. Wells, 33 N. Y. 518; Knapp v. Smith, 27 N. Y. 277.

95. Patten v. Patten, 75 Ill. 446.

96. Aldridge v. Muirhead, 101 U. S. 397; Coleman v. Semmes, 56 Miss. 321; Wells v. Smith, 54 Ga. 262.

97. Woodman v. Neal, 48 Me. 266. But only in her name, in accordance with statute.

98. Bryan v. Hunnicutt (Ala.), 76 So. 471.

1. Buchanan Elevator Co. v. Lees (N. D.), 163 N. W. 264.

2. Irwin v. Hoyt, 162 Ia. 679, 144 N. W. 584.

3. Manship v. Newton (S. C.), 89 S. E. 467.

4. Wilson v. Wilson-Rogers, 181 Pa. 80, 37 A. 117.

5. Morris v. Friend (Ark.), 173 S. W. 199.

imply power to bind her by a purchase of other property of like nature,[6] or to apply rents to improvements or the payment of taxes.[7] A wife is not bound by the husband's agreement establishing her boundary lines, even though he is her general agent in the management of her lands and business.[8]

§ 379. Implied Authority as Agent.

If a wife has once authorized her husband to act for her, she will continue to be liable for his acts to anyone knowing of the agency till she has notified such person of its termination.[9] Authority to a husband to sell his wife's property implies authority to receive payment,[10] but without special authority a husband acting as his wife's agent cannot accept anything but money in payment for her real estate,[11] nor on her promissory note,[12] nor appropriate the money received to his own use.[13] Her indorsement of a promissory note to his order is sufficient authority for him to collect it for her.[14] A power to collect money for a wife does not give power to make a gift of it to a third person.[15] Her authority to pledge her property will not authorize a sale.[16] Authority to a husband to make his wife a definite specified contract does not empower him to make other contracts not specified, though in relation to the same subject matter,[17] as where he contracts to pay a commission for the sale of her land, he acting as her agent for the sale.[18] Where a wife intrusts a deed to her husband for delivery, he has implied power to make reasonable stipulations as to the delivery which are within her instructions and not in fraud of her rights.[19] A husband having authority from his wife to build a barn may employ a contractor and authorize him to procure materials.[20] It has been held that where a

6. Du Bose v. Gladden, 75 S. C. 78, 55 S. E. 152.

7. Taylor v. Taylor, 54 Ore. 560, 103 P. 524.

8. McCombs v. Wall, 66 Ark. 336, 50 S. W. 876.

9. Howard v. Strawbridge & Clothier, 165 Ky. 88, 176 S. W. 977.

10. Long v. Martin, 71 Mo. App. 569.

11. Runyon v. Snell, 116 Ind. 164, 18 N. E. 522, 9 Am. St. R. 839.

12. Carver v. Carver, 53 Ind. 241.

13. Reynolds v. Nat. Bank of Commerce (Kan.), 178 Pa. 605.

14. Stone v. Gilliam Exch. Bank, 81 Mo. App. 9.

15. Mitchener v. Frazer, 168 Mo. App. 265, 153 S. W. 488.

16. Morgan v. Hays (Tex.), 147 S. W. 315.

17. Crawley v. Watt-Holmes Hardware Co., 12 Ga. App. 367, 77 S. E. 106.

18. Harnwell v. J. D. Arnold & Co., 128 Ark. 10, 193 S. W. 506.

19. Bott v. Wright (Tex.), 132 S. W. 960.

20. Elliott v. Bodine, 59 N. J. Law, 567, 36 A. 1038.

husband was executor under a will containing a legacy to his wife, and under which she was trustee, had authority to employ counsel and other assistance in the management of the estate and property, including the trust estate.[21] The marital relation gives a husband no authority to consent to a surgical operation on the wife, as she is capable of consenting.[22]

§ 380. Power to Bind Wife by Declarations.

The general rule that a principal is bound by the representations of an agent as to existing facts in regard to the subject matter of the agency applies to a wife's agent.[23] Thus delivery to a husband of a note made by the wife as surety is authority for his delivery of it and to bind her by his representation that she made it as principal,[24] and where he manages her business he has implied authority to make representations as to her financial condition.[25] A wife is bound by her husband's admission when he acts as her agent,[26] but not otherwise.[27] Declarations not made at the time of a transaction, and disconnected with his act as her agent, are not admissible in evidence against her, even though they might be as against himself.[28] An authority to declare that a wife is in partnership with her husband cannot be inferred from his authority to attend generally to her business.[29]

§ 381. Evidence of Agency in General.

The husband's agency, whether created under suspicious circumstances or not, as regards the public, is, like other agencies, a matter of fact for legal ascertainment upon all the proof. A husband's agency to act for his wife must in some way affirmatively appear.[30] The fact of agency must be clearly estab-

21. Sowles v. Hall, 73 Vt 55, 50 A. 550.

22. Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609.

23. Watring v. Gibson (W. Va.), 100 S. E. 68.

24. Wm. Deering & Co. v. Veal, 25 Ky. Law, 1809, 78 S. W. 886.

25. Morris v. Posner, 111 Ia. 335, 82 N. W. 755.

26. Arnold v. Loomis, 170 Cal. 95, 148 P. 518.

27. Lohrman v. Grundler, 168 Ill. App. 161; Ewing v. Gray, 12 Ind. 64; Green v. Pearlstein, 213 Mass. 360, 100 N. E. 625; Ricks v. Wilson, 154 N. C. 282, 70 S. E. 476.

28. Livesley v. Lasalette, 28 Wis. 38; Warner v. Warren, 46 N. Y. 228.

29. First Nat. Bank v. Leland, 122 Ala. 289, 25 So. 195.

30. Dussoulas v. Thomas (Del.), 65 A. 590; Axson v. Belt, 103 Ga. 578, 30 S. E. 262; Blackstone v. Widincamp, 145 Ga. 689, 89 S. E. 745; Wait v. Baldwin, 60 Mich. 622, 27 N. W. 697, 1 Am. St. R. 551; Slaughter v. Elliott, 138 Mo. App. 692, 119 S. W. 481; Guenther v. Moffett (N. J.), 71 A. 153; Snyder v. Sloane, 65 App.

lished.[31] His possession of her property is some evidence of agency to deal with it,[32] but it is not conclusive,[33] as is her permitting him to do business generally in her name.[34] Where the transaction in question concerns their household goods, slight evidence will establish the fact of agency.[35] The same is true where his acts in regard to her property tend to carry out her known wishes.[36] Under the Alabama statute a wife may only contract in writing with her husband's written consent, and therefore cannot authorize him orally to act as her agent.[37]

§ 382. Burden of Proof.

Persons dealing with a husband as his wife's agent are at their peril to know that he has authority.[38] Therefore the burden of proof is on the party relying on such agency.[39] It may be shown

Div. 543, 72 N. Y. S. 981; Hornberger v. Feder, 30 Misc. 121, 61 N. Y. S. 865; Hewey v. Andrews, 82 Ore. 448, 161 P. 108; True v. Cudd, 106 S. C. 478, 91 S. E. 856; Henderson v. State, 55 Tex. Cr. 640, 117 S. W. 825; Enslen v. Allen, 160 Ala. 529, 49 So. 430. Under the Mississippi Married Women's Act a husband cannot charge his wife's property with a liability without her written consent. Fairbanks Co. v. Briley (Miss.), 25 So. 354.

31. Roper v. Cannel City Oil Co. (Ind.), 121 N. E. 96; Mead v. Spalding, 94 Mo. 43, 6 S. W. 384; Long v. Martin, 152 Mo. 668, 54 S. W. 473; Farley v. Stroeh, 68 Mo. App. 85; Elliott v. Bodine, 59 N. J. Law, 567, 36 A. 1038; Shesler v. Patton, 114 App. Div. 846, 100 N. Y. S. 286.

32. Furman v. Chicago, R. I. & P. Ry. Co., 62 Ia. 395 (husband possessing wife's bills of lading).

33. Morse v. Kelsey, 156 App. Div. 946, 141 N. Y. S. 1132.

34. Highland v. Ice (W. Va.), 84 S. E. 252. The use in an instruction of the words "habitual" and "habitually," to qualify the alleged conduct of the husband in dealing with his wife's land, did not require the husband's acts to be so often repeated as to form a habit, but they meant that, if the wife ratified all contracts assumed to have been made by the husband, his agency might be implied. Marks v. Herren, 47 Ore. 603, 83 P. 385. Though a wife knew her husband was trying to bring about a sale of her property and it was within her right to approve any sale he might arrange for if she found it satisfactory, that does not render her individually liable to compensate brokers engaged by the husband. Bierkamp v. Beuthien (Ia.), 155 N. W. 819.

35. Furman v. Chicago, R. I. & P. Ry. Co., 62 Ia. 395, 17 N. W. 598.

36. Simes v. Rockwell, 156 Mass. 372, 31 N. E. 484.

37. First Nat. Bank v. Leland, 122 Ala. 289, 25 So. 195; Reeves v. McNeill, 127 Ala. 175, 28 So. 623.

38. Kenton Ins. Co. of Ky. v. McClellan, 43 Mich. 564, 6 N. W. 88.

39. Colt v. Lawrenceburg Lumber Co., 44 Ind. App. 122, 88 N. E. 720; Davidson v. Slack, 143 Ia. 104, 120 N. W. 109; State *ex rel.* Armour Packing Co. v. Dickmann, 146 Mo. App. 396, 124 S. W. 29; Kuenzel v. Nicholson, 155 Mo. 280, 56 S. W. 1076; Speiss v. Weinberg, 27 Misc. 774, 57 N. Y. S. 761; Citizens' Sav. Bank & Trust Co. v. Jenkins (Vt.), 99 A. 250.

by any evidence from which agency can be reasonably and logically inferred,[40] if the evidence fairly indicates that his acts were with her knowledge and acquiescence.[41] The evidence should be direct.[42] In Missouri it is said that, to establish an agency of the husband on his wife's behalf, the evidence must be more cogent and strong, and more satisfactory than would be required between persons occupying different positions,[43] especially where the contract is to manage her separate estate and calls for compensation to him for services which the relation obliges him to do for nothing.[44] It may be established by circumstantial evidence,[45] but it need not usually be in writing.[46] Her silence when in her presence he makes a contract for her is usually sufficient evidence of agency.[47] Her failure to object when she has knowledge of his dealings with her property as her agent,[48] or where the facts put her on inquiry to learn his acts, are both evidence of agency.[49] The wife's denial of the fact of agency may be controlled by other evidence, including her previous inconsistent declarations.[50]

§ 383. Presumptions.

No presumption of such agency arises merely from the fact of the relation.[51] The courts in Illinois go so far as to hold that the

40. Lunge v. Abbott, 114 Me. 177, 95 A. 942; Bigelow v. Woolverton, 65 Misc. 178, 119 N. Y. S. 630.

41. Chamberlain v. Brown, 141 Ia. 540, 120 N. W. 334; Newton Centre Trust Co. v. Stuart, 201 Mass. 288, 87 N. E. 630.

42. Cox v. St. Louis, M. & S. E. Ry. Co., 111 Mo. App. 394, 85 S. W. 989.

43. Brown v. Daugherty, 120 F. 526; Brown v. Connecticut Fire Ins. Co., 197 Mo. App. 317, 195 S. W. 62; Eystra v. Capelle, 61 Mo. 578. See, further, Aldridge v. Muirhead, 101 U. S. 397; Paine v. Farr, 118 Mass. 74; Beutel v. Standau, 7 Kan. App. 813, 53 P. 836.

44. *In re* Simonson's Estate, 164 Wis. 590, 160 N. W. 1040.

45. Rauer's Law & Collection Co. v. Berthiaume, 21 Cal. App. 670, 132 P. 596.

46. Lister v. Vowell, 122 Ala. 264, 25 So. 564; Long v. Martin, 152 Mo. 668, 54 S. W. 473; Stenson v. Lancaster, 178 Mo. App. 340, 165 S. W. 1158; Burchett v. Hamill, 5 Okla. 300, 47 P. 1053.

47. Foertsch v. Germuiller, 9 App. D. C. 351; Shimer v. Ronk, 139 App. Div. 137, 123 N. Y. S. 479; Kissinger v. Jacobs, 113 N. Y. S. 819; Laycock v. Parker, 103 Wis. 161, 79 N. W. 327.

48. Brooks v. Greil Bros. Co. (Ala.), 81 So. 549; Journal Pub. Co. v. Barber, 165 N. C. 478, 81 S. E. 694; Barry v. Stover, 20 S. D. 459, 107 N. W. 672; Horr v. Hollis, 20 Wash. 424, 55 P. 565; Shanks & March v. Michael, 4 Cal. App. 553, 88 P. 596.

49. Phillips v. Phillips, 163 Cal. 530, 127 P. 346.

50. Korf v. Korf, 125 Mich. 259, 84 N. W. 130, 7 Det. Leg. N. 491.

51. Furman v. Chicago, R. I. & P. Ry. Co., 62 Ia. 395, 17 N. W. 598; Detroit Lumber Co. v. Cleff, 164 Mich. 276, 128 N. W. 231, 17 Det. Leg. N. 878; J. L. Thompson Co. v. Coats, 174 N. C. 193, 93 S. E. 724; Bryan v. Orient Lumber & Coal Co. (Okla.),

husband's dealings with his wife's separate property will now be presumed, in the absence of proof to the contrary, to be in the character of agent, even as to the proceeds and income thereof; and hence rendering him liable to account like other agents, with allowance of his reasonable compensation, but so as to require him to establish any claim he may make of a gift or legal transfer to him, by due proof that the wife so assented and understood; in short, that the common-law rights of the husband to the wife's property are swept away.[52] But in such a presumption other States by no means concur. The fact that the acts of the husband as agent were done with the wife's knowledge and concurrence will raise a presumption of agency,[53] but it has been held that his cultivation of her lands will not raise such a presumption.[54] Under the Arkansas statute making the husband having the control of the wife's separate property presumptively her agent, there is an implication of agency where the wife accepts the benefits of his acts as such.[55]

§ 384. Admissibility of Evidence.

The husband's testimony is competent on the question of his agency,[56] even though the wife was present at the transaction,[57] but it is not conclusive, especially where the wife denies the

156 P. 897; Red River Nat. Bank v. Bray (Tex.), 132 S. W. 968; (1909) Stroter v. Brackenridge, 102 Tex. 386, 118 S. W. 634; Wagoner v. Silva, 139 Cal. 559; Steele v. Gold Fissure Gold Min. Co., 42 Colo. 529, 95 P. 349; Rheam v. Martin, 26 App. D. C. 181; McLeod v. Poe, 142 Ga. 254, 82 S. E. 663; Woodward v. Fuller (Ga.), 88 S. E. 974; Van Kleeck v. Channon, 175 Ill. App. 626; Turgrimson v. Wahl, 169 Ill. App. 462; Brown v. Honeyfield, 139 Ia. 414, 116 N. W. 731; Bianchi v. Del Valle, 117 La. 587, 42 So. 148; Harvey v. Squire, 217 Mass. 411, 105 N. E. 355; Sutton v. Brekke, 117 Minn. 519, 34 N. W. 289; Baker v. Thompson, 214 Mo. 500, 114 S. W. 497; McCollum v. Boughton, 132 Mo. 601, 30 S. W. 1928, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480; Henry v. Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. R. 580; Francis v. Reeves, 137 N. C. 269, 49 S. E. 213; Sciolaro v. Asch, 137 App. Div. 667, 946, 122 N. Y. S. 518; Garber v. Spivak, 114 N. Y. S. 762; Clarke v. Wells, 83 Misc. 93, 144 N. Y. S. 629; Cushman v. Masterton (Tex.), 64 S. W. 1031; Fulton Bank v. Mathers (Ia.), 166 N. W. 1050; Crane v. Ross, 168 Mich. 623, 135 N. W. 83.

52. Patten v. Patten, 75 Ill. 446.

53. Bankard v. Shaw, 199 Pa. 623, 49 A. 230.

54. Jones v. Harrell, 110 Ga. 373, 35 S. E. 690; Carolina Chemical Co. v. Wisenbaker, 18 Ga. App. 528, 89 S. E. 1053.

55. American Exp. Co. v. Lankford, 2 Ind. T. 18, 46 S. W. 183.

56. Rogers v. Smith, 184 Ala. 506, 63 So. 530; Christian v. Smith, 85 Mo. App. 117; Lake Grocery Co. v. Chiostri, 34 N. D. 386, 158 N. W. 998.

57. Chicago, R. I. & P. Ry. Co. v. Cotton (Okla.), 162 P. 763.

agency.[58] Evidence of similar previous transactions in which he is shown to have been authorized to act as agent are not of themselves sufficient to establish the agency in the particular case,[59] but are competent as tending to prove agency.[60] Evidence that a wife had given directions how she wanted a house built is not competent in an action on a contract made by her husband for materials for the house, to prove his agency.[61] In an action against a wife to charge her for overdrafts by her husband as her agent, evidence of contracts for the purchase of property by him in which she participated was held competent as tending to show an agency in regard to her bank account.[62]

§ 385. Estoppel to Deny Agency.

Where the wife has permitted her husband to deal with her property as her agent, she may be estopped to deny his authority where he exceeds it,[63] and though his act results in damage to her,[64] unless she shows that the creditor knew that the agency was limited.[65] She may be liable for his contracts for materials for finishing her dwelling house where he acted as agent and parties believed him to be the owner.[66] The mere fact that a wife gets the benefit of goods bought by her husband in her name will not of itself make her liable for the price,[67] but where such is the fact, slight evidence

58. Drake v. Drake, 142 Wis. 602, 126 N. W. 19; Just v. State Sav. Bank, 132 Mich. 600, 94 N. W. 200, 10 Det. Leg. N. 36.

59. Nunn v. Carroll, 83 Mo. App. 135.

60. Hawkins v. Windhorst, 77 Kan. 674, 96 P. 48; Rahm v. Newton, 87 Minn. 415, 92 N. W. 408.

61. Russell v. Stoner, 18 Ind. App. 543, 47 N. E. 645.

62. First Commercial Bank v. Newton, 117 Mich. 433, 75 N. W. 924, 5 Det. Leg. N. 276.

63. Brookes v. Griel Bros. Co., 179 Ala. 459, 60 So. 387; Class v. Cincinnati Tobacco Warehouse Co., 142 Ky. 505, 134 S. W. 897; Corn v. Meredeth, 160 Ky. 677, 170 S. W. 22; Maxey, &c., Co. v. Burnham, 89 Me. 538, 36 A. 1003, 56 Am. St. R. 436; Cannon v. Bannon, 136 N. Y. S. 139; Gleason v. Bell, 91 Ohio St. 268, 110 N. E. 513; McLean v. Windham Light & Lumber Co., 85 Vt. 167, 81 A. 613; Barry v. Stover, 20 S. D. 459, 107 N. W. 672; Downing v. Lewis, 59 Neb. 38, 80 N. W. 261 (where wife permitted husband to receive joint consideration). Where, with knowledge of wife, a deed by third person to her was delivered to husband, who recorded it with her knowledge and consent, it was held there was sufficient evidence to warrant the conclusion of a delivery to and acceptance by the wife. Battle v. Claiborne (Tenn.), 180 S. W. 584.

64. Camren v. Squires, 174 Mo. App. 272, 156 S. W. 773.

65. McMullen v. Ritchie, 64 F. 522 (mod., 79 F. 522, 25 C. C. A. 50.)

66. Maxey Mfg. Co. v. Burnham, 89 Me. 538, 36 A. 1003, 56 Am. St. R. 436; Friedman v. D'Amico, 123 N. Y. S. 953.

67. Hightower v. Walker, 97 Ga. 748, 25 S. E. 386. Porter v. Terrell, 2 Ga. App. 269, 58 S. E. 493.

will be sufficient to establish his agency,[68] such as the fact that the wife learned of the transaction and caused certain alterations to be made in the work.[69] She cannot reap the benefit of his acts and claim she did not know that they were fraudulent.[70] Where a wife permitted her husband to pawn her jewelry in his name and authorized him to redeem it, he has sufficient apparent authority to authorize a third person to redeem and hold it as security for the amount advanced.[71] Where a wife permitted her husband, a note broker, to take and transfer notes and securities in her name, she was held bound by his act in receiving payment from a mortgagor who had executed a non-negotiable note and mortgage to her, which her husband transferred to another.[72] A wife cannot take the benefit of part of an unauthorized contract made by her husband, and repudiate the balance,[73] nor can she escape liability for his fraudulent conduct as her agent by denying his agency where she takes the benefit of the contract.[74] She will be estopped to deny his agency to raise money for her benefit where she gives him negotiable securities for the purpose.[75] Where a wife for twenty years had permitted her husband to control her real estate and to appropriate the rents, she was held estopped to claim rent notes which he had taken in his own name and assigned to a *bona fide* holder for value.[76] A wife is not estopped to deny her husband's agency by the mere fact that she has permitted him to manage her land and dispose of the products.[77]

§ 386. Ratification in General.

It would appear that in general the agency of the husband in selling, exchanging, or managing his wife's separate statutory property may be previously conferred or ratified afterwards by

68. Pinkston v. Cedar Hill Nursery & Orchard Co., 123 Ga. 302, 51 S. E. 387; Home Fertilizer & Chemical Co. v. Dickerson, 12 Ga. App. 149, 76 S. E. 1040.

69. *In re* Berkebile, 144 F. 572; Holden v. Kutscher, 17 Misc. 540, 40 N. Y. S. 737; Whipple v. Webb, 101 App. Div. 612 (building control), 92 N. Y. S. 1150.

70. Allen v. Garrison, 92 Tex. 546, 50 S. W. 335; Barber v. Keeling (Tex.), 204 S. W. 139.

71. Lesser v. Steindler, 110 App. Div. 262, 97 N. Y. S. 255.

72. Barry v. Stover, 20 S. D. 459, 107 N. W. 672.

73. Chamberlain v. Brown, 141 Ia. 540, 120 N. W. 334; Smith v. Olivarri (Tex.), 27 S. W. 235.

74. Watring v. Gibson (W. Va.), 100 S. E. 68.

75. Gardner v. Hughes (Ark.), 206 S. W. 678; Whitaker v. Lee (Tenn.), 57 S. W. 348.

76. Brooks v. Greil Bros. (Ala.), 81 So. 549.

77. Saunders v. King, 119 Ia. 291, 93 N. W. 272.

the wife,[78] but only where the husband represents himself as her agent.[79] Ratification of his unauthorized acts as attorney may be presumed in some instances by her acts and conduct; to his violation of private instructions should apply the usual rules;[80] but evidence to bind the principal should perhaps be stronger where a wife is concerned than in the ordinary case of an agent.[81] The party relying on a ratification has the burden of showing it.[82]

§ 387. What Constitutes Ratification.

In an action wherein plaintiff relied on a wife's ratification of her husband's unauthorized contract, it was held error to refuse an instruction as to what constituted a ratification.[83] The following facts have been held to operate as a ratification: participation in her husband's unauthorized building contract in her name;[84] execution of a deed to carry out her husband's unauthorized contract to sell her land;[85] disposal of part of the property she secures by his contract;[86] occupation of land to the line agreed on by him;[87] knowledge of his unauthorized act and her failure to repudiate it;[88] a promise to pay for materials bought by him for use on her land;[89] giving a note in payment for goods unau-

78. Lichtenberger v. Graham, 50 Ind. 288; Young v. Inman & Nelson, 146 Ia. 492, 125 N. W. 177; Black v. McQuaid (N. J.), 68 A. 102; Lichtenberger v. Graham, 50 Ind. 288. See § 455.

79. Delaware & Atlantic Telegraph & Telephone Co. v. Jordan (Del.), 78 A. 401; Steward v. Church, 108 Me. 83, 79 A. 11. But see, *contra*, Kuenzel v. Nicholson, 155 Mo. 280, 56 S. W. 1076.

80. Griffin v. Ransdell, 71 Ind. 440; Jordan v. Delaware & A. Telegraph & Telephone Co. (Del.), 75 A. 1014.

81. Ladd v. Hildebrant, 27 Wis. 135; Wells v. Thorman, 37 Conn. 318; McLaren v. Hall, 26 Ia. 297; Lichtenberger v. Graham, 50 Ind. 288; Merrill v. Parker, 112 Mass. 250. And see Chappell v. Boyd, 61 Ga. 662.

82. Sanders v. Brown, 145 Ala. 665, 39 So. 732.

83. Morrill v. McNeill, 74 Neb. 291, 104 N. W. 105.

84. *In re* Berkebile, 144 F. 572.

85. Schader v. White, 173 Cal. 441, 160 P. 557; Czarnecki v. Derecktor, 81 Conn. 339, 71 A. 354; Coonrod v. Studebaker, 53 Wash. 32, 101 P. 489; Nugent v. City of New York, 58 Misc. 453, 111 N. Y. S. 438; Heinemann v. Sullivan, 57 Wash. 346, 106 P. 911.

86. Hoene v. Pollak, 118 Ala. 617, 24 So. 349, 72 Am. St. R. 189; Antony v. Dickel, 167 N. Y. 539, 60 N. E. 1106.

87. Matthews v. French, 194 Mo. 553, 92 S. W. 634.

88 Santa Cruz Rock-Pavement Co. v. Lyons, 133 Cal. 114, 65 P. 329; Richards v. John Spry Lumber Co., 169 Ill. 238, 48 N. E. 63; Bethea v. Beaufort County Lumber Co. (S. C.), 96 S. E. 717.

89. Vetault v. Kennedy, 178 App. Div. 228, 165 N. Y. S. 203. It was held otherwise where in the case of a contract for materials she had given him the money to pay cash and did not know of the sale on credit. Young v. Swan, 100 Ia. 323, 69 N. W. 566.

thorizedly purchased for her by him;[90] giving testimony in an action brought by the husband to enforce an unauthorized contract;[91] claiming rent under a lease made by a husband without authority.[92] Where she accepts the benefit of his unauthorized fraudulent acts she ratifies the acts and becomes liable for the fraud.[93] Bringing action on an insurance policy will ratify statements of her husband as her agent made in the application.[94] Mere silence, of itself, will not operate as a ratification,[95] but the inference of ratification is more easily drawn from that fact when parties are spouses than in other cases.[96] Where a husband took title to her land in his own name, it was held that her acquiescence for five years with knowledge of the fact and acceptance of the application of the land to her debts was a sufficient ratification.[97] Where a husband accepted a payment from a debtor of his wife's who was in default in his payments on a contract to sell land, it was held that her failure to refund the payments operated as a ratification of his waiver of the default.[98] The immediate return of goods unauthorizedly purchased for a wife by a husband, the package being unopened, has been held a good repudiation.[99] Though the Missouri Married Women's Act requires the written consent of a wife to enable her husband to lease her land, she may, after divorce or his death, effectively ratify a lease made by him without such assent.[1]

§ 388. Rights to Recover for Improvements.

Generally a husband cannot recover for improvements made by him on his wife's land during coverture without an express agreement that he is to be repaid for them,[2] nor for money paid for land

90. Norton v. Birmingham Fertilizer Co. (Ala.), 74 So. 97; Swearingen v. Virginia-Carolina Chemical Co., 19 Ga. App. 658, 91 S. E. 1050.

91. Harrington v. Gies, 45 Mich. 374, 8 N. W. 87.

92. Shull v. Cummings, 174 Mo. App. 569, 161 S. W. 360.

93. Quarg v. Scher, 136 Cal. 406, 69 P. 96; Atherton v. Barber, 112 Minn. 523, 128 N. W. 827; Bell v. Jones, 151 N. C. 85, 65 S. E. 646; Lewis v. Hoeldtke (Tex.), 76 S. W. 309; Watring v. Gibson (W. Va.), 100 S. E. 68; Barber v. Keeling (Tex.), 204 S. W. 139.

94. Queen of Arkansas Ins. Co. v. Dumas (Ark.), 168 S. W. 561.

95. Kelly v. Cook (Ala.), 73 So. 220.

96. Bethea v. Beaufort County Lumber Co. (S. C.), 96 S. E. 717.

97. Thompson v. Stringfellow, 119 Ala. 317, 24 So. 849.

98. Robberson v. Clark, 173 Mo. App. 301, 158 S. W. 854.

99. National Perfume Co. v. Jacobson, 137 N. Y. S. 856.

1. Shull v. Cummings, 174 Mo. App. 569, 161 S. W. 360.

2. Larson v. Carter, 14 Ida. 511, 94 P. 825; Reuter v. Stuckart, 181 Ill.

to which title is taken in her name,[3] even though he has authority to manage and control her land,[4] especially where he receives the rents and profits,[5] or where under a joint conveyance he takes the entire title by survivorship.[6] It is presumed that they are a gift to her,[7] and that he is reimbursed by the use and enjoyment of the land.[8] Such improvements become her separate estate.[9]

It has been held otherwise where he purchased land with his own money and took title in her name on a void contract with her that he should have a half interest in case of her death, and where he afterward improved such property,[10] and also where in making the improvements he honestly believed that he was improving his own land.[11] Her express promise to reimburse him for improvements will not be enforced where rents and profits received by him have already done so.[12] Where a wife sues to set aside a deed to him, the court may make such allowance for his improvements as will adjust the rights of the parties.[13]

§ 389. To Recover for Services.

A wife may validly employ her husband to render services to her, either with or without compensation,[14] but without a special agreement his services rendered in farming her land will not give him title to the crops or render them subject to his debts,[15] nor can he recover for keeping her livestock on his farm.[16] In Vir-

529, 54 N. E. 1014; Rau v. Rowe's Adm'x, 168 Ky. 704, 182 S. W. 846; Carpenter v. Hazelrigg, 103 Ky. 538, 20 Ky. Law, 231, 45 S. W. 666; Curd v. Brown, 148 Mo. 82, 49 S. W. 990; Holman v. Holman (Mo.), 183 S. W. 623.

3. Woodard v. Woodard, 148 Mo. 241, 49 S. W. 1001.

4. Larson v. Carter, 14 Ida. 511, 94 P. 825.

5. Watkins v. Watkins (Tex.), 119 S. W. 145.

6. Friedrich v. Huth, 155 Wis. 196, 144 N. W. 202.

7. Kearney v. Vann, 154 N. C. 311, 70 S. E. 747; Nelson v. Nelson (N. C.), 96 S. E. 986; Scheiner v. Arnold, 142 Wis. 564, 126 N. W. 17.

8. Ketterer v. Nelson, 146 Ky. 7, 141 S. W. 409.

9. Shaw v. Bernal, 163 Cal. 262, 124 P. 1012; Hood v. Hood, 83 N. J. Eq. 695, 93 A 797.

10. Stroud v. Ross, 118 Ky. 630, 26 Ky. Law, 521, 82 S. W. 254; but see, *contra*, Miller v. Miller, 156 Ky. 267, 160 S. W. 923.

11. Anderson v. Anderson (N. C.), 99 S. E. 106.

12. Nall v. Miller, 95 Ky. 448, 15 Ky. Law 862, 25 S. W. 1106.

13. Fay v. Fay, 165 Cal. 469, 132 P. 1040.

14. Bank of Tipton v. Adair, 172 Mo. 156, 72 S. W. 510.

15. Fink v. McCue, 123 Mo. App. 313, 100 S. W. 549; Pocomoke Guano Co. v. Colwell (N. C.), 98 S. E. 535; Olson v. O'Conner, 9 N. D. 504, 84 N. W 359, 81 Am. St. R. 595; Thurston v. Osborne-McMillan Elevator Co., 13 N. D. 508, 101 N. W. 892.

16. Smith's Ex'r v. Johns, 154 Ky. 274, 157 S. W. 21.

ginia it has been held that an expectation of payment for services will enable a husband to recover for them without an express contract.[17]

§ 390. To Recover for Advances.

A husband cannot recover for money advanced to pay off his wife's mortgages,[18] or her taxes, even though he was acting as executor under a will naming her as residuary legatee.[19] In order to recover for money advanced to pay a wife's debts a husband has the burden of showing that he used his own money.[20] In Louisiana payment of a wife's note and mortgage renders him her creditor, but without subrogation, as the payment extinguishes the mortgage.[21] In the same State, where he has a claim against her for an advance, it is held to be his duty to apply to its satisfaction money received by him from her inheritance, and not to wait and prove the debt against her succession.[22]

§ 391. Liabilities; For Wife's Money Used for Necessaries.

Again, the wife is permitted to bestow her statutory separate property upon her husband, or waive her statutory rights to a considerable extent. Thus, it is held that money used by the husband with the wife's knowledge and consent, in payment of ordinary household expenses and without any agreement for repayment to her on his part, cannot be recovered from his estate afterwards,[23] no promise to pay being implied, either at law or in equity,[24] and the wife's consent being presumed.[25] Thus, if the wife's separate estate is received by the husband with her consent, it will be pre-

17. Browning's Ex'r v. Browning (Va.), 36 S. E. 108 (aff'd., reh., 36 S. E. 525).

18. Vazis v. Zimmer (Mo.), 209 S. W. 909.

19. Bean v. Bean, 135 N. C. 92, 47 S. E. 232.

20. Gosnell v. Jones, 152 Ind. 638, 53 N. E. 381; Morin v. Kirkland, 226 Mass. 345, 115 N. E. 414.

21. Aiken v. Robinson, 52 La. Ann. 925, 27 So. 529.

22. Succession of Barrow, 118 La. 1031, 43 So. 667. If a husband pending his marriage expends separate funds of his own on the separate property of his wife, and is by her will left all the property belonging to her, his claim for the enhanced value of the property through the expenditures is merged in the acquisition made by him under the will of the property, and if the forced heir of the wife has the legacy reduced to the wife's disposal portion, the claim for enhancement is merged to the extent of the interest continued to be held by the husband. Succession of Barrow, 118 La. 1031, 43 So. 667.

23. Cartwright v. Cartwright, 53 Ia. 57; Bubb v. Bubb, 201 Pa. 212, 50 A. 759.

24. Stoekslager v. Mechanies' Loan & Savings Inst., 87 Md. 232, 39 A. 742.

25. Denny v. Denny, 123 Ind. 240, 23 N. E. 519.

sumed to have been expended in accordance with her wishes,[26] especially where he expends it for the family benefit.[27] The fact that he receives it as "agent" does not tend to show that she objected to its receipt by him.[28] In Missouri it is held that a wife cannot recover from her husband the income from her farm on which they cohabited, even though she gave no written consent to his use of the money, as required by the Married Women's Act in that State, if he supported the family,[29] nor is he liable to her collateral heirs for her rents and profits where he is entitled to them as tenant by the curtesy after her death, and where before death they cohabited and he never denied to her the right to control her rents and profits, and where no contract was made for their repayment.[30]

§ 392. For Wife's Property Received.

A husband who uses his wife's separate estate without her consent is liable to her for the money used,[31] as well as for the purchase price of property conveyed to him by her procurement.[32] His promissory notes given for a loan from her may also be enforced against him or his estate.[33] Where a husband takes title to land in his own name, for which the wife has paid part of the consideration, he holds in trust for her to the extent of her payment.[34] Where a husband invests the wife's money in land, taking title in his own name, but under an agreement to hold it in trust for her, such a trust is enforceable,[35] as is a contract between spouses that the husband should collect rents and pay necessary

26. Carpenter v. Hazelrigg, 103 Ky. 538, 20 Ky. Law, 231, 45 S. W. 666; Holt v. Colyer, 71 Mo. App. 280.

27. Bristor v. Bristor, 93 Ind. 281; Young v. Valentine 78 App. Div. 633, 79 N. Y. S. 536 (affd., 177 N. Y. 347, 69 N. E. 643).

28. Faircloth v. Borden, 130 N. C. 263, 41 S. E. 381.

29. Crowley v. Crowley, 167 Mo. App. 414, 151 S. W. 512.

30. Donovan v. Griffith, 215 Mo. 149, 114 S. W. 621.

31. Morrish v. Morrish (Pa.), 105 A. 83; Tison v. Gass, 46 Tex. Civ. 163, 102 S. W. 751.

32. Atkins v. Atkins' Estate, 69 Vt. 270, 37 A. 746.

33. Logan v. Hall, 19 Ia. 491; Bryant v. Bryant, 3 Bush (Ky.), 155.

34. Bell v. Stewart, 98 Ga. 669, 27 S. E. 153; Jones v. Elkins, 143 Mo. 647, 45 S. W. 261; Cleghorn v. Obernalte, 53 Neb. 687, 74 N. W. 62; Ray v. Long, 128 N. C. 90, 38 S. E. 291; Kingman-Texas Implement Co. v. Herring Nat. Bank (Tex.), 153 S. W. 394; Sparks v. Taylor, 99 Tex. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381; Strnad v. Strnad, 29 Tex. Civ. 124, 68 S. W. 69.

35. Boyer v. Libey, 88 Ind. 235; Schwartz v. Castlen, 22 Ky. Law, 1063; Stockwell v. Stockwell's Estate (Vt.), 105 A. 30.

expenses therefrom and account to his wife for the balance.[36] If he has received her money as trustee she may in equity compel him to account without proving a contract.[37] A consent that the husband may use the money for a short time is not a waiver of the wife's right to an account,[38] nor is a mere permission to represent her in collecting rents.[39] No lapse of time will bar a wife's right to an account for her property which he uses for her benefit and which he admits she owns.[40] Where she consents to his use of her property he is not liable for interest, in the absence of a special agreement.[41] In Louisiana a husband is not liable for interest on his wife's estate, either dotal or paraphernal, delivered to him under an antenuptial contract, till after demand.[42] Under the Missouri statute providing that a husband may not reduce his wife's choses in action to possession without her written consent, a wife may treat her husband either as trustee or debtor where he obtains her money without the statutory consent.[43]

On the whole there is and must be, throughout this transition period, conflict in the authorities as to the effect of a husband's receiving the proceeds of his wife's share in inherited property, or of some sale or investment in her sole right; States which abide by the common law of coverture inclining to sustain his ancient right of reduction into possession, and presuming in his favor,[44] and States, on the other hand, under the impress of the new legislative policy, reserving her title, unless she plainly and voluntarily divests herself of separate rights.[45]

Certain States, following the English equity doctrine, avoid close inquisition into the husband's management of his wife's property, by limiting the time during which the husband's receipt of the rents, profits, or income shall charge him.[46] It is held, too, that a wife, by allowing her husband for a long series of years to

36. Griffith v. Griffith, 187 Pa. 306, 41 A. 30, 42 W. N. C. 447.

37. McConville v. National Valley Bank, 98 Va. 9, 34 S. E. 891.

38. Stockwell v. Stockwell's Estate (Vt.), 105 A. 30; Keller v. Washington (W. Va.), 98 S. E. 880.

39. Smith's Ex'r v. Johns, 154 Ky. 274, 157 S. W. 21.

40. Barber v. Barber, 125 Ga. 226, 53 S. E. 1017; Parrish v. Williams (Tex.), 53 S. W. 79.

41. *In re* Remmerde, 206 F. 826.

42. Murphy v. McLoughlin, 247 F. 385, 159 C. C. A. 439.

43. Algeo v. Algeo (Mo.), 207 S. W. 842; Smith v. Settle, 128 Mo. App. 379, 107 S. W. 430.

44. Reade v. Earle, 12 Gray (Mass.), 423; Windsor v. Bell, 61 Ga. 671; Nevius v. Gourley, 95 Ill. 206; Jacobs v. Hesler, 113 Mass. 157.

45. Nissley v. Heisey, 78 Pa. 418; Penn v. Young, 10 Bush (Ky.), 626; Moyer's Appeal, 77 Pa. 482.

46. One year from date of such re-

appropriate to his own use, or their joint use, the income of her separate estate, forfeits her right to compel him to account, until at all events she revokes such permission, and then only from the date of revocation,[47] a rule desirable for preserving domestic peace, and ensuring the husband's estate after death against dubious claims; for otherwise, as we have intimated, and apart from the wife's delay, or her presumed assent to household expenses or to a gift to her husband, and after deducting his charge for services, the husband, where regarded as purely an agent, is obligated to account. But even admitting the income his, he may show and execute an intention of preserving such income as his wife's separate property.[48]

§ 393. To Third Person.

A husband acting as his wife's agent in causing furniture to be conveyed to their house has been held liable for conversion, though he disclaimed all personal interest.[49] A husband who orders repairs on his wife's automobile without disclosing the fact of her ownership is liable therefor,[50] as well as for labor performed for him on her farm,[51] as well as where he sells grass from her land which he does not deliver.[52] Where a husband contracted to give land for target practice and to pay for improvements made by a shooting society thereon if they should discontinue the use of the land, it was held that he could not defend against an action on the contract by showing that his wife owned the land.[53] Where a husband exercised dominion over his wife's land, *inter alia* changing the course of a stream thereon, it was held that he was liable for negligence in so doing.[54] In the absence of an agreement he is not liable for compensation for selling her interest in land which they own jointly,[55] especially where he expressly acts as agent for the wife,[56] nor for plans for her building for which he contracted

ceipt is the Mississippi limitation. Hill v. Bugg, 52 Miss. 397.

47. Lyon v. Green Bay R., 42 Wis. 548; Reeder v. Flinn, 6 Rich. (S. C.) 216; Lishey v. Lishey, 2 Tenn. Ch. 5.

48. Gill v. Woods, 81 Ill. 64; Patten v. Patten, 75 Ill. 446; Bongard v. Core, 82 Ill. 19.

49. Edgerly v. Whalen, 106 Mass. 307.

50. Sidney B. Bowman Auto Co. v. Stiner, 177 N. Y. S. 186.

51. Winebremer v. Eberhardt, 137 Mo. App. 659, 119 S. W. 530.

52. Kreisle v. Wilson (Tex.), 148 S. W. 1132; Florida Citrus Exchange v. Grisham, 65 Fla. 46, 61 So. 123.

53. Ackerman v. Ackerman Schuetzen Verein (Tex.), 60 S. W. 366.

54. Garrett v. Beers, 97 Kan. 255, 155 P. 2.

55. Hansbrough v. Neal, 94 Va. 722, 27 S. E. 593.

56. Stevens v. Bacher, 162 Mo. App. 284, 141 S. W. 1143

expressly as her agent,[57] nor as partner for the debts of a store wherein she has an interest.[58] It is a question for the jury to say to whom advances made under a wife's contract were to be charged, where they were actually made to the husband, and where the wife actually owns the land and claims the crops.[59]

57. Rauer's Law & Collection Co. v. Berthiaume, 31 Cal. App. 670, 132 P. 596.

58. Horton v. Haralson, 130 La. 1003, 58 So. 858.

59. Watson v. Herring, 115 Ala. 271, 22 So. 28.

CHAPTER XX.

VALIDITY OF WIFE'S CONTRACTS RELATING TO STATUTORY SEPARATE ESTATE.

§ 394. Power to Contract — Under Statutes Limiting Wife's Power to Contract.

Where the statute limits the wife's power to contract to contracts for the benefit of her separate estate, the wife's bond for payment of money does not bind her personally.[60] The wife cannot become a general borrower, even though she give a promissory note or security in the same connection.[61] Her general engagements, in a word, without the scope of the general rules we have stated, will create no charge upon her separate property enforceable in equity.[62]

60. Huntley v. Whitner, 77 N. C. 392.

61. O'Daily v. Morris, 31 Ind. 111; Way v. Peck, 47 Conn. 23; Viser v. Scruggs, 49 Miss. 705.

62. Williams v. Hugunin, 69 Ill.

There is some difficulty in the purchase, by a married woman, of property, whether real or personal, on credit, arising out of the circumstance that she cannot make a contract for payment which will be personally binding. In New Hampshire it was held that a married woman could not, under the statutes as they stood a few years ago, make a contract for money or property in anticipation of the purchase of separate estate; and hence that her note given for money borrowed, wherewith to make such purchase, was void.[63] The early Married Women's Act in Michigan empowered a wife to contract only as to her property owned at the time of contract.[64] It has been held that the Illinois Married Women's Act did not empower a wife to adopt a child, support it and provide for it out of her estate.[65] Under the District of Columbia statute, a wife's contract for the exchange of her real estate and for the purchase of personal property is *prima facie* presumed to be for the benefit of her separate estate.[66] A wife's agreement to devise property has been held within the California statute as to contracts "concerning or relating" to her separate estate.[67]

§ 395. Effect of Statute of Frauds.

The statute of frauds must apply to her oral promise to be liable for another.[68]

§ 396. By Agent.

In the absence of statutory power to contract, a wife is not bound by contracts made by her agent.[69] Hence in such case she cannot be liable for the negligence of such an agent.[70] But she is bound by such a contract where the statute has removed her disability.[71] Under Married Women's Acts, by virtue of which

214; Huyler v. Atwood, 26 N. J. Eq. 504; Stillwell v. Adams, 29 Ark. 346.

63. Ames v. Foster, 42 N. H. 381. But see later statutes of this State. Batchelder v. Sargent, 47 N. H. 262; Blake v. Hall, 57 N. H. 382. A similar rule applies in some other States. Thompson v. Weller, 85 Ill. 197.

64. Menard v. Campbell, 180 Mich. 583, 147 N. W. 556.

65. Thompson v. Minnich, 227 Ill. 430, 81 N. E. 336.

66. Dobbins v. Thomas, 26 App. D. C. 157.

67. Steinberger v. Young (Cal.), 165 P. 432.

68. Lennox v. Eldred, 65 Barb. (N. Y.), 410.

69. Troy Fertilizer Co. v. Zachry, 114 Ala. 177, 21 So. 471; Appeal of Freeman, 68 Conn. 533, 37 A. 420, 57 Am. St. R. 112, 37 L. R. A. 452.

70. Collier v. Struby, 99 Tenn. 241, 47 S. W. 90.

71. Porter v. Taylor, 64 Fla. 100, 59 So. 400; Baker v. Thompson, 214 Mo. 500, 114 S. W. 497; Kirkpatrick v. Pease, 202 Mo. 471, 101 S. W. 651; Wyatt v. Walton Guano Co., 114 Ga. 375, 4 S. E. 237.

she may invest her estate in a business, she may employ agents to carry it on.[72]

§ 397. Necessity of Joinder or Assent of Husband.

In some States the husband's joinder or assent is essential to validate his wife's contracts.[73] Under the former Indiana Married Women's Act, requiring the husband's consent to the wife's contracts or transfers of her personal estate, she was not bound by her contract without such assent.[74] In Tennessee a husband's written approval of a wife's contract of accord and satisfaction validates it and binds her.[75]

§ 398. Release.

In Delaware a woman divorced *a mensa et thoro* may execute a release of an annuity.[76]

§ 399. In Judicial Proceedings.

A wife may be bound by her contracts made in judicial proceedings.[77]

§ 400. Jointly with Husband.

The joint contract[78] or joint note of herself and her husband is now binding on her, as where the spouses make an express joint contract to repay a third person who has paid the debt of the husband,[79] or to sell their farm in return for support by the grantee.[80] She may be jointly liable with her husband for an advance made to them jointly, but not where the advance is made to him, even if she later obtains the money.[81] An oil and gas

72. Taylor v. Wands, 55 N. J. Eq. 491, 37 A. 315, 62 Am. St. R. 818.

73 Wright v. Brown, 44 Pa. 224; Camden v. Vail, 23 Cal. 633; Maclay v. Love, 25 Cal. 367; Pentz v. Simonson, 2 Beasl. (N. J.) 232; Major v. Symmes, 19 Ind. 117; Miller v. Hine, 13 Ohio St. 565; Haugh v. Blythe, 20 Ind. 24; Dodge v. Hollinshead, 6 Minn. 25; Eaton v. George, 42 N. H. 375; Miller v. Weatherby, 12 Ia. 415; Ezelle v. Parker, 41 Miss. 520; O'Neal v. Robinson, 45 Ala. 526; Bressler v. Kent, 61 Ill. 426; Greenholz v. Haeffer, 53 Md. 184; Cole v. Van Riper, 44 Ill. 58; Armstrong v. Ross, 5 C. E. Green (N. J.), 109; Farmers' Bank v. Richardson, 171 Ky. 340, 188 S. W. 406.

74. Hileman v. Hileman, 85 Ind. 1.

75. Brundige v. Nashville, C. & St. L. R. R., 112 Tenn. 526, 81 S. W. 1248; Montague v. Buchanan (Tenn.), 211 S. W. 211.

76. Bied v. Stiley, 1 Horn. (Del.) 339.

77. Blagge v. Shaw (Tex.), 41 S. W. 756.

78. Pierce v. Kittredge, 115 Mass. 374; Post v. Shafer, 63 Mich. 85, 29 N. W. 519; Basford v. Pearson, 7 Allen (Mass.), 504.

79. Hill v. Cooley, 112 Ga. 115, 37 S. E. 109.

80. Lavoie v. Dube, 229 Mass. 87, 118 N. E. 179.

81. Di Orio v. Venditti, 39 R. I. 101, 97 A. 599.

lease of a husband's land executed by the spouses jointly as "parties of the first part," to whom rentals are payable, has been held a joint obligation, so that payment of rent to the wife is sufficient.[82]

Where the wife signs with the husband a contract as to their joint property the failure to name her as a party to the contract does not prevent its binding her interest.[83] Their joint contract to purchase land raises the presumption that both are principals.[84] In West Virginia, where spouses join in a conveyance of her land for a price to be paid to them in the future, the vendee may pay the price to either, if both are alive, or to the survivor.[85]

§ 401. For the Purchase of Property in General.

A married woman may now bind herself by her separate contract for the purchase of real estate,[86] or personal property,[87] or property of any kind,[88] even if as a result of the purchase a husband's previous contract is to be cancelled.[89]

Under the Vermont Married Women's Act a wife is liable on her contract to buy real estate, whether she has a separate estate or not.[90] Under the Texas Married Women's Act a wife is not bound by a purchase of goods not for her separate estate.[91]

§ 402. On Credit.

The current of negative authority on this point turns much towards the purchase of real estate by the wife; and, upon what ought to be deemed more fundamental reasons than those of cash or credit, it is held that a married woman is incapable of acquiring real property to her separate use under such circumstances.[92] This, however, is by no means a uniform doctrine; for a married

82. Jens-Marie Oil Co. v. Rixse (Okla.), 178 P. 658.

83. Agar v. Streeter (Mich.), 150 N. W. 160, L. R. A. 1915D 196.

84. Tipton v. Ellsworth, 18 Ida. 207, 109 P. 134.

85. Freeman v. Swiger (W. Va.), 98 S. E. 440.

86. Faucett v. Currier, 109 Mass. 79. For the New Jersey rule, see Pierson v. Lum, 25 N. J. Eq. 390.

87. Caldwell v. Blanchard, 191 Mass. 489, 77 N. E. 1036.

88. Kriz v. Peege, 119 Wis. 105, 95 N. W. 108; Nadel v. Weber Bros. Shoe Co. (Fla.), 70 So. 20; Marcellus v. Wright, 51 Mont. 559, 154 P. 714; Smith v. J. F. Brown & Co. (Ga.), 85 S. E. 950; Furrow v. Chapin, 13 Kan. 107; Bush & Lane Piano Co. v. Woodard (Wash.), 175 P. 329; Davis v. Leonard, 66 Fla. 351, 63 So. 584.

89. Simmons v. International Harvester Co. (Ga.), 96 S. E. 9; Bateman v. Cherokee v. Feritlizer Co. (Ga.), 93 S. E. 1021.

90. Seaver v. Lang (Vt.), 104 A. 877.

91. Wright v. Couch (Tex.), 113 S. W. 321.

92. Ames v. Foster, 42 N. H. 381; Carpenter v. Mitchell, 50 Ill. 470; Dunning v. Pike, 46 Me. 461; Miller v. Albertson, 73 Ind. 343.

woman may, as several State jurisdictions rule, acquire and hold real property to her separate use upon suitable consideration, whether she purchase it on credit or not.[93] Some of these decisions go only to the point of forbidding a suit at law on such purchases.[94] And it is held that where a married woman borrows money with which she purchases a piece of land, taking a deed in her own name, and furnishing no note or other written obligation for the loan, the lender may in equity follow his loan into the land.[95] Some States, under their liberal enabling acts, repudiate such restrictions upon the *jus disponendi*.[96] But, on the other hand, the New York doctrine is that she may purchase property on credit; and if the vendor will run the risk of being able to obtain payment of the consideration of the sale, the transfer remains valid, and no estate will pass to the husband, whether the wife had previously any separate estate or not.[97] Under the Michigan Married Women's Act a wife may bind herself by a purchase of goods on credit for her separate business.[98] In Wisconsin the fact that a creditor to whom a wife pledges her credit to acquire property knows that she intends to devote the property to the use of her husband will not invalidate her contract to pay the amount agreed.[99]

§ 403. For Improvements and Repairs.

Independently of enabling statutes, the written contract of a married woman, by which she acknowledges an indebtedness for materials and labor used to improve her separate estate, is void at law.[1] It is a reasonable doctrine, and justified by some State decisions, that where lumber is purchased, or other materials, and used, or labor bestowed, with the wife's acquiescence, in benefiting and enhancing her separate estate, and with full knowledge on her part that it is unpaid for, and equitable obligation may be inferred, she is bound to recompense accordingly.[2]

93. Shields v. Keys, 24 Ia. 298; Darby v. Calligan, 16 N. Y. 21; Chapman v. Foster, 6 Allen (Mass.), 136; McVey v. Green Bay R., 42 Wis. 532.

94. Carpenter v. Mitchell, 50 Ill. 470.

95. Donovan's Appeal, 41 Conn. 551.

96. See Allen v. Fuller, 118 Mass. 402; Knapp v. Smith, 27 N. Y. 277.

97. Darby v. Calligan, 16 N. Y. 21; Knapp v. Smith, 27 N. Y. 277. So in other States. Chapman v. Foster, 6 Allen (Mass.), 136; Shields v. Keys, 24 Ia. 298.

98. Rankin v. West, 25 Mich. 195; Canton v. Grinnell, 138 Mich. 590, 101 N. W. 811, 11 Det. Leg. N. 658.

99. Kriz v. Peege, 119 Wis. 105, 95 N. W. 108.

1. Williams v. Wilbur, 67 Ind. 42.

2. Miller v. Hollingsworth, 36 Ia. 163; Anderson v. Armstead, 69 Ill. 452; Shannon v. Bartholomew, 53

Upon the ground that the wife's separate estate should be bound by contracts for its benefit, or upon its express credit, her debts for improvements upon lands conveyed to her sole and separate use have been enforced in several late instances.[3] But all States do not go so far. The disposition of the courts in such cases, where the contract was made by the husband, is frequently to infer an agency on the wife's behalf for that purpose; and yet he might prove no agent, and if only sole credit were given to the husband himself for repairs on his wife's premises, it would appear that the creditor cannot resort to the wife's separate estate for remuneration, agency not being inferable from the marital relation alone.[4]

Apart from permanent improvements, a married woman's real estate may well be rendered liable for repairs made to her separate estate at her own request, and as necessary for its due preservation and enjoyment,[5] and on her sole note or sole contract, for lumber and materials to be used thereon.[6] And where she contracts for services or materials, or the work and labor is done, at her request, in and about the improvement, care, management, or cultivation of the premises, or in farm stock, she will be held liable accordingly, where the premises and farm stock are her sole and separate property.[7]

Under a statute providing that the lands of a married woman shall be her separate property, but that she shall have no power to convey or encumber them without the joint deed of her husband,

Ind. 54. But cf. Emery v. Lord, 26 Mich. 431; Capp v. Stewart, 38 Ind. 479.

3. Conway v. Smith, 13 Wis. 125; Marshall v. Miller, 3 Met. (Ky.) 333; Fowler v. Seaman, 40 N. Y. 592; Carpenter v. Leonard, 5 Minn. 155; Perkins v. Baker, 38 Tex. 45; Britter v. Robertson, 11 Tex. 142. In Heugh v. Jones, 32 Pa. 432, it is held that unless the materials are *actually* so used the debt cannot be enforced against the estate. And see as to the Pennsylvania rule, which does not favor such debts, Brunner's Appeal, 47 Pa. 67.

4. Holmes v. Bronson, 43 Mich. 562; Willard v. Magoon, 30 Mich. 273; Price v. Seydel, 46 Ia. 696; Lauer v. Bandow, 43 Wis. 556; Crickmore v. Breckenridge, 51 Ind. 294; Lobman v. Kennedy, 51 Ala. 163; Roberts v. Kelley, 51 Vt. 97. A promise by the married woman to pay for materials bought and used by the husband in erecting buildings on her land will not be inferred from her contemporaneous knowledge alone. Ferguson v. Spear, 65 Me. 277.

5. Lippincott v. Leeds, 77 Pa. 420. Coverture of the owner is no reason why land should not be assessed for cost of street improvement. Ball v. Balfe, 41 Ind. 221.

6. Parker v. Kane, 4 Allen (Mass.), 346; Major v. Symmes, 19 Ind. 117; Eckert v. Reuter, 4 Vroom (N. J.), 266; Langenbach v. Schell, 40 Conn. 224.

7. Terry v. Hammonds, 47 Cal. 32; Cookson v. Toole, 59 Ill. 515.

she may make a valid contract alone for the exploration of her land for natural gas and oil. Such a contract is not an encumbrance within the meaning of the statute.[8] A loan made to a wife to improve land which the lender knows her money paid for, and which he thinks she owns, cannot be defeated by showing that the title was in the spouses jointly.[9] A wife's liability for services rendered in improving her land is not affected by the fact that the creditor sends a bill to the husband.[10]

§ 404. Submission to Arbitration.

Under the Michigan statute, a wife may agree to a common-law arbitration.[11] Under the North Carolina Constitution such an agreement is invalid without the written assent of her husband.[12]

§ 405. Promissory Notes.

In general it is held that a married woman cannot become personally liable on her general or executory promise except it concern expressly, under general rules, her benefit or her separate estate. Hence a note given by her upon any other consideration is void,[13] even though it be in the hands of a *bona fide* holder;[14] and quite generally her simple indorsement of a bill or note is held to be inoperative beyond divesting her of a title therein.[15] Fraud will not avail a wife as a defense against her note in the hands of a holder for value in good faith,[16] especially if the fraud is practiced by one not a party to the record or interested in the property,[17] nor will secret instructions to her husband, acting as her agent, have that effect, though he disregards them.[18] Whether a wife is a principal or not in a note which she signs depends on the nature of the contract with the payee, and not on the manner in which she signs.[19] Therefore, where a statute forbids a wife

8. Kokomo Natural Gas Co., v. Matlock (Ind.), 97 N. E. 787, 39 L. R. A. (N. S.) 675.

9. June v. Labadie, 138 Mich. 52, 100 N. W. 996, 11 Det. Leg. N. 469.

10. Vetault v. Kennedy, 178 App. Div. 228, 165 N. Y. S. 203.

11. Hoste v. Dalton, 137 Mich. 522, 100 N. W. 750, 11 Det. Leg. N. 392.

12. Smith v. Bruton, 137 N. C. 79, 49 S. E. 64.

13. Kenton Ins. Co. v. McClellan, 43 Mich. 564; Pippen v. Wesson, 74 N. C. 437; Stokes v. Shannon, 55 Miss. 583.

14. Wright v. Fox (Ind.), 103 N. E. 442; Kenton Ins. Co. v. McClellan, 43 Mich. 564.

15. Moreau v. Branson, 37 Ind. 195.

16. Hart v. Church, 126 Cal. 471, 58 P. 910, 77 Am. St. R. 195.

17. Williams v. Farmers' & Drovers' Bank, 20 Ky. Law, 1273, 49 S. W. 183.

18. Wyatt v. Walton Guano Co., 114 Ga. 375, 40 S. E. 237.

19. Young v. McFadden, 125 Ind. 254, 25 N. E. 284.

to be surety for her husband, the court will look to the substance and not the form and disregard the presumption that the first signer of a note as obligor is the principal debtor.[20] Under the North Carolina Constitution, a wife's indorsement of a note, to pass title, must have the written assent of her husband.[21]

§ 406. Jointly with Husband.

A joint note by spouses to pay off a mortgage on the husband's land has been held a benefit to the wife's dower right, and therefore binding on her.[22] A note given by the wife jointly with her husband to pay dues and assessment on his life insurance policy wherein she is beneficiary is not void as being given to secure a debt of a husband.[23] Where spouses executed a joint note before the Married Women's Act, and after the act, and without new consideration, renewed it, the promise of the wife was supported by the consideration originally moving to the husband.[24] Under the Massachusetts statute a joint note of the spouses for borrowed money paid by the wife's direction to her husband binds her, though a portion of such money had been previously advanced to the husband, with her consent.[25] A wife's note jointly with her husband is no consideration for the confirmation by the payee, her husband's creditor, of a transfer to her in fraud of his creditors.[26]

§ 407. Consideration.

Inquiry into consideration is always pertinent under the equity rule, and in States where the wife is not invested with plenary power of legal disposition under appropriate statutes. This applies to the wife's promissory note, which, as the law stands, apart from statute, cannot be a safe investment for anyone; for its value consists in the proof that it was a contract on her part, and a binding contract, relative to her separate property, within the general rule. Even in Massachusetts, where the wife's mortgage on real estate duly executed is upheld, a note secured by it, if for unbeneficial consideration, such as the husband's indebted-

20. Mutual Benefit Life Ins. Co. v. First Nat. Bank, 160 Ky. 538, 169 S. W. 1028.

21. Walton v. Bristol, 125 N. C. 419, 34 S. E. 544; Vann v. Edwards, 128 N. C. 425, 39 S. E. 66.

22. Crevier v. Berberdick, 60 N. J. Law, 389, 37 A. 959.

23. Crenshaw v. Collier, 70 Ark. 5, 65 S. W. 709.

24. Lackey v. Boruff, 152 Ind. 371, 53 N. E. 412.

25. Goodnow v. Hill, 125 Mass. 587; State Trust Co. v. Owen Paper Co., 162 Mass. 156, 38 N. E. 438.

26. Heaton v. White, 85 Ind. 376.

ness, could not be enforced.[27] But later legislation in Massachusetts does not require the consideration of a wife's contract to enure to her own benefit, and her joint note with her husband, or her indorsement, binds her to quite or nearly the same extent as that of any single woman.[28] Drafts drawn by a wife on her trustee for her separate use are based on a consideration where drawn for a loan to her or husband at her request.[29]

§ 408. For Insurance.

Her contract for insurance on her separate property is not enforceable against her, as conservative States rule,[30] though this would appear to be a beneficial contract; and at all events it is held that her contract of insurance on her property cannot be defeated by third persons.[31]

§ 409. As Stockholder in Corporation or Joint Stock Company.

A married woman is not personally liable, unless legislation be positive, for the debts of a corporation in which she holds stock, more than upon her contracts of suretyship.[32] To hold a married woman liable on her subscription to stock is not always favored,[33] but its purchase or subscription may often be upheld as a beneficial transaction.[34] Thus, the acceptance of stock in a corporation has been held to create a binding contract rendering a wife liable for unpaid portions of the subscription and for assessments to which stockholders were liable at the time of acceptance.[35] In Arkansas it has been held that a wife who is elected president of a corporation, and whose stock is part of her separate estate, is thereby freed from the disability of coverture so as to be liable for the statutory penalties for failure to file statements required by law.[36] Under the Louisiana statute a wife may, for her separate estate, subscribe for and borrow on stock of a building and loan association without the consent of her husband.[37]

27. Heburn v. Warner, 112 Mass. 271. And see Wright v. Dresser, 110 Mass. 51.

28. Major v. Holmes, 124 Mass. 108; Kenworthy v. Sawyer, 125 Mass. 28; Goodnow v. Hill, 125 Mass. 587.

29. Bain v. Buff's Adm'r, 76 Va. 371.

30. American Ins. Co. v. Avery, 60 Ind. 566.

31. Bernheim v. Beer, 56 Miss. 149.

32. Russel, v. People's Sav. Bank, 39 Mich. 671.

33. Rice v. Columbus R., 32 Ohio St. 380.

34. Williams v. King, 43 Conn. 569.

35. Bidwell v. Beckwith, 86 Conn. 462, 85 A. 682.

36. Arkansas Stables v. Samstag, 78 Ark. 517, 94 S. W. 699.

37. Holloman v. Alexandria & Pineville Bldg. & Loan Ass'n, 137 La. 970, 69 So. 764.

§ 410. Loans and Advances.

A wife is now liable for loans which have been passed to her as her own, whether used for herself or another,[38] and that other her husband, if in obtaining the loan she acts in good faith, and not as a surety.[39] In Louisiana she is not liable for a loan unless there is evidence that the consideration inured to her, though she received a certificate from a judge entitling her to borrow.[40]

The loan of money to a married woman, with which she paid off a mortgage on her land, gives no lien on such land to the lender, notwithstanding her oral promise to substitute him.[41]

According to the more liberal doctrine, one who advances money to a married woman, whether on her bond, promissory note, or otherwise, is not bound to see to the application of the money, but may recover upon the instrument or contract on showing the avowed purpose of the transaction on her part, as in due compliance with the general rule as to a married woman's *jus disponendi*.[42]

§ 411. Leases.

Under some Married Women's Acts a lease to her, and its covenants, as for rent or taxes, are held binding upon the wife.[43]

§ 412. To Secure Husband's Debts.

A married woman's promissory note does not, as a rule, secure her husband's debts, nor does she, by executing it, bind herself lawfully as his surety or guarantor on a contract not relating to her separate estate, nor for its benefit, so as to render herself liable to suit.[44]

38. Arnold v. McBride, 78 Ark. 275, 93 S. W. 989; Lloyd v. State *ex rel.* Banta, 134 Ind. 506, 34 N. E. 311; Bogie v. Nelson, 151 Ky. 443, 152 S. W. 250. To make a married woman liable for money borrowed by her, it is only necessary that it shall have passed to her as her own property to do with as she pleased. It is not necessary that she actually used it for her own own purposes and benefit. Arnold v. McBride, 78 Ark. 275, 93 S. W. 989.

39. Exchange Bank of Valdosta v. Newton (Ga.), 99 S. E. 705; Yeany v. Shannon, 256 Pa. 135, 100 A. 527.

40. Dayries v. Lindsly, 128 La. 259, 54 So. 791.

41. Owens v. Johnson, 8 Baxt. (Tenn.), 265.

42. McVey v. Cantrell, 70 N. Y. 295. But see Heugh v. Jones, 32 Pa. 432, which tends more strongly to the protection of married women in such transactions.

43. Worthington v. Cooke, 52 Md. 297; Marshall v. Marshall, 4 Thomp. & C. (N. Y.), 449; Harris v. Williams, 44 Tex. 124. As to wife's lease to her husband, see Albin v. Lord, 39 N. H. 196. But see Eustaphieve v. Ketchum, 13 N. Y. 621.

44. Parker v. Simonds, 1 Allen

Consistently with the principle of the wife's non-liability as surety, it is held that she cannot be held liable to a pledgee, to whom she has pledged stock so as to secure her husband's debt, for money received by her upon a subsequent sale of the stock contrary to the pledgee's rights.[45]

The tendency of some of the late cases is to exempt promissory notes which are drawn payable to a married woman or order from all liability for the husband's engagements; a presumption being thus afforded that the money is due to her and not to her husband.[46] In Georgia she is liable where she borrows money with the object of raising money for paying her husband's debts, though the fact is known to the lender.[47] It has also been there held that a wife's note given to settle litigation against the spouses jointly was binding on her, where the creditor claims a joint liability, even though the debt was that of the husband alone, the real consideration of the note being the settlement of the litigation.[48]

§ 413. Suretyship in General.

A wife may now become a surety or guarantor,[49] by force of statute, not only in New York but in some other States.[50] In other States the wife's capacity to make a contract of suretyship or guaranty is still denied.[51] In those States such a transaction is binding only where she receives an independent consideration for her contract,[52] or where the mortgagee knows nothing of the intention to evade the law, and there is nothing in the record title to put him on inquiry.[53] To bind her by such a contract the consider-

(Mass.), 258; Shannon v. Canney, 44 N. H. 592; Keaton v. Scott, 25 Ga. 652; Yale v. Dederer, 18 N. Y. 265; Emery v. Lord, 26 Mich. 431; Schmidt v. Postel, 63 Ill. 58; Sweazy v. Kammer, 51 Ia. 642; King v. Thompson, 59 Ga. 380; Athol Machine Co. v. Fuller, 107 Mass. 437; Wolff v. Van Meter, 19 Ia. 134; Sweeney v. Smith, 15 B. Mon. (Ky.), 325. And see Sawyer v. Fernald, 59 Me. 500; De Vries, v. Conklin, 22 Mich. 255; Vankirk v. Skillman, 5 Vroom (N. J.), 109.

45. Platt v. Hawkins, 43 Conn. 139.

46. See Cowles v. Morgan, 34 Ala. 535; Lewis v. Harris, 4 Met. (Ky.), 353; Chapman v. Williams, 13 Gray (Mass.), 416; Paine v. Hunt, 40 Barb. (N. Y.) 75; Tooke v. Newman, 75 Ill. 215.

47. Chastian v. Peak, 111 Ga. 889, 36 S. E. 967.

48. Thornton v. Lemon, 114 Ga. 155, 39 S. E. 943; Kile v. Kilner, 37 Pa. Super. 90.

49. Woolsey v. Brown, 74 N. Y. 82.

50. Hart v. Grigsby, 14 Bush (Ky.), 542; Northwestern Life Ins. Co. v. Allis, 23 Minn. 337.

51. Russel v. People's Sav. Bank, 39 Mich. 671.

52. Hamilton v. Hamilton, 162 Ind. 430, 70 N. E. 535.

53. Grzesk v. Hibberd, 149 Ind. 354, 48 N. E. 361.

ation must be actually received by her, and nominal receipt, where the receipt is for the use of her husband, will not avail to bind her.[54] Thus, where the proceeds of such a note are invested in land in her name she is bound,[55] and none the less so where she has a right of dower in the property incumbered.[56] Such obligations are valid only to the extent to which her separate estate is benefited thereby,[57] and to which they are supported by a valid consideration running to her[57a]

In Missouri a wife is not liable as surety for her husband in the absence of an express promise to pay the debt, a mere recital that she is surety being insufficient.[58] In New Jersey, to validate the accommodation note of a wife she must be shown to have obtained therefore something of value to her own use or to the use of her estate.[59] In Indiana statute provides that she is bound by a contract executed as surety where she makes an affidavit that she is contracting for her separate use.[60] In such States where the creditor knows that she is acting as a surety he cannot recover against her,[61] because he is bound to know the limitation placed by the law on her ability to contract,[62] even though the obligee, in consideration of her obligation, releases the husband's liability,[63] and even though she makes affidavit that the loan is just.[64]

54. Feather v. Feather's Estate, 116 Mich. 384, 74 N. W. 524, 4 Det. Leg. N. 1209.

55. Smith v. Hardman, 99 Ga. 381, 27 S. E. 731; Thomas v. Boston Banking Co., 157 Ky. 473, 163 S. W. 480.

56. Andrysiak v. Satkowski, 159 Ind. 428, 63 N. E. 854, 65 N. E. 286.

57. Bley v. Lewis (Ala.), 66 So. 454; Mills v. Hudmon & Co., 175 Ala. 448, 57 So. 739; Kelley v. York, 183 Ind. 628, 109 N. E. 772; Wredman v. Falls City Sav. & Loan Ass'n, 40 Ind. App. 478, 82 N. E. 476; Vogel v. Leichner, 102 Ind. 55, 1 N. E. 554; Pritchett v. McGaughey, 151 Ind. 638, 52 N. E. 397; Fitts v. A. F. Messick Grocery Co., 144 N. C. 463, 57 S. E. 164; Equitable Trust Co. v. Torphy, 37 Ind. App. 220, 76 N. E. 639; McKay v. Corine (Ind.), 118 N. E. 978.

57a. Washburn v. Gray, 49 Ind. App. 271, 97 N. E. 190.

58. Newman v. Newman, 152 Mo. 398, 54 S. W. 19.

59. Vliet v. Eastburn, 63 N. J. Law, 450, 43 A. 741.

60. Ludlow v. Colt, 41 Ind. App. 138, 83 N. E. 643.

61. Warren v. Crow (Ala.), 73 So. 989; Jones v. Weichselbaum, 115 Ga. 369, 41 S. E. 615; Munroe v. Haas, 105 Ga. 468, 30 S. E. 654; Govt. Bldg. & Loan Inst. v. Denny, 154 Ind. 261, 55 N. E. 757; Weil v. Waterhouse, 46 Ind. App. 690, 91 N. E. 746; Manor Nat. Bank v. Lowery, 242 Pa. 559, 89 A. 678; Algeo v. Fries, 24 Pa. Super. 427; Harper v. O'Neill, 194 Pa. 141, 44 A. 1065; First Nat. Bank v. Taylor, 38 Utah, 516, 114 P. 529; Ritter v. Bruss, 116 Wis. 55, 92 N. W. 361.

62. Field v. Campbell, 164 Ind. 389, 72 N. E. 260, 108 Am. St. R. 301.

63. Russell v. Rice, 19 Ky. Law, 1613, 44 S. W. 110.

64. Neighbors v. Davis, 34 Ind. App. 441, 73 N. E. 151.

§ 414. For Third Persons.

The same may be said, though perhaps with more reserve, of her undertakings for the benefit of third parties; as a mere accommodation indorser, for instance.[65] In Louisiana a married woman may bind herself as surety for any one except her husband.[66] The Texas statute by implication empowers the wife to become surety or joint maker with a third person with her husband's joinder.[67]

§ 415. What Constitutes Contract of Suretyship in General.

Statutes prohibiting a wife from being a surety for her husband, being for her benefit, should not permit technicality or misrepresentation to defeat the rights of creditors not at fault.[68] The test as to whether a wife is a surety or not is the intention of the parties,[69] and depends on whether the benefit of the contract inures to her or her estate, to which extent she is a principal.[70] It does not, within the meaning of such statutes, depend on the form of the obligation, especially where there is an intent to evade the statute,[71] but on her actual relation to the obligation.[72]

§ 416. Illustrations.

The fact that a wife is surety may be shown by any competent evidence.[73] The fact that the husband and not the wife receives

65. Shannon v. Canney, 44 N. H. 592; Crane v. Kelley, 7 Allen (Mass.), 250; Kohn v. Russell, 91 Ill. 138; Bailey v. Pearson, 9 Fost. (N. H.) 77; Lytle's Appeal, 36 Pa. 131; Peake v. La Baw, 6 C. E. Green (N. J.), 269; Bauer v. Bauer, 40 Misc. 61.

66. Wickliffe v. Dawson, 19 La. Ann. 48.

67. Red River Nat. Bank v. Ferguson (Tex.), 206 S. W. 923.

68. Tombler v. Reitz, 134 Ind. 9, 33 N. E. 789.

69. McCollom v. Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480.

70 Leschen v. Guy, 149 Ind. 17, 48 N. E. 344; Gillett v. Citizens' Nat. Bank (Ind.), 104 N. E. 775; First Nat. Bank v. Bertoli, 87 Vt. 297, 89 A. 359; McCoy v. Barns, 136 Ind. 378, 36 N. E. 134; Berdenkoff v. Brazee, 28 Ind. App. 646, 63 N. E. 577, 61 N. E. 954; Feld v. Noblett, 154 Ind. 357, 56 N. E. 841; Cook v. Bubrlage, 159 Ind. 162, 64 N. E. 603; Guy v. Lieberenz, 160 Ind. 524, 65 N. E. 186; Harbough v. Tanner, 163 Ind. 574, 71 N. E. 145; Field v. Campbell, 164 Ind. 389, 72 N. E. 260; John C. Groub Co. v. Smith, 31 Ind. App. 685, 68 N. E. 1030; Brady v. Equitable Trust Co., 178 Ky. 693, 199 S. W. 1082.

71. Sibley v. Robertson, 212 Pa. 24, 61 A. 426; Keystone Brewing Co. v. Varzaly, 39 Pa. Super. 155; Lackey v. Boruff, 152 Ind. 371, 53 N. E. 412; Wm. Deering & Co. v. Veal, 25 Ky. Law, 1809, 78 S. W. 886; Hamilton v. Hamilton, 162 Ind. 430, 70 N. E. 535.

72. McKay v. Corwine (Ind.), 119 N. E. 471; First Nat. Bank v. Bertoli, 88 Vt. 421, 92 A. 970.

73. Black v. McCarley's Ex'r, 31 Ky. Law, 1198, 104 S. W. 987.

the consideration conclusively establishes the fact that she is a surety,[74] as well as where her mortgage secures his debt.[75] Where the only consideration of a wife's note is the conveyance of property to another, she is a surety and the contract is void.[76] She is a surety where she gives a new note without new consideration in lieu of her husband's note to which she was not a party.[77] A renewal of a note given as surety wherein the wife appears as maker does not validate such a transaction.[78] Where a wife causes property to be conveyed to herself and gives a note and mortgage for it, she is not a surety though the vendor has refused to sell it to her husband because he could give no security.[79] An absolute deed of trust of a wife's separate estate providing that the land be sold and the proceeds applied to pay the husband's debts has been held not a contract of suretyship.[80] In Georgia it has also been held that where a husband became tenant of land, and afterward the wife by an original undertaking became tenant of the same land, she was not a surety.[81] Where a wife borrows money with intention to use it to pay her husband's debts she does not act as surety,[82] nor where she gives a mortgage of her separate estate in consideration of the transfer to her of his note,[83] nor where, after a conveyance to her of all his property, she promises to pay his debt to relieve herself of a creditor's attack on the conveyance as in fraud of him,[84] nor where she agrees with him to pay his note in consideration of a conveyance of his property to her,[85] nor where she agrees with the creditor to pay her husband's note in consider-

74. Leschen v. Guy, 149 Ind. 17, 48 N. E. 344; Voreis v. Nussbaum, 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45; Oswald v. Jones, 254 Pa. 32, 98 A. 784.

75. Harbaugh v. Tanner, 163 Ind. 574, 71 N. E. 145; Barrett v. Davis, 104 Mo. 549, 16 S. W. 377; McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27.

76. Cook v. Buhrlage, 159 Ind. 162, 64 N. E. 603.

77. Deposit Bank of Carlisle v. Stitt, 107 Ky. 49, 21 Ky. Law, 671, 52 S. W. 950.

78. Continental Nat. Bank v. Clarke, 117 Ala. 292, 22 So. 988; Union Stock Yards Nat. Bank v. Coffman, 101 Ia. 594, 70 N. W. 693; Sponhaur v. Malloy, 21 Ind. App. 287, 52 N. E. 245.

79. McDonald v. Bluthenthal, 117 Ga. 120, 43 S. E. 422.

80. Rogers v. Shewmaker, 27 Ind. App. 631, 60 N. E. 462, 87 Am. St. R. 274.

81. Burgess v. Torrence (Ga.), 98 S. E. 170.

82. Taylor v. American Freehold Land-Mortgage Co., 106 Ga. 238, 32 S. E. 153; Lowenstein v. Meyer, 114 Ga. 709, 40 S. E. 726.

83. Sample v. Guyer, 143 Ala. 613, 42. So. 106.

84. Welpley v. Stoughton, 112 Mich. 594, 70 N. W. 1098, 4 Det. Leg. N. 137.

85. Bryant v. Jones (Ky.), 209 S. W. 30.

ation of a conveyance of land to her,[86] nor where she gives her note to his creditor to induce the creditor to forbear an action against the husband,[87] nor where she pays his shortage at a bank to avoid his exposure,[88] nor where, in order to get a good title to land which is incumbered with a lien for his debts, she pays them and removes the incumbrance,[89] nor where in a conveyance of her separate land she gives a warranty in discharge of his debt, since the debt was thereby extinguished,[90] nor where the spouses jointly agree to devise part of their property held by the entirety to one who has rendered services and made expenditures in their behalf,[91] or where they jointly executed an obligation to pay for clothing for her and the children,[92] nor, in Georgia, where she procures a third person to pay his debt, and contracts to reimburse such third person.[93]

§ 417. Rights of Wife as Surety.

Where a wife is a surety only, she can only be held liable as such[94] and is entitled to the rights of a surety,[95] such as exoneration out of his estate.[96] The wife's right to exoneration from his estate as a creditor after his death applies with reference to mortgages of her separate lands for the benefit of herself and her heirs.[97] But she cannot, as against a *bon fide* holder of the note, compel him to marshal the assets of the payee before foreclosure.[98] Lapse of time is no defence against a wife's bill against her husband's executors for reimbursement for money raised by her mortgage to pay her husband's debt, where the bill is brought before the mortgage debt has matured.[99] The contract of a wife who had received

86. Hamilton v. Parent, 152 Mich. 587, 15 Det. Leg. N. 318, 116 N. W. 367.

87. King v. Hansing, 88 Minn. 401, 93 N. W. 307.

88. Adams v. Davidson (Ala.), 68 So. 267.

89. Atlanta Suburban Land Corp. v. Austin, 122 Ga. 374, 50 S. E. 124.

90. Nichol v. Hays, 20 Ind. App. 369, 50 N. E. 768.

91. Gifford v. Gifford (Ind.), 107 N. E. 308.

92. Reynolds v. Starks (Ga.) 85 S. E. 950.

93. Third Nat. Bank v. Poe, 5 Ga. 113, 62 S. E. 826; Druckamiller v. Coy, 42 Ind. App. 500, 85 E. 1028.

94. Smith v. Herman (Cal.), 180 P. 640; Fitcher v. Griffiths, 216 Mass. 174, 103 N. E. 471; Dibble v. Richardson, 171 N. Y. 131, 63 N. E. 829; Thurmond v. Woods' Ex'r, 27 Grat. (Va.) 727.

95. Foster v. Davis, 75 N. C. 541, 95 S. E. 917.

96. Browne v. Bixby, 190 Mass. 69, 76 N. E. 454.

97. *Ib.;* Kinner v. Walsh, 44 Mo. 65.

98. Davies v. Simpson (Ala.), 79 So. 48.

99. Shea v. McMahon, 16 App. D. C. 65.

certain benefits thereby to mortgage property, which the contract provided should be conveyed to her, to pay her husband's debts, has been held unenforceable by a surety of her husband who had paid one of such debts.[1] Where title to property mortgaged jointly by spouses stood in the husband's name, but where the wife had an equitable undivided part of it, it was held that she could not enforce her right as surety to the extent of her interest against the mortgagee who had no notice of her interest other than the fact that she joined in the covenant of seizin.[2]

§ 418. Enforcement.

Specific performance is decreed against her on her written promise to convey; provided the contract be executed with the formalities requisite in her conveyance.[3] Where she buys with notice of an existing contract of sale held by another, she will be compelled to perform.[4] The fact that her contract cannot be specifically enforced does not prevent its enforcement in other ways, as by enforcing a lien on her property for the return of money paid to her under the contract.[5]

§ 419. Ratification.

In some States her ratification of a defective conveyance, whether directly or by acts presumptive, is pronounced valid.[6]

§ 420. Avoidance.

A wife who joins suitably with her husband or trustee in a conveyance of her separate or general property, so as legally to convey it in conformity with statute, cannot afterwards assert her equitable title so as to avoid altogether or change from an absolute to a security title, as against a *bona fide* purchaser for value, having no notice of her equitable claim,[7] nor, according to the growing opinion, assert a present or subsequent title after duly conveying her entire interest.[8] The recitals of her acknowledg-

1. Hamilton v. Hamilton, 162 Ind. 430, 70 N. E. 535.

2. Hemert v. Taylor, 73 Minn. 339, 76 N. W. 42.

3. Woodward v. Seaver, 38 N. H. 29; Baker v. Hathaway, 5 Allen (Mass.), 103. See Rumfelt v. Clemens, 46 Pa. 455; Stevens v. Parish, 29 Ind. 260; Love v. Watkins, 40 Cal. 547.

4. Fee v. Sharkey, 59 N. J. Eq. 284, 44 A. 674, decree affirmed, 60 N. J. Eq. 446.

5. Vance v. Jacksonville Realty & Mortgage Co. (Fla.), 67 So. 636.

6. Spafford v. Warren, 47 Ia. 47.

7. Pepper v. Smith, 54 Tex. 115; Comegys v. Clarke, 44 Md. 108.

8. Knight v. Thayer, 125 Mass. 25; King v. Rea, 56 Ind. 1. But see Barker v. Circle, 60 Mo. 258.

ment in the magistrate's certificate may be relied upon by a *bona fide* purchaser or mortgagee.[9] And equity will not permit the wife to avoid a sale without refunding the purchase-money.[10] There is much logical confusion on this point; and the true equity rule appears to be to regard not so much the credit as the consideration of that credit, whether it were for her benefit or on express credit of the separate property. Where the wife cannot be sued upon her promise to buy upon credit, she will not in equity be allowed to decline and yet keep the property too; and hence lands or personal property sold her on her credit, and for the benefit of her separate estate, have been treated as subject to the vendor's lien, even though the notes she gave by way of executory contract could not, as such, be enforced against her.[11] And, once again, it is asserted, and quite fairly, that the sale to a married woman on credit is a voidable contract on her part; that she may either recede from the bargain and claim its annulment, or allow it to stand with a right in the vendor to subject the specific property to the payment of the debt.[12] A wife's contract can be avoided on the ground that she acted as surety only by her privies in blood

9. Singer Man. Co. v. Rook, 84 Pa. 442; Marston v. Brittenham, 76 Ill. 611; Conn. Life Ins. Co. v. McCormick, 45 Cal. 580; Homœopathic Life Ins. Co. v. Marshall, 32 N. J. Eq. 103.

10. Kolls v. De Leyer, 41 Barb. (N. Y.) 208.

11. Pemberton v. Johnson, 46 Mo. 342; Bruner v. Wheaton, *ib.* 363; Carpenter v. Mitchell, 54 Ill. 126; Hunter v. Duvall, 4 Bush (Ky.), 438; Smith v. Doe, 56 Ala. 456; Boland v. Klink, 63 Ga. 447.

12. Nicholson v. Heiderhoff, 50 Miss. 56. Beyond this, the court here observes, the vendor cannot go, nor can he coerce payment out of her other property; but she cannot retain possession of the legal title, and plead her own disability in annulment of her obligation and security for the purchase-money. *Ib.* Sixbee v. Bowen, 91 Pa. 149, asserts the rule of voidable contract on the wife's part so as to permit her to stand by it as against her husband's creditors.

A wife who induces a third person to buy her lands by her oral promise, with her husband's concurrence, that he may deduct from the price a debt due him from her husband, cannot, after full conveyance, repudiate this promise. Meiley v. Butler, 26 Ohio St. 535.

It is held in New York that a married woman is not liable for property obtained upon her credit and contract, but delivered to her husband and for his use, and which is used by him and not for the benefit of her estate, where the intent to charge her separate estate is not expressed in the contract. Manhattan Co. v. Thompson, 58 N. Y. 80. In some States the test of the wife's liability is by statute limited expressly to purchases, etc., "for the benefit" of the wife's separate property, etc. Wallace v. Finberg, 46 Tex. 35; National Bank v. Smith, 43 Conn. 327.

A Pennsylvania statute authorizes a married woman to loan money of her separate estate through the intervention of a trustee; and the power

and representation.[13] Therefore her creditor cannot avoid them.[14] Where she chooses to avoid them she need not return the consideration.[15] Where a wife seeks cancellation of a note and mortgage on the ground that she acted as a surety she has the burden of showing that such was the fact,[16] there being no presumption that the wife is a surety, where the spouses are apparently joint debtors, and she has the burden of showing the fact affirmatively.[17] She may defend against a contract secured by threats of criminal prosecution against her husband, though there was ground for the prosecution.[18] Merely stating to a wife that unless she binds herself as a surety for her husband he will suffer loss and detriment is not sufficient to show duress.[19]

thus conferred, when freely and voluntarily exercised, gives to the transaction the form of a contract equally binding on both parties. Flattery v. Flattery, 91 Pa. 474.

13. Plant v. Storey, 131 Ind. 46, 30 N. E. 886; Lindsley v. Patterson (Mo.), 177 S. W. 826, L. R. A. 1915F, 680.

14. Lackey v. Boruff, 152 Ind. 371, 53 N. E. 412.

15. Opperman v. Citizens' Bank, 44 Ind. App. 401, 85 N. E. 991.

16. Bartholomew v. Pierson, 112 Ind. 430, 14 N. E. 249.

17. Atkins v. Grist, 44 Pa. Super. 310.

18. Hensinger v. Dyer, 147 Mo. 219, 48 S. W. 912.

19. United States Banking Co. v. Veale, 84 Kan. 385, 114 P. 229.

CHAPTER XXI.

WIFE'S POWER TO CHARGE STATUTORY SEPARATE ESTATE WITH LIABILITY FOR DEBT.

§ 421. Power to Charge in General.

There is now little or no limit upon the wife's legal capacity to bind her statutory estate to the discharge of liabilities created on

account thereof, in several States.[20] In some States her right to deal with her separate estate is as complete as though she were sole,[21] even including contracts to the prejudice of such estate, or for the benefit of a third person solely,[22] or for the benefit of her husband.[23] Under the Alabama Married Women's Act a wife may make all contracts relating to her separate estate, unless such contract is directly or indirectly with her husband.[24] In Illinois it is said that capacity to make contracts respecting her separate property is an implication of law and not of equity, and consequently all contracts made by her within the scope of that legal capacity are legal contracts and cognizable in the courts of law.[25] The equitable rule in which American cases, together with the latest English cases[26] generally agree, whether with reference to the equitable or statutory separate property of the wife, is, that the separate estate of a married woman becomes chargeable with the due performance of her engagements or obligations made or incurred upon its express credit or for its benefit.[27] Benefit is not the sole test; but to the extent of her power of disposition over her separate estate the wife may charge it with such engagements as she sees fit to make, provided the evidence of intention be satisfactory (upon which point States differ) and provided, of course, that the transaction were voluntary on her part and not fraudulently procured.

§ 422. What Constitutes Charge.

An indorsement by the wife on the back of her promissory note "I hereby bind my separate estate" has been held a sufficient charge.[28] Under the Kentucky statute providing that a wife may not charge her separate estate to answer the debt of another, unless set apart for that purpose by mortgage or other conveyance, it was held that her written assignment of an insurance policy to

20. Righter v. Livingston, 214 Pa. 28, 63 A. 195; Mercantile Exch. Bank v. Taylor, 51 Fla. 473, 41 So. 22; Patrick v. Littell, 36 Ohio St. 79; Kouskop v. Shontz, 51 Wis. 204; Knight v. Thayer, 125 Mass. 25; *Re* Kinkead, 3 Biss. (U. S.) 405; Wells v. Caywood, 3 Col. 487.

21. Knaggs v. Mastin, 9 Kan. 532; Merrell v. Purdy, 129 Wis. 331, 109 N. W. 82.

22. Dages v. Lee, 20 W. Va. 584.

23 Wimpee v. McHenry & Porter, 18 Ga. App. 475, 89 S. E. 607.

24. Sample v. Guyer, 143 Ala. 613, 42 So. 106.

25. Williams v. Hugenin, 69 Ill. 214.

26. *Supra*, § 274.

27. Patrick v. Littell, 36 Ohio St. 79.

28. Nat. Exch. Bank v. Cumberland Lumber Co., 100 Tenn. 479, 47 S. W. 85.

secure a loan to her husband was binding.[29] In North Carolina, as between the parties, a debt may be charged on a wife's land otherwise than by mortgage.[30]

§ 423. Limitation of Power to Charge.

In some States, in order to charge her separate estate by a contract, it must appear that the contract is reasonably calculated to benefit or improve it, or secure its use and enjoyment,[31] and, in Nebraska, it must be made with reference to, and be upon the faith and credit of, such estate.[32] In such States her contract cannot be supported merely because it is only incidentally beneficial to her separate estate.[33] Whether such a contract does in fact benefit her separate estate is a question of fact,[34] and where the statute limits the power of the wife to contract the creditor must show that the particular contract is within the statute.[35] In Wisconsin it must appear that her becoming party to a note is necessary or convenient to the use and enjoyment of her separate estate, or to carrying on her separate business, or is related to her personal services, a mere intention to charge such estate, or the existence of equitable grounds therefor being insufficient.[36]

§ 424. What Contracts are for Benefit of Separate Estate.

The following have been held to be contracts for the benefit of a wife's separate estate; money borrowed to pay off incumbrances on her separate real estate,[37] money advanced to a wife to enable her to pay for land held under a bond for a deed and actually so used,[38] plans and specifications for a building on her land,[39] the

29. New York Life Ins. Co. v. Miller, 22 Ky. Law, 230, 56 S. W. 975.

30. Wachovia Nat. Bank v. Ireland, 122 N. C. 571, 29 S. E. 835.

31. Thebo v. McConnell, 62 Fla. 578, 56 So. 566; Copeland v. Cunningham, 31 Ind. 116; Smith v. Howe, 31 Ind. 233; First Nat. Bank v. Rutter (N. J.), 106 A. 371; J. L. Thompson Co. v. Coat, 174 N. C. 193, 93 S. E. 724.

32. Farmers' Bank v. Normand, 3 Neb. (Unof.) 643, 92 N. W. 723; Kloke v. Martin, 55 Neb. 554, 76 N. W. 168.

33. Russel v. People's Sav. Bank, 39 Mich. 671, 33 Am. R. 444; Detroit Cham. Commerce v. Goodman, 110 Mich. 498, 68 N. W. 295, 3 Det. Leg. N. 467, 35 L. R. A. 96.

34. Stenger Benev. Ass'n v. Stenger, 54 Neb. 427, 74 N. W. 846; Crockett v. Doriot, 85 Va. 240, 3 S. E. 128.

35. Gilbert v. Brown, 123 Ky. 703, 29 Ky. Law, 1248, 97 S. W. 40, 7 L. R. A. (N. S.) 1053.

36. Bailey v. Fink, 129 Wis. 373, 109 N. W. 86.

37. Cupp v. Campbell, 103 Ind. 213, 2 N. E. 565; Scott v. Collier, 166 Ind. 644, 78 N. E. 184; Towusend v. Huntzinger, 41 Ind. App. 223, 83 N. E. 619.

38. Ames v. Foster, 3 Allen (Mass.), 541.

39. Emerson v. Kneezell (Tex.), 62 S. W. 551.

wages of persons engaged in cultivating her land,[40] a contract for drilling a well on her separate land,[41] money advanced to a wife to improve her land under a contract void because of coverture,[42] the assumption of debts which are a charge on an estate conveyed to her in satisfaction of her own debt,[43] a note given to a landlord to induce him to release her property situated on premises rented by her husband, and occupied by the family, from its legal liability for payment for rent,[44] a contract whereby a wife is released from her statutory liability to support her mother,[45] a contract for a garage for a corporation in which the wife is a stockholder, indirectly increasing the value of her stock,[46] where a wife who has no separate estate borrows money and afterwards pays cash for goods for use in her separate business there was sufficient evidence to warrant a finding that the loan was for the benefit of her separate etate, so as to validate the mortgage,[47] and where a wife secured a loan to pay off a purchase-money mortgage and gave a bond, secured by mortgage of her separate estate, it was held that the mortgage was valid for the amount of the loan though not for that of the bond, which was void.[48] Where it appeared that a husband, acting as his deceased wife's agent, negotiated a loan for which she signed a note, and that she was then actively conducting a farm, keeping accounts and paying the help, it was held that there was some evidence that she contracted for the benefit of her separate estate.[49]

§ 425. What Contracts are Not for Benefit of Separate Estate.

The following have been held not for the benefit of a wife's separate estate: a note given to protect a father's estate against suit for a debt for which it was claimed the father was surety,[50] a note given for the purchase of a judgment against land conveyed to the wife, where the land was incumbered for more than

40. Miller v. Miller's Adm'r, 92 Va. 510, 23 S. E. 891.

41. Lemons v. Biddy (Tex.), 149 S. W. 1065.

42. Daily v. Cain, 11 Ky. Law, 936, 13 S. W. 424.

43. Hugo & Schmeltzer Co. v. Hirsch (Tex.), 63 S. W. 163.

44. Karns v. Moore, 5 Pa. Super, 381.

45. Payne v. Payne, 129 Wis. 450, 109 N. W. 105.

46. Nystrom v. Barker, 88 Conn. 382, 91 A. 649.

47. Singleton v. Singleton, 60 S. C. 216, 38 S. E. 462.

48. Equitable Bldg. & Loan Ass'n v. King, 48 Fla. 252, 37 So. 181.

49. Webb. v. Feather's Estate, 119 Mich. 473, 78 N. W. 550, 5 Det. Leg. N. 884.

50. West v. Laraway, 28 Mich. 464.

its value,[51] a contract to plant and cultivate an orchard on land whereon the spouses live, the title to which is in a third person,[52] money advanced for supplies for agricultural purposes to third persons, who are to farm certain land belonging in part to the wife,[53] a note by a wife having a revisionary interest in the estate of her father to a legatee under his will who had released his legacy prior to the making of the note, there being no evidence that the release was in consideration of the note,[54] and in Texas, under a statute, a lease of her separate land are not for her benefit.[55]

§ 426. Property Subject to Liability.

Before the Ohio Married Women's Act a wife could charge only her separate esetate owned at the time of the contract.[56] Therefore, since an expectant right to receive money as beneficiary under a life insurance policy is not property, she could not charge it by her contract.[57] The rule has been abrogated by the Married Women's Act making all after acquired property of a wife liable for her debts.[58] In West Virginia the general creditors of a wife can subject the rents of her real estate to her debts only so long as she is entitled to them.[59] Under the Tennessee Married Women's Act, which fully relieves a wife from common-law disabilities of coverture, she can have no separate estate as such so that all her property is subject to her debts.[60] Prior to that statute real property not shown to be the separate estate of the wife could not be charged as such even for benefits accruing to her interest.[61] Under the Missouri statute providing that the property of the wife acquired, *inter alia,* by " purchase with her separate means or estate," shall be liable to her debts contracted before marriage, property purchased with her separate estate is subject to a joint and several note executed by the spouses before marriage.[62]

51. Johnson v. Scott (Tex.), 208 S. W. 671.

52. Edison v. Babka, 111 Mich. 235, 69 N. W. 499, 3 Det. Leg. N. 630.

53. Simon v. Sabb, 56 S. C. 38, 33 S. E. 799.

54. Merrell v. Purdy 129 Wis. 331, 109 N. W. 82.

55. Taylor v. Thomas (Tex.), 145 S. W. 1061.

56. Manahan v. Hart, 24 Ohio Cir. Ct. 527.

57. Sticken v. Schmidt, 64 Ohio St. 354, 60 N. E. 561.

58. Klinckhamer Brewing Co. v. Cassman, 21 Ohio Cir. Ct. 465, 12 O. C. D. 141.

59. Cox v. Horner, 43 W. Va. 786, 28 S. E. 780.

60. Henderson Grocery Co. v. Johnson (Tenn.), 207 S. W. 723.

61. City Lumber Co. v. Barnhill, 129 Tenn. 676, 168 S. W. 159.

62. Conrad v. Howard, 89 Mo. 217, 1. S. W. 212.

§ 427. Extent of Liability for Joint Debt.

Where a wife pledges her property for a debt which is part her own and part that of her husband, she is liable for that part of the debt which is hers, where the parts are ascertainable, but not for that of her husband.[63]

§ 428. Necessity of Intention to Charge.

In order to bind a wife on a contract relating to her separate estate it must appear that there was an intention to bind such separate estate, as well as a sufficient consideration for that purpose,[64] but in Kansas it is no defense in an action against a wife on a note given to pay her husband's debt that at the time of giving the note she refused to charge her separate estate with it.[65]

§ 429. Evidence of Intention to Charge.

Whether a wife contracts by promissory note, bond, oral or written promise, the instrument and the proof, taken together, must disclose the intention[66] to charge her separate estate expressly, or else some beneficial object for which the money was raised. If a loan is made to the wife, the purpose of that loan must be established by the lender as the test of his right to recover.[67] The same is true of contracts generally.[68] So, too, if she gives a bond, whether as surety or otherwise,[69] or signs or indorses a promissory note.[70] And in some States, even in equity, as to her properly executed conveyance of real estate.[71]

In order to charge the separate estate of a married woman with a debt, as the cases now to be examined will show, a specifis agreement to that effect is not indispensable; but the intent, or the creditor's right to procure such charge, may be inferred from the surrounding circumstances.[72] A purchase money note duly

63. Johnston v. Gulledge, 115 Ga. 981, 42 S. E. 354.

64. Mercantile Nat. Bank, v. Benbow, 150 N. C. 781, 64 S. E. 891; Ritter v. Bruss, 116 Wis. 55, 92 N. W. 361; West v. Laraway, 28 Mich. 464; Merrell v. Purdy, 129 Wis. 331, 109 N. W. 82.

65. Wicks v. Mitchell, 9 Kan. 80.

66. The presumption is that a contract entered into by a married woman having a separate estate, for its benefit or for her exclusive benefit, was contracted upon the credit of her estate. Williams v. King, 43 Conn. 569.

67. Way v. Peck, 47 Conn. 23; Viser v. Scruggs, 49 Miss. 705.

68. Farmer's Bank v. Boyd, 67 Neb. 497, 93 N. W. 676; Mercantile Nat. Bank v. Benbow, 150 N. C. 781, 64 S. E. 891.

69. Gosman v. Cruger, 69 N. Y. 87.

70. U. S. cases, *supra;* Flanders v. Abbey, 6 Bis. (U. S.) 16; Conrad v. Le Blanc, 29 Ann. 123.

71. Sutton v. Aiken, 62 Ga. 733.

72. Breese v. Smith, 4 Ky. Law,

executed by a wife specifying the property on which it is a lien and duly recorded has been held not sufficient evidence of a general charge against her separate estate under the West Virginia Married Women's Act, prescribing how and when a wife may charge her property for her debts.[73]

Under the West Virginia Married Women's Act every charge on a wife's separate estate must be evidenced by a writing, acknowledged and recorded.[74]

§ 430. Necessity of Joinder or Assent of Husband.

Under the Alabama and Florida Married Women's Acts a wife cannot bind herself by a contract affecting her separate estate without the joinder of her husband.[75] In Florida the husband's consent need not be expressed in a separate instrument but is sufficient if she executes a mortgage of her property to secure his debts,[76] but the creditor must aver an agreement in writing in that State.[77] The statue does not apply in Florida where the wife has been made a free dealer.[78]

In North Carolina, prior to 1911, a wife could not bind herself by an executory contract without her husband's written assent except for her necessary personal expenses or to pay antenuptial debts,[79] and a deed executed by both spouses making such charge need not recite the assent.[80] It was also held that a husband's act in writing to a creditor as her agent asking for a shipment of goods to her was sufficient as a written assent within the statute, though not expressly given in the letter,[81] but that such consent was not validly given where he merely deposited her note indorsed by her in blank as collateral for his debt.[82] Under that statute

347; Conlin v. Cantrell, 64 N. Y. 217; Harshberger v. Alger, 31 Gratt. (Va.) 52.

73. Harvey v. Curry, 47 W. Va. 800, 35 S. E. 838.

74. Fouse v. Gilfillan, 45 W. Va. 213, 32 S. E. 178.

75. Cowan v. Motley, 125 Ala. 369, 28 So. 70; Equitable Building & Loan Ass'n v. King, 48 Fla. 252, 37 So. 181.

76. Ocklawaha River Farms Co. v. Young (Fla.), 74 So. 644.

77. King v. Hooton, 56 Fla. 805, 47 So. 394.

78. Lerch v. Barnes, 61 Fla. 672, 54 So. 763.

79. J. L. Thompson Co. v. Coats, 174 N. C. 193, 93 S. E. 724; Sanderlin v. Sanderlin, 122 N. C. 1, 29 S. E. 55; Sheppard v. Paquin, 140 N. C. 83, 52 S. E. 410, 3 L. R. A. (N. S.) 307.

80. Causey v. Snow, 120 N. C. 279, 26 S. E. 775; Wachovia Nat. Bank v. Ireland, 122 N. C. 571, 29 S. E. 835; Bazemore v. Mountain, 126 N. C. 313, 35 S. E. 542.

81. Brinkley v. Ballance, 126 N. C. 393, 35 S. E. 631.

82. Walton v. Britsol, 125 N. C. 419, 34 S. E. 544.

it was held that an order to pay money to be charged by the drawee as a payment on the contract price of a house which the drawer was building for the drawee created no charge on the land of the drawee, a wife.[83] The statute did not apply to a crop lien.[84]

In Louisiana a wife may contract and bind her separate estate with the assent of her husband,[85] or the authority of the court, but will be bound by misstatements made to it to obtain such authority, as against those relying on them.[86]

§ 431. Effect of Separation or Abandonment.

If the wife lives apart from her husband, all the more readily will her separate property be charged with debts contracted for her benefit or on the credit of such property.[87] Under the former North Carolina statute a wife whose husband has abandoned her had power to contract and thereby bind her separate estate without waiting to secure a divorce on the ground of the abandonment.[88]

§ 432. By Contract in General.

Under Married Women's Acts a wife may charge her separate estate with the payment of her debts,[89] even where the contract is made for her by an agent.[90] She may bind such estate by a contract to pay a commission for the sale of her own real estate.[91]

83. Lachary v. Perry, 130 N. C. 289, 41 S. E. 533.

84. Rawlings v. Neal, 126 N. C. 271, 35 S. E. 597.

85. Priestly v. Chapman, 130 La. 480, 58 So. 156.

86. Kohlman v. Cochrane, 123 La. 219, 48 So. 914.

87. Johnson v. Cummins, 1 C. E. Green (N. J.), 97; Leonard v. Mason, 1 Lea (Tenn.), 384; Hodgson v. Williamson, 42 L. T. 676; Hazelbaker v. Goodellow, 64 Ill. 238; Lane v. Moon, 46 Tex. Civ. 625, 103 S. W. 211.

88. Vandiford v. Humphrey, 139 N. C. 65, 51 S. E. 893; Bushnell v. Bertolett, 153 N. C. 564, 69 S. E. 610.

89. Nadel v. Weber Bros. Shoe Co. (Fla.), 70 So. 20; Robertson v. Robertson, 24 Ky. Law, 2020, 72 S. W. 813; Rogers v. Eaton, 181 Mich. 620, 148 N. W. 348; Bolthouse v. De Spelder, 181 Mich. 153, 147 N. W. 589; Feather v. Feather's Estate, 116 Mich. 384, 74 N. W. 524, 4 Det. Leg. N. 1209; Bowen v. Daugherty, 168 N. C. 242, 84 S. E. 265; Lapham v. Collins, 78 N. H. 548, 103 A. 306; Green v. Green, 255 Pa. 224, 99 A. 801; Patton v. Merchants' Bank, 12 W. Va. 587; Manzy v. Manzy, 79 Va. 537; Dezendorf v. Humphreys, 95 Va. 473, 28 S. 880; Duval v. Chelf, 92 Va. 489, 23 S. E. 893; Bain v. Buff's Adm'r, 76 Va. 371; Russell v. Phelps, 73 Vt. 390, 50 A. 1101; Camden v. Hiteshew, 23 W. Va. 236; Hughes v. Hamilton, 19 W. Va. 366; Merrell v. Purdy, 129 Wis. 331, 109 N. W. 82; *In re* Breed's Estate, 125 Wis. 100, 103 N. W. 271. *The Texas Married Women's Act* does not give to a wife a general power to bind themselves personally or their separate estates by contracts. Aiken v. First Nat. Bank (Tex.), 198 S. W. 1017; Johnson v. Scott (Tex.), 208 S. W. 671.

90. Wuertz v. Braun, 113 App. Div. 459, 99 N. Y. S. 340.

91. Isphording v. Wolf, 36 Ind. App. 250, 75 N. E. 598.

§ 433. Evidence of Debt in General.

Agreeably to English chancery rules, it is held immaterial by the better authorities whether the wife's debt chargeable on her personal property be evidenced by written instrument or parol promise.[92] But a written expression of actual consideration is not readily to be contradicted by parol evidence to the contrary.[93] In case of security generally, equity may well consider which is principal and which accessory upon the point of parol evidence.[94]

§ 434. Necessity of Express Contract.

In Indiana it is held that there must be an express contract to charge a wife's separate estate with liability for materials used to improve it,[95] and such seems to be the law in Kentucky.[96] Under the Florida Married Women's Act a wife may bind her separate estate for a payment of money only by an agreement in writing.[97]

§ 435. By Mortgage.

A mortgage given by a married woman upon her separate estate, acknowledged in conformity with the statute, and with the joinder of the husband, is a valid security and capable of enforcement; not alone where she had it mortgaged to secure her own or her husband's debt, but also, in a case free from fraud or undue influence, where it was mortgaged for the benefit of a third person.[98] But in some States her mortgage is valid only if given for the benefit

92. Miller v. Brown, 47 Mo. 505; Elliott v. Gower, 12 R. I. 79.

93. Johnson v. Sutherland, 39 Mich. 579.

94. Thacher v. Churchill, 118 Mass 108.

95. Dame v. Coffman, 58 Ind. 345.

96. Benson v. Simmers, 21 Ky. Law, 1060, 53 S. W. 1035.

97. Springfield Co. v. Ely, 44 Fla. 319, 32 So. 892; Cobb v. Bear, 57 Fla. 370, 49 So. 29; Equitable Bldg. & Loan Ass'n v. King, 48 Fla. 252, 37 So. 181; Micou v. McDonald, 55 Fla. 776, 46 So. 291.

98. Galway v. Fullerton, 2 C. E. Green (N. J.), 389; Marlow v. Barlew, 53 Cal. 456; Beals v. Cobb, 51 Me. 348; Jeffrees v. Green, 79 N. C. 330; Voorhies v. Granberry, 5 Baxt. (Tenn.) 704; First Nat. Bank v. Haire, 36 Ia. 443; Haffey v. Carey, 73 Pa. 431; Jordan v. Peake, 38 Tex. 429; Bartlett v. Bartlett, 4 Allen (Mass.), 440. But in Mississippi she cannot mortgage for her husband's debts beyond the extent of her separate income, though her husband may be bound to the usual extent. Foxworth v. Magee, 44 Miss. 430; Hand v. Winn, 52 Miss. 784. See Wilkinson v. Cheatham, 45 Ala. 337; Coleman v. Smith, 55 Ala. 368; Conrad v. Le Blanc, 29 La. Ann. 123; Keller v. Ruiz, 21 La. Ann. 283, which lay down a strict rule on this point.

As to giving security by means of an absolute deed, and the title becoming absolute in the lender by reason of a breach, see Mashburn v. Gouge, 61 Ga. 512. A wife's separate statutory estate in her reality is not, in Rhode Island, subject to an equitable charge for her individual contracts in favor of her creditors. Angell v. McCullough, 12 R. I. 47. A wife may

of her separate estate.[99] Where the law permits her to be a partner, she may join with her partner in mortgaging the firm property to secure a firm debt,[1] and if the transaction is otherwise valid, its wisdom is immaterial.[2]

Where the statute limits the purposes for which a wife may mortgage her separate estate, the burden is on the mortgagee to show that the purpose of the mortgage in question was within the statute.[3] In Louisiana a wife is not bound by a mortgage of her separate estate which shows on its face that it is intended for use in cultivating a plantation carried on by her husband for the benefit of the community,[4] but if authority has been duly obtained by the wife to borrow, the mortgage will not be avoided by evidence that she gave the money to her husband and that he used it in his business.[5] In the same State valid contracts by a wife during coverture may be secured on her paraphernal property.[6]

In Missouri, Wisconsin and North Carolina the statute does not permit a wife to become personally bound by a mortgage of her separate estate, the debt being chargeable only on the mortgaged estate, but she may be sued in so far as to enable the mortgagee to foreclose.[7]

§ 436. By Equitable Mortgage.

Equity will charge a debt, and even one with mortgage or other collateral security upon specific property, upon the wife's separate property generally, so long as the debt was contracted for the benefit of the wife's separate property.[8] At law, of course, there

charge her separate estate by a mortgage to secure a loan made by a building association to her husband as a member. Juanita Association v. Mixell, 84 Pa. 313; Mercantile Exch. Bank v. Taylor, 51 Fla. 473, 41 So. 22; Till v. Collier, 27 Ind. App. 333, 61 N. E. 203; Blakemore v. Blakemore, 19 Ky. Law, 1619, 44 S. W. 96; Hughes v. Farmers' Sav. & Bldg. & Loan Ass'n (Tenn.), 46 S. W. 362; Etheridge's Adm'r v. Parker, 76 Va. 247.

99. Booth Mercantile Co. v. Murphy, 14 Ida. 212, 93 P. 777; Littler v. Dielmann, 48 Tex. Civ. 392, 106 S. W. 1137; Tinkham v. Wright (Tex.), 163 S. W. 615.

1. Hackley Nat. Bank v. Jeannot, 143 Mich. 454, 106 N. W. 1121, 13 Det. Leg. N. 7.

2. Washburn v. Gray, 49 Ind. App. 271, 97 N. E. 190.

3. Schamp v. Security Sav. & Loan Ass'n, 44 W. Va. 47, 28 S. E. 709.

4. Berwick v. Frere, 49 La. Ann. 201, 21 So. 692.

5. Johnson v. Pesson, 49 La. Ann. 109, 21 S. 177.

6. Johnson v. Pesson, 49 La. Ann. 109, 21 S. 177.

7. Hagerman v. Sutton, 91 Mo. 519, 4 S. W. 73; Edwards v. Jefferson Standard Life Ins. Co., 173 N. C. 614, 92 S. E. 695; Loizeaux v. Fremder, 123 Wis. 193, 101 N. W. 423.

8. Armstrong v. Ross, 5 C. E. Green (N. J.), 109.

may be no such remedy; and yet it should be borne in mind that local legislation frequently extends the legal rights of a married woman in this same direction. For the charge of a debt, suitably contracted by a married woman upon her separate estate, is not a specific lien; but equity charges it upon all the property, real or personal, she may have when satisfaction is demanded and sought.[9] But on the other hand the general property rights of married women being now recognized by sundry statutes, their right in equity to make contracts affecting their property is no longer limited to property settled to a sole and separate use; and although in numerous instances statutory requisites for making the contract binding in law may be wanting, equity will bind her property, nevertheless, where she or her estate has received the benefit of the transaction.[10] We speak here with a constant reservation of *feme sole* liabilities acquired under local statutes which may affect all such issues.

One who makes improvements on a wife's land on the faith of her void sale to him may have a lien in equity for their value.[11]

An intent to create a mortgage being an essential of an equitable mortgage a wife's written statement on a note which she signed that she bound her separate estate for the payment of the loan does not create a lien on her separate property so as to give the holder priority over other creditors, though the note would be enforceable in equity against the wife.[12] So a letter by a wife pledging her separate estate for her husband's debts is not valid as an equitable mortgage where it failed to identify or describe the particular property to which the lien was to attach.[13]

In New Jersey a deed by a wife charging her separate estate with a debt owed by the spouses is void at law, but is enforceable in equity against her separate estate to the extent specified in the deed.[14] It is held in New Jersey that a married woman cannot charge her separate real estate by an appointment in writing; but can only convey or charge it by deed duly executed with her husband and acknowledged, save in certain cases where she and her husband live apart. But it appearing that her real estate mort-

9. Maxon v. Scott, 55 N. Y. 247; Dale v. Robinson, 51 Vt. 20.

10. Donovan's Appeal, 41 Conn. 551.

11. Dailey v. Cain, 11 Ky. Law, 936, 13 S. W. 424.

12. Western Nat. Bank v. Nat. Union Bank, 91 Md. 613, 46 A. 960.

13. Goldsmith Bros. Smelting & Refining Co. v. Moore, 108 Ark. 362, 157 S. W. 733.

14. Pape v. Ludeman (N. J.), 59 A. 9.

gage was void, in which the husband had not joined, equity nevertheless charged the mortgage debt upon her separate property generally where the debt was contracted for the benefit of that property.[15] Under the Kentucky statute a lien against the wife's separate estate can be created only as provided by the statute, which does not permit equitable liens.[16]

§ 437. By Assumption of Existing Mortgage.

A wife may, as part of the consideration of a conveyance to her, assume an existing mortgage on the premises.[17] It was held otherwise in Michigan where the estate is conveyed jointly to spouses, since under the Married Women's Act in that State her interest in such land is not her separate estate which alone can be bound by such a lien.[18]

Such obligations are enforceable when the wife assumes them at the time of taking title to the property incumbered by them.[19]

§ 438. By Deficiency Decree.

In some States a wife is now, by statute, rendered liable for a deficiency on the foreclosure of her mortgage,[20] So, under New York statutes, liability for a deficiency is found under a mortgage foreclosure, a bond and mortgage having been duly executed.[21] which, of course, is contrary to the earlier and modern equity rule.[22]

§ 439. By Confession of Judgment.

A wife may be bound by a judgment confessed as part of the agreement under which she takes land.[23]

15. Armstrong v. Ross, 5 C. E. Green (N. J.), 109; Homœpathic Life Ins. Co. v. Marshall, 32 N. J. Eq. 103.

16. Luigart v. Lexington Turf Club, 130 Ky. 473, 113 S. W. 814.

17. Huyler v. Atwood, 26 N. J. Eq. 504. And see Fenton v. Lord, 128 Mass. 466; Coolidge v. Smith, 129 Mass. 554; Rhodes v. People's Sav. & Bldg. Ass'n, 107 Ky. 119, 21 Ky. Law, 747, 52 S. W. 1050; Vizard v. Moody, 119 Ga. 918, 47 S. E. 348; Cushman v. Henry, 75 N. Y. 103; Huyler v. Atwood, 26 N. J. Eq. 404; Blakeley v. Adams, 113 Ky. 392, 24 Ky. Law, 263, 68 S. W. 393; Citizen's Loan & Trust Co. v. Witte, 116 Wis. 60, 92 N. W. 443.

18. Doane v. Feather's Estate, 119 Mich. 691, 78 N. W. 884, 6 Det. Leg. N. 25.

19. Conkling v. Levie, 66 Neb. 132, 94 N. W. 987 (affd., 66 Neb. 132, 94 N. W. 988).

20. Henley v. Wheatley, 68 Kan. 271, 74 P. 1125; First Nat. Bank v. Leonard, 36 Ore. 390, 59 P. 873; Marlow v. Barlew, 53 Cal. 456; Cushman v. Henry, 75 N. Y. 103. But not where the wife joins in executing the mortgage and not the note. Kirby v. Childs, 10 Kan. 639.

21. Ballin v. Dillaye, 37 N. Y. 35.

22. Brick v. Scott, 47 Ind. 299.

23. Quinn's Appeal, 86 Pa. 41.

§ 440. By Vendor's Lien.

A wife's land is subject to a vendor's lien,[24] whether the notes were executed by her or by the spouses jointly.[25] The lien follows the notes into the hands of any assignee, however remote.[26]

Where the consideration of the deed to her is other land, and where her deed conveys incumbered land with a warranty against incumbrances, a vendor's lien will attach to the land conveyed to her for the amount necessary to clear the incumbrances, though the warranty is not enforceable.[27] Under the Texas Married Women's Act a wife may bind herself by a renewal of purchase-money notes, and thereby keep the lien alive.[28]

§ 441. By Mechanic's Lien.

The mechanic's statutory right of lien generally extends to a married woman's lands where she contracted in person or by agent, and perhaps, too, where the contract was for the benefit of the land.[29] Under the Tennessee Married Women's Act a wife's separate estate cannot be charged for mechanic's or furnishers' liens either of contractors or subcontractors, except by a written contract signed by her.[30]

§ 442. Jointly with Husband.

Under Married Women's Acts in some States a wife may now bind her separate estate by a contract made jointly with her husband.[31] So where spouses joined in a mortgage of her separate

24. Weller v. Monroe, 21 Ky. Law, 1705; Micou v. McDonald, 55 Fla. 776, 46 So. 291; Frank v. Lacey, 3 Ky. Law, 335; Adams v. Feeder, 19 Ky. Law, 581, 41 S. W. 275; Roehl v. Nieter (N. D.), 172 N. W. 114; Burbridge v. Sadler, 46 W. Va. 39, 32 S. E. 1028; Weinberg v. Rempe, 15 W. Va. 829.

25. Faught v. Henry, 13 Bush (Ky.), 471.

26. Hite v. Hewitt, 7 Ky. Law, 454.

27. Harvey v. Gallaher (Tenn.), 48 S. W. 298.

28. Proetzel v. Rabel, 21 Tex. Civ. 559, 54 S. W. 373.

29. Vail v. Meyer, 71 Ind. 159; *Ex parte* Schmidt, 62 Ala. 252; Burdick v. Moon, 24 Ia. 418; Woodward v. Wilson, 68 Pa. 208; Anderson v. Armstead, 69 Ill. 452; Schwartz v. Saunders, 46 Ill. 18; Lindley v. Cross, 31 Ind. 106; Marsh v. Alford, 5 Bush (Ky.), 392. The mechanic's lien claim must, in some States, show on its face all the requisites. Loomis v. Fry, 91 Pa. 396.

30. Cage v. Lawrence (Tenn.), 57 S. W. 192; City Lumber Co. v. Barnhill, 129 Tenn. 676, 168 S. W. 159.

31. Cook v. Hightower & Co., 13 Ga. App. 309, 79 S. E. 165; Tipton v. Ellsworth, 18 Ida. 207, 109 P. 134; Ellis v. Abbott, 69 Ore. 234, 138 P. 488; Kriz v. Peege, 119 Wis. 105, 95 N. W. 108. *Prior to the Ohio* Married Women's Act a wife could not create a liability for which a personal judgment against her could be rendered by a joinder with her husband in a note for the repayment of a loan. Sticken v. Schmidt, 64 Ohio St. 354, 60 N. E.

estate, the wife receiving part of the money, and paying such portion of the note from her separate estate, she was held liable for money which the husband used to pay the balance of the note, where she knew that he used trust funds for the purpose.[32] And where a joint judgment in favor of spouses was incumbered by an attorney's lien for services the wife was held jointly liable to an assignee who took the judgment without notice of the lien for the expense of discharging it, and of defending an action to enforce it.[33]

§ 443. For Purchase of Land.

In various States, a wife is bound by her bond or note to secure the price of land conveyed to her sole and separate use.[34]

§ 443a. For Improvements and Materials.

A wife may charge her separate estate with the cost of its improvement,[35] as well as the improvement of land owned jointly by the spouses,[36] if shown to be necessary to the enjoyment of her separate estate,[37] even for improvements contracted for by her husband without authority, if she acquesces and accepts,[38] or promises to pay for them,[39] or if they are so constructed with her knowledge and consent,[40] or by her express authority,[41] and even where the creditor supposes the land to be that of her husband,[42] and charges the cost to him.[43]

561. *And under the Texas* Married Women's Act a wife cannot bind herself jointly with her husband either as maker of surety. Red River Nat. Bank v. Ferguson (Tex.), 206 S. W. 923. Nor will her request for an extension of time on a joint note bind her, even after his death. W. C. Belcher Land Mortgage Co. v. Taylor (Tex.), 173 S. W. 278.

32. Gray v. Huffaker (Cal.), 169 P. 1038.

33. Montana Coal & Iron Co. v. Hoskins, 88 Ore. 523, 172 P. 118.

34. Rogers v. Ward, 8 Allen (Mass.), 387; Chapman v. Foster, 6 Allen (Mass.), 136; Garland v. Pamplin, 32 Gratt. (Va.) 305; First Nat. Bank v. Haire, 36 Ia. 443.

35. Johnson v. Tutewiler, 35 Ind. 353; Schickhaus v. Sanford, 83 N. J. Eq. 454, 91 A. 878.

36. Curtis v. Crowe, 74 Mich. 99, 41 N. W. 876.

37. McGill v. Art Stone Const. Co., 57 Fla. 498, 49 So. 539; Crickmore v. Breckenridge, 51 Ind. 294.

38. Tarr v. Muir, 107 Ky. 283, 21 Ky. Law, 988, 53 S. W. 663; Cate v. Rollins, 69 N. H. 426, 43 A. 122.

39. Salisbury v. Wellman Electrical Co., 173 Ky. 462, 191 S. W. 289; Mitchell v. Jodon, 22 Pa. Super. 304.

40. Micou v. McDonald, 55 Fla. 776, 46 So. 291.

41. Reid v. Miller, 205 Mass. 80, 91 N. E. 223.

42. Heller v. Hohman, 12 Ohio Cir. Ct. 216, 5 O. C. D. 338.

43. Popp v. Connery, 138 Mich. 84, 101 N. W. 54, 11 Det. Leg. N. 478, 110 Am. St. 304.

She is not liable for materials furnished on the sole credit of her husband, though used in such improvements,[44] nor where the creditor knows that the property is hers.[45] Under the Kentukey and Pennsylvania Married Women's Acts a wife may bind herself by a contract for the erection of a house on her land without her husband's consent.[46] Under the North Carolina Married Women's Act a wife's separate estate cannot be charged for improvements by a verbal contract.[47]

§ 444. For Services Rendered.

Now, to apply the test of incurring debt upon the credit or for the benefit of a wife's separate estate to the latest American decisions, and with more or less reference to local statute. A married woman's written agreement to pay for services rendered in procuring a loan to discharge a mortgage upon her separate estate is held, in Ohio, enforceable against her separate estate.[48] But in Rhode Island it is held that compensation of the wife's solicitor for prosecuting a suit in equity regarding her separate leaseholds cannot be recovered from her separate estate.[49]

As to legal fees for the wife's divorce, some States still disincline to charge her estate: in absence, at all events, of an express undertaking on her part to that effect.[50] But in New York, professional services rendered a married woman, as in collecting demands arising out of transactions permitted her by the statute, are recoverable under the general rule against her separate estate, as rendered by her procurement on its credit and for its benefit.[51] Contracts by the wife for employing counsel in her property suits or in divorce cases are in other States sustained more or less liberally.[52] She is not liable for services of counsel employed by her

44. Fries v. Acme White Lead & Color Works (Ala.), 79 So. 45; McCray v. Wotkyns (Cal.), 182 P. 972; Fisher v. Darsey (Ga.), 94 S. E. 839; Poe v. Ekert, 102 Ia. 361, 71 N. W. 579; Shrieveport Nat. Bank v. Maples, 119 La. 41, 43 So. 905; Morrison v. Berry, 42 Mich. 389, 4 N. W. 731, 36 Am. R. 446; Schiaffino v. Christ, 96 Miss. 801, 51 So. 546; City Nat. Bank v. Cobb, 58 S. C. 231, 36 S. E. 569; Hanley v. Nat. Loan & Investment Co., 44 W. Va. 450, 29 S. E. 1002.

45. Hesselbach v. Savage, 57 App. Div. 632, 69 N. Y. S. 429.

46. Ware v. Long, 24 Ky. Law, 696, 69 S. W. 797; Bankard v. Shaw, 199 Pa. 623, 49 A. 230.

47. Weathers v. Borders, 121 N. C. 387, 28 S. E. 524.

48. Patrick v. Littell, 36 Ohio St. 79.

49. Cozzens v. Whitney, 3 R. I. 79.

50. Pfirshing v. Falsh, 87 Ill. 260; Drais v. Hogan, 50 Cal. 121; McCabe v. Britton, 79 Ind. 225; Whipple v. Giles, 55 N. H. 139; Wilson v. Burr, 25 Wend. (N. Y.) 336.

51. Owen v. Cawley, 36 N. Y. 600.

52. Major v. Symmes, 19 Ind. 117;

husband without her authority to defend a suit affecting her separate estate,[53] and in New York a husband's fine for not paying alimony *pendente lite* is not subject to a lien for the services of the wife's counsel.[54]

§ 445. For Debt of Husband.

In some States a wife may charge her separate estate with the payment of her husband's debts either by mortgage,[55] or pledge.[56] In other States such a transaction is not binding either by mortgage,[57]

Thresher v. Barry, 69 Conn. 470, 37 A. 1064; Merchant v. Cook, 7 App. D. C. 391; Porter v. Haley, 55 Miss. 66; Tyler v. Winder (Neb.), 131 N. W. 592, 34 L. R. A. (N. S.) 1080; Patrick v. Morrow, 33 Colo. 509, 81 P. 242, 108 Am. St. R. 107; McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746, 10 Det. Leg. N. 927; Wolcott v. Patterson, 100 Mich. 227, 58 N. W. 1006, 24 L. R. A. 629; Tyler v. Winder (Neb.), 131 N. W. 592, 34 L. R. A. (N. S.) 1080.

53. Cushman v. Masterson (Tex.), 64 S. W. 1031; Parker v. Wood, 25 Tex. Civ. 506, 61 S. W. 940.

54. Turner v. Woolworth, 221 N. Y. 425, 117 N. E. 814.

55. Kaiser v. Stickney, 131 U. S. Append., clxxxvii, 26 L. Ed. 176; Walker v. Arkansas Nat. Bank, 256 F. 1; Harper v. McGoogan, 107 Ark. 10, 154 S. W. 187; Goldsmith v. Lewine, 70 Ark. 516, 69 S. W. 308; Goodrum v. Merchants' & Planters' Bank of England, 102 Ark. 326, 144 S. W. 198; Johnson v. Graham Bros. Co., 98 Ark. 274, 135 S. W. 853; Ocklawaha River Farms Co. v. Young (Fla.), 74 So. 644; Thomson v. Kyle, 39 Fla. 582, 23 So. 12, 63 Am. St. R. 193; Philadelphia Sav. Fund Society v. Lasher, 144 Ill. App. 653; Hubbard v. Ogden, 22 Kan. 363; Hite v. Reynolds, 163 Ky. 502, 173 S. W. 1108; Ehle v. Looker (Mich.), 148 N. W. 378; Lewis v. Doyle (Mich.), 148 N. W. 407; Hach v. Hill, 106 Mo. 18, 16 S. W. 948; White v. Smith, 174 Mo. 186, 73 S. W. 610; Jones v. Edeman, 223 Mo. 312, 122 S. W. 1047; Bell v. Bell, 133 Mo. App. 570, 113 S. W. 667; Northwestern Mutual Life Ins. Co. v. Mallory, 93 Neb. 579, 141 N. W. 190; Bode v. Jussen, 93 Neb. 482, 140 N. W. 768; Wilson v. Neu, 1 Neb. (Unof.) 42, 95 N. W. 502; Holmes v. Hull, 50 Neb. 656, 70 N. W. 241; Marsh v. Marsh, 92 Neb. 189, 137 N. W. 1122; Hallowell v. Daly (N. J.), 56 A. 234; Colonial Bldg. & Loan Ass'n v. Griffin, 85 N. J. Eq. 455, 96 A. 901; Seigman v. Streeter, 64 N. J. Law, 169, 44 A. 888; Lawshe v. Trenton Banking Co., 87 N. J. Ch. 56, 99 A. 617; Bliss v. Cronk, 68 N. J. Eq. 655, 60 A. 1133; Strong v. Gambier, 155 App. D. 294, 140 N. Y. S. 421; Young v. Brown, 136 Tenn. 184, 188 S. W. 1149; Red River Nat. Bank v. Ferguson (Tex.), 206 S. W. 923; Bird v. Bird (Tex.), 212 S. W. 253, 257; Dearing v. Jordan (Tex.), 130 S. W. 876; Krause v. Reichel, 167 Wis. 360, 167 N. W. 817; Merrell v. Purdy, 129 Wis. 331, 109 N. W. 82; Bailey v. Fink, 129 Wis. 373, 109 N. W. 86.

56. Springfield Co. v. Ely, 44 Fla. 319, 32 So. 892; Just v. State Sav. Bank, 132 Mich. 600, 94 N. W. 200, 10 Det. Leg. N. 36.

57. Copeland v. Hornik, 216 F. 117; Eubanks v. Anniston Mercantile Co. (Ala.), 55 So. 98; Webb v. Globe Securities Co. (Ala.), 82 So. 476; Campbell v. Hughes, 155 Ala. 591, 47 So. 45; Corinth Bank & Trust Co. v. King, 182 Ala. 403, 62 So. 704; Prince v. Prince, 67 Ala. 565; American Mortg. Co. of Scotland v. Hartzog, 74 F. 993; Henderson v. Brunson,

or pledge,[58] whether the transaction is direct or indirect,[59] nor can she bind herself by a conveyance of property to him so that he can pay his debts with it.[60] In some States such a transaction is wholly void,[61] so that its invalidity can be shown in ejectment without a cancellation.[62]

Where the statute provides that transfers of a wife's separate estate to pay her husband's debts shall be void, a conveyance of which the consideration is in part legal and in part illegal under the statute is wholly void as to the wife,[63] and a deed of a wife to secure both her own and her husband's debts has been held not binding, though for the purpose of compromising a doubtful claim against her own estate.[64] Other courts hold such a transaction valid in so far as its benefit inures to the wife.[65] Where such a mortgage is merely voidable, a creditor of the wife cannot attack it for invalidity if she does not.[66]

In some States a wife may borrow on mortgage of her separate estate and pay her husband's debts with the proceeds,[67] unless there is a scheme to evade the statute to which the lender is a party,[68] or may pay his debts with such estate.[69] Under such a

141 Ala. 674, 37 So. 549; Gross v. Whiteley, 128 Ga. 79, 57 S. E. 94; Sharpe v. Denmark, 143 Ga. 156, 84 S. E. 554; Boyd v. Radabaugh, 150 Ind. 394, 50 N. E. 301; Indianapolis Brewing Co. v. Behnke, 41 Ind. App. 288, 81 N. E. 119; McClelland v. Hamilton's Adm'r, 5 Ky. Law, 58; Keating v. Wilbert, 119 La. 461, 44 So. 265; Aiken v. Robinson, 52 La. Ann. 925, 27 So. 529.

58. Corinth Bank & Trust Co. v. Pride (Ala.), 79 So. 255.

59. Trotter Bros. v. Downs (Ala.), 75 So. 906; Osborne v. Cooper, 113 Ala. 405, 21 So. 320, 59 Am. St. R. 117; Hughes v. Shannon, 113 Ky. Law, 782.

60. Morrison v. Morrison's Assignee, 113 Ky. 507, 24 Ky. Law, 340, 68 S. W. 467; Same v. Morrison, 113 Ky. 507, 24 Ky. Law, 786, 69 S. W. 1102.

61. Hamilton v. Moore, 136 La. 631, 67 So. 523; Shannon v. Ogletree (Ala.), 76 So. 865; Vinegar Bend Lumber Co. v. Leftwich (Ala.), 72 So. 538; Russell v. Feavy, 131 Ala. 563, 32 So. 492; Harper v. T. N. Hays Co., 149 Ala. 174, 43 So. 360; Allen v. Pierce, 163 Ala. 612, 50 So. 924; Trotter Bros. v. Downs (Ala.), 75 So. 906.

62. Richardson v. Stephens, 122 Ala. 301, 25 So. 39.

63. Pond v. Sullivan, 133 Ga. 160, 65 S. E. 376.

64. Mickleberry v. O'Neal, 98 Ga. 42, 25 S. E. 933.

65. Johnson v. Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795; Christensen v. Wells, 52 S. C. 497, 30 S. E. 611.

66. Hawes v. Glover, 126 Ga. 305, 55 S. E. 62.

67. Johnson v. Leffler Co., 122 Ga. 670, 5 S. E. 488; McGee v. Cunningham, 69 S. C. 470, 48 S. E. 473.

68. Bank of Eufaula v. Johnson, 146 Ga. 791, 92 S. E. 631.

69. Davidson v. Biddleman, 82 N. J. Law 92, 81 A. 366; Patton v. Merchants' Bank, 12 W. Va. 587; Bushard v. McCay (Ala.), 77 So. 699; Fitzgerald v. Dunn, 112 Wis. 37.

statute a mortgage given for funds wherewith to build a house on her land is not invalid merely because the mortgagee deals with her husband as her agent.[70]

Where a wife has secured the necessary judicial authority to borrow money, a holder of the note in due course and before maturity will be protected though the husband used the money,[71] and a mortgage of her land to secure their joint and several note may be regarded as his sole debt where the facts warrant such a conclusion.[72] Under the Kentucky statute neither a wife's land nor its rents can be subjected to the debts of her husband unless set apart for that purpose as required by the statute.[73] In Michigan a wife may secure the price of property owned by the spouses jointly by a mortgage of her separate real estate,[74] and under the Mississippi statute a wife may mortgage her land to the extent of its income to secure her husband's debts.[75] Under the Pennsylvania statute she may charge her property for his debt by mortgage or pledge but cannot render herself personally liable for it,[76] as where she assigns her interest in an insurance policy on his life.[77] Similar statutes exist in Kentucky, Rhode Island and Wisconsin.[78]

After her husband's death a wife may bind herself by an assumption of his debts.[79]

§ 446. Statutory Liability for Support of Husband.

Under the California statute providing that spouses contract mutual duties of support, a wife may be compelled to support her infirm husband, which duty must be enforced by contempt proceedings, thereby being no remedy at law.[80] In North Dakota

70. Christensen v. Wells, 52 S. C. 497, 30 S. E. 611.

71. Josephson v. Powers, 123 La. 5, 48 So. 564.

72. *In re* Minot, 164 Mass. 38, 41 N. E. 63.

73. Patton's Ex'r v. Smith, 130 Ky. 819, 114 S. W. 315.

74. Wineman v. Phillips, 93 Mich. 223, 53 N. W. 168.

75. Foxworth v. Magee, 44 Miss. 430.

76. Righter v. Livingston, 214 Pa. 28, 63 A. 195; Herr v. Reinoehl, 209 Pa. 483, 58 A. 862; Bartholomew v. Allentown Nat. Bank, 260 Pa. 509, 103 A. 954; Siebert v. Valley Nat. Bank, 186 Pa. 233, 40 A. 472, 42 W. N. C. 319.

77. Dusenberry v. Mutual Life Ins. Co., 188 Pa. 454, 41 A. 736.

78. Brady v. Equitable Trust Co. of Dover, 178 Ky. 693, 199 S. W. 1082; Thacker v. Medbury, 33 R. I. 37, 80 A. 186; Goll v. Fehr, 131 Wis. 141, 111 N. W. 235.

79. Walker v. Walker, 139 Ga. 547, 77 S. E. 795; Booker v. A. T. Small & Sons, 147 Ga. 566, 94 S. E. 999.

80. Livingston v. Superior Court of Los Angeles County, 117 Cal. 633, 49 P. 836, 38 L. R. A. 175.

she may be compelled to support him, where amply able to do so, if he is old and unable to earn a living, if she has not been abandoned by him, which duty is enforceable in equity.[81] Under the Louisiana statute a wife cannot recover for her paraphernal funds used to support her sick husband who has no property.[82]

§ 447. Liability for Breaches of Trust.

Where a married woman as trustee wastes the trust estate, English practice recognizes remedies against her separate property.[83] Appointing a married woman trustee may be considered objectionable (apart from equity rules of constructive trust) while the law yet fails to divest her of all coverture disabilities, so as to make her both efficient and responsible in the legal sense. Yet it is held in some States that a married woman may, under the statutes, hold an estate in trust, and make contracts accordingly.[84]

§ 448. Debts Contracted in Separate Business.

Where a wife carries on a separate business, her separate estate is liable for debts incurred in such business.[85] [86] A wife is not a "public merchant," within the meaning of the Louisiana statute, merely by passively permitting her brothers to operate a store in the name of an estate wherein she has an interest, so as to make her liable for its debts.[87]

The North Carolina statute providing that a wife shall be deemed a free trader where she conducts a business through an agent without displaying her Christian name, does not apply to cases where the seller of goods knows the real facts, the statute being intended to prevent her from deceiving persons into thinking that they are dealing with legally responsible persons.[88] Under the West Virginia statute, debts incurred by a wife in her separate business will bind only the property used in the business unless

81. Hagert v. Hagert, 22 N. D. 290, 133 N. W. 1035.

82. Succession of Turgeau, 130 La. 650, 58 So. 497.

83. Pemberton v. McGill, 1 Dr. & Sm. 266.

84. Springer v. Berry, 47 Me. 330.

85-86. First Nat. Bank v. Hirschkowitz, 46 Fla. 588, 35 So. 22; West v. De Moss, 50 La. Ann. 1349, 24 So. 325; First Commercial Bank v. Newton, 117 Mich. 433, 75 N. W. 934, 5 Det. Leg. N. 276; Jones v. Bruens, 26 Misc. Rep. 741, 57 N. Y. S. 77; People's Trust Co. v. Merrill, 78 N. H. 540, 102 A. 827; Nadel v. Weber Bros. Shoe Co. (Fla.), 70 So. 20.

87. Horton v. Haralson, 130 La. 1003, 58 So. 858.

88. Weld, Colburn & Wilckens v. La Marguerite Shop Co., 147 N. C. 588, 61 S. E. 573; Scott-Sparger Co. v. Ferguson, 152 N. C. 346, 67 S. E. 750.

there is a wrting, executed, acknowledged and delivered as required by the statute.[89]

§ 449. By Contract of Guaranty or Suretyship.

A guaranty executed by the wife and her husband on the transfer of her mortgage, to extricate the title, and as part of the consideration, is enforceable, an intention to charge or for direct benefit duly appearing.[90]

Where a married woman having separate estate executes a promissory note as surety for another, such estate is presumably charged with is payment in some States.[91] But the rule, as we have seen, is otherwise in other States,[92] even though part of the proceeds were used to improve her heal estate.[93] In some States such a transaction is wholly void, so that neither ratification or failure to set it aside will validate it.[94] It is otherwise where the property mortgaged is placed in her hands by him for the purpose of defrauding his creditors.[95]

Under the Indiana statute a mortgage given by a wife as surety is not void but merely voidable by her affirmative action,[96] and in Massachusetts such contracts are enforceable only in equity against the wife's property,[97] and in Pennsylvania are binding where

89. Oney v. Ferguson, 41 W. Va. 568, 23 S. E. 710.

90. White v. McNott, 33 N. Y. 371.

91. Avery v. Van Sickle, 35 Ohio St. 271; Mayo v. Hutchinson, 57 Me. 546; Lincoln v. Rowe, 51 Mo. 571; Metropolitan Bank v. Taylor, 53 Mo. 444. See Wicks v. Mitchell, 9 Kan. 80; Wood v. Orford, 52 Cal. 412; Alphin v. Wade 89 Ark. 354, 116 S. W. 667.

92. Central Bank & Trust Corporation v. Almand, 135 Ga. 231, 69 S. E. 111; Webb v. John Hancock Mut. Life Ins. Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632; Yale v. Dederer, 22 N. Y. 450; s. c., 68 N. Y. 329. But see Woolsey v. Brown, 74 N. Y. 82; Willard v. Eastham, 15 Gray (Mass.), 328; Sibert v. Hughes, 174 Ala. 426, 56 So. 1012; Johnson v. Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795; Washburn v. Gray, 49 Ind. App. 271, 97 N. E. 190; Perkins v. Elliott, 7 C. E. Green (N. J.), 127. A married woman cannot be sued at law on such a promissory note. Vankirk v. Skillman, 5 Vroom (N. J.), 109; Veal v. Hurt, 63 Ga. 728; Saulsbury v. Weaver, 59 Ga. 254; Robertson v. Willburn, 1 Lea (Tenn.), 633; State Sav. Bank v. Scott, 10 Neb. 83. See Harris v. Finberg, 46 Tex. 79.

93. Richardson v. Stephens, 122 Ala. 301, 25 So. 39; Harrison Bldg. & Deposit Co. v. Lackey, 149 Ind. 10, 48 N. E. 254.

94. Trotter Bros. v. Downs (Ala.), 75 So. 906; Smith v. Thompson (Ala.), 82 So. 101; Street v. Alexander City Bank (Ala.), 82 So. 111; Corinth Bank & Trust Co. v. Pride (Ala.), 79 So. 255; Evans v. Faircloth-Byrd Mercantile Co., 165 Ala. 176, 51 So. 785.

95. Webb v. Globe Securities Co. (Ala.), 82 So. 476.

96. Field v. Campbell (Ind.), 68 N. E. 911.

97. Heburn v. Warner, 112 Mass. 271, 17 Am. R. 86.

made by way of mortgage,[98] and in Georgia where given to extinguish the debt.[99] In Louisiana where a husband makes a transfer of property to a third person to enable his wife to become surety for such person, but really for himself, a mortgage given by her on such property is void, if the mortgagee knows the facts.[1] and in that State, though a wife may not bind herself as surety for her husband, her act as surety for a partnership of which he is a member is valid, the partnership being a personality distinct from her husband.[2] In Nebraska a wife's mortgage of her separate property, other than a homestead, to secure her husband's debt is valid, though not duly acknowledged, as between the parties.[3] In New Jersey, on the other hand, where no such power was given under statute for the married women to dispose of her separate property as has been conferred by the New York legislature, equity has refused to recognize any power in a married woman, independently of appropriate legislation, to charge her separate satutory estate by any writing, even though it contain words which show a clear intention to bind such estate, except by a mortgage acknowledged as required by law, or for debts contracted for the benefit of her separate estate, or for her own benefit on the credit of it; and hence it declines to impose a lien on the wife's separate estate because of her note as surety, even though by express words she charges the payment of that note on her separate property.[4] It is now held in that State that such contracts cannot be avoided if executed.[5]

§ 450. Rule of Yale v. Dederer.

The obstinate case of *Yale* v. *Dederer* is an important one, as establishing in a leading American State, under cover of modern legislative policy, a new doctrine, at variance with that of English equity courts, and apparently contrary to its own precedents.[6] In this case New York statutes of 1848 and 1849 were to be construed, which in terms permitted the wife to hold to separate use,

98. Kuhn v. Ogilvie, 178 Pa. 303, 35 A. 957.

99. Tindol v. Breedlove (Ga.), 90 S. E. 977.

1. Martinez v. Gallois, Man. Unrep. Cas. (La.) 401.

2. Stothart v. William T. Hardle & Co., 110 La. 696, 34 So. 740.

3. Fisk v. Osgood, 58 Neb. 486, 78 N. W. 924.

4. Perkins v. Elliott, 7 C. E. Green (N. J.), 127; Kohn v. Russell, 91 Ill. 138; Dunbar v. Mize, 53 Ga. 435.

5. Shipman v. Lord, 58 N. J. Eq. 380 (aff'd., N. J. Eq. 484, 46 A. 1101).

6. Yale v. Dederer, 18 N. Y. 265; s. c., N. Y. 450.

and to "convey and devise" as if *sole,* but left her promissory note as void as it always had been at the common law. It appeared that the husband had offered his promissory note to the plaintiff in payment of certain cows which he wished to purchase; that the plaintiff, doubting his solvency, required him to procure his wife to unite in a note with him. This he did. The note was subsequently renewed. At the time of signing the note Mrs. Dederer remarked that if her husband was not able to pay it, she was. The husband turned out insolvent afterwards, and judgment on the note was returned *nulla bona* as against him. It was established that the wife had sufficient real estate, held in her own right, to satisfy the claim; and the judge, who heard the evidence, stated in his finding that "the defendant, Mrs. Dederer, intended to charge, and did expressly charge, her separate estate for the payment of the note." The Court of Appeals nevertheless held that Mrs. Dederer was a mere surety for her husband; and that being such, although it was her intention to charge her separate estate, such intention did not take effect.

A question properly raised here was whether, notwithstanding her legal disabilities to contract remained substantially as before the statute, the married woman might, as incidental to the complete right of property and *jus disponendi* which she took under the statute, charge her estate for the purposes and to the extent which rules of equity had heretofore sanctioned with reference to her equitable separate estate. The decision was adverse, and the principle of the decision was this: that, in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or else the consideration must be obtained for the direct benefit of the estate itself. Later New York decisions followed the rule of this case, and required a distinct written obligation to bind the wife where the debt is not contracted for the direct benefit of the estate.[7]

7. White v. McNett, 33 N. Y. 371; Ledlie v. Vroman, 41 Barb. (N. Y.) 109; White v. Story, 43 Barb. (N. Y.) 124; Merchants' Bank v. Scott, 59 Barb. (N. Y.) 641.

We may add that Yale v. Dederer was passed upon by the New York Court of Appeals three several times. After the first appeal (18 N. Y. 265), when it was ruled that, in order for a married woman to charge her separate estate with a debt not contracted for the benefit of that estate, it was necessary that there should be evidence of an intention to charge it, the court below, which would at first have entered judgment to sell, found that the wife actually intended to charge her

The decision in *Yale* v. *Dederer,* on its second appeal, made a profound impression among chancery jurists, the novelty of the Married Women's Act favoring this result, and likewise the circumstance that chancery jurisdiction had hitherto been taken more liberally in New York than in other States in the Union. Opinions differed as to the merits of the decision, but not as to the boldness of the innovation upon chancery precedents.

It does not appear that this doctrine has found favor in all the other States. In Wisconsin, the decision of *Yale* v. *Dederer* was unsparingly condemned soon after, in the course of judicial discussion.[8] And for several years the more common equitable rule in this country still seemed to be that the wife's separate estate would be held liable for all debts which she by implication or expressly, by writing or parol, charged thereon, even if not contracted directly for the benefit of the estate.[9] For the wife's debts are charged in justice upon her separate estate, not because of her power to make a valid written or verbal contract, but because it is right that her debts should be paid.[10]

But influences were at work to bring other jurisdictions to reject the loose discretionary powers which English precedents appeared to have established against, as well as favorably to, the interests of married woman. In Massachusetts, at a term of 1860, the

separate estate with the promissory note in question. Hence the principle so broadly asserted as to evidence in writing on the second appeal (Yale v. Dederer, 22 N. Y. 450); Selden, J., observing that hereafter married women were not to be indebted to equity merely for protection in their separate estate, and that, discarding the fictitious theories of the English courts, there was no reason why the wife's acts in this respect should not be tested by the same principles and rules of evidence as apply to similar questions in other cases. A third time (see Yale v. Dederer, 68 N. Y. 329), or about 1877, the case went up on appeal; the effort upon the last trial being made to take the case out of the rule by evidence tending to show that the property was purchased by the husband as agent of the defendant, and for the benefit of her separate estate; but it was held that the findings as to the circumstances and intent were not inconsistent with the idea that the defendant had signed as surety, and that the purchase was not for the benefit of her separate estate.

8. Todd v. Lee, 15 Wis. 365.

9 Pentz v. Simonson, 2 Beasl. 232; Grapengether v. Fejervary, 9 Ia. 163; Rogers v. Ward, 8 Allen (Mass.), 387; Mayo v. Hutchinson, 57 Me. 546; Major v. Symmes, 19 Ind. 117; Oakley v. Pound, 1 McCart. 178; Miller v. Newton, 23 Cal. 554; 2 Kent, Com. 164; 2 Story Eq. Juris., §§ 1398, 1401. See Koontz v. Nabb, 16 Md. 549; Knox v. Jordan, 5 Jones Eq. (N. C.) 175; McFadden v. Crumpler, 20 Tex. 374; Phillips v. Graves, 20 Ohio St. 371; Avery v. Vansickle, 35 Ohio St. 270.

10. Cummins v. Sharpe, 21 Ind. 331; Pentz v. Simonson, 2 Beasl. 232;

Supreme Court, called for the first time to exercise full equity powers under a statute then recent, followed the rule of *Yale* v. *Dederer,* in a similar case of married women's suretyship.[11] The English chancery itself, finding occasion in 1861 to consider the subject of separate estate liability for a wife's unbeneficial dealings,[12] showed a new inclination to discriminate for the protection of a wife's separate estate in such instances. On the whole, therefore, while the lines of American and English decisions of late do not run parallel, and States themselves are discordant as to burden of proof and as to admitting or denying the New York and Massachusetts doctrine,— some States holding it immaterial in equity whether the wife's debt be evidenced by a written instrument or parol promise,[13] and, of course, to the extent only to which the wife's power of disposal may go.[14]

The tendency on both sides of the water is towards the conclusion that the debts of a married woman having separate property are only to be surely charged by a court of equity upon that separate property, and payment enforced out of it, when it was contracted by her for its benefit, or expressly made a charge thereon or expressly contracted on its credit.[15]

Since the second decision in *Yale* v. *Dederer* the New York

Glass v. Warwick, 40 Pa. 140. But see Maclay v. Love, 25 Cal. 367; Hanly v. Downing, 4 Met. (Ky.) 95.

11. Willard v. Eastham, 15 Gray (Mass.), 328. The volume of Reports containing this opinion was not, however, published before 1869.

12. That is, for buying stock in trade for her separate business. This case was Johnson v. Gallagher, 3 De G. F. & J. 494.

13. Miller v. Brown, 47 Mis. 505.

14. See Hix v. Gosling, 1 Lea (Tenn.), 560.

15. Armstrong v. Ross, 5 C. E. Green (N. J.), 109; Kantrowitz v. Prather, 31 Ind. 92; Hasheagan v. Specker, 36 Ind. 413; Perkins v. Elliott, 7 C. E. Green (N. J.), 127; Patrick v. Littell, 36 Ohio St. 79, and authorities cited; Westgate v. Munroe, 100 Mass. 227; Nash v. Mitchell, 71 N. Y. 199; Wilson v. Jones, 46 Md. 349; Wallace v. Finberg, 46 Tex. 35; Williams v. Hugunin, 69 Ill. 214; Stillwell v. Adams, 29 Ark. 346; Pippen v. Wesson, 74 N. C. 437.

The doctrine of Yale v. Dederer, whether by statute or judicial decision, finds more direct support from Cozzens v. Whitney, 3 R. I. 79; Jones v. Crosthwaite, 17 Ia. 393; Perkins v. Elliott, 7 C. E. Green (N. J.), 127; Maguire v. Maguire, 3 Mo. App. 458; Hodson v. Davis, 43 Ind. 258; Chatterton v. Young, 2 Tenn. Ch. 768; Nelson v. Miller, 52 Miss. 410. But other cases are to the contrary. Metropolitan Bank v. Taylor, 62 Mo. 338; Mayo v. Hutchinson, 57 Me. 546; *supra,* p. 302. The rule is regarded as settled in New York, that, in order to charge the estate of a married woman with a debt not contracted for the benefit of her separate estate, the intent to charge such estate, where the obligation is in writing, must be expressed in the instrument. Yale v. Dederer, 68 N. Y. 329.

statute of 1860 provides that any married woman possessed of real estate as her separate property may bargain, sell, and convey such property, and "enter into any contract" in reference to the same. By way of construing this statute, together with the prior acts of 1848 and 1849, the New York Court of Appeals has charged a married woman as party without consideration to a promissory note, where she added, as promisor or special indorser, express words charging the payment of the note on her separate property.[16]

§ 451. Loans.

Generally a wife is liable to repay borrowed money,[17] if the loan was used for the benefit of her separate estate,[18] and if a wife is duly authorized to borrow, the lender need not inquire as to the purpose of the loan.[19]

The requirement that she secure authority from the judge in order to borrow is intended as a protection to her and to those dealing with her, and her legal capacity to incur debts and to mortgage her property is not essentially dependent on it.[20] Where such a wife admits in her examination by the judge as a preliminary to granting authority to borrow that the loan is for her separate advantage, she will be bound by it though she puts the money to another us, where the lender does not know of such use.[21]

Where a lender declined to loan money to a husband who was general agent for a wife, but offered to let him have the money if he would induce his wife to give a mortgage on her land to secure it, the transaction was to be construed as a loan to the wife.[22] So one who loans money to a wife on the authority of her husband can recover it only by showing affirmatively that the loan inured only to the separate benefit of the wife, and that it was not borrowed for the purpose of paying the husband's debts or for the community.[23]

Under the Texas Married Women's Act a wife has no power to borrow money for investment,[24] and in Vermont one loaning a

16. Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613.

17. Hamilton v. Parent, 152 Mich. 587, 116 N. W. 367, 15 Det. Leg. N. 318.

18. Blair v. Teel (Tex.), 152 S. W. 878.

19. Saufley v. Joubert, 51 La. Ann. 1048, 25 So. 934.

20. Kohlman v. Cochrane, 123 La. 219, 48 So. 914.

21. Saufley v. Joubert, 51 La. Ann. 1048, 25 So. 934.

22. Gibson v. Wallace, 147 Ala. 322, 41 So. 960.

23. National City Bank v. Barringer (La.), 78 So. 134.

24. Mills v. Frost Nat. Bank (Tex.), 208 S. W. 698.

wife money which is in fact used for the benefit of her separate estate is entitled to an equitable lien thereon.[25] The Kentucky statute providing that a wife shall not be surety for her husband was not intended to prevent a wife from borrowing money to pay her husband's debts or to dispose of borrowed money as she pleases, so that a lender is not required to inquire into the disposition of the money, if the transaction is not a scheme to evade the statute, or to secure her obligation as surety.[26] In order to secure the permission of a judge to enable a wife to borrow money in Louisiana, she must satisfy the judge that the loan is for the benefit of her separate estate.[27] In the same State, while a substantial variation in a wife's mortgage from the authority granted by the judge, which is to her disadvantage, does not avoid it, it compels the mortgagee to show that it inured to her separate estate,[28] as well as where the loan was not properly authorized in other respects.[29]

§ 452. By Promissory Note.

A promissory note whose consideration inures to the benefit of the wife's separate estate, or was given upon its express credit, is enforceable,[30] and the wife's estate may be bound by her indorsement of a note with suitable extension of the instrument.[31]

The purchase of a piano as her separate property, and a note given therefor, is held, in Ohio, enforceable against the wife's separate estate; an intention to charge being inferable from execution of the note,[32] or her note given for purchase of a sewing-machine.[33] And where the wife acquires title to property by

25. Fletcher v. Brainerd, 75 Vt. 300, 55 A. 608.

26. Third Nat. Bank v. Tierney, 128 Ky. 836, 110 S. W. 293, 33 Ky. Law, 418.

27. Barth v. Bone, Man. Unrep. Cas. (La.) 431; O'Keefe v. Handy, Man. Unrep. Cas. (La.) 369.

28. West v. De Moss, 50 La. Ann. 1349, 24 So. 325.

29. Opelousas Nat. Bank v. Fahey, 129 La. 225, 55 So. 772.

30. See Wright v. Dresser, 110 Mass. 51; Quassaic Nat. Bank v. Waddell, 3 Thomp. & C. (N. Y.) 680.

31. Third Nat. Bank v. Blake, 73 N. Y. 260.

32. Graves v. Phillips, 20 Ohio St. 371.

33. Williamson v. Dodge, 5 Hun (N. Y.), 497.

As to a *bona fide* holder for value before maturity, it is held in Virginia that a married woman's signature or indorsement of a blank note holds her to the extensive obligations which the law imposes upon parties *sui juris*, so far as charging her separate estate is concerned. Frank v. Lilienfeld, 33 Gratt. (Va.) 377. But this seems contrary to the general tenor of American decisions independently of broad statutes and the equitable rule requiring her contract to be beneficial to her,

purchase (which by force of statute becomes her separate property) and executes a promissory note, the implication is that she intended to charge her separate estate with its payment.[34]

In Massachusetts it is deemed that the intent and the facts on which it rests are not affected by the giving of collateral security. Hence payment may be enforced out of a married woman's separate estate upon a bond or promissory note given by her for the price of land conveyed to her sole and separate use.[35] And while, in that State, a wife is not legally liable upon a promissory note made by her payable to her husband's own order, and by him indorsed over,[36] she is held liable upon a promissory note signed by her upon consideration moving from her as tenant in common with her husband,[37] or another, or given for goods sold her on her sole credit, although she received no benefit therefrom.[38]

Where a wife gives her note to a husband's creditor to pay his debt and secures it with a deed of land conveyed to her by her husband, the creditor may, on her failure to pay the note, recover the land in ejectment.[39] In the same way, where in a division of land among heirs a wife's share was conveyed to herself and her husband, they giving a note to other heirs for a surplus, it was held that she was liable to her husband for an amount paid by him on the note, and for interest thereon.[40] The Indiana statute providing that if a wife executing a note for a loan shall be bound by her statement that the loan is for her separate use, applies only where the lender pays the loan in cash, or by check or draft.[41]

§ 453. Proceedings to Charge Separate Estate; In Equity.

The Married Women's Acts in some States make, as might be anticipated, a radical change in the character of the practice for reaching the wife's separate property.

According to the English practice, and that prevalent in most

&c.; and it rather appears that in such cases all who rely upon a married woman's signature or indorsement are bound to take notice of the consideration upon which it was procured.

34. Exhaustion of the proceeds in payment of prior liens does not affect a creditor's right to recover out of the residue of the estate. Avery v. Van Sickle, 35 Ohio St. 296.

35. Rogers v. Ward, 8 Allen (Mass.), 387; Estabrook v. Earle, 97 Mass. 302.

36. Roby v. Phelon, 118 Mass. 541.

37. Burr v. Swan, 118 Mass. 588.

38. Allen v. Fuller, 118 Mass. 402.

39. Strickland v. Gray, 98 Ga. 667, 27 S. E. 155.

40. Propes v. Propes, 171 Mo. 407, 71 S. W. 685.

41. Union Nat. Bank v. Finley, 180 Ind. 470, 103 N. E. 110.

States, there was no personal judgment against a married woman. But a chancery decree was directed against the separate property of the wife, declaring the separate estate vested in the wife at the date of the decree, which it was within her power to dispose of, chargeable with the payment of the debt.[42] The debt was not a lien upon the wife's separate estate until made so by decree of the court of equity, and the lien was by virtue of such decree.[43] Under such proceedings there was only a sort of equitable execution, the decree reaching only property which the wife had power to bind, and no personal judgment being awarded against her,—nothing from which direct personal liability on her part could be predicated.

A proceeding in equity to enforce a wife's debts against her separate estate is in the nature of a proceeding *in rem*,[44] resting on her inability to bind herself *in personam* or to bind herself by her sole act or agreement.[45] In such case an injunction is a sufficient incipient sequestration of her visible separate estate, such estate being then specifically proceeded against by the creditor in equity.[46]

The proceeding in Florida by a creditor to subject a wife's goods to her debt contracted in her separate business is not a creditor's bill, but is *sui generis,* the appointment of a receiver operating as an equitable attachment, creating a lien.[47] Such a bill is demurrable if it does not aver that the contract was for the benefit of the wife's separate estate.[48]

§ 454. At Law.

Under the recent married women's legislation the same judgment is required, with the same process for its enforcement, as would be awarded if the woman were *sole;* saving, perhaps, the

42. Johnson v. Gallagher, 3 De G. F. & J. 520; Picard v. Hine, L. R. 5 Ch. App. 274; Collett v. Dickenson, L. R. 11 Ch. D. 687; Davies v. Jenkins, L. R. 6 Ch. D. 730; Patrick v. Littell, 36 Ohio St. 79; Armstrong v. Ross, 20 N. J. Eq. 109.

43. Armstrong v. Ross, 5 C. E. Green (N. J.), 109; Terry v. Hammonds, 47 Cal. 32; Wilson v. Jones, 46 Md. 349; Gage v. Gates, 62 Mo. 412. A creditor cannot procure an *interim* injunction to restrain a married woman from dealing with her separate estate pending the trial of an action to establish a charge against it. Robinson v. Pickering, 44 L. T. 165.

44. Hughes v. Hamilton, 19 W. Va. 366.

45. West v. Laraway, 28 Mich. 464; Kelliher v. Kennard (Fla.), 79 So. 28.

46. Osborn v. Glasscock, 39 Wa. Va. 749, 20 S. E. 702.

47. First Nat. Bank v. Hirschkowitz, 46 Fla. 588, 35 So. 22.

48. King v. Hooton, 56 Fla. 805, 47 So. 394.

usual exemptions, and treating the wife's property in such case substantially as the husband's property might be treated were the judgment rendered against him and the liability his. And where such is the practice, no equitable circumstances can usually be alleged calling for the intervention of a court of equity.[49] Legal attachment on mesne process, or by way of legal execution against a married woman, may be made under such statutes,[50] or in appropriate instances the foreign attachment or trustee process applied,[51] but a wife's property cannot be attached in Nebraska in a proceeding against the husband alone, though she agreed to pay the debt.[52] In North Carolina property of a non-resident wife may be attached for her debt if valid in the State where it was made.[53]

On the whole, policy still disinclines to permit a personal judgment to be rendered against a married woman even on what purports to be her personal obligation.[54] The subjection of the wife's property, furthermore, under these acts, extends to all her statutory separate estate, or, as might generally turn out, by the changing of equitable into statutory estates by operation of legislation, all her separate property. And by this means the old distinction between the real and personal separate estate becomes well-nigh obliterated.[55]

49. Stevens v. Reed, 112 Mass. 515; Patrick v. Littell, 36 Ohio St. 79; Cookson v. Toole, 59 Ill. 515; Andrews v. Monilaws, 15 N. Y. 65.

50. See language of Hoar, J., in Willard v. Eastham, 15 Gray (Mass.), 328.

51. Powers v. Totten, 42 N. J. L. 442.

52. Simmonds v. Fenton, 95 Neb. 771, 146 N. W. 944.

53. Nat. Exchange Bank v. Rook Granite Co., 155 N. C. 43, 70 S. E. 1002.

54. See Norton v. Meader, 4 Sawyer (U. S.), 603; Mallett v. Parham, 52 Miss. 921; Miner v. Pearson, 16 Kan. 27; Richards v. O'Brien, 64 Ind. 418; Andrews v. Monilaws, 15 N. Y. 65.

55. Patrick v. Littell, 36 Ohio St. 79.

A judgment against the husband upon the joint promissory note of himself and wife does not merge the right to charge the wife's separate estate with the payment of the note in a subsequent action. Avery v. Vansickle, 35 Ohio St. 270. Coverture is in general, like infancy, a matter of defence which the married woman may plead or not; it need not be set up by a plaintiff. Smith v. Duuning, 61 N. Y. 249; Aetna Ins. Co. v. Baker, 71 Ind. 102. After judgment the defence of coverture cannot be interposed to prevent the sale of a married woman's property on the execution. McDaniel v. Carver, 40 Ind. 250.

A married woman, though not liable in the action, may charge her separate estate by directing her attorney to allow judgment to be taken against her; and the acts of her counsel, in the absence of fraud, should bind her. Palen v. Starr, 14 N. Y. 422; Glover v. Moore, 60 Ga. 189; Vick v. Pope, 81 N. C. 22. Judgment against a married woman is not the less conclusive because rendered as part of a

§ 455. Ratification.

Payments made on a mortgage void because of coverture do not operate as a ratification by the wife or stop the running of the statute.[56] So where a wife joined her husband in a quitclaim deed of her land she did not thereby ratify his previous unauthorized mortgage of the same land, even though she never disclaimed his act, since there was no reason for her disclaiming his act or defending against a foreclosure where she had parted with her title.[57]

§ 456. Estoppel to Deny Validity.

A wife is estopped to deny the validity of a deed of trust of her land, as against the beneficiary where she did not read it but executed it on the faith of her husband's false statement that it covered land in which she had only a right of dower,[58] and where she gives a mortgage to pay off liens on her separate property to which coverture might have been a defence, but which she treated as valid,[59] but she is not estopped to assert her title to land mortgaged by her husband as his merely by the fact that she joins to release dower and homestead, where the statute prohibits her from directly or indirectly mortgaging her property for his debt,[60] nor

compromise arrangement. Lewis v. Gunn, 63 Ga. 542. Her gross laches, too, or her negligence, as in defaulting after a personal service, should disable her from maintaining a bill in equity to set the adverse judgment aside. Wilson v. Coolidge, 42 Mich. 112; Landers v. Douglas, 46 Ind. 522. Or from collaterally attacking it. Burk v. Hill, 55 Ind. 419. But American practice is not agreed as to the validity of a judgment against a married woman. Some States hold that such a judgment is absolutely null and void unless the record shows it to be within the special cases authorized by law, so that proceedings to enforce it may be stayed by injunction. Cary v. Dixon, 51 Miss. 593. Other decisions favor setting judgment aside on appeal or review, where the cause of action was unsuitable. Swing v. Woodruff, 41 N. J. L. 469; Emmett v. Yandes, 60 Ind. 548. Practice requiring husband and wife to be sued together, an execution, it is held, must issue against the husband, and be returned unsatisfied, before the wife's estate can be held liable. Berger v. Clark, 79 Pa. 340. But in some States the husband is treated as a formal, not a substantial party. Ross v. Linder, 12 S. C. 592.

After-acquired property may be taken upon a judgment against the wife rendered upon a legal contract. Van Metre v. Wolf, 27 Ia. 341. A married woman is not bound by her answer in chancery made jointly with her husband. Kerchner v. Kempton, 47 Md. 568. See Robinson v. Trofitter, 109 Mass. 478.

56. Radican v. Radican, 22 R. I. 405, 48 A. 143.

57. Waughtal v. Kane, 108 Ia. 268, 79 N. W. 91.

58. Hyatt v. Lion, 102 Va. 909, 48 S. E. 1.

59. Till v. Collier, 27 Ind. App. 333, 61 N. E. 203.

60. Gibson v. Clark, 132 Ala. 370, 31. So. 472.

where she gives him a deed running to herself for record and he changes it before recording so that his name appears as joint grantee, even though she later joins him in mortgaging it,[61] nor by the fact that after her second marriage she executes her mortgage by the name she bore when a widow,[62] nor by the fact that the proceeds of a second mortgage were used to pay off a previous mortgage which was void because given as surety.[63]

She may be estopped to deny her liability for goods purchased on her husband's account where she represents to the creditor that it is her own debt,[64] and where a wife obtains credit on the faith of statements that the purchase is for the benefit of her separate estate, she is estopped to deny her liability for the price, though the property obtained was not so used.[65] It is otherwise where the creditor knows that she receives no benefit.[66]

A wife is estopped to deny the validity of a transaction whereby she conveys her property to another in order that he may mortgage it to secure his own debt, as against one who accepts the mortgage on the faith of the mortgagor's apparent title,[67] as well as where she joins him in a mortgage of land belonging to him, but which he had conveyed to her by an unrecorded deed, where the mortgagee supposed that it was still his property.[68]

A mortgage given to secure an extension of a previous mortgage which was voidable for defective acknowledgment will not operate as a ratification or estoppel against the first where there was nothing in the second mortgage indicating such an intention.[69] But where a wife knowingly executed a mortgage with her husband on land wherein she had an equitable interest, she cannot assert her equitable right against the mortgagee,[70] and she may be precluded from denying the validity of a pledge of her property for a debt

61. Bank of Coffee Springs v. Austin (Ala.), 75 So. 301.

62. Wilkins v. Lewis (Fla.), 82 So. 762.

63. Bank of Coffee Springs v. Austin (Ala.), 75 So. 301.

64. Wolff v. Hawes, 105 Ga. 153, 31 S. E. 425.

65. Vosburg v. Brown, 119 Mich. 697, 78 N. W. 886, 6 Det. Leg. N. 40; Nat. Lumberman's Bank v. Miller, 131 Mich. 564, 91 N. W. 1024, 9 Det. Leg. N. 435, 100 Am. St. R. 623.

66. First Nat. Bank v. Rutter (N. J.), 104 A. 138, 106 A. 371.

67. Bragg v. Lamport, 96 F. 630, 38 C. C. A. 467.

68. Galvin v. Britton, 151 Ind. 1, 49 N. E. 1064; Magel v. Milligan, 150 Ind. 582, 50 N. E. 564, 65 Am. St. R. 382.

69. Evans v. Dickenson, 114 F. 284, 52 C. C. A. 170.

70. Neslor v. Grove (N. J.), 107 A. 281.

of her husband by demanding and receiving surrender of a draft given by the husband in part payment of the claim.[71]

A wife subjected her property used in her separate business to the lien of her husband's assignee in insolvency for his services, where such property was in her husband's hands as her agent and was by him assigned to the assignee, and where she joined with her husband in asking the assignee to act as his trustee and in fixing the terms on which he should act.[72] So a wife may be bound on contracts inuring to the benefit of her separate estate where to hold otherwise would enable her to work a fraud.[73] But an express recital in a mortgage that it was given for the benefit of a wife's separate estate would not estop her from denying its validity as against the mortgagee or his assigns,[74] but it was held otherwise, as against a holder of the note in due course and before maturity, where there was an express recital of her intention to charge her separate estate.[75] Under the former South Carolina statute a creditor of a wife need only show that she contracted with reference to her separate estate, and not that the property was used for the benefit of such estate.[76]

§ 457. Avoidance.

Where a wife seeks to cancel a mortgage on the ground that it was given as surety, she has the burden of showing that fact,[77] as well as that the mortgage included property belonging to her.[78] In some States she must also show that the mortgagee knew that she was a surety,[79] or had knowledge of facts putting him on inquiry.[80] It is otherwise in Louisiana, even where the wife is

71. Knowlton v. Ross, 114 Me. 18, 95 A. 281.

72. Belden v. Sedgwick, 68 Conn. 560, 37 A. 417.

73. Ackerman v. Larner, 116 La. 101, 40 So. 581.

74. Egan v. Raysor, 49 S. C. 469, 27 S. E. 475.

75. White v. Goldsberg, 49 S. C. 530, 27 S. E. 517.

76. Darwin v. Moore, 58 S. C. 164, 36 S. E. 539.

77. Cox v. Brown (Ala.), 73 So. 964; Mohr v. Griffin, 137 Ala. 456, 34 So. 378; Pulliam v. Hicks, 132 Ala. 134, 31 So. 456; Lunsford v. Harrison, 131 Ala. 263, 31 So. 24; McCrary v. Williams, 127 Ala. 251, 28 So. 695; Gafford v. Speaker, 125 Ala. 498, 27 So. 1003; Taylor v. Maxwell (Ala.), 75 So. 959; Birmingham Trust & Sav. Co. v. Howell (Ala.), 79 So. 377; Street v. Alexander City Bank (Ala.), 82 So. 111; Guy v. Liberenz, 160 Ind. 524, 65 N. E. 186; Aldridge v. Clasmeyer (Ind.), 123 N. E. 825.

78. Burgess v. Blake, 128 Ala. 105, 28 So. 963, 86 Am. St. R. 78.

79. Temples v. Equitable Mortg. Co., 100 Ga. 503, 28 S. E. 232, 62 Am. St. R. 326; Webb v. John Hancock Mut. Life Ins. Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632.

80. Field v. Campbell, 164 Ind. 389, 72 N. E. 260, 108 Am. St. R. 301.

separated in property, since the creditor has the burden of showing that the consideration moved to the wife.[81]

In Ohio the fact that a joint mortgage by the spouses secures the husband's debt is sufficient to put the burden on the mortgagee to show the true relation of the wife to the note.[82] But where in Louisiana a wife sold land to pay the debt of her husband, reserving a right to redeem, and her husband afterwards made a *dation en payment* to her, conveying property in part consideration of the land conveyed to the creditor, she could not recover the land from the creditor without showing that she was imposed on in signing the *dation en payment.*[83]

Where a wife joins in a void deed of her land to secure a debt, an offer to pay the debt is not a prerequisite to her right to a cancellation.[84]

Acquiescence may bar a wife's right to cancellation of deed voidable because given as surety.[85]

81. Erwin v. McCalop, 5 La. Ann. 173.

82. Insurance Co. of North America v. Miller, 24 Ohio Cir. Ct. 667.

83. Sealy v. Cook, 51 La. Ann. 723, 25 So. 316.

84. Shook v. Southern Bldg. & Loan Assn., 140 Ala. 575, 37 So. 409.

85. Rogers v. Shewmaker, 27 Ind. App. 631, 60 N. E. 462, 87 Am. St. R. 274.

CHAPTER XXII.

CONVEYANCE, MORTGAGE OR LEASE OF STATUTORY SEPARATE ESTATE.

§ 458. Wife's Power to Dispose of Separate Estate in General.

The doctrine of the wife's dominion over her separate estate is at this day more generally asserted, in the United States at least, with reference to the Married Women's Acts; and some of the later cases show important variations from the equity rule, as we shall proceed to notice. The decided change seems to date, in American chancery, from the passage of the important Married Women's Acts, or about 1848, and in most States at this day to

affect equitable remedies with reference to both the statutory and equitable separate estate of the wife.[86]

Under the Married Women's Acts in Arkansas, Colorado, Connecticut, Idaho, Missouri, Oklahoma, South Carolina, Utah and Wisconsin the wife has a complete power of disposition of her separate estate.[87] Under the Indiana Married Women's Act a wife may sell and dispose of her personal property in her own name as though *sole*.[88] The Virginia Married Women's Act secures to a wife as her separate estate all property acquired during coverture, however it was acquired.[89] Under that statute choses in action accruing before coverture, but not reduced to possession till after marriage, are her separate estate.[90] Under the Vermont Married Women's Act the wife has full power of disposition of her personal property, however acquired, including gifts from her husband, if it is kept separate from his property.[91] The Missouri Married Women's Act does not apply to estates by the entirety,[92] nor did the early Married Women's Act in that State empower a wife to convey her remainder in land.[93]

§ 459. What Law Governs.

The question whether a mortgage of a wife is valid depends on the law of the State wherein lies the land encumbered,[94] as well as the question whether a wife's warranty estops her to claim the land.[95]

§ 460. Consideration.

A debt owing by a husband to the grantee is sufficient to support a conveyance by his wife,[96] or for a mortgage of her property to

86. *Supra*, § 286 *et seq.*

87. Wagner v. Mutual Life Ins. Co., 88 Conn. 536, 91 A. 1012; *In re* Carpenter, 179 F. 743; Wyatt v. Scott, 84 Ark. 355, 105 S. W. 871; Deutsch v. Rohlfing, 22 Colo. App. 543, 126 P. 1123; McFarland v. Johnson, 22 Ida. 694, 127 P. 911; Stewart v. Weiser Lumber Co., 21 Ida. 340, 121 P. 775; Barnes v. Plessner, 121 Mo. App. 677, 97 S. W. 626; Caylor Lumber Co. v. Mays (Okla.), 174 P. 521; Morrison v. Clark, 20 Utah, 432, 59 P. 235, 77 Am. St. R. 924; Schneider v. Breier's Estate, 129 Wis. 446, 109 N. W. 99, 6 L. R. A. (N. S.) 917.

88. Townsend v. Huntzinger, 41 Ind. App. 223, 83 N. E. 619.

89. Williams v. Lord, 75 Va. 390.

90. Riggan's Adm'r v. Riggan, 93 Va. 78, 24 S. E. 920.

91. *In re* Hill, 190 F. 390; Gowan v. Stevens, 83 Vt. 358, 76 A. 147.

92. Frost v. Frost, 206 Mo. 474, 98 S. W. 527.

93. O'Reilly v. Kluender, 193 Mo. 576, 91 S. W. 1033.

94. Thomson v. Kyle, 39 Fla. 582, 23 So. 12, 63 Am. St. R. 193; Otis v. Gregory, 111 Ind. 504, 13 N. E. 39.

95. Smith v. Ingram, 132 N. C. 959, 44 S. E. 643, 95 Am. St. R. 680, 61 L. R. A. 878.

96. Wagner v. Phillips, 78 N. J. Eq.

secure his debt,[97] especially if completed,[98] even where such consideration is his pre-existing debt,[99] as is the community liability of spouses for a partnership liability of one of them,[1] unless, in Georgia, the transaction is part of a scheme to induce a wife to pay such debts,[2] if participated in by the grantee.[3] It is held otherwise in North Dakota and Missouri.[4]

Where a husband had depleted a bank's funds, the advance of a large sum of money by its officers to enable it to carry on business was not held a sufficient consideration for a wife's conveyance, though the husband was a principal stockholder in the bank.[5]

Where a note given by a wife for her husband's debt is voidable when made, because she is a surety, an agreement by the payee to forbear an action against the husband's estate after his death is not a sufficient consideration for the widow's note renewing the voidable note.[6]

§ 461. Form and Requisites in General.

A wife's mortgage is not invalid for want of an express promise to pay the amount loaned, if there is a sufficient description and identification of the debt secured,[7] as well as where it unequivocally appears that she contracted and received the exclusive benefit of the loan,[8] nor for want of an express recital that she is the

33, 78 A. 806; Lemay v. Wickert, 98 Mich. 628, 57 N. W. 827; Kieldson v. Blodgett, 113 Mich. 655, 72 N. W. 9; Steinmeyer v. Steinmeyer, 55 S. C. 9, 33 S. E. 15; Pratt Land & Improvement Co. v. McClain, 135 Ala. 452, 33 So. 185, 93 Am. St. R. 35; Nelms v. Keller, 103 Ga. 745, 30 S. E. 572; Thomas v. Halsell (Okla.), 164 P. 458; Lewis v. Doyle (Mich.), 148 N. W. 407; Thornton v. Esco, 181 Ala. 241, 61 So. 255; Bowron v. Curd, 28 Ky. Law, 58, 88 S. W. 1106.

97. Ocklawaha River Farms Co. v. Young (Fla.), 74 So. 644, L. R. A. 1917F, 337; Smith v. Hernan (Cal.), 180 P. 640; Sigel Campion Live Stock Commission Co. v. Haston, 68 Kan. 749, 75 P. 1028; Linton v. Cooper, 53 Neb. 400, 73 N. W. 731; Harn v. Missouri State Life Ins. Co. (Okla), 173 P. 214; Knickerbocker Co. v. Hawkins (Wash.), 173 P. 628.

98. Citizens' Bank v. Opperman (Ind.), 115 N. E. 55.

99. Ocklawaha River Farms Co. v. Young (Fla.), 74 So. 644.

1. Lumbermen's Nat. Bank v. Ellis H. Grose Co., 37 Wash. 18, 79 P. 470.

2. Hickman v. Cornwell, 145 Ga. 368, 89 S. E. 330; Riviere v. Ray, 100 Ga. 626, 28 S. E. 391.

3. Bond v. Sullivan, 133 Ga. 160, 65 S. E. 376.

4. Finnerty v. John S. Blake & Bro. Realty Co. (Mo.), 207 S. W. 772; Maas v. Rettke (N. D.), 170 N. W. 309.

5. Rostad v. Thorsen, 83 Ore. 489, 163 P. 987, L. R. A. 1917D, 1170, 163 P. 423, L. R. A. 1917D, 1170.

6. Turner v. Sheridan, 32 Misc. 233, 65 N. Y. S. 791.

7. Gregory v. Van Voorst, 85 Ind. 108.

8. Jouchert v. Johnson, 108 Ind. 436, 9 N. E. 413.

grantor, even where the first part of the deed is so drawn as to make it appear that the husband owned the land, if later recitals show that she is the real grantor.[9] Under the Alabama statute requiring a wife's sale of her separate estate to be by an instrument in writing with two witnesses, it was held that such an instrument having only one witness was void.[10] Under the Kentucky statute a deed setting apart the wife's property for her husband's debt need not state the wife's purpose.[11] In Pennsylvania it has been held that a wife's mortgage is binding though it was blank as to the consideration when delivered and afterwards filled up as to the consideration in her presence alone, if otherwise as provided by the statute.[12]

§ 462. Execution by Wife.

A wife is bound by a deed which she authorizes another to sign for her and which he does so sign in her presence, especially where she later acknowledges it as required by law,[13] and by a deed which she signs after it has been left at a bank by the grantee in pursuance of an arrangement between him and her husband.[14]

§ 463. Necessity of Husband's Joinder.

The rule in many States, under the Married Women's Acts, is that the husband must join the wife in contracts and conveyances relating to her separate property. Particularly is this true of transactions concerning the wife's real estate. Conveyances otherwise made are not considered binding.[15]

9. Harper v. McGoogan, 107 Ark. 10, 154 S. W. 187.

10. Clements v. Motley, 120 Ala. 575, 24 So. 947.

11. Staib v. German Ins. Bank, 179 Ky. 118, 200 S. W. 322.

12. *In re* Hogan's Estate, 181 Pa. 500, 37 A. 548.

13. Godsey v. Virginia Iron, Coal & Coke Co., 26 Ky. Law, 657, 82 S. W. 386.

14. Manning v. Foster, 49 Wash. 541, 96 P. 233.

15. Wright v. Brown, 44 Pa. 224; Camden v. Vail, 23 Cal. 633; Maclay v. Love, 25 Cal. 367; Pentz v. Simonson, 2 Beasl. (N. J.) 232; Major v. Symmes, 19 Ind. 117; Miller v. Hine, 13 Ohio St. 565; Haugh v. Blythe, 20 Ind. 24; Dodge v. Hollinshead, 6 Minn. 25; Eaton v. George, 42 N. H. 375; Miller v. Wetherby, 12 Iowa, 415; Ezelle v. Parker, 41 Miss. 520; O'Neal v. Robinson, 45 Ala. 526; Bressler v. Kent, 61 Ill. 426; Greenholtz v. Haeffer, 53 Md. 184; Cole v. Van Riper, 44 Ill. 58; Armstrong v. Ross, 5 C. E. Green (N. J.), 109. And see Wickliffe v. Dawson, 19 La. Ann. 48. But see Stacker v. Whitlock, 3 Met. (Ky.) 244, where the right to sell or encumber is strictly construed. Brown v. Hunter, 121 Ala. 210, 25 So. 924; Interstate Building & Loan Ass'n v. Agricola, 124 Ala. 474, 27 So. 247; Hamil v. American Freehold Land Mortg. Co., 127 Ala. 90, 28 So. 558; Wilkins v. Lewis (Fla.), 82 So. 762; Gregory v. Van Voorst, 85 Ind. 108; Starkey v. Starkey, 166 Ind.

The Alabama statute, requiring the husband's joinder to validate his wife's deed, applies to her conveyance of a life estate,[16] but not to a conveyance by the wife to the husband,[17] nor where either or both of the spouses are non-resident,[18] or where the wife has been judicially declared a *feme sole*,[19] nor to the payment by her of his debt with her separate estate, since another statute permits the disposition of her personal effects by the spouses jointly, by parol or otherwise.[20] A wife's mortgage of her separate estate without her husband's joinder is a good equitable conveyance in Connecticut.[21] The Idaho statute requiring the joinder of the husband to validate his wife's deed was intended to protect her from fraud and duress, and not to protect those who would cheat her.[22] The husband's joinder is required in Illinois in a mortgage of household goods.[23] The Indiana statute requiring the husband's joinder in the wife's conveyance or incumbrance of her separate estate does not apply to her contract granting an exclusive right to explore her land for oil and gas.[24] In Louisiana, before St. 1916, No. 94, a wife could not alienate or incumber her separate estate without the assent of her husband or of a competent court.[25] A wife may sell her paraphernal estate with the consent

140, 76 N. E. 876; Bogie v. Nelson, 151 Ky. 443, 152 S. W. 250; Deusch v. Questa, 116 Ky. 474, 25 Ky. Law, 707, 76 S. W. 329; Weber v. Tanner, 23 Ky. Law, 1107, 64 S. W. 741 (mod. reh., 23 Ky. Law, 1694); Realty Title & Mortgage Co. v. Schaaf, 81 N. J. Eq. 115, 85 A. 602; Beso v. Eastern Building & Loan Ass'n, 16 Pa. Super. 222; Maury Co. Bldg. & Loan Assn. v. Cowley (Tenn.), 52 S. W. 312; Bledsoe v. Fitts, 47 Tex. Civ. 1907; 105 S. W. 1142; Morton v. Calvin (Tex.), 164 S. W. 420; Latner v. Long (Tenn.), 47 S. W. 1111; Pyles v. Williams (Tenn.), 39 S. W. 232; Dietrich v. Hutchinson, 73 Vt. 134, 50 A. 810, 87 Am. St. R. 698; Bumgardner v. Edwards, 85 Ind. 117; Thomason v. Hays (Tenn.), 62 S. W. 336; Wethered v. Conrad, 73 W. Va. 551, 80 S. E. 953; Collins v. Sherbet, 114 Ala. 480, 21 So. 997; Farley v. Stacy, 177 Ky. 109, 197 S. W. 636.

16. Young v. Sheldon, 139 Ala. 444, 36 So. 27, 101 Am. St. R. 44.

17. Crosby v. Turner (Ala.) 75 So. 937.

18. Bell v. Burkhalter, 176 Ala. 62, 57 So. 460; Collier v. Doe *ex dem.* Alexander, 142 Ala. 422, 38 So. 244; Hughes v. Rose, 163 Ala. 368, 50 So. 899; High v. Whitfield, 130 Ala. 444, 30 So. 449.

19. Jackson Lumber Co. v. Bass, 181 Ala. 169, 61 So. 271.

20. Hollingsworth v. Hill, 116 Ala. 84, 22 So. 460.

21. Lynch v. Moser, 72 Conn. 714, 46 A. 153; Tice v. Moore, 82 Conn. 244, 73 A. 133.

22. Karlson v. Hanson & Karlson Sawmill Co., 10 Ida. 361, 78 P. 1080.

23. Pease v. L. Fish Furniture Co., 176 Ill. 220, 52 N. E. 932.

24. Kokomo Natural Gas & Oil Company v. Matlock, 177 Ind. 225, 97 N. E. 787.

25. Douglas v. Nicholson, 140 La. 1098, 74 So. 566.

of her husband in that State and make whatever use of the proceeds she sees fit.[26] The joinder by the husband in a deed of the wife's separate estate, required by the Missouri Married Women's Act to validate such deed, does not recognize any title in the husband.[27] In New Jersey a deed wherein the husband does not join has been held operative as an equitable pledge.[28] Under the constitution and statutes of North Carolina, a wife may convey her property as though *sole,* with the written assent of her husband,[29] but no title is passed where the husband's consent is not proved and recorded till after her death.[30] There is a sufficient compliance with the statute to validate her assignment of her interest in an insurance policy where the husband signs his name as a witness,[31] as well as to her note which is delivered after he has indorsed it in blank.[32] In that State it has been decided, on equity principles, that where a wife after marriage, supposing the whole interest in her land was in her, made a conveyance to a trustee for her sole and separate use, which her husband signed as a party, and by various clauses manifested a concurrence in her act, but did not profess directly to convey any estate, the recital in the deed that ten dollars was paid by the trustee to the wife raised a use, and in that way passed the husband's interest to the trustee.[33]

The language of the Married Women's Acts in many States authorizes the inference that nothing further than the written concurrence of the husband is requisite to complete the validity of the wife's transfer of separate personal property; the voluntary conveyance of the wife with her husband passes her separate estate, real or personal; nor is the husband's joinder always essential to her transfer of personal property.[34] And in some States the assent of the husband to the wife's transfer or conveyance is held so strictly a personal trust, that the husband cannot delegate it by letter of attorney to another.[35]

26. Caldwell v. Trezevant, 111 La. 410, 35 So. 619.

27. East v. Davis (Mo.), 204 S. W. 402.

28. Wright v. Pell (N. J.), 105 A. 20.

29. Slocumb v. Ray, 123 N. C. 571, 31 S. E. 829, 68 Am. St. R. 830.

30. Green v. Bennett, 120 N. C. 394, 27 S. E. 142.

31. Jennings v. Hinton, 126 N. C. 48, 35 S. E. 187.

32. Coffin v. Smith, 128 N. C. 252, 38 S. E. 864.

33. Barnes v. Haybarger, 8 Jones (N. C.), 76.

34. Trader v. Love, 45 Md. 1.

35. Meagher v. Thompson, 49 Cal. 189. But see Douglass v. Fulda, 50 Co. 77. A curative act may validate

Transfers of a married woman's stock in a corporation require, under some statutes, the husband's written assent or joinder; under others, again, she may convey as if *sole*. After her transfer without observance of such requirements, she may, upon information of her legal rights, obtain a retransfer in equity, notwithstanding subsequent purchasers have intervened.[36]

§ 464. Effect of Abandonment, Separation, Divorce, or Insanity of Husband.

In West Virginia the deed of a wife separated from her husband must recite that fact, as well as the fact that the land conveyed is her sole and separate estate.[37] A divorced wife may convey a good title to her separate land before a proceeding to review the decree of divorce, if the grantee has no notice of fraud or error in the decree.[38] In Alabama and Texas a husband's joinder is not required where he has abandoned her.[39] Under the Alabama Married Women's Act the wife of an insane person may convey her land as though *sole*.[40]

§ 465. When Husband's Joinder Not Required.

Some States permit a wife to convey her separate estate without her husband's joinder,[41] unless the estate is a homestead.[42] Though the Tennessee statute requires the joinder of the husband to vali-

a conveyance of a wife's land improperly by power of attorney. Randall v. Kreiger, 23 Wall. (U. S.) 137.

36. Merriam v. Boston R., 117 Mass. 241.

37. Bennett v. Pierce, 45 W. Va. 654, 31 S. E. 972.

38. Campbell v. Switzer, 74 W. Va. 509, 82 S. E. 319.

39. Knight v. Colman, 117 Ala. 266, 22 So. 974; Ballard v. Bank of Roanoke (Ala.), 65 So. 356; Williams v. Farmers' Nat. Bank (Tex.), 201 S. W. 1083.

40. Royal v. Goss, 154 Ala. 117, 45 So. 231.

41. Hope v. Seaman, 119 N. Y. S. 713 (mod., 137 App. Div. 86, 122 N. Y. S. 127); Wallace v. St. John, 119 Wis. 585, 97 N. W. 197; Bank of Commerce v. Baldwin, 12 Ida. 202, 85 P. 497; Jordan v. Jackson, 76 Neb. 15, 106 N. W. 999 (reh. den., 107 N. W. 1047); De Roux v. Girard, 105 F. 798 (affd., 112 F. 89, 50 C. C. A. 136); Comings v. Leedy, 114 Mo. 454, 21 S. W. 804; Morton v. Stow, 91 Mo. App. 554; Morris v. Linton, 61 Neb. 537, 85 N. W. 565; Farmers' State Bank v. Keen (Okla.), 167 P. 207; Buckingham v. Buckingham, 81 Mich, 89, 45 N. W. 504; Fairchild v. Creswell, 109 Mo. 29, 18 S. W. 1073; Riggs v. Price (Mo.), 210 S. W. 420; Evans v. Morris, 234 Mo. 177, 136 S. W. 408; Rutledge v. Rutledge (Mo.), 119 S. W. 489; Lawler v. Byrne, 252 Ill. 194, 96 N. E. 892; Dooley v. Greening, 201 Mo. 343, 100 S. W. 43; Clay v. Mayer, 144 Mo. 376, 46 S. W. 157.

42. Jordan v. Jackson, 76 Neb. 15, 106 N. W. 999 (reh. den., 107 N. W. 1047); Nakdimen v. Brazil (Ark.), 208 S. W. 431.

date his wife's deed, yet it was held that her deed to him without his joinder conveying lands held in trust for him was not void.[43] A similar Kentucky statute was held not to apply to a conveyance by a wife as trustee under a deed which did not require such joinder.[44]

§ 466. Presumption as to Husband's Assent.

Where an award disposes of property of a wife, the submission will be presumed to have been made with the husband's assent, if the contrary does not appear,[45] and after a long lapse of time her conveyance will be presumed to have been made with his consent.[46]

§ 467. Evidence of Assent.

In several States the husband's consent must be evidenced by his joinder in the conveyance as grantor,[47] even where the land came to her from a former husband.[48] In Vermont he must not only join as grantor, but also sign and acknowledge.[49] Where the statute requires a joint deed, it is not complied with by a deed in which his name does not appear as grantor, but which he merely signs,[50] nor where the spouses execute separate deeds and the husband gives an oral consent,[51] nor where he executes and acknowledges it after delivery.[52] In Kentucky it has been held that a deed which does not join the husband in the granting clause, but merely to release curtesy and homestead, is sufficient if both

43. Insurance Co. of Tennessee v. Waller, 116 Tenn. 1, 95 S. W. 811, 115 Am. St. R. 763.

44. Antonini v. Straubs, 130 Ky. 10, 112 S. W. 1092.

45. Brown v. Mize, 119 Ala. 10, 24 So. 453.

46. Wm. Cameron & Co. v. Cuffie (Tex.), 144 S. W. 1024.

47. Blakely v. Kanaman (Tex.), 175 S. W. 674; Johnson v. Rockwell, 12 Ind. 76; Starkey v. Starkey, 166 Ind. 140, 76 N. E. 876; Daggett v. Barre (Tex.), 135 S. W. 1099; Schickhaus v. Sanford, 83 N. J. Eq. 454, 91 A. 878; Bates v. Capital State Bank, 21 Ida. 141, 121 P. 561; Simpson v. Smith, 142 Ky. 608, 134 S. W. 1166; Buchanan v. Henry 143 Ky. 628, 137 S. W. 222; Wicker v. Durr, 225 Pa. 305, 74 A. 64; Merriman v. Blalack, 56 Tex. Civ. 594, 121 S. W. 552; Sencerbox v. First Nat. Bank, 14 Ida. 95, 93 P. 360; Moore v. Johnson, 162 N. C. 266, 78 S. E. 158; Zimpleman v. Portwood, 48 Tex. Civ. 438, 107 S. W. 584; Ellis v. Pearson, 104 Tenn. 591, 58 S. W. 318; Dinkins v. Latham, 154 Ala. 90, 45 So. 60; Johnson v. Goff, 116 Ala. 648, 22 So. 995; Gato v. Christian, 112 Me. 427, 92 A. 489.

48. Mattox v. Hightshue, 39 Ind. 95.

49. Dietrich v. Deavitt, 81 Vt. 160, 69 A. 661.

50. Adams v. Teague, 123 Ala. 591, 26 So. 221, 82 Am. St. R. 144; Weber v. Tanner, 23 Ky. Law, 1107 (mod., 23 Ky. Law, 1694, 65 S. W. 848).

51. Baxter v. Bodkin, 25 Ind. 172.

52. Hensley v. Blankinship (N. C.), 94 S. E. 519.

sign and acknowledge.[53] In that State the husband's interest may be conveyed by a separate deed if he first conveys,[54] and if he is a minor when the wife conveys, he may disaffirm after majority, in which case neither are bound by the deed.[55] Since the Florida statute requiring the joinder of the husband in the wife's transfers of her property does not prescribe the manner of joinder, it may be effected in any legal way.[56] Under the Missouri statute requiring the joinder of the husband to validate the wife's deed, it was held that the statute was complied with where it appeared that both signed and acknowledged and were referred to throughout the deed as "parties" of the first part and in the plural number, and where he never made claim to the land during his life, even though the introductory clause of the deed did not refer to him.[57] Under the West Virginia statute requiring the joinder of the husband to validate his wife's deed of her separate estate, a deed wherein he does not appear as grantor but merely signs is good if he acknowledges it as required by the statute.[58] In the same State he must join to validate a deed by her to him.[59] A wife's mortgage is sufficiently acknowledged where she joins in the granting clause and acknowledges the instrument separately in the absence of the husband and before the proper officer.[60]

§ 468. Acknowledgment.

In some States a wife's deed or mortgage is not valid unless acknowledged as required by law,[61] even though the husband joins,[62] and, in some States, the acknowledgment must be apart

53. Hopper's Adm'r v. Hopper, 172 Ky. 72, 188 S. W. 1069.

54. Mays v. Pelly (Ky.), 125 S. W. 713; Furnish's Adm'r v. Lilly, 27 Ky. Law, 226; Syck v. Hellier, 140 Ky. 388, 131 S. W. 30.

55. Mueller v. Ragsdale, 158 Ky. 412, 165 S. W. 404; Lockart v. Kentland Coal & Coke Co. (Ky.), 207 S. W. 18; Phillips v. Hoskins, 128 Ky. 371, 108 S. W. 283, 33 Ky. Law, 378.

56. McNeil v. Williams, 64 Fla. 97, 59 So. 562.

57. Peter v. Byrne, 175 Mo. 233, 75 S. W. 433, 97 Am. St. R. 576.

58. Morgan v. Snodgrass, 49 W. Va. 387, 38 S. E. 695; Linn v. Collins (W. Va.), 87 S. E. 934.

59. Mullins v. Shrewsbury, 60 W. Va. 694, 55 S. E. 736.

60. Cazort & McGehee Co. v. Dunbar, 91 Ark. 400, 121 S. W. 270.

61. Evans v. Dickenson, 114 F. 284, 52 C. C. A. 174; Lanzer v. Butt, 84 Ark. 335, 105 S. W. 595; Belloc v. Davis, 38 Cal. 242; Service v. West, 60 Colo. 366, 153 P. 446; Chassman v. Wiese (N. J.), 106 A. 19; King v. Driver (Tex.), 160 S. W. 415; Kimmey v. Abney (Tex.), 107 S. W. 885; Bott v. Wright (Tex.), 132 S. W. 960; Shumate v. Shumate, 78 W. Va. 576, 90 S. E. 824; Simpson v. Belcher, 61 W. Va. 157, 56 S. E. 211; Titchenell v. Tichenell, 74 W. Va. 237, 81 S. E. 978.

62. Francis v. Rose, 141 Ky. 645, 133 S. W. 550.

from her husband, and after private examination.[63] In Massachusetts, where spouses join in a deed only one need acknowledge.[64] In Missouri a wife need not acknowledge to validate a joint mortgage of an estate by the entirety.[65] In Nebraska a wife's instrument affecting her separate estate is valid without acknowledgment except where a release of dower or homestead is concerned.[66] In New Jersey the wife need not acknowledge to validate the wife's release of dower.[67] In North Carolina both spouses must acknowledge.[68] In Oklahoma a deed by a wife joining the husband in the operative words, but acknowledging relinquishment of dower only, has been held operative to convey the fee between the parties, but is not entitled to record.[69] In Texas a lease of the wife's land for more than one year must be joined in and acknowledged by the wife.[70] In the same State a wife's unacknowledged deed is valid to effect a partition.[71] In West Virginia, where one grants land to a wife and takes a deed of trust to secure the purchase money, no title passes to the trustee where the deed is not acknowledged as required by the statute, but an equitable lien is created in favor of such third person.[72] Where a deed of spouses of the wife's land is void because not acknowledged as required by the statute, the grantee takes only the husband's life estate.[73]

§ 469. Delivery in Escrow.

A wife is bound by the delivery of a deed in escrow.[74]

§ 470. Record.

In Kentucky a wife's conveyance is good against even creditors from its date if duly recorded within sixty days, and if recorded

63. Bates v. Capital State Bank, 21 Ida. 141, 121 P. 561; Campbell v. Virginia Iron, Coal & Coke Co., 31 Ky. Law, 1110, 104 S. W. 770; Sipe v. Herman, 161 N. C. 107, 76 S. E. 556; Tillery v. Land, 136 N. C. 537, 48 S. E. 824; Whalen v. Manchester Land Co., 65 N. J. Law, 206, 47 A. 443; Wilkins v. Lewis (Fla.), 82 So. 762.

64. Perkins v. Richardson, 11 Allen (Mass.), 538.

65. First Nat. Bank v. Kirby (Mo.), 175 S. W. 926.

66. Linton v. National Life Ins. Co., 104 F. 584, 44 C. C. A. 54.

67. Fee v. Sharkey, 59 N. J. Eq. 284, 44 A. 673 (aff., 60 N. J. Eq. 446, 45 A. 1091).

68. Moore v. Johnson, 162 N. C. 266, 78 S. E. 158.

69. Adkins v. Arnold, 32 Okla. 167, 121 P. 186.

70. Dority v. Dority, 30 Tex. Civ. 216, 70 S. W. 338 (affd., 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 941).

71. Cowan v. Brett, 43 Tex. Civ. 569, 97 S. W. 330.

72. Schmertz v. Hammond, 47 W. Va. 527, 35 S. E. 945.

73. Arnold v. Bunnell, 42 W. Va. 473, 26 S. E. 359.

74. Bott v. Wright, (Tex.), 132 S. W. 960.

after that time will be good against them from the date of such record.[75] Even if not recorded it is valid between the parties.[76]

§ 471. Conveyance.

In some States the wife's sole deed of her separate real estate is sufficient to pass her entire interest,[77] though, so antagonistic is this to the old common law, that a clearly enabling statute should be required. But it has been held that the wife's execution of a conveyance in blank is void, though the deed be afterwards filled up according to her directions.[78] In Missouri and North Carolina a wife cannot convey or mortgage her property in any manner other than that pointed out by the statute.[79] Under the Kentucky Married Women's Act a wife may convey her separate property by any statutory method of conveyance.[80] The designation in a joint deed by spouses of the wife's interest in the land does not affect its validity.[81]

§ 472. Mortgage or Deed of Trust.

Mortgages with power of sale are among those which a wife may now execute; a sale under such power effectually barring her equity of redemption.[82] The mortgage, to be good, should identify

75. Finley v. Spratt & Co., 14 Bush (Ky.), 225; Crawford v. Tate, 105 Ky. 502, 20 Ky. Law, 1314, 49 S. W. 307.

76. Mounts v. Mounts, 155 Ky. 363, 159 S. W. 818; Finley v. Spratt & Co., 14 Bush (Ky.), 225; Woods v. Davis, 153 Ky. 99, 154 S. W. 905.

77. Springer v. Berry, 47 Me. 330; Farr v. Sherman, 11 Mich. 33; Hale v. Christy, 8 Neb. 264; Libby v. Chase, 117 Mass. 105; Beal v. Warren, 2 Gray (Mass.), 447. But a contemporaneous written assent of the husband is required by some statutes. Melley v. Casey, 99 Mass. 241; Weed Sewing-Machine Co. v. Emerson, 115 Mass. 554.

78. Burns v. Lynde, 6 Allen (Mass.), 305. The husband's oral consent will not suffice, where the statute requires his written consent to her conveyance. Townsley v. Chapin, 12 Allen (Mass.), 476. But as to sale of certain personal chattels, see Holman v. Gillette, 24 Mich. 414. The rules of the text apply to a power of attorney to sell the wife's separate land; and here the husband must join. Dow v. Gould, etc., Co., 31 Cal. 629. As to conveying by power of attorney, see also Weisbrod v. Chicago R., 18 Wis. 35; Peck v. Hendershott, 14 Iowa, 40; Randall v. Kreiger, 23 Wall. (U. S.) 137. Power in the wife to convey implies power to rescind the contract of sale under proper circumstances. Scott v. Griggs, 49 Ala. 185. As to the proper form of the husband's joinder in the deed States differ. See Warner v. Peck, 11 R. I. 431; Friedenwald v. Mullan, 10 Heisk. (Tenn.) 226.

79. Comings v. Leedy, 114 Mo. 454, 21 S. W. 804; Smith v. Bruton, 137 N. C. 79, 49 S. E. 64.

80. Cropper v. Bowles, 150 Ky. 393, 150 S. W. 380; Kearns' Guardian v. Anderson (Ky.), 124 S. W. 271.

81. Heinmiller v. Hatheway, 60 Mich, 391, 27 N. W. 558.

82. Barnes v. Ehrman, 74 Ill. 402. As to looking up a title for a mortgage,

the property as general rules require.[83] The creditor's agreement of defeasance accompanying the transaction, or covenants on his part, must be faithfully observed,[84] and as to other security her rights are the usual ones.[85]

It must be remembered that in certain States a conservative policy is still pursued, so as to prohibit the wife's mortgage to a greater or less extent, and with reference, perhaps, to the beneficial nature of the consideration.[86] The effect of a joint mortgage by spouses will not be changed by the addition of words indicative of a release of dower by the wife, further than to indicate that in addition to the joinder in the conveyance the wife also releases dower.[87] Mortgages by spouses of land held jointly raises a presumption that they are joint principals.[88] Where a wife gave a mortgage to her husband's surety reciting that it was to secure the debt, but not that she intended to indemnify the surety, it was held that the creditor might be substituted to the surety's rights, when the latter became bankrupt.[89] The Alabama statute empowering a wife to "alienate" her lands if her husband concurs by joinder therein, empowers her to bind herself by a deed of trust to secure her debts.[90] The Illinois statute requiring the joinder of both spouses in a chattel mortgage of the household goods of either does not prevent a wife from binding herself by a purchase of such goods and giving a mortgage in her own name on such goods to secure the purchase price.[91] In Louisiana a husband cannot authorize his wife to mortgage her separate property for his debts.[92] The provision of the South Carolina Married

where a single woman has afterwards married, see Cleaveland v. Savings Bank, 129 Mass. 27.

83. Brick v. Scott, 47 Ind. 299.

Concerning the wife's sole mortgage of her personal property under local statutes, see Root v. Schaffner, 39 Iowa, 375.

For the application of payments where husband and wife mortgage her estate to secure her own debt and also a debt of the husband's, see Williams v. Schwab, 56 Miss. 338.

84. Lomax v. Smyth, 50 Iowa, 223.

85. Wilcox v. Todd, 64 Mo. 388.

86. Bowers v. Van Winkle, 41 Ind. 432; Thames v. Rembert, 63 Ala. 561; Lippincott v. Mitchell, 91 U. S. 767; Coleman v. Smith, 55 Ala. 368.

87. Burnside v. Mealer, 26 Ky. Law, 79, 80 S. W. 785.

88. Magel v. Milligan, 150 Ind. 582, 50 N. E. 564, 65 Am. St. R. 382; Foster v. Honan, 22 Ind. App. 252, 53 S. E. 667; Vansell v. Carithers, 33 Ind. App. 294, 71 N. E. 158; Appleby v. Sewards, 168 N. Y. 664, 61 N. E. 1127; Algeo v. Fries, 24 Pa. Super. 427.

89. Magoffin v. Boyle Nat. Bank, 24 Ky. Law, 585, 69 S. W. 702.

90. Collier v. Doe *ex dem.* Alexander, 142 Ala. 422, 38 So. 244.

91. Mantonya v. Martin Emerich Outfitting Co., 172 Ill. 92, 49 N. E. 721.

92. Cuny v. Brown, 12 Rob. (La.) 86.

Women's Act that a wife's conveyance shall convey her separate estate when the intent is expressed in writing, applies to mortgages and similar conveyances but not to absolute deeds.[93]

§ 473. Declaration of Trust.

Where a wife assigned a mortgage in trust for herself, it was held to be presumed, *prima facie,* that she intended the trust to continue only during coverture.[94] In North Carolina she cannot create a trust except by an instrument executed as required by law and to which her husband consents.[95] In Pennsylvania a wife may create a valid trust of personalty by trust deed without the assent of her husband.[96] In Massachusetts a wife may convey her personal propetry to a trustee presently, reserving a life estate and giving a remainder over, even where she intends thereby to prevent her husband from sharing in the property at her death.[97]

§ 474. Gift.

In North Carolina a wife may validly give property without her husband's assent where a written instrument is not required to pass title.[98] Under the Pennsylvania Married Women's Act a wife's gift of personal property, if possession is transferred, is valid, even though made with intention to defeat the husband's succession at her death, and without his knowledge till that time.[99] In Texas the statute permitting a wife to dispose of her separate property by will, without the consent of her husband, does not apply to her gifts *causa mortis.*[1]

§ 475. Lease.

A wife's lease of her own separate premises is, on strong grounds of benefit, upheld against her [2] in several States, and even to the

93. Carroll v. Thomas, 54 S. C. 520, 32 S. E. 497.

94. Bradford v. Burgess, 20 R. I. 290, 38 A. 975.

95. Ricks v. Wilson, 154 N. C. 282, 70 S. E. 476.

96. Windolph v. Girard Trust Co., 245 Pa. 349, 91 A. 634.

97. Kelley v. Snow, 185 Mass. 288, 70 N. E. 89.

98. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461.

99. Windolph v. Girard Trust Co., 245 Pa. 349, 91 A. 634.

1. Bledsoe v. Fitts, 47 Tex. Civ. 1907, 105 S. W. 1142.

2. In Mississippi a parol lease for one year, made by a wife to her husband, is not invalid. America Bank v. Banks, 101 U. S. 240. And see Welsh v. Oates, 9 Phila. (Pa.) 154. But as to her lease, oral or written, where the husband assumed to make it on her behalf, see Muir v. Bissett, 52 Vt. 287. Wife's verbal lease void in some States. Keller v. Klopfer, 3 Col. 132.

extent of her executing (where statutes so permit) without her husband's consent, and for a term of years.[3] The Indiana Married Women's Act, providing that a wife cannot "convey" or "incumber" her separate estate without her husband's joinder in the deed or mortgage, does not include a lease.[4] She may, therefore, lease her lands for not more than three years without his assent, such a lease being not an incumbrance within the statute.[5] Under the Missouri Married Women's Act a wife may not bind herself by a lease of land without the husband's joinder even though she is so old that there is no possibility of issue.[6] In Tennessee she cannot bind herself by a lease except of land secured to her separate use or in the execution of a power.[7] The Pennsylvania statute gives her power to bind herself by a lease of land and to collect rent therefor as though *sole,* without proof of her capacity to contract.[8]

§ 476. By Equitable Assignment.

An equitable assignment of note and mortgage on the wife's part is recognized in some other States.[9] Other States, once more, insist strictly upon the pursuance of statute formalities, whether the issue be raised in law or equity.[10] If equity establish a lien, the lien will have no retroactive operation, so as to affect *bona fide* rights previously acquired.[11]

3. Parent v. Callerand, 64 Ill. 97; Douglass v. Fulda, 50 Cal. 77; Woodward v. Lindley, 43 Ind. 333; Child v. Sampson, 117 Mass. 62. Void without her husband's joinder in execution. De Wolf v. Martin, 12 R. I. 533. But the usual local rule as to conveyances generally applies. Child v. Sampson, 117 Mass. 62. Whether husband can make it as wife's agent, see Sanford v. Johnson, 24 Minn. 172. Whether, where lease was executed by both spouses, the husband has any concern except as agent for receiving rents, accepting surrender, etc., see Woodward v. Lindley, 43 Ind. 333. In Illinois the wife must sue in her own name to recover rent. Hayner v. Smith, 63 Ill. 430.

4. Heal v. Niagara Oil Co., 150 Ind. 483, 50 N. E. 482; Spiro v. Robertson (Ind.), 106 N. E. 726.

5. Shipley v. Smith, 162 Ind. 526, 70 N. E. 803.

6. Ennis v. Eager, 152 Mo. App. 493, 133 S. W. 850.

7. Johnson v. Sharp, 4 Cold. (Tenn.) 45.

8. Ewing v. Cottman, 9 Pa. Super. 444, 43 W. N. C. 525.

9. Baker v. Armstrong, 57 Ind. 189. In equity, even though the trust be created by parol, it binds the wife; for the note a chattel is the principal and the mortgage but accessory. Thacher v. Churchill, 118 Mass. 108.

10. Herdman v. Pace, 85 Ill. 345.

11. Lewis v. Graves, 84 Ill. 205. An unrestricted power to sell includes a power to mortgage. See Zane v. Kennedy, 73 Pa. 182.

§ 477. Dedication to Public Use.

Prior to the Ohio Married Women's Act a wife could not dedicate her separate estate to public use except in the manner prescribed by the statute.[12]

§ 478. Parol Transfers.

A wife cannot bind herself by a parol sale of land,[13] or by a parol assent to an encroachment on her land,[14] or by a parol gift of her separate estate.[15]

§ 479. By Power of Attorney.

A wife's power of attorney to convey land does not enable the attorney to convey to himself,[16] nor to convey contrary to her instruction, if the grantee has notice.[17] Attorneys in fact of a wife cannot bind her by stipulations where she cannot bind herself, nor can they bind her to a contract which she never authorized.[18] Fraudulent representations by a husband, made to induce a sale of the wife's land, are ground for cancellation of the sale, where the wife permits the husband to conduct the negotiations, executes the contract and accepts its fruits, though she does not actively participate in the negotiations.[19] Under the Nebraska Married Women's Act a wife may charge her separate estate with a mortgage executed by her attorney in fact.[20]

§ 480. Construction and Operation.

Even where statutes make special requirements as to a wife's deed, the established principles of construction of such instruments apply and control.[21] Where spouses are joint tenants, the wife does not convey her moiety by joining in her husband's deed of his moiety.[22] Where spouses were tenants in common of land and gave a mortgage wherein the wife was mentioned only in a release of dower and homestead, but both signed, it was held that the wife's act operated only to release dower and homestead in her husband's moiety.[23] No intention to affect a wife's inde-

12. Westlake v. City of Youngstown, 62 Ohio St. 249, 56 N. E. 873.

13. Jackson v. Knox, 119 Ala. 320, 24 So. 724.

14. Gilbert v. White, 23 Pa. Super. 187.

15. Tannery v. McMinn (Tex.), 86

16. English v. English, 229 Mass. 11, 118 N. E. 178.

17. Butte Inv. Co. v. Bell (Mo.), 201 S. W. 880.

18. Strode v. Miller, 7 Ida. 16, 59 P. 893.

19. Chisholm v. Eisenhuth, 69 App. Div. 134, 74 N. Y. S. 496.

20. Linton v. National Life Ins. Co., 104 F. 584, 44 C. C. A. 54.

21. Dinkins v. Latham, 154 Ala. 90, 45 So. 60.

22. Pierce v. Chace, 108 Mass. 254.

23. Penny v. British & American Mortg. Co., 132 Ala. 357, 31 So. 96.

pendent interests can be inferred from the fact that she joins with her husband in his deed to release dower and homestead.[24] Where a wife conveys her separate estate by deed with warranties of title, her further recital of a release of dower will be regarded as surplusage, not affecting the title granted.[25] Where a wife was the owner of land and joined with her husband in a mortgage of it, being mentioned for the first time in a clause releasing dower and homestead, she conveys only a life estate to the grantee.[26]

Where spouses joined in a deed of the husband's land with warranties conveying the land in trust to secure his indebtedness to her, her rights under the first deed were held not affected by the fact that she joined with him in a later deed of the same land to a third person to secure such person's claim, there being no intimation of such an intention in the second deed.[27]

A provision in a joint mortgage by spouses of a wife's land that surplus on foreclosure should be paid to "husband and wife" has been held to be construed as requiring payment as their interests may appear, and not as a gift by the wife to the husband of the surplus.[28]

In Georgia a wife is bound by a deed of her land though the purchase price was used to pay her husband's debts, where the vendee was not one of the creditors paid, and was not party to the manner on which the money was used, and had no reason to apprehend that the wife was coerced.[29] Such a deed of a wife's expectant interest in her living mother's community estate has been held valid in Texas.[30] In Vermont, where a husband renounces his marital rights, the wife's sole deed of her land conveys an equitable interest.[31] A wife's deed of her expectant interest in land of which her father might die possessed is a nullity in Virginia.[32]

In West Virginia a wife's deed of her separate property, if executed, acknowledged and recorded as required by law, operates to convey the property described in the deed as though she were

24. Agar v. Streeter (Mich.), 150 N. W. 160.

25. Bachman v. H. R. Ennis Real Estate & Investment Co. (Mo.), 204 S. W. 1115.

26. Allendorff v. Gaugengigl, 146 Mass. 542, 16 N. E. 283.

27. Augusta Nat. Bank v. Beard's Ex'r, 100 Va. 687, 42 S. E. 694.

28. Harrington v. Rawls, 136 N. C. 65, 48 S. E. 571.

29. Skinner v. Braswell, 126 Ga. 761, 55 S. E. 914.

30. Barre v. Daggett (Tex.), 153 S. W. 120.

31. Blondin v. Brooks, 83 Vt. 472, 76 A. 184.

32. Garber's Adm'r v. Armentrout, 32 Grat. (Va.) 235.

sole, even though it be for the purpose of securing a past-due debt of her husband or some third person, and without new consideration moving to her.[33]

§ 481. Liability on Covenants in Conveyance.

Following the spirit of married women's legislation, some American courts now held the wife liable on her covenants contained in a conveyance of her separate lands.[34] Even upon her covenants the wife may, in some States, be sued like a single woman.[35] Where a wife is liable on her covenants of warranty the covenantee need not plead the statute making her liable.[36]

§ 482. Extent of Lien or Liability.

Where property of each spouse is included in a mortgage given to secure his debt, his property should be first resorted to to pay it.[37] The whole of his estate must be first exhausted before resorting to hers.[38] Thus, where the whole of the property mortgaged was that of the wife, and was sold on foreclosure after her death, his curtesy rights should be first sold, to exonerate her estate *pro tanto.*[39] Likewise where the mortgage covers both community property and the wife's separate estate, the community property must be first resorted to.[40] The fact that a wife's mortgage to secure her husband's debt includes both her property and his does not make her property a primary fund out of which the debt is to be satisfied, though part of the property was the homestead.[41] Where spouses mortgage land which they own by moieties to secure his debt, and the mortgagee redeems the husband's moiety from an execution against it, he cannot enforce his claim therefor against the wife's moiety.[42] Where a wife joins in a mortgage of

33. Rollins v. Menager, 22 W. Va. 461.

34. Basford v. Peirson, 7 Allen (Mass.), 524; Gunter v. Williams, 40 Ala. 561; Richmond v. Tibbles, 26 Iowa, 474.

35. Worthington v. Cooke, 52 Mo. 297.

36. Dickey v. Kalfsbeck, 20 Ind. App. 290, 50 N. E. 590.

37. Shew v. Call, 119 N. C. 450, 26 S. E. 33, 56 Am. St. R. 678; Hall v. Hyer, 48 W. Va. 353, 37 S. E. 594; Sherrod v. Dixon, 120 N. C. 60, 26 S. E. 770; Bowen v. Day, 71 S. C. 492, 51 S. E. 274.

38. Stoehr v. Moerlein Brewing Co., 27 Ohio Cir. Ct. 330.

39. Kinney v. Heuring (Ind), 87 N. E. 1053 (reh. den., 44 Ind. App. 590, 88 N. E. 865); Harrington v. Rawls, 136 N. C. 65, 48 S. E. 571; Alderson's Adm'r v. Alderson, 53 W. Va. 388, 44 S. E. 313.

40. Schneider v. Sellers, 25 Tex. Civ. 226, 61 S. W. 541.

41. Graham v. Lamb, 120 Mich. 577, 79 N. W. 804, 6 Det. Leg. N. 276.

42. Freud v. Ruhl, 126 Mich. 129, 85 N. W. 463, 7 Det. Leg. N. 745.

her estate to secure her husband's debt, the surplus on foreclosure belongs to her, though the mortgage provides that it be paid to the spouses jointly.[43] A wife's liability on her mortgage cannot be affected by a subsequent agreement between her husband and the mortgagee.[44]

§ 483. Effect of Extension of Time on Novation.

Where a wife gives a mortgage as surety for her husband she is released where he and the mortgagee make a material alteration in the contract without her consent.[45] Mere indulgences as to time given by the mortgagee to the husband will not release the wife, if the mortgagee does not bind himself to give further time.[46] Where the record title to the property mortgaged is in the husband the wife's liability will not be released by alterations in the contract unless she shows that the mortgagee knew of her claim when the alterations were made.[47] It has been held otherwise in Kansas and Pennsylvania.[48]

Where the proceeds of a wife's mortgage to pay her husband's debt were to be paid by the mortgagee to the creditor, it was held not a diversion of funds where the creditor took the note by indorsement instead of the funds.[49]

Where a mortgage was given to secure a husband's debt, and there is no evidence that the creditor intended to take it as satisfaction of the debt, the subsequent cancellation of the mortgage by the creditor in his will operates to discharge the mortgage and to release the surety, except so far as necessary to meet deficiency in the assets of the testator to pay his debts.[50]

In Kentucky a wife who gives a mortgage to secure her husband's

43. Kinner v. Walsh, 44 Mo. 65.

44. Christensen v. Wells, 52 S. C. 497, 30 S. E. 611.

45. Westbrook v. Belton Nat. Bank (Tex.), 75 S. W. 842; Angel v. Miller (Tex.), 39 S. W. 1092; Schneider v. Sellers, 98 Tex. 380, 84 S. W. 417; Higgins v. Deering Harvester Co., 181 Mo. 300, 79 S. W. 959; Bruegge v. Bedard, 89 Mo. App. 543; Johnson v. Franklin Bank, 173 Mo. 171, 73 S. W. 191; Post v. Losey, 111 Ind. 4, 12 N. E. 121, 60 Am. R. 677; Fleming v. Borden, 127 N. C. 214, 37 S. E. 219, 53 L. R. A. 316; De Barrera v. Frost, 39 Tex. Civ. 544, 88 S. W. 476; Foster v. Davis, 175 N. C. 541, 95 S. E. 917; Vanderwolk v. Matthaei (Tex.), 167 S. W. 304; Red River Nat. Bank v. Bray (Tex.), 132 S. W. 968.

46. Frickee v. Donner, 35 Mich. 151

47. Creighton v. Crane, 73 Neb. 650, 103 N. W. 284.

48. Kauffman v. Rowan, 189 Pa. 121, 42 A. 25, 29 Pittsb. Leg. J. (N. S.) 325; Jenness v. Cutler, 12 Kan. 500.

49. Sigel Campion Live Stock Commission Co. v. Haston, 68 Kan. 749, 75 P. 1028.

50. Dibble v. Richardson, 171 N. Y. 131, 63 N. E. 829.

debt is not a surety, so that her liability is not released by a novation,[51] nor by renewals of the note without her consent.[52] In Oklahoma a wife who joins her husband in mortgaging their homestead does not become a surety so as to be released by an extension of time without her consent.[53]

§ 484. Conveyances in Fraud of Creditors.

In Maryland a conveyance of a wife's property to a trustee, with a provision that the income shall be paid to her but that the *corpus* shall be out of the reach of creditors, has been held invalid.[54] A deed in fraud of creditors which is invalid for failure to comply with the statute is not confirmed so as to shut out creditors defrauded thereby where a later deed which complies with the statute is executed and delivered with the intention of confirming the first deed.[55]

§ 485. Rights and Liabilities of Purchasers.

In Kentucky, where a wife's deed is void for want of due acknowledgment, she may recover the land from a purchaser of the grantee.[56] It was held otherwise in that State where the spouses conveyed the wife's separate estate to a third person, who at once reconveyed to the husband, each deed reciting a cash consideration, and where the husband conveyed to one who had no knowledge that the transactions were intended to evade a provision in the instrument creating the estate, prohibiting her from selling or incumbering the estate for the husband's debts.[57]

Where a wife's deed is void for failure of her husband to join, the land is chargeable with the amount paid as consideration for the conveyance,[58] as well as for the amount of increase in the value of the land by improvements made by the vendee in good faith where the deed is void because of failure of the grantor to comply with conditions of her right to convey.[59] But where a wife sold

51. Magoffin v. Boyle Nat. Bank, 24 Ky. Law, 585, 69 S. W. 702.

52. New Farmer's Bank's Trustee v. Blythe, 21 Ky. Law, 1033, 53 S. W. 409, 54 S. W. 208; Staib v. German Ins. Bank, 179 Ky. 118, 200 S. W. 322.

53. Bennett v. Odneal, 44 Okla. 354, 147 P. 1013.

54. Brown v. McGill, 87 Md. 161, 39 A. 613, 67 Am. St. R. 334, 39 L. R. A. 806.

55. Murphy v. Green, 128 Ala. 486, 30 So. 643.

56. Pribble & Hall, 13 Bush (Ky.), 61.

57. Johnson v. Mutual Life Ins. Co., 113 Ky. 871, 24 Ky. Law, 668, 69 S. W. 751.

58. Furnish's Adm'r v. Lilly, 27 Ky. Law, 226, 84 S. W. 734.

59. Bell v. Blair, 28 Ky. Law, 614, 89 S. W. 732.

her standing timber by a deed which was void because of the non-joinder of her husband, she was held entitled to recover the value of the timber after the grantee had cut it.[60]

Where a husband takes title in his own name to land paid for with his wife's money and conveys it to a third person who conveys it to others, the wife, in order to recover the land, must show that those holding under her husband were not *bona fide* purchasers.[61] Where spouses convey land of which the legal title is in the husband and the equitable title in the wife by a deed of trust void because given to secure the husband's debts, the beneficiary in the deed is not a *bona fide* purchaser for value.[62]

In Louisiana a transaction whereby a wife sells her separate property vests a good title in the vendee, though with the proceeds she pays her husband's debts.[63] In North Carolina, where a wife avoids her deed the purchase price will be declared to be an equitable lien on the land.[64]

§ 486. Laches.

The wife's right to recover her separate estate conveyed under an invalid deed may be barred by laches,[65] but in Georgia laches will not be imputed to her for a ten years' delay in suing to cancel a deed made to her husband without the authority of the superior court, as required by the statute, where during that time she continues in possession with him.[66]

§ 487. Estoppel to Deny Validity.

Where a deed is void for non-compliance with a statute as to the husband's joinder, no estoppel usually arises against the wife to assert her title,[67] even though she received the full considera-

60. Farmers' Bank v. Richardson, 171 Ky. 340, 188 S. W. 406.

61. Sparks v. Taylor, 99 Tex. 411, 90, S. W. 485, 6 L. R. A. (N. S.) 381.

62. Shook v. Southern Building & Loan Assn., 140 Ala. 575, 37 So. 409.

63. Hamilton v. Moore, 136 La. 631, 67 So. 523.

64. North v. Bunn, 122 N. C. 766, 29 S. E. 776.

65. McPeek's Heirs v. Graham's Heirs, 56 W. Va. 200, 49 S. E. 125.

66. Echols v. Green, 140 Ga. 678, 79 S. E. 557.

67. Venters v. Fotter (Ky.), 212 S. W. 117; Syek v. Hellier, 140 Ky. 388, 131 S. W. 30; Smith v. Ingram, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878; Wilkins v. Lewis (Fla.), 82 So. 762; Weber v. Lightfoot, 152 Ky. 83, 153 S. W. 24; Daniels v. Mason, 90 Tex. 240, 38 S. W. 161, 59 Am. St. R. 815; Merriman v. Blalack, 56 Tex. Civ. 594, 121 S. W. 552; First State Bank of Tomball v. Tinkham (Tex.), 195 S. W. 880; Johnson v. Elliott, 64 Fla. 318, 59 So. 944.

In Tennessee it has been held that where a husband is in the penitentiary and the wife represents that she is a widow, she is estopped to deny the validity of her deed because of his non-

tion,[68] or indirectly received its benefits,[69] or makes verbal or written statements that she will not deny the validity of her deed,[70] nor will those claiming under her after her death be so estopped.[71] It has been held otherwise where the contract of sale was made prior to coverture.[72] In Indiana it is held that an express recital in a wife's mortgage that it was for her sole benefit, and that the husband derived no advantage from it, did not estop her from showing its invalidity because she was a surety,[73] nor is she precluded from that defence by such a recital where the mortgagee knew she was acting as a surety,[74] nor where she represents to a mortgagee that the transaction is solely for her benefit, and where after due investigation he in good faith relies on such representation,[75] but where, after giving the first mortgage as surety, she secures another loan and gives a mortgage on the same and other separate property and pays off the first mortgage, she cannot defend against the second mortgage on the ground that the first was given as a surety.[76]

Where a wife stands by and permits her husband to transfer her property as his own, and permits the vendee to believe that it is his, she is estopped from questioning the vendee's title,[77] and the same may be true where she permits her husband to convey her land as his, she assenting to the sale,[78] especially where the spouses later claimed and received payment of a note given for the purchase price.[79] A wife is not estopped from asserting her interest

joinder as required by statute. Bryant v. Freeman, 134 Tenn. 169, 183 S. W. 731.

68. Brown v. Pechman, 53 S. C. 1, 30 S. E. 586.

69. Bank of Mobile v. Smith (Ala.), 81 So. 193; Corinth Bank & Trust Co. v. Pride (Ala.), 79 So. 255; Richardson v. Stephens, 122 Ala. 301, 25 So. 39; Marbury Lumber Co. v. Woolfolk (Ala.), 65 So. 43; Bank of Mobile v. Smith (Ala.), 81 So. 193; Hanchey v. Powell, 171 Ala. 597, 55 So. 97; Hamil v. American Freehold Land Mortg. Co., 127 Ala. 90, 28 So. 558

70. Mays v. Pelly (Ky.), 125 S. W. 713.

71. Hellard v. Rockcastle Mining, Lumber & Oil Co., 153 Ky. 259, 154 S. W. 401.

72. Lockart v. Kentland Coal & Coke Co. (Ky.), 207 S. W. 18; Sloss-Sheffield Steel & Iron Co. v. Lollar, 170 Ala. 239, 54 So. 272.

73. Biedenkoff v. Brazee, 28 Ind. App. 646, 61 N. E. 954.

74. Ft. Wayne Trust Co. v. Sihler, 34 Ind. App. 140, 72 N. E. 494.

75. Trinkle v. Ladoga Bldg. Loan Fund & Savings Assn. (Ind.), 117 N. E. 542.

76. Field v. Campbell (Ind.), 68 N. E. 911.

77. Grant v. Ricker, 56 S. C. 476, 35 S. E. 132.

78. Marchant v. Young, 147 Ga. 37, 92 S. E. 863.

79. Scales v. Johnson (Tex.), 41 S. W. 828; Harle v. Texas Southern Ry. Co., 39 Tex. Civ. 43, 86 S. W. 1048; Morrison v. Balzer, 35 Tex. Civ. 247, 80 S. W. 248.

in land owned by the spouses jointly by knowledge that her husband is negotiating for its sale as his, and by casual expressions of satisfaction with the transaction after it is made.[80]

Where a wife permitted her husband to lease her property in his own name and collect the rents, it was held that she was estopped to deny his authority,[81] especially where it appeared that she personally received rents under such lease, and gave receipts in his name.[82] Where a husband conveyed to his wife his interest in their estate by the entirety, and she conveyed the whole estate to a third person by a warranty deed, both were held estopped to question the title of her grantee.[83] As against an innocent purchaser a wife is estopped to deny that the consideration of a deed passed to her where her deed contains a recital that such was the fact.[84] A wife is not estopped to assert her right to land incumbered by an invalid mortgage by fraudulent representations as to her capacity to bind herself where the mortgagee knew the real facts.[85] Where a contingent right not capable of assignment was sought to be assigned, that fact, coupled with subsequent conduct, continued till the title of the assignor had become perfect, was held to raise an estoppel to deny the validity of the assignment.[86]

Where a wife conveyed land to her husband by a deed expressing a full consideration, and not reciting the relationship of the parties, she was held estopped, under the Alabama statute, to assert, as against her husband's mortgagee, that there was no consideration, where she joined in such mortgage and where the mortgagee had no notice of the facts relating to the conveyance to the husband, there being no evidence of an abuse of the confidential relationship of the spouses.[87]

Where spouses as tenants by the entirety platted the land so held, and on the plat imposed certain restrictions, it was held that the surviving wife was bound to perform the restrictions specified

80. McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562.

81. Johnson v. Ehrman Brewing Co., 66 App. Div. 103, 72 N. Y. S. 639.

82. Western New York & P. Ry. Co. v. Riecke, 83 App. Div. 576, 81 N. Y. S. 1093.

83. Hardwick v. Salzi, 46 Misc. Rep. 1, 93 N. Y. S. 265.

84. Johnson v. Mutual Life Ins. Co., 113 Ky. 871, 24 Ky. Law. 668, 69 S. W. 751.

85. Indianapolis Brewing Co. v. Behnke, 41 Ind. App. 288, 81 N. E. 119.

86. Marsh v. Marsh, 92 Neb. 189, 137 N. W. 1122.

87. Osborne v. Cooper, 113 Ala. 405, 21 So. 320, 59 Am. St. R. 117. To the same effect see Stacey v. Walter, 125 Ala. 291, 28 So. 89, 82 Am St. R. 235.

in the plat in favor of a grantee whose deed did not specify all of them, but who had relied on the plat.[88]

Where a wife in a deed of trust authorizes the grantee to pay off incumbrances on her land, which is done, she is thereafter estopped to claim that she did not authorize such payment in writing, within the meaning of the California statute requiring such authorization.[89] In Texas it is held that a wife is not estopped to assert her equitable title to land under a parol gift from her father, and possession thereunder, by agreeing that a purchaser of the land from her shall take title directly from the father, and surrendering possession to such purchaser.[90] In Louisiana a wife who has obtained from a court a certificate authorizing her to mortgage her land cannot afterwards attack the validity of the certificate or contradict the statements made to obtain it.[91]

§ 488. Ratification.

Where a statute forbids a wife to pay her husband's debts, her ratification will not validate a sale of her separate estate for such purpose.[92] Where a wife joined with her husband in an action to cancel a contract of sale made by the husband alone affecting land which they owned in common, and to forfeit payments made by the vendee, it was held that she was bound by her ratification.[93] Where a husband joined in a conveyance of the reversion of a wife's land after a lease in which he did not join, it was held that he ratified the lease, making it effectual to pass the wife's interest during the term.[94] In Connecticut a wife may, after her husband's death, effectively ratify her act during coverture which was not binding for want of the husband's joinder.[95] Since under the North Carolina statute a husband's execution of a lien on the wife's crops without her joinder is void, her ratification of his act will not validate it, even after his death.[96]

Where a wife granted land in Pennsylvania without her husband's joinder, as required by the statute, her failure to repudiate

88. Schickhaus v. Sanford, 83 N. J. Eq. 454, 91 A. 878.

89. Continental Bldg. & Loan Ass'n v. Wilson, 144 Cal. 776, 78 P. 254.

90. Cauble v. Worsham, 96 Tex. 86, 70 S. W. 737, 97 Am. St. R. 871.

91. Kohlman v. Cochrane, 132 La. 303, 61 So. 382; Clark v. Whitaker, 117 La. 298, 41 So. 580.

92. Grant v. Miller, 107 Ga. 804, 33 S. E. 671.

93. Whiting v. Doughton, 31 Wash. 327, 71 P. 1026.

94. Winestine v. Liglatzki-Marks Co. 77 Conn. 404, 59 A. 496.

95. Pettus v. Gault, 81 Conn. 415, 71 A. 509.

96. Rawlings v. Neal, 126 N. C. 271, 35 S. E. 597.

the deed in a partition proceeding to which she was a party and which involved the land granted was held a ratification of the deed.[97] In Texas a conveyance of a wife's land by the husband under power of attorney may be effectively ratified so as to vest title in the grantee by a deed given by the spouses jointly for that purpose, if the rights of third persons have not intervened.[98] In the same State a lease of the wife's land, void because of her failure to join, was held ratified where she later signed a properly executed and acknowledged assignment of the lease, annexing it to the assignment.[99]

§ 489. Avoidance.

A wife may have cancellation of a deed of land of which her husband had the legal and she the equitable title where the deed was not acknowledged by her as required by the Alabama statute.[1] Where a wife's conveyance is void because made in payment of the husband's debts, in violation of the Georgia statute, she may maintain ejectment against the grantee or any grantee of his with notice of the consideration, without bringing a bill to cancel the deed,[2] or she may maintain a bill for cancellation.[3]

In Missouri, where a wife conveyed her property to pay her husband's debt and received a balance over and above the amount of the debt, she was held entitled to a reconveyance only on payment of the amount so received.[4] In Pennsylvania, in such case, she must return the consideration and reimburse the grantee for expenses incurred.[5] In Texas she is not required to refund the consideration of a deed which is void because not duly acknowledged as a prerequisite to recovery of the land conveyed,[6] nor in Tennessee, where the deed is void because in violation of a restraint of alienation.[7] To set aside a deed of spouses for fraud, it must appear that the grantees had knowledge or notice

97. *In re* Simons' Estate, 20 Pa. Super. 450.

98. Scales v. Johnson (Tex.), 41 S. W. 828.

99. Ascarete v. Pfaff, 34 Tex. Civ. 375, 78 S. W. 974.

1. Shook v. Southern Bldg. & Loan Ass'n, 140 Ala. 575, 37 So. 409.

2. Taylor v. Allen, 112 Ga. 330, 37 S. E. 408; Bond v. Sullivan, 133 Ga. 160, 65 S. E. 376.

3. Gilmore v. Hunt, 137 Ga. 272, 73 S. E. 364; Hamilton v. Duvall, 142 Ga. 432, 83 S. E. 103.

4. Newman v. Newman, 152 Mo. 398, 54 S. W. 19.

5. McCoy v. Niblick, 221 Pa. 123, 70 A. 577.

6. Silcock v. Baker, 25 Tex. Civ. 508, 61 S. W. 939.

7. Travis v. Sitz (Tenn.), 185 S. W. 1075; Webber v. Lightfoot, 152 Ky. 83, 153 S. W. 24.

of the fraud before giving the consideration.[8] A wife cannot avoid her deed where such avoidance would operate as a fraud,[9] nor can she have cancellation of a deed merely because she did not understand it when it was executed,[10] unless there is evidence that she intended to obtain money to pay her husband's debts.[11] A wife's deed may be avoided for duress,[12] but not where the grantee did not know of the duress.[13] The mere fact that a grantee knew that a husband was intemperate and tyrannical is not enough to charge him with notice that a wife's deed to him was obtained by the husband's coercion.[14]

The invalidity of a wife's conveyance because given to pay her husband's debts cannot be taken advantage of by a third person in litigation to which she is not a party and in which she has no interest,[15] or, in Connecticut, even where she is a nominal party,[16] or even though the plaintiff in such action is the husband and though he sues as an incompetent by his wife as guardian *ad litem*.[17] Where the statute forbids a wife from being a surety, a complaint to set aside such a transaction which merely alleges that the mortgage was given to secure her husband's debt states a cause of action.[18] In a suit to set aside a wife's mortgage as being void because she was a surety, she has the burden of proof.[19] A contract whereby a wife transfers property in satisfaction of her husband's debts is not voidable where she receives a valuable consideration for so doing.[20] Where a wife mortgages her prop-

8. Pratt Land & Improvement Co. v. McClain, 135 Ala. 452, 33 So. 185, 93 Am St. R. 879.

9. Harris v. Smith, 98 Tenn. 286, 39 S. W. 343.

10. McDaniels v. Sammons, 75 Ark. 139, 86 S. W. 997.

11. Caldwell v. Trezevant, 111 La. 410, 30 So. 619.

12. Rostad v. Thorsen (Ore.), 163 Pac. 423, L. R. A. 1917D 1176.

13. Frasure v. McGuire, 23 Ky. Law, 1990, 66 S. W. 1015; Johnson v. A. Leffler Co., 122 Ga. 670, 50 S. E. 488; Brady v. Equitable Trust Co., 178 Ky. 693, 199 S. W. 1082; Colonial Bldg. & Loan Assn. v. Griffin, 85 N. J. Eq. 455, 96 A. 901; Ryan v. Strop, 253 Mo. 1, 161 S. W. 700; Kauffman v. Rowan, 189 Pa. 121, 42 A. 25, 29 Pittsb. Leg. J. (N. S.) 325.

14. Pratt Land & Improvement Co. v. McClain, 135 Ala. 452, 33 So. 185, 93 Am. St. R. 35.

15. Henry v. Ayer, 102 Ga. 140, 29 S. E. 144.

16. Pettus v. Gault, 81 Conn. 415, 71 A. 509.

17. Thompson v. Davis, 172 Cal. 491, 157 P. 595.

18. Warner v. Jennings, 37 Ind. App. 394, 76 N. E. 1013.

19. Bushard v. McCay (Ala.), 77 So. 699; Interstate Bank v. Wesley, 178 Ala. 186, 59 So. 621; Lamkin v. Lovell, 176 Ala. 334, 58 So. 258; Hall v. Gordon (Ala.), 66 So. 493; Sample v. Guyer, 143 Ala. 613, 42 So. 106; Gibson v. Wallace, 147 Ala. 322, 41 So. 960.

20. Hamilton v. Hamilton, 162 Ind. 430, 70 N. E. 535; Brady v. Equitable

erty and the money is paid to her agent, she cannot avoid it on the ground that she was a surety where her husband obtains the money from the agent and uses it.[21] Under the Louisiana statute a wife must, within five years from the time of the dissolution of the marriage or the majority of the wife's heir, assert her title to property conveyed by a deed which is void because given to pay her husband's debts.[22] In the same State she will be bound by her disposal of her property in the interest of her husband as against those who have dealt with him on the faith of his apparent title, though she is not generally liable as surety for him,[23] and cannot attack a mortgage given by a corporation for marital coercion, fraud or error in her sale of the mortgaged property to one who conveyed it to the corporation.[24]

Trust Co., 178 Ky. 693, 199 S. W. 1082; Lewis v. Ferris (N. J.), 50 A. 630.

21. Hamil v. American Freehold Land Mort. Co., 127 Ala. 90, 28 So. 558.

22. Munholland v. Fakes, 111 La. 931, 35 So. 983.

23. Clark v. Whitaker, 117 La. 298, 41 So. 580.

24. Parent v. First Nat. Bank, 135 La. 254, 65 So. 233.

CHAPTER XXIII.

ANTENUPTIAL SETTLEMENTS.

§ 490. What Law Governs.

Generally the construction of a marriage settlement is governed by the law of the intended matrimonial domicile,[25] but in New Jersey it is held that the law of the State where the settlement is made and the marriage celebrated will govern.[26] Where a valid settlement reserves to the wife her separate property as though *sole*, the common law as to the rights of parties is inapplicable.[27]

25. Mueller v. Mueller, 127 Ala. 356, 28 So. 465.

26. New Jersey Title Guaranty & Trust Co. v. Parker (N. J.), 96 A. 574. To affect property, subsequently acquired by either spouse in a State foreign to the place of contract, an antenuptial contract must specifically include such a property. Clark v. Baker, 76 Wash. 110, 135 P. 1025.

27. Overall v. Ellis, 38 Mo. 209.

§ 491. Marriage Settlements Favored by Public Policy.

Public policy does not inhibit settlements between persons contemplating marriage.[28] Such agreements are ordinarily regarded with favor,[29] as tending to adjust family disputes,[30] and as making for the welfare of the parties.[31] Therefore the courts will seek to uphold them, and, in order to do so, will, if necessary, strain to the uttermost the interpretation of equivocal words and conduct.[32] It has been held, however, that a provision making a certain disposition of property in case of a separation is void,[33] as well as antenuptial contracts limiting the amount to be paid to the wife for wardrobe and personal expenses, since these are necessaries, which the policy of the law requires the husband to furnish.[34] In North Dakota it is held that an antenuptial agreement relating to homestead exemptions is void.[35]

§ 492. General Considerations.

Settlements are a useful contrivance for preserving estates intact in a family. As between husband and wife the word "settlement" is applied to their mutual contracts in reference to the property of one another, by means of which, under the protection of courts of equity (which favor, as did also the civil law, arrangements in recognition of property in the wife as well as the husband), they change and control the general rules of the marriage state. They cannot vary the terms of the conjugal relation itself; they cannot add to or take from the personal rights and duties of husband and wife; but they may essentially alter the interest which each takes in the property of the other, if they choose to enter into special stipulations for that purpose. These special stipulations may be either antenuptial or postnuptial; while, as we shall soon perceive, the two classes are more alike in

28. Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63; Stephens v. Stephens (Ky.), 205 S. W. 573; Peckham v. Loch, 14 Ky. Law, 763; President, &c., of Newburyport Bank v. Stone, 13 Pick. (Mass.), 420; Rieger v. Schaible, 81 Neb. 33, 115 N. W. 560 (reh. den., 81 Neb. 58, 116 N. W. 953).

29. Oesau v. Oesau's Estate, 157 Wis. 255, 147 N. W. 62; De Cicco v. Schweitzer, 221 N. Y. 431, 117 N. E. 817, L. R. A. 1918E 1004.

30. Fishblate v. Fishblate, 238 Pa. 450, 86 A. 469.

31. *In re* Malchow's Estate (Minn.), 172 N. W. 915.

32. De Cicco v. Schweitzer, 221 N. Y. 431, 117 N. E. 807.

33. Neado v. Neado, 56 Kan. 507, 44 Pac. 1.

34. Warner v. Warner, 235 Ill. 448, 85 S. E. 630.

35. Swingle v. Swingle, 36 N. D. 611, 162 N. W. 912.

name than substance, and the term "marriage settlements" is frequently applied to antenuptial settlements only.

Marriage settlements are very common in England, among parties possessed of large means; not generally so in this country, although many are made in the Southern States and elsewhere. The American policy is to dispense with trusts, and place a married woman's separate property in her own absolute keeping. Yet marriage settlements might often be well resorted to in order to equalize the burdens and privileges of matrimony, while our local legislation remains in its present crude condition. If settlements of property are made to the wife's separate use, the usual equitable rules apply, as to making the property liable for her debts and engagements.[36]

§ 493. Promises to Marry, and Promises in Consideration of Marriage.

A distinction meets us at the outset between promises to marry and promises in consideration of marriage. The Statute of Frauds, § 4, requires that promises and agreements in consideration of marriage shall be "in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Yet a promise to marry is binding although verbal.[37] It would strike anyone (except perhaps a lawyer) that a promise by a woman to marry a man in consideration of his promising to marry her was an agreement made in consideration of marriage, but it is not.[38] Perhaps it is public policy which sustains the latter rather than the former contract without requiring a writing. Perhaps, too, this carries weight: that a promise to marry is merely a promise to enter into a certain relation; and, therefore, clearly interpreted by any court without the aid of written evidence, provided the promise be once proved; while the Statute of Frauds is found most convenient for clearly fixing mutual stipulations which might be varied in a thousand ways, and affect the property rights of the contracting parties accordingly. At all events, a promise to marry, whether verbal or written, affords a singular remedy, one quite different from the remedies attending marriage settlements; namely, no right of specific performance, but always damages to the injured party.

36. Sprague v. Shields, 61 Ala. 428.

37. Macq. Hus & Wife, 220; Cook v. Baker, 1 Stra. 34; Harrison v. Cage, 1 Ld. Raym. 386.

38. See Smith on Contracts, 57.

§ 494. Form and Requisites.

No particular formality is required in antenuptial agreements, if the intention is plain,[39] hence the signature of the wife to an instrument, or an indenture deed, is by no means indispensable in order that her rights upon marriage consideration be sustained.[40]

Courts of equity have frequently refused, however, to enforce marriage agreements on the ground of their being inconsistent, uncertain, or unintelligible;[41-42] and particularly is this found true of loose expressions contained in letters written by relatives of the married parties, upon which the attempt is made to render them chargeable when the marriage was not thereby induced.[43]

Under the Maine statute an antenuptial agreement not executed as required by the statute has been held good as between the parties.[44] If the contract is in the form of a writing, due delivery should appear; though if the written contract be produced from the proper custody, and its execution proved, proper delivery is readily presumed.[45] The acknowledgment of such contracts, too, is in some States a prerequisite to their validity.[46]

39. Buffington v. Buffington, 151 Ind. 200, 51 N. E. 328.

40. Cochran v. MacBeath, 1 Del. Ch. 187.

41-42. Franks v. Martin, 1 Eden, 309; Kay v. Crook, 3 Jur. (N. S.) 107; Peachey, Mar Settl. 68; Quinlan, Hayes & Jones, Ir. Rep. 785; Maunsell v. White, 1 Jo. & Lat. 539.

43. Hincks v. Allen, 28 W. R. 533. As to carrying out the wishes of a third party respecting property devised so as to settle it upon marrying, see Teasdale v. Braithwaite, 5 Ch. D. 630.

44. McAlpine v. McAlpine, 116 Me. 321, 101 A. 1021.

45. In Smith v. Moore, 3 Green Ch. (N. J.) 485, the document being found in the husband's possession after his death, execution proved, and also his recognition during his lifetime, due delivery was presumed.

Possession by the wife at her death of an antenuptial agreement whereby the husband waived his rights in her property has been held to raise a presumption of delivery. Dunlop v. Lamb, 182 Ill. 319, 55 N. E. 354; Kennedy v. Kennedy, 150 Ind. 636, 150 Ind. 636, 50 N. E. 756.

A delivery of an antenuptial agreement has been held sufficient when delivered *in escrow* before marriage and delivered to the parties after marriage, the second delivery relating back to the date of the delivery *in escrow*. Koch v. Koch, 126 Mich. 187, 85 N. W. 455, 7 Det. Leg. N. 758.

46. A marriage contract executed before marriage, but not acklowledged until after marriage, is a nullity. Patton's Estate, Myrick's Prob. (Cal.) 241. As to New York statutes on the subject, see Douglas v. Cruger, 80 N. Y. 15.

In Louisana an antenuptial contract may provide that certain separate property of each party shall form part of the community. Hanley v. Drumm, 31 La. Ann. 106.

Under the Kansas statute an acknowledgment of an antenuptial agreement before a notary is sufficient. Brown v. Weld, 5 Kan. App. 341, 48 P. 456.

Under the Texas statute such an agreement must be authenticated be-

Our local registry system raises questions of constructive notice, as to marriage settlements and the property embraced under them, often of great local importance, which do not appear to prevail in England, where the recording of deeds, though long ago commended by Blackstone,[47] is still strangely neglected by legislators.[48]

A marriage contract made by a husband without fraud, and duly recorded, is a good settlement against him, and for valuable consideration, and the lien thus created on property therewith transferred and duly recorded is constructive notice to all subsequent creditors as to such property.[49] But as to property to be subsequently acquired, even though the contract provides in terms for embracing such property under the trust, the record operates no such positive notice against the public.[50] And in general, however good the settlement may be against the settlor and creditors, or even subsequent purchasers, legal liens actually acquired already

fore a notary and two witnesses. Ellington v. Ellington, 29 Tex. 2.

In Louisana an authentication before a justice of the peace is void. Flores v. Lemee, 16 La. 271.

47. 2 Bl. Com. 342, 343.

48. Compare Ingham v. White, 4 Allen (Mass.), 412, with Teasdale v. Braithwaite, 5 Ch. D. 630, in which James, L. J., declares it a hardship that in England there is no general registry of deeds, and that one who has conveyed to one owner may represent himself as owner and induce another the next day to accept a conveyance of the same property. And see Gibbes v. Cobb, 7 Rich. Eq. (Mass.) 54; Logan v. Phillips, 18 Mo. 22; Levinz v. Will, 1 Dall. (Pa.) 430; O'Neill v. Cole, 4 Md. 107; 1 Story, Eq. Juris., § 403; 2 Kent Com. 173, *n.;* Reinhart v. Miller, 22 Ga. 402; Clark v. Way, 33 Ga. 149; Hill v. Garman, 2 Del. Ch. 273. In Massachusetts an antenuptial contract is absolutely void under the statute, if not recorded as therein required, in the county in which the husband, if a resident, resides. Ingham v. White, 4 Allen (Mass.), 412. Otherwise as to a mere arrangement as to reciprocal rights after death and dissolution of the marriage. Jenkins v. Holt, 109 Mass. 261.

49. Vason v. Bell, 53 Ga. 416. An unrecorded antenuptial agreement is valid between the parties in California. *In re* Cutting (Cal.), 161 P. 1137.

The Georgia statute requiring settlements made by the husband on the wife to be recorded in the county of his residence within three months after execution has been held complied with where a contract reciting that the husband was a resident of a particular county is recorded in another county within the statutory period, where the marriage was not consumamted till a month after the execution of the agreement and where from the date of the marriage he resided continuously in such other county. Lampkin v. Hayden, 103 Ga. 575, 30 S. E. 294.

In that State a marriage contract between a resident woman and a nonresident man whereby the latter attempts to release supposed rights in her real estate within the State need not be recorded. Bearden v. Benner, 136 F. 258.

50. Vason v. Bell, 53 Ga. 416.

in rem, as that of a judgment or mortgage prior to due record, cannot be divested.[51]

Under the Massachusetts statute a schedule of the property affected by a marriage settlement sufficient to identify such property must be annexed and recorded, but it is valid between the parties without such annexation or record.[52] An assignment made in consideration of marriage is not a marriage settlement within this statute.[53]

§ 495. Necessity of Trustee.

Under modern rules of separate use,[54] a valid marriage settlement may be made without the designation of a trustee, though in such contracts, when drawn up with due formality, trustees are commonly interposed outside the marriage relation, however, who hold the legal title; and such is unquestionably the more prudent arrangement.[55] The probate courts in this country frequently have jurisdiction in the appointment of such trustees to fill vacancies, as in cases of any testamentary trust,[56] though the general supervision remains with chancery. When trustees are interposed, their concurrence in the disposition, by either or both spouses, is not essential, unless as such instruments usually provide, their assent is made requisite.[57] With respect to the form of marriage settlements it may be generally observed that equity pays no regard to the externals, but considers only the substantial intention of the parties; and hence articles or an agreement will be binding between husband and wife without the intervention of trustees; for here the husband himself may be bound to act as trustee.[58] A strong instance of the liberality of the equity courts in this respect was afforded in an early decision by Lord Keeper Wright. The intended husband gave the intended wife a bond conditioned to leave her £1,000 if she should survive him. They married,

51. *Ib.* See, further, Justis v. English, 30 Gratt. (Va.), 565.

52. Cook v. Adams, 169 Mass. 186, 47 N. E. 605; Walker v. Walker, 175 Mass. 349.

53. Huntress v. Hanley, 195 Mass. 236, 80 N. E. 946.

54. Cochran v. McBeath, 1 Del. Ch. 187; Peachey, Mar. Settl. 260.

55. Richardson v. De Giverville, 107 Mo. 422, 17 S. W. 974, 28 Am. St. R. 426; Haymond v. Lee, 33 Gratt (Va.) 317.

56. Bassett v. Crafts, 129 Mass. 513.

57. See Essex v. Atkins, 14 Ves. 547; Justis v. English, 30 Gratt. (Va.) 565; Braune v. McGee, 50 Ala. 359; Peachey, Mar. Settl. 261; Haymond v. Lee, 33 Gratt. (Va.) 317; Wallace v. Wallace, 82 Ill. 530; Coatney v. Hopkins, 14 W. Va. 338.

58. Peachey, Mar. Settl. 65; Macq. Hus. & Wife, 242; Logan v. Goodall, 42 Ga. 95. But see Dillaye v. Greenough, 45 N. Y. 438.

and of course the bond became void at law. But it was held that in equity this should subsist as an antenuptial agreement.[59] Even in law a bond, with conditions properly expressed, may be enforced against the husband to the extent of the penalty therein named; yet equity, regarding the contract as one for specific performance, will not confine the remedy of the injured party to the penal sum named in the bond; but, enforcing the real obligations of the bond, will give, if need be, thirty times that sum to her who married on the strength of it. Such is the advantage of equity over the law.[60]

§ 496. Reformation.

Mistakes in marriage settlements, either through error or fraud, will in general be corrected in equity; the principle being that the parties are to be placed in the same situation in which they would have stood, if the error to be corrected, or the fraud, had not been committed.[61] Rectification may be made in a proper case, though one of the spouses has already died.[62] Marriage articles, to make a settlement of real property, should be drawn up only in extreme cases; though in the case of personalty, more latitude may be allowed; and when drawn up they should leave as little to construction as possible. Yet marriage articles are frequently prepared in great haste, and many questions must necessarily arise as to the intention of the parties; these the courts of equity endeavor to meet by adopting the intention of the parties as their true guide, and taking it for granted that the articles are merely minutes which the settlement may explain more at large, but which are

59. Acton v. Pierce, 2 Vern. 480; Crostwaight v. Hutchinson, 2 Bibb (Ky.), 407; Liles v. Fleming, 1 Dev. Eq. (N. C.) 185; Kenly v. Kenly, 2 How. (Miss.) 751.

60. See Prebble v. Boghurst, 1 Swan. 309, before Lord Eldon, cited in Macq. Hus. & Wife, 243 *et seq.;* Camnel v. Buckle, 2 P. Wms. 242; Rippon v. Dawding, Ambl. 565; Peachey, Mar. Settl. 65. Bonds have been frequently enforced in this country as constituting a marriage settlement. Aucker v. Levy, 3 Strobh. Eq. (S. C.) 197; Hunter v. Bryant, 2 Wheat. (U. S.) 32; Freeman v. Hill, 1 Dev. & Bat. Eq. (N. C.) 389; Baldwin v. Carter, 17 Conn. 201.

61. Rooke v. Lord Kensington, 2 Kay & Johns. 770; Peachey, Mar. Settl. 565, 576; Alexander v. Crosbie, Lloyd & Goold, temp. Sudg. 149; Sanderson v. Robinson, 6 Jones Eq. (N. C.) 155; Love v. Graham, 25 Ala. 187; Reade v. Armstrong, 7 Irish Eq. (N. S.) 381; Walker v. Armstrong, 2 Jur. (N. S.) 962; Brown v. Bonner, 8 Leigh (Va.) 1; Ball v. Storie, 1 Sim. & Stu. 210, 219; Cook v. Fearn, 27 W. R. 212; Brown v. Brown, 31 Gratt. (Va.) 502; Russell's Appeal, 75 Pa. 269.

62. Burge v. Burge, 45 Ga. 301.

not to be literally followed.[63] The general rule as to reforming settlements framed upon antenuptial articles is thus laid down by Lord Chancellor Talbot:[64] "Where articles are entered into before marriage, and settlement made after marriage, differing from the articles, this court will set up the articles against the settlement." That is to say, the court will order the settlement to be reformed. Where both the articles and the settlement are prior to the marriage, at a time when all the parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and the articles will be controlled accordingly.[65] For the discrepancy will be presumed to have arisen from some change of mutual intention, while matters remained open. But this rule is not invariable, according to the later authorities; for any clear and satisfactory evidence may be introduced to show that the discrepancy had arisen from a mistake.[66] Where the settlement expressly declares that it is made in terms of the articles, and yet differs from them, the settlement will be reformed, so as to correspond with the articles. This is no contradiction of the general rule; for where the settlement is expressly mentioned to be made in pursuance of the marriage articles, the intention of the parties is by writing shown to be the same as when the articles were drawn, and must be construed accordingly. And curiously enough in an English case under this head, though the settlement followed the precise words of the marriage articles, the court reformed it, in order to carry out the actual intention of the parties.[67]

Marriage articles under which parties agree to make a settlement and yet fail to do so, may, apart from the partial performance which marriage might be said to establish, afford one the right to damages as against the other.[68] The rule that mistakes apparent on the face of the deed may be corrected without extrinsic evidence applies to a marriage settlement.[68a]

63. Peachey, Mar. Settl. 89-97; Macq. Hus & Wife, 257; Trevor v. Trevor, 1 P. Wms. 631; Blandford v. Marlborough, 2 Atk. 545; Rochfort v. Fitzmaurice, Dru. & War. 18. But see Breadalbane v. Chandos, 2 Myl. & Cr. 711.

64. Legg v. Goldwire, Forrester, 20; Macq. Hus. & Wife, 259.

65. Legg v. Goldwire, Forrester, 20; Peachey, Mar. Settl. 134.

66. See Peachey, Mar Settl. 135; Bold v. Hutchinson, 2 Jur. (N. S.) 97; 5 De G. M. & G. 567.

67. West v. Errissey, 2 P. Wms. 350.

68. Jeston v. Key, L. R. 6 Ch. 610.

68a. Cook v. Adams, 169 Mass. 186, 47 N. E. 605 (construing "desire" as "devise"); Creighton v. Pringle, 4 Rich. (S. C.) 77 (construing "hereinafter" to mean "hereinbefore").

§ 497. Consideration.

Marriage is a sufficient consideration for an antenuptial contract.[69] Marriage is of itself pronounced in the Supreme Court of this land to be not only a valuable consideration to support a marriage settlement, "but a consideration of the highest value."[70] It is the consideration of marriage, not the consideration of a corresponding fortune, which runs through the whole settlement or agreement, and supports every part of it, thus making marriage not only a high, but the highest consideration in fact known to the law.[71] The rule is the same where the settlement is antedated by some months by an absolute agreement to marry.[72] The marriage consideration supports every provision with regard to the husband, the wife, and the issue. As for marriage itself, the marriage of persons formerly in loose cohabitation furnishes good consideration;[73] and even perhaps a void or illegal marriage, provided that marriage was contracted with honest conjugal intent, and particularly where the question affects only their respective interests.[74] The consideration is held, also, to extend to stepchildren by a former marriage.[75] It does not, however, always extend to collaterals,[76] though Sir Matthew Hale and others held

69. Mallow v. Eastes, 179 Ind. 267, 100 N. E. 836; *In re* Adams (Ia.), 140 N. W. 872; *In re* Thorman's Estate, 162 Ia. 316, 144 N. W. 5; Nesmith v. Platt, 137 Ia. 292, 114 N. W. 1053; Henry v. Butler, 87 Kan. 122, 123 P. 742; Settles v. Settles, 130 Ky. 797, 114 S. W. 303; Graves v. Von Below, 160 Mich. 408, Det. Leg. N. 96, 125 N. W. 379; *In re* Appleby's Estate, 100 Minn. 408, 10 L. R. A. (N. S.) 590, 111 N. W. 305; Hosmer v. Tiffany, 115 App. Div. 303, 100 N. Y. S. 797; Pence v. Vanfell, 35 Ind. App. 525, 74 N. E. 554; Fisher v. Koontz, 110 Ia. 498, 80 N. W. 551; Hofer v. Hofer, 33 Kan. 449, 6 P. 537; Broadrick v. Broadrick, 25 Pa. Super. 225.

70. Per Story, J., Magniac v. Thompson, 7 Pet. (U. S.) 348. And see Armfield v. Armfield, 1 Freem. Ch. 311; Foley v. Ronalds, 177 N. Y. S. 55.

71. Ford v. Stuart, 15 Beav. 499; Nairn v. Prouse, 6 Ves. 752; Peachey, Mar. Settl. 56. As to power of appointment under a settlement, see Webb v. Saddler, L. R. 8 Ch. 419.

72. *In re* Appleby's Estate, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 590.

73. Herring v. Wickham, 29 Gratt. (Va.) 628.

74. Even in England, upon lapse of time, a settlement deed was allowed to tand where a widower had married his deceased wife's sister. Ayers v. Jenkins, L. R. 16 Eq. 275; Ogden v. McHugh, 167 Mass. 276, 45 N. E. 731, 57 Am. St. R. 456.

75. Michael v. Morey, 26 Md. 239; Gale v. Gale, 6 Ch. D. 144; Vason v. Bell, 53 Ga. 516. But see Price v. Jenkins, 4 Ch. D. 483. Cf. Ardis v. Printup, 39 Ga. 648, with Wollaston v. Tribe, L. R. 9 Eq. 44, as to children of a future marriage.

76. Peachey, Mar. Settl. 58, 60, and cases cited; Davenport v. Bishop, 1 Phil. 701; Barham v. Earl of Clarendon, 10 Hare, 133; Ford v. Stuart, 15 Beav. 505; Cotterell v. Homer, 13 Sim.

formerly that it would, maintaining that the influence of the marriage consideration extended to purchasers generally.[77] Collaterals are never included by marriage settlements, executed or executory, except where the language used compels that construction and negatives the conclusion that parties hoped for issue.[78] Thus, in *Neves* v. *Scott,* which came up on appeal before the Supreme Court of the United States, it is declared as the result of the authorities, English and American, that if, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit. They will not be regarded as volunteers outside of the deed, but as coming fairly within the influence of the consideration on which it is founded; the consideration extending, in fact, through all the limitations for the benefit of the remotest persons provided for consistent with law.[79] Nor are covenants in favor of strangers supported by the marriage consideration unless specially provided for.[80] Attempted agreements is also supported by mutual covenants releasing the rights of each in the property of the other,[81] or covenants that a surviving spouse shall take no share in the estate of the deceased.[82] A mutual release of rights under an executory parol settlement will support a written agreement superseding the oral settlement.[83] Equity will enforce a settlement, if in good faith and free from imposition, however inadequate the pecuniary consideration.[84]

506; Wollaston v. Tribe, L. R. 9 Eq. 44.

77. Jenkins v. Kemis, 1 Ch. Cas. 103, 1 Lev. 152.

78. Markwell v. Markwell, 4 Ky. 908; Isaacs v. Isaacs, 71 Neb. 537, 99 N. W. 268 (covenant to reside in a particular State after marriage); *In re* Krug's Estate, 196 Pa. 484, 46 A. 484.

79. Neves v. Scott, 9 How. (U. S.) 196; *ib.* 13 How. 268. And see Eaton v. Tillinghast, 4 R. I. 276; Buchanan v. Deshon, 1 Har. & G. (Md.) 280; De Barranti v. Gott, 6 Barb. (N. Y.) 492; Wallace v. McCullough, 1 Rich. Eq. (S. C.) 426; Parsons v. Ely, 45 Ill. 232; Mitchell v. Moore, 16 Gratt. (Va.) 275.

80. Sutton v. Chetwynd, 3 Mer. 249, per Sir Wm. Grant; Sugden Law Prop. 153; Peachey, Mar. Settl. 61.

81. Kroell v. Kroell, 219 Ill. 105.

82. Moore v. Harrington, 26 Ind. App. 408, 59 N. E. 1077; Hockenberry v. Donovan, 170 Mich. 370, 136 N. W. 389.

83. Cannon v. Birmingham Trust & Sav. Co. (Ala.), 69 So. 934.

84. Simpson v. Simpson's Ex'rs, 23 S. W. 361, 15 Ky. Law, 353, 94 Ky. 586; Moran v. Stewart, 173 Mo. 207, 73 S. W. 177.

§ 498. Validity in General.

In this country the validity of marriage settlements is generally recognized; and it is well understood that almost any *bona fide* and reasonable agreement, made before marriage, to secure the wife either in the enjoyment of her own property or a portion of that of her husband, whether during coverture or after his death, will be carried into execution in chancery.[85]

"These marriage settlements," observes Chancellor Kent, "are benignly intended to secure to the wife a certain support in every event, and to guard her against being overwhelmed by the misfortunes or unkindness or vices of her husband. They usually proceed from the prudence and foresight of friends, or the warm and anxious affection of parents; and if fairly made, they ought to be supported according to the true intent and meaning of the instrument by which they are created."[86] Antenuptial agreements are so liable to misapprehension and fraud, that they will not be enforced in equity unless the court is satisfied that they were made, and that the marriage consideration really entered into the contract.[87] The same facts which would enable a court to compel a settlement for a wife will uphold one already made.[88] A settlement is not invalid because one party is already married, if the other was not aware of the fact,[89] nor because it cuts off homestead rights which the husband would have otherwise had in the wife's property,[90] nor because of the concealment by the husband of his fatal malady.[91] It has been held that the limitation of a provision for a wife's support to widowhood merely is not a condition subsequent which will render the settlement valid as a

85. Stilley v. Folger, 14 Ohio, 610; 2 Kent Com. 163; 2 U. S. Eq. Dig. Hus. & Wife, 22-30; English v. Foxall, 2 Pet. (U. S.) 595; Hunter v. Bryant, 2 Wheat. 32; Tarbell v. Tarbell, 10 Allen (Mass.), 278; Skillman v. Skillman, 2 Beasl. 403; Cartledge v. Cutliff, 29 Ga. 758; Albert v. Winn, 5 Md. 66; Snyder v. Webb, 3 Cal. 83; Smith v. Chappell, 31 Conn. 589.

An estate may be limited to an unmarried woman's separate use, even where no particular marriage is contemplated. Haymond v. Jones, 33 Gratt. 317.

86. 2 Kent Com. 165.

87. Coles v. Trecothick, 9 Ves. 250; Franks v. Martin, 1 Eden, 309; Kay v. Crook, 3 Jur. (N. S.) 107; Montgomery v. Henderson, 3 Jones Eq. (N. C.) 113; Peachey, Mar. Settl. 68; Kinnard v. Daniel, 13 B. Mon. (Ky.) 496.

88. Smith v. Bradford, 76 Va. 758.

89. Broadrick v. Broadrick, 25 Pa. Super. 225.

90. Weis v. Bach, 146 Ia. 320, 125 N. W. 211; *In re* Appleby's Estate, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 590.

91. *In re* Uker's Estate, 154 Ia. 428, 134 N. W. 1061.

jointure.[92] A marriage settlement is void in so far as it attempts to convey a naked possibility without a present interest.[93] An agreement that the wife shall live with her husband at his parent's home has been held invalid, being merged in the marriage contract.[94] A Hebrew betrothal, whereby the husband was to contribute to the dower an amount equal to that brought in by the wife, has been held unenforceable, as between the spouses, where it did not appear to whom or when it was to be paid.[95] Property cannot be settled by the intended husband, so that, in event of his future bankruptcy or insolvency, the wife will be entitled to a provision.[96] But the wife's fortune may be settled on her husband till he fail, and then to her separate use.[97] In Massachusetts it is held that the validity of antenuptial agreements depends on the common law and not on statute.[98] In Virginia an antenuptial deed executed before the code of 1887 took effect is valid, unless there is fraud by the wife.[99]

§ 499. Oral Promise to Make Settlement.

Under the English Statute of Frauds, and similar enactments in various American States, promises "in consideration of marriage" are required to be in writing; and hence an oral promise to settle property upon an intended spouse is void,[1] but it may be made binding if confirmed in writing after marriage,[2] especially where it has been reduced to writing before marriage, and signed

92. Moran v. Stewart, 173 Mo. 207, 73 S. W. 177.

93. Trammell v. Inman, 115 Ga. 874, 42 S. E. 246.

94. Marshak v. Marshak (Ark.), 170 S. W. 567; Stansberry v. Stansberry (Neb.), 167 N. W. 563; Ellis v. Ellis, 1 Tenn. Ch. App. 198.

95. Goldstein v. Goldstein, 86 N. J. Ch. 351, 98 A. 835.

96. Higginson v. Kelly, 1 Ball & B. 255; Peachey, Mar. Settl. 219; *In re* Casey's Trusts, 4 Ir. Ch. (N. S.) 247.

97. Lester v. Garland, 5 Sim. 222; Sharp v. Cosserat, 20 Beav. 470; Lockyer v. Savage, 2 Stra. 947; *Ex parte* Verner, 1 Ball & B. 260. And see Higginson v. Kelly, 1 Ball & B. 252.

98. Hill v. Treasurer and Receiver General, 227 Mass. 331, 116 N. E. 509.

99. Moore v. Butler, 90 Va. 683, 19 S. E. 850; Metz v. Blackburn, 9 Wyo. 481, 65 P. 857.

1. Fischer v. Dolwig (N. D.), 166 N. W. 793; Eck v. Hatcher, 58 Mo. 235; Claypool v. Jaqua, 135 Ind. 499, 35 N. E. 285; Tawney v. Crowther, 3 Bro. C. C. 263; Coles v. Trecothick, 9 Ves. 250; *supra*, § 350; Lloyd v. Fulton, 91 U. S. 479; Flenner v. Flenner, 29 Ind. 569; Henry v. Henry, 27 Ohio St. 121.

2. Buffington v. Buffington, 151 Ind. 200, 51 N. E. 328.

Where an antenuptial agreement is required by the Statute of Frauds to be in writing it cannot be made valid by reducing it to writing after the marriage. Such a doctrine would in effect work a judicial repeal of the statute. Fischer v. Dolwig (N. D.), 166 N. W. 793.

after marriage.[3] A mere oral agreement between the intended husband and wife, followed by marriage and a continued recognition by acts, especially in connection with such other consideration, is held sufficient for the wife's favor in some American cases, as between the parties and those claiming under them.[4] It has been suggested that even though the parol antenuptial agreement might be inoperative under the Statute of Frauds, it might tend to prove that one spouse, by consistent subsequent conduct, intended to relinquish all claim upon the specific property to which that agreement referred.[5] After an oral agreement has been fully executed after marriage equity will not relieve the husband against it.[6]

§ 500. Postnuptial Settlements in Execution of Antenuptial Agreement.

Marriage does not destroy antenuptial agreements intended to be executed after marriage.[7] The reason of the rule is that to permit marriage to destroy contracts which can only take effect on marriage would be inequitable.[8] Therefore, if an agreement be made in writing before marriage, for the settlement of an estate, the settlement, although made after marriage, will be deemed valuable.[9] This is a well-settled rule, and should be constantly borne in mind.

3. Lamb v. Lamb, 18 App. Div. 250, 46 N. Y. S. 219; Haraldson v. Knutson (Minn.), 171 N. W. 201.

4. Southerland v. Southerland, 5 Bush (Ky.), 591; Child v. Pearl, 43 Vt. 224; Bradley v. Saddler, 54 Ga. 681. But see Davenport v. Karnes, 70 Ill. 465.

5. So ruled in the wife's favor in Sanford v. Atwood, 44 Conn. 141. But a woman's promise to a man, that if he will marry her and will make certain improvements on her land, she will convey the land to him, is "an agreement in consideration of marriage," which by the Ohio Statute of Frauds, must be in writing. Neither marriage, nor making the improvements, is a part-performance such as takes the case out of the statute. Henry v. Henry, 27 Ohio St. 121. In Georgia an oral promise to settle property upon an intended wife is void. Lloyd v. Fulton, 91 U. S. 479. Cf. Bradley v. Saddler, 54 Ga. 681. The woman's promise before marriage to release a judgment recovered against the man is required to be in writing under the Indiana Statute of Frauds, as an agreement "in consideration of marriage." Flenner v. Flenner, 29 Ind. 564. And the marriage celebration is not part-performance in the husband's favor. *Ib.*

An expectancy as devisee of one yet living may be settled on marriage. Estate of Wilson, 2 Pa. 325.

6. Powell's Adm'r v. Meyers, 23 Ky. Law, 795, 64 S. W. 428.

7. Houghton v. Houghton, 14 Ind. 505, 77 Am. D. 69.

8. Broadrick v. Broadrick, 25 Pa. Super. 225.

9. Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481; Finch v. Finch, 10 Ohio St. 501; Izard v. Izard, 1 Bailey Ch.

There are *dicta* to the effect that a settlement after marriage, reciting a parol agreement before marriage, is not fraudulent against creditors, provided the agreement had actual existence; but this point has never been distinctly decided in England; and some late authorities appear to doubt its correctness.[10] The payment of money would, however, make a good consideration for such a settlement as against subsequent creditors.[11] The language of the Statute of Frauds has a material bearing upon all such cases. Yet very informal agreements are often sustained, rather on liberal than technical construction, the court taking into consideration the fact that marriage had taken place, or other acts been performed, on the strength of the promise.[12]

The dispositoin of equity courts in the United States is favorable to settlements after marriage in pursuance of some informal prior agreement, particularly as relates to personal property and as between the spouses themselves. Other considerations, such as forbearance to sue or the fulfilment in return of terms prejudicial, might intervene.[13] It has also been held that a settlement reciting that the husband had agreed to and did thereby convey certain lands to be held by the wife absolutely operated as a present conveyance, without a formal conveyance.[14] A provision in an antenuptial agreement that the husband "will release" his interest in his wife's property has been held not executory in the sense that it leaves something to be done, where the purpose was to ad-

228; Davidson v. Graves, Riley Ch. 219; Satterthwaite v. Emly, 3 Green Ch. (N. J.) 489; Rogers v. Brightman, 10 Wis. 55; Peachey, Mar. Settl. 63; Sudg. Vend. & Purch., 13 ed., 590; Macq. Hus. & Wife, 257.

(Or.) Under L. O. L., § 808, subd. 4, a promise by a man to transfer property to a woman after their marriage, and the execution of a deed which is not delivered till six months after marriage, is not a prenuptial settlement, but a postnuptial gift. Matlock v. Matlock, 72 Ore. 330, 143 P. 1010.

10. See Peachey, Mar. Settl. 63; Lassence v. Tierney, 1 Mac. & Gor. 571; Warden v. Jones, 5 W. R. 447. And see Babcock v. Smith, 22 Pick. (Mass.) 61; Simpson v. Graves, Riley Ch. 232.

11. Stillman v. Ashdown 2 Atk. 478; Brown v. Jones, 1 Atk. 189. And see Butterfield v. Heath, 15 Beav. 414.

12. See Livingston v. Livingston, 2 Johns. Ch. (N. Y.) 481; Resor v. Resor, 9 Ind. 347; Brooks v. Dent, 1 Md. Ch. 523; West v. Howard, 20 Conn. 581.

13. Riley v. Riley, 25 Conn. 154; Bradley v. Sadler, 54 Ga. 681. See, as to the like English practice, Peachey, Mar. Settl. 74, 87; Macq. Hus. & Wife, 234; Hammersley v. De Biel, 12 Cl. & Fin. 45; Lassence v. Tierney, 1 Mac. & Gor. 571.

The numerous *dicta* in all such cases serve rather to obscure than illustrate the principle.

14. Smith's Ex'r v. Johns, 154 Ky. 274, 157 S. W. 21.

just all property rights.[15] An agreement on behalf of an infant intended wife that her husband, on her attainment of full age, would join in a deed conveying all her property to her mother, in trust for her separate use, and followed by a deed in execution of the agreement, has been held to create a separate estate for her in such property, free of all marital claims of the husband.[16]

§ 501. Contracts Releasing Rights in Estate of Other Spouse.

As to the rights of surviving husband or wife, too, in the deceased spouse's property, the obvious inclination must be not to disturb the usual laws of inheritance and distribution, but rather to presume that the marriage settlement contemplates rights of property as limited to the duration of the marriage relation.[17] But settlements controlling the division and descent of property are valid if freely and intelligently made, and if just and equitable in their provisions.[18] To be valid such a contract must be free in good faith and from fraud and be reasonable in all its provisions.[19] Clauses providing for the contingency of death and survivorship receive in these times not unfrequent consideration from American courts of equity; and it is properly held that clauses debarring or restraining the wife,[20] or the husband,[21] or both,[22] as to the usual rights of inheritance, such as dower, curtesy, and the distributive share, ought to be clearly expressed and carefully established in proof in order to prevail; notwithstanding which, it is clear that deliberate concurrent intention settles such issues, and that in general, husband and wife may thus mutually agree that the one, the other, or the two reciprocally, shall claim no interest in the

15. Buffington v. Buffington, 151 Ind. 200, 51 N. E. 328.

16. Wood v. Reamer, 118 Ky. 841, 26 Ky. Law, 819, 82 S. W. 572. To the same effect see Pratt v. Wright, 5 Mo. 192 (shares). See also Anderson v. Burney, 147 Ga. 138, 93 S. E. 93.

17. Pierce v. Pierce, 71 N. Y. 154; Hays v. Bright, 11 Heisk. (Tenn.) 325.

18. Baughman v. Baughman, 283 Ill. 55, 119 N. E. 49; Becker v. Becker, 241 Ill. 423, 89 N. E. 737; Matney v. Linn, 59 Kan. 613, 54 P. 668; King v. Mollohan, 61 Kan. 683, 60 P. 731 (affd., 61 Kan. 692, 61 P. 685). Bramer v. Bramer (W. Va.), 99 S. E. 329; Bright v. Chapman, 105 Me. 62, 72 A. 750. For the purposes of inheritance tax statutes antenuptial provisions in lieu of dower are treated as dower, and are subjected to the tax. People v. Field, 248 Ill. 147, 93 N. E. 721, 33 L. R. A. (N. S.) 230.

19. *In re* Mansfield's Estate (Ia.), 170 N. W. 415; Tilton v. Tilton, 130 Ky. 281, 113 S. W. 134.

20. Pierce v. Pierce, 71 N. Y. 154.

21. Daubenspeck v. Biggs, 71 Ind. 255.

22 Peck v. Peck, 12 R. I. 485.

property of the one who shall die first;[23] and may even exclude all right to administer.[24]

Antenuptial provisions in lieu of the usual rights by survivorship deserve more favor, such as an equitable jointure in bar of dower;[25] or where otherwise rights of property are conferred equivalent to the rights which were taken away.[26] In general, to preclude the usual marital rights of a spouse without some equivalent, plain intention should appear.[27] Generally the husband has the burden of showing that no unfair advantage was taken of the wife to secure such a contract,[28] as well as the fact of the contract.[29] Such a settlement will not usually deprive the wife of a right to her husband's homestead.[30]

§ 502. Marriage Articles.

In this connection the use of the term "marriage articles" is properly to be noticed. "When promises and agreements in consideration of marriage," says Mr. Macqueen, "are meant to become the groundwork of settlements, they are called marriage articles. They are often drawn up hastily, and signed on the eve of the nuptial ceremony from want of time to prepare a final

23. Tarbell v. Tarbell, 10 Allen (Mass.), 278; Falk v. Turner, 101 Mass. 494; Culberson v. Culberson, 37 Ga. 296; Naill v. Maurer, 25 Md. 532; Garrard v. Garrard, 7 Bush (Ky.), 436; Pierce v. Pierce, 71 N. Y. 154; Daubenspeck v. Biggs, 71 Ind. 255; Jacobs v. Jacobs, 42 Ia. 160. The amount of property brought by the respective parties into the marriage may have a bearing on the issue whether the arrangement is grossly inequitable. Peck v. Peck, 12 R. I. 485; Pierce v. Pierce, *supra*. Such a provision usually contemplates passing over the surviving spouse in favor of surviving offspring; and this may sometimes suggest a restraint against construing such clauses in favor of surviving parents or collateral relatives of the deceased spouse.

24. Charles v. Charles, 8 Gratt. (Va.) 486; Hamrico v. Laird, 10 Yerg. (Tenn.) 222.

25. Mintier v. Mintier, 28 Ohio St. 307; Hathaway v. Hathaway, 46 Vt. 234; Freeland v. Freeland, 128 Mass. 509; Boardman's Appeal, 40 Conn. 169.

26. Pond v. Skeen, 2 Lea (Tenn.), 126. See also Camp v. Smith, 61 Ga. 449. A statutory specific allowance in case of a husband's decease, for the benefit of young children in a household as much as the widow, cannot on their part at all events, be affected by an antenuptial contract. Phelps v. Phelps, 72 Ill. 545. Cf. Tierman v. Binns, 92 Pa. 248.

27. Dunlap v. Hill, 145 N. C. 312, 59 S. E. 112; Pond v. Skeen, 2 Lea (Tenn.), 126; Mitchell v. Gates, 23 Ala. 438.

28. Tilton v. Tilton, 130 Ky. 281, 113 S. W. 134; Stephens v. Stephens (Ky.), 205 S. W. 573; Egger v. Egger, 225 Mo. 116, 123 S. W. 928.

29. Dean v. Dean (Ill.), 121 N. E. 234.

30. Plistil v. Kaspar (Ia.), 150 N. W. 584.

deed; which, however, when ultimately executed, if it be in strict conformity with the articles, will supersede them."[31] The American rule is favorable to marriage articles, although unskilfully drawn, so long as they are *bona fide* articles, and the party marrying upon their faith had good reason to rely upon them as such.[32] Any settlement made after marriage, in pursuance of marriage articles, or what may be construed as such, receives the full support of the marriage consideration, and must prevail accordingly against creditors, purchasers and each of the married parties. Letters or a correspondence before marriage may establish an antenuptial settlement where they sufficiently furnish the terms of the agreement. And so, too, may they constitute marriage articles and support a settlement made in pursuance of their terms.[33] But the authenticity of such correspondence should be well established, so easy is such proof manufactured to suit emergencies; and certainly where the contest is between the married pair and a husband's creditors, the true date of the letters should be proved, or else that they were duly received before the marriage.[34] Nor will performance be decreed, unless it can be gathered from a fair interpretation of the letters that they imported a concluded agreement, and induced the marriage; nor if it be doubtful whether what passed was not mere negotiation, or a gratuitous offer by the one, which the other never accepted nor meant to rely upon.[35]

Cases have arisen, however, under the Statute of Frauds, where the marriage agreement had been reduced to writing, but not signed, and yet letters passed afterwards between the parties, referring to the agreement, which sufficed to establish it. In a case of this character, decided in 1791, Lord Thurlow expressed the opinion that if a letter refers so clearly to an agreement as to

31. Macq. Hus. & Wife, 246.

32. Neves v. Scott, 9 How. (U. S.) 196; Hooks v. Lee, 8 Ired. Eq. (N. C.) 157; Rivers v. Thayer, 7 Rich. Eq. (S. C.) 136; Kninard v. Daniel, 13 B. Mon. (Ky.) 496; Montgomery v. Henderson, 3 Jones Eq. (N. C.) 113; Smith v. Moore, 3 Green Ch. (N. J.) 485; Potts v. Gogdell, 1 Desaus. (S. C.) 456.

33. Logan v. Wienholt, 1 Cl. & Fin. 611; Hammersley v. De Biel, 12 Cl. & Fin. 45; Moorehouse v. Colvin, 15 Beav. 349; Kinnard v. Daniel, 13 B. Mon. (Ky.) 496.

Letters from an intended wife to her intended husband stating that she intended to make use of a certain part of her property for their joint use has been held not a settlement giving the husband rights in her property when they separated after marriage. Walker v. Walker, 175 Mass. 349, 56 N. E. 601.

34. Kinnard v. Daniel, 13 B. Mon. (Ky.) 496; Montgomery v. Henderson, 3 Jones Eq. (N. C.) 113.

35. Fowle v. Freeman, 9 Ves. 315; Card v. Jaffray, 2 Seh. & Lef. 384; Chambers v. Sallie, 29 Ark. 407.

show what was meant by the parties, that may take the case out of the statute.[36] Lord Eldon states that though the agreement be not signed, yet if the letter contain all the terms and describes the consideration, and all the circumstances, so that by the contents of the letter it can be connected and identified with the agreement, there is a writing which amounts to a note or memorandum, and so satisfies the statue.[37] In general, a letter which contains the terms of an agreement, or refers to another paper which specifies the terms, is sufficient to take the contract out of the Statute of Frauds.[38]

§ 503. Settlement by Third Person.

Promises made in consideraion of the marriage by a third party, such as the wife's father, may afterwards be enforced against him, as (in such an instance) by the husband. But it must appear that the latter knew of the promise, and that it entered as an ingredient into the marriage; and the husband cannot, upon finding, after marriage, that his wife, while single, had received a letter from her father promising a certain allowance, hold the latter to specific performance.[39] The promise of a third party may be for the wife's benefit; or it may be for the mutual benefit of the married parties, and enforceable accordingly. Thus, in a recent English case the estate of a father was held bound by his written statements of intention to settle the whole of his property upon his daughter, on the strength of which she married; and this, notwithstanding the father, being at the time a widower, remarried afterwards and left a widow.[40]

It is held that a marriage settlement may bind a wife on the ground that she has assented to the father's arrangement, even though the husband's engagement was to settle what was not his, but hers, and hence was not beneficial to her.[41] A contract by the mother of an intended wife to convey land to her husband as soon as the intended husband erects a house on it has been held valid.[42] A settlement made by a wife's father covenanting to pay a sum of money in case she survived her coverture is binding even though

36. Tawney v. Crowther, 3 Bro. C. C. 263. See citation of this opinion in Jorden v. Money, 5 H. L. 253.

37. Coles v. Trecothick, 9 Ves. 250.

38. Hammersley v. De Biel, 12 Ch. & Fin. 45; Moorhouse v. Colvin, 15 Beav. 349; Peachey, Mar. Settl. 67.

39. Ayliffe v. Tracy, 2 P. Wms. 66; Madox v. Nowlan, Beatty, 632.

40. Coverdale v. Eastwood, L. R. 15 Eq. 121 (a harsh case, truly).

41. See Lee v. Lee, 4 Ch. D. 175.

42. Bell v. Sappington, 111 Ga. 391, 36 S. E. 780.

the marriage was dissolved during the lifetime of the settlor.[43] The same rule did not apply where the covenant was to pay if the marriage was "solemnized," and where it was afterwards declared null on the ground of the impotence of the husband, that rendering the marriage void *ab initio*.[44]

§ 504. Covenant to Settle After-acquired Property.

Marriage settlements frequently contain a covenant on the husband's part to settle all the after-acquired property of the wife. Settlements of after-acquired or future property of either or both spouses are valid; and in most of the cases decided under this head, the courts have evidently sought to adapt the covenant to the presumed intention of the parties; the question still being one of intention to be gathered from the contents of the instrument by which the parties have bound themselves.[45] And the rule of construction is the same, whether damages for breach of covenant be sought at law, or specific performance in equity.[46] Such covenants may be on the wife's part; or they may be conditional.[47]

The presumption is, however, that only property acquired during the marriage state is to be thus embraced under the terms of the settlement; and hence property acquired by the survivor of the marriage, after its dissolution, is not subjected to the trust in absence of explicit proof.[48] Settlement of property to which the wife shall become entitled includes reversionary interests when

43. *In re* Crawford, (1905) 1 Ch. 11, 91 Law T. 683, 53 Wkly. Rep. 107, 74 Law J. Ch. 22; De Cicco v. Schweizer, 221 N. Y. 431, 117 N. E. 807, L. R. A. 1918E 1004.

44. *In re* Garnett, 74 Law J. Ch. 570, 93 Law T. 117.

45. Ramsden v. Smith, 2 Drew. 302; Steinberger v. Potter, 3 C. E. Green (N. J.), 452; Withers v. Weaver, 10 Barr (Pa.), 391; Vason v. Bell, 53 Ga. 416.

A covenant by a husband in a settlement made in consideration of marriage to settle all his after-acquired property except business assets is not too vague and uncertain to be enforced. *In re* Reis, 73 Law J. K. B. 929 (1904), 2 K. B. 769, 91 Law T. 592, 53 Wkly. Rep. 122, 11 Mansion, 229, 20 Times Law R. 547.

46. Smith v. Osborne, 6 Ho. Lords, 394; Blythe v. Granville, 13 Sim. 190; Tawney v. Ward, 1 Beav. 563; Young v. Smith, L. R. 1 Eq. 180; Peachey, Mar. Settl. 523; Macq. Hus. & Wife, 268. As to the application of this covenant to separate property, see Mainwaring's Settlements, L. R. 1 Eq. 180; Milford v. Peile, 17 Beav. 602; Dering v. Kynaston, L. R. 6 Eq. 212; Campbell v. Bainbridge, L. R. 6 Eq. 269; *Re* Viant's Trusts, L. R. 18 Eq. 436; Dawes v. Tredwell, 44 L. T. 740. That a contingent remainder becoming vested during the coverture, or reversionary interest, may be included, see Agar v. George, 2 Ch. D. 706; *Re* Mitchell's Trusts, L. R. 9 Ch. D. 767; *Re* Jones's Will, 2 Ch. D. 362.

47. Peachey, Mar. Settl. 548.

48. *Re* Campbell's Policies, 6 Ch. D. 686; *Re* Edwards, L. R. 9 Ch. 97.

they fall in, the provision intending entitlements in interest and not in possession.[49] An agreement to settle the wife's after-acquired property does not bind property in which the savings of her separate income are invested.[50] Where a settlement provided that all after-acquired property of the wife should be subject to a trust therein created for her separate use, it was held that the settlement did not include a legacy received by her after her husband's death.[51] An agreement as to the division of a certain farm and its "accumulations" had been held to include only improvements on the land itself, and not lands subsequently conveyed to a spouse, whether or not it was paid for by the products of the land settled.[52]

§ 505. Provisions for Children or Heirs.

Many deeds of settlement provide what are called "portions." The word "portion" may be used to denote what the wife brings her husband in marriage, and in this sense it corresponds with the word *dos* at the civil law, or what we sometimes call her dowry. But in its more special acceptation, the word "portion" signifies that part of a person's estate which is given or left to a child. Marriage settlements usually contain some provision to secure portions for the children of the marriage.[53] Double portions may sometimes be created for children; as if a father should make a provision for a child by marriage settlement, and afterwards provide for the same child by will; but the presumption is always against such an intent, and in favor of regarding the latter as a substitute for the former.[54] So favorably are issue regarded in such instruments, that, it is held, an intention to provide for the offspring of the marriage should be presumed, unless the language

49. *In re* Bland's Settlement, 1 Ch. 4, 91 Law T. 681, 74 Law J. Ch. 28.

50. In re Clutterbuck's Settlement (1905), 1 Ch. 200, 53 Wkly. Rep. 10, 73 Law J. Ch. 698.

51. Borland v. Welch, 162 N. Y. 104, 56 N. E. 556.

52. Haenky v. Weishaar, 59 Kan. 206, 52 P. 437.

53. Wood v. Briant, 1 Atk. 522. For a full discussion of this topic, see Peachey, Mar. Settl. 409 *et seq.*, and cases cited.

54. *Ex parte* Pye, 18 Ves. 147; Peachey, Mar. Settl. 492 et seq., and cases cited; Earl of Durham v. Wharton, 3 Cl. & Fin. 155; Russell v. St. Aubyn, L. R. 2 Ch. D. 398. But the Scotch rule of construction is otherwise. Kippen v. Darley, 3 Macq. 203. Provision for the son of a former marriage held purely voluntary as against a purchaser for valuable consideration. Price v. Jenkins, 4 Ch. D. 483, and cases cited. But children of a former marriage are favored in Gale v. Gale, 6 Ch. D. 144. And see Vason v. Bell, 53 Ga. 416.

of the settlement plainty indicates otherwise.[55] Clear evidence is necessary to overcome the presumption.[56] Where a settlement required the husband to support and educate the children of the wife by a former marriage, and to treat them as his own, it was held that the obligation ceased at his death and could not be enforced against the estate.[57]

§ 506. Secret Settlement on Third Person in Fraud of Husband.

A secret settlement made by a woman upon third persons, while engaged, and contemplating marriage, is liable to be set aside in equity as a fraud upon the marital rights of her intended husband, at the husband's instance, when he learns of it. *Prima facie,* her transactions as a *feme sole* with reference to her own property are valid both at law and in equity; it is only because of the fraud that her husband can afterwards obtain relief against them; yet the English courts have gone far in discountenancing all conveyances made by the intended wife in derogation of the property rights of her intended husband, where made without notice to him.[58] The secrecy of the proceeding is a material element, from which fraud will be inferred.[59] The husband must have been kept in ignorance of the transaction up to the moment of marriage. For, as Lord Chancellor Brougham once observed, if a man, knowing what has been done, still thinks fit to marry the lady, he cannot be permitted to allege afterwards that he has been deceived.[60] Actual concurrence on the part of the intended husband in his wife's settlement will be even more conclusive against him; and, even though he were a minor, will preclude all subsequent allegations of fraud on the marital right.[61] It is the usual practice with English conveyancers to make the intended husband a party

55. Wallace v. Wallace, 82 Ill. 430.

56. McCoy v. Fahrney, 182 Ill. 60, 55 N. E. 61; Goldstein v. Goldstein, 87 N. J. Eq. 601, 101 A. 249 (Jewish betrothal agreement).

57. Hinklebein v. Totten's Adm'r, 22 Ky. Law, 1357, 60 S. W. 641; Dickinson v. Lane, 193 N. Y. 18, 85 N. E. 818.

58. Peachey, Mar. Settl. 142, and cases cited; Doe d. Richard v. Lewis, 11 C. B. 1035; St. George v. Wake, 1 Myl. & K. 610; Countess of Strathmore v. Bowes, 1 Ves. Jr. 28; Macq. Hus. & Wife, 36; England v. Downes, 2 Beav. 522; Howard v. Hooker, 2 Ch. Rep. 81; 1 Eq. Cas. Ab. 59, pl. 1; Lance v. Norman, 2 Cas. in Ch. Rep. 79; 1 Eq. Cas. Ab. 59, pl. 2; Carleton v. Earl of Dorset, 2 Vern. 17; Goddard v. Snow, 1 Russ. 485.

59. England v. Downes, 2 Beav. 522; Macq. Hus. & Wife, 36.

60. St. George v. Wake, 1 Myl. & K. 610; Peachey, Mar. Settl. 145, and cases cited.

61. Slowcombe v. Glubb, 2 Bro. C. C. 545.

to all instruments executed by the intended wife in contemplation of or during a treaty of marriage.[62]

The same general doctrine has been repeatedly declared in the courts of this country; and secret and voluntary conveyances, made by a woman contemplating marriage, may be set aside on the husband's subsequent application as a fraud upon his marital rights,[63] under the same qualification that the intended spouse was thereby defrauded.[64] Nor need she have formally settled her whole property in order to come within the prohibition; any voluntary transfer, under fraudulent circumstances, is void, so far as that particular property is concerned.[65] But if the husband received notice of the transfer before marriage, and chose to marry her notwithstanding, he is without a remedy.[66] Though not where he merely heard a vague rumor after he had married.[67] On this principle the wife's antenuptial deed, purporting to convey her property in trust for her separate use, has been treated as fraudulent.[68]

Lord Thurlow says the question in all such cases is whether the evidence is sufficient to raise fraud.[69] And from the decisions it would appear that some alienations of the wife's property, without her intended husband's knowledge, will be allowed to stand.[70] The facts are always open to inquiry; and it seems settled that the court is warranted in considering such circumstances as the meritorious object of the conveyance and the situation of the husband in point of pecuniary means.[71]

62. Peachey, Mar. Settl. 155.

63. 2 Kent Com. 174, 175, and notes, 12th ed.; Spencer v. Spencer, 3 Jones Eq. (N. C.) 404; Tucker v. Andrews, 13 Me. 124, 128; Williams v. Carle, 2 Stockt. (N. J.) 543; Freeman v. Hartman, 45 Ill. 57; Baker v. Jordan, 73 N. C. 145; Hall v. Carmichael, 8 Baxt. (Tenn.) 211.

64. Gregory v. Winston, 23 Gratt. (Va.) 102.

65. Fletcher v. Ashley, 6 Gratt. (Va.) 332.

66. Cheshire v. Payne, 16 B. Mon. (Ky.), 618; Terry v. Hopkins, 1 Hill Ch. (N. Y.) 1. See 1 Story Eq. Juris., § 403. And see Cole v. O'Neill, 3 Md. Ch. 174; O'Neill v. Cole, 4 Md. 167.

67. Spencer v. Spencer, 3 Jones Eq. (N. C.) 404. But see, as to registration; Peachey, Mar. Settl. 155.

68. Belt v. Ferguson, 3 Grant, 289. And see Duncan's Appeal, 43 Pa. 67.

69. Strathmore v. Bowes, 1 Ves. Jr. 28.

70. Taylor v. Pugh, 1 Hare, 613; 2 Roper, Hus. and Wife, 162; Peachey, Mar. Settl. 147.

71. St. George v. Wake, 1 Myl. & K. 610; King v. Cotton, 2 P. Wms. 674. And see Thomas v. Williams, Mosely, 177; Blanchet v. Foster, 2 Ves. Sen. 264; Anonymous, 34 Ala. 430; Taylor v. Pugh, 1 Hare, 614; Lewellin v. Cobbold, 1 Sm. & Gif. 376; Peachey, Mar. Settl. 151.

If the wife's transfer or conveyance to another, under such circumstances, be without valuable consideration to herself, there is the less reason why equity should uphold it;[72] and if it be in plain derogation of her own interests, as, for instance, to some insolvent relative to hold in trust for her, or so as to suggest that fraud or coercion was practised upon her, it is for the common nuptial interests that courts of chancery repudiate the arrangement altogether.[73] By virtue of late statutory changes, tending to relieve a husband of his wife's antenuptial debts, or of other common-law burdens, on her account, the husband may sometimes stand in equity on the stronger footing of a defrauded creditor, where he seeks to have the secret conveyance of his affianced set aside in his favor.[74]

From what has been said it may readily be gathered that a secret settlement by the intended wife, made before she was courted, is not likely to be set aside, on proof that the complainant commenced courting her afterwards.[75] And the husband must show, not only that the wife contemplated marriage with some person at the time of the settlement, but that he was the person intended.[76]

A corresponding rule as to fraud would doubtless apply to a husband, who, before marriage, had made a secret transfer or conveyance of his own property to his wife's injury; not, however, without regard to the difference which subsists at law between their marital rights in each other's property.[77] Indeed, it is sometimes said that any designed and material concealment ought to avoid an antenuptial contract at the will of the party who has been thereby injured.[78]

72. Baker v. Jordan, 73 N. C. 145; Fletcher v. Ashley, 6 Gratt (Va.) 332.

73. Hall v. Carmichael, 8 Baxt. (Tenn.) 211.

74. Westerman v. Westerman, 25 Ohio St. 500. But the fact of an antenuptial settlement does not relieve the husband from his common-law liability for antenuptial debts, apart from statute. Powell v. Manson, 22 Gratt. (Va.) 177.

75. King v. Cotton, 2 P. Wms. 674.

76. England v. Downes, 2 Beav. 522; Peachey, Mar. Settl. 15; Macq. Hus. & Wife, 37; Strathmore v. Bowes, 1 Ves. Jr. 22. And see Waters v. Tazewell, 9 Md. 291.

77. See Leach v. Duvall, 8 Bush (Ky.) 201; Gainor v. Gainor, 26 Ia. 337. Lapse of time and other circumstances may remove any presumption of fraud or unfairness on his part. Butler v. Butler, 21 Kan. 521.

78. Kline v. Kline, 57 (Pa.) 120; Kline's Estate, 64 (Pa.) 122.

§ 507. Construction.

In the construction of these marriage settlements, the courts exhibit a propensity to change, as property doctrines change in this connection; but on the whole to incline to that construction, in case of doubt, which renders the arrangement mutually beneficial and as far as possible, upholds marital rights of property as adjusted by public policy. A reserved power in the one to alter or revoke, or to dispose differently from the original settlement to the detriment of the other, will not be readily inferred from the terms of the contract.[79] As to children embraced under such arrangements, an equal distribution among them and equality of benefits, as American policy favors, should be preferred in courts of this country, as well as the preservation of their legal rights whatever the compact of parents with one another.[80] The true intention of the parties, as in wills and trusts generally, is the primary rule in the construction of all marriage settlements; subject to which rule the ordinary meaning should be given to written words, unless manifest absurdity or inconvenience will follow; no power resting in the court to strain language beyond its fair significance.[81] In order to carry out the intention of the parties, courts will liberally construe such instruments.[82] If the instrument will admit of more than one construction, that most favorable to the wife should be adopted, if reasonable and not violative of the language,[83] especially where the language is doubtful or ambiguous.[84] Single words and phrases cannot alone be regarded, and the intention must be collected from the whole instrument in

79. Yeaton v. Yeaton, 4 Ill. App. 579, Such reservations, however, as *e. g.*, to dispose by will, if made must be respected. Bishop v. Wall, 3 Ch. D. 194; Rogers v. Cunningham, 51 Ga. 40; Russell's Appeal, 75 Pa. 269; Reynolds v. Brandon, 3 Heisk. (Tenn.) 593.

80. *In re* Hubinger's Estate, 150 Ia. 307, 130 N. W. 155; Brown v. Brown, 31 Gratt. (Va.) 502; Phelps v. Phelps, 72 Ill. 545.

81. Landes v. Landes, 268 Ill. 11, 108 N. E. 691; Kennedy v. Kennedy, 150 Ind. 636, 50 N. E. 756; Peachey, Mar. Settl. 457, 523, 532; Hoare v. Hornby, 2 Yo. & Coll. C. C. 129; Reid v. Kendrick, 1 Jur. (N. S.) 898; Carswell v. Schley, 56 Ga. 101; Mintier v. Mintier, 28 Ohio St. 307. And see Creighton v. Clifford, 6 Rich. (S. C.) 188; Burging v. McDowell, 30 Gratt. (Va.) 236.

82. Matney v. Linn, 59 Kan. 613, 54 P. 668; Collins v. Bauman, 125 Ky. 846, 102 S. W. 815, 31 Ky. Law, 455.

83. Mallow v. Eastes (Ind.), 100 N. E. 836; Oesau v. Oesau's Estate, 157 Wis. 25, 147 N. W. 62; *In re* Deller's Estate, 141 Wis. 255, 124 N. W. 278.

84. Wetsel v. Firebaugh, 258 Ill. 404, 101 N. E. 602.

its general scope and design.[85] Where several articles are to be considered in such an instrument, the usual rules of interpretation are applied.[86] Not only the language of the parties, but also what the law implies therefrom, in view of the promise to marry, is to be considered.[87] In seeking such intention, the court will consider its scope and purpose, and the circumstances under which it was entered into,[88] the situation of the parties,[89] as well as the usage in similar cases, the rights of parties as they existed before the marriage, and as they would have existed if no such settlement were made.[90] It is also proper to consider the nature of the property affected, and the effect of the instrument as vesting an equitable title in the wife.[91] The meaning of the word "heirs," in marriage settlements, is one of intention, to be gathered from the facts and the relation of the parties.[92] A settlement vesting a life estate in the husband's land in the wife if she survived, with remainder "at her death" to his heirs has been held to create a vested remainder in the heirs.[93] A marriage settlement creating a remainder to the heirs and distributees of the wife after the death of both spouses has been held to intend those persons who were heirs and distributees at the time of the wife's death.[94] The doctrine that marriage settlements are excepted from the rule in *Shelly's Case* does not apply to a settlement actually completed by formal deed.[95] A settlement conveying to a trustee all the estate, real and personal, which she may "receive," or to which she might be entitled by right, devise or bequest, has been held to intend

85. Carr v. Lackland, 112 Mo. 442, 20 S. W. 624.

86. Estate of Baubichon, 49 Cal. 18.

87. Where the methods of devolution by which realty must be acquired in order to come within the terms of a marriage settlement are expressed in the deed, the maxim of the law, "*Expressio unius est exclusio alterius,*" will exclude from its operation land acquired in other ways. Dunlap v. Hill, 145 N. C. 312, 59 S. E. 112; Dickinson v. Lane, 193 N. Y. 18, 85 N. E. 818.

88. Ragsdale v. Barnett, 10 Ind. App. 478, 37 N. E. 1109.

89. *In re* Hubinger's Estate, 150 Iowa, 307, 130 N. W. 155.

90. Coatney v. Hopkins, 14 W. Va. 338.

91. Gordon v. Munn, 88 Kan. 72, 127 P. 764, 87 Kan. 624, 125 P. 1.

92. Markwell's Adm'r v. Markwell's Ex'r, 4 Ky. Law. Rep. 908 (holding that in the particular case it meant "children"); Appeal of Philadelphia Trust, Safe Deposit & Ins. Co., 108 Pa. 311; Rutledge v. Rutledge, Dud. Eq. (S. C.) 201.

93. Harris v. Russell, 124 N. C. 547, 32 S. E. 958; Freeman v. Freeman, 274 Ill. 228, 113 N. E. 602.

94. Glover v. Adams, 11 Rich. Eq. (S. C.) 264; *Ex parte* Roberts, 19 S. C. 150.

95. Brown v. Wadsworth, 32 App. Div. 423, 53 N. Y. S. 215; Kirby v. Brownlee, 13 Ohio Cir. Ct. 86, 7 O. C. D 460.

only personal property by the word "receive," and real estate by the remainder of the language, so that land conveyed to her by deed during coverture was not within the settlement.[96]

§ 508. Power of Disposition of Property Settled.

Where a settlement reserves to each spouse all their property as though there was no marriage, either may dispose of their sole property both real and personal by deed or will.[97] Where an antenuptial settlement created a life estate in certain property for the wife, her will after coverture cannot affect the rights of the remainderman.[98] Where a settlement provided that a wife might convey her property by deed in which he joined, and where he induced her to convey it separately, and where he was present when she so conveyed it to a *bona fide* purchaser for full value, it was held that he might be compelled to join in order to complete the vendee's title.[99] Where a settlement provided that the wife should have, at her death and that of her husband, a certain power of disposition of her personal property to her son, her husband taking possession of the property for his life, it was held that she had a naked power of appointment, and that she had no claim against the estate of her husband where she made no appointment during his lifetime.[1] A settlement giving the wife an estate in the husband's property for life after his death, with a right to sell, if necessary for her support, does not give her arbitrary power to sell to the disadvantage of the remaindermen, but only to sell on an adjudication by the court that the necessity exists.[2]

§ 509. Operation and Effect.

An instrument in the form of a marriage settlement or similar writing, by which a husband renounces certain marital rights in favor of his intended wife, or of her and her children, cannot operate by itself as restraining her own equitable rights in her property.[3] So strongly is the trust created upon the marriage consideration upheld against either spouse, that the husband's conver-

96 Dunlap v. Hill, 145 N. C. 312, 59 S. E. 112.

97. Brown v. Weld, 5 Kan. App. 341, 48 P. 456; Kennedy v. Koopman, 166 Mo. 87, 65 S. W. 1020; Wright v. Westbrook, 121 N. C. 155, 28 S. E. 298.

98. Lampkin v. Hayden, 99 Ga. 363, 27 S. E. 764.

99. Bearden v. Benner, 136 F. 258.

1. Agee v. Agee's Adm'r, 22 Mo. 366.

2. Robbins v. Thornton (Iowa), 145 N. W. 891.

3. Bass v. Wheless, 2 Tenn. Ch. App. 531.

sion of his wife's income thus settled to her separate use gives the wife a claim which she can enforce against his estate upon surviving him, notwithstanding the settlement upon her was stated to be in lieu of all dower and distributive share, and her husband's will made ample provision for her notwithstanding.[4] And on the other hand, under a marriage settlement, though it be of all the woman's property, which confines the income to herself during life, the trust must continue even upon her widowhood; for, as it is observed, a spendthrift trust may be created as well for a woman as a man.[5] But settlements, as properly construed, provide more frequently that upon the dissolution of marriage the survivor shall have the same rights as though the instrument had not been made.[6] It is usually held that antenuptial agreements cannot take away the personal rights or duties of either spouse,[7] but where this is permitted the agreement should not be extended beyond the plain words or necessary implication of the instrument.[8] Thus, under a marriage settlement providing that both shall contribute to the expenses of the "family," the death of one spouse ends the obligation, as the family consists of both spouses.[9] An antenuptial settlement in terms limited to the estate possessed by the wife at marriage may cover property which she had previously conveyed to her brother in fraud of creditors, and which he conveyed to her after marriage.[10] An antenuptial agreement made in Hesse Cassel making the spouses heirs of each other to the exclusion of the heirs of the deceased has been held to apply to land acquired after their emigration to New Jersey.[11] Where land owned by a husband and wife has been acquired by the wife

4. In such case, *semble*, the provision under the husband's will is to be construed as in lieu of all such claim on the widow's part, so that she may accept it or pursue the claim instead. Boardman's Apepal, 40 Conn. 169.

Under the trusts of a marriage contract profits and income belong usually to the wife, under the equitable rules of separate property, and do not become part of the *corpus* of the trust fund, with its reversion or survivorship of rights, unless so provided. See Artrope v. Goodall, 53 Ga. 318.

5. Ashhurst's Appeal, 77 Pa. 464. And see Greensboro' Bank v. Chambers, 30 Gratt. (Va.) 202.

6. See Woods v. Richardson, 117 Mass. 276.

7. Clopton v. Clopton, 162 Cal. 27, 121 P. 720; Isaacs v. Isaacs, 71 Neb. 537, 99 N. W. 268. But see Baughman v. Baughman, 283 Ill. 55, 119 N. E. 49.

8. Bramer v. Bramer (W. Va.), 99 S. E. 329.

9. *In re* Mansfield's Estate (Iowa), 170 N. W. 415.

10. Weis v. Bach, 146 Iowa, 320, 125 N. W. 211.

11 Kleb v. Kleb, 70 N. J. Eq. 305, 62 A. 396.

by a postnuptial settlement reserving to the husband only a survivorship, and was sold by a transaction wherein a trust deed was taken to secure payment of part of the price, it was held that on re-acquirement of the property by the wife by foreclosure the estate again became incumbered by the right of survivorship as provided by the settlement.[12] An antenuptial settlement providing, *inter alia,* that the wife should retain control of her separate property, and that both might dispose of their sole property by will, was held to contemplate a permanent adjustment of their property, and not during coverture only.[13]

A contract providing that the wife shall be "endowed" with one-third of real estate of the husband has been held to grant a life estate only, the quoted term being used in its technical sense.[14] A settlement whereby the wife took for life a third of her husband's estate on his death, and as much more as in her judgment she needed for her comfortable support, has been held not affected by his will reducing her estate to widowhood only, even though she took out letters under the will.[15] A decree in a suit for specific performance of a settlement awarding a wife money "owned or left" by the husband at his death has been held not to include the proceeds of an insurance policy which he had assigned.[16]

In Louisiana donations by one spouse to the other before marriage are subject to Civ. Code, art. 1753, providing that on remarriage such spouse forfeits all rights in such donations to the children of the first marriage.[17]

§ 510. Enforcement.

There is this difference pointed out between promises and agreements in consideration of marriage, and all other agreements; namely, that the contract, though broken by one of the parties, remains binding upon the other. The reason for this is, that such promises and agreements affect not only the rights of the married pair, but those of their offspring; the children being, in fact, regarded as purchasers.[18] But where the performance is sought

12. Walt v. Walt, 113 Tenn. 189, 81 S. W. 228.

13. Buffington v. Buffington, 151 Ind. 200, 51 N. E. 328.

14. Fish v. Fish (Ky.), 212 S. W. 586.

15. Bowman v. Knorr, 206 Pa. 272, 55 A. 976; Foehner v. Huber, 166 N. Y. 619, 59 N. E. 1122.

16. Dickinson v. Lane, 193 N. Y. 18, 85 N. E. 818.

17. Didlake v. Cappel, 116 La. 844, 41 So. 112.

18. Bale v. Coleman, 1 P. Wms. 145; Harvey v. Ashley, 3 Atk. 610. Even children of a former marriage may enforce. Gale v. Gale, 6 Ch. D. 144.

by the defaulting party, the contract cannot be enforced against the person injured through such default;[19] though performance by one party is not necessarily a condition precedent to a right to sue the other.[20] The difference thus mentioned is, therefore, a difference which grows out of the peculiar nature of the contract, and the existence of parties, other than those contracting, who may be brought within the purview of the consideration. As Lord Eldon observes, the issue have a right to say to the parents, "You shall, each of you, do what you can do, and we must not be disappointed."[21] Unquestionably, however, even in the case of a marriage settlement, the covenants may be so framed as to be mutually dependent; and if it be clear on the face of the settlement that such was the intention, that intention must prevail, even against the offspring of the marriage.[22]

Though contracts between the spouses before marriage be released in law, modern equity which enforces marriage settlements and preserves the wife's separate estate, relying upon the marriage consideration, will still hold the indebted or obliged party bound to performance in numerous instances; its policy being to give a more flexible scope to the presumed intention of the married parties.[23]

Where a wife is too old to have children, an antenuptial settlement contemplates that its provisions as to release of her husband's rights in her estate shall be enforced by her collateral relatives.[24] An antenuptial contract whereby the husband receives the wife's property and agrees to secure it to her may be enforced against his estate where his executor fails to restore such property.[25] A provision of a marriage settlement for the wife out of the estate of the husband is not wholly executory, and may be enforced

19. Crofton v. Ormsby, 2 Sch. & Lef. 583.

20. See Jeston v. Key, L. R. 6 Ch. 610, as to covenant between husband and wife's father, under marriage articles agreeing to make a settlement which neither party performed.

21. Rancliffe v. Parkyns, 6 Dow, 209.

22. Per Lord Cottenham, Lloyd v. Lloyd, 2 Myl. & Cr. 192; Pyke v. Pyke, 12 Ves. 67. See further, Bliss v. Sheldon, 7 Barb. (N. Y.) 152; Shoch v. Shoch, 19 Pa. 252.

23. Power v. Lester, 23 N. Y. 527; Fitzgerald v. Fitzgerald, L. R. 2 P. C. 83. This rule was enforced in Miller v. Goodwin, 8 Gray (Mass.), 542, so as to require specific performance of a man's written contract to convey land to the woman, marriage entering into the consideration. And as to obtaining goods under a promise to marry not fulfilled, see Frazer v. Boss, 66 Ind. 1.

24. Dunlop v. Lamb, 182 Ill. 319, 55 N. E. 354.

25. Hoffman v. Hoffman's Ex'r, 126 Mo. 486, 29 S. W. 603.

against his estate though he killed her.[26] In the absence of statute, a court of equity is the proper forum in which to enforce a marriage settlement.[27] The settlement authorized under the Maine statute may be enforced at law after the death of a party thereto.[28] Where a wife claims property as given to her by her husband before and in consideration of marriage, she must show clearly and unequivocally that he intended to part absolutely with the title and possession of the property.[29]

In an action to enforce a settlement against her husband's estate, and for an accounting of property received by him thereunder, a judgment for the wife is supported by evidence of admissions of the husband in his lifetime where he kept no proper accounts.[30] Where a trust created by a postnuptial settlement was intended for the protection of the wife's estate in the land during the life of her husband, she may after his death enforce her rights in the land without making heirs of the deceased trustee parties, since the trust became inoperative at the husband's death.[31] The fact that the wife expended money for her own and her husbands's support is no defence to an action by his executor to enforce a settlement wherein he promised to support her, nor basis for a cross-complaint, though such expenditures were an enforceable claim against his estate.[32]

§ 511. Rescission or Avoidance; In General.

A spouse may, by conduct, ratify a contract wherein the confidential relation has been violated so as to preclude an attack on it on that ground,[33] and has no relief where she signs an agreement under the mistaken supposition that marriage would revoke her husband's will, in the absence of fraud.[34] Where a wife repudiated her antenuptial agreement, it was held that her receipt of certain rents from the homestead in the belief that she was entitled to them till her dower and homestead were assigned was not a

26. Logan v. Whitley, 129 App. Div. 666, 114 N. Y. S. 255.

27. Schnepfe v. Schnepfe, 124 Md. 330, 92 A. 891; Bright v. Chapman, 105 Me. 62, 72 A. 750.

28. Bright v. Chapman, 105 Me. 62, 72 A. 750.

29. Martin v. Smith, 25 W. Va. 579 (bonds).

30. Hoffman v. Hoffman's Ex'r, 126 Mo. 486, 29 S. W. 603.

31. Walt v. Walt, 113 Tenn. 189, 81 S. W. 228.

32. Buffington v. Buffington, 151 Ind. 200, 51 N. E. 328.

33. Landes v. Landes, 268 Ill. 11, 108 N. E. 691.

34. Robbins v. Robbins, 225 Ill. 333, 80 N. E. 326.

ratification.[35] If a spouse rescinds, the consideration must be restored.[36] The question whether there has been a rescission is one of intention.[37] A complaint alleging that the wife was ill at the time of the agreement and signed it without reading at the request of the husband has been held to state a cause of action for its cancellation.[38]

A man cannot set aside an agreement in contemplation of marriage, on the plea that his wife's fortune fell short of his expectations; for, as Lord Hardwicke observed, it would be extremely mischievous to set aside marriage settlements upon such grounds.[39] Where the wife by an antenuptial agreement released her dower for $500, her death before his does not release him from paying the money, since the contract was in part in consideration of the marriage.[40] A settlement releasing the wife's dower "should there be no heirs born" of the marriage is on condition subsequent, and the birth of a posthumous child will defeat the contract.[41]

§ 512. By Agreement.

An antenuptial agreement as to the wife's property is rescindable at the joint pleasure of the parties, and a joint conveyance of a part or all of such property operates *pro tanto* as a rescission.[42] The sole act of one spouse is not enough.[43] A settlement may be altered before marriage by another instrument, in which case the two should be construed together.[44] Provisions of a settlement may be waived by parol,[45] as where the husband, with the wife's assent, conveyed property on trusts which were inconsistent with the settlement.[46] Likewise, where a settlement pro-

35. Lachman v. Lachman, 201 Ill. 380, 66 N. E. 256, 94 Am. St. R. 180.

36. Erb v. McMaster, 88 Neb. 817, 130 N. W. 576.

37. Gordon v. Munn, 87 Kan. 624, 125 P. 1 (reh. den., 88 Kan. 72, 127 P. 764); Barclay v. Waring, 58 Ga. 86.

38. Slingerland v. Slingerland, 109 Minn. 407, 124 N. W. 19.

39. *Ex parte* Marsh, 1 Atk. 159.

40. Barlow's Adm'r v. Comstock's Adm'r, 117 Ky. 573, 25 Ky. Law, 1680, 78 S. W. 475.

41. Ellis v. Ellis, 1 Tenn. Ch. App. 198.

42. Martin v. Collison, 266 Ill. 172, 107 N. E. 257; Stevenson v. Renardet, 83 Miss. 392, 35 So. 576 Mallow v. Easter, Ind. App. 1911, 96 N. E. 174.

43. Yockey v. Marion, 269 Ill. 342, 110 N. E. 34.

44. South Carolina Loan & Trust Co. v. Lawton, 69 S. C. 345, 48 S. E. 282, 104 Am. St. R. 802.

45. Becker v. Becker, 250 Ill. 117, 95 N. E. 70.

46. Goodloe v. Woods, 115 Va. 540, 80 S. E. 108.

vided that if the property was sold the wife should have the proceeds, it was held that she could not enforce the agreement where such proceeds were invested in land and the title taken jointly.[47]

§ 513. Fraud.

Antenuptial settlements are not inherently fraudulent,[48] and in the absence of fraud or unfairness the courts will leave the parties where they place themselves.[49] But they will rigidly scrutinize such agreements and will set them aside if the wife has been overreached or deceived, or has been induced thereto by fraud.[50] The reason for the rule is that while parties are engaged to be married the relation is confidential, and the intended wife is supposed to place confidence in her intended husband.[51]

It has been held that where an antenuptial agreement was made whereby the wife should take a certain proportion of his estate by his will, it was fraud for him to diminish her interest by making large gifts to his sons in his lifetime.[52]

§ 514. Failure to Perform Conditions.

The failure of the husband to observe the conditions on which the wife releases her rights in his estate may entitle her to claim her dower at his death,[53] and conversely may disentitle the husband to rights in her estate granted on the faith of the conditions.[54] A deed executed in consideration of a promise to marry cannot be set aside because the wife failed to comply with certain conditions, in the absence of evidence that she was ever asked to comply with

47. Cantrell v. Cantrell, 178 Ala. 273, 59 So. 652.

48. *In re* Robinson's Estate, 222 Pa. 113, 70 A. 966; *In re* Whitmer's Estate, 224 Pa. 413, 73 A. 551.

49. *In re* Devoe's Estate, 113 Iowa, 4, 84 N. W. 923.

50. *In re* Deller's Estate, 141 Wis. 255, 124 N. W. 278.

51. Martin v. Collison, 266 Ill. 172, 107 N. E. 257; Nesmith v. Platt, 137 Iowa, 292, 114 N. W. 1053.

52. Eaton v. Eaton, 233 Mass. 351, 124 N. E. 37.

53. *In re* Warner's Estate, 6 Cal. App. 361, 92 P. 191; *In re* Warner's Estate, 158 Cal. 441, 111 P. 352.

Where a husband made an antenuptial agreement with his wife to take out a death benefit certificate, naming her as beneficiary, the mere taking out of such certificate, followed by a change of beneficiary, was not a performance. Ryan v. Boston Letter Carriers' Mut. Ben. Ass'n, 222 Mass. 237, 110 N. E. 281.

An antenuptial contract by the husband to take out a fraternal beneficiary certificate in the name of the wife is broken where the husband changes the beneficiary, and, in place of the wife, without her knowledge, makes another the beneficiary. Ryan v. Boston Ltter Carriers', etc., Ass'n, 222 Mass. 237, 110 N. E. 281, L. R. A. 1916C, 1130.

54. Becker v. Becker, 241 Ill. 423, 89 N. E. 737.

them.[55] Where a settlement provided for certain testamentary dispositions to be made by the husband for the wife, it was held to be an implied condition that the wife should not contest a will made in accordance with the agreement.[56]

An antenuptial agreement that an intended wife should receive certain securities on marriage has been held to contemplate her remaining the wife of the intended husband, hence where she divorced him for causes not recognized in New York, where she was married, she was not entitled to the securities.[57]

§ 515. Infancy or Laches.

An antenuptial settlement is voidable by the wife on account of infancy, but the court will restore what has been settled on her, if she still has it.[58] The right of action under a marriage settlement may be lost by laches.[59]

The wife may, like all others, forfeit her rights to a trust for her benefit, by long acquiescence as well as active participation in the unlawful acts of the trustees under the marriage settlement.[60] Thus, where a wife does not in her husband's lifetime avoid a settlement for his failure to perform it, she may be precluded from doing so after his death.[61] Where a wife knows enough of her husband's estate to enable her to act advisedly she cannot after his death set a settlement aside because its provision for her is inadequate.[62]

§ 516. Misconduct of Spouse.

In an early case, Lord Talbot is reported to have said that where marriage articles were pretty much in the nature of a jointure, they were not forfeitable by adultery or an elopement.[63] And upon the strength of this it has been held that marriage articles will be enforced on behalf of the wife, although she be living in a state of adultery.[64] We find no late authority to support this

55. Metz v. Blackburn, 9 Wyo. 481, 65 P. 857.

56. Eaton v. Eaton (Mass.), 124 N. E. 37.

57. New Jersey Title Guaranty & Trust Co. v. Parker (N. J.), 96 A. 574.

58. Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369.

59. Dallas Compress Co. v. Smith (Ala.), 67 So. 289.

60. Jones v. Higgins, L. R. 2 Eq. 538; Stone v. Stone, L. R. 5 Ch. 74.

61. Hammond v. Hammond, 135 Ga. 768, 70 S. E. 588; *In re* Warner's Estate 168 Cal. 771, 145 P. 504.

62. *In re* Whitmer's Estate, 224 Pa. 413, 73 A. 551.

63. Sidney v. Sidney, 3 P. Wms. 275; Seagrave v. Seagrave, 13 Ves. 443.

64. Macq. Hus. & Wife, 263; Buchanan v. Buchanan, 1 Ball & B. 206.

doctrine, and it is doubtful whether such a rule would be enforced at this day.[65] The mere fact that a divorce sought by the wife is refused is not conclusive of her fault so as to prevent her from enforcing a marriage settlement.[66]

Missouri R. S. 1899, §§ 2950-2952, authorize jointure and require election in certain cases, and that if jointure fail the wife shall have proportionate dower, and if she demands dower jointure shall determine. Section 2953 provides that her voluntary desertion and subsequent adultery shall bar her "jointure or dower." Section 2929 provides that in case of divorce the guilty party shall forfeit all marital rights; and § 2947, that if divorced for her fault she shall not be endowed. An antenuptial agreement provided that the wife should receive in lieu of dower a child's part, "that is, * * * shall in any distribution of the property" share with the children of a former wife. To the wife's action the husband's heirs pleaded desertion and adultery followed by divorce. It was held that the agreement conferred an equitable jointure, which, under § 2953, was forfeited, or if that section did not apply, then on general equitable principles the termination of dower under §§ 2929, 2947, by divorce carried the jointure with it.[67]

Cruel and inhuman conduct by the husband, if condoned, does not work a forfeiture of an antenuptial contract.[68]

§ 517. Acts in Pais.

The result of a long array of diffuse, but exceedingly interesting, English equity decisions under this head, appears to have been to establish the following propositions: *First,* that if anyone make a representation to another on which he would reasonably act, the party making the representation is bound thereby, and cannot recede from it; in other words, that a man who, by his deliberate assertion, induces another to enter into obligations, cannot afterwards, by his acts, negative the truth of that assertion.[69] *Second,* that moral obligations in matters of this description are treated in courts of equity as coextensive with legal obligations; and that

65. See Peachey, Mar. Settl. 384; Legard v. Hodges, 4 Bro. C. C. 421, cited by Lord Manners in Buchanan v. Buchanan, 1 Ball & B. 206.

66. Schnepfe v. Schnepfe, 124 Md. 330, 92 A. 891.

67. Leavy v. Cook, 171 Mo. 292, 71 S. W. 182.

68. Fisher v. Koontz, 110 Iowa, 498, 80 N. W. 551; Johnston v. Johnston (Iowa), 166 N. W. 65.

69. Money v. Jorden, 15 Beav. 377; Pulsford v. Richards, 17 Beav. 94.

while vague and ambiguous representations may be made to persons on marriage, which are only morally binding upon the person making them, though creating reasonable expectation and belief of advantage in the minds of the marrying parties; yet, where the matter is clearly and distinctly expressed and, presumably, relied upon, then the legal obligation follows the moral obligation, and the contract will be enforced by the courts.[70]

A settlement may be abandoned where a wife accepts provisions made in lieu of dower in a decree of divorce.[71]

§ 518. Inadequacy of Provision for Wife.

Owing, moreover, to the confidential relation which subsists between the parties, an antenuptial contract which appears to have been unfairly procured will be set aside; and one whose terms are grossly inequitable, especially if involving unreasonable sacrifice of the wife's rights, can only be sustained upon very clear proof of concurrent intent.[72]

Equity, moreover, sometimes refuses to enforce an antenuptial settlement, as between husband and wife, not only because of its fraudulent character as regards the one or the other party, but on the ground that it is improvident. Yet relief of this sort is rarely afforded, and especially so where a third party, or the husband, not the wife, seeks it.[73] And while the intended wife may, perhaps, in an extreme case, be relieved from an antenuptial contract which bears very harshly upon her property rights, as though defrauded and deceived in the arrangement, there is no doubt that where she is of competent age she may bargain away her rights quite extensively under a marriage contract, as her husband likewise could have done; provided, of course, that her deliberate intention to do so be made manifest; and in this state of the law it certainly becomes a matter of serious question what these fundamental property rights may be which spouses ought not reciprocally to relinquish.

Therefore, courts will rigidly scrutinize an apparently unjust antenuptial contract, especially where the wife is deprived thereby of her interest in her husband's estate without provision for her

70. Bold v. Hutchinson, 20 Beav. 259; Peachey, Mar. Settl. 87.

71. Long v. Barton, 236 Ill. 551, 86 N. E. 127; O'Day v. Meadows, 194 Mo. 588, 92 S. W. 637.

72 Pierce v. Pierce, 71 N. Y. 154; Daubenspeck v. Biggs, 71 Ind. 255; Pond v. Skeen, 2 Lea (Tenn.), 126; Russell's Appeal, 75 Pa. 269.

73. Everitt v. Everitt, L. R. 10 Eq. 405; Dillaye v. Greenough, 45 N. Y. 438.

if she survives,[74] and if there is gross disproportion between the provision made for the wife and the rights in her husband's estate which she surrenders the law will raise a presumption that there was fraudulent concealment, which will avoid the settlement unless those profiting by the settlement rebut the presumption.[75]

It has been held otherwise where no marriage engagement raising a fiduciary relation existed at the time the contract was made.[76] In such case the wife has the burden of showing a marriage engagement sufficient to raise the duty to disclose.[77] To do so it must appear that at the time of executing the agreement the wife

74. Fisher v. Koontz, 110 Iowa, 498, 80 N. W. 551; *In re* Enyart's Estate (Neb.), 160 N. W. 120; Scott v. Watson, 75 Wash. 610, 135 P. 643; Bibelhausen v. Bibelhausen, 159 Wis. 365, 150 N. W. 516.

75. Barker v. Barker, 126 Ala. 503, 28 So. 587; Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369; *In re* Warner's Estate, 6 Cal. App. 361, 92 P. 191; Mines v. Phee, 254 Ill. 60, 98 N. E. 260; Warner v. Warner, 235 Ill. 448, 85 N. E. 630; Landes v. Landes, 268 Ill. 11, 108 N. E. 691; Hessick v. Hessick, 169 Ill. 486, 48 N. E. 712; Wetsel v. Firebaugh, 258 Ill. 404, 101 N. E. 602; Friebe v. Elder (Ind.), 103 N. E. 429 (affd., 181 Ind. 597, 105 N. E. 151); Rankin v. Shiereck (Iowa), 147 N. W. 180; Nesmith v. Platt, 137 Iowa, 292, 114 N. W. 1053; Fisher v. Koontz, 110 Iowo, 498, 80 N. W. 551; Tilton v. Tilton, 130 Ky. 281, 113 S. W. 134; Daniels v. Banister, 146 Ky. 48, 141 S. W. 393; Fish v. Fish (Ky.), 212 S. W. 586; Stephens v. Stephens (Ky.), 205 S. W. 573; Gaines v. Gaines' Adm'r, 163 Ky. 260, 173 S. W. 774; Maze's Ex'rs v. Maze, 30 Ky. Law, 679, 99 S. W. 336; Watson v. Watson (Kan.), 180 P. 242; Casey v. Casey, 84 Kan. 380, 113 P. 1047; Collins v. Collins, 212 Mass. 131, 98 N. E. 588; Slingerland v. Slingerland, 115 Minn. 270, 132 N. W. 326; *In re* Appleby's Estate, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 590; Donaldson v. Donaldson, 249 Mo. 228, 155 S. W. 791; *In re* Enyart's Estate (Neb.), 160 N. W. 120; Curtis v. Crossley, 59 N. J. Eq. 358, 45 A. 905; Green v. Crane, 57 App. Div. 9, 68 N. Y. S. 248; *In re* Warner's Estate, 210 Pa. 431, 59 A. 1113; *In re* Warner's Estate, 207 Pa. 580, 57 A. 35, 99 Am. St. R. 804; *In re* Haberman's Estate, 239 Pa. 10, 86 A. 641; *In re* Mauk's Estate, 19 Pa. Super. 338; *In re* Yost's Estate, 23 Pa. Super. 183; Bramer v. Bramer (W. Va.), 99 S. E. 329; Ellis v. Ellis, 1 Tenn. Ch. App. 198; Bibelhausen v. Bibelhausen, 159 Wis. 365, 150 N. W. 516; *In re* Malchow's Estate (Minn.), 172 N. W. 915; Way v. Union Cent. Life Ins. Co., 61 S. C. 501, 39 S. E. 742.

In New Jersey, where the wife takes no interest in the husband's personalty at his death, the question of proportion must be determined by a comparison between the provision made for the wife by the contract and her statutory dower in the husband's real estate. Russell v. Russell, 60 N. J. Eq. 282, 47 A. 37 (affd., 63 N. J. Eq. 282, 49 A. 1081).

An honest underestimate by the husband of the size of his estate will not amount to a fraud. *In re* Birkbeck's Estate, 215 Pa. 323, 64 A. 536.

76. Martin v. Collison, 266 Ill. 172, 107 N. E. 257.

77. Yockey v. Marion, 269 Ill. 342, 110 N. E. 34; Mann v. Mann, 270 Ill. 83, 110 N. E. 345. A recital in a settlement that it is made in contemplation of marriage has been held

fully knew of the nature and value of the husband's estate, or that she ought reasonably to have known them.[78] The evidence in rebuttal must be strong.[79]

In passing on the adequacy of the provision for the wife in view of the size of the husband's estate, the court will consider the relationship of the parties, the known estate of each and the conditions under which the contract was executed.[80] The rule is not affected by the fact that the wife was born and reared in a log house, with the usual accessories of such a home, or that the wife has negro blood.[81] As a general rule knowledge of the husband's circumstances will be inferred where the facts warrant it,[82] but the fact that the wife knows in a general way that the husband is reputed wealthy is not sufficient.[83]

Where the wife was expressly informed that she would take less under the contract than under the statute, it was held that the presumption was rebutted.[84] If a settlement is avoided for inadequacy of provision the court will restore what has been settled on the wife, if she still has it.[85]

§ 519. Rights of Creditors.

The consideration of marriage will support a settlement against creditors, even prior ones; this, too, it would appear, though the

not equivalent to an assertion of an engagement to marry. Yockey v. Marion, 269 Ill. 342, 110 N. E. 34.

78. Warner v. Warner, 235 Ill. 448, 85 N. E. 630; Yockey v. Marion, 269 Ill. 342, 110 N. E. 34; Murdock v. Murdock, 219 Ill. 123, 76 N. E. 57; Cox v. Cox (Iowa), 163 N. W. 388; Gordon v. Munn, 87 Kan. 624, 125 P. 1 (reh. den., 88 Kan. 72, 127 P. 764); Simpson's Ex'rs, 94 Ky. 586, 15 Ky. Law, 353, 23 S. W. 361; Stratton v. Wilson, 170 Ky. 61, 185 S. W. 522; Brown v. Brown's Adm'r, 25 Ky. Law, 2264, 80 S. W. 470.

Where the property was a farm, the fact that the wife had had an interest in farm property in the same vicinity has been held to tend to show that she had some knowledge of the value of the farm in question. Colbert v. Rings, 231 Ill. 404, 83 N. E. 274.

79. Simpson v. Simpson's Ex'rs, 94 Ky. 586, 15 Ky. Law, 353, 23 S. W. 361.

80. *In re* Mauk's Estate, 19 Pa. Super. 338. In determining the reasonableness of an antenuptial contract by which the wife released her rights in her husband's property, the court may consider the adequacy of provision for the wife, the means and ages of the parties, and the wife's understanding of the meaning of the contract. Tilton v. Tilton, 130 Ky. 281, 113 S. W. 134.

81. Warner v. Warner, 235 Ill. 448, 85 N. E. 630.

82. Warner v. Warner, 235 Ill. 448, 85 N. E. 630.

83. Hessick v. Hessick, 169 Ill. 486, 48 N. E. 712; *In re* Enyart's Estate (Neb.), 160 N. W. 120.

84. Yarde v. Yarde, 187 Ill. 636, 58 N. E. 600; Koch v. Koch, 126 Mich. 187, 7 Det. Leg. N. 758.

85. Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369.

parties both knew of the husband's indebtedness, so long as the provisions of the settlement are not grossly out of proportion to his station and circumstances;[86] and so, too, where the party to be benefited thereby was implicated in no fraud upon the other's creditors, even though that provision be unreasonably large.[87] But if it appear that the celebration of marriage is part of a scheme between the marrying parties to defraud and delay creditors, such settlement will not be allowed to protect the property against just claims of the latter.[88] Where fraud has been com-

86. Sallaske v. Fletcher, 73 Wash. 593, 132 Pac. 648, 47 L. R. A. (N. S.) 320; Campion v. Cotton, 17 Ves. 272; *Ex parte* McBurnie, 1 De G. M. & G. 446; Ramsay v. Richardson, Riley Ch. 271; Armfield v. Armfield, 1 Freem. Ch. 311; Jones's Appeal, 62 Pa. 324; Brunnel v. Witherow, 29 Ind. 123; Barrow v. Barrow, 2 Dick. (N. J.) 504; Cochran v. McBeath, 1 Del. Ch. 187; Credle v. Carrawan, 44 N. C. 422.

87. Where no fraud upon the husband's creditors can be charged on the woman, she may hold as a purchaser for value against the husband's prior creditors, even though the sttlement upon her embraced the husband's whole estate, and the marrying parties had been cohabiting while single, and had illegitimate children. Herring v. Wickham, 29 Gratt. (Va.) 628. This is an extreme case, and perhaps some other States would not extend the rule so far. But it finds strong support from the Supreme Court of the United State in a case decided in 1881, which upheld the settlement of a large amount of real estate, in consideration of marriage, by an insolvent debtor upon the woman who accepted him, notwithstanding the latter knew he was financially embarrassed. Prewit v. Wilson, 103 U. S. 22. The court, relying upon its belief that the woman, nevertheless, did not know of the man's insolvency, and did not participate in his fraudulent intent upon his creditors, asserted very strenuously, by Mr. Justice Field, the high value of marriage as a consideration for such a conveyance. But, it might be asked, is it not straining a point, as to the sanctity and immutability of the marriage union, to imagine woman as bargaining her person literally for the sake of a certain piece of property? Admitting marriage to be a consideration of the highest value, and one which cannot be recalled on failure of such a bargain, ought mere mercenary considerations to control when such contracts ought to be for better or for worse, for love and personal esteem, and not money alone? It may be allowed that prior creditors cannot attack a deed executed for valuable consideration without knowledge by the grantee of the grantor's fraudulent intent; and yet why fraudulent knowledge should not be inferred from facts tending to establish it in all cases, or why "the clearest proof of the wife's participation" should be required, seems, apart from positive and final decision, a fair subject for legal disputation. Where the intended wife was a foreigner, who understood the English language imperfectly, the settlement was held good upon her and her children, notwithstanding the husband's insolvency and false recitals in the deed, her own ignorance of the fraud being shown. Kevan v. Crawford, 6 Ch. D. 29.

88. Columbine v. Penhall, 1 Sm. & Gif. 228; Goldsmith v. Russell, 5 De G. M. & G. 555; Peachey. Mar. Settl. 63; Simpson v. Graves, Riley Ch. 232.

mitted by husband and wife in reference to property embraced in the terms of a settlement, the rights of a creditor with insufficient notice are sometimes upheld as against themselves; and a wife's settlement of her own property has been so far set aside as to secure payment of her antenuptial debt to the creditor.[89] Under a settlement reserving the right of the wife to her separate property for life, with power to dispose of it as though *sole,* it was held that the portion remaining at her death was subject to her debts.[90]

89. Sharpe v. Foy, L. R. 4 Ch. 35; Smith v. Chirrell, L. R. 4 Eq. 390; Chubb v. Stretch, L. R. 9 Eq. 555; Obermayer v. Greenleaf, 42 Miss. 304; Brame v. McGee, 46 Ala. 170.

90. Stevenson v. Renardet, 83 Miss. 392, 35 So. 576; South Carolina Loan & Trust Co. v. Lawton, 69 S. C. 345, 48 S. E. 282, 104 Am. St. R. 802.

CHAPTER XXIV.

POSTNUPTIAL SETTLEMENTS.

§ 520. General Considerations.

But though, for want of consideration, postnuptial settlements are deemed voluntary, yet, like other voluntary transactions, they will be valid and binding, so far as the parties are concerned, and can only be impeached as fraudulent upon others. Postnuptial settlements, therefore, must be viewed in two different aspects: (1) as between the married parties and the creditor or purchasers of either; (2) as between husband and wife themselves.

§ 521. Antenuptial Settlements Distinguished.

The important distinction between settlements before and settlements after marriage is that, while the former have the marriage consideration to support them, the latter are without it.[91] The term "postnuptial settlements," then, must not confuse the reader's mind. We use the language of the text-writers without meaning to imply that it is appropriate, or that antenuptial and postnuptial settlements constitute two branches of one general subject. On the contrary, postnuptial settlements are usually nothing more nor less than gifts of real or personal property, or of both, between husband and wife, which equity places, notwithstanding the disabilities of coverture, upon the footing of other gifts.[92]

Furthermore, it should be remembered that formal settlements

91. Lannoy v. Duke of Athol, 2 Atk. 448.

92. "Gift" in the more technical sense concerns personal property, but we use the word here in its wider sense. 2 Schoul. Pers. Prop. 55.

made between parties in the marriage state, in pursuance of articles or memoranda signed before marriage, are not technically postnuptial settlements (as the name itself would seem to indicate); for the settlement relates back to the antenuptial stipulations, however loosely these may have been drawn up, and it is protected by the marriage consideration like all other antenuptial contracts.

§ 522. Necessity of Trustee.

The common-law requirement that trustees shall intervene in conveyances or transfers between husband and wife no longer prevails to any great extent, in England or the United States, as a doctrine of equity.[93] But trustees are always desirable; and in some States it is a rule that the husband and wife can only contract with one another through the intervention of third persons.[94] This passes a legal estate in any event, and permits of suits relative to the property with more freedom; for it should still be remembered that suits at law between husband and wife are discountenanced at the common law; and their gifts and contracts generally. The insolvency of a trustee does not impair the validity of such a transfer to him on a wife's behalf.[95]

§ 523. Validity and Requisites in General.

Postnuptial contracts will be scrutinized by courts to prevent unjust advantages, and slight misrepresentation will avoid them.[96] Such contracts are not against public policy, unless made in contemplation of living apart.[97] Such a settlement providing that a wife should take no part of her husband's estate at his death has been held not binding.[98] Voluntary settlements may become valid by matter *ex post facto*.[99]

93. Jones v. Clifton, 101 U. S. 225; Baddeley v. Baddeley, 26 W. R. 850; Thomas v. Harkness, 13 Bush (Ky.) 23.

94. McMulen v. McMulen, 10 Iowa, 412; Johnston v. Johnston, 1 Grant, 468; Pike v. Baker, 53 Ill. 163.

95. Rowland v. Plummer, 50 Ala. 182.

96. Keith v. Keith, 37 S. D. 132, 156 N. W. 910.

97. Newberry v. Newberry, 114 Iowa, 704, 87 N. W. 658; Boyd v. Boyd, 188 Ill. App. 136. In Illinois it is held that a written postnuptial contract on a valuable consideration will effectively release to a husband his wife's rights in his estate, and extinguish her rights as his widow, even if they are living apart. Stokes v. Stokes, 240 Ill. 330, 88 N. E. 829.

98. Dudley v. Pigg, 149 Ind. 363, 48 N. E. 642; Engleman v. Deal, 14 Tex. Civ. 1, 37 S. W. 652. To the same effect see Scott v. Watson, 75 Wash. 610, 135 P. 643.

99. Peachey, Mar. Settl. 236; Prodgers v. Langham, 1 Sid. 133; Brown v. Carter, 5 Ves. 877.

In this country, as also in England, a voluntary settlement by husband upon the wife may become valid by matter subsequently arising.[1] Statutory requirements, such as registry or acknowledgment, are found to affect postnuptial transactions in local practice.[2] To avoid a postnuptial settlement for duress practiced on the wife the acts relied on as duress must so operate on her mind as to render her acts not voluntary.[3] Improper conduct by the wife after the execution of a postnuptial agreement does not affect its validity except to explain her previous acts.[4] A postnuptial settlement made with full knowledge of the facts will not be set aside for her mistake of law in thinking she could break it.[5]

The Iowa statute providing that neither spouse shall take any interest in the property of the other which may be the subject of contract between them does not prevent a postnuptial settlement cancelling one made before marriage and which restores her marital property rights.[6] Where a wife dismisses a divorce proceeding in view of a postnuptial settlement which conveys certain property to her, but does not provide that she shall not seek divorce again, the husband cannot avoid the agreement for breach of condition subsequent where he did not defend such second divorce proceeding.[7] A contract whereby a wife who was separated from her husband released her dower, which did not mention the fact of separation, has been held not affected by a resumption of marital relations.[8] A postnuptial judicial settlement of property of a wife in the custody of the court may be amended in equity at the suit of a married woman notwithstanding her infancy or coverture.[9]

1. 4 Kent, Com. 463; Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261; Huston v. Cantrill, 11 Leigh (Va.) 136.

2. As where a pecuniary provision is made the wife in lieu of dower. Randles v. Randles, 63 Ind. 93. And see Brookbank v. Kennard, 41 Ind. 339.

A man's transaction with a woman may be so carried out that, as against creditors, part may be sustained as antenuptial, and part fail as postnuptial and voluntary. Zimmerman v. Heinrichs, 43 Iowa, 260.

3. Mitchell v. Mitchell, 267 Ill. 244, 108 N. E. 298.

4. Krug v. Krug, 81 Wish. 461, 162 P. 1136.

5. Crumlish v. Security Trust & Safe Deposit Co., 8 Del. Ch. 375, 68 A. 388.

The absence of a power of revocation in a settlement made by a married woman is not evidence in itself of mistake authorizing the setting aside of the settlement. Crumlish v. Security Trust & Safe Deposit Co., 8 Del. Ch. 375, 68 A. 388.

6. Fisher v. Koontz, 110 Iowa, 498, 80 N. W. 551; *In re* Devoe's Estate, 113 Ia. 4, 84 N. W. 923.

7. Moore v. Martin, 233 Ill. 512, 84 N. E. 630.

8. Stokes v. Stokes, 240 Ill. 330, 88 N. E. 829.

9. Brown v. Wadsworth, 168 N. Y. 225, 61 N. E. 250.

§ 524. Consideration.

A parol promise or agreement in consideration of marriage being void, being within the Statute of Frauds, such promise will not support a postnuptial settlement,[10] but an existing marriage relation is a sufficient consideration to support a postnuptial settlement,[11] even without a separation.[12]

A wife's relinquishment of either certain or contingent interests in her husband's estate will support a postnuptial settlement where there is no badge of fraud.[13] In Indiana it is held that marriage is not a consideration for a postnuptial settlement.[14] In Missouri it is held that such contracts must be supported by a valuable consideration.[15]

§ 525. Property Subject to Claims of Creditors.

The property which may be recovered by creditors does not embrace property which is exempt from execution; for the creditors have no concern with anything except assets, actual or possible, for the payment of their debts.[16] This was formerly a matter of dispute; but it is now apparently set at rest.

§ 526. Construction.

In the construction of a postnuptial settlement, made in due form, questions of interpretation may of course arise, such as are common to all marriage settlements,[17] and the rectification of mistakes may likewise be invoked in a court of chancery.[18]

The usual presumption of chancery is that the postnuptial conveyance of land, or transfer of money to the wife by way of gift, is intended as an advancement for her benefit; and where the name of a third person is also used, that person becomes presum-

10. London v. G. L. Anderson Brass Works, 197 Ala. 16, 72 So. 359.

11. Indiana Match Co. v. Kirk, 118 Ill. App. 102; Eberhart v. Rath, 89 Kan. 329, 131 P. 604; Harrison v. Harrison, 146 Ky. 631, 143 S. W. 40; Banner v. Banner, 184 Mo. App. 396, 171 S. W. 2; Walt v. Walt, 113 Tenn. 189, 81 S. W. 228; Sawyer v. Churchill, 77 Vt. 273, 59 A. 1014, 107 Am. St. Rep. 762; *In re* Irwin, 73 Law J. Ch. 832 (1904), 2 Ch. 752, 53 Wkly. Rep. 200; Irwin v. Parks, *Id.*

12. Harrison v. Harrison (Mo.), 211 S. W. 708.

13. De Farges v. Ryland, 87 Va. 404, 12 S. E. 805, 24 Am. St. R. 659; Beverlin v. Casto, 62 W. Va. 158, 57 S. E. 411.

14. Clow v. Brown, 37 Ind. App. 172, 72 N. E. 534; Unger v. Mellinger, 37 Ind. App. 639, 77 N. E. 814, 117 Am. St. R. 348.

15. Egger v. Egger, 225 Mo. 116, 123 S. W. 928.

16. Peachey, Mar. Settl. 199 *et seq.*; 1 Story Eq. Juris., § 410. See 2 Kent, Com. 443, *n.*, 12th ed.

17. *Re* Mackenzie, L. R. 6 Eq. 210.

18. Hanley v. Pearson, L. R. 13 Ch. D. 545.

ably her trustee.[19] But such presumptions may be repelled upon due proof.[20]

§ 527. Settlements in Fraud of Creditors; Statutes of Elizabeth.

There are two English statutes which control this subject, as concerns creditors and purchasers, to a great extent, wherever the husband makes a postnuptial settlement upon his wife and offspring. The first is that of 13 Eliz., c. 5, in favor of creditors; the second that of 27 Eliz., c. 4, in favor of purchasers; the one being directed against fraudulent conveyances of all property with intent to defeat or delay creditors; the other against fraudulent or voluntary conveyances of lands designed to defeat subsequent purchasers. These statutes, Lord Mansfield said, cannot receive too liberal a construction or be too much extended in suppression of fraud.[21]

Settlements as concerns the right of creditors and purchasers are affected by the statute of 27 Eliz., c. 4. This statute, too, is to be considered as part of the common law brought to this country by our ancestors; though not generally adopted here to the full extent of the English equity decisions.[22] It provides that all conveyances of lands, made with the intent to defraud and receive purchasers, shall, as against them, be utterly void. The statute has no application whatever to personal estate.[23]

The language of the statutes in some States contributes to the confusion which prevails as to the correct legal doctrine on this whole subject. Furthermore, our registry system places the law on a somewhat different footing from that prevalent in England, in all settlements, as we noticed elsewhere.[24]

§ 528. Effect of Bankruptcy Acts.

Voluntary settlements, in England, are likewise affected by the bankrupt acts, which are intimately connected with the statute of Elizabeth.[25] Here questions arise as to what acts amount to a contemplation of bankruptcy; and what constitutes a fraudulent preference; and these we need not here discuss. But it should be observed that the husband cannot bestow his property upon his

19. *Re* Eykyn's Trusts, L. R. 6 Ch. D. 115.

20. Darrier v. Darrier, 58 Mo. 222.

21. Cadogan v. Kennett, Cowp. 434; Peachey, Mar. Settl. 189.

22. 4 Kent Com. 463.

23. Sugden Vend. & Purch. 587, 13th ed.; Peachey, Mar. Settl. 226; 4 Kent Com. 463.

24. *Supra* (N. Y., § 5, antenptial settlements).

25. Peachey, Mar. Settl. 210 *et seq.*

wife, conditional upon his future bankruptcy or insolvency; yet, that third persons may, by voluntary conveyance, settle property to the wife's separate use, free from all control of her husband; or in trust to pay the income to the husband for life, "or until he should become a bankrupt," and after that, to the wife's separate use.[26] In the former case the transaction would be simply an artifice of the husband to evade the bankrupt laws; in the latter, a third person parts with his own property, and makes his own terms as to its final disposition, as he has a right to do.[27]

The Bankruptcy Act of 1867 also affected the doctrine of fraudulent conveyances in the United States. And under that act, the gift of all a debtor's property to his wife, if not more subtle contrivances for evading creditors as well, has been treated as constituting an act of bankruptcy.[28] With the repeal of the act, this whole subject became regulated by State insolvent laws, which are far from uniform in their scope and purpose. As to artifices by a husband for keeping his own property under his own control, subject to its divestment in his wife's favor upon his bankruptcy, the American rule, like the English, discountenances them.[29]

§ 529. As Against Subsequent Creditors.

But a voluntary deed is good as against subsequent creditors; and there can be nothing inequitable in a man's making a voluntary conveyance to a wife, child, or even a stranger, if it be not at the time prejudicial to the rights of third persons, or in furtherance of some design of future fraud or injury to them.[30]

The question of the husband's indebtedness, as affecting his postnuptial settlement, is not, however, as free from difficulty as it might appear at first sight. Concerning creditors existing at the time of the settlement, the settlement may be void under the statute; but not because the husband has creditors; for who goes through life without being indebted at all? It will be void, how-

26. Manning v. Chambers, 1 De G. & Sm. 282; Sharp v. Cosserat, 20 Beav. 473.

27. The setlement by a trader of all his property, both present and future, in trust for his wife's separate use, with remainder for himself for life, and remainder for his children, reserving the control of the stock in trade to himself, is likewise void as to creditors in bankruptcy. Ware v. Gardner, L. R. 7 Eq. 317. See also *Re* Pearson, 3 Ch. D. 807.

28. *Re* Alexander, 1 Lowell (U. S.) 470. And see *Re* Jones, 6 Biss. (U. S.) 68.

29. Levering v. Heighe, 2 Md. Ch. 81; Head v. Halford, 5 Rich. Eq. (S. C.) 128; Peigne v. Snowden, 1 Desaus. (S. C.), 591.

30. Holloway v. Millard, 1 Madd. 414; Peachey, Mar. Settl. 192.

ever, when he is so far indebted, and his debts are so considerable in amount, as to render him likely to be insolvent. Probabilities are sufficient to meet this case; and if existing creditors wish to set the conveyance aside, they need only show that at the date of the instrument he was indebted to such an extent that having regard to his property, the effect might be to delay, hinder, and defraud them.[31]

§ 530. Effect of Payment of Valuable Consideration by Spouse.

If husband and wife may transfer property to one another without consideration, still more may they do so where the consideration is valuable. All such provisions, even if made without the intervention of a trustee, though void in law (independently of suitable Married Women's Acts), may be enforced in equity if fairly made between the parties, and with no fraudulent intent upon others concerned,[32] a rule which, with particular force, sustains an indebted husband's provision in his wife's favor, wholly or partially executed. The mutual contracts of the spouses for a transfer, where there is a *bona fide* and valuable consideration, may be specifically enforced in equity upon proof that the agreement has been executed by one party, and not by the other. Thus a husband and wife agreed, by parol, that he should purchase a lot of land in her name, and build a house thereon, and be reimbursed from the proceeds of the sale of another house belonging to her. The husband having executed the agreement on his part, the wife died suddenly, before the sale of her former house could be effected. She left

31. Jenkyn v. Vaughan, 3 Drew. 424; Turnley v. Hooper, 2 Jur. (N. S.) 1081.

32. See Crouse v. Morse, 49 Iowa, 382.

The husband's note or bond to pay money in consideration that his wife would live with him is not on good consideration. Roberts v. Frisby, 38 Tex. 219; Ximines v. Smith, 39 Tex. 49. Cf. Kehr v. Smith, 20 Wall. (U. S.) 31. Nor prior advances to the wife disconnected with the settlement, and made without expectation of repayment. Perkins v. Perkins, 1 Tenn. Ch. 537. But where the wife advances money to her husband as his creditor, or the latter is indebted to her upon any valid consideration, a fair conveyance or transfer may be made to adjust or secure such liability. Kesner v. Trigg, 98 U. S. 50; Clough v. Russell, 55 N. H. 279; Sims v. Rickets, 35 Ind. 181; Booker v. Worrill, 55 Ga. 332; Kaufman v. Whitney, 50 Miss. 103; Greer v. Greer, 24 Kan. 101; Rowland v. Plummer, 50 Ala. 182; Barclay v. Plant, 50 Ala. 509; Jordan v. White, 38 Mich. 253; Lehman v. Levy, 30 La. Ann. 745. Releases of dower in husband's lands may furnish consideration; Sykes v. Chadwick, 18 Wall. (U. S.) 141 (a statute case).

As to transfers out of all proportion to the consideration, and apparently fraudulent, see Kelley v. Case, 18 Hun (N. Y.), 472; Warren v. Ranney, 50 Vt. 653.

infant children. It was decreed in equity that the agreement should be carried into effect, the former house sold, a conveyance thereof executed by the infants, by their guardian *ad litem,* and the husband be reimbursed out of the proceeds of the sale.[33]

But the mere fact that the husband has received property in right of the wife cannot constitute a valuable consideration by relation, to support a settlement upon her some years afterwards; and this, on the general principle applicable to contracts.[34] Nor can an antenuptial settlement, once extinguished by the agreement of all parties concerned, be revived for such purpose.[35]

In no case should contracts in derogation of the husband's property rights rest on slight proof; the relation of debtor and creditor should be distinctly shown.[36]

There are instances in which a postnuptial settlement has been sustained against creditors and purchasers on the ground that a valuable consideration is interposed. Thus, Lord Hardwicke has said, "If, after marriage, the father of the wife, or other person, in consideration of the husband making a settlement, advance a sum of money, such a settlement will be good and for a valuable consideration. And though the money be not paid at the time, yet if it be sufficiently secured, the settlement will stand.[37] The rule is general that where any marriage settlement is for a valuable consideration, it cannot be avoided as fraudulent upon the creditors, unless both husband and wife were cognizant of the fraud; her position here being the usual one of *bona fide* purchaser for value.[38] And in numerous instances, the equity courts of various States have sustained a postnuptial gift or transaction in the wife's favor and against the husband's creditors, on the ground that a valuable consideration was interposed.[39] The primary

33. Livingston v. Livingston, 2 Johns. Ch. (N. Y.) 537. And see Bowie v. Stonestreet, 6 Ind. 418; Jones v. Jones, 18 Md. 464; Steadman v. Wilbur, 7 R. I. 481; Peiffer v. Lytle, 58 (Pa.) 386. Cf. O'Hara v. Dilworth, 72 (Pa.) 397.

34. Lyne v. Bank of Kentucky, 5 J. J. Marsh. (Ky.) 545.

35. Harper v. Scott, 12 Ga. 125.

36. See Steadman v. Wilber, 7 R. I. 481; Tripner v. Abrahams, 47 (Pa.) 220; Wales v. Newbould, 9 Mich. 45.

37. Wheeler v. Caryl, Ambl. 121. See further, Macq. Hus. & Wife, 277; Cottle v. Tripp, 2 Vern, 220; Ward v. Shallet, 2 Ves. Sen. 17; Lavender v. Blackstone, 2 Lev. 147; Arundell v. Phipps, 10 Ves. 140.

38. Magniac v. Thompson, 7 Pet. (U. S.) 348; 4 Kent. Com. 463. The connection between prior and subsequent, so as to sustain the consideration, should be shown. Cheatham v. Hess, 2 Tenn. Ch. 763.

39. As where the husband has transferred property to his wife in consideration of payment from her separate

issues, in short, in all such cases, are whether the indebtedness of husband to wife, or the consideration passing from the latter, was

estate. Simmons v. McElwain, 26 Barb. (N. Y.) 420; Bullard v. Briggs, 7 Pick. (Mass.) 533; Ready v. Bragg, 1 Head (Tenn.), 511. And see Teller v. Bishop, 8 Minn. 226; Butterfield v. Stanton, 44 Miss. 15; Randall v. Lunt, 51 Me. 246; Reich v. Reich, 26 Minn. 97; Mix v. Andes Ins. Co., 16 N. Y. 397. And where he conveys what her equity entitles her to claim. Poindexter v. Jeffries, 15 Gratt. (Va.) 363. And where he has appropriated a like amount of his wife's property without her consent. Wiley v. Grey, 36 Miss. 510. So where the wife pays her husband's debts from her separate earnings. Dygert v. Remerschneider, 39 Barb. (N. Y.) 417. Or releases her dower or homestead. Unger v. Price, 9 Md. 552; Randall v. Randall, 37 Mich. 563; Randles v. Randles, 63 Ind. 93; Nalle v. Liveily, 15 Fla. 130; Payne v. Hutcheson, 32 Gratt. (Va.) 812; Garlick v. Strong, 3 Paige (N. Y.) 440; Hale v. Plummer, 6 Ind. 121; Andrews v. Andrews, 28 Ala. 432. Or, in general, releases her interest in his property. Davis v. Davis, 25 Gratt. (Va.) 587. Or advances money to the husband to buy land, even though it be conditioned upon paying and securing the money to her children. Goff v. Rogers, 71 Ind. 459. Or where the husband is indebted to her for rents collected from her separate real estate. Barker v. Morrill, 55 Ga. 332; Kaufman v. Whitney, 50 Miss. 103. Or upon any debt due her. French v. Motley, 63 Me. 326; Brigham v. Fawcett, 42 Mich. 542; Lahr's Apepal, 90 Pa. 507. Or a claim, generally, which grows out of the husband's appropriation of his wife's separate estate, if founded on an agreement to refund. Odend'hal v. Devlin, 48 Md. 439. See also Johnston v. Gill, 27 Gratt. (Va.) 587; Thompson v. Feagin, 60 Ga. 82; Bedell's Appeal, 87 (Pa.) 510. But not a claim for the husband's mere appropriation, without any such agreement to refund. Clark v. Rosenkrans, 31 N. J. Eq. 665. See also Rose v. Brown, 11 W. Va. 122.

Priority considered of a mortgage given by husband and wife in trust for the wife, to secure to her money loaned by her from her separate estate. McFarland v. Gilchrist, 25 N. J. Eq. 487. In States which permit a preference of creditors the husband is permitted to prefer his wife, if she be his creditor. Jordan v. White, 38 Mich. 253. And see Wood v. Warden, 20 Ohio, 518. Some of the later decisions speak of a "reasonable provision" made for the wife by the husband while in prosperous circumstances. Babcock v. Eckler, 24 N. Y. 628; Townsend v. Maynard, 45 Pa. 198. And the wife's relinquishment of her equity to a *chose in action* constitutes a valuable consideration, even perhaps for his settlement of the whole *chose* upon her. Bradford v. Goldsborough, 15 Ala. 311; Barron v. Barron, 24 Vt. 375.

But where the consideration advanced by the wife is inadequate, equity will never sustain the settlement further than to secure the repayment thereof, and not always even to this extent; especially if she be privy, with her husband, to a fraud upon others. Herchfeldt v. George, 6 Mich. 456; Skillman v. Skillman, 2 Beasl. 403; Farmers' Bank v. Long, 7 Bush, 337; Den v. York, 13 Ired. (N. C.) 206; Pusey v. Harper, 27 Pa. 469; 2 Kent Com. 174; William & Mary College v. Powell, 12 Gratt. (Va.), 372. And a settlement of all or the greater part of the husband's property upon the wife, on the plea of a reasonable provision for her support, is not sustainable in equity. Coates v. Gerlach, 44 Pa. 43. A settlement by a husband on his wife, in consideration of her services, is voluntary merely, apart from statutes which

bona fide, and whether there was fraud or no fraud intended in the transaction; and these issues are usually for a jury to determine.

Mere suspicions arising from the relation of husband and wife will not disturb a settlement upon her as for value received.[40] But, of course, where there is consideration for the settlement claimed on her part, so that her position is that of *bona fide* purchaser, so to speak, her innocence or complicity in the fraud becomes a material issue.

The wife's complicity in a fraud upon antecedent creditors may impair her own claims.[41] But even though the transaction were not fully sustained as to pre-existing creditors, the inclination is to protect her to the extent of her own consideration, and place her *in statu quo* as far as posible.[42]

§ 531. Effect of Intent of Settler.

The question of fraudulent intent is the real point at issue. And as to fraud upon future creditors, it has been said that while an instrument might be executed with the purpose of defrauding them, it is not a thing very likely to happen.[43] But cases of this sort are not impossible. Thus a person might make a voluntary settlement upon his wife and children, raising enough

change the common law. Belford v. Crane, 1 C. E. Green (N. J.), 265. And see Keith v. Woombell, 8 Pick. (Mass.) 211.

40. French v. Motley, 63 Me. 326. The fact that the debt from husband to wife which formed the consideration was barred by limitations, is not conclusive against the wife's rights. *Ib.*

41. Annin v. Annin, 24 N. J. Eq. 184; Phelps v. Morrison, *ib.* 195.

42. Hinkle v. Wilson, 53 Md. 287; Davis v. Davis, 25 Gratt. (Va.) 587.

43. Jenkyn v. Vaughan, 25 L. J. Eq. 339.

"Fraud," observes Mr. Justice Swayne in a recent case, "is always a question of fact with reference to the intention of the grantor. Where there is no fraud, there is no infirmity in the deed. Every case depends upon its circumstances and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test." Lloyd v. Fulton, 91 U. S. 479. In this case it was held that the husband's prior indebtedness, apart from insolvency, &c., was only presumptive and not conclusive proof of fraud, and that the presumption was open to explanation. And see Patrick v. Patrick, 77 Ill. 555; Booker v. Worrill, 55 Ga. 332; Kaufman v. Whitney, 50 Miss. 103. Yet transfers to the wife of an insolvent debtor, and even purchases by her, are justly regarded with suspicion; and consideration from her separate estate must be established by affirmative proof. Seitz v. Mitchell, 94 U. S. 580; Kehr v. Smith, 20 Wall. (U. S.) 31.

The husband's possession of his wife's property is not a badge of fraud. Barncord v. Kuhn, 36 Pa. 383. Nor are his representations of ownership, as it would appear, sufficient to charge such property for his debts, unless deceitful and calculated to mislead the public. Lyman v. Cessford, 15 Ia. 229.

cash to pay off existing creditors, and leaving those who advanced the cash without the means of securing their reimbursement.[44] Doubtless such a transaction is to be set aside as fraudulent.[45] The question is not that of actual insolvency, but the intention to defraud.[46] Appropriation of the wife's property, as though in assertion of a husband's marital rights, is, however, a suspicious circumstance, no agreement to refund having passed,[47] and so is a sale by husband to wife without delivery,[48] or a provision out of all reasonable proportion to the alleged consideration.[49]

§ 532. Rights of Bona Fide Purchasers; English Doctrine.

As to the statute of 13 Eliz., c. 5, it is held that, if a man who is indebted conveys property for the use of his wife and children, or in trust for their benefit, such a conveyance is subject to the statute prohibition, inasmuch as the consideration, although good between the parties themselves, is not *bona fide* as regards creditors.[50]

The English doctrine is that a voluntary conveyance, though for a meritorious purpose, shall be deemed to have been made with fraudulent views, and must be set aside in favor of a subsequent purchaser for a valuable consideration, even though he had notice of the prior deed.[51] In other words, while the statute of 13 Eliz. permits a voluntary conveyance to stand as against subsequent creditors, that of 27 Eliz. makes a voluntary conveyance of land void as against a subsequent purchaser for value. The principle on which the English cases rest appears to be that, by selling the property over again for a valuable consideration, the vendor so

44. Richardson v. Smallwood, Jac. 552; Holmes v. Penney, 3 Kay & Johns. 102.

45. *Ib.;* Maeq. Hus. & Wife, 275; Peachey, Mar. Settl. 193.

46. Peachey, Mar Settl. 195, and cases cited; Skarf v. Soulby, 1 M. & Gord. 375; French v. French, 6 De G. M. & G. 95; Wawefield v. Gibbon, 26 L. J. Eq. 508. As to the right of subsequent creditors to impeach voluntary settlement, see Walker v. Burrowes, 1 Atk. 93; Richardson v. Smallwood, Jac 552; Maeq. Hus. & Wife, 275; Peachey, Mar. Settl. 197. When the deed is once set aside, the property is thrown open to all creditors. Ede v. Knowles, 2 Y. & Col. C. C. 178; Kidney v. Coussmaker, 12 Ves. 136; Jenkyn v. Vaughan, 3 Drew. 419.

47. Clark v. Rosenkrans, 31 N. J. Eq. 665.

48. Lewis v. Caperton, 8 Gratt. (Va.) 148; Geisendorff v. Eagles, 70 Ind. 418; Woodruff v. Apgar, 42 N. J. L. 198.

49. Coates v. Gerlach, 44 Pa. 43. Cf. Thompson v. Feagin, 60 Ga. 82.

50. Goldsmith v. Russell, 5 De G. M. & G. 547; Peachey, Mar. Settl. 191.

51. Doe v. Manning, 9 East, 59.

entirely repudiates the former transaction and shows his intention to sell, that the presumption against the prior gift becomes conclusive.[52] And while the correctness of this principle might well be doubted in its application to subsequent purchasers with notice, yet, as Lord Thurlow said, so many estates stand upon the rule that it cannot be now shaken.[53] This doctrine applies to postnuptial settlements in England.[54]

§ 533. American Doctrine.

Under the statute of 13 Eliz. it is generally held in this country that voluntary postnuptial settlements made with intent to hinder, delay, or defeat creditors are void. But it must be admitted the principle is not stated with equal precision in all the States, and while some cases doubtless proceed upon the doctrine that the voluntary gift fails because there is an intent to hinder and defraud, others again seem to rest upon the mere existence of actual creditors whose rights are thereby impaired or prejudiced. It is not within our province to treat of this subject in its general bearings, as in gifts between man and man; but so far as the American decisions concern gifts between husband and wife, we shall presently give the results somewhat at length.[55] The point of the distinction, however, is readily perceived to be this: that, whereas one class of cases tends to establish that the husband may never settle property upon his wife during coverture, if he owes debts at the time so as to be insolvent, but may otherwise do so absolutely without the fear of future creditors before his eyes; the other class of cases is to the purport that, no matter whether they be existing or subsequent creditors, his voluntary settlement upon his wife will be voidable if with intent to prejudice their rights, and not otherwise. The latter we conceive to be the true rule, subject to the qualification that fraud as to existing creditors may be presumed from the fact of insolvency or even embarrassment.[56]

Fortunately in this country we have not been hampered by

52. Doe v. Rusham, 17 Q. B. 724; 16 Jur. 359.

53. Evelyn v. Templar, 2 Bro. C. C. 148; Peachey, Mar. Settl. 228, and cases cited.

54. See Bill v. Cureton, 2 Myl. & K. 510; Peachey, Mar. Settl. 232, 240. And English conveyancers insert words importing certain valuable considerations in such deeds, in order to deter purchasers.

55. See 2 Kent Com. 440 *et seq.*; 4 *b.* 463 *et seq.*, where the subject is discussed at length, with citations from American cases.

56. Patrick v. Patrick, 77 Ill. 555; Lloyd v. Fulton, 91 U. S. 479.

the English construction of the statute of 27 Eliz. And in a case before the Supreme Court of the United States it was held that the principle of construction which prevailed in England, at the commencement of the American Revolution, went no further than to hold the subsequent sale to be presumptive and not conclusive evidence of a fraudulent intent in making the prior voluntary conveyance; and the court declined to follow the subsequently established construction of Westminster Hall.[57] And the better American doctrine seems to be that voluntary conveyances of land, *bona fide* made, and not originally fraudulent, are valid as against subsequent purchasers having record or other notice.[58]

In some States the English statute is re-enacted with the language essentially changed; as in Connecticut and New York. And it is the settled American doctrine that a *bona fide* purchaser for value is protected, whether he purchases from a fraudulent grantor or a fraudulent grantee; and that there is no difference in this respect between a deed to defraud subsequent creditors, and one to defraud subsequent purchasers; both being voidable only and not absolutely void.[59] As to negotiable instruments not overdue, too, the usual equity rule may apply, which protects in general the rights of a *bona fide* holder for consideration and without notice of adverse claim or fraudulent intent.[60]

57. Catheart v. Robinson, 5 Pet. (U. S.) 280.

58. 4 Kent Com. 464, *n.*, and cases cited; Jackson v. Town, 4 Cow. 603; Ricker v. Ham, 14 Mass. 139; Atkinson v. Phillips, 1 Md. Ch. 507; Shepard v. Pratt, 32 Ia. 296; Beal v. Warren, 2 Gray (Mass.), 447. But *contra*, see Clanton v. Burges, 2 Dev. Ch. (N. C.) 13.

59. 4 Kent Com. 464, and cases cited in notes; Anderson v. Roberts, 18 Johns. (N. Y.) 515; Bean v. Smith, 2 Mason (U. S.), 252; Eldred v. Drake, 43 Ia. 569; Oriental Bank v. Haskins, 3 Met. 332. So the English Stat., 3 & 4 Wm. IV., ch. 27, § 26, protects *bona fide* purchasers for value.

60. Farmers' Bank v. Brooke, 40 Md. 249.

The following American cases may be cited with reference to the effect of a husband's postnuptial settlement as against his creditors, &c. See *supra*, § 374. In several States it is expressly held, that a voluntary transfer or conveyance from husband to wife is valid against all subsequent creditors and purchasers. United States Bank v. Ennis, Wright (Ohio), 605; Beach v. White, Walk. Ch. 495; Davis v. Herrick, 37 Me. 397; Story v. Marshall, 24 Tex. 305; Phillips v. Meyers, 82 Ill. 67. A postnuptial settlement is not in valid, it is recently declared by the Supreme Court of the United States, if rights of existing creditors be not impaired. Clark v. Killian, 103 U. S. 766; Jones v. Clifton, 101 U. S. 225. In New Jersey, however, the rule, as concisely stated, is that the husband's settlement, if voluntary, is fraudulent as to existing debts by an inference of law; and, as to subse-

§ 534. Rescission and Avoidance.

Postnuptial settlements for the welfare of minor children, together with the wife, are favored in numerous instances, like antenuptial.[61] It is sometimes held that a postnuptial settlement will not be enforced in equity to the prejudice of the rights of

quent debts, fraud in fact must be proved. Annin v. Annin, 24 N. J. Eq. 184; Belford v. Crane, 1 C. E. Green (N. J.), 265. This is the doctrine in New York and many other States, and indeed a preferable one, though the tendency is to regard intent. Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481; Lyman v. Cessford, 15 Ia. 229. And Chancellor Kent has ruled, in the leading American case on this subject, that if a settlement after marriage be set aside by the prior creditors, subsequent creditors are entitled to come in and be paid out of the proceeds of the settled estate.

Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481. That *intended* fraud, and this alone, should be considered, as to a husband's subsequent creditors, in case of his voluntary settlement for his wife and children, see Mattingly v. Nye, 8 Wall. (U. S.) 370; Caswell v. Hill, 47 N. H. 407; Phillips v. Wooster, 36 N. Y. 412; Place v. Rhem, 7 Bush, 585, Niller v. Johnson, 27 Md. 6; Teller v. Bishop, 8 Minn. 226. The husband's condition as to his creditors is to be regarded with reference to the time he made the settlement upon his wife, not with reference to the condition subsequently of his estate upon his death. Leavitt v. Leavitt, 47 N. H. 329. Concerning the unfavorable effect of a secret agreement between husband and wife upon the rights of intervening creditors, ignorant of such agreement, see Hatch v. Gray, 21 Ia. 29; Annin v. Annin, 24 N. J. Eq. 184; Phelps v. Morrison, *ib.* 195. A husband's voluntary conveyance may, from its very substance, be void as to all creditors, being an artifice to keep his property out of his creditors' hands in case of future insolvency while using it in trade. Case v. Phelps, 39 N. Y. 164. Equity will regard, in cases of this sort, the intent, notwithstanding a compliance with certain formalities of transfer on the husband's part. Metropolitan Bank v. Durant, 22 N. J. Eq. 35.

That as to existing creditors, the husband's intent to defraud should be considered, which intent may be inferred from his insolvency or embarrassment, see the late cases of Redfield v. Buck, 35 Conn. 328; Gardner v. Baker, 25 Ia. 343; Woolston's Appeal, 51 Pa. 452; Bertrand v. Elder, 23 Ark. 494; Lloyd v. Fulton, 91 U. S. 479; Myers v. King, 42 Md. 65.

The right of a husband to settle the surplus of property, over and above what he then owes, for the benefit and future comfort of wife and children, is liberally considered in Gridley v. Watson, 53 Ill. 186; Vance v. Smith, 2 Heisk. (Tenn.) 343; Brookbank v. Kennard, 41 Ind. 339; White v. Bettis, 9 Heisk. (Tenn.) 645. But even here it is proper that abundant means for creditors should be reserved, nor should such a settlement be with a view of incurring debts in the future. Allen v. Walt, 9 Heisk. (Tenn.) 242.

For instances where a husband's voluntary conveyance to his wife has been set aside as in fraud of creditors, see Clarke v. McGeihan, 25 N. J. Eq. 423; Watson v. Riskamire, 45 Ia. 231; Annin v. Annin, 24 N. J. Eq. 184. See further, Davidson v. Lanier, 51 Ala. 318; Bowser v. Bowser, 82 Pa. 57; Nippes's Appeal, 75 Pa. 472.

61. See White v. Bettis, 9 Heisk. (Tenn.) 645; Goff v. Rogers, 71 Ind. 459.

children for whom no provision has been made,[62] though in such a case it would appear that the complainant must show that he is thus prejudiced.[63]

62. Crooks v. Crooks, 34 Ohio St. 610.

63. *Ibid.;* Majors v. Everton, 89 Ill. 56. A grown child, not dependent for support, is not greatly favored. Horden v. Horden, 23 Kan. 391.

CHAPTER XXV.

CONTRACTS BETWEEN SPOUSES.

§ 535. What Law Governs.

It is generally held that a contract between spouses valid where made is enforceable everywhere else.[64] Where a contract between spouses is void where made because of common-law disabilities, it is not enforceable there though intended to be performed where a wife had the right to contract as though *sole*.[65] Where spouses domiciled in North Carolina contract to release the wife's dower in lands in that State and the husband's marital rights in her land in Massachusetts, it was held that the wife's capacity to contract was governed by the law of North Carolina.[66]

Where a wife in New Jersey made and delivered to her husband a written promise to pay money to his order, which he carried to New York with her consent and there indorsed and delivered it to a third person, it was held that the contract was made in New York, and governed by the law of that State, though void in New Jersey.[67] In Louisiana the validity of a conveyance of immovable property and the capacity of spouses to deal in regard thereto are governed by the law of that State.[68] In the same State, except as modified by Act No. 94 of 1916, contracts between spouses are

64. Shane v. Dickson, 111 Ark. 353, 163 S. W. 1140.

65. Brown v. Dalton, 105 Ky. 669, 20 Ky. Law, 1484, 49 S. W. 443, 88 Am. St. R. 325.

66. Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. R. 452.

67. Thompson v. Taylor, 66 N. J. Law, 253, 49 A. 544, 88 Am. St. R. 485.

68. Rush v. Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353.

prohibited, including those made while residing temporarily in another jurisdiction.[69]

§ 536. Contracts and Debts Existing at the Time of Marriage.

A debt or obligation due a woman is extinguished, not suspended, at common law, by her marriage with the debtor or obligor, and she cannot recover the same against him or his estate after the relation is ended.[70] So, too, where the woman is debtor and marries the creditor, the debt against her is discharged.[71] These doctrines are subject to the exception that this must not affect the rights of third parties.[72] The rule applies where before marriage the wife contracts to render her husband personal services for a compensation.[73] In Massachusetts it is held, where a woman mortgages her land to secure the debt of a third person and afterwards marries the mortgagee, his representative may enforce it.[74] The same is true in Arkansas under the Married Women's Act.[75] It is held otherwise in Tennessee, even under the Married Women's Act.[76] In Massachusetts it has also been held that a note given by a man to a woman before marriage for money loaned was not extinguished by the marriage,[77] nor is a debt due on a loan made before marriage by the wife to the husband.[78] Under the Vermont Married Women's Act a woman payee of a promissory note did not lose her rights by marriage with the maker, and might validly indorse it for collection, though she could not sue her husband on it.[79]

69. Marks v. Loesenberg (La.), 78 So. 444.

70. Smiley v. Smiley, 18 Ohio St. 543.

71. Gosnell v. Jones, 152 Ind. 638, 53 N. E. 381; Dillon v. Dillon, 24 Ky. Law, 781, 69 S. W. 1099.

Indorsement or assignment of such a debt, or its evidence before marriage, may nevertheless give a third person rights against the debtor. Guptil v. Horne, 63 Me. 405. *Aliter*, where such indersement or assignment takes place after the marriage. Long v. Kinney, 49 Ind. 235.

72. Price v. Price, L. R. 11 Ch. D. 163. Here it was said that where the woman was entitled to a bond as legal personal representative, and creditors or legatees of the estate would be prejudiced thereby, no extinguishment of the bond would take place by her marriage. *Aliter*, however, where, as here, the wife was residuary legatee, and all debts and legacies were shown to have been paid.

73. *In re* Callister's Estate, 153 N. Y. 294, 60 Am. St. R. 620.

74. Bemis v. Call, 10 Allen (Mass.), 512; McMahan v. Bowe, 114 Mass. 140, 19 Am. R. 321.

75. McKie v. McKie (Ark.), 172 S. W. 891.

76. Schilling v. Darmody, 102 Tenn. 439, 52 S. W. 291, 73 Am. St. R. 892.

77. MacKeown v. Lacey, 200 Mass. 437, 86 N. E. 799.

78. Delval v. Gagnon, 213 Mass. 203, 99 N. E. 1095.

79. Spencer v. Stockwell, 76 Vt. 176, 56 A. 661.

§ 537. Under Married Women's Acts.

The early Married Women's Acts seldom permitted a wife's executory contracts with anyone outside her separate estate or separate trade,[80] but they now frequently permit spouses to contract with each other and to have the usual remedies on such contracts,[81] where the contract is not against public policy.[82] There-

80. Bassett v. Bassett, 112 Mass. 99; Hogan v. Hogan, 89 Ill. 427; Jenne v. Marble, 37 Mich. 319. Some statutes are explicit enough for such purposes. Hamilton v. Hamilton, 89 Ill. 349. And see Hon v. Hon, 70 Ind. 135; Elfelt v. Hinch, 5 Ore. 255; Grove v. Jeager, 60 Ill. 249.

Judgment confessed by a husband in his wife's favor is now held good in some States. Rose v. Latshaw, 90 Pa. 238.

As to transactions where a member of an indebted partnership is husband of the creditor, see Osborn v. Osborn, 36 Mich. 48; Moore v. Foote, 34 Mich. 443.

Oral evidence may be introduced in equity to show that what purported to be a written agreement between husband and wife was intended mutually to have no binding force. Earle v. Rice, 111 Mass. 17. Wood v. Warden, 20 Ohio, 518, treats a paper acknowledging the receipt of money paid by the wife, and making collateral stipulations, as a postnuptial settlement enforceable against his estate, after his death, to the exclusion of his other creditors.

81. Spooner v. Spooner, 155 Mass. 52, 28 N. E. 1121; Clark v. Clark, 49 Ill. App. 163; McKie v. McKie (Ark.), 172 S. W. 891, L. R. A. 1915D 1126; Rice, Stix & Co. v. Sally, 176 Mo. 107, 75 S. W. 398; Demarest v. Terhune, 62 N. J. Eq. 663; O'Day v. Meadows, 194 Mo. 588, 92 S. W. 637, 112 Am. St. R. 542; Bower v. Daniel, 198 Mo. 289, 95 S. W. 347; Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. R. 452; Walker's Assignee v. Walker, 21 Ky. Law, 1521, 55 S. W. 726; Darcey v. Darcey, 29 R. I. 384, 71 A. 595; Dailey v. Dailey, 26 Ind. App. 14, 58 N. E. 1065 (contract to release dower); Mathewson v. Mathewson, 79 Conn. 23, 63 A. 285, 5 L. R. A. (N. S.) 611; Hoeck v. Grief, 142 Cal. 119, 75 P. 670; Stoff v. Erken, 25 Cal. App. 528, 144 P. 312; Roche v. Union Trust Co. (Ind.), 52 N. E. 612; Perkins v. Blethen, 107 Me. 443, 78 A. 574; Turner v. Davenport, 63 N. J. Eq. 288, 49 A. 463; Maxwell v. Jurney, 238 F. 566, 151 C. C. A. 502; Bronson v. Brady, 28 App. D. C. 250; Bea v. People, 101 Ill. App. 132; Ramsey v. Yount (Ind.), 120 N. E. 618; Baker v. Syfritt, 147 Ia. 49, 125 N. W. 998; Brecheisen v. Clark (Kan.), 176 P. 137; Cole v. Cole, 231 Mo. 236, 132 S. W. 734; Regal Realty & Investment Co. v. Gallagher (Mo.), 188 S. W. 151; Crowley v. Crowley, 167 Mo. App. 414, 151 S. W. 512; Abbott v. Fidelity Trust Co., 149 Mo. App. 511, 130 S. W. 1120; Montgomery v. Montgomery, 142 Mo. App. 481, 127 S. W. 118; Koopman v. Mansolf, 51 Mont. 48, 149 P. 491; Rodgers v. Rodgers, 174 N. Y. S. 24; Werner v. Werner, 163 App. Div. 9, 154 N. Y. S. 370; Howell v. Howell, 42 Okla. 286, 141 P. 412; Davison v. Davison, 62 Ore. 475, 124 P. 1097; Fidelity Title & Trust Co. v. Graham (Pa.), 105 A. 295; Potter v. Mobley (Tex.), 194 S. W. 205; Masten v. Herring (Del.), 66 A. 368; Stroud v. Ross, 118 Ky. 630, 82 S. W. 254, 26 Ky. Law, 521.

82. Randall v. Randall, 37 Mich. 563.

Under the Colorado Married Women's Act it was held that a contract whereby in consideration of receiving a stove a wife agreed to cook for her husband's threshing gang was not

fore, spouses cannot by contract change the obligations of their marriage,[83] or contract as to alimony,[84] nor, unless empowered by statute, can the wife agree to submit the respective rights of both spouses in property to arbitrators.[85] Such a power must be express, and will not be inferred from a statute removing the wife's disability to contract.[86] Under such a statute equity will not relieve against a wife's valid contract whereby she applies her separate estate to the family support,[87] nor is there any implied contract on which either spouse may recover from the other money so paid,[88] unless the payments were made with the expectation of repayment.[89]

Where a husband sells his wife's property without her knowledge, there is an implied contract to pay its value.[90] Whatever the law will compel parties to do, they may do voluntarily; and this is a principle applicable to transactions as between husband and wife, so far as equity may exercise jurisdiction in the case.[91] The rule as to contracts between spouses does not apply to a man and woman living together bigamously.[92] Under the Oregon statute providing that neither spouse shall have any interest in the property as to which they may contract, it was held that an agreement that spouses should execute mutual conveyances so that the property of each should be freed from the dower or curtesy of the other was void.[93] A similar statute in Iowa has been held not to include interests of either spouse in property which do not arise out of the marital relation.[94] Therefore, it was held under that statute that a contract whereby the husband, in consideration of his disposition of certain money received from the wife at mar-

against public policy. Tuttle v. Shutts, 43 Colo. 534, 96 P. 260.

83. Patterson v. Patterson, 111 Ill. App. 342; *In re* Simonson's Estate, 164 Wis. 590, 160 N. W. 1040.

84. Thompson v. Thompson, 132 Ind. 288, 31 N. E. 529. But see O'Day v. Meadows, 194 Mo. 588, 92 S. W. 637.

85. Crouch v. Crouch, 30 Tex. Civ. 288, 70 S. W. 595.

86. Bolyard v. Bolyard (W. Va.), 91 S. E. 529, L. R. A. 1917D 440.

87. Young v. Valentine, 177 N. Y. 347, 69 N. E. 643.

88. *In re* Skillman's Estate, 146 Ia. 601, 125 N. W. 343.

89. *In re* Kosanke's Estate (Minn.), 162 N. W. 1060.

90. Miller Watt & Co. v. Mercer (Ia.), 150 N. W. 694 (bank stock).

91. See Campbell v. Galbreath, 12 Bush (Ky.), 459; Randall v. Randall, 37 Mich. 563.

92. Vaughn v. Vaughn, 100 Tenn. 282, 45 S. W. 677.

93. Potter v. Potter, 43 Ore. 149, 72 P. 702; Rich v. Rich, 147 Ga. 488, 94 S. E. 566.

94. Poole v. Burnham, 105 Ia. 620, 75 N. W. 474; *In re* Piper's Estate, 145 Ia. 373, 124 N. W. 181; Frazer v. Andrews, 134 Ia. 621, 112 N. W. 92.

riage, she should have one-half of the property, real and personal, coming into their possession thereafter, was enforceable against him.[95] Where that statute applies, it includes both personal and real property, so that a contract by a husband relinquishing his rights in the separate property of the wife is invalid.[96]

A similar statute in Minnesota has been held not to include the assignment by a husband to his wife of a mortgage on the land of a third person, to which dower does not attach.[97] Under the Maine statute providing that a wife may contract as though *sole,* it was held that a contract made between spouses that a building erected upon the wife's land by the husband remain his separate property was valid.[98]

The purpose of the North Carolina statute providing that contracts between spouses charging her real estate for more than three years or her personal estate or income for the same time shall be invalid unless executed as provided by the statute, was to prevent frauds by him on her, and to validate such transactions when properly executed, though void at common law.[99] In that State conveyances by the wife to the husband are void if not executed as required by the statute.[1]

§ 538. Contracts as to Wife's Statutory Separate Estate.

Contracts between the spouses as to her separate estate are usually valid as though she were *sole,*[2] if the contract is just and reasonable, without a trustee,[3] but the law looks with some jealousy on such contracts, requiring the utmost good faith on the part of the husband.[4] In New York a husband may be tenant of his wife.[5] In Michigan spouses can make with each other only contracts which would have been enforced in equity before the Married Women's Act.[6]

95. McElhaney v. McElhaney, 125 Ia. 279, 101 N. W. 90.

96. Baird v. Connell, 121 Ia. 278, 96 N. W. 863.

97. Kersten v. Kersten, 114 Minn. 24, 129 N. W. 1051; Erickson v. Robertson, 116 Minn. 90, 133 N. W. 164, 37 L. R. A. (N. S.) 1133.

98. Peaks v. Hutchinson, 96 Me. 530, 53 A. 38, 59 L. R. A. 279.

99. Stout v. Perry, 152 N. C. 312, 67 S. E. 757.

1. Kilpatrick v. Kilpatrick (N. C.), 96 S. E. 988; Deese v. Deese (N. C.), 97 S. E. 475; Anderson v. Anderson (N. C.), 99 S. E. 106.

2. Talcott v. Arnold, 55 N. J. Eq. 519, 37 A. 891.

3. Rose v. Rose, 93 Ind. 179.

4. Hon v. Hon, 70 Ind. 135.

5. Baumann v. City of New York, 227 N. Y. 25, 124 N. E. 141.

6. Jenne v. Marble, 37 Mich. 319; Stockwell v. Reid's Estate (Mich.), 136 N. W. 476.

§ 539. Validity in General.

In general, wherever a contract is just and reasonable of itself, and would be good at law when made with trustees for the wife, that contract will be sustained in equity, when made between husband and wife without the intervention of trustees,[7] where the wife has not been overreached,[8] and if fair and based on a good consideration,[9] especially where the purpose of the contract is to provide for her,[10] or to repay money advanced by her.[11] A court will uphold rather than defeat a transaction between spouses, notwithstanding the relation, if there has been no fraud or imposition.[12] Transactions between spouses which have the badges of fraud will be closely scrutinized,[13] and where by a contract with a wife the husband obtains any advantage over her, he or his representatives have the burden of showing that she was fully informed as to the effects of the transaction, and that the utmost fairness was shown her.[14] The reason of the rule is that the husband is presumed to have exerted his superior, dominent influence.[15] At law such contracts could only be effectuated through a trustee.[16] A mutual agreement, by which the wife renounces all further claim upon the husband for his services, or necessary sup-

7. Spurlock v. Spurlock, 80 Ark. 37, 96 S. W. 753; Wilson v. Mullins (Ky.), 119 S. W. 1180; Jenne v. Marble, 37 Mich. 319; Wallingsford v. Allen, 10 Pet. (U. S.) 583; 2 Story, Eq. Juris., § 1204; Slanning v. Style, 3 P. Wms. 334; Barron v. Barron, 24 Vt. 375; Resor v. Resor, 9 Ind. 347; Coates v. Gerlach, 44 Pa. 43; Wright v. Wright, 16 Ia. 496; Williams v. Maull, 20 Ala. 721; Schaffer v. Reuter, 37 Barb. (N. Y.) 44; Hutton v. Duey, 3 Barr (Pa.), 100; Sims v. Rickets, 35 Ind. 181; McCampbell v. McCampbell, 2 Lea (Tenn.), 661; Myers v. King, 42 Md. 65; Fritz v. Fernandez, 45 Fla. 318, 34 So. 315; Moayon v. Moayon, 24 Ky. Law, 1641, 72 S. W. 33, 60 L. R. A. 415, 102 Am. St. R. 303; Fitzgerald v. Fitzgerald, 168 Mass. 488, 47 N. E. 431.

In Massachusetts a contract between husband and wife is invalid and cannot be enforced even in equity, and the fact that the wife survives cannot make a good contract out of a nullity. Clark v. Supreme Council, 176 Mass. 468, 57 N. E. 787.

8. Washburn v. Gray, 49 Ind. App. 271, 97 N. E. 190.

9. McDonald v. Smith, 95 Ark. 523, 130 S. W. 515; Brown v. Clark, 80 Conn. 419, 68 A. 1001; Kimball v. Kimball, 75 N. H. 291, 73 A. 408; Lister v. Lister, 86 N. J. Eq. 30, 97 A. 170.

10. Williams v. Betts (Del.), 98 A. 371; Thomas v. Hornbrook, 259 Ill. 156, 102 N. E. 198.

11. English v. Brown, 219 F. 248.

12. Hannaford v. Dowdle, 75 Ark. 127, 86 S. W. 818.

13. Gibson v. Kimmit, 113 Ill. App. 611.

14. Way v. Union, &c., Ins. Co., 61 S. C. 501, 39 S. E. 741.

15. Leimgruber v. Leimgruber, 172 Ind. 370, 86 N. E. 73.

16. Winter v. Winter, 191 N. Y. 462, 84 N. E. 382; *In re* Hill, 190 F. 390.

port for herself, and stipulates that she will contract no debts on his account, while the husband renounces all claim for her services or support, affords a strong illustration. This might not avail against creditors, but so far as the husband and his heirs, and in fact all who claim under him, are concerned, it will be enforced.[17]

§ 540. Consideration.

A contract by a wife to pay her money to her husband must be based on a good and valuable and not merely meritorious consideration.[18] A deed by a man to his intended wife, followed by marriage, is conclusively presumed to be based on marriage as a consideration.[19] The following have also been held to be good considerations for a deed from a husband to a wife: love and affection;[20] marriage;[21] a wife's release of dower;[22] forbearance of libel for divorce;[23] a debt originally due from a father to his son, and by the son presented to his mother in good faith.[24]

A deed by a wife to her husband of property which he has previously conveyed to her without consideration through a third person, has been upheld in equity in New York, where the early Married Women's Acts did not affect the common-law rule that conveyances between spouses were void, the deed in question being held to be based on an equitable consideration.[25] An antenuptial promise to convey is not a good consideration for a postnuptial conveyance, where the wife did not rely on the promise in contracting the marriage.[26] It is held in Texas that the resumption of marital relations after a separation is not a good consideration for such a conveyance.[27]

Where a husband receives his wife's money at a time when such

17. Barron v. Barron, 24 Vt. 375.

18. Gouge v. Gouge, 26 App. Div. 154, 49 N. Y. S. 879.

19. Snyder v. Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. R. 863.

20. Arbaugh v. Alexander, 164 Ia. 635, 146 N. W. 747.

21. Jackson v. Jackson, 222 Ill. 46, 78 N. E. 19, 6 L. R. A. (N. S.) 785; La Fleure v. Seivert, 98 Ill. App. 234; Welch v. Mann, 193 Mo. 304, 92 S. W. 98.

22. Merchants' & Laborers' Bldg. Ass'n v. Scanlan, 144 Ind. 11, 42 N. E. 1008; Baldwin v. Heil, 155 Ind. 682, 58 N. E. 200.

23. Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 57 Am. St. R. 452, 36 L. R. A. 771; Faulkner v. Faulkner, 162 App. Div. 848, 147 N. Y. S. 745.

24. Yates v. Bank of Ringgold (Ga.), 96 S. E. 427.

25. Hulse v. Bacon, 167 N. Y. 599, 60 N. E. 1113.

26. Markillie v. Markillie, 115 Mich. 658, 74 N. W. 1117, 4 Det. Leg. N. 1018. But see *contra*, Metz. v. Blackburn, 9 Wyo. 481, 65 P. 857.

27. Tanton v. Tanton (Tex.), 209 S. W. 429.

money would have been his sole property, and at other times when the law did not permit spouses to contract with each other, such receipt does not constitute a moral obligation to repay which will be a sufficient consideration to sustain a deed to the wife.[28] In Louisiana it must be shown, where it is claimed that a husband conveys property to his wife to pay a debt, that the relation of debtor and creditor existed at the time of the conveyance, and that the property was actually conveyed in payment of the debt.[29]

§ 541. Bills and Notes.

A wife is not legally liable, in the absence of an enabling statute, upon a promissory note made by her, payable to her husband's own order, and by him indorsed over.[30] The husband's note, given to his wife and transferred by her, is equally void.[31] In the absence of statute, a wife cannot enforce a note against her husband either at law or in equity, whether he is maker or prior indorsee,[32] nor can she be liable to him on a note either as maker or indorsee.[33] He cannot pass to her the title to a note.[34] In Vermont it has been held otherwise where the husband merely transferred the note to his wife by delivery, without becoming a party to the note.[35] She may be liable as accommodation indorser on a note made by him.[36] Where one loaned money to a wife, taking as security her void notes to her husband, it was held that the lender might elect to treat the notes as void and go against the maker in assumpsit on the common counts.[37] But in some States, where a note is made by a wife payable to her husband, it may be enforced by a third party who holds it, on the usual principles applicable to her separate property and separate liabilities.[38] In

28. Strayer v. Dickerson, 205 Ill. 257, 68 N. E. 767.

29. Rush v. Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353.

30. Roby v. Phelon, 118 Mass. 541.

31. Doll v. Teurer, 6 Rob. (La.) 276; Roby v. Phelon, 118 Mass. 541; Nat. Granite Bank v. Whicher, 173 Mass. 517, 53 N. E. 1004, 73 Am. St. R. 317; Caldwell v. Nash, 190 Mass. 507, 77 N. E. 515; Hoker v. Boggs, 63 Ill. 161; Slawson v. Loring, 5 Allen (Mass.), 340, 81 Am. D. 750.

32. Wilson v. Bryant, 134 Mass. 291.

33. Nat. Bank of the Republic v. Delano, 185 Mass. 424, 70 N. E. 444; Harman v. Harman (Ia.), 149 N. W. 72; Demarest v. Terhune, 62 N. J. Eq. 663.

34. Nelson v. Piper, 213 Mass. 531, 100 N. E. 749; Gay v. Kingsley, 11 Allen (Mass.), 345.

35. Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 A. 285.

36. Middleborough Nat. Bank v. Cole, 191 Mass. 168, 77 N. E. 781.

37. Nat. Granite Bank v. Tyndale, 176 Mass. 547, 57 N. E. 1022, 51 L. R. A. 447.

38. Morrison v. Thistle, 67 Mo. 596. Proof that the wife transferred as the husband's agent might establish a

Georgia it is held that a wife's note to her husband is valid in the hands of a holder for value before maturity, though given as surety or in payment of his debt, in violation of statute.[39] In Pennsylvania a note given by a husband to a wife as a consideration for her abandonment of a proposed proceeding for support, and for her resumption of marital relations, has been held valid.[40] Under some statutes a note from husband to wife or from wife to husband, if for sufficient consideration, has been held enforceable.[41] And equity will sometimes enforce such an instrument, with respect to the parties themselves, as a declaration of trust.[42]

§ 542. Loans and Advances.

Formerly it was said that at law, and upon the coverture theory, the husband's promise to refund money to the wife as a borrower had neither parties nor a consideration.[43] Therefore, at common law the husband was under no legal duty to repay money of his wife which she delivered to him without an agreement for repayment.[44] The same is true where he receives and appropriates her property with her knowledge.[45] Where a husband, instead of asserting his marital rights to his wife's personal property as at common law, or being precluded from asserting such rights under the statute, actually borrows money or property from her with the understanding that it shall be repaid, he will be treated in equity as her debtor accordingly.[46] The parties must have understood it to be a debt in order to raise a contract to repay.[47] In such case she is his creditor,[48] and may have the usual legal remedies against

right of action upon the husband's note to her. Hoker v. Boggs, 63 Ill. 161.

39. Rood v. Wright, 124 Ga. 849, 53 S. E. 390; Farmers' & Traders' Bank v. Eubanks, 2 Ga. App. 839, 59 S. E. 193.

40. *In re* Christie's Estate, 36 Pa. Super. 506.

41. Krouse v. Krouse, 48 Ind. App. 3, 95 N. E. 262; Coleman v. Coleman, 142 Ky. 36, 133 S. W. 1003; Greer v. Greer, 24 Kan. 101.

42. First Nat. Bank v. Albertson (N. J.), 47 A. 818; McCampbell v. McCampbell, 2 Lea (Tenn.), 661.

43. Johnston v. Johnston, 31 Pa. 450; Frierson v. Frierson, 21 Ala. 549.

44. Eggleston v. Slusher, 50 Neb. 83, 69 N. W. 310.

45. Stone v. Curtis, 115 Me. 63, 97 A. 213.

46. Jaycox v. Caldwell, 51 N. Y. 395.

47. Spruance v. Equitable Trust Co. (Del.), 103 A. 577; Coburn v. Storer, 67 N. H. 86, 36 A. 607; De Baun's Ex'x v. De Baun, 119 Va. 85, 89 S. E. 239.

48. Bates v. Papesh, 30 Ida. 529, 166 P. 270; Herbert v. Mueller, 83 Ill. App. 391; Rice v. Crozier, 139 Ia. 629, 117 N. W. 984; Knickerbocker Trust Co. v. Carhart, 71 N. J. Eq. 495, 64 A. 756; Gormly v. Smith, 118 N. Y. S. 1069.

him,[49] even though the money loaned was paid to her by him for her services.[50] She may, therefore, prove her claim against his insolvent estate.[51] Likewise, where on his death she paid the balance due on his contract to buy land and took a retained deed in his name, she had a lien on the land for the money paid.[52] Married Women's Acts treat such a loan as constituting a valid indebtedness legally enforceable against him or his estate on her behalf as a creditor.[53] Where the statute empowers a wife to contract with her husband, she may receive payment of a debt from him as though sole.[54] The fact that a wife's property is occupied as a homestead will not invalidate a contract for the repayment of money advanced by the husband to build a house on the property.[55] Where the wife's parents advanced money to the husband for family expenses on his promise to reimburse the wife, she may recover on the contract, without express contract between the spouses,[56] and the same has been held of an advance by her parents to him to pay his debt.[57] Where a Married Women's Act is in force, the rules as to loans and repayments are not as strictly applied between spouses as between strangers.[58] In Louisiana a wife does not stand as a creditor of her husband where she lends her paraphernal estate to enable him to make a crop on his lands.[59] Money advanced by the husband to pay his wife's debts is presumed to be so advanced by virtue of her marital rights and not as a loan.[60] Therefore he cannot counterclaim for such expendi-

49. Wagner v. Mutual Life Ins. Co., 88 Conn. 536, 91 A. 1012; Proctor v. Cole, 104 Ind. 373, N. E. 303; Fowle v. Torrey, 135 Mass. 87; Lord v. Cronin, 9 App Div. 9, 40 N. Y. S. 1097, 75 N. Y. St. R. 415 (affd., 154 N. Y. 172, 47 N. E. 1088); *In re* Dice's Estate, 180 Pa. St. 647, 37 A. 117.

50. Roche v. Union Trust Co. (Ind.), 52 N. E. 612.

51. Weeks & Potter Co. v. Elliott, 93 Me. 286, 45 A. 29, 74 Am. St. R. 348; Woodward v. Spurr, 141 Mass. 283, 6 N. E. 521; Bailey v. Herrick, 141 Mass. 287, note.

52. Moore v. Gulley, 30 Ky. Law, 442, 98 S. W. 1011.

53. Whitford v. Daggett, 84 Ill. 144. Monroe v. May, 9 Kan. 466; Woodworth v. Sweet, 51 N. Y. 8.

54. Cartwright v. Cartwright, 68 Ill. App. 74; Kolbe v. Harrington, 15 S. D. 263, 88 N. W. 572; *In re* Strock's Estate, 56 Pa. Super. 32.

55. North v. North, 166 Ill. 179, 46 N. E. 729.

56. Clark Bros. v. Ford, 126 Ia. 460, 102 N. W. 421.

57. Walker v. Walker's Assignee, 19 Ky. Law, 626, 41 S. W. 315.

58. Bynum v. Johnston, 222 F. 659, 138 C. C. A. 183.

59. Viguerie v. Viguerie, 133 La. 406, 63 So. 89.
63 So. 89.

60. Gosnell v. Jones, 152 Ind. 638, 53 N. E. 381.

tures in an action by her to recover his debt to her,[61] nor can he recover for money paid for the support of the wife's children by her first husband, nor for the maintenance of her stock, in the absence of an express contract,[62] but it may be otherwise where the wife expressly promises to repay the loan.[63] Where a wife was liable to discharge a mortgage on her husband's property and had given him more than enough money to do so, it was held that he could not assert her liability in equity.[64] A wife has been held liable to her husband on a contract whereby she secured an advance of money from him to be used in her business, she agreeing from the proceeds to build a house and convey it to him as his property, though there was no agreement for the repayment of the money in kind, and no interest calculated or paid, the transaction creating the relation of debtor and creditor between them.[65] Under the Connecticut statute a wife leaving her husband without justifiable cause cannot sue him for money loaned, the right to maintain the action being given only to a wife who is abandoned.[66]

§ 543. Contracts for Services.

A contract by a husband to pay his wife for services is invalid even though rendered outside the family.[67] Such contracts will not be enforced even in equity.[68] Therefore, a contract whereby spouses each agree to work for the other in farming, and that the joint product shall be her property was held against public policy, and to give the wife no title to the crop as against the husband's creditors.[69] The rule has not been changed in Kentucky even by the Married Women's Act.[70] Such contracts are now valid under the Married Women's Act in Louisiana,[71] in Nebraska[72] and Minnesota.[73] The Illinois statute providing that neither spouse

61. Harrington v. Stallo, 169 App. Div. 786, 155 N. Y. S. 688.

62. Allen v. Allen, 158 Ky. 759, 166 S. W. 211.

63. Skinner v. Harrington, 6 Kan. App. 176, 51 P. 310.

64. Nihiser v. Nihiser, 127 Md. 451, 96 A. 611.

65. Clark v. Black, 78 Conn. 467, 62 A. 757.

66. Muller v. Witte, 78 Conn. 495, 62 A. 756.

67. *In re* Kaufmann, 104 F. 768; Overbeck v. Ahlmeier, 106 Ill. App. 606.

68. Turner v. Davenport, 61 N. J. Eq. 18, 47 A. 766.

69. Dempster Mill Mfg. Co. v. Bundy, 64 Kan. 444, 67 P. 816, 56 L. R. A. 739.

70. Foxworthy v. Adams, 136 Ky. 403, 124 S. W. 381.

71. Roche v. Union Trust Co. (Ind.), (1899), 52 N. E. 612.

72. *In re* Cormick's Estate (Neb.), 160 N. W. 989.

73. Bodkin v. Kerr, 97 Minn. 301, 107 N. W. 137.

shall recover for services rendered to the other, does not prevent the wife from receiving compensation as receiver in her husband's action, the compensation being received from the court and not the husband.[74]

§ 544. Liability to Pay Interest.

Generally a husband is not liable for interest on a loan by his wife in the absence of a special contract,[75] which may be by parol.[76] A husband whose wife borrows money for him by mortgage of her separate estate is liable for interest without express agreement.[77]

§ 545. Spouses as Partners.

At common law a wife could not be a partner of her husband.[78] By statute in several States the spouses may now make a vaild contract of partnership.[79] The contrary is held under the Massachusetts and New Hampshire Married Women's Acts.[80] By statute in the District of Columbia, a wife may be a partner of third persons but not with her husband.[81] The Illinois statute provides that with her husband's consent the wife may be a partner, and hence, it is held, she may be his partner.[82]

74. Meissler v. Meissler, 101 Ill. App. 256.

75. Riker v. Riker, 83 N. J. Eq. 198, 693, 92 A. 586; Keady v. White, 168 Ill. 76, 48 N. E. 314; King v. King, 24 Ind. App. 598, 57 N. E. 275; Collins v. Babbitt, 67 N. J. Eq. 165, 58 A. 481; Stuart v. Stuart, 182 Pa. 543, 38 A. 409.

76. *In re* Cornman's Estate, 197 Pa. 125, 46 A. 940.

77. Griffith v. Griffith, 187 Pa. 306, 41 A. 30, 42 W. N. C. 447.

78. Barlow Bros. Co. v. Parsons, 73 Conn. 696, 49 A. 205.

79. Morrison v. Dickey, 122 Ga. 353, 50 S. E. 175, 69 L. R. A. 87; Vizard v. Moody, 119 Ga. 918, 47 S. E. 348; Burney v. Savannah Grocery Co., 98 Ga. 711, 25 S. E. 915, 58 Am. St. R. 342; Ellis v. Mills, 99 Ga. 490, 27 S. E. 740; Butler v. Frank, 7 Ga. App. 655, 67 S. E. 884; Stewart v. Todd (Ia.), 173 N. W. 619; Hackley Nat. Bank v. Jeannot, 143 Mich. 454, 106 N. W. 1121, 3 Det. Leg. N. 7; Conservative Life Ins. Co. v. Boyce, 94 Neb. 408, 143 N. W. 468; Jones v. Jones, 99 Miss. 600, 55 So. 361; Anderson v. Citizens' Nat. Bank, 38 Ind. App. 190, 76 N. E. 811; Hoaglin v. C. M. Henderson & Co., 119 Ia. 720, 94 N. W. 247, 61 L. R. A. 756, 97 Am. St. R. 335; Graff v. Kinney, 15 Abb. N. C. (N. Y.) 397, 1 How. Pr. (N. S.) 59.

80. Voss v. Sylvester, 203 Mass. 233, 89 N. E. 241; Lord v. Parker, 3 Allen (Mass.), 127; Lord v. Davison, 3 Allen (Mass.), 131; Edwards v. Stevens, 3 Allen (Mass.), 315; Ingram v. White, 4 Allen (Mass.), 412; Plumer v. Lord, 5 Allen (Mass.), 460, 7 Allen (Mass.), 481; People's Trust Co. v. Merrill, 78 N. H. 329, 99 A. 650.

81. Norwood v. Francis, 25 App. D. C. 463.

82. Heyman v. Heyman, 210 Ill. 524, 71 N. E. 591.

§ 546. Releases Between Spouses.

Spouses may validly release to each other their interests, both present and in expectancy,[83] if, in the case of the wife, it is not done unadvisedly or improvidently,[84] even when they are separated.[85] The husband has the burden of showing that adjustments made during coverture of a claim by his wife against him was fair and honest and reasonably advantageous to her.[86] A release of all right the wife might have in property which the husband then had or might acquire, made after separation, and in contemplation of divorce, does not release him from a note previously given for a loan.[87]

83. Perkins v. Sunset Telephone & Telegraph Co., 155 Cal. 712, 103 P. 190.

84. Levy v. Dockendorff, 177 App. Div. 249, 163 N. Y. S. 435.

85. Hinkle v. Hinkle, 148 Ga. 250, 96 S. E. 340.

86. Hon v. Hon, 70 Ind. 135.

87. Price v. Price, 25 Ky. Law, 1803, 78 S. W. 888.

CHAPTER XXVI.

GIFTS BETWEEN SPOUSES.

§ 547. What Constitutes Gift.

Although a direct gift of property by the husband to the wife is void at law, it will be sustained in equity, so far as they are concerned and their heirs and personal representatives and assigns. In general, to constitute a voluntary gift between parties, it must be complete, or courts of equity will not enforce it.[88] But the rule is more favorable as to a *cestui que trust* claiming against his trustee.[89] There should be a clear irrevocable gift to a trustee for the wife, or some positive act by the husband, by which he divests himself of the property, and engages to hold it for the wife's separate use.[90] A voluntary promise does not constitute a perfect

88. Thomas v. Thomas, 107 Mo. 459, 18 S. W. 27; Grimes v. Reynolds, 184 Mo. 679, 83 S. W. 1132; Botts v. Gooch, 97 Mo. 88, 11 S. W. 42, 10 Am. St. R. 286; West v. Burke, 165 App. Div. 667, 151 N. Y. S. 329; Cotteen v. Missing, 1 Madd. 176; Kekewich v. Manning, 1 De G., M. & G. 188.

89. Ellison v. Ellison, 6 Ves. 662; Peachey, Mar. Settl. 245, 246; Meek v. Kettlewell, 1 Hare, 470; Kekewich v. Manning, 1 De G., M. & G. 192; Beech v. Keep, 18 Beav. 289.

90. But see Towle v. Towle, 114 Mass. 167.

It would appear to be the rule of some States, that the gifts of a husband require less proof than the gifts of third persons. Deming v. Williams, 26 Conn. 226. In some States, however, the wife is put upon strict proof as to all implied gifts. Gannard v. Eslava, 20 Ala. 733; Paschall v. Hall, 5 Jones Eq. (N. C.) 108; Hollifield v. Wilkinson, 54 Ala. 275. The precise extent to which the rule of a gift without a trustee will be enforced depends greatly upon the liberality of the married women's legislation in any particular State,— a subject which has already been discussed. See Underhill v. Morgan, 33 Conn. 105; Brown v. Brown, 23 Barb. (N. Y.) 565; Jennings v. Davis, 31 Conn. 134; Wilder

gift. Nor is a voluntary assignment, unaccompanied by other acts more effectual to confer a title on the donee than a mere agreement, as it has been repeatedly held in equity.[91] But there is some difficulty in reconciling the authorities on this latter subject; for it has been fully decided that the voluntary assignment without reservation of a *chose in action* or incorporeal personalty is good, if the relation of *cestui que trust* and trustees be once established; while, on the other hand, if one assigns to trustees certain property immediately transferable, the gift is imperfect without the transfer.[92] The point of distinction seems to be, that in the one case the donor, by the assignment, not only indicates the intention of making a gift, but executes his intention so far as it is possible for him to do so, or so far, at least, that the donee might as a matter of justice, come into equity and get his title perfected; while, in the other, by his failure to make the transfer, he does not execute his intention to the extent of his power, but leaves it incomplete. Whatever may be the real principle involved, the authorities proceed on the ground that a trust relation is in the former case created by the instrument. Hence, a mere formal assignment to a wife is incomplete as such; for a husband ought to do all he can to make the settlement or gift complete; as, for instance, to convey the land, transfer the stock, or indorse over the negotiable instruments payable to his order. Words importing a husband's present intention to make a gift cannot operate to complete it.[93] And his oral promise to make a gift is void

v. Aldrich, 2 R. I. 518. A gift with power to the wife to dispose thereof by will may be good against the husband's representatives. Churchill v. Corker, 25 Ga. 479. But it is said that a man cannot denude himself of his marital rights in property which the law vests in him by simply declaring that it belongs to his wife. Wade v. Cantrell, 1 Head (Tenn.), 346.

A grown child not dependent on his father for support, though he be heir, cannot impeach the husband's voluntary conveyance or gift to the wife. Horder v. Horder, 23 Kan. 391. It is good against the husband's heirs-at-law in general, and especially if a reasonable provision for the wife. Majors v. Everton, 89 Ill. 56; Crooks v. Crooks, 34 Ohio St. 610.

91. Edwards v. Jones, 1 M. & Cr. 226; Holloway v. Headington, 8 Sim. 324.

92 See Bridge v. Bridge, 16 Beav. 321; Donaldson v. Donaldson, Kay, 717; McFaddyn v. Jenkins, 1 Hare, 462; Peachey, Mar Settl. 247, 248; Scales v. Maude, 6 De G., M. & G. 52; Penfold v. Mould, L. R. 4 Eq. 562. As to the assignment of leaseholds to a wife; the deed operating sufficiently as a declaration of trust, see Fox v. Hawks, L. R. 13 Ch. 822. And see Thomas v. Harkness, 13 Bush (Ky.), 23. See also as to gifts in general, 2 Sch., Pers. Prop., Part V., ch. 2.

93. Breton v. Woollven, L. R. 17 Ch. D. 416; Campbell's Appeal, 80 Pa. 298.

for want of consideration.[94] Nevertheless, in a strong emergency, the deed or writing of assignment may operate as a declaration of trust, rendering the husband himself, if need be, a trustee to carry it into full execution.[95] A gift by a husband to his wife is not invalid merely because she knows nothing of it at the time.[96] A gift may be inferred from declarations of intention to make it, coupled with long asquiescence by the donor in the donee's use of the property as his own,[97] as well as from the fact that a wife uses her property to improve her husband's land with the exception of occupying them jointly with him.[98] Causing a note and mortgage for a loan made by the husband to be drawn in the name of the wife is a good gift,[99] as well as causing half of a debt due him to be paid by a check payable to his wife,[1] and causing shares of a loan association to be cancelled and new shares issued to the spouses jointly, with a right of survivorship,[2] and giving her several sums of money on a trip abroad without evidence of any intention that she should account for it.[3] Giving a wife all his wages, with part of which she paid household expenses and with the balance paid off incumbrances against her home, has been held a good gift of the balance as against the donor's creditors.[4] Where a wife signed her husband's deed in consideration of the delivery of a horse to her, it was held that there was a good gift of the horse,[5] and where she assigned her stock to him, and he, with her knowledge, treated it as his own, there was a valid gift.[6]

94. Lloyd v. Fulton, 91 U. S. 479; Bradley v. Saddler, 54 Ga. 681; Hayford v. Wallace, 114 Cal. 16, 46 P. 301.

95. Baddeley v. Baddeley, 26 W. R. 850. And see Thomas v. Harkness, 13 Bush (Ky.), 23; Hutchins v. Dixon, 11 Md. 29. This doctrine of equity seems a dangerous one to press far, since it tends to dispense with the fundamental doctrine that a gift, to be irrevocable, ought to be perfected by delivery and acceptance. See Wade v. Cantrell, 1 Head (Tenn.), 349.

96. Sparks v. Hurley, 208 Pa. 166, 57 A. 364, 101 Am. St. R. 926 (transfer of bank account).

97. Miller v. McLean, 31 Ohio Cir. Ct. 64.

98. Knickerbocker Trust Co. v. Carhart, 71 N. J. Eq. 495, 64 A. 756.

99. Dupont v. Jonet, 165 Wis. 554, 162 N. W. 664.

1. Brown v. Brown, 174 Mass. 197, 54 N. E. 532, 75 Am. St. R. 292; Wilcox v. Murtha, 41 App. Div. 408, 58 N. Y. S. 783.

2. East Rutherford Sav., Loan & Bldg. Ass'n v. McKenzie, 87 N. J. Eq. 375, 100 A. 931.

3. Straton v. Wilson, 170 Ky. 61, 185 S. W. 522; Grondenberg v. Grondenberg, 112 Ill. App. 615.

4. Ford Lumber & Mfg. Co. v. Curd, 150 Ky. 738, 150 S. W. 991, 43 L. R. A. (N. S.) 685.

5. Tillis v. Dean, 118 Ala. 645, 23 So. 804.

6. Morris v. Westerman, 79 W. Va. 502, 92 S. E. 567.

But it has been held that no gift could be inferred where a spouse placed securities in a safe deposit box used by them jointly, though the securities were placed in an envelope marked with the name of the other spouse.[7] The abandonment of a wife by her husband does not operate as a gift of money left in her possession.[8] But to prove the executed gift, so as to establish a *bona fide* transfer against the husband's creditors, involves, of course, the greater difficulty.[9] The question whether or not there is a completed gift is for the jury.[10] In determining the question all the evidence must be considered.[11]

§ 548. Intervention of Trustee or Third Person.

Though the common law did not permit a wife to take a gift directly from her husband, it might validly be made through a third person who merely acted as a conduit for the title.[12] Such a mode of transfer did not affect its character as a gift.[13] It has been held that a husband buying land subject to a mortgage may pay the amount of such mortgage to the holder and by causing him to assign it to his wife, make her a valid gift of it.[14]

§ 549. Property which may be subject of Gift; Generally.

The wife may be the grantee, under due statutory formalities, of real estate from her husband,[15] or of personal property,[16] or of

7. *In re* Squibb's Estate, 95 Misc. 475, 160 N. Y. S. 826.

8. Dawson v. Lindsay, 111 Mich. 200, 69 N. W. 495, 3 Det. Leg. N. 648.

9. *Re* Pierce, 7 Biss. (U. S.) 426.

10. Davis v. Seaboard Air Line Co., 134 N. C. 300, 46 S. E. 515; Roberts v. Griffith, 112 Ga. 146, 37 S. E. 179; Martin v. Jennings, 52 S. C. 371, 29 S. E. 807.

11. Clawson v. Clawson's Adm'r, 25 Ind. 229.

12. Tucker v. Curtin, 148 F. 929, 78 C. C. A. 557; Brown v. Brown, 174 Mass. 197, 54 N. E. 532, 75 Am. St. R. 292; Coulter v. Meining, 143 Minn. 104, 172 N. W. 910.

13. Hamilton v. Rathbone, 175 U. S. 414, 20 S. Ct. 155, 44 L. Ed. 219.

14. Betts v. Betts, 159 N. Y. 547, 54 N. E. 189.

15. Corbett v. Sloan, 52 Wash. 1, 99 P. 1025; Nason v. Lingle, 143 Cal. 363, 77 P. 71; Thompson v. Commissioners, 79 N. Y. 54; McMillan v. Peacock, 57 Ala. 127; Sherman v. Hogland, 54 Ind. 578. A false recital in the deed cannot make the conveyance antenuptial or "in consideration of marriage." Phillips v. Phillips, 9 Bush (Ky.), 183; Westmore v. Harz, 111 La. 305, 35 So. 578.

16. V. G. Fischer Art Co. v. Hutchins, 41 App. D. C. 156; Smith v. Sheppard, 2 Ga. App. 144, 58 S. E. 303; Succession of Turgeau, 130 La. 650, 58 So. 497; Le Blanc v. Sayers, 202 Mich. 565, 168 N. W. 445; Aylor v. Aylor, 184 Mo. App. 607, 170 S. W. 704; Light v. Graham (Mo.), 199 S. W. 570; Abbott v. Fidelity Trust Co., 149 Mo. App. 511, 130 S. W. 1120; Strothers v. McFarland (Mo.), 194 S. W. 881; Finch v. Finch, 89 N. J. Eq. 563, 105 A. 205; Leitch v. Diamond Nat. Bank, 234 Pa. 557, 83 A. 416; Besterman v. Besterman, 263 Pa. 555,

real and personal property combined,[17] or of community property.[18] Rents and profits may be secured to her exclusive beneficial use.[19] The promissory note of a creditor or other third party may thus be legally transferred by the husband to his wife under some of the Married Women's Acts;[20] and independently of such statutes on equitable grounds.[21] His voluntary settlement of choses or incorporeal personalty upon her is good, *prima facie*,[22] and this may include an assignment of a claim due him.[23] Leasehold property may be assigned to the wife by way of gift.[24]

§ 550. Bank Deposits.

The husband may make a gift to his wife by depositing in some savings bank on his wife's separate account and by his acts binding the bank to account to her.[25] To constitute a valid gift by a husband to his wife of his bank deposit, there must be evidence of his intention to make the gift,[26] which is not effectively made while he retains control.[27] Therefore, no gift is shown merely by the fact that the wife draws interest on such a deposit,[28] nor because both spouses have a right to draw upon a deposit in their joint names,[29] even where they have joint possession of the pass

107 A. 323; Walston v. Allen, 82 Vt. 549, 74 A. 225; *In re* Bushnell's Estate, 107 Wash. 331, 182 P. 89.

17. Wing v. Goodman, 75 Ill. 159; Indianapolis R. v. McLaughlin, 77 Ill. 275.

18. Sullivan v. Fant, 51 Tex. Civ. 6, 110 S. W. 507.

19. Hutchinson v. Mitchell, 39 Tex. 487.

20. Motley v. Sawyer, 38 Me. 68; Dillage v. Parks, 31 Barb. (N. Y.) 132; Slawson v. Loring, 5 Allen (Mass.), 340. And see Clough v. Russell, 55 N. H. 279. But cf. Hoker v. Boggs, 63 Ill. 161.

21. Tullis v. Fridley, 9 Minn. 79.

22. Campbell v. Galbreath, 12 Bush (Ky.), 459. Such transfer is frequently good without formal assignment. Seymour v. Fellowes, 44 N. Y. Super. 124.

23. Seymour v. Fellows, 77 N. Y. 178.

24. Fox v. Hawks, L. R. 13 Ch. D. 822.

25. Fisk v. Cushman, 6 Cush. (Mass.) 20; Howard v. Windham Co. Sav. Bank, 40 Vt. 597; Sweeney v. Five Cents' Sav. Bank, 116 Mass. 384; Spelman v. Aldrich, 126 Mass. 113. *Aliter*, where the deposit is not in contravention of a husband's marital rights and control. See McCubbin v. Patterson, 16 Md. 179; Way v. Peek, 47 Conn. 23.

26. Peninsular Sav. Bank v. Wineman, 123 Mich. 257, 81 N. W. 1091, 6 Det. Leg. N. 1010; Hairston v. Glenn, 120 N. C. 341, 27 S. E. 32.

27. First Nat. Bank v. Taylor, 142 Ala. 456, 37 So. 695; *In re* Brown's Estate, 113 Ia. 351, 85 N. W. 617; Monoghan v. Collins (N. J.), 71 A. 617; Martin v. Munroe, 121 Md. 679, 89 A. 319.

28. Dodge v. Lunt, 181 Mass. 320, 63 N. E. 891.

29. Gish Baking Co. v. Leachman, 163 Ky. 720, 174 S. W. 492 L. R. A. 1915D 920; Staples v. Berry, 110 Me. 32, 85 A. 303; Schneider v. Schneider, 122 App. Div. 774, 107 N. Y. S. 792. In a recent case where the husband

books,[30] nor from a deposit in the wife's name, while withholding the bank book and making no express declaration of trust,[31] even where the wife without authority takes from her husband's papers a bank book showing a deposit in her name,[32] or making a deposit in her name to enable her to care for the money he earns.[33] But where after making such a deposit he delivers the book to her and she accepts it there is an irrevocable gift,[34] even though his original intent was to defraud his creditors,[35] as well as where after making the first deposit the wife makes others and he never claims the money,[36] and where in making a joint deposit he created a right of survivorship.[37] Where a savings bank deposit was in the joint names of spouses, owned equally and payable on either's draft, it was held that neither could make a valid gift of more than his interest.[38] In New York it is held that a deposit made by a husband in the joint names of himself and his wife creates a right of survivorship in the fund, in the absence of evidence of another intention.[39] She has no legal interest in it till his death.[40] But where the account was made "payable to either or the survivor," it was held that she had an equal right to draw on the account, in

deposited his money in a joint account in the names of himself and wife and told her she could draw to the full amount "but if you do I will give you hell," the court found it was his intention to allow her the use of the account to reasonable amounts only, being the equivalent of a power of attorney and not an immediate gift, and that he intended to give her what remained at his death. This purpose being testamenetary in character and therefore invalid as not being made in the form required in case of wills, the balance of the account at his death belonged to his estate. Morristown Trust Co. v. Capstick (N. J.), 106 Atl. 391.

30. Schwab v. Schwab, 177 App. Div. 246, 163 N. Y. S. 246.

31. Getchell v. Biddeford Sav. Bank, 94 Me. 452, 47 A. 895, 80 Am. St. R. 408.

32. Fairfield Sav. Bank v. Small, 90 Me. 516, 38 A. 551; Slee v. Kings County Sav. Inst., 78 App. Div. 534, 79 N. Y. S. 630, 12 N. Y. Ann. Cas. 351.

33. Monohan v. Monohan, 77 Vt. 133, 59 A. 169, 70 L. R. A. 935; McCluskey v. Provident Inst. for Savings, 103 Mass. 300.

34. *In re* Holmes, 176 N. Y. 603, 68 N. E. 1118; *In re* Reichert, 85 App. Div. 619, 82 N. Y. S. 1113.

35. Wipfler v. Detroit Pattern Works, 140 Mich. 677, 104 N. W. 545, 12 Det. Leg. N. 309.

36. *In re* Klenke's Estate, 210 Pa. 572, 60 A. 166.

37. Blick v. Cockins, 252 Pa. 56, 97 A. 125.

38. Wetherow v. Lord, 58 N. Y. S. 778, 41 App. Div. 413.

39. West v. McCullough, 194 N. Y. 518, 87 N. E. 1130; *In re* Thompson's Estate, 167 App. Div. 356, 153 N. Y. S. 164; *In re* Mills' Estate, 93 Misc. 43, 157 N. Y. S. 138.

40. Wegmann v. Kress, 141 N. Y. S. 525.

addition to the survivorship, the quoted expression importing a gift.[41]

§ 551. Necessity of Intention to make Gift.

Whether gift or loan be the effect of a transaction is a question of intention, to be determined by the proof submitted,[42] especially where the evidence is oral.[43] The intelligent intent of the supposed donor, if it can be ascertained, will govern.[44] It has been repeatedly held, in chancery courts of this country, that gifts of personal property or voluntary conveyances of real estate from husband to wife are, as between themselves, valid, and such is now the rule in most, but not all, of the States; the Married Women's Acts in some jurisdictions creating a legal estate in the wife under such circumstances. The evidence of intention should be clear and distinct in all such cases.[45] The evidence must show the donor's intention to part with both title and possession.[46] No presumption of gift arises where a husband retains certificates of stock without delivery or a declaration of trust, though made out in the wife's name,[47] or where he purchases articles of personal adornment for her use.[48] The alleged donee has the burden of showing such intention.[49] The testimony of the donee is competent, and if uncontradicted, will sustain a judgment.[50] A hus-

41. Moore v. Fingar, 131 App. Div. 399, 115 N. Y. S. 1035.

42. The indorsement of a draft given in settlement of the wife's legacy, and its deposit to the husband's bank account, is insufficient proof of a gift to him, for this might be for mere convenience of collection. Green v. Carlill, 4 Ch. D. 282.

43. Colvin v. Johnston, 104 La. 655, 29 So. 274.

44. McGee v. McGee, 78 N. J. Eq. 430, 79 A. 268; McMahon v. Cronin, 128 N. Y. S. 423.

45. Borst v. Spelman, 4 Comst. (U. S.) 284; Coates v. Gerlach, 44 Pa. 43; Jennings v. Davis, 31 Conn. 134; George v. Spencer, 2 Md. Ch. 353; Deming v. Williams, 26 Conn. 226; Reynolds v. Lansford, 16 Tex. 286; Pennsylvania, etc., Co. v. Neel, 54 Pa. 9; Hunt v. Johnson, 44 N. Y. 27; Sims v. Rickets, 35 Ind. 181; Kitchen v. Bedford, 13 Wall. (U. S.) 413; Campbell v. Galbreath, 12 Bush (Ky.) 459; Hagin v. Shoaf, 9 Ala. App. 300, 63 So. 764 (cert. den., 64 So. 615); Gray v. Gray, 111 Me. 21, 87 A. 661; Farrow v. Farrow, 72 N. J. Eq. 421, 65 A. 1009; Keniston v. Keniston, 56 Vt. 680; Beck v. Beck, 78 N. J. Eq. 544, 80 A. 550.

46. Wheeler v. Armstrong, 164 Ala. 442, 51 So. 268; Foxworthy v. Adams, 136 Ky. 403, 124 S. W. 381; Light v. Graham (Mo.), 199 S. W. 570; Beck v. Beck, 77 N. J. Eq. 51, 75 A. 228.

47. Getchell v. Biddeford Sav. Bank, 94 Me. 452, 47 A. 895, 80 Am. St. R. 408.

48. Mains v. Webber's Estate, 131 Mich. 213, 91 N. W. 172, 9 Det Leg. N. 269.

49. LeBlanc v. Sayers, 202 Mich. 565, 168 N. W. 445.

50. Kelly v. Kelly, 164 N. Y. S. 172.

band's declarations to a third person that he had made a gift are insufficient of themselves to establish it,[51] but it is otherwise where accompanied by a delivery of the subject of the alleged gift,[52] or where accompanied by evidence that both parties considered the property hers,[53] or by conduct tending to corroborate his admissions.[54] The circumstances under which the husband's transfer is made are always material. Thus a husband might have placed his earnings or property in his wife's hands for safe-keeping, and not as a gift to her, in which case title to the fund should be respected accordingly as between them; or it might be regarded, perhaps, as bestowed for their joint benefit or that of the whole family upon due proof.[55] Or the understanding might be that the transaction was to stand upon mutual consideration or by way of security.[56] Acts of the wife recognizing the husband as owner of the subject of the gift are competent on the question of her acceptance of it.[57]

§ 552. Necessity and Nature of Delivery.

To constitute a valid gift of personalty there must be a delivery of the thing given;[58] delivery directly or through some third party, such as a trustee; delivery by acts parol, or under an instrument in writing, such as a deed of gift. Delivery should be according to the subject-matter; imperfect delivery being permitted by way of an equitable assignment in the case of incorporeal but not of corporeal, personalty. The donee should accept correspondingly; though acceptance is preferable; and the mutual intention may be gathered from words, acts and mutual conduct.[59] Where the husband gives corporeal property there should be some

51. Chambers v. McCreery, 106 F. 364, 45 C. C. A. 322; Bauernschmidt v. Bauernschmidt, 97 Md. 35, 54 A. 637; Burns v. Burns, 132 Mich. 441, 93 N. W. 1077, 9 Det. Leg. N. 662; *In re* Meehan, 59 App. Div. 156, 69 N. Y. S. 9; Pierce v. Giles, 93 Ill. App. 524.

52. *In re* Wise's Estate, 182 Pa. 168, 37 A. 936.

53. Williams v. Hoehle, 95 Wis. 510, 70 N. W. 556 (piano).

54. Hale v. Kennedy (Cal.), 183 P. 723.

55. Marshall v. Crutwell, L. R. 20 Eq. 328; Adlard v. Adlard, 65 Ill. 212; Edgerly v. Edgerly, 112 Mass. 175; Seibold v. Christian, 7 Mo. App. 254.

56. Grain v. Shipman, 45 Conn. 572. Where the evidence is conflicting as to a husband's object in making conveyance to his wife, the ordinary presumption of a provision for her benefit is not rebutted. Linker v. Linker, 32 N. J. Eq. 174.

57. Gould v. Glass, 120 Ga. 50, 47 S. E. 505.

58. Fritz v. Fernandez, 45 Fla. 318, 34 So. 315.

59. For the principles applicable to such gifts, see 2 Sch. Pers. Prop., Part V., ch. 2.

visible change of possession manifested; and in gifts, as of furniture, of that which remains in the common dwelling-house, there may be difficulty in establishing a transfer.[60] Mere expression of a wish that he should have it is not enough,[61] nor is a mere understanding that the property was to be owned in common.[62] Such delivery must be unconditional,[63] and may be actual or constructive.[64] But a constructive delivery will not avail where an actual delivery is possible. Thus where a husband delivers to his wife the key of a box containing certificates of stock, which was in another room in the house, and she merely took the key and kept it on her key ring and did nothing more, it was held that there was no valid gift.[65] Likewise, a gift by a husband to his wife of an automobile is not shown by evidence of his statements that he intended it as a birthday present for her and that he gave her a duplicate garage key, where the car was continuously used in his business and his wife never used it except to go on a pleasure trip with him.[66] The delivery may be qualified instead of absolute. But his reservation of a power to revoke or appoint to other uses does not impair the validity or efficiency of the transfer to his wife to hold until this power shall be executed; nor does it raise any imputation of bad faith in the transaction.[67] Delivery of a wife's notes to her husband may be inferred from the fact that they are found among his papers at his death, coupled with other evidence of her intention to make a gift.[68] No gift can be inferred merely from the fact that a wife delivers her money to her husband,[69] or that she gives him authority to draw on her bank account.[70] Under the West Virginia statute a wife acquires no title by gift to the personal property of her husband

60. *Re* Pierce, 7 Biss. (U. S.) 426.

61. Littlefield v. Perkins, 100 Me. 96, 60 A. 707.

62. Blick v. Cockins, 252 Pa. 56, 97 A. 125.

63. Hancock v. Hancock (Ind.) 111 N. E. 336.

64. Humphrey v. Ogden, 53 Colo. 309, 125 P. 110; Butler v. Farmers' Nat. Bank, 173 Ia. 659, 155 N. W. 999; Abegg v. Hirst, 144 Ia. 196, 122 N. W. 838; Coulter v. Meining, 143 Minn. 104, 172 N. W. 910; Jiles v. Jiles, 54 Pa. Super. 565.

65. Apache State Bank v. Daniels, 32 Okla. 121, 121 Pac. 237, 40 L. R. A. (N. S.) 901.

66. Rydzewski's Estate, 67 Pittsburg L. J. 270.

67. Jones v. Clifton, 101 U. S. 225. Such a power does not, in the event of the husband's bankruptcy, pass to his assignee. *Ib.*

68. Morey v. Wiley, 100 Ill. App. 75.

69. Adoue v. Spencer, 62 N. J. Eq. 782, 49 A. 10, 56 L. R. A. 817, 90 Am. St. R. 484.

70. Colmary v. Fanning, 124 Md. 548, 92 A. 1045; *In re* Holmes, 176 N. Y. 603, 68 N. E. 1118.

delivered to her at the matrimonial domicile except by deed or will.[71]

§ 553. Gift by Wife to Husband.

A wife may make a valid gift to her husband,[72] if it appears that such was her intention, and that she intended to part with her title to the property.[73] As to such gifts fraud or undue influence may be reasonably suspected; and transactions of this sort are scrutinized by the courts with gerat care,[74] such a gift will be enforced if fair and reasonable, and not procured by fraud or imposition.[75] They will be presumed to be valid *prima facie* as against a stranger.[76] Where a partition deed conveys a wife's land to her husband, the intent to give it to him is a question of fact.[77] The Virginia Married Women's Act does not take away the wife's power to make a valid gift to her husband,[78] nor is it taken away by the Georgia statute requiring the approval of a court to validate her conveyances to him.[79] Under the Missouri Married Women's Act her written transfer is required to validate such a gift.[80]

§ 554. Presumptions; Husband's Gift to Wife.

Where a husband causes title to his land to be taken in his wife's name, he is presumed to intend a gift to her,[81] even though

71. Evans v. Higgins, 70 W. Va. 640, 74 S. E. 909.

72. Evans v. Wells (Ark.), 212 S. W. 328; Davis v. Davis, 93 Ark. 93, 124 S. W. 525; Morrison v. Dickey, 122 Ga. 353, 50 S. E. 175, 69 L. R. A. 87; American Ins. Co. v. Bagley, 6 Ga. App. 736, 65 S. E. 787; Rea v. Rea, 156 N. C. 529, 72 S. E. 573.

73. Denigan v. Hibernia Savings & Loan Soc., 127 Cal. 137, 59 P. 389; *In re* Ford's Estate, 232 Pa. 179, 81 A. 200.

74. Long v. Beard, 20 Ky. Law, 1036, 48 S. W. 158; Spradling v. Spradling, 101 Ark. 451, 142 S. W. 848; Selle v. Rapp (Ark.), 170 S. W. 1021; Cruger v. Douglas, 4 Edw. Ch. (N. Y.) 433; Nedby v. Nedby, 1 E. L. & Eq. 106; *Re* Jones, 6 Biss. (U. S.) 68; Converse v. Converse, 9 Rich. Eq. (S. C.) 535; Stiles v. Stiles, 14 Mich. 72; Hollis v. François, 5 Tex. 195; Wales v. Newbould, 9 Mich. 45; Merriam v. Harsen, 4 Edw. Ch. (N. Y.) 70.

75. Fritz v. Fernandez, 45 Fla. 318, 34 So. 315.

76. Golding v. Golding, 82 Ky. 51, 5 Ky. L. 806.

77. Carter v. Becker, 69 Kan. 524, 77 P. 264; Mays v. Hannah, 4 Ky. Law, 50.

78. Throckmorton v. Throckmorton, 91 Va. 42, 22 S. E. 162.

79. Rich v. Rich, 147 Ga. 488, 94 S. E. 566.

80. Craig v. Miners' Bank of Joplin, 189 Mo. App. 389, 176 S. W. 433.

81. Carpenter v. Gibson, 104 Ark. 32, 148 S. W. 508; Jentzsch v. Jentzsch, 84 Ark. 322, 105 S. W. 572; Mayers v. Lark (Ark.), 168 S. W. 1093; Hall v. Cox, 104 Ark. 303, 149 S. W. 80; O'Hair v. O'Hair, 76 Ark. 389, 88 S. W. 945; Wilson v. Warner, 89 Conn. 243, 93 A. 533; Marchant v. Young, 147 Ga. 37, 92 S. E. 863;

his original intent was to defraud creditors.[82] The same presumption arises where he expends his money in improving her property,[83] and where he improves property held in their joint names, being presumed to intend a gift of half the value of the improvements in such case.[84] The same rule has been applied where a note in payment of his land is taken in the wife's name,[85] and to money furnished her with which to buy real estate,[86] and to the issuance in her name of corporate stock owned by him.[87] The presumption arises whether the conveyance is direct or through a third person,[88] and will be indulged wherever necessary to the theory that the land is the wife's property.[89] Unless it is overthrown she may recover the premises from him in ejectment.[90] The presumption may be rebutted,[91] and the husband has the

Elliott v. Prater, 260 Ill. 64, 102 N. E. 1015; Schultz v. Schultz, 274 Ill. 341, 113 N. E. 638; Hanks v. Hanks, 114 Ill. App. 526 (affd., 75 N. E. 352, 217 Ill. 359); Corcoran v. Corcoran, 119 Ind. 138, 21 N. E. 468, 12 Am. St. R. 390, 4 L. R. A. 782; Sims v. Rickets, 35 Ind. 181, 9 Am. R. 679; Nall v. Miller, 95 Ky. 448, 15 Ky. Law, 862, 25 S. W. 1106; Jaquith v. Massachusetts Baptist Convention, 172 Mass. 439, 52 N. E. 544; Siling v. Hendrickson, 193 Mo. 365, 92 S. W. 105; Solomon v. Solomon, 3 Neb. (Unof.) 540, 92 N. W. 124; Doan v. Dunham, 64 Neb. 135, 89 N. W. 640; Veeder v. McKinley-Lanning Loan & Trust Co., 61 Neb. 892, 86 N. W. 982; Kobarg v. Greder, 51 Neb. 365, 70 N. W. 921; Van Etten v. Passumpsic Savings Bank, 79 Neb. 632, 113 N. W. 163; Singleton v. Cherry, 168 N. C. 402, 84 S. E. 698; Cropsey v. Cropsey, 88 N. J. Eq. 491, 103 A. 1051; Warren v. Warren (N. J.), 104 A. 823; Weigert v. Schlesinger, 150 App. Div. 765, 135 N. Y. S. 335; Kent v. Tallent, 75, 76 Okla. 185, 183 P. 422; Kjolseth v. Kjolseth, 27 S. D. 80, 129 N. W. 752; Tison v. Gass, 46 Tex. Cir. 163, 102 S. W. 751; Anderson v. Cercone (Utah), 180 P. 586; Effler v. Burns, 70 W. Va. 415, 74 S. E. 233; Perkinson v. Clarke, 135 Wis. 584, 116 N. W. 229; Gilmour v. North Pasadena Land & Water Co., 178 Cal. 6, 171 P. 1066; Lins v. Lenhardt, 127 Mo. 271, 29 S. W. 1025. The same rule is established in Georgia by statute. Stonecipher v. Kear, 131 Ga. 688, 63 S. E. 215.

82. Carter v. McNeal, 86 Ark. 150, 110 S. W. 222.

83. Hamby v. Brooks, 86 Ark. 448, 111 S. W. 277; Maciejewska v. Jarzombek, 243 Ill. 136, 90 N. E. 231; Anderson v. Anderson, 177 N. C. 401, 99 S. E. 106; Selover v. Selover, 62 N. J. Eq. 761, 48 A. 522, 90 Am. St. R. 478.

84. Brady v. Brady, 86 Conn. 199, 84 A. 925; Foreman v. Citizens' State Bank, 128 Iowa, 661, 105 N. W. 163.

85. Adams v. Button, 156 Ky. 693, 161 S. W. 1100.

86. Hipkins v. Estes, 51 Wash. 1, 97 P. 1089.

87. Colmary v. Crown Cork & Seal Co. of Baltimore City, 124 Md. 476, 92 A. 1051.

88. Balster v. Cadick, 29 App. D. C. 405; Andreas v. Andreas, 84 N. J. Eq. 368, 96 A. 39.

89. Shaw v. Bernal, 163 Cal. 262, 124 P. 1012.

90. Balster v. Cadick, 29 App. D. C. 405.

91. Carle v. Heller, 18 Cal. App. 577, 123 P. 815; Gould v. Glass, 120 Ga. 50, 47 S. E. 505; Jackson v. Williams, 129 Ga. 716, 59 S. E. 776; Pool v. Phillips, 167 Ill. 432, 47 N. E. 758;

burden of proof.[92] The rebuttal evidence may be oral,[93] and must be clear and convincing.[94] Therefore, if the evidence is conflicting the presumption prevails.[95] Rebuttal evidence should be of facts antecedent to or contemporaneous with the transaction.[96] Where the presumption is overcome there is a resulting trust in favor of the husband.[97] The marital relation raises no presumption that a gift from a husband to his wife is the result of undue influence.[98] Where a father places furniture in the house of a daughter about to be married, with the consent of her husband, it is presumed to be a gift, but may be shown to be a loan.[99]

§ 555. Wife's Gift to Husband in General.

The rule is recognized under the statutes of many States, though in other States denied, that she may bestow her separate estate upon him by way of gift.[1] A wife's delivery of her property to her husband or her act in taking title in his name does not of itself raise a presumption of a gift,[2] there being a presumption that it was not a gift,[3] and either that he holds as trustee for her,[4] or that it is a loan.[5] The rule is the same where

Toney v. Toney, 84 Or. 310, 165 P. 221; Dean v. Dean (Tex.), 214 S. W. 505; Walston v. Smith, 70 Vt. 19, 39 A. 252.

92. Huston v. Smith, 248 Ill. 396, 94 N. E. 63; Moran v. Neville, 56 N. J. Eq. 326, 38 A. 851.

93. Johnson v. Johnson, 115 Ark. 416, 171 S. W. 475; Monahan v. Monahan, 77 Vt. 133, 59 A. 169, 70 L. R. A. 935.

94. Hubbard v. McMahon, 117 Ark. 563, 176 S. W. 122; Clavey v. Schnadt, 272 Ill. 464, 112 N. E. 360; Hood v. Hood, 83 N. J. Eq. 695, 93 A. 797; Waggy v. Waggy (W. Va.), 87 S. E. 178.

95. Andreas v. Andreas, 84 N. J. Eq. 368, 94 A. 415 (affd., 96 A. 39).

96. Wood v. Wood, 100 Ark. 370, 140 S. W. 275; Della v. Della, 98 Ark. 540, 136 S. W. 937; Alexander v. Bosworth, 26 Cal. App. 589, 147 P. 607.

97. Duvale v. Duvale, 54 N. J. Eq. 581, 35 A. 750; Corey v. Morrill, 71 Vt. 51, 42 A. 976.

98. Crofford v. Crofford, 29 Cal. App. 662, 157 P. 560.

99. Nichols v. Edwards, 16 Pick. (Mass.) 62.

1. Hinney v. Phillips, 50 Pa. 382; Fox v. Jones, 1 W. Va. 205; White v. Callinan, 19 Ind. 43; 2 Kent, Com. 111, and cases cited, last ed.; Johnston v. Johnston, 1 Grant, 468; Gage v. Dauchy, 28 Barb. (N. Y.) 622; Roper v. Roper, 29 Ala. 247. See Postnuptial Settlements.

2. Mahan v. Schroeder, 236 Ill. 392, 86 N. E. 97; Jackson v. Kraft, 186 Ill. 623, 58 N. E. 298; *In re* Mahon's Estate, 202 Pa. 201, 51 A. 745; Tison v. Gass, 46 Tex. Civ. 163, 102 S. W. 751.

3. Denny v. Denny, 123 Ind. 240, 23 N. E. 519; Reed v. Tilton (N. J.), 105 A. 597; Elmer v. Trenton Trust & Safe Deposit Co., 76 N. J. Eq. 452, 74 A. 668; Adoue v. Spencer, 62 N. J. Eq. 782, 49 A. 10, 56 L. R. A. 817, 90 Am. St. R. 484.

4. Barber v. Barber, 125 Ga. 226, 53 S. E. 1017; Beddow v. Sheppard, 118 Ala. 474, 23 So. 662; Garner v. Lankford, 47 Ga. 235, 93 S. E. 411; Burt v. Kuhnen, 113 Ga. 1143, 39 S.

the funds used by the husband were given him by another with the express intention that the land should belong to the wife,[6] and where the title is taken in their joint names, so that the spouses did not take by the entirety in such case,[7] and where the wife is in possession under a deed, and the husband gets in an outstanding title, for the purpose of bettering her title, paying for it with community funds and taking a deed to himself,[8] and where he mingles it with community funds so as to destroy the identity of the wife's separate funds,[9] and to personal property in which he has invested her funds and taken title in his name,[10] or in their joint names.[11] The rule does not hold where the wife's funds were loaned to the husband.[12] No presumption of fraud arises from such a transaction.[13] The husband has the burden of proving that there was a gift,[14] by clear evidence.[15] He must also

E. 414; Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538; Bristor v. Bristor, 93 Ind. 281; Black v. Black, 64 Kan. 689, 68 P. 662 Pribble v. Hall, 13 Bush (Ky.), 61; Oaks v. West (Tex.) 64 S. W. 1033; L. W. Levy & Co. v. Mitchell, 52 Tex. Civ. 189, 114 S. W. 172; Donovan v. Selinas, 85 Vt. 80, 81 A. 235; Bohannon v. Bohannon's Adm'x, 29 Ky. Law, 143, 92 S. W. 597; Martin v. Remington, 100 Wis. 540, 76 N. W. 614, 69 Am. St. R. 941; Harter v. Holman, 152 Wis. 463, 139 N. W. 1128.

5. Krider v. Hartzell, 40 Pa. Super. 186.

6. Goldstein v. Cockrell (Tex.), 66 S. W. 878.

7. McLeod v. Venable, 163 Mo. 536, 63 S. W. 847.

8. Gebhart v. Gebhart (Tex.), 61 S. W. 964.

9. Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360.

10. Ireland v. Webber, 27 Ind. 256; Nagle's Am'r v. Nagle, 22 Ky. Law R. 1417, 60 S. W. 639 (deposit of wife's money in husband's name); Bajohr v. Bajohr (Mo.), 184 S. W. 76 (wife's money deposited in husband's name).

11. Gooch v. Weldon Bank & Trust Co. (N. C.), 97 S. E. 53 (shares of stock).

12. Blethen v. Bonner, 30 Tex. Civ. 585, 71 S. W. 290.

13. Donlon v. Donlon, 154 App. Div. 212, 138 N. Y. S. 1039.

14. *In re* Carpenter, 179 F. 743; King v. King, 24 Ind. App. 598, 57 N. E. 275, 79 Am. St. R. 287; Buckel v. Smith's Adm'r, 26 Ky. Law, 494, 82 S. W. 235; Gillings v. Winter, 101 Md. 194, 60 A. 630; Stone v. Curtis, 115 Me. 63, 97 A. 213; Brady v. Brady (N. J.), 58 A. 931.

Under the California statute a gift from a wife to her husband is presumed to be the result of undue influence, which he must disprove. White v. Warren, 120 Cal. 322, 49 P. 129; Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360.

Under the Georgia statute no gift is presumed, but the wife has the burden of showing fraud or undue influence. Third Nat. Bank v. Poe, 5 Ga. App. 113, 62 S. E. 826. Under the same statute the evidence of her intention to make a gift must be clear and free from doubt. Shackelford v. Orris, 135 Ga. 29, 68 S. E. 838.

15. *In re* McMonagle, 139 App. Div. 398, 124 N. Y. S. 258; McKimmie v. Postelthwait, 78 W. Va. 273, 88 S. E. 833.

show that it was freely and deliberately made and that the transaction was fair.[16]

Where the question arises, then, whether the husband is enjoying the wife's property by way of gift from her, or as her managing attorney, it must be determined by evidence. In either case the advantage seems to be with husband and wife in all controversies with the creditor. The general rule still prevails, however, that money transactions between husband and wife should be free from fraud, and not prejudicial to pre-existing creditors of the husband. The presumptions are not equally balanced in the different States. But presumptions of a gift from the wife are not to be strongly favored where the husband is held out to others as her agent.[17] But it is fair to say that whenever she gives her property to him without agreement for any repayment, but for investment in his business, and to afford him credit with the world, and he so invests it with her knowledge and acquiescence, or takes title to real estate in his own name with her acquiescense for a similar purpose, his *bona fide* creditors ought not, especially when his time and energies were of essential value to it, and changes of material or investment are such as to render identification of the property as hers impossible, to suffer afterwards, who had relied upon this capital, because of her attempt to recall the gift when she finds him embarrassed; not even a special partner would have a right to do so.[18]

Furthermore, an investment, by the husband, of the wife's separate means and property, whether in purchasing real estate or personal property for her separate use, is valid, if the rights of

16. Manfredo v. Manfredo, 191 Ala. 322, 68 So. 157; Lamb v. Lamb, 18 App. Div. 250, 46 N. Y. S. 219; McElveen v. King, 88 S. C. 346, 70 S. E. 801; Turner v. Turner, 90 Conn. 676, 98 A. 324.

17. See Wales v. Newbould, 9 Mich. 45; Miller v. Edwards, 7 Bush (Ky.), 394; Patten v. Patten, 75 Ill. 446; Aldridge v. Muirhead, 101 U. S. 397.

18. See Kuhn v. Stansfield, 28 Md. 210; Wortman v. Price, 47 Ill. 22; Mazouck v. Iowa Northern R. R. Co., 30 Iowa, 559; Guill v. Hanny, 1 Ill. App. 490; Lichtenberger v. Graham, 50 Ind. 288; Brooks v. Shelton, 54 Miss. 353; Mathews v. Sheldon, 53 Ala. 136; Besson v. Eveland, 26 N. J. Eq. 468; Kaufman v. Whitney, 50 Miss. 103. The wife may be her husband's creditor in bankruptcy. *In re* Blandin, 1 Lowell (U. S.), 543.

As to the wife's gratuitous undertaking to subject her property to her husband's debts, her Pennsylvania rule is that equity will not enforce it, but leave the parties to their legal remedies. White's Appeal, 36 Pa. 134. The husband's own waiver of a statute exemption for the wife's benefit will not aid his creditors against her. Hess v. Beates, 78 Pa. 429.

creditors be not thereby impaired.[19] But where he purchases real estate or other property, and procures the title in his wife's name or in trust for her, when largely indebted, the validity of the transfer and its good faith may well be called in question, especially if the means were not clearly furnished from her separate estate.[20] As against creditors, therefore, where a husband receives and uses his wife's money with her consent, a gift is presumed,[21] and that she paid for it out of her separate estate.[22] In such case she must show an express promise to repay, or that it was a loan.[23] The evidence to show these facts must be clear.[24]

§ 556. Validity in General.

Very slight or technical considerations are often held sufficient to support a gift to the wife in English chancery.[25] That which belongs to the husband by common-law right, unaffected by equity or statute, unless he chooses to bestow it upon the wife, cannot constitute a consideration on her part for his further transfer of property to her.[26] A husband may make a good gift *causa mortis* to his wife,[27] but her testimony in such case, where no third person was present at the time of gift, should be received with caution.[28] A plural wife may accept a gift from her husband or may get a title by adverse possession founded on such gift.[29]

19. Jackson v. Jackson, 91 U. S. 122.

20. See Postnuptial Settlements, *ante*, § 520, *et seq.;* Eldred v. Drake, 43 Iowa, 569; Davidson v. Lanier, 51 Ala. 318; Bowser v. Bowser, 82 Pa. 57; Snow v. Paine, 114 Mass. 520; Hearn v. Lander, 11 Bush (Ky.), 669.

21. Nihiser v. Nihiser, 127 Md. 451, 96 A. 611; Reed v. Reed, 109 Md. 690, 72 A. 414; McConville v. National Valley Bank, 98 Va. 9, 34 S. E. 891; Crumrine v. Crumrine, 38 W. Va. 747, 18 S. E. 960; Throckmorton v. Throckmorton, 91 Va. 42, 22 S. E. 162.

22. Harr v. Shaffer, 52 W. Va. 207, 43 S. E. 89; Shaw v. Bernal, 163 Cal. 262, 124 P. 1012.

23. Miller v. Cox, 38 W. Va. 747, 18 S. E. 960; Horner v. Huffman, 52 W. Va. 40, 43 S. E. 132.

24. Bennett v. Bennett, 37 W. Va. 396, 16 S. E. 638; Keller v. Washington (W. Va.), 98 S. E. 880.

25. Peachey, Mar. Settl. 233, 238; Butterfield v. Heath, 15 Beav. 414; Fitzmaurice v. Sadlier, 9 Ir. Ch. 595; Hewison v. Negus, 16 Beav. 594; Bayspoole v. Collins, L. R. 6 Ch. 228; *Re* Foster, 6 Ch. D. 87; Teasdale v. Braithwaite, L. R. 5 Ch. D. 630; *Ex parte* Fox, L. R. 1 Ch. D. 302.

26. As, *e. g.*, her earnings or family plate. Belford v. Crane, 1 C. E. Green (N. J.), 265. And see Terry v. Wilson, 63 Mo. 493.

27. Marshall v. Jaquith, 134 Mass. 138.

28. Mellor v. Bank of Willows, 173 Cal. 404, 160 P. 567.

29. Raleigh v. Wells, 29 Utah, 217, 81 P. 908, 110 Am. St. R. 689.

§ 557. Operation and Effect.

All voluntary conveyances, though void against existing creditors and purchasers for value, are good against the grantor and those claiming under him.[30] Where there is a valid gift the donee takes absolute title,[31] but subject to valid liens.[32] A wife taking a deed to her husband's property with knowledge of the claims of others is not a *bona fide* purchaser.[33] A gift of certificates of stock carries the dividends, though credited to the husband, in whose name they stand on the transfer books.[34]

Where a good gift of real estate by deed has been made, the surrender and the destruction of the deed will not revest title in the grantor.[35] Where a husband made a written gift to his wife of three of his houses, the court imposed as a condition of the enforcement of the contract that the wife release dower in the others.[36] Where a husband with his wife's consent purchases land with her money and some of his own, and takes title in his own name for their joint use, her heirs cannot recover her money from him.[37] The Kentucky statute requiring the acknowledgment and record of written transfers to validate as against "third persons" gifts between spouses, refers only to creditors and *bona fide* purchasers.[38] A similar statute in Mississippi has been held inapplicable to wearing apparel and the like, which the husband's marital duty obliges him to furnish to her.[39] In Louisiana property acquired in the name of the wife and paid for by the husband vests title in the wife as a donation to his children by a previous marriage and reduced to a value not exceeding one-third of the donor's estate.[40]

30. Bill v. Cureton, 2 Myl. & K. 510; Doe v. Rusham, 17 Q. B. 724; Dayton Spice-Mills v. Sloan, 49 Neb. 622, 68 N. W. 1040; First Nat. Bank v. Havlik, 51 Neb. 668, 71 N. W. 291; Fletcher v. Wakefield, 75 Vt. 257, 54 A. 1012.

31. Garner v. Fry, 104 Iowa, 515, 73 N. W. 1079.

32. Hopper v. Hopper, 151 Ky. 120, 151 S. W. 359; Succession of Suarez, 131 La. 500, 59 So. 916.

33. City of Middlesborough v. Coal & Iron Bank, 33 Ky. Law, 469, 110 S. W. 355.

34. First Nat. Bank v. Holland, 99 Va. 495, 3 Va. Sup. Ct. Rep. 335, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. R. 898.

35. Marchant v. Young, 147 Ga. 37, 92 S. E. 863.

36. Cowdrey v. Cowdrey, 71 N. J. Eq. 353, 64 A. 98 (affd., 67 A. 111).

37. *In re* Kreider's Estate, 212 Pa. 587, 61 A. 1115.

38. McWethy's Adm'x v. McCright, 141 Ky. 816, 133 S. W. 1001.

39. Kennington v. Hemingway, 101 Miss. 259, 57 So. 809, 39 L. R. A. (N. S.) 541.

40. Succession of Graf, 125 La. 197, 51 So. 115.

In the same State donations of money and checks by a wife to her husband, if not revoked during marriage, become his property.[41]

A voluntary conveyance by the husband to his wife in consideration of natural love and affection creates usually an equitable separate estate; and, whether equitable or legal, she may encumber or alienate or transfer it, as in other instances of property held to her separate use.[42]

One sued in respect of the property transferred to the wife, or an intruder, and third persons generally, utter strangers to the transaction, ought not, as a rule, to dispute collaterally the wife's title as grantee or transferee from her husband under the conveyance or assignment.[43]

§ 558. Rescission or Avoidance.

The gift or voluntary conveyance once deliberately and absolutely made cannot usually be recalled by the settlor or donor upon allegations which fail to establish material fraud or coercion in the inducement, or a mutual material mistake, or upon any subsequent change of circumstances, such as death or divorce. This is the usual rule, and it applies to a husband's gifts to his wife.[44] But the wife's gift to her husband appears to be more leniently regarded in this respect than that of a husband to his wife; her readier liability to imposition or a misapprehension of legal rights being admitted, in courts of equity, in her favor.[45]

41. Succession of Desina, 123 La. 468, 49 So. 23.

42. McMillan v. Peacock, 57 Ala. 127; Myers v. James, 2 Lea (Tenn.), 159.

43. Thompson v. Commissioners, 79 N. Y. 54; Seymour v. Fellows, 77 N. Y. 178; Hollifield v. Wilkinson, 54 Ala. 275; Degman v. Farr, 126 Mass. 297. But see Hoker v. Boggs, 63 Ill. 161; Chicago v. McGraw, 75 Ill. 566; Huftalin v. Misner, 70 Ill. 55.

A wife has been allowed, under a postnuptial settlement, to subject her property to her husband's debts. Muller v. Bayly, 21 Gratt. (Va.) 521.

44. Jagers v. Jagers, 49 Ind. 428; Chew v. Chew, 38 Iowa, 405. If the husband made the gift, knowing that his wife had another husband, he cannot, after divorce, have the gift set aside. Chew v. Chew, 38 Iowa, 405. And see as to wife's alleged misconduct, Kehr v. Smith, 20 Wall. (U. S.) 31.

45. Boyd v. De La Montagnie, 73 N. Y. 498; Smyley v. Reese, 53 Ala. 89; Campbell's Appeal, 80 Pa. 298. A provision more beneficial to a husband than is reasonable may be set up as an abuse of his confidential relation to his wife. McRae v. Battle, 69 N. C. 98; Witbeck v. Witbeck, 25 Mich. 439. See also Birdsong v. Birdsong, 2 Head (Tenn.), 289; Wells v. Wells, 35 Miss. 638; McClellan v. Kennedy, 3 Md. Ch. 234.

Gifts and voluntary transfers by the husband to third persons, if not with the actual intent of defeating the wife's rights, are held in Maryland to be sustainable, though leaving her

But it may be said generally that a gift by one spouse to the other once completed cannot be revoked or anulled without the mutual assent of donor and donee,[46] and will not be set aside on a wife's remarriage after a divorce, though the gift was made in contemplation of such divorce,[47] but may be set aside if procured by fraud,[48] or if made without knowledge of the donee's adultery.[49] The use of more than a persuasive argument to obtain a gift will invalidate it.[50] A wife is not estopped by acts subsequent to a void conveyance to her husband from recovering the property from him,[51] nor from successfully defending against a void note to him, even in the hands of his indorsees.[52] Where spouses make a contract whereby the wife, for a consideration, releases all rights for dower, alimony and maintenance, her later action for divorce and alimony, not defended by him, is not a rescission.[53] Where a contract between spouses is void or set aside, the consideration will be returned.[54] It was held otherwise where a husband, whose gift from the wife was set aside for fraud or duress, had incurred expenses in the care of the property which he never expected or asked to be reimbursed for.[55] Where a deposit stands in the name of a wife, creating a presumption of a gift, his large money legacy in his will will not defeat the wife's right, though he left no property to pay the legacy.[56] The right to assail a deed from a husband to a wife because in violation of the Georgia statute requiring an order of court to validate a sale of the separate estate of the

without the means of subsistence; but here the statutes of Elizabeth would apply. Feigley v. Feigley, 7 Md. 537.

46. 2 Schoul. Pers. Prop., Part V., ch. 3; Garner v. Graves, 54 Ind. 188; James v. Hanks, 202 Ill. 114, 66 N. E. 1034.

47. West v. Burke, 165 App. Div. 667, 151 N. Y. S. 329.

48. Womack v. Womack, 73 Ark. 281, 83 S. W. 937 (motion to modify opinion denied, 83 Ark. 281); Hursen v. Hursen, 212 Ill. 377, 72 N. E. 1034, 103 Am. St. R. 230; Stout v. Stout, 165 Iowa, 552, 146 N. W. 474, L. R. A. 1915 A. 711.

49. Evans v. Evans, 118 Ga. 890, 45 S. E. 612; Warlick v. White, 86 N. C. 139, 41 Am. R. 453; Thomas v. Thomas, 27 Okla. 784, 109 Pac. 825, 35 L. R. A. (N. S.) 124.

50. (Ch. 1908), Schultze v. Schultze, 73 N. J. Eq. 597, 75 A. 824 (affd., 74 A. 1135).

51. Connar v. Leach, 84 Md. 571, 36 A. 591.

52. National Granite Bank v. Tyndale, 176 Mass. 547, 57 N. E. 1022, 51 L. R. A. 447.

53. O'Day v. Meadows, 194 Mo. 588, 92 S. W. 637, 112 Am. St. R. 542.

54. Fay v. Fay, 165 Cal. 469, 132 P. 1040; Wilson v. Mullins (Ky.), 119 S. W. 1180; Newby v. Cox, 81 Ky. 58, 4 Ky. Law, 744; Ice v. Ice, 26 Ky. Law, 1065, 83 S. W. 135.

55. Hoag v. Hoag, 210 Mass. 94, 96 N. E. 49.

56. *In re* Klenke's Estate, 210 Pa. 572, 60 A. 166.

wife is personal to her, and cannot be exercised by a stranger to the title,[57] or by the husband's heirs [58] or creditors.[59]

Under the Louisiana statute, interspousal donations are always revokable except as against third possessors acquiring property by a prescription of ten years.[60] By statute in the same State, gifts between spouses, except in the three cases specified by the statute, are void, even between the parties.[61] Under the Michigan statute a voluntary conveyance from a husband to a wife cannot be set aside by either party except for fraud.[62]

§ 559. Gifts in Fraud of Creditors.

A gift from one spouse to the other is valid against subsequent creditors of the donor,[63] even though such donor subsequently has possession and use of the property,[64] but not against those to whom the donor contemplates becoming indebted when he makes the gift.[65] The mere fact that the husband owed money to the wife will not validate a conveyance by him to her made for the purpose of avoiding liability as indorser on a note not then due, where the wife knew of the fraudulent nature of the transaction.[66]

The fraudulent effect of a mere gift by husband to wife, which consists in placing the property beyond the reach of his creditors, is not averted by the fact that the wife did not know the gift was improper, so long as she knew he was indebted, nor, in general, does it appear that her knowledge is of consequence, since the creditor's intent is here the material point to consider.[67]

Even accumulations by labor and the natural produce of the fund may be reached by creditors, where the original fund was transferred to his wife in fraud of their rights by an insolvent husband, and by way of voluntary gift to her.[68]

57. Scaife v. Scaife, 134 Ga. 1, 67 S. E. 408.

58. Munroe v. Baldwin, 145 Ga. 215, 88 S. E. 947.

59. Williams v. Rhodes, 149 Ga. 170, 99 S. E. 531.

60 Leverett v. Loeb, 117 La. 310, 41 So. 584.

61. Kelly v. Kelly, 131 La. 1024, 60 So. 671.

62. Judd v. Judd, 192 Mich. 198, 158 N. W. 948.

63. Morey v. Wiley, 100 Ill. App. 75; Pare v. Renfro, 178 Ky. 143, 198 S. W. 553; Sawyer v. Metters, 133 Wis. 350, 113 N. W. 682.

64. Swindell v. Swindell, 153 N. C. 22, 68 S. E. 892.

65. Lavigne v. Tobin, 52 Neb. 686, 72 N. W. 1040.

66. Strassburger v. McGovern, 66 Pittsburgh Legal Journal, 653.

67. Matson v. Melchor, 42 Mich. 477. Cf. as to antenuptial settlement upon a wife, who knew her husband to be embarrassed, but did not know he was insolvent, *supra*, Prewit v. Wilson, 103 U. S. 22.

68. Hamilton v. Lightner, 53 Iowa, 470. But intent to defraud in conveying a farm does not necessarily impair the wife's rights to crops raised

The statute of 13 Eliz., ch. 5, is generally recognized throughout the United States; in some cases having been formally re-enacted; in others, claimed to be part of the common law transported hither by the first settlers; and hence gifts of goods and chattels, as well as voluntary conveyances of lands, by writing or otherwise, are void when made with intent to delay, hinder, and defraud creditors, even though the gift or conveyance be to wife and children.[69] For it is a maxim, both at the civil and common law, that the claims of justice shall precede those of affection.[70]

thereon. Sanders v. Chandler, 26 Minn. 273.

69. 2 Kent, Com. 440, 441, and cases cited; Bayard v. Hoffman, 4 Johns. Ch. 450; Montgomery v. Tilley, 1 B. Mon. (Ky.) 157; Reade v. Livingston, 3 Johns. Ch. 481; Pinney v. Fellows, 15 Vt. 525; Simpson v. Graves, Riley Ch. 232; Sexton v. Wheaton, 8 Wheat. (U. S.) 229; 1 Am. Lead. Cas. 1.

70. Cicero, de Off. I. 14, cited in 2 Kent, Com. 441.

CHAPTER XXVII.

CONVEYANCES AND MORTGAGES BETWEEN SPOUSES.

§ 560. Conveyances and Leases.

A conveyance, by husband and wife, of land belonging to the wife, to a third person, and a conveyance of the same land by such third person to the husband, vests the entire title in the husband.[71] But a conveyance of lands by the wife directly to her husband, especially if it be voluntary, has been considered ineffectual and void. And under the early Married Women's Acts her right to make such a conveyance was generally, though not universally, denied, and she must convey through a third person, her husband joining in the conveyance.[72] In many States the wife's conveyance directly to her husband is absolutely void in law and equity; and the safer course must be to convey through a third party.[73] Not only was the wife incompetent to convey at common law, but the husband could not take under such a conveyance.[74] A conveyance by a wife directly to her husband might in certain cases be enforced in equity,[75] where the husband acted in good faith, and

71. Merriam v. Harsen, 4 Edw. Ch. (N. Y.) 70; Durant v. Ritchie, 4 Mason (U. S.) 45; Garvin v. Ingram, 10 Rich. Eq. (S. C.) 130; Bowen v. Sebree, 2 Bush (Ky.), 112. This is a good conveyance, even though the third person be an adult son. Chicago v. McGraw, 75 Ill. 566.

72. White v. Wager, 32 Barb. (N. Y.) 250; Winans v. Peebles, 32 N. Y. 423; Gebb v. Rose, 40 Md. 387; Preston v. Fryer, 38 Md. 221; Fowler v. Trebein, 16 Ohio St. 493. But see Robertson v. Robertson, 25 Iowa, 350; Hannaford v. Dowdle, 75 Ark. 127, 86 S. W. 818; Leach v. Rains, 149 Ind. 152, 48 N. E. 858; Wicks v. Dean, 103 Ky. 69, 19 Ky. Law, 1708, 44 S. W. 397; Kennedy v. Ten Broeck, 11 Bush (Ky.), 241; Young v. Brown, 136 Tenn. 184, 188 S. W. 1149.

73. Kinnaman v. Pyle, 44 Ind. 275; Postnuptial Settlements, *ante*, § 520.

A deed not expressed on its face as discharging the lien of a mortgage held in trust for the wife does not operate to extinguish, even though husband and wife joined in the conveyance. Klein v. Caldwell, 91 Pa. 140.

74. Elder v. Elder, 256 Pa. 139, 100 A. 581; Buchanan v. Corson, 51 Pa. Super. 558.

75. Johnson v. Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795; McCord v. Bright, 44 Ind. App. 275, 87 N. E. 654; Vicroy v. Vicroy, 20 Ky. Law, 47, 45 S. W. 75; Douglass

with proper motives and purposes.[76] Such a transaction will be more closely scrutinized by the courts than a similar conveyance by the husband to the wife;[77] but in some States she may convey directly to him,[78] even though the property was acquired before she had statutory power to convey it to him.[79] She may do so by

v. Douglass, 51 La. Ann. 1455, 26 So. 546; Alexander v. Shalala, 228 Pa. 297, 77 A. 554; Wicker v. Durr, 225 Pa. 305, 74 A. 64; Giffin v. Giffin (Tenn.), 37 S. W. 710; Hughey v. Mosby, 37 Tex. Civ. 76, 71 S. W. 395; Jarrell v. Crow, 30 Tex. Civ. 629, 71 S. W. 397; Kelley v. Dearman, 65 W. Va. 49, 63 S. E. 693; Smith v. Vineyard, 58 W. Va. 98, 51 S. E. 871.

76. Wood v. Wood, 100 Ark. 372, 172 S. W. 860; *In re* Williams, 4 Del. 401, 88 A. 716.

77. Hannaford v. Dowdle, 75 Ark. 127, 86 S. W. 818; McDonald v. Smith, 95 Ark. 523, 130 S. W. 515.

78. Wells v. Caywood, 3 Colo. 487; Postnuptial Settlements; Sample v. Guyer, 143 Ala. 613, 42 So. 106; Whittaker v. Van Hoose, 157 Ala. 286, 47 So. 741; Tyler v. Currier, 147 Cal. 31, 81 P. 319; Despain v. Wagner, 163 Ill. 598, 45 N. E. 129; Stubbings v. Stubbings, 248 Ill. 406, 94 N. E. 54; Noel v. Fitzpatrick, 124 Ky. 787, 30 Ky. Law, 1011, 100 S. W. 321; Turner v. Shaw, 96 Mo. 22, 8 S. W. 897, 9 Am. St. R. 319; Glascock v. Glascock, 217 Mo. 362, 117 S. W. 617; Haguewood v. Britain, 273 Mo. 89, 199 S. W. 950; Butler v. Butler, 169 N. C. 584, 86 S. E. 507; Rea v. Rea, 156 N. C. 529, 72 S. E. 573; Lawshe v. Trenton Banking Co., 87 N. J. Eq. 56, 99 A. 617; Battle v. Claiborne (Ark.), 180 S. W. 584; Johnson v. Austin, 86 Ark. 446, 111 S. W. 455; Brandau v. McCurley, 124 Md. 243, 92 A. 540, L. R. A. 1915C, 767; Wilkinson v. Kneeland, 125 Mich. 261, 84 N. W. 142, 7 Det. Leg. N. 409; Chittenden v. Chittenden, 22 Ohio Cr. Ct. 498, 12 O. C. D. 526; Yeager v. Yeager, 82 Wash. 271, 144 P. 22.

The Alabama statute permitting conveyances by wives to third persons under certain restrictions, does not permit her to convey to her husband. Osborne v. Cooper, 113 Ala. 405, 21 S. 320, 59 Am. St. R. 117. Under that statute it has been held that a deed from a wife to her husband reserving a reversion to her if she survives him, but giving him power to convey, vested an absolute title in the husband. Manfredo v. Manfredo, 191 Ala. 322, 68 So. 157.

Under the Georgia statute the approval of a court is required to validate a transfer by the wife of her husband of her separate property. Gordon v. Harris, 141 Ga. 24, 80 S. E. 276; Buchannon v. James, 135 Ga. 392, 69 S. E. 543; Stonecipher v. Kear, 131 Ga. 688, 63 S. E. 215; Carpenter v. Booker, 131 Ga. 546, 62 S. E. 983; Webb v. Harris, 124 Ga. 723, 53 S. E. 247; Sikes v. Bradley, 20 Ga. App. 470, 93 S. E. 111. Such a conveyance is void under the Louisiana statute prohibiting sales between spouses. Douglass v. Douglass, 51 La. Ann. 1455, 26 So. 546.

Under the Tennessee statute providing that a wife can convey as though sole only when she abandons or is abandoned by her husband, or when he is insane, she cannot convey directly to her husband when she is not within the specified classes. Worrell v. Drake, 110 Tenn. 303, 75 S. W. 1015. In that State, prior to a statute permitting her to contract as sole, she could not convey to him even by a deed otherwise as required by law and in which he joined. Bailey v. Apperson, 134 Tenn. 716, 185 S. W. 710.

79. Smelser v. Meier, 271 Mo. 178, 196 S. W. 22.

any recognized form of conveyonce,[80] if executed as required by law.[81] Such a conveyance must be subject to the rights of creditors whether antecedent or subsequent to the transaction;[82] and where her right to the property is questioned by his creditors, she has the burden of showing her right affirmatively and distinctly.[83] A husband's agreement to support the wife's children by a former marriage will support such a conveyance.[84] A conveyance from a wife to her husband through a third person will not be avoided for his coercion where the evidence is not clear.[85] It must appear that his conduct toward her was of such a character as to preclude her resisting his influence.[86]

In Arkansas a conveyance by a wife to her husband passes an equitable interest only, the legal title remaining in her.[87] A husband taking a deed from his wife has the burden of showing good faith, the want of undue influence, that the transaction was fair and reasonable, and the consideration adequate.[88] Payment of a mortgage from a wife to her husband cannot be inferred from his failure to foreclose after their separation.[89] In Georgia transfers of property by a wife to her husband are not binding unless made with the consent of the superior court.[90] An order giving such consent cannot be validly made in vacation.[91] The statute does not apply to a deed reconveying to the husband land conveyed to the wife as security for a loan.[92] The statute applies to transfers made while the spouses are separated, and the want of compliance with the statute renders the deed void, and not merely voidable.[93] Under the New Jersey statute empowering a wife who has land in the State and who is living apart from her husband, who refuses to support her, to apply to a court for leave to dispose of her land

80. Powers v. Munson, 74 Wash. 234, 133 P. 453.

81. Funkhouser v. Fowler, 117 Tenn. 539, 101 S. W. 769.

82. McCabe v. Guido, 116 Miss. 858, 77 So. 801.

83. Evans v. Bell (D. C.), 48 Wash. L. R. 218.

84. Schroeder v. Smith, 249 Ill. 574, 94 N. E. 969.

85. Moorman v. Board, 11 Bush (Ky.), 135.

86. Kennedy v. Ten Broeck, 11 Bush (Ky.), 241.

87. Mathy v. Mathy, 88 Ark. 56, 113 S. W. 1012.

88. McCord v. Bright, 44 Ind. App. 275, 87 N. E. 654; Thompson v. Brozo, 92 Wash. 79, 159 P. 105.

89. Stelts v. Martin, 90 S. C. 14, 72 S. E. 550.

90. Webb. v. Harris, 124 Ga. 723, 53 S. E. 247.

91. Frank v. McEachin, 148 Ga. 858, 98 S. E. 497; Roland v. Roland, 131 Ga. 579, 62 S. E. 1042.

92. Turner v. Woodward, 133 Ga. 467, 66 S. E. 160.

93. Echols v. Green, 140 Ga. 678, 79 S. E. 557.

as *sole,* except such as is given to her by him, it is immaterial whose fault caused the separation.[94] Under the Kentucky statute relating to the sale of land for reinvestment, the court cannot order the sale of land of which a wife is the owner in fee.[95] In Tennessee it is held that a decree rendered in an *ex parte* proceeding by spouses to obtain leave to violate a restraint of alienation in a deed creating a separate estate in the wife is void for want of jurisdiction.[96] Likewise it is the older rule that the husband cannot convey real estate to his wife directly, and without the intervention of a trustee.[97]

The reason of this rule was the legal unity of husband and wife at the common law,[98] while the statute of uses furnished a mode of conveyance through trustees.[99] But the husband may make a valid conveyance to his wife through the medium of a third person.[1] While it does not appear that a deed by husband to wife is of itself valid and operative in equity more than law, special circumstances might induce a court of equity to give effect to it where a court of law could not; as by decreeing the husband a trustee for his wife; not, however, without strict scrutiny where rights of creditors are infringed, nor in any case where the equity is not made apparent.[2] Under some statutes he may convey directly to

94. *In re* Staheli, 78 N. J. Eq. 74, 78 A. 206.

95. Chenault v. Chenault, 22 Ky. Law, 122, 56 S. W. 728.

96. Travis v. Sitz, 135 Tenn. 605, 185 S. W. 1075.

97. Voorhees v. Presbyterian Church, 17 Barb. (N. Y.) 103; Ransom v. Ransom, 30 Mich. 328.

98. 1 Washb. Real Prop. 279.

99. 1 Roper, Hus. & Wife, 53; Thatcher v. Omans, 3 Pick. (Mass.) 521; 1 Washb. Real Prop. 279; Wms. Real Prop. 185. The later American cases are disposed to sustain all such conveyances, when with valuable consideration, upon equitable grounds. Winans v. Peebles, 32 N. Y. 423; Putnam v. Bicknell, 18 Wis. 333; 2 Story Eq. Juris., § 1204; Wallingsford v. Allen, 10 Pet. (U. S.) 583. In various States the trustee or intermediate grantee is now dispensed with altogether under statutes treating the wife as *sui juris.* Allen v. Hooper, 50 Me. 371. And see Albin v. Lord, 39 N. H. 196; Fowler v. Trebein, 16 Ohio St. 493; Ransom v. Ransom, 30 Mich. 328; Wells v. Caywood, 3 Col. 487.

1. A judgment lien against the third party is not effectual against the wife. O'Donnell v. Kerr, 50 How. Pr. (N. Y.), § 324. And see Huftalin v. Misner, 70 Ill. 55. Destruction of unrecorded deeds will not invalidate the wife's title as against the grantor and his heir. Dukes v. Spangler, 35 Ohio St. 119; Johnson v. Rockwell, 12 Ind. 76; Battle v. Claiborne (Tenn.), 180 S. W. 584.

In Arizona the common-law rule requiring the intervention of a trustee to effectuate a transfer of property between spouses has never been adopted. Luhrs v. Hancock, 181 U. S. 567, 21 S. Ct. 726, 45 L. Ed. 1005.

2. Loomis v. Brush, 36 Mich. 40; Dale v. Lincoln, 62 Ill. 22; Aultman v. Obermeyer, 6 Neb. 260.

her; and the deed (supposing it to have been properly recorded) will be good against all but injured creditors,[3] if not intended to avoid the necessity of administration at his death.[3a] Under such a statute a husband may convey to his wife his interest in an estate by the entirety.[4] Such a transfer will destroy the tenancy, and give the wife sole title in severalty.[5]

In West Virginia a deed by a wife to her husband of real estate, while they cohabit, passes no title where he does not join.[6] In the same State, and in Arkansas and Delaware, a deed from him to her passes an equitable title, he holding the legal title in trust for her, without power to incumber it.[7] His grantees take subject to the trust.[8] Under the Minnesota statute all contracts between spouses as to their real estate are void, even though made after their separation.[9] In Louisiana a deed by a husband to his wife of land to replace the value of real estate which is part of her paraphernal property sold by him, is valid.[10] Since the statute in that State provides a means whereby wives may waive their rank of mortgage in favor of subsequent mortgages of their husbands,

3. Jewell v. Porter, 11 Fost. (N. H.) 34; Motte v. Alger, 15 Gray (Mass.), 322; Burdeno v. Amperse, 14 Mich. 91; Crowley v. Savings Union Bank & Trust Co., 30 Cal. App. 535, 159 P. 194; Koch v. Sallee, 176 Ill. App. 379; Merchants' & Laborers' Building Ass'n v. Scanlan, 144 Ind. 11, 42 N. E. 1008; Hellyer v. Hellyer (Iowa), 112 N. W. 196; Sproul v. Atchison Nat. Bank, 22 Kan. 336; Ice v. Ice, 26 Ky. Law, 1065, 83 S. W. 135; Wooden v. Wooden, 72 Mich. 347, 4 N. W. 460; Strauss v. Parshall, 91 Mich. 475, 51 N. W. 1117; Currier v. Teske, 84 Neb. 60, 120 N. W. 1015; Kent v. Tallent, 75 Okla. 185, 183 P. 422; Watts v. Bruce, 31 Tex. Civ. 347, 72 S. W. 258; Shorett v. Signor, 58 Wash. 695, 107 P. 1033; Reagle v. Reagle, 179 Pa. 89, 36 A. 191.

Under the Missouri statute a husband may convey to a wife through a third person an estate in land, to commence at his death and thereafter during her life, without creating any particular estate. O'Day v. Meadows, 194 Mo. 588, 92 S. W. 637, 112 Am. St. R. 542. A later case in the same State holds that the same was true of a direct conveyance before the Married Women's Act. Carson v. Berthold & Jennings Lumber Co., 270 Mo. 238, 192 S. W. 1018.

3a. Eves v. Roberts, 96 Wash. 99, 164 P. 915.

4. Hardwick v. Salzi, 46 Misc. 1, 93 N. Y. S. 265; Mardt v. Scharmach, 65 Misc. 124, 119 N. Y. S. 449.

5. Demerse v. Mitchell, 187 Mich. 683, 154 N. W. 22.

6. Smith v. Vineyard, 58 W. Va. 98, 51 S. E. 871.

7. Carter v. McNeal, 86 Ark. 150, 110 S. W. 222; Stricklin v. Moore, 98 Ark 30, 135 S. W. 360; Maupin v. Gains, 125 Ark. 181, 188 S. W. 552; Williams v. Betts (Del.), 98 A. 371; Swiger v. Swiger, 58 W. Va. 119, 52 S. E. 23.

8. Depue v. Miller, 65 W. Va. 120, 64 S. E. 740.

9. Phillips v. Baker, 68 Minn. 152, 70 N. W. 1082 (mortgage).

10. Provost v. Provost, 4 Mart. (O. S.) (La.), 506; Pons v. Yazoo & M. V. R. Co., 122 La. 156, 47 So. 449.

they cannot do so by making in a notarial act an unfounded acknowledgment of payment by her husband of paraphernal funds converted to his own use, with authority to the recorder to erase the mortgage from the record.[11]

Under some statutes the wife may lease directly to her husband,[12] and the husband, perhaps, to the wife; and here, too, the medium of a trustee may be invoked by way of assignment. Practical difficulties may arise, however, in suing upon the covenants as between husband and wife directly, so contrary are all such transactions to the old rule of coverture.[13]

§ 561. Mortgages.

A mortgage by a husband to his wife is now usually held valid.[14] A wife may acquire and foreclose a mortgage on her husband's property, even though she joined to release dower.[15] The same is true where she pays off his note and mortgage and takes an assignment.[16]

§ 562. Operation and Effect.

Where a husband conveys property to his wife, the presumption that he intends a conveyance of the beneficial as well as the legal title is very strong.[17] Such a conveyance vests title in her as against her husband and those claiming under him, and is subject to her conveyance or devise,[18] even though he remains in possession of and farms the land and pays taxes, unless he regains title by adverse possession,[19] or even if the husband has used community

11. Equitable Securities Co. v. Talbert, 49 La. Ann. 1393, 22 So. 762; Tobin v. White, 142 La. 84, 76 So. 248.

12. Albin v. Lord, 39 N. H. 196; America Bank v. Banks, 101 U. S. 240.

13. Jeune v. Marble, 37 Mich. 319; *supra*, § 411.

14. Cort v. Benson, 159 Iowa, 218, 140 N. W. 419.

15. Crosby v. Clem, 209 Mass. 193, 95 N. E. 297; Youmans v. Loxley, 56 Mich. 197, 22 N. W. 282; Graham v. Lamb, 120 Mich. 577, 79 N. W. 804, 6 Det. Leg. N. 276.

16. Fitcher v. Griffiths, 216 Mass. 174, 103 N. E. 471.

17. *In re* Foss, 147 F. 790; McCartney v. Fletcher, 11 App. D. C. 1; McComb v. McComb, 241 Ill. 453, 89 N. E. 714; Roper v. Getman (Iowa), 75 N. W. 177; Oliver v. Sample, 72 Kan. 582, 84 P. 138.

18. Milam v. Coley, 144 Ala. 535, 39 So. 511; Donnelly v. Tregaskis, 154 Cal. 261, 97 P. 421; Shea v. McMahon, 16 App. D. C. 65; *In re* Pieper's Estate, 45 Iowa, 373, 124 N. W. 181; English v. English, 229 Mass. 11, 118 N. E. 178; Haines v. Roydhouse, 83 N. J. Eq. 675, 93 A. 190.

Where a grantor had previously executed deeds to a husband which were not recorded, and where a wife recorded the deeds to her, it was held that she was entitled to a cancellation of the first deeds. Ball v. Ball, 97 App. D. 347, 89 N. Y. S. 1046; Stolte v. Karren (Tex.), 191 S. W. 600.

19. Bias v. Reed, 169 Cal. 33, 145 P. 516.

funds to buy it,[20] and even though she later abandons him for justifiable cause.[21] She may be shown to hold it in trust.[22] She may acquire a life estate in his land by a deed in which she joins which reserves to both spouses life estate in the granted property.[23] A wife taking property from her husband for a nominal consideration takes only his interest, and is not a *bona fide* purchaser for value.[24] In the absence of statute the want of record does not affect the validity of a conveyance, as between the parties,[25] but as against third persons the deed must be recorded to be effectual.[26]

§ 563. Transfers of Personalty.

In some States transfers of personal property between spouses are valid.[27] In such case the transferee may replevy it from those wrongfully seizing it as the property of the transferor.[28] Where such transfers are not valid at law equity will sometimes enforce them.[29] It has been held that a wife holding a valid mortgage of her husband's personal property may have the statutory remedy against an officer attaching it as the property of the husband.[30] A transfer by a husband to a wife through a third person has been upheld where both bills of sale were handed to her without having been actually in the hands of the third person.[31] Under the North Carolina statute a transfer of an insurance policy for the benefit of the wife is within its requirement that contracts between the spouses impairing or altering the body or capital of her personal estate for more than three years to be in writing and acknowledged

20. Bott v. Wright (Tex.), 132 S. W. 960.

21. Purcell v. Purcell, 17 Det. Leg. N. 594, 127 N. W. 310.

22. Wilson v. Wilson, 86 Md. 638, 39 A. 276; Walston v. Smith, 70 Vt. 19, 39 A. 252; Oliver v. Sample, 72 Kan. 582, 84 P. 138.

23. Reigel v. Reigel, 243 Ill. 626, 90 N. E. 1108.

24. Aeker v. Pridgen, 158 N. C. 337, 74 S. E. 335; Morgan v. Northern Pac. Ry. Co., 50 Wash. 480, 97 P. 510; Perkinson v. Clarke, 135 Wis. 584, 116 N. W. 229.

25. Tyler v. Currier, 147 Cal. 31, 81 P. 319.

26. Austin Clothing Co. v. Posey, 105 Miss. 720, 64 So. 5, 1 A. L. R. 13.

27. *In re* Hoffman, 199 F. 448; V. G. Fischer Art Co. v. Hutchins, 41 App. D. C. 156; Butler v. Farmers' Nat. Bank, 173 Ia. 659, 155 N. W. 999; Sherman v. Davenport, 106 Ia. 741, 75 N. W. 187; Kraft v. Kraft, 70 Minn. 144, 72 N. W. 804; Pedrick v. Kuemmell, 74 N. J. 379, 65 A. 906; Connar v. Leach, 84 Md. 571, 36 A. 591.

28. Faddis v. Woollomes, 10 Kan. 56.

29. Thomas v. Harkness, 13 Bush (Ky.), 23; Kulin v. Heller, 69 N. J. Law, 33, 54 A. 519.

30. Duggan v. Wright, 157 Mass. 228, 32 N. E. 159.

31. Garwood v. Garwood, 56 N. J. Eq. 265, 38 A. 954.

in a certain way.[32] The Missouri statute requiring the written assent of the wife to enable her husband to pass title to her personal property is not complied with where she delivers to him her note indorsed in blank,[33] nor where the fact that she joins with him in a deed of her property and permits the grantee to pay in part with a note payable to her husband.[34] Except as modified by the Louisiana Act, No. 94 of 1916, a wife in that State may not convey her paraphernal property to her husband in trust for a third person for life.[35]

32. Sydnor v. Boyd, 119 N. C. 481, 26 S. E. 92, 37 L. R. A. 734.

33. Case v. Espenschied, 169 Mo. 215, 69 S. W. 276, 92 Am. St. R. 633.

34. McGregor v. Pollard, 66 Mo. App. 324.

35. Marks v. Loewenberg, 143 La. 196, 78 So. 444.

CHAPTER XXVIII.

CONVEYANCES TO SPOUSES.

§ 564. Estate by the Entirety in Land.

It may here be added that, at the common law, a conveyance of land to husband and wife and their heirs vests the entirety in each of them; and upon the death of one the survivor takes the whole estate, discharged of the other's debts, and to the exclusion of the heirs of the deceased.[36] The tenancy may be created by a

36. Wright v. Sadler, 20 N. Y. 320; Banton v. Campbell, 9 B. Mon. (Ky.) 587; Gilson v. Zimmerman, 12 Mis. 385; Bates v. Seely, 46 Pa. 248; French v. Mehan, 56 Pa. 286; Robinson v. Eagle, 29 Ark. 202; Marburg v. Cole, 49 Md. 402; Fisher v. Provin, 25 Mich. 347; Johnson v. Austin, 86 Ark. 446, 111 S. W. 455; Johnson v. Johnson, 122 Ark. 363, 183 S. W. 967; Maxey v. Logan, 131 Ark. 593, 198 S. W. 270; Robertson v. Robinson, 87 Ark. 367, 112 S. W. 883; Naler v. Ballew, 81 Ark. 328, 99 S. W. 72; McWhorter v. Green, 111 Ark. 1, 162 S. W. 1100; Kunz v. Kurtz, 8 Del. Ch. 404, 68 A. 450; Marshall v. Lane, 27 App. D. C. 276; English v. English, 66 Fla. 427, 63 So. 822; Kron v. Kron, 195 Ill. 181, 62 N. E. 809; Alles v. Lyon, 216 Pa. 604, 66 Atl. 81; Odum v. Russell (N. C.), 101 S. E. 495; Maitten v. Barley, 174 Ind. 620, 92 N. E. 738; Dotson v. Faulkenberg, 186 Ind. 417, 116 N. E. 577; Tharp v. Updike, 55 Ind. App. 452, 102 N. E. 855; Holmes v. Holmes, 70 Kan. 892, 79 P. 163; Louisville v. Coleburne, 108 Ky. 420, 22 Ky. Law, 64, 56 S. W. 681; Frey v. McGraw, 127 Md. 23, 95 A. 960; Lang v. Wilmer, 131 Md. 215, 101 A. 706; Woodard v. Woodard, 216 Mass. 1, 102 N. E. 921; Hoag v. Hoag, 213 Mass. 50, 99 N. E. 521; Appeal of Lewis, 85 Mich. 340, 48 N. W. 580, 24 Am. R. 94; W. C. Ellis Co. v. Walker, 101 Miss 326, 58 So. 97; Wilson v. Frost, 186 Mo. 311, 85 S. W. 375, 105 Am. St. R. 619; Moss v. Ardrey, 260 Mo. 595, 169 S. W. 6; Holmes v. Kansas City, 209 Mo. 513, 108 S. W. 9 (reh. den., 108 S. W. 1134; Otto f. Stifel's Union Brewing

joint devise to spouses,[37] and an equitable estate by the entirety

Co. v. Saxy, 273 Mo. 159, 201 S. W. 67, L. R. A. 1918C, 1009; Burke v. Murphy, 275 Mo. 397, 205 S. W. 32; Frost v. Frost, 200 Mo. 474, 98 S. W. 527; Hume v. Hopkins, 140 Mo. 65, 41 S. W. 784; Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S. W. 72; Edmondson v. Moberly, 98 Mo. 523, 11 S. W. 990; Murchison v. Fogleman, 165 N. C. 397, 81 S. E. 627; Ginn v. Edmundson, 173 N. C. 85, 91 S. E. 696; Harris v. Carolina Distributing Co., 172 N. C. 14, 89 S. E. 789; Dorsey v. Kirkland, 177 N. C. 520, 99 S. E. 407; Morton v. Blades Lumber Co., 154 N. C. 278, 70 S. E. 467; Ray v. Long, 132 N. C. 891, 44 S. E. 652; Kimble v. Newark, 91 N. J. 249, 102 A. 637; *In re* McKelway's Estate, 221 N. Y. 15, 116 N. E. 348; Kimble v. Newark 91 N. J. 249, 102 A. 637, L. R. A. 1918E, 793 (citing, with approval, Hardenberg v. Hardenberg, 10 N. J. L. 42, 18 Am. Dec. 371); Vollaro v. Vollaro, 129 N. Y. S. 43; Tillman v. Lewisburg & Northern R. Co., 133 Tenn. 554, 182 S. W. 597, L. R. A. 1916D, 259; Price v. Pestka, 54 App. Div. 59, 66 N. Y. S. 297; Smith v. Russell, 172 App. Div. 793, 159 N. Y. S. 169; Clay v. Robertson, 30 Okla. 758, 120 P. 1102; Oliver v. Wright, 47 Ore. 322, 83 P. 870; Chase v. McKenzie, 81 Ore. 429, 159 P. 1025. An "estate by entireties" is one held by husband and wife by virtue of title acquired by them jointly after marriage. *In re* Rhodes' Estate, 232 Pa. 489, 81 A. 643; McCreary v. McCorkle, 54 S. W. 53; Young v. Brown, 136 Tenn. 184, 188 S. W. 1149; Stieff Co. v. Ullrich, 110 Md. 629, 73 A. 874; Alsop v. Fedarwisch, 9 App. D. C. 408; Hudson's Heirs v. Hudson's Adm'r (Ky.), 121 S. W. 973.

The venerable estate known as an estate by entireties may be out of harmony with modern conditions but it is still recognized. Fundamentally the estate rests on the legal unity of husband and wife. It is, therefore, a unit, not made up or divisable parts subsisting in different natural persons, but is an indivisible whole vested in two persons actually distinct, yet to legal intendment one and the same. Each is seised of the whole estate from its inception, and upon the death of one, while the right of survivorship remains to the other, that other takes no new title or estate. Beihl v. Martin, 236 Pa. 519, 84 Atl. 953, 42 L. R. A. (N. S.) 555.

A tenancy by the entirety is not greater than any other estate in fee. Simmons v. Meyers (Ind.), 112 N. E. 31.

An administrator of a deceased husband, tenant by the entirety, has no right of action for a trespass committed prior to the death of his intestate. Spruill v. Branning Mfg. Co., 130 N. C. 42, 40 S. E. 824.

A release of a mortgage on the husband's land, the mortgage being in the form of an absolute deed, will not create an estate by the entirety, though to spouses jointly Haak Lumber Co. v. Crothers, 146 Mich. 575, 109 N. W. 1066, 13 Det. Leg. N. 957.

Where a husband owning mortgaged land executed a deed in which his wife joined, conveying the land to a third person who contracted to reconvey to the husband and wife on payment of a specified sum, and the wife made all the payments and survived the husband, she acquired the property by right of survivorship. Robson v. Townley, 176 Mich. 581, 142 N. W. 756.

Habendum to her heirs. It has been held that a deed to spouses will not create an estate by the entirety where the *habendum* is to her heirs, she being a remarried widow and both having children by former marriages. Fullager v. Stockdale, 138 Mich. 363, 101 N. W. 576, 11 Det. Leg. N. 605.

37. Booth v. Fordham, 185 N. Y. 535, 77 N. E. 1182.

may be created by a joint contract to their buyer to sell land.[38] A wife's deed to her husband of an undivided half in land, with a declared intention to create an estate by the entirety, has been held to have that effect.[39]

They do not take by moieties. The theoretic unity of husband and wife occasioned this rule. It applies only to conveyances made to them during coverture. In the same way a conveyance to husband and wife and a third person gives only a moiety to husband and wife,[40] and where the conveyance is made to several persons, two of whom are husband and wife, these two take their portion as tenants by entirety likewise, whether the deed described them as husband and wife or not.[41] Nor can the wife maintain ejectment alone, or an action for use and occupation as to such premises.[42]

Where the wife has an estate for life, and husband and wife are seised of the remainder in entirety, the estate for life does not merge in the estate in remainder.[43] Where, again, the conveyance is to her for life, with remainder to her husband, and, in case he does not survive her, to his heirs, the wife cannot claim the whole by right of survivorship.[44] And if the equitable title to land is in the wife, it cannot, of course, be conveyed to husband and wife so as to bar her rights.[45]

But if lands descend to A., B., and C., they each take a third part, though A. and B. happen to be husband and wife.[46]

Since in theory the spouses each own the entire estate, no new estate accrues to the survivor which can be subjected to an inheritance tax.[47]

38. *In re* Berry, 247 F. 700; Roach v. Richardson, 84 Ark. 37, 104 S. W. 538; Comfort v. Robinson, 155 Mich. 143, 118 N. W. 943, 15 Det. Leg. N. 951.

39. *In re* Horler's Estate, 180 App. Div. 608, 168 N. Y. S. 221.

40. See 1 Washb. Real Prop. 278; Wms. Real Prop. 184.

41. Hulett v. Iulon, 57 Ind. 412.

42. Allie v. Schmetz, 17 Wis. 169. And see Torrey v. Torrey, 4 Kern. 430; Clark v. Thompson, 12 Pa. 274; Wentworth v. Remick, 47 N. H. 226; Freeman v. Barber, 1 Hun (N. Y.), 433.

43. Bomar v. Mullins, 4 Rich. Eq. (S. C.) 80. And see Brinton v. Hook, 3 Md. Ch. 477.

44. Riggin v. Love, 72 Ill. 553.

45. Moore v. Moore, 12 B. Mon. (Ky.) 651. And see Hicks v. Cochran, 4 Edw. Ch. (N. Y.) 107; Barnead v. Kuhn, 36 Pa. 383; Wright v. Sadler, 20 N. Y. 320; Wales v. Coffin, 13 Allen (Mass.), 213; 1 Washb. Real Prop. 278, and cases cited.

46. Knapp v. Windsor, 6 Cush. (Mass.) 156.

47. Palmer v. Mansfield, 222 Mass. 263, 110 N. E. 283, L. R. A. 1916C, 677.

§ 565. Estate by the Entirety in Personalty.

Where a promissory note, too, or other evidence of a debt, or personal security, is made payable to a husband and wife jointly, it belongs to the survivor, and may be sued upon accordingly;[48] but not if the facts are inconsistent with that presumption of joint-ownership which a technical expression of this sort would afford;[49] and the drift of modern policy is unfavorable to extending to personalty this rule of survivorship, applicable originally to real estate.[50] Nevertheless, some courts hold that a conveyance of personal property to spouses jointly creates an estate by the entirety,[51] even in Wisconsin, where such tenure in real property has been abolished.[52] But it is otherwise in New York.[53]

The courts are not agreed whether a mortgage to spouses jointly will create the estate. The affirmative is held in Massachusetts and New York, and seems the better view.[54] The contrary has been held in Missouri and Michigan.[55]

48. Abshire v. State, 53 Ind. 64, and cases cited.

49. Sanford v. Sanford, 45 N. Y. 723; Johnson v. Lusk, 6 Cold. (Tenn.) 113.

50. Wait v. Bovee, 35 Mich. 425.

51. Flaherty v. Columbus, 41 App. D. C. 525; Baker v. Baker, 123 Md. 32, 90 A. 776 (bank deposit); Truitt v. Battle Creek, 205 Mich. 180, 171 N. W. 338; *In re* Greenwood's Estate (Mo.), 208 S. W. 635; Rezabek v. Rezabek, 196 Mo. App. 673, 192 S. W. 107; Craig v. Bradley, 153 Mo. App. 586, 134 S. W. 1081; Jones v. W. A. Smith & Co., 149 N. C. 318, 62 S. E. 1092; Beck v. Beck, 77 N. J. Eq. 51, 75 A. 228; *In re* Niles, 142 App. Div. 198, 126 N. Y. S. 1066; Blick v. Cockins, 252 Pa. 56, 97 A. 125; *In re* Klenke's Estate, 210 Pa. 572, 60 A. 166 (bank deposit); *In re* Sloan's Estate, 254 Pa. 346, 98 A. 966; *In re* Parry's Estate, 188 Pa. 33, 41 A. 448, 43 W. N. C. 62, 49 L. R. A. 444, 68 Am. St. R. 847 (letter of credit); Smith v. Haire (Tenn.), 181 S. W. 161; Brewer v. Bowersox, 92 Md. 567, 48 A. 1060 (certificate of deposit); Temple v. Bradley, 119 Md. 602, 87 A. 394; Arn v. Arn, 81 Mo. App. 133 (insurance policy); (1910) *In re* Kaupper, 141 App. Div. 54, 125 N. Y. S. 878 (affd., 201 N. Y. 534, 94 N. E. 1095.

Thus where a husband, tenant by the entirety, held the income of the estate with the intention of applying it to the payment of the mortgage on the estate when the income should amount to $5,000, the surviving wife was held to take the accumulation. Collins v. Babbitt, 67 N. J. Eq. 135, 58 A. 481.

52. Dupont v. Jonet, 165 Wis. 554, 162 N. W. 664.

53. *In re* McKelway's Estate, 221 N. Y. 15, 116 N. E. 348; *In re* Thompson's Estate, 81 Misc. 86, 142 N. Y. S. 1064; Baumann v. Guion, 21 Misc. Rep. 120, 46 N. Y. S. 715; *In re* Baum, 121 App. Div. 496, 106 N. Y. S. 113.

54. Boland v. McKowen, 189 Mass. 563, 76 N. E. 206, 109 Am. St. R. 663; *In re* Rapelje, 66 Misc. 414, 123 N. Y. S. 287.

55. McLeod v. Free, 96 Mich. 57, 55 N. W. 685; Luttermoser v. Leuner, 110 Mich. 186, 68 N. W. 117; Johnston v. Johnston, 173 Mo. 91, 73 S. W. 202, 61 L. R. A. 166, 96 Am. St. R. 486; Ludwig v. Brunner, 203 Mich. 556, 169 N. W. 890.

§ 566. Essentials of Estate by the Entirety.

In an estate by the entirety there must be unity of estate, unity of possession, unity of control, and unity of conveying.[56] To create the estate of entirety the relation of husband and wife must legally exist between the grantees at the time of the conveyance,[57] and if the relation in fact exists at that time, the deed need not so recite.[58] The deed must grant a joint estate to the spouses, and one granting to each specified undivided parts will not create the estate.[59]

Likewise, a deed by a husband to himself and wife does not create such a tenancy,[60] even where the statute permits spouses to convey directly to each other,[61] nor is it created where one spouse receives a deed from the co-tenant of the other spouse of such co-tenant's undivided interest,[62] nor by a deed from one spouse to the other of an undivided part of an estate owned by the grantor in severalty.[63]

It is usually immaterial who pays the consideration,[64] but it may be otherwise in equity where the land was purchased with the wife's money and where the form of the conveyance was without her consent.[65]

§ 567. Possession as Between Spouses.

By the common law the beneficial enjoyment during the joint lives of husband and wife was that of the husband; but in this respect the Married Women's Acts have made some changes.[66]

56. Chandler v. Cheney, 37 Ind. 391.

57. Wright v. Kayner, 14 Det. Leg. N. 631, 113 N. W. 779, 150 Mich. 7; Hubatka v. Myerhofer, 81 N. J. 410, 75 A. 454; Butler v. Butler, 93 Misc. 258, 157 N. Y. S. 188; McKee v. Bevins, 138 Tenn. 249, 197 S. W. 563.

58. Richards v. Richards (Ind.), 110 N. E. 103; Ryan v. Ford, 151 Mo. App. 689, 132 S. W. 610; Bennett v. Hutchens, 133 Tenn. 65, 179 S. W. 629; Deese v. Deese, 176 N. C. 527, 97 S. E. 475 (holding that the fact must appear from the deed).

59. Blease v. Anderson, 241 Pa. 198, 88 A. 365.

The use of the word "jointly" in a deed to spouses, does not prevent their taking an estate by the entirety, the word being surplusage. Simons v. Bolinger, 154 Ind. 83, 56 N. E. 23, 23 L. R. A. 234.

60. Michigan State Bank v. Kern, 189 Mich. 467, 155 N. W. 502; Wright v. Knapp (Mich.), 150 N. W. 315; Grimminger v. Alderton (N. J.), 96 A. 80.

61. Ringstad v. Hansom, 150 Ia. 324, 130 N. W. 145.

62. Isley v. Sellars, 153 N. C. 374, 69 S. E. 279; Tindell v. Tindell (Tenn.), 37 S. W. 1105.

63. Pegg v. Pegg, 165 Mich. 228, 130 N. W. 617, 33 L. R. A. (N. S.) 166.

64. White v. Woods (Ind.), 106 N. E. 536; Stalcup v. Stalcup, 137 N. C. 305, 49 N. E. 210; Hayes v. Horton, 46 Ore. 597, 81 P. 386.

65. Donovan v. Griffith, 215 Mo. 149, 114 S. W. 621.

66. Bolles v. State Trust Co., 27 N.

Under such a statute the occupation of spouses during coverture is substantially that of tenants in common,[67] each being entitled to half the rents and profits.[68] In Missouri it is held that a wife's interest in an estate by the entirety is not her separate property, hence the husband has the occupation and rents and profits of it for his life, *jure mariti*.[69]

The use and occupation of such an estate is not a matter for an accounting between the spouses.[70]

§ 568. Effect of Partition and Divorce.

An estate by the entirety is not subject to partition or affected by the attainder of one of the spouses.[71]

The courts are not agreed as to the effect of a divorce. In North Carolina it is held that it renders the spouses tenants in common.[72] The contrary is held in Pennsylvania.[73] The estate by entireties is not dissolved by a divorce *a mensa et thoro,* as this does not purport on its face to dissolve the bonds of matrimony, but is in legal effect simply a decree of separation and merely suspends and does not alter the marriage relation.[74]

§ 569. Effect of Statutes.

An estate by the entirety is not affected by a statute passed after it has vested.[75]

It has never been recognized in Connecticut, Nebraska, Ohio, or

J. Eq. 308; Kip v. Kip, 33 N. J. Eq. 213.

67. Schulz v. Ziegler, 80 N. J. Eq. 199, 83 A. 968; Goodrich v. Village of Otego, 216 N. Y. 112, 110 N. E. 162; Quigley v. Monsees, 56 Misc. 110, 106 N. Y. S. 167; Steenberge v. Low, 46 Misc. 285, 92 N. Y. S. 518; *In re* Village of Holcomb, 97 Misc. 241, 162 N. Y. S. 848.

The Maryland Married Women's Act has taken away the husband's common-law right to the whole of the rents and profits of such an estate. Masterman v. Masterman, 129 Md. 167, 98 A. 537.

68. Niehaus v. Niehaus, 141 App. Div. 251, 125 N. Y. S. 1071; *In re* Klatzl's Estate, 149 N. Y. S. 794; Maekotter v. Maekotter, 74 Misc. 214, 131 N. Y. S. 815.

It has been held that at common law the husband was entitled to the rents and profits *jure mariti* and not as tenant. Masterman v. Masterman, 129 Md. 167, 98 A. 537.

69. First Nat. Bank v. Fry, 168 Mo. 492, 68 S. W. 348.

70. Minion v. Warner, 173 N. Y. S. 69.

71. Jacobs v. Miller, 50 Mich. 119, 15 N. W. 42; Jones v. W. A. Smith & Co., 149 N. C. 318, 62 S. E. 1092.

72. McKinnon, Currie & Co. v. Caulk, 167 N. C. 411, 83 S. E. 559, L. R. A. 1915C, 396; Freeman v. Belfer, 173 N. C. 581, 92 S. E. 486; see further *post.*

73. Alles v. Lyon, 216 Pa. 604, 66 A. 81, 10 L. R. A. (N. S.) 463.

74. Freeman v. Belfaer, 173 N. C. 581, 92 S. E. 486, L. R. A. 1917E, 368.

75. Pease v. Inhabitants of Whitman, 182 Mass. 363, 65 N. E. 795; Hough v. Jasper County Light & Fuel Co., 127 Mo. App. 570, 106 S. W. 547.

Oklahoma,[76] but in some States legislation has abrogated this common-law doctrine of entirety.[77]

Such has been held to be the effect of the Married Women's Acts in Alabama, Colorado, Illinois, Maine, Nebraska, South Carolina, Tennessee, England and Canada.[78] In Arkansas, Delaware, District of Columbia, Michigan, Missouri, New York, North Carolina, and Pennsylvania the Married Women's Acts have not abolished it.[79]

Cases holding the opposite view proceed on the theory that such acts have destroyed the unity of husband and wife, but they overlook the plain fact that such acts are meant to destroy the unity of unequals, the foundation of the *jus mariti*, and to thereby restore to its full vigor the unity made up of equals, the foundation of the estate by entireties. The design of such acts was not to destroy the oneness of husband and wife, but to protect the wife's

76. Whittlesey v. Fuller, 11 Conn. 337; Miles v. Fisher, 10 Ohio 1, 36 Am. D. 61; Wilson v. Fleming, 13 Ohio, 68; Kerner v. McDonald, 60 Neb. 663, 84 N. W. 92, 83 Am. St. R. 550; Hamra v. Fitzpatrick (Okla.), 154 P. 665; Helvie v. Hoover, 11 Okla. 687, 69 P. 958.

77. Hannon v. Southern Pac. R. Co., 12 Cal. App. 350, 107 P. 335; Swan v. Walden, 156 Cal. 195, 103 P. 931; Bassler v. Rewodlinski, 130 Wis. 26, 109 N. W. 1032, 7 L. R. A. (N. S.) 701; Stewart v. Thomas, 64 Kan. 511, 68 P. 70; McNeeley v. South Penn. Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562; Wilson v. Wilson, 43 Minn. 398, 45 N. W. 710.

And thus may the spouses be regarded as joint tenants or rather tenants in common. Cooper v. Cooper, 76 Ill. 57; Whittlesey v. Fuller, 11 Conn. 337; Clark v. Clark, 56 N. H. 105; Meeker v. Wright, 76 N. Y. 262.

78. Whyman v. Johnston (Colo.), 163 P. 76; Lawler v. Byrne, 252 Ill. 194, 96 N. E. 892; Kerner v. Donald, 60 Neb. 663, 84 N. W. 92, 83 Am. St. R. 550; Mettel v. Karl, 133 Ill. 65, 24 N. E. 553; Gill v. McKinney, 140 Tenn. 549, 205 S. W. 416; Donegan v. Donegan, 103 Ala. 488, 15 So. 823; *Re* Robinson, 88 Me. 17, 33 Atl. 652; Green v. Cannaday, 77 S. C. 193, 57 S. E. 832; Jupp v. Buckwell, L. R. 39 Ch. Div. 148; *Re* Wilson, 20 Ont. Rep. 397; Griffin v. Patterson, 45 U. C. Q. B. 536.

79. Roulston v. Hall, 66 Ark. 305, 50 S. W. 690, 74 Am. St. R. 97; Godman v. Greer (Del.), 105 A. 380; Kunz v. Kurtz, 8 Del. Ch. 404, 68 A. 450; Loughran v. Lemmon, 19 App. D. C. 141; Fisher v. Provin, 25 Mich. 347; Johnston v. Johnston, 173 Mo. 91, 73 S. W. 202, 61 L. R. A. 166, 96 Am. St. R. 486; Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S. W. 72; Ray v. Long, 132 N. C. 891, 44 S. E. 652; Jones v. W. A. Smith & Co., 149 N. C. 318, 62 S. E. 1092; Bilder v. Robinson, 73 N. J. Eq. 169, 67 A. 828; Goodrich v. Village of Otego, 160 App. Div. 349, 145 N. Y. S. 497; *In re* Meyer's Estate, 232 Pa. 89, 81 A. 145; Hoover v. Potter, 42 Pa. Super. 21; Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337; Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824; Stifel's Union Brewing Co. v. Saxy (Mo.), 201 S. W. 67, L. R. A. 1918C, 1009; Morrill v. Morrill, 138 Mich. 112, 101 N. W. 209, 4 Ann. Cas. 1100; Diver v. Diver, 56 Pa. 106.

property by removing it from under the dominion of the husband, and has nothing to do with the nature of the estate.[80]

In Minnesota neither estates by the entirety or joint tenancies, with survivorship, can be held by spouses either in real or personal property.[81]. In West Virginia it seems that there may still be a life estate by the entirety.[82] In Arkansas, Delaware, Indiana, Massachusetts, Missouri, and North Carolina it is held that statutes providing that a deed to two or more persons shall create a tenancy in common and not a joint tenancy have not abolished estates by the entirety.[83]

§ 570. Spouses as Tenants in Common.

By express words husband and wife may be made tenants in common by a conveyance to them during coverture,[84] where the deed shows a plain intention to create such an estate.[85] Such an

80. Cole Mfg. Co. v. Collier, 95 Tenn. 115, 31 S. W. 100; Simpson v. Biffle, 63 Ark. 289, 38 S. W. 345; Stifel's Union Brewing Co. v. Saxy (Mo.), 201 S. W. 67, L. R. A. 1918C, 1009.

81. Semper v. Coates, 93 Minn. 76, 100 N. W. 662.

82. Irvin v. Stover, 67 W. Va. 356, 67 S. E. 1119.

83. Roulston v. Hall, 66 Ark. 305, 50 S. W. 690, 74 Am. St. R. 97; Davies v. Johnson, 124 Ark. 390, 187 S. W. 323; Kunz v. Kurtz, 8 Del. Ch. 404, 68 A. 450; Dotson v. Faulkenburg (Ind.), 116 N. E. 577; McLaughlin v. Rice, 185 Mass. 212, 70 N. E. 52, 102 Am. St. R. 663; Wilson v. Frost, 186 Mo. 311, 85 S. W. 375, 105 Am. St R. 619; Moore v Greenville Banking & Trust Co. (N. C.), 100 S. E. 269.

84. Carroll v. Reidy, 5 App. D. C. 59; Brown v. Brown, 133 Ind. 476, 32 N. E. 1128; Prest Abst. 41; 1 Washb. Real Prop., 278. See Barnes v. Loyd, 37 Ind. 523.

Under a devise to husband and wife, making them joint tenants, the husband's interest is vendible on execution against him, the purchaser, however, buying subject to the wife's right, in case she survives her husband, to take the entire estate. Hall v. Stephens, 65 Mo. 670.

85. Whitley v. Meador, 137 Tenn. 163, 192 S. W. 718, L. R. A. 1917D, 736; Norman's Ex'x v. Cunningham, 5 Gratt. (Va.) 63; Dotson v. Faulkenburg, 186 Ind. 417, 116 N. E. 577; Messenbaugh v. Goll, 198 Mo. App. 698, 202 S. W. 265; Highsmith v. Page, 158 N. C. 226, 73 S. E. 998; Holloway v. Green, 167 N. C. 91, 83 S. E. 243; Eason v. Eason, 159 N. C. 539, 75 S. E. 797; Booth v. Fordham, 185 N. Y. 535, 77 N. E. 1182; Lerbs v. Lerbs, 71 Misc. 51, 129 N. Y. S. 903; Saxon v. Saxon, 46 Misc. 202, 93 N. Y. S. 191; Bedford Lodge v. Lentz, 194 Pa. 399, 45 A. 378; American Nat. Bank v. Taylor, 112 Va. 1, 70 S. E. 534; Hoover v. Potter, 42 Pa. Super. 21 (holding that a deed expressly reciting that the grantees were husband and wife created a tenancy by the entirety though it also provided that they should take as tenants in common).

Where there was an agreement between the spouses that they should take in common, but where by mistake the deed was to them as tenants by the entirety, they were held to take in

intent must be plainly expressed, and effect cannot be given to random phrases inserted by an ignorant scrivener.[86] The question of intention is one of fact for the jury.[87]

Partition deeds to spouses jointly conveying the distributive share of one of them in real estate create a tenancy in common and not a tenancy by the entirety,[88] even where the deed is so drawn at the request of the distributee.[89]

Under the statutes of California, Iowa, Mississippi, and Oklahoma a deed to spouses jointly creates a tenancy in common,[90] and as a result of the South Carolina Married Women's Act it is held that a conveyance to spouses jointly creates a tenancy in common except where a contrary intention appears.[91] In Minnesota the spouses take equally and in common in the absence of evidence showing different interests.[92] In California the presumption that spouses take in common may be rebutted,[93] and it may be shown to be community property.[94] Under the Kentucky statute an estate in common is taken unless the deed expressly provides for a survivorship.[95] In New Jersey it is held that a chose in action made to spouses jointly is held by them as tenants in common.[96] In Illinois a judgment creditor of the husband acquires no interest in the share of the wife in a joint estate by a sale on the judgment.[97]

common. Stalcup v. Stalcup, 137 N. C. 305, 49 N. E. 210.

86. Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S. W. 72.

87. Olson v. Peterson, 88 Kan. 350, 128 P. 191.

88. Harrison v. McReynolds, 183 Mo. 533, 82 S. W. 120; Jelly v. Lamar, 242 Mo. 44, 145 S. W. 799; Speas v. Woodhouse, 162 N. C. 66, 77 S. E. 1000; Stoffal v. Jarvis, 235 Pa. 50, 83 A. 609.

89. Sprinkle v. Spainhour, 149 N. C. 223, 62 S. E. 910.

90. Shaw v. Bernal, 163 Cal. 262, 124 P. 1012; Bader v. Dyer, 106 Ia. 715, 77 N. W. 469, 68 Am. St. R. 332; Conn v. Boutwell, 101 Miss. 353, 58 So. 105; Wagoner v. Silva, 139 Cal. 559, 73 P. 433; Helvie v. Hoover, 11 Okla. 687, 69 P. 958; Alsop v. Fedarwisch, 9 App. D. C. 408.

91. Green v. Cannady, 77 S. C. 193, 57 S. E. 832.

92. Dorsey v. Dorsey, 142 Minn. 279, 171 N. W. 933.

93. Volquards v. Myers, 23 Cal. App. 500, 138 P. 963.

94. *In re* Shirley's Estate, 167 Cal. 193, 138 P. 994.

95. McCallister v. Folden's Assignee, 110 Ky. 732, 23 Ky. Law, 113, 62 S. W. 538; Harris v. Taliaferro, 148 Ky. 150, 146 S. W. 22; Campbell v. Asher, 28 Ky. Law, 50, 88 S. W. 1067.

96. Aubry v. Schneider, 69 N. J. Eq. 629, 60 A. 929.

97. Sledge v. Dobbs, 254 Ill. 130, 98 N. E. 243.

§ 571. Spouses as Joint Tenants.

Spouses take as joint tenants in Connecticut, where the estate by the entirety has never been recognized,[98] and in Iowa and Wisconsin, where it has been abolished.[99] The same is true under the West Virginia statute.[1]

In California, Nebraska and Wisconsin spouses may hold as joint tenants where the deed clearly shows such an intention.[2] They may do so even in Massachusetts and Indiana, where the tenancy by the entirety is recognized.[3]

Where spouses hold as joint tenants the wife takes half the rents and profits, as though *sole*.[4]

No joint tenancy is created where one tenancy in common conveys to the wife of his co-tenant,[5] and where husband and wife take as joint tenants and by virtue of the relation become tenants by the entirety, a divorce will restore the joint tenancy.[6]

Where a bill to reach the interest of a husband in a joint estate charged that the wife paid no consideration, it was held that she had the burden of showing the contrary, the presumption being that the husband paid it.[7]

§ 572. Rights of Creditors.

It is held by most of the courts that an estate by the entirety cannot be subjected to the debts of one tenant,[8] but only to their

98. New York, N. H. & H. R. Co. v. Russell, 83 Conn. 581, 78 A. 324; Whittlesey v. Fuller, 11 Conn. 337.

99. Gruwell v. Gruwell (Ia.), 171 N. W. 290; Fielder v. Howard, 99 Wis. 388, 75 N. W. 163; Bassler v. Rewodlinski, 130 Wis. 26, 109 N. W. 1032, 7 L. R. A. (N. S.) 701.

1. McNeeley v. South Penn. Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562.

2. *In re* Harris' Estate, 169 Cal. 725, 147 P. 967; Sanderson v. Everson, 93 Neb. 606, 141 N. W. 1025; Dupont v. Jonet, 165 Wis. 554, 162 N. W. 664; Friedrich v. Huth, 155 Wis. 196, 144 N. W. 202; Bassler v. Rewodlinski, 130 Wis. 26, 109 N. W. 1032, 7 L. R. A. (N. S.) 701; Church v. McLennan (Wis.), 158 N. W. 89.

3. Phelps v. Smith, 116 Ind. 387, 17 N. E. 602; Woodard v. Woodard, 216 Mass. 1, 102 N. E. 921.

4. Messing v. Messing, 64 App. Div. 125, 71 N. Y. S. 717.

5. Banzer v. Banzer, 156 N. Y. 429, 51 N. E. 291.

6. Lash v. Lash, 58 Ind. 526.

7. Murdock v. Baker, 46 W. Va. 78, 32 N. E. 1009.

8. Baker v. Lamb, 18 N. Y. Super. 519; Simpson v. Biffle, 63 Ark. 289, 3 S. W. 345; Davis v. Clark, 26 Ind. 424, 89 Am. D. 471; Simmons v. Meyers (Ind.), 112 N. E. 31; Ades v. Caplan, 132 Md. 66, 103 A. 94, L. R. A. 1918D, 276; Masterman v. Masterman, 129 Md. 167, 98 A. 537; Sanford v. Bertrau, 204 Mich. 244, 169 N. W. 880; Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S. W. 72; Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67, L. R. A. 1918C, 1009; Moore v. Greenville Banking & Trust Co. (N. C.), 100 S. E. 269; Harris v. Carolina Distributing Co., 172 N. C.

joint debts.[9] Therefore, a judgment against a husband does not affect the joint estate of the husband and wife, and a decree in equity in favor of such a judgment creditor can confer no better title than a sale of the premises under the judgment at law.[10] A sheriff's sale fails to pass the undivided half of either, or indeed any title whatever.[11] It may also be subject to a vendor's lien.[12] In Pennsylvania the interest of a tenant may be subject to lien, and in New Jersey his interest as tenant by the entirety, but not an equal and undivided interest, may be subjected to his debts.[13]

The right of one tenant cannot be affected by the bankruptcy of the other.[14]

In Michigan the rule is that the estate is not subject to the sole debts of either party where contracted after the estate vested, but it may be subject to those contracted before such time.[15]

Where a creditor is permitted to reach the interest of a tenant by the entirety, one buying at an execution sale becomes tenant in common with the other subject to the survivorship.[16]

14, S. E. 789; Ray v. Long, 132 N. C. 891, 44 S. E. 652; Hood v. Mercer, 150 N. C. 699, 64 S. E. 897; Servis v. Dorn, 76 N. J. Eq. 241, 76 A. 246; Alles v. Lyon, 216 Pa. 604, 66 A. 81, 10 L. R. A. (N. S.) 463; Hetzel v. Lincoln, 216 Pa. 60, 64 A. 866; Citizens' Sav. Bank & Trust Co. v. Jenkins (Vt.), 99 A. 250.

9. Union Nat. Bank v. Finley, 180 Ind. 470, 103 N. E. 110; Sharp v. Baker, 51 Ind. App. 547, 96 N. E. 627; Frey v. McGaw, 127 Md. 23, 95 Atl. 960, L. R. A. 1916D, 113.

10. Thomas v. De Baum, 1 McCart. 37; Tupper v. Fuller, 7 Rich. Eq. (S. C.) 170; Davis v. Clark, 26 Ind. 424.

11. Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67, L. R. A. 1918C, 1009; Almond v. Bonnell, 76 Ill. 536; Anderson v. Tannehill, 42 Ind. 141; McConnell v. Martin, 52 Ind. 434. Equity, however, reserving the wife's potential survivorship and right to enjoy, will sometimes dispose of the husband's interest for the benefit of his creditors. Cochran v. Kerney, 9 Bush (Ky.), 199.

12. Moore v. Carey, 138 Tenn. 332, 197 S. W. 1093, L. R. A. 1918D, 963.

13. Wortendyke v. Rayot, 87 N. J. Eq. 159, 99 A. 917, 102 A. 2; Beihl v. Martin, 236 Pa. 519, 84 A. 953.

14. Beihl v. Martin, 236 Pa. 519, 84 A. 953; *Re* Meyer, 232 Pa. 89, 81 Atl. 145, 36 L. R. A. (N. S.) 205.

But where subsequently a petition in bankruptcy is filed against the husband and is followed by his discharge in bankruptcy this prevents the sale of the property during his lifetime under an execution on the judgment, as the lien of the judgment is wiped out by the bankruptcy. The effect of this is practically the same as if the judgment had been recovered against the wife alone, in which case the property could not have been sold during the lifetime of the husband, if at all, under an execution issued on such judgment. Ades v. Caplan, 132 Md. 66, 103 Atl. 94, L. R. A. 1918D, 276.

15. Dickey v. Converse, 117 Mich. 449, 76 N. W. 80, 5 Det. Leg. N. 306, 72 Am. St. R. 568; Michigan Beef & Provision Co. v. Coll, 116 Mich. 261, 74 N. W. 475, 4 Det. Leg. N. 306; Schliess v. Thayer, 170 Mich. 395, 136 N. W. 365.

16. Bartkowaik v. Sampson, 73

§ 573. Conveyance or Mortgage.

It is usually held that neither spouse can convey or affect an estate by the entirety during the other's lifetime to the exclusion of that other,[17] or dispose of it by will.[18] Therefore it may be conveyed in fee or encumbered only by the joint deed of husband and wife.[19]

Though a husband alone cannot convey an interest in an estate by the entirety so as to bind his co-tenant, such deed may take effect at the wife's death and vest a title in the grantee if there were covenants of title,[20] and a quitclaim deed of one tenant does not give an equitable lien for the purchase price without joinder of the other.[21]

Where spouses orally agreed to sell land held by the entirety, and the wife treated the contract as valid in the husband's lifetime and accepted payments on the contract, it was held that she was bound by it after his death.[22]

In Indiana a mortgage by both spouses to secure the sole debt of the husband is voidable by either, being in violation of the statute prohibiting a wife from binding herself as surety for her husband.[23] It is otherwise in Michigan, Oklahoma and Ken-

Misc. 446, 133 N. Y. S. 401; Mardt v. Scharmach, 65 Misc. 124, 119 N. Y. S. 449.

17. Healey Ice Mach. Co. v. Green, 181 F. 890; *In re* Berry, 247 F. 700; Chandler v. Cheney, 37 Ind. 391; Davis v. Clark, 26 Ind. 524, 89 Am. D. 471; Sharpe v. Baker (Ind.), 99 N. E. 44; Ades v. Caplan, 132 Md. 66, 103 A. 94, L. R. A. 1918D, 276; Masterman v. Masterman, 129 Md. 167, 98 A. 537; Dutch v. Manning, 2 Danl. Abr. (Mass.) 230; Shaw v. Husey, 5 Mass. 521; Fox v. Fletcher, 8 Mass. 274; Varnum v. Abbott, 12 Mass. 474, 7 Am. D. 87; Pierce v. Chace, 108 Mass. 254; Pease v. Inhabitants of Whitman, 182 Mass. 363, 65 N. E. 795; Vinton v. Beamer, 55 Mich. 559, 22 N. W. 40; Kegan v. Haslett, 128 Mo. 286, 107 S. W. 17; Ernst v. Ernst, 178 Mich. 100, 144 N. W. 513, 51 L. R. A. (N. S.) 317; Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67, L. R. A. 1918C, 1009; Moore v. Greenville Banking & Trust Co. (N. C.), 100 S. E. 269; *In re* McKelway's Estate, 221 N. Y. 15, 116 N. E. 348; Hayes v. Horton, 46 Ore. 597, 81 P. 386; Gibbs v. Tiffany, 4 Pa. Super. 29; Yokley v. Superior Drill Co., 26 Ky. Law, 302, 80 S. W. 1153.

18. Young v. Biehl, 166 Ind. 357, 77 N. E. 406; Wilson v. Johnson, 4 Kan. App. 747, 46 P. 833; Hubert v. Traeder, 139 Mich. 69, 102 N. W. 283, 11 Det. Leg. N. 756.

19. Rogers v. Shewmaker, 27 Ind. App. 631, 60 N. E. 462, 87 Am. St. R. 274; Moore v. Greenville Banking & Trust Co. (N. C.), 100 S. E. 269; McDuff v. Beauchamp, 50 Miss. 531. See Insurance Co. v. Nelson, 103 U. S. 544; Jones v. Shepley, 90 Mo. 307, 2 S. W. 400.

20. Hume v. Hopkins, 140 Mo. 65, 41 S. W. 784.

21. Ernst v. Ernst, 178 Mich. 100, 144 N. W. 513.

22. Kilsby v. Nichols, 168 N. Y. S. 92, 180 App. Div. 827.

23. Neighbors v. Davis, 34 Ind. App. 441, 73 N. E. 151.

tucky.[24] In New York it has been held either may alienate his or her interest,[25] while in New Jersey a husband may alienate his interest in such an estate and thereby constitute the grantee tenant in common with the other tenant by the entirety, but for the joint lives of the spouses only.[26]

A husband may also lease it for his lifetime,[27] and a husband may grant a license to lay a sewer on land held by himself and his wife by the entirety, which will be good as against both during their joint lives, and absolute against himself if he survives.[28] The contrary is held in New York.[29]

§ 574. Rule in Equity as to Gift or Conveyance to Spouses; In General.

If a gift or settlement be made to husband and wife jointly, the husband (where permitted, as under the old rule, to reduce to possession) may collect the whole; but if not reduced to possession, the fund will survive to the wife. Where the fund is in chancery, however, a settlement may be ordered, or the fund reserved with a suitable decree as to the disposal of the income; and a husband's creditors may avail themselves accordingly.[30]

A purchase or investment is sometimes made with the joint funds of husband and wife, or in such other manner as to make their interest joint or common.[31] Under such circumstances a wife may claim protection of her undivided interest against a seizure or attachment of the fund by the husband's creditors.[32] But in equity a partition of such interests is favored,[33] and the

24 Drye v. Cook's Trustee, 14 Bush (Ky), 459; Ehle v. Looker, 182 Mich. 248, 148 N. W. 378; Bastin v. Schafer, 15 Okla. 607, 85 P. 349.

25. Messing v. Messing, 64 App. Div. 125, 71 N. Y. S. 717.

26. Schulz v. Ziegler, 80 N. J. Eq. 199, 83 A. 968.

27. Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. R. 462; Bank of Greenville v. Gornto, 161 N. C. 341, 77 S. E. 222.

28. Ewen v. Hart, 183 Mo. App. 107, 166 S. W. 315.

29. Wightman v. Cottrell, 155 App. Div. 76, 139 N. Y. S. 564.

30. 2 Perry Trusts, § 644. Where the husband transfers a fund to the name of himself, his wife, and a third person, the presumable intent is to make that third person a trustee for the survivor; though, had the third person contributed to the investment, the effect would be rather to cretate a joint or common tenancy in the fund. *Re* Eykyn's Trusts, L. R. 6 Ch. D. 115. As to a wife's corresponding transfer, cf. Batstone v. Salter, L. R. 10 Ch. 431.

31. Kilby v. Godwin, 2 Del. Ch. 61.

32. In Iowa the wife need not resort to remedies by injunction, but may notify the officer of the existence of her claim. McTighe v. Bringolf, 42 Ia. 455.

33. Long v. Perdue, 83 Pa. 214; Baggs v. Baggs, 54 Ga. 95.

subjection of the husband's interest or share to the claims of his own creditors.[34] In Massachusetts, a wife and her husband owning a vessel together are jointly liable on the contracts of the master made within due scope of authority; and this, though the husband himself be master.[35]

Where real estate is purchased with joint funds of husband and wife, and the title conveyed to the latter without fraudulent complicity, the creditors of the husband must resort to equity in order to reach his equitable interest.[36]

§ 575. Resulting Trust.

The question whether a resulting trust is established in certain property of husband or wife comes up constantly in the latest American cases, with the extension of equity jurisdiction in the States and the new married women's legislation. Issues of this sort are made up not only where the claim is that of a wife against her husband, or of a husband against his wife, but in controversies between either one and the creditors of the other. The decision must be according to the evidence adduced, which is usually oral, deference being paid to the usual presumptions as between husband and wife; but the ostensible title afforded by instruments of title or security standing in the name of the one is thus overthrown by proof that the property actually belonged by right to the other.[37] As between themselves, therefore, one spouse may be treated as in effect trustee for the other, and bound to make the title according to the just ownership; though an intervening purchaser in good faith for value may be entitled to protection, of course, by reason of a superior equity,[38] as also may the general

34. Creighton v. Clifford, 6 Rich. (S. C.) 188.

35. Reiman v. Hamilton, 111 Mass. 245.

36. Snow v. Paine, 114 Mass. 520. The marital occupation of the wife's separate farm, as between her and her husband, is but one possession, and manure accumulated upon the land, though produced in part by his stock or hay, is part of the land belonging to her. Norton v. Craig, 68 Me. 275. But where husband and wife own premises jointly they may join in an action for injury thereto. Armstrong v. Colby, 47 Vt. 360, and cases cited.

37. Among late cases under this head, see Sweeney v. Damron, 47 Ill. 450; Bent v. Bent, 44 Vt. 555; Cotton v. Wood, 25 Ia. 43; Howe v. Colby, 19 Wis. 583; Cairns v. Colburn, 104 Mass. 274; Pribble v. Hall, 13 Bush (Ky.), 61; Evans v. English, 61 Ala. 416; Carpenter v. Davis, 72 Ill. 14; Keller v. Keller, 45 Md. 269; Payne v. Twyman, 68 Mo. 339; Dula v. Young, 70 N. C. 450; Irvine v. Greever, 32 Gratt. (Va.) 411; Davis v. Davis, 43 Ind. 561; Lyon v. Akin, 78 N. C. 258. As to disputing a deed by parol, notwithstanding the statute of frauds, in such an issue, see Foote v. Bryant, 47 N. Y. 544.

38. Dixon v. Brown, 53 Ala. 428.

creditors in some instances.[39] Even though the husband become embarrassed in circumstances, he may be compelled to execute his trust for the wife's benefit.[40] But to the extent of the husband's own pecuniary interest in such a fund his creditors may claim the benefit, besides which the identity of the wife's property is of material importance.[41]

§ 576. Effect of Purchase at Judicial Sale.

A creditor or third person may buy the debtor's property at a sheriff's or bankruptcy sale, and then give or sell it to the debtor's wife, provided, of course, the transaction be *bona fide;* for this would be his own gift or transfer, not the husband's, and the husband's own insolvency cannot invalidate the transaction.[42] So, too, the wife's purchase of her husband's property at a sheriff's or bankruptcy sale, upon a *bona fide* bid, vests in her a good title as her separate property.[43] A similar rule applies, in the absence of fraud, where she or someone in her interest purchases under a mortgage or judicial sale of premises belonging to her husband, no fraud being disclosed in the transaction.[44] But if fraud is committed on the wife in such a transaction, through the husband's false inducement, or by other means, she may obtain relief against the disadvantageous purchase and recover the money paid.[45]

§ 577. As to Insurance on Husband's Life in Favor of Wife.

Insurance is frequently effected by a husband on his own life for the separate benefit of his wife; a provision most just and honorable, if not so unreasonable in amount, with its incidental payment of premiums, as to defraud one's antecedent creditors. The subsequent *bona fide* assignment by wife and husband of such a policy for the benefit of the latter's creditors is sustained in several late cases;[46] though an assignment procured from the

39. Darnaby v. Darnaby, 14 Bush (Ky.), 485; Brooks v. Shelton, 54 Miss. 353.

40. Payne v. Twyman, 68 Mo. 339.

41. Hearn v. Lander, 11 Bush (Ky.), 669; Sampson v. Alexander, 66 Me. 182.

42. Winch v. James, 68 Pa. 297.

43. Bowser v. Bowser, 82 Pa. 57; Blum v. Harrison, 50 Ala. 16.

44. Page v. Dixon, 59 Mo. 43; Hill v. Bugg, 53 Miss. 397.

45. Case v. Colter, 66 Ind. 336. And see Norman v. Norman, 6 Bush (Ky.), 495.

46. Whether the creditors of a married woman for premiums paid on a policy upon her husband's life can enforce payment out of her separate estate, see Ogden v. Guill, 56 Miss. 330. As to the extent to which the validity of the wife's title to the policy-money may be affected in consequence, see Barry v. Mut. Life Ins. Co., 49 How. Pr. (N. Y.) 504; Godfrey v. Wilson, 70 Ind. 50. Under some statutes, the

wife, injurious to her interest, must raise the general question of a wife's separate contracts and liability;[47] and an assignment procured from her by fraud or undue marital influence amounting to compulsion will not be enforced.[48] Due reference being had to the language of every policy, it is likewise true, in general, that if the husband survive the wife, for whose benefit the policy was taken out, he may dispose of it otherwise, and, with the insurer's consent, can have it changed so as even to benefit a subsequent wife, in case he marries again.[49]

The proceeds of a policy of insurance on her husband's life, when realized by the wife after his death, are not absolved from her own liabilities, although exempt from the payment of debts contracted by the husband during his lifetime.[50] Her constituted agent for paying the premiums is liable to her (under her separate estate or statutory rights) for his default or misconduct.[51] And chancery will sometimes intervene, where the face of the policy does not sufficiently indicate the interest intended for wife or children, and protect their interests against the husband and his creditors.[52] A policy may be limited to children in default of the wife surviving; and, if so, the wife cannot assign it to their detriment.[53]

§ 578. Equitable Relief.

Equity, in recognizing husband and wife as distinct persons capable of contracting with one another and holding property adverse to one another's claims, affords the relief appropriate to such a situation. Where either one is false to the other, and fraudulently or through coercion procures an unjust advantage, chancery will relieve against the transaction.[54]

wife's assignment with her husband's consent may suffice without his signature. Whitridge v. Barry, 42 Md. 140.

47. *Supra*, § 223.

48. Whitridge v. Barry, 42 Md. 140; Fowle v. Butterly, 78 N. Y. 68.

A policy in the wife's name, and for her benefit, upon her husband's life, becomes her separate property beyond his reach. Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606; Succession of Bofenschen, 29 La. Ann. 711.

49. See Pomeroy v. Manhattan, &c., Ins. Co., 40 Ill. 398; Emerick v. Coakley, 35 Md. 188; Gambs v. Covenant, &c., Life Ins. Co., 50 Misc. 44; Kerman v. Howard, 23 Wis. 108; Stokes v. Coffey, 8 Bush (Ky.), 533; Thompson v. American, &c., Ins. Co., 46 N. Y. 674. And see 1 Shouler Pers. Prop., 703-727.

50. Smedley v. Felt, 43 Ia. 607.

51. Ainsworth v. Backus, 5 Hun (N. Y.), 414.

52. *Re* Mellor's Policy Trusts, L. R. 6 Ch. D. 127.

53. Knickerbocker Life Ins. Co. v. Weitz, 99 Mass. 157.

54. Case v. Colter, 66 Ind. 336. The wife's fraud on her husband was re-

A voluntary and self-imposed trust, without consideration, may likewise, it is held, be set aside by a court of equity when its purpose has been fulfilled and there is no reason for preserving it.[55]

lieved against in Stone v. Wood, 85 Ill. 603.

55. Tucker's Appeal, 75 Pa. 354.

CHAPTER XXIX.

COMMUNITY DOCTRINE.

§ 579. Nature and History of Doctrine.

The *communio bonorum,* or community system, relates to marital property, in which respect it occupies an intermediate position between the civil and common-law schemes. The *communio bonorum* may have been part of the Roman law at an earlier period of its history, but it had ceased to exist long before the compilation of the Digest; though parties might by their nuptial agreement adopt it.[56] This constitutes a prominent feature of the codes of France, Spain, and other countries of modern Europe, whence it has likewise found its way to Louisiana, Florida, Texas, California, and other adjacent States, once subject to French and Spanish dominion, and erected, in fact, out of territory acquired during the present century upon the Mississippi, the Gulf of Mexico, and the Pacific Ocean.

The relation of husband and wife is regarded by these codes as a species of partnership, the property of which, like that of any other partnership, is primarily liable for the payment of debts. This partnership or community applies to all property acquired during marriage; and it is the well-settled rule that the debts of the partnership have priority of claim to satisfaction out of the community estate. Sometimes the community is universal, comprising not only property acquired during coverture, but all which belonged to the husband and wife before or at their marriage.[57]

It is evident, therefore, that the provisions of such codes may differ widely in different States or countries. The principle which distinguishes the community from both the civil and common-law schemes is, however, clear; namely, that husband and wife should have no property apart from one another.

§ 580. The European Doctrine of Community.

Under modern European codes this law of community embraces profits, income, earnings, and all property which, from its nature and the interest of the owner, is the subject of his uncontrolled

56. 1 Burge, Col. & For. Laws, 202; *ib.* 263, *et seq.*
57. 1 Burge, Col. & For. Laws, 277 *et seq.*

and absolute alienation; but certain gifts made between husband and wife in contemplation of marriage are of course properly excluded.[58] Whether antenuptial debts are to be paid from the common property, as well as debts contracted while the relation of husband and wife continues, would seem to depend upon the extent of the *communio bonorum*, as including property brought by each as capital stock to the marriage, or only such property as they acquire afterwards.[59]

The codes of modern Europe recognize no general capacity of the wife to contract, sue and be sued, as at the later civil law. On the contrary, the husband becomes, by his marriage, the curator of his wife. He has, therefore, the sole administration and management of her property, and that of the community; and she is entirely excluded in every case in which her acts cannot be referred to an authority, express or implied, from her husband.[60]

The community ceases on the termination of marriage by mutual separation or the death of either spouse.[61] And the various codes provide for the rights of the survivor on the legal dissolution of the community by death.

§ 581. Effect of Doctrine on American Jurisprudence.

The reader may readily trace the influence of the community system upon the jurisprudence of Louisiana and the other States to which we have referred, whose annexation was subsequent to the adoption of our Federal Constitution, by examining their judicial reports. The Civil Code of Louisiana, as amended and promulgated in 1824, pronounced that the partnership or community of *acquêts* or gains arising during coverture should exist in every marriage where there was no stipulation to the contrary. This was a legal consequence of marriage under the Spanish law.[62] The statutes of Texas, Florida, Missouri, California, and other neighboring States are characterized by similar features. But all of these laws have been modified by settlers bringing with them the principles of the common law. So, too, the doctrines of separate estate, revived in modern jurisprudence, are introduced into the legislation of these, as other American States.[63]

58. 1 Burge, Col. & For. Laws, 281, 282. By the French law only the personal estate entered into the community; but the Spanish law included both real and personal estate. Childress v. Cutter, 16 Mo. 24.

59. *Ib.* 294.

60. *Ib.* 296, 301.

61. *Ib.* 303, 305.

62. Art. 2312, 2369, 2370; 2 Kent, Com. 183, *n.*

63. Texas Digest, Paschal, "Mari-

There is in the doctrine of community much that is fair and reasonable; but in the practical workings of this system it is found rather complicated and perplexing, and hence unsatisfactory; while in no part of the United States can it be said to exist at this day in full force, since husband and wife are left pretty free to contract for the separate enjoyment of property, and so exclude the legal presumption of community altogether;[64] and, moreover, the constant tendency of our Southwestern States is to remodel their institutions upon the Anglo-American basis, common to the original States and those of the Ohio valley.

§ 582. Nature of Community.

The community is an entity, separate and distinct from either spouse.[65] The community status, like partnership, has elements of gains and losses based on the presumed labors of each spouse, irrespective of the real industry of either.[66] In Louisiana every marriage superinduces a partnership or community of *acquêts* or gains, unless there is a stipulation to the contrary.[67] No community can exist in the absence of a lawful marraige.[68] Therefore, no community interest is acquired in a man's property by one who acts as his housekeeper and who has illicit relations with him,[69] even though he holds her out as his wife, and even if she joins with him as such in a mortgage of his property.[70]

Where, at the time a husband goes through a marriage ceremony, he has a living, undivorced wife, the property purchased with joint earnings of himself and his second or putative wife does not become community property, but joint or partnership property of

tal Rights;'' Cal. Civil Code, ''Husband & Wife;'' Parker's Cal. Dig., ''Husband & Wife;'' Walker v. Howard, 34 Tex. 478; Caulk v. Picou, 23 La. Ann. 277. And see Forbes v. Moore, 32 Tex. 195.

64. See Packard v. Arellanes, 17 Cal. 525; Waul v. Kirkman, 25 Miss. 609; Succession of McLean, 12 La. Ann. 222; Jones v. Jones, 15 Tex. 143; *Ex parte* Melbourn, L. R. 6 Ch. 64; La. Civil Code, §§ 2369-2405; 1 Burge, Col. & For. Laws, 277 *et seq.*, where the law of community as it was about half a century ago is fully set forth; and the learned note to 2 Kent, Com. 183.

65. Ostheller v. Spokane & I. E. R. Co., 107 Wash. 678, 182 P. 630; Shorett v. Signor, 58 Wash. 695, 107 P. 1033.

66. Briggs v. McBride (Tex.), 190 S. W. 1123.

67. Succession of Le Besque, 137 La. 567, 68 So. 956.

68. *In re* Sloan's Estate, 50 Wash. 86, 96 P. 684; Sortore v. Sortore, 70 Wash. 410, 126 P. 915.

69. Harris v. Hobbs, 22 Tex. Civ. 367, 54 S. W. 1085.

70. Engstrom v. Peterson, 107 Wash. 523, 182 P. 623.

the two.[71] The rule only applies as long as the putative wife acts innocently.[72]

§ 583. What Law Governs.

The status of a debt owed to a spouse, as being community or separate estate, is determined by the law of the State where such debt is acquired,[73] and money which was the separate property of a spouse in the State where it was acquired will remain separate estate when brought into a State where the community doctrine prevails,[74] even if invested in land in such latter State.[75]

Likewise, the status of property as community or separate property acquired in States where the community doctrine prevails is to be determined by the law of such State at the time when it is acquired,[76] so that statutes regulating the disposition of community property,[77] or providing that property formerly community property shall be presumptively separate property, do not affect property of which the title has vested prior to the enactment of the statute.[78] But a statute requiring the wife's assent to deeds conveying community property is merely an additional protection for her existing interest in the property, and not an attempt to divest a vested estate by later legislation.[79]

The community laws of Louisiana do not extend to land in another State or country,[80] but land in Louisiana, owned by a community residing in Texas, is governed by the Louisiana laws

71. Little v. Nicholson (Tex.), 187 S. W. 506.

72. Middleton v. Johnston (Tex.), 110 S. W. 789.

73. Huyvaerts v. Roedtz, 105 Wash. 657, 178 P. 801; Douglas v. Douglas, 22 Ida. 336, 125 P. 796.

74. Brookman v. Durkee, 46 Wash. 578, 90 P. 914; *In re* Niecolls' Estate, 164 Cal. 368, 129 P. 278; Gooding Milling & Elevator Co. v. Lincoln County State Bank, 22 Ida. 468, 126 P. 772; *In re* Burrows' Estate, 136 Cal. 113, 68 P. 488; Witherill v. Fraunfelter, 46 Wash. 699, 91 P. 1086; Hunt v. Matthews (Tex.), 60 S. W. 674.

75. McDaniel v. Harley (Tex.), 42 S. W. 323; Blethen v. Bonner, 30 Tex. Civ. 585; *In re* Warner's Estate, 167 Cal. 686, 140 P. 583.

76. Seeber v. Randall, 102 F. 215, 42 C. C. A. 272; Winters v. Winters, 34 Nev. 323, 123 P. 17 (reh. den., 123 P. 1135); Sandoval v. Priest, 210 F. 814; Guye v. Guye, 63 Wash. 340, 115 P. 731; *In re* Granniss' Estate, 142 Cal. 1, 75 P. 324; Folsom v. Folsom (Wash.), 179 P. 847; Union Savings & Trust Co. v. Manney, 101 Wash. 274, 172 P. 251.

77. Spreckels v. Spreckels, 116 Col. 339, 48 P. 228, 36 L. R. A. 497; Clavo v. Clavo, 10 Cal. App. 447, 102 P. 556; Duncan v. Duncan, 6 Cal. App. 404, 92 P. 310.

78. Nilson v. Sarment, 153 Cal. 524, 96 P. 315.

79. Arnett v. Reade, 220 U. S. 311, 31 S. Ct. 425, 36 L. R. A. (N. S.) 1040.

80. Nott v. Nott, 111 La. 1028, 36 So. 109.

as to the validity of a conveyance by the wife on the death of the husband.[81] The question whether land acquired under the homestead laws of the United States falls into a community already dissolved by the death of the wife is governed by the laws of the United States.[82]

A wife's right to a tacit lien or mortgage for the repayment of money brought by her into the community is determined by the law of the domicile of the spouses at marriage.[83] As to personal property acquired during coverture, the law of the domicile controls.[84] Where stock in an Alabama corporation is part of a community estate in Louisiana, the Alabama courts will, on the principles of equity, avoid a donation of such stock in fraud of the wife's community rights.[85] In Idaho it is held that where a deceased spouse resided in Washington at the time of death, the distribution of such spouse's community interest may be made according to the law of the latter State.[86]

Where a resident of Mississippi was married in that State to a minor resident of Louisiana, with intention to reside in Mississippi, the marriage was held not constructively and *de jure* a Louisiana marriage, so as to entitle the wife to a portion of the community property at the husband's death, though the spouses intended to be married in Louisiana and were prevented by accident from so doing.[87] The Spanish and Mexican laws as to community or acquest property in force when the United States acquired New Mexico are still in force in that State except as modified by statute.[88] Since the rights of separate spouses in community property in that State are not regulated either by statute or the common law, such rights are, during the lives of both, determined by such Spanish and Mexican laws.[89]

In New York it has been held that the provision of the French code as to the establishment of community by the non-existence of contract was limited to marriages between French subjects, or persons married in France, so that an ancillary executrix was bound

81. Bender v. Bailey, 130 La. 341, 57 So. 998.

82. Wadkins v. Producers' Oil Co., 130 La. 308, 57 So. 937.

83. *In re* Myer, 14 N. M. 45, 89 P. 246.

84. Colpe v. Lindblom, 57 Wash. 106, 106 P. 634.

85. Eustis v. Eustis, 236 F. 726, 150 C. C. A. 58.

86. Vansickle v. Hazeltine, 29 Ida. 228, 158 P. 326.

87. Connor v. Connor, 10 La. Ann. 440.

88. Strong v. Eakin, 11 N. M. 107, 66 P. 539.

89. Barnett v. Barnett, 9 N. M. 205, 50 P. 337.

to show affirmatively the applicability of the French law as to a legal community in support of her claim thereunder.[90]

The proceeds of community property situated in Texas are subject to the law of Kentucky when received by a husband in that State, and not by the law of Texas.[91]

§ 584. What Constitutes Community Property in General.

The status of property as community or separate property is fixed by the manner of its acquisition,[92] and by the character of the inception of the title.[93] Separate property of spouses which is mingled with community property in such fashion that its separate character cannot be determined becomes community property.[94] A deed reciting a consideration for a deed to a spouse may be shown to have been paid for with community funds.[95]

In Washington the test of whether it is community property or not is whether it is acquired with community funds or on community credit.[96]

§ 585. Property Acquired During Coverture.

The American community doctrine, as we may term it, is that all property purchased or acquired during marriage, by or in the name of either husband or wife, or both, shall be deemed to belong

90. *In re* James' Will, 221 N. Y. 140, 116 N. E. 1010; *In re* James, 221 N. Y. 636, 117 N. E. 1072.

91. Cooke v. Fidelity Trust & Safety Vault Co., 104 Ky. 473, 20 Ky. Law, 667, 47 S. W. 325.

92. *In re* Hill's Estate, 167 Cal. 59, 138 P. 690.

93. Welder v. Lambert, 91 Tex. 510, 44 S. W. 281; Word v. Colley (Tex.), 173 S. W. 629; Osborn v. Mills, 20 Cal App. 346, 128 P. 1090.

94. Brown v. Lockhart, 12 N. M. 10, 71 P. 1086; Robb v. Robb (Tex.), 41 S. W. 92; Edelstein v. Brown (Tex.), 95 S. W. 1126 (affd., 100 Tex. 403, 100 S. W. 129); Moor v. Moor, 24 Tex. Civ. 150, 57 S. W. 992; Doyle v. Langdon, 80 Wash. 175, 141 P. 352; *In re* Buchanan's Estate, 89 Wash. 172, 154 P. 129.

Where a decedent during his lifetime had an income of $550 a month before marriage, and where during coverture his wife gave him $15 per month from her separate property, and where at death his property had greatly increased, it was held that the fact that he had mingled the small amount paid him by the wife with his own property did not convert it all into community property. *In re* Cudworth's Estate, 133 Cal. 462, 65 P. 1041.

Where a wife purchased property as her separate estate for $8,500, and her husband purchased an adjoining lot for $1,700, later selling both for $26,000, it was held that there was no commingling which prevented the segregation of the wife's separate estate. Carle v. Heller, 18 Cal. App. 577, 123 P. 815.

95. Newman v. Newman (Tex.), 86 S. W. 635.

96. United States Fidelity & Guaranty Co. v. Lee, 58 Wash. 16, 107 P. 870.

prima facie to the community,[97] unless by gift, devise or descent,[98] or unless paid for with the separate means of a spouse,[99] even if title is taken in the name of one of the spouses,[1] or in the name of a third person,[2] unless, in Louisiana, the purchase was made by way of investment or administration of paraphernal funds,[3] and even though the spouses are separated and the wife is obliged to support herself, if they are not divorced.[4] Land acquired by either spouse during coverture is community property,[5] even land originally separate estate, if conveyed away and reconveyed to the spouse during coverture,[6] as is land acquired by either spouse by adverse possession,[7] even where the possession is under a void deed to the

97. Baker v. Murrey, 78 Wash. 241, 138 P. 890; Edwards v. White (Tex.), 120 S. W. 914; Summerville v. King, 98 Tex. 332, 83 S. W. 680 (mod. reh., 84 S. W. 643); *In re* Slocum's Estate, 83 Wash. 158, 145 P. 204; *In re* Baillard, 173 Cal. 293, 173 P. 170; Scott v. Scott, 247 F. 976; Rowe v. Hibernia Sav. & Loan Soc., 134 Cal. 403, 66 P. 569; Mitchell v. Moses, 16 Cal. App. 594, 117 P. 685; Kin Kaid v. Lee, 54 Tex. Civ. 622, 119 S. W. 342; Richmond v. Sims (Tex.), 144 S. W. 1142; Louisiana Civil Code, §§ 2369-2372; Succession of Planchet, 29 La. Ann. 520; Tally v. Haffner, 29 La. Ann. 583; Wingard v. Wingard, 56 Wash. 389, 105 P. 834.

98. Sauvage v. Wauhop (Tex.), 143 S. W. 259; Cotten v. Friedman (Tex.), 158 S. W. 780; Merrell v. Moore, 47 Tex. Civ. 200, 104 S. W. 514; Moody v. Southern Pac. Co., 167 Cal. 786, 141 P. 388; Scott v. Scott, 247 F. 976.

Under the Texas statute it was held that a monthly allowance received by a spouse from a spendthrift trust created in his favor is his separate estate. McClelland v. McClelland (Tex.), 37 S. W. 350.

99. Wade v. Wade, (Tex.), 106 S. W. 188.

1. Fulkerson v. Stiles, 156 Cal. 703, 105 P. 966; Wells v. Allen (Cal.), 177 P. 180.

2. Daniel v. Daniel, 106 Wash. 659, 181 P. 215.

3. Knoblock & Rainold v. Posey, 126 La. 610, 52 So. 847.

4. Gutheridge v. Gutheridge (Tex.), 161 S. W. 892.

5. Janes v. Stratton (Tex.), 203 S. W. 386; Gameson v. Gameson (Tex.), 162 S. W. 1169; Otto v. Long, 144 Cal. 144, 77 P. 885; Houts v. First Trust & Savings Bank, — Cal. App. —, 168 P. 383.

6. Word v. Colley (Tex.), 173 S. W. 629.

7. Mitchell v. Schofield (Tex.), 140 S. W. 254; Villescas v. Arizona Copper Co., 20 Ariz. 268, 179 P. 963.

In Texas, under Rev. St. 1895, arts. 2967, 2968, declaring that all property of the husband "owned or claimed" by him before marriage, and that "acquired" afterwards by gift, devise, or descent, shall be his separate property, and all property "acquired" by the husband or wife during the marriage, except that "acquired" by gift, devise, or descent, shall be the common property of the husband and wife, ownership resting in adverse possession for 10 years, existing in part before marriage and in part after marriage, is community property; the word "acquired" denoting all property coming to husband or wife during coverture by title, other than by gift, devise, or descent; and the word "claim," when applied to land, importing a legal or equitable right to the land; and the words "owned or claimed" signify-

wife, the consideration of which was paid from her separate estate,[8] but where title so acquired by spouses occupying jointly is perfected after the death of one, the estate so acquired inures to the separate estate of the survivor.[9] The community owns all property bought with community funds,[10] and all property acquired in exchange for community property,[11] as well as property purchased in part with community funds and in part with the joint note and mortgage of the spouses.[12] Community property also includes money borrowed by either spouse during coverture, in the absence of a different agreement,[13] and property purchased with borrowed money,[14] even though a note given jointly by the spouses for the repayment of the loan is later paid with the separate funds of one of them,[15] and even though the transaction was made in another State, in the absence of proof of the laws of such other State.[16] The same rules govern mortgages given to either spouse,[17] and leases made to one of them during coverture,[18] as well as debts due the spouses jointly, even where there is an agreement that when the debt is collected it shall be the wife's separate property.[19] The following have been held to create a community property: money received by a husband under an agreement that he should have half his partner's winnings by gambling,[20] money saved by a wife from her household allowance, in the absence of a different agreement,[21] money deposited to the joint account of the spouses in a savings bank, though the pass-book recites that

ing a legal or equitable, ownership or legal or equitable right to demand the land. Sauvage v. Wauhop (Tex.), 143 S. W. 259.

8. Brown v. Foster Lumber Co. (Tex.), 178 S. W. 787.

9. Cook v. Houston Oil Co. of Texas (Tex.), 154 S. W. 279.

10. Bollinger v. Wright, 143 Cal. 292, 76 P. 1108; Gilmour v. North Pasadena Land & Water Co., 178 Cal. 6, 171 P. 1066.

11. Witt v. Teat (Tex.), 167 S. W. 302.

12. Bollinger v. Wright, 143 Cal. 292, 76 P. 1108.

13. Emerson-Brantingham Implement Co. v. Brothers (Tex.), 194 S. W. 608; Canfield v. Moore, 16 Tex. Civ. 472, 41 S. W. 718.

14. Northwestern & P. Hypotheek Bank v. Rauch, 7 Ida. 152, 61 P. 516; Chaney v. Gauld Co., 28 Ida. 76, 152 P. 468; Main v. Scholl, 20 Wash. 201, 57 P. 800.

15. Katterhagen v. Meister, 75 Wash. 112, 134 P. 673.

16. Clark v. Eltinge, 29 Wash. 215, 69 P. 736.

17. Nance v. Woods, 79 Wash. 188, 140 P. 323.

18. Williams v. Beebe, 79 Wash. 133, 139 P. 867.

19. Gentry v. McCarty (Tex.), 141 S. W. 152.

20. *In re* Gold's Estate, 170 Cal. 621, 151 P. 12.

21. McMurray v. Bodwell, 16 Cal. App. 574, 117 P. 627.

payment is to be made to either spouse producing the book,[22] property acquired under an agreement to pay the grantor an annual sum,[23] land paid for by the labor of an unemancipated wife and children while the husband is in the insane asylum,[24] land bought under an oral agreement made before marriage, where the price, to which the wife contributed, was not paid till after marriage,[25] property purchased on credit for a business conducted by the husband on the wife's property and paid for out of the profits of such business,[26] and a ring purchased by the wife, in the absence of evidence that it was bought with her separate estate.[27-28] The character of community property will not be changed by the fact that it is sold for taxes under a wrong description to a third person who reconveys it to the wife,[29] nor by the fact that a partition decree allots lands previously purchased by the husband to himself and his wife,[30] nor, conversely, where a partition decree allots to the husband alone land belonging to both spouses,[31] nor by an order of court directing a wife's successor as guardian to turn over to her fees earned by her as such guardian.[32] No such estate is created where property is conveyed to a spouse without consideration so that he may qualify as surety on a bond,[33] nor where land is purchased by a surviving spouse with money secured from the community estate.[34] Where a community estate has been created in land bought on a contract of sale, such interest will be forfeited where the terms of the contract are not complied with.[35] In Idaho all property acquired by either spouse during coverture which is not separate property is community property.[36]

22. Lynam v. Vorwerk 13 Cal. App. 507, 110 P. 355.

23. Winchester v. Winchester, 175 Cal. 391, 165 P. 965.

24. Messimer v. Echols (Tex.), 194 S. W. 1171.

25. *In re* Mason's Estate, 95 Wash. 564, 164 P. 205.

26. Farmers' State Bank v. Farmer (Tex.), 157 S. W. 283.

27-28. Sweeney v. Taylor Bros., 41 Tex. Civ. 365, 92 S. W. 442

29. Meserole v. Whitney, 22 Ida. 543, 127 P. 553.

30. Cunha v. Hughes, 122 Cal. 111, 54 P. 535, 68 Am. St. 27.

31. O'Connor v. Vineyard, 91 Tex. 488, 44 S. W. 485.

32. Scott v. Scott (Tex.), 170 S. W. 273.

33. Crenshaw v. Harris, 16 Tex. Civ. 263, 41 S. W. 391

34. Griffin v. McKinney, 25 Tex. Civ. 432, 62 S. W. 78.

35. Converse v. La Barge, 92 Wash. 282, 158 P. 958.

36. Hall v. Johns, 17 Ida. 224, 105 P. 71; Douglas v. Douglas, 22 Ida. 336, 125 P. 796; Kohny v. Dunbar, 21 Ida. 258, 121 P. 544.

§ 586. Public Lands Acquired by Grant or Entry.

Where a husband acquires no interest in a homestead because his location is invalid, the wife can take no community interest.[37] Under the Federal Homestead Act a patent issued to a husband after the death of his wife creates a separate estate in him,[38] as well as when he enters before marriage but gets his patent during coverture,[39] but under the same law a homestead acquired by the widow of a deceased homesteader after the dissolution of the community is her separate estate,[40] she having, under that statute, a right of residence, cultivation and patent where he dies before perfecting his entry.[41] Under the same statute the homestead was held community property where there was a dispute as to part of the claim, and where the entryman died before paying for the disputed part, which was paid for after his death, and the patent issued in his name.[42] That statute does not prevent the application of a State law which makes such land community property after patent.[43] In Arizona land acquired from the government by a spouse during marriage is community property.[44] In Louisiana a homestead made and cultivated for five years during the existence of the community is community property, though the final receipt is not issued till after the wife's death,[45] as is a homestead entered upon by a spouse under the Federal law during the existence of the community, even though final proofs, certificate and patent were not issued till after the dissolution of the community by the death of the wife, the acquisition of property dating from the entry under that statute.[46] In New Mexico title obtained by a divorced husband to public lands by patent does not relate back to its initiation by entry and settlement, so as to make the homestead community property.[47] Under the Texas

37. Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P. 574.

38. Wadkins v. Producers' Oil Co., 130 La. 308, 57 So. 937.

39. Teynor v. Heible, 74 Wash. 222, 133 Pa. 1, 46 L. R. A. (N. S.) 1033; Humbird Lumber Co. v. Doran, 24 Ida. 507, 135 P. 66.

40. Richard v. Moore, 110 La. 435, 34 So. 593; Cunningham v. Krutz, 41 Wash. 190, 83 P. 109, 4 L. R. A. (N. S.) 967; Crochet v. McCamant, 116 La. 1, 40 So. 474, 114 Am. St. R. 538.

41. Wadkins v. Producer Oil Co., 227 U. S. 368, 33 S. Ct. 380, 57 L. Ed. ——.

42. Douglas v. Nicholson, 140 La. 1098, 74 So. 566.

43. Buchser v. Buchser, 231 U. S. 157, 34 S. Ct. 46, 58 L. Ed. —.

44. Molina v. Ramirez, 15 Ariz. 249, 138 P. 17.

45. Brown v. Fry, 52 La. Ann. 58, 26 So. 748.

46. Crochet v. McCamant, 116 La. 1, 40 So. 474.

47. Baker v. Saxon, 24 N. M. 531, 174 P. 991.

statute offering land to volunteers for the defence of the State the interest of a married volunteer is community property,[48] as is a land certificate transferred to a husband during coverture,[49] or before coverture where the location was not made till after marriage,[50] and land settled on before the death of the wife, where such death occurs before the completion of occupation.[51] In that State a wife of one who acquires a right to land under a pre-emption survey and conveys it to another has only an equitable title by reason of her community interest.[52] The question whether public land purchased from that State is community property or not is determinable by the character of the inception of the title,[53] and if its inception takes place during marriage it is community property.[54] Under the Washington homestead statute land so acquired is community property,[55] even though final proof is not made nor patent issued till after the wife's death,[56] as well as a homestead patented to a husband under the Federal statute.[57] It is otherwise where the entryman marries after making the entry, and before final proofs,[58] and as to property acquired under coal land and mining entries.[59] In the same State a wife divorced from her husband prior to his entry under the homestead law acquires no community interest in the homestead,[60] nor does a wife living with her husband on land squatted on prior to homestead entry take a commuuity interest therein.[61] In the same State it has been held that the fact that community funds were used to pay for a timber claim which was the husband's separate estate would not give the wife an interest in or a lien upon the property itself.[62]

48. Barrett v. Spence, 28 Tex. Civ. 344, 67 S. W. 921.

49. Booth v. Clark, 34 Tex. Civ. 315, 78 S. W. 392.

50. Phillips v. Palmer, 56 Tex. Civ. 91, 120 S. W. 911.

51. Adams v. West Lumber Co. (Tex.), 162 S. W. 974; Creamer v. Briscoe, 101 Tex. 490, 109 S. W. 911.

52. Kirby Lumber Co. v. Smith (Tex.), 185 S. W. 1068.

53. McClintic v. Midland Grocery & Dry Goods Co. (Tex.), 154 S. W. 1157; Stiles v. Hawkins (Tex.), 207 S. W. 89.

54. Hawkins v. Stiles (Tex.), 158 S. W. 1011.

55. (D. C.) Buchser v. Morss, 196 F. 577 (affd., 202 F. 854).

56. Eckert v. Schmitt, 60 Wash. 23, 110 P. 635; Ahern v. Ahern, 31 Wash. 334, 71 P. 1023, 96 Am. St. R. 912; Cox v. Tompkinson, 39 Wash. 70, 80 P. 1005.

57. Buchser v. Morss, 202 F. 854, 121 C. C. A. 212; Curry v. Wilson, 57 Wash. 509, 107 P. 367.

58. Card v. Cerini, 86 Wash 419, 150 P. 610; Rogers v. Minneapolis Threshing Mach Co. 48 Wash. 19, 92 P. 774.

59. Guye v. Guye, 63 Wash. 340, 115 P. 731.

60. Hall v. Hall, 41 Wash. 186, 83 P. 108, 111 Am. St. R. 1016.

61. Reed v. St. Paul, M. & M. Ry. Co., 234 F. 123.

62. James v. James, 51 Wash. 60, 97 P. 1113 (affd. reh., 51 Wash. 66, 98 P. 1115).

§ 587. Rents, Profits and Issues of Separate Estates.

The rents and profits of separate estates of spouses are generally community property,[63] as well as interest on such property,[64] and, in Louisiana, the revenue of the wife's paraphernal property[65] and property acquired by the use of separate property.[66] Crops grown on a spouse's land are community property,[67] as well as crops raised by a spouse on leased land though the other spouse gives a note for the seed,[68] and, in Texas, the increase of separate livestock,[69] but not the natural enhancement in value of separate property.[70] Where a wife bought ginning machinery with her separate estate and sold a half interest to a son, later buying such interest back with the profits of the mill, it was held that the half so repurchased was community property as between herself and her husband.[71] Though an interest in a partnership business possessed by a spouse at marriage remains separate estate, yet whatever thereafter accrues from the personal activity of such spouse is community property.[72] It has been held otherwise as to money realized by a spouse from the sale of trees and plants grown in a nursery conducted by a spouse on land acquired before marriage, though the industry and attention of the spouse to the business was an important element.[73]

63. Scott v. Scott, 247 F. 976; *In re* Finn's Estate (Wash.), 179 P. 103; Emerson-Brantingham Implement Co. v. Brothers (Tex.), 194 S. W. 608; Succession v. Webre, 49 La. Ann. 1491, 22 So. 390 Texas Lumber & Loan Co. v. First Nat. Bank (Tex.), 209 S. W. 811; De Berrera v. Frost, 33 Tex. Civ. 580, 77 S. W. 637; Sharp v. Zeller, 110 La. 61, 34 So. 129.

Under the Texas statute the rents of a wife's separate real estate, though community property, are not subject to community debts. Texas Lumber & Loan Co. v. First Nat. Bank (Tex.), 209 S. W. 811.

Where the spouses owned adjoining fruit orchards and the husband managed and sold the crop raised on both, it was held that the wife's share of the proceeds were not community property, subject to its debts. Tennyson v. Beggs, 176 Cal. 255, 168 P. 140.

64. Parrish v. Williams (Tex.), 53 S. W. 79.

65. Succession of McCloskey, 144 La. 438, 80 So. 650.

66. First Nat. Bank of Plainview v. McWhorter (Tex.), 179 S. W. 1147.

67. Hanks v. Leslie (Tex.), 159 S. W. 1056; Kreisle v. Wilson (Tex.), 148 S. W. 1132.

68. Davis v. Green, 122 Cal. 364, 55 P. 9.

69. Barr v. Simpson, 54 Tex. Civ. 105, 117 S. W. 1041; Wolford v. Melton, 26 Tex. Civ. 486, 63 S. W. 543; Jordan v. Marcantell (Tex.), 147 S. W. 357.

70. Guye v. Guye, 63 Wash. 340, 115 P. 731.

71. Miller v. Fenton (Tex.), 207 S. W. 631.

72. *In re* Gold's Estate, 170 Cal. 621, 151 P. 12.

73. *In re* Pepper's Estate, 158 Cal. 619, 112 P. 62.

§ 588. Improvements on Separate Estates.

In California it is held that a wife's separate property is not made community property by the fact that the labor of the husband contributed to building a house on such property, or by the fact that he advanced money to pay a mortgage thereon.[74] In Louisiana improvements made with community funds on separate estate are a charge on such separate estate in favor of the community,[75] though, subject to the claim of the community, such buildings belong to the spouse on whose separate estate they are placed,[76] who must pay their value to the community in order to claim them.[77] The community can recover from the spouse only the amount to which the value of the separate estate has been enhanced thereby,[78] at the date of the dissolution of the community.[79] In Texas such improvements are community property,[80] but the burden of showing that community funds were so used is on those claiming the improvements as community property.[81] In Washington it is held that improvements on separate property paid for with separate estate are not community property though the other spouse makes them under employment from the owner of the separate estate.[82]

§ 589. Damages Recovered by Spouses.

Under most statutes rights of action accruing to and damages recovered by either spouse are community property,[83] even if the

74. Carlson v. Carlson, 10 Cal. App. 300, 101 P. 923.

75. Succession of Webre, 49 La. Ann. 1491, 22 So. 390.

76. Sims v. Billington, 50 La. Ann. 968, 24 So. 637.

77. Succession of Burke, 107 La. 82, 31 So. 391.

78. Succession of Meteye, 113 La. 1012, 37 So. 909.

79. Dillon v. Freville, 129 La. 1005, 57 So. 316.

80. Brady v. Maddox (Tex.), 124 S. W. 739; Cervantes v. Cervantes (Tex.), 76 S. W. 790; Hillen v. Williams, 25 Tex. Civ. 268, 60 S. W. 997; Maddox v. Summerlin, 92 Tex. 483, 49 S. W. 1033; Summerville v. King [(affd., 98 Tex. 332, 83 S. W. 680), mod. reh., 84 S. W. 643].

81. Welder v. Lambert, 91 Tex. 510, 44 S. W. 281.

82. Glaze v. Pullman State Bank, 91 Wash. 187, 157 P. 488.

83. Martin v. Southern Pac. Co., 130 Cal. 285, 62 P. 515; Moody v. Southern Pac. Co., 167 Cal. 786, 141 P. 388; Justis v. Atchison, T. & S. F. Ry. Co., 12 Cal. App. 639, 108 P. 328; Giffen v. City of Lewiston, 6 Ida. 231, 55 P. 545; Labonte v. Davidson, 31 Ida. 644, 175 P. 588; Ft. Worth & R. G. Ry. Co. v. Robertson, 55 Tex. Civ. 309, 121 S. W. 202; Schneider v. Biberger, 76 Wash. 504, 136 P. 701; Maynard v. Jefferson County, 54 Wash. 649, 653, 103 P. 418; Bohan v. Bohan (Tex.), 56 S. W. 959; City of San Antonio v. Wildenstein, 49 Tex. Civ. 514, 109 S. W. 231; Posener v. Long (Tex.), 156 S. W. 591; Chicago, R. I. & G. Ry. Co. v. Oliver (Tex.), 159 S. W. 853; Hawkins v. Front, etc., R. Co.,

cause of action accrues after the spouses have permanently separated.[84] Under the Louisiana statute damages recovered by a wife, for personal injuries are her separate property.[85]

§ 590. Wife's Earnings.

Where the community doctrine prevails, earnings of the wife are community property,[86] if earned while living together,[87] unless the husband has given them to her,[88] or unless, in Louisiana, there has been a separation of property,[89] or unless earned in a jurisdiction where such earnings are separate property,[90] even though earned in the active management of her husband's business as the "man of the family."[91] The same rule applies to property acquired in the wife's name and paid for with her earnings during coverture,[92]

§ 591. Property in Part Community Property and in Part Separate Estate.

Property purchased by a spouse in part with community funds and in part with separate estate is *pro rata* community property and separate estate.[93] The same is true where the purchase is in

3 Wash. 592, 1021; Ezell v. Dodson, 60 Tex. 331; Hynes v. Colman, etc., Co., 108 Wash. 642, 185 P. 617; Davis v. Davis (Tex.), 186 S. W. 775.

84. Ligon v. Ligon, 39 Tex. Civ. 392, 87 S. W. 838.

85. Martin v. Derenbecker, 116 La. 495, 40 S. 849.

86. Johnson v. Burford, 39 Tex. 242; Lilly v. Yeary (Tex.), 152 S. W. 823; Gentry v. McCarty (Tex.), 141 S. W. 152; Henry v. Land (Tex.), 168 S. W. 994; Cline v. Hackbarth, 27 Tex. Civ. 391, 65 S. W. 1086; Fisher v. Marsh, 69 Wash. 570, 125 P. 951; Lewis v. Burns, 122 Cal. 358, 55 P. 132; Succession of Manning, 107 La. 456, 31 So. 862; Barr v. Simpson, 54 Tex. Civ. 105, 117 S. W. 1041. See Fisk v. Flores, 43 Tex. 340.

87. Moore v. Crandall, 205 F. 689, 124 C. C. A. 11; Fennell v. Drinkhouse, 131 Cal. 447, 63 P. 734, 82 Am. St. R. 361.

88. Dority v. Dority, 30 Tex. Civ. 216 (affd., 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 041); Ahlstrom v. Tage, 31 Ida. 459, 174 P. 605.

89. Knight v. Kaufman, 105 La. 35, 29 So. 711.

90. Meyers v. Albert, 76 Wash. 218, 135 P. 1003. Under the Texas statute of 1911, the wife's earnings, either before or after the enactment of the statute, are separate estate and not community property. Scott v. Scott (Tex.), 170 S. W. 273.

91. Bekins v. Dieterle, 5 Cal. App. 690, 91 P. 173.

92. Knight v. Kaufman, 105 La. 35, 29 So. 711.

93. Beneke v. Beneke, 47 Wash. 178, 91 P. 641; Texas Moline Plow Co. v. Clark (Tex.), 145 S. W. 266; Letot v. Peacock (Tex.), 94 S. W. 1121; Moore v. Moore, 28 Tex. Civ. 600, 68 S. W. 59; Hillen v. Williams, 25 Tex. Civ. 268, 60 S. W. 997; *In re* Finn's Estate (Wash.), 179 P. 103; Ochoa v. Edwards (Tex.), 189 S. W. 1022; Miller v. Odom, 106 Tex. 36, 152 S. W. 1185; Strnad v. Strnad, 29 Tex. Civ. 124, 68 S. W. 69.

part with separate funds and in part with a joint note of the spouses,[94] or with a sole note of the spouse,[95] and where a spouse purchases property in part with separate estate and in part with money borrowed during coverture.[96] In Texas where spouses sold land owned half by the community and half by the wife, it was held that the husband's receipt of and control over cash and notes received in payment did not deprive the wife of her right to half such cash and notes.[97]

§ 592. Separate Estate Distinguished.

The character of community property does not attach to property owned by a spouse before marriage,[98] or to property bought with the separate funds of a spouse[99] even though bought on credit, if afterwards paid for with separate funds,[1] and even though its buildings are burned and are replaced with money secured by fire insurance, the premiums of which are paid for with the separate estate of the other spouse.[2] The rule applies even though advancements on the purchase price were made before marriage by the other spouse,[3] and to any property acquired after marriage with the proceeds of separate property,[4] and to property occupied by spouse for many years before marriage under a claim of ownership, though such ownership was not perfected by deed till after marriage,[5] especially where the spouse pays part of the purchase price before marriage from his separate estate,[6] and improves it.[7] Crops growing on land rented by a spouse at the time of marriage, remain separate estate,[8] as well as funds or a

94. Katterhagen v. Meister, 75 Wash. 112, 134 P. 673; Barr v. Simpson, 54 Tex. Civ. 105, 117 S. W. 1041.

95. Heintz v. Brown, 46 Wash. 387, 90 P. 211.

96. Northwestern & P. Hypotheek Bank v. Rauch, 7 Ida. 152, 61 P. 516.

97. Ochoa v. Edwards (Tex.), 189 S. W. 1022.

98. Douglas v. Douglas, 22 Ida. 336, 125 P. 796; *In re* Cudworth's Estate, 133 Cal. 462, 65 P. 1041; Graves v. Columbia Underwriters, 93 Wash. 196, 160 P. 436; Allen v. Allen (Tex.), 158 S. W. 104; Eslinger v. Eslinger, 47 Cal. 62; Lake v. Lake, 52 Cal. 428.

99. Clark v. Baker, 76 Wash. 110, 135 P. 1025; Powers v. Munson, 74 Wash. 234; 133 P. 453; *In re* Deschamps' Estate, 77 Wash. 514, 137 P. 1009.

1. O'Farrell v. O'Farrell, 119 S. W. 899, 56 Tex. Civ. 51; McClintic v. Midland Grocery & Dry Goods Co. (Tex.), 154 S. W. 1157.

2. Rolater v. Rolater (Tex.), 198 S. W. 391.

3. Morse v. Johnson, 88 Wash. 57, 152 P. 677.

4. Worden v. Worden, 96 Wash. 592, 165 P. 501.

5. *In re* Pepper's Estate, 158 Cal. 619, 112 P. 62.

6. Guye v. Guye, 63 Wash. 340, 115 P. 731.

7. Guye v. Guye, 63 Wash. 340, 115 P. 731, 37 L. R. A. (N. S.) 186.

8. Booker v. Booker (Tex.), 207 S. W. 675.

partnership existing before marriage between the spouses which were before marriage appropriated by one of them,[9] and a claim of a wife to damages for indignities suffered before marriage.[10] Property received in exchange for separate estate remains such,[11] as well as land acquired during a second marriage by the exchange of land held as community property during the first marriage,[12] and separate estate conveyed to the other spouse and by such spouse recognized to the grantor.[13] The character of property as separate estate is not changed by the fact that the husband joins in a mortgage of it either to improve it,[14] or to pay the purchase price,[15] or though improvements are made with community funds,[16] but in such case the property is community property to the extent of the improvements.[17] Of a wife's separate property she retains the full right of dominion, and may resume it at any time; and debts contracted by her, inuring to its benefit, bind her.[18] Under the Idaho statute providing, *inter alia,* that rents and profits of separate estate is community property, but that the separate estate of the wife is exempt from her husband's debts, it was held that the increase of her livestock was separate estate.[19] The same was formerly held in Louisiana of the increase of slaves.[20] A community estate is not created where after a wife's death a husband secures title under a tax deed issued, but not recorded, before her death,[21] even where the tax deed was to both spouses, if the wife dies before the limitation period has run.[22] A yacht which is the separate estate of the wife remains such though registered in the name of the husband, and kept in his possession remains such,

9. Lenninger v. Lenninger, 167 Cal. 297, 139 P. 679.

10. St. Louis Southwestern Ry. Co. v. Wright, 33 Tex. Civ. 80, 75 S. W. 565.

11. Holly St. Land Co. v. Beyer, 48 Wash. 422, 93 P. 1065; Smith v. Weed, 75 Wash. 452, 134 P. 1070.

12. Haring v. Shelton (Tex.), 114 S. W. 389; Succession of Rouse, 144 La. 143, 80 So. 229.

13. Grandchampt v. Administrator of Succession of Billis, 124 La. 117, 49 So. 998; Brown v. Davis, 98 Wash. 442, 167 P. 1095; Shook v. Shook (Tex.), 125 S. W. 638.

14. Graves v. Columbia Underwriters, 93 Wash. 196, 160 P. 436.

15. Stewart v. Weiser Lumber Co., 21 Ida. 340, 121 P. 775.

16. Schwartzman v. Cabell (Tex.), 49 S. W. 113.

17. Clardy v. Wilson, 24 Tex. Civ. 196, 58 S. W. 52.

18. Jordan v. Anderson, 29 La. Ann. 749; Grant v. Whittlesey, 42 Tex. 320.

19. Thorn v. Anderson, 7 Ida. 421, 63 P. 592; Bank of Nez Perce v. Pindel, 193 F. 917, 113 C. C. A. 545.

20. Bradish v. Johnson, 6 La. Ann. 639, *note.*

21. Gafford v. Foster, 36 Tex. Civ. 56, 81 S. W. 63.

22. Sweeny v. Taylor Bros., 41 Tex. Civ. 365, 92 S. W. 442.

he being presumed to hold it in trust for her.[23] The same is true of an automobile purchased with separate estate.[24] Land acquired by a husband under the Federal Forfeiture Act, forfeiting certain lands granted to railroads, but providing that one in possession of such lands under a grant from the railroad might purchase a certain amount of land from the government, is separate estate, though the wife died prior to the forfeiture.[25] Under the Federal statute the sole property in a mining claim located on public land is vested in the locator.[26] In Louisiana a husband may prevent a purchase made by him during coverture in his own name from falling into the community by making, in the act of purchase, the double declaration that the property is bought with the proceeds of his separate property and that the purchase is for his sole account, neither of the declarations being alone sufficient.[27] Where a wife buys, such recital is unnecessary.[28] Where the purchase of property by a husband and his sale of other property, the proceeds of which he uses in the purchase, are not simultaneous, it should appear that such proceeds have not in the meantime been used in the purchase of community property.[29] Under the Texas statute providing, *inter alia,* that property "claimed" by a husband before marriage shall be his separate property, the kind of claim intended by the statute is either a legal claim or an equitable claim which may ripen into a legal claim, not including a claim to land not based on a contract with its owner for its sale.[30] In that State, where a husband insured his life in favor of his wife, and on payment of the policy gave her the money, and where his partnership borrowed the money while solvent, and in part payment of the note conveyed her certain land, it was held that the land was not community property.[31] In that State the status of community property does not attach to land before its conveyance to a spouse, and therefore where at the request of such spouse it is

23. Dyment v. Nelson, 166 Cal. 38, 134 P. 988.

24. Rhoades v. Lyons (Cal.), 168 P. 385.

25. Carratt v. Carratt, 32 Wash. 517, 73 P. 481.

26. Phoenix Minning & Mill Co. v. Scott, 20 Wash. 48, 54 P. 777; McAlister v. Hutchinson (N. M.), 75 P. 41.

27. Succession of Andrus, 131 La. 940, 60 So. 623.

28. Succession of Burke, 107 La. 82, 31 So. 391.

29. Sharp v. Zeller, 110 La. 61, 34 So. 129.

30. Gameson v. Gameson (Tex.), 162 S. W. 1169.

31. Hall v. Levy, 31 Tex. Civ. 360, 72 S. W. 263.

conveyed to another, it does not become the community property of such spouse and his wife.[32]

§ 593. Gifts.

By statute in several States property acquired as a gift by one of the spouses during coverture is separate estate,[33] including gifts from one spouse to the other,[34] gifts made to spouses jointly, which vest an undivided half in each spouse as separate estate,[35] and land acquired by adverse possession by a spouse where her father entered as a trespasser, and after occupying it for some years gave it to his daughter, a wife, who with her husband remained in possession long enough to get title.[36] Property acquired by a deed which recites a consideration may be shown to be a gift.[37]

§ 594. Insurance Policies.

In Louisiana proceeds of insurance policies on the life of a spouse payable to his executors, administrators and assigns are his separate property if he was not married when the policies were written, but otherwise they are community property.[38] In Texas an insurance policy on the life of a wife, payable to the husband, is his separate property,[39] as is a policy on his own life, though the premiums were paid from the spouses' community estate, unless so paid with intent to defraud the wife,[40] but such a policy on the life of another in which a husband is beneficiary is community property on the death of the insured.[41] After divorce a wife takes no interest in a policy of insurance on her husband's life, though community property was used in paying the premiums.[42]

32. Empire State Surety Co. v. Ballou, 66 Wash. 76, 118 P. 923.

33. Siddall v. Haight, 132 Cal. 320, 64 P. 410; Fanning v. Green, 156 Cal. 279, 104 P. 308; *In re* Carlin, 19 Cal. App. 168, 124 P. 868 Corbett v. Sloan, 52 Wash. 1, 99 P. 1025; Holly St. Land Co. v. Beyer, 48 Wash. 422, 93 P. 1065; Hurst v. W. B. Thompson & Co., 118 La. 57, 42 So. 645.

34. *In re* Cudworth's Estate, 133 Cal. 462, 65 P. 1041.

35. Summerville v. King, 98 Tex. 332, 83 S. W. 680 (mod. reh., 84 S. W. 643).

36. Treadwell v. Walker County Lumber Co. (Tex.), 161 S. W. 397.

37. Mahon v. Barnett (Tex.), 45 S. W. 24.

38. Succession of Buddig, 108 La. 406, 32 So. 361; Succession of Le Blanc, 142 La. 27, 76 So. 223, L. R. A. 1917F 1137; Succession of Verneuille, 120 La. 605, 45 So. 520.

39. Martin v. McAllister, 94 Tex. 567, 63 S. W. 624.

40. Martin v. McAllister, 94 Tex. 567, 63 S. W. 624; Jones v. Jones (Tex.), 146 S. W. 265.

41. Wooden v. Wooden (Tex.), 116 S. W. 627

42. Northwestern Mut. Life Ins. Co. v. Whiteselle (Tex.), 188 S. W. 22.

§ 595. Determination of Status of Property; Presumptions.

Prima facie property received by either spouse during coverture is presumed to be community property,[43] in the absence of a recital limiting it to separate use,[44] and unless, in Louisiana, the spouses are separate in property,[45] whether standing in the name of a spouse, or in their joint names,[46] as well as land conveyed to a spouse after marriage,[47] or any interest therein.[48] The presumption does not arise in Louisiana where a wife, having a separate income sufficient to pay a separate debt owed by her, pays it from such income, though the husband sometimes receives rents from

43. La. Code, §§ 2316, 2369, 2371; Pinard's Succession, 30 La. Ann. 167; McAfee v. Robertson, 43 Tex. 591; Webb's Estate, Myrick's Prob. 93; Schmeltz v. Garey, 49 Tex. 49; Farrington v. McClellan, 26 Cal. App. 375, 146 P. 1051; Lisenbee v. Lisenbee (Cal.), 181 P. 804; Rhodes v. Alexander, 19 Tex. Civ. 552, 47 S. W. 754; Strong v. Eakin, 11 N. M. 107, 66 P. 539; Wells v. Allen (Cal.), 177 P. 180; Brucker v. De Hart, 106 Wash. 386, 180 P. 397; Chaney v. Gauld Co., 28 Ida. 76, 152 P. 468; Colpe v. Lindblom, 57 Wash. 106, 106 P. 634; Lynch v. Lynch (Tex.), 130 S. W. 461; Palmer v. Abrahams, 55 Wash. 352, 104 P. 648; Ellerd v. Randolph (Tex.), 138 S. W. 1171; *In re* Pepper's Estate, 158 Cal. 619, 112 P. 62; Clark v. Thayer, 98 Tex. 142, 81 S. W. 1274; Blackwell v. Mayfield (Tex.), 69 S. W. 659; O'Sullivan v. O'Sullivan, 35 Wash. 481, 77 P. 806; Hill v. Gardner, 35 Wash. 529, 77 P. 808.

44. Cockburn v. Cherry (Tex.), 153 S. W. 161; Lanfer v. Powell, 30 Tex. Civ. 604, 71 S. W. 549.

45. Latour v. Guillory, 130 La. 570, 58 So. 341.

46. Keyser v. Clifton (Tex.), 50 S. W. 957; Succession of Manning, 107 La. 456, 31 So. 862; Gastauer v. Gastauer, 131 La. 1, 58 So. 1012; Patterson v. Bowes, 78 Wash. 476, 139 P. 225; Succession of Graf, 125 La. 197, 51 So. 115; Henry v. Vaughan, 46 Tex. Civ. 531, 103 S. W. 192; Killian v. Killian, 10 Cal. App. 312, 101 P. 806; O'Brien v. Reardon, 29 Cal. App. 703, 155 P. 534; Aycock v. Thompson (Tex.), 146 S. W. 641.

47. Douglas v. Douglas, 22 Ida. 336, 125 P. 796; Hanna v. Reeves, 22 Wash. 6, 60 P. 62; Woodland Lumber Co. v. Link, 16 Wash. 72, 47 P. 222; Hoeck v. Greif, 142 Cal. 119, 75 P. 670; Stowell v. Tucker, 7 Ida. 312, 62 P. 1033; Winkie v. Conatser (Tex.), 171 S. W. 1017; Maxson v. Jennings, 19 Tex. Civ. 700, 48 S. W. 781; Welder v. Lambert, 91 Tex. 510, 44 S. W. 281; Wolf v. Gibbons (Tex.), 69 S. W. 238; Dormitzer v. German, etc., Assn., 23 Wash. 132, 62 P. 682 (affd., 192 U. S. 125, 24 S. Ct. 221, 48 L. ed. 373); Schneider v. Sellers, 25 Tex. Civ. 226, 61 S. W. 541; Burleson v. Alvis, 28 Tex. Civ. 51, 66 S. W. 235; Wauhop v. Sauvage's Heirs (Tex.), 159 S. W. 185; Houston Oil Co. v. Griggs (Tex.), 181 S. W. 833; Emery v. Barfield, 107 Tex. 306, 183 S. W. 386; Ross v. Martin (Tex.), 140 S. W. 432 (mod. reh., 104 Tex. 558, 141 S. W. 518); Nilson v. Sarment, 153 Cal. 524, 96 P. 315; Martin v. Burr (Tex.), 171 S. W. 1044; Swilley v. Phillips (Tex.), 169 S. W. 1117; Mattson v. Mattson, 29 Wash. 417, 69 P. 1087; Frey v. Myers, 102 Tex. 527, 113 S. W. 592; Glaze v. Pullman State Bank, 91 Wash. 187, 157 P. 488.

48. Sauvage v. Wauhop (Tex.), 143 S. W. 259.

her separate estate.[49] Personal property acquired during the marriage is presumed to have been earned by one or both of the spouses.[50] Property in possession of either spouse when the community is dissolved is presumed to be community property.[51] It will not be presumed that property is acquired during the marriage,[52] nor that payments made during coverture on indebtedness against the husband's separate property are made with community funds,[53] or that community funds were used to pay taxes on separate estate where the spouse has a separate income,[54] or that property acquired by a spouse after divorce is community property,[55] or that a payment made by a husband on community property after his wife's death was made from his separate estate,[56] or that a wife applies her separate property rather than community property to family expenses.[57] No presumption of a gift arises where title to property purchased with community funds is taken in the name of the wife,[58] or from the fact that a husband makes improvements on the separate estate of the wife with community funds.[59] Where the husband conveys community property to the wife it is presumed to be separate property,[60] and the same is true of a conveyance by the wife to the husband.[61] Under the

49. Succession of Lanphier, 104 La. 384, 29 So. 122.

50. Lyman v. Vorwerk, 13 Cal. App. 507, 110 P. 355; Clark v. Thayer, 98 Tex. 142, 81 S. W. 1274; Gates v. Cunningham, 30 Cal. App. 319, 158 P. 227; Marston v. Rue, 92 Wash. 129, 159 P. 111; Jolly v. McCoy (Cal.), 172 P. 618.

51. Hammond v. McCullough, 159 Cal. 639, 115 P. 216; *In re* Bollinger's Estate, 170 Cal. 380, 149 P. 995; Cope v. Blount (Tex.), 91 S. W. 615; McCelvey v. Cryer (Tex.), 37 S. W. 175; Cope v. Blount, 38 Tex. Civ. 516, 91 S. W. 615; Edelstein v. Brown, 100 Tex. 403, 95 S. W. 1126 (affd., 100 S. W. 129); Byrn v. Kleas, 15 Tex. Civ. 205, 39 S. W. 980; Stein v. Mentz, 42 Tex. Civ. 38, 94 S. W. 447; Phillips v. Palmer, 56 Tex. Civ. 91, 120 S. W. 911.

52. Laird v. Upton, 8 N. M. 409, 45 P. 1010.

53. Rolater v. Rolater (Tex.), 198 S. W. 391.

54. Guye v. Guye, 63 Wash. 340, 115 P. 731.

55. McDaniel v. Lauchner (Tex.), 206 S. W. 221.

56. Richmond v. Sims (Tex.), 144 S. W. 1142.

57. Thompson v. Davis, 172 Cal. 491, 157 P. 595.

58. Union Savings & Trust Co. v. Manney, 101 Wash 274, 172 P. 251; Richards v. Hartley (Tex.), 194 S. W. 478; Swartzman v. Cabell (Tex.), 49 S. W. 113; Caffey's Ex'rs v. Cooksey, 19 Tex. Civ. 145, 47 S. W. 65; Killian v. Killian, 10 Cal. App. 312, 101 P. 806.

59. Collins v. Bryan, 40 Tex. Civ. 88, 88 S. W. 432.

60. Main v. Main, 7 Ariz. 149, 60 P. 888; Emery v. Barfield, 107 Tex. 306, 183 S. W. 386; Alexander v. Bosworth, 26 Cal. App. 589, 147 P. 607.

61. *In re* Klumpke's Estate, 167 Cal. 415, 139 P. 1062; Lewis v. Burns, 122 Cal. 358, 55 P. 132; Lenninger v. Lenninger, 167 Cal. 297, 139 P. 697.

California statute conveyances to a wife are presumed to create a separate estate in her. The presumption applies whether the property conveyed was purchased with separate estate or community property.[62] The presumption is *prima facie* as between the wife and creditors, and between the husband and the representative of the wife.[63] In the same State a joint deposit in a savings bank was held *prima facie* to create an estate in common.[64]

§ 596. Evidence and Burden of Proof.

Where property is conveyed to a spouse during coverture, those claiming it as separate estate have the burden of showing that fact affirmatively,[65] or, if the claim is only to part of the property,

62. Carle v. Heller, 18 Cal. App. 577, 123 P. 815.

63. Fanning v. Green, 156 Cal. 279, 104 P. 308.

64. Crowley v. Savings Union Bank & Trust Co., 30 Cal. App. 535, 159 P. 194.

65 *In re* Boody's Estate, 113 Cal. 682, 45 P. 858; Graves v. Columbia Underwriters, 93 Wash. 196, 160 P. 436; Lanigan v. Miles, 102 Wash. 82, 172 P. 894; Folsom v. Folsom, 106 Wash. 315, 179 P. 847; Brown v. Lockhart, 12 N. M. 10, 71 P. 1086; Hoopes v. Mathis, 40 Tex. Civ. 121, 89 S. W. 36; Fennell v. Drinkhouse, 131 Cal. 447, 63 P. 734, 82 Am. St. R. 361; Succession of Manning, 107 La. 456, 31 So. 862; Strong v. Eakin, 11 N. M. 107, 66 P. 539; Stewart v. Weiser Lumber Co., 21 Ida. 340, 121 P. 775; Blum v. Smith, 66 Wash. 192, 119 P. 183; Allen v. Chambers, 22 Wash. 304, 60 P. 1128; Bunker v. Hattrup, 20 Wash. 318, 55 P. 122; Somes v. Ainsworth (Tex.), 67 S. W. 468; Plath v. Mullins, 87 Wash. 403, 151 P. 811; Humbird Lumber Co. v. Doran, 24 Ida. 507, 135 P. 66; *In re* Hill's Estate, 167 Cal. 59, 138 P. 690; United States Fidelity & Guaranty Co. v. Lee, 58 Wash. 16, 107 P. 870; Hames v. State, 46 Tex. Cr. 562; Guye v. Plimpton, 40 Wash. 234, 82 P. 596; Worden v. Worden, 96 Wash. 592, 165 P. 501; Foy v. Pacific Power & Light Co., 105 Wash. 525, 178 P. 452; Gooding Milling & Elevator Co. v. Lincoln County State Bank, 22 Ida. 468, 126 P. 772; O'Farrell v. O'Farrell, 56 Tex. Civ. 51, 119 S. W. 899; First Nat. Bank v. Thomas (Tex.), 118 S. W. 221; McClintic v. Midland Grocery & Dry Goods Co. (Tex.), 154 S. W. 1157; Parks v. Worthington, 101 Tex. 505, 104 S. W. 921 (affd., 109 S. W. 909; Hoopes v. Mathias, 40 Tex. Civ. 121, 89 S. W. 36; Emery v. Barfield, 107 Tex. 306, 183 S. W. 386; Emery v. Barfield, 107 Tex. 306, 156 S. W. 311; Smith v. Smith (Tex.), 91 S. W. 815; Clardy v. Wilson, 27 Tex. Civ. 49, 64 S. W. 489; Simpson v. Texas Tram & Lumber Co. (Tex.), 51 S. W. 655; Edelstein v. Brown, 100 Tex. 403, 95 S. W. 1126 (affd., 100 Tex. 403, 100 S. W. 129); Allardyce v. Hambleton, 96 Tex. 30, 70 S. W. 76; Letot v. Peacock (Tex.), 94 S. W. 1121.

Thus where a husband exchanged his own property for other property and gave money to boot, he was held bound to show, in a settlement with the community, that the money given as boot was his separate estate. Dillon v. Freeville, 129 La. 1005, 57 So. 316.

Where in an action for a partition of community property a spouse claims that such property was acquired in a State whose laws made it separate property, such spouse must plead and prove the facts claimed, and the laws of such other State.

the extent to which it is separate estate,[66] by clear and convincing evidence,[67] which will produce conviction in an unprejudiced mind, or will amount to proof to a moral certainty.[68] such fact may be shown either by recital in the deed making the property separate estate,[69] or an agreement to that effect,[70] or by tax receipts running to the spouse claiming the estate,[71] or by showing a contrary intention from declarations and conduct of the parties,[72] or that it was purchased with separate estate,[73] or that it was acquired by gift, bequest, devise or descent,[74] or that it was acquired before marriage,[75] or, in Louisiana, that a husband so acquiring property declared that it was made with his separate funds,[76] or, in the same State, that a wife's paraphernal funds were used in the purchase,[77] or by other evidence that the property was separate estate.[78] In determining the character of the property the court will look beyond the terms of the conveyance to ascertain the

Griffin v. McKinney, 25 Tex. Civ. 432, 57 S. W. 992.

66. Potter v. Kennedy (Tex.), 41 S. W. 711.

67. Denny v. Schwabacher, 54 Wash. 689, 104 P. 137; *In re* Nicoll's Estate, 164 Cal. 368, 129 P. 278; Davidson v. Woodward, 156 F. 915, 84 C. C. A. 495; Ballard v. Slyfield, 47 Wash. 174, 91 P. 642; Smith v. Weed, 75 Wash. 452, 134 P. 1070; Watkins v. Watkins (Tex.), 119 S. W. 145; Blackwell v. Mayfield (Tex.), 69 S. W. 659; Gameson v. Gameson (Tex.), 162 S. W. 1169; *In re* Slocum's Estate, 83 Wash. 158, 145 P. 204; Smith v. Smith (Tex.), 91 S. W. 815; Freese v. Hibernia Sav. & Loan Soc., 139 Cal. 392, 73 P. 172; Neher v. Armijo, 9 N. M. 327, 54 P. 236; York v. Hilger (Tex.), 84 S. W. 1117; Ahlstrom v. Tage, 31 Ida. 459, 174 P. 605; Wells v. Allen (Cal.), 177 P. 180.

68. *In re* Pepper's Estate, 158 Cal. 619, 112 P. 62.

69. Flannery v. Chidney, 33 Tex. Civ. 638, 77 S. W. 1034; Richards v. Hartley (Tex.), 194 S. W. 478.

70. McMurray v. Bodwell, 16 Cal. App. 574, 117 P. 627.

71. Svetinich v. Sheean, 124 Cal. 216, 56 P. 1028, 71 Am. St. R. 50.

72. Carpenter v. Brackett, 57 Wash. 460, 107 P. 359; Hirsch v. Howell (Tex.), 60 S. W. 887.

73. York v. Hilger (Tex.), 84 S. W. 1117; Strong v. Eakin, 11 N. M. 107, 66 P. 539; Clark v. Thayer, 98 Tex. 142, 81 S. W. 1274; Austin v. Clifford, 24 Wash. 172, 64 P. 155; *In re* Warner's Estate, 167 Cal. 686, 140 P. 583; *In re* Boselly's Estate (Cal.), 175 P. 4.

74. Booker v. Castillo, 154 Cal. 672, 98 P. 1067.

75. Gilbert v. Edwards, 32 Tex. Civ. 460, 74 S. W. 959.

76. Hall v. Toussaint, 52 La. Ann. 1763, 28 So. 304; Succession of Muller, 106 La. 89, 30 So. 329.

77. Succession of Rogge, 50 La. Ann. 1220, 23 So. 933; Fortier v. Barry, 111 La. 776, 35 So. 900; Jordy v. Muir, 51 La. Ann. 55, 25 So. 550.

It must also be shown that the wife had the separate administration of such funds. Ellerslie Planting Co. v. Blackman, 129 La. 948, 57 So. 279; Succession of Burke, 107 La. 82, 31 So. 391.

78. Thompson v. Wilson, 24 Tex. Civ. 666, 60 S. W. 354; Baldwin v. McFarland, 26 Ida. 85, 141 P. 76; Winfield v. Rilling (Tex.), 132 S. W. 828.

intention of the parties.[79] The evidence to rebut the presumption may be parol,[80] except where the property has been conveyed to a *bona fide* purchaser for value.[81] The presumption is not rebutted merely by a recital in the deed that money was paid by a spouse as a consideration for it,[82] or by a recital that the property is separate estate,[83] nor by the mere testimony of the spouse claiming the estate.[84] A spouse who claims fraud, error, or lesion in the division of community property on separation has the burden of showing it by a preponderance of the evidence.[85] To rebut the statutory presumption in California that a conveyance to a wife creates a separate estate the evidence must be clear and convincing.[86] Declarations of the wife that the property was that of the community are not sufficient to rebut the presumption,[87] though of some weight when supported by other evidence.[88]

§ 597. Change of Status of Property by Agreement.

Usually the spouses may by agreement change a community estate in property into a joint tenancy,[89] or a separate estate in one of the spouses,[90] and may in the same way change separate property into community property.[91] The court may do the same when essential to a determination of the rights of the spouses in

79. *In re* Deschamps' Estate, 77 Wash. 514, 137 P. 1009.

80. *In re* Bollinger's Estate, 170 Cal. 380, 149 P. 995; Clarke v. Lassus, 128 La. 919, 55 So. 576; Woods v. Whitney, 42 Cal. 358.

81. Crawford v. Gibson (Tex.), 203 S. W. 375.

82. McCulloch v. Nicholson (Tex.), 162 S. W. 432.

83. Westmore v. Harz, 111 La. 305, 35 So. 578.

84. Newman v. Cooper, 50 La. Ann. 1220, 23 So. 116; Carlson v. Rea, 94 Wash. 218, 161 P. 1195.

85. Haddad v. Haddad, 120 La. 218, 45 So. 109; Walther v. Walther, 139 La. 138, 71 So. 344.

Lesion, to invalidate a partition of community property after separation of husband and wife, must be more than one-fourth of the true value of the property received by the complainant, as provided by Civ. Code (La.), art. 1398. Haddad v. Haddad, 120 La. 218, 45 So. 109.

86. Lewis v. Burns, 122 Cal. 358, 55 P. 132; Lenninger v. Lenninger, 167 Cal. 297, 139 P. 679; Thompson v. Davis, 172 Cal. 491, 157 P. 595.

87. Pabst v. Shearer, 172 Cal. 139 156 P. 466.

88. Bias v. Reed, 169 Cal. 33, 145 P. 516.

89. Ives v. Connacher, 162 Cal. 174, 121 P. 394; Yoakam v. Kingery, 126 Cal. 30, 58 P. 324; *In re* Gurnsey's Estate, 177 Cal. 211, 170 P. 402; Bias v. Reed, 169 Cal. 33, 145 P. 516.

90. Jordan v. Marcantell (Tex.), 147 S. W. 357; Perkins v. Sunset Telephone & Telegraph Co., 155 Cal. 712, 103 P. 190.

91. *In re* Klumpke's Estate, 167 Cal. 415, 139 P. 1062; Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1, 94 P. 94.

an action between them.[92] This cannot be done in Washington by an oral agreement.[93] Usually spouses may divide the community property by agreement,[94] if the division is fair,[95] and without fraud or coercion.[96] No money consideration is required to support such an agreement.[97] Where it includes an executory contract to convey land, the party entitled may have specific performance.[98] A division of community property on separation may be rescinded for the husband's fraud where he makes promises of future support to the wife as a consideration for the division, which he intends to disregard and actually does disregard.[99] Where spouses received money, notes and land in exchange for property owned in part by the community and part by the wife separately, the husband was held not entitled to partition the consideration by allotting the land to the wife without her consent, though that might have been done by agreement.[1] In Idaho, where in a divorce proceeding a wife agreed to convey to their minor child certain community lands, which agreement was approved, her later deed of the same land to her husband was held void.[2] In Louisiana spouses cannot put an end to the community by agreement,[3] or make a valid contract with even others relating to community property.[4] In that State separation of property must be the result of a judicial proceeding as required by the statute.[5] In Texas where spouses separate intending to live apart permanently and by agreement divide the community property, their later co-

92. Fay v. Fay, 165 Cal. 469, 132 P. 1040.

93. Graves v. Graves, 48 Wash. 664, 94 P. 481.

94. Murrison v. Seiler, 22 La. Ann. 327; Desobry v. Schlater, 25 La. Ann. 425; Smith v. Boquet, 27 Tex. 507; Texas, Louisana, and California Codes, Succession of Wade, 21 La. Ann. 343; Peck v. Brummagim, 31 Cal. 440; Warfield v. Bobo, 21 La. Ann. 466; La. Code, §§ 2316, 2393-2398; Hussey v. Castle, 41 Cal. 239; Couch v. Schwalbe, 51 Tex. Civ. 94, 111 S. W. 1046.

The California statute permits spouses to agree on separation to settle their rights in community property. *In re* Sloan's Estate, 179 Cal. 393, 177 P. 150.

95. Cox v. Mailander (Tex.), 178 S. W. 1012.

96. Corrigan v. Goss (Tex.), 160 S. W. 652.

97. Worden v. Worden, 96 Wash. 592, 165 P. 501.

98. Carpenter v. Brackett, 57 Wash. 460, 107 P. 359.

99. Swearingen v. Swearingen (Tex.), 193 S. W. 442.

1. Ochoa v. Edwards (Tex.), 189 S. W. 1022.

2. Lamb v. Brammer, 29 Ida. 770, 162 P. 246.

3. Driscoll v. Pierce, 115 La. 156, 38 So. 949.

4. Guillot v. Guillot, 141 La. 86, 74 So. 704.

5. Jones v. Jones, 119 La. 677, 44 So. 429.

habitation will not change the status of property as agreed on, where they do not intend to change it, and do nothing to change it.[6]

§ 598. Nature of Wife's Interest.

A wife's rights in community property are not contingent, but are a present estate,[7] and she has as much interest in the estate as and as much right to its beneficial use,[8] no distinction being made as to the degree, quantity, nature and extent of the interest of each,[9] whether the conveyance be to one of them or is joint.[10] She can have no accounting from her husband of such estate till the community is dissolved by death or divorce, or in some other legal manner,[11] and he cannot be compelled to account, even then, for recklessness and extravagance in its management.[12] Under the Spanish law the wife's interest was a mere expectancy, similar to that of an heir.[13] As her interest in the community property attaches at is acquisition and is not derived from her husband, she is not liable to an inheritance tax at his death.[14] In Nevada her interest in the community property is more than a mere expectancy, though the statute speaks of property which "belongs to" the husband, and that which "goes to" the wife.[15]

§ 599. Wife's Paraphernal and Dotal Property.

Separate property of the wife, under these codes, is of two kinds: dotal and extra-dotal. Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Extra-doral property, otherwise called paraphernal property, is that which forms no part of the dowry.[16] Whatever in the marriage contract is declared to belong to the wife, or to be given to her on account of the marriage by other persons than the husband, is part of the dowry, unless otherwise stipulated, and husband and wife may by their marriage contract

6. Batla v. Batla (Tex.), 51 S. W. 664; Moore v. Moore, 28 Tex. Civ. 600, 68 S. W. 59.

7. Marston v. Rue, 92 Wash. 129, 159 P. 111.

8. Davis v. Davis (Tex.), 186 S. W. 775.

9. Ewald v. Hufton, 31 Ida. 373, 173 P. 247.

10. Burnham v. Hardy Oil Co., 108 Tex. 555, 195 S. W. 1139.

11. Daniel v. Daniel, 106 Wash. 659, 181 P. 215.

12. Garrozi v. Dastas, 204 U. S. 64, 27 S. Ct. 224, 51 L. Ed. 369.

13. Reade v. De Lea, 14 N. M. 442, 95 P. 131.

14. Kohny v. Dunbar, 21 Ida. 258, 121 Pac. 544, 39 L. R. A. (N. S.), 1107; *Re* Williams, 40 Nev. 241, 161 Pac. 741, L. R. A. 1917C, 602.

15. *In re* Williams' Estate, 40 Nev. 241, 161 P. 741.

16. La. Code, § 2315; Hannie v. Browder, 6 Mart. (La.) 15.

make reciprocal arrangement as to donations from one another or third persons; but dowry proper is an antenuptial arrangement, and of this dowry the husband has usually the income and management, so as to help support the charges of matrimony, though stipulations more favorable may be made on the wife's behalf.[17] The wife's paraphernal or extra-dotal property she may manage with or without invoking her husband's assistance; his permitted participation therein is somewhat in the character of her agent, as to binding it for debt or managing it, though the risk is thus incurred of subjecting its income to the community rule; and while he should authorize its conveyance or transfer, the wife may be authorized by the judge in case of his absence or refusal.[18] In Louisiana it was held that under an antenuptial contract a wife's property could not be treated as paraphernal instead of dotal, so as to render a husband liable for interest where he took control of such property.[19] The wife has a tacit mortgage for her separate property, so far as the law may have placed it in her husband's control; also upon the community property from the time it went into his hands; so that, notwithstanding his conveyance or transfer without her consent and to her injury, during the marriage, she has an interest, and not a mere hope or expectancy, left, which interest becomes absolute and enforceable at his death, she surviving him. In this respect our codes follow the Spanish rather than the French law. And for the wife's further protection and benefit, judicial intervention is sometimes permitted, not only to secure her support from the funds in her husband's control, while marriage continues, but for a separation of the common property altogether, where her interests are exposed to great hazard by his mismanagement.[20] The wife's tacit mortgage for her security against her husband's acts applies to both her dotal and extra-dotal property.[21]

17. La. Code, §§ 2317-2332; Guilbeau v. Cornier, 2 La. 6.

18. La. Code, §§ 2360-2367; Stuffler v. Puckett, 30 La. Ann. 811.

19. Murphy v. McLoughlin, 247 F. 385, 159 C. C. A. 439.

"Paraphernal property" is property brought to the marriage by one of the spouses, and there can be no such thing as paraphernal property prior to marriage. Le Boeuf v. Melancon, 131 La. 148, 59 So. 102.

20. Newman v. Eaton, 27 La. Ann. 341.

21. *Ib.;* Newman v. Eaton, 27 La. Ann. 341; Lehman v. Levy, 30 La. Ann. 745. After the wife has obtained and executed a separation of property from her husband, no tacit mortgage is acquired by her upon the husband's later acquisitions, as against the public. Succession of Gayle, 27 La. Ann. 547.

§ 600. Control and Disposition.

The husband, being the head of the family, has the sole right to administer or control community property,[22] having the same power of disposition which he has of his separate property,[23] the real legal title being in him during the existence of the community,[24] though the record title is in the wife.[25] The spouse in whose name the title stands is deemed to hold the title in trust for the community.[26] The husband is not bound by any agreement of the wife with reference to it, unless authorized or sanctioned by him,[27] except for family necessaries,[28] even though the title is in the wife's name.[29] But a husband cannot dispose of it by will,[30] or convert it into his separate property by gift.[31] Under the California statute the husband is the absolute owner of the community property, the wife having no vested interest in it till the dissolution of the community.[32] In the same State a gift by the husband of community property without the wife's consent is not void as to him, and cannot be avoided by him, but may be avoided by his wife after his death.[33] In Texas he has the management of such estate, with the exception of a conveyance of the homestead, unless the wife is abandoned, or he acts in fraud of her.[34] In the same State a conveyance of community property by the husband during the wife's insanity is void as to the wife where made without an application for management, etc.[35]

22. La. Code, § 2373; Kellogg v. Duralde, 26 La. Ann. 234; Cooper v. Cappel, 29 La. Ann. 213; Ranney v. Miller, 51 Tex. 263; Strother v. Hamlet, 28 La. Ann. 839; Schaadt v. Mutual Life Ins. Co. of New York, 2 Cal. App. 715, 84 P. 249; Merriman v. Patrick, 103 Wash. 442, 174 P. 641; Waterman Lumber & Supply Co. v. Robins (Tex.), 159 S. W. 360; Pearll v. Pearll Advertising Co., 17 Det. Leg. N. 543, 127 N. W. 264.

23. Kohny v. Dunbar, 21 Ida. 258, 121 P. 544.

24. Hall v. Johns, 17 Ida. 224, 105 P. 71; Reade v. De Lea, 14 N. M. 442, 95 P. 131.

25. Osborn v. Mills, 20 Cal. App. 346, 128 P. 1009.

26. Mitchell v. Schofield, 106 Tex. 512, 171 S. W. 1121; Mitchell v. Moses, 16 Cal. App. 594, 117 P. 685.

27. Travers v. Barrett, 30 Nev. 402, 97 P. 126.

28. Bowers v. Good, 52 Wash. 384, 100 P. 848.

29. Nilson v. Sarment, 153 Cal. 524, 96 P. 315.

30. Rowlett v. Mitchell, 52 Tex. Civ. 589, 114 S. W. 845.

In California a husband may dispose by will of half the community property. Giuffre v. Lauricella, 25 Cal. App. 422, 143 P. 1061.

31. Rowlett v. Mitchell, 52 Tex. Civ. 589, 114 S. W. 845.

32. Spreckles v. Spreckles, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. R. 170.

33. Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537.

34. Briggs v. McBride (Tex.), 190 S. W. 1123.

35. Gibson v. Pierce (Tex.), 146 S. W. 983.

§ 601. Sales, Mortgages and Conveyances; By Husband.

A husband has generally the power to sell or mortgage the community property,[36] or pledge it.[37] The power may be exercised without the wife's joinder,[38] or acknowledgment,[39] or privy examination,[40] or approval,[41] and without even consulting her.[42] His right to do so is not taken away by the wife's right to dispose of such estate when deserted.[43] even though the property is personal and exempt.[44] A sale of community property executed in a husband's lifetime but not delivered till after his death is invalid.[45] He cannot make a gift of his wife's interest to a stranger,[46] or dispose of it by will,[47] or in fraud of his wife,[48] his power being limited to conveyances of community property for value.[49] Under the California statute a husband cannot bind the wife by a conveyance of community property without consideration without her written consent.[50] Such a transfer is not void, but voidable by the wife as to her half interest as survivor.[51] Her written consent is also required to validate his sale of their household furni-

36. Hearfield v. Bridges, 75 F. 47, 21 C. C. A. 212; Tustin v. Adams, 87 F. 377; Watts v. Snodgrass (Tex.), 152 S. W. 1149; Wits-Keets-Poo v. Rowton, 28 Ida. 193, 152 P. 1064; Delay v. Truitt (Tex.), 182 S. W. 732; Mabry v. Harrison, 44 Tex. 286.

37. Sweeney v. Taylor Bros., 41 Tex. Civ. 365, 92 S. W. 442.

38. Northwestern & P. Hypotheek Bank v. Rauch, 7 Ida. 152, 61 P. 516; Boehm v. Butler, 16 Tex. Civ. 658, 41 S. W. 658; Zuckerman v. Munz, 48 Tex. Civ. 337, 107 S. W. 78; Wilson v. Wilson, 6 Ida. 597, 57 P. 708; Gulf, C. & S. F. Ry. Co. v. Fenn, 33 Tex. Civ. 352, 7 S. W. 597; Kimball v. Slater, 20 Ariz. 81, 176 P. 843.

39. Clopper v. Sage, 14 Tex. Civ. 296, 37 S. W. 393; McClellan v. Lewis (Cal.), 169 P. 436.

40. Phoenix Ins. Co. v. Neal, 23 Tex. Civ. 427, 56 S. W. 91.

41. Simon v. Meaux (La.), 79 So. 330; First Nat. Bank of Ely v. Meyers (Nev.), 150 P. 308.

42. Demarets v. Demarets, 144 La. 173, 80 So. 240.

43. King v. King, 41 Tex. Civ. 473, 91 S. W. 633.

44. King v. King, 41 Tex. Civ. 473, 91 S. W. 633.

45. Cox v. Busch-Everett Oil Co., 131 La. 817, 60 So. 256.

46. Watson v. Harris (Tex.), 130 S. W. 237.

47. Mealy v. Lipp, 16 Tex. Civ. 163, 40 S. W. 824.

48. Krenz v. Strohmeir (Tex.), 177 S. W. 178; Cetti v. Dunman, 26 Tex. Civ. 433, 64 S. W. 787; Reade v. De Lea, 14 N. M. 442, 95 P. 131.

The failure of a husband to take title to community property in the name of his wife, in accordance with his promise to her, and his subsequent transfer of the property, do not constitute a fraud upon her unless done with a fraudulent intent. Clavo v. Clavo, 10 Cal. App. 447, 102 P. 556; Rowlett v. Mitchell, 52 Tex. Civ. 589, 114 S. W. 845.

49. Strauss v. Canty, 169 Cal. 101, 145 P. 1012; Ragan v. Ragan, 29 Cal. App. 63, 154 P. 479.

50. Winchester v. Winchester, 175 Cal. 391, 165 P. 965; Johnson v. Johnson, 33 Cal. App. 93, 164 P. 421.

51. Dargie v. Patterson, 176 Cal. 714, 169 P. 360.

ture and furnishings, if community property.[52] In Louisiana a husband's voluntary conveyance of immovable community property is void unless made for the establishment of children of the marriage.[53] In the same State he cannot dispose of the immovables of the community during the pendency of a divorce proceeding.[54] Under the New Mexico statute the joinder of both spouses is necessary to convey community land.[55] In Texas he cannot alienate or incumber the community property during the pendency of a divorce proceeding, if his intention is to defraud the wife, if the divorce proceeding is filed prior to the conveyance,[56] nor can he alienate or mortgage the homestead without the wife's consent.[57] Where a wife avoids a sale of community property she can avoid it only as to her half, his conveyance being valid against himself as to his own half.[58] In Washington a woman living in adultery with the husband of another takes no interest in conveyances of such husband's community estate made without the joinder of his wife.[59] In the same State a husband's contract for the sale of community property not joined in by the wife is binding on her where she joins in the deed in execution of the contract,[60] but otherwise her consent is required.[61] Since by statute in that State, the husband has power to sell and dispose of community personalty, his mortgage of such property is binding,[62] but he cannot waste it or give it away,[63] nor can he alone empower a trustee of community property to sell it, except as to *bona fide* purchasers,[64] nor can he convey or mortgage community land without his wife's joinder.[65] She may be estopped to claim

52. Duncan v. Duncan, 6 Cal. App. 404, 92 P. 310.

53. Melady v. Succession of Bonnegent, 142 La. 534, 77 So. 143; Radovich v. Jenkins, 123 La. 355, 48 So. 988.

54. Gastauer v. Gastauer (La.), 79 So. 326.

55. Arnett v. Reade, 220 U. S. 311, 31 S. Ct. 425, 55 L. Ed. ——; Miera v. Miera, 25 N. M. 299, 181 P. 583.

56. Sparks v. Taylor, 99 Tex. 411, 90 S. W. 485, 6 L. R. A. (N. S.), 381.

57. Flynn v. J. M. Radford Grocery Co. (Tex.), 174 S. W. 902; Mabry v. Harrison, 44 Tex. 286; Paschall v. Brown, 105 Tex. 247, 133 S. W. 509; Wiener v. Zwieb, 105 Tex. 262, 141 S. W. 771; Best v. Kirkendall (Tex.), 107 S. W. 932; Jones v. Harris (Tex), 139 S. W. 69; Mass v. Bromberg, 28 Tex. Civ. 145, 66 S. W. 468.

58. Gutheridge v. Gutheridge (Tex.), 161 S. W. 892.

59. Kimble v. Kimble, 17 Wash. 75, 49 P. 216.

60. Wash. State Bank v. Dickson, 35 Wash. 641, 77 P. 1067.

61. Leimantz v. Blake, 39 Wash. 6, 80 P. 822.

62. First Nat. Bank v. Fowler, 54 Wash. 65, 102 P. 1038.

63. Marston v. Rue, 92 Wash. 129, 159 P. 111.

64. Norgren v. Jordan, 46 Wash. 437, 90 P. 597.

65. Olson v. Springer, 60 Wash. 77,

community rights in land which is sold without her joinder, where she consents to and approves of the sale and permits the grantee to improve the property without objection.[66] Where the wife has been adjudged insane, the vendees under a contract of sale of community property may rescind at once.[67] A husband's contract to sell land is not invalid in Porto Rico because the wife did not join as required by the statute in case of community property.[68]

§ 602. By Wife.

A wife may convey community property as the attorney-in-fact of her husband,[69] or with his consent,[70] though he does not join therein.[71] Such authority may be inferred from his joinder and acknowledgement of a deed containing a recital of his consent and authority,[72] or even where he merely signs and acknowledges, though not named as grantor.[73] She may contract for its sale to pay community debts,[74] or for community purpose,[75] or may sell perishable personal property.[76] She may also convey a good title to such property where she is abandoned and where she and their children are in necessitous circumstances,[77] or to obtain necessaries even where she has no children.[78] Her mortgage of community property, even if invalid, may be a lien on her separate interest when the community ceases.[79] Where a divorced wife was indebted to her husband on an accounting of community property, it was held that a gift by her of community land to their children

110 P. 807; Monroe v. Staydt, 57 Wash. 592, 107 P. 517; Anders v. Bouska, 61 Wash. 393, 112 P. 523.

66. Schillreff v. Schillreff, 50 Wash. 435, 97 P. 457; Stevens v. Kittredge, 44 Wash. 347, 87 P. 484.

67. Colpe v. Lindblom, 57 Wash. 106, 106 P. 634.

68. Parker v. Monroig, 239 U. S. 83, 36 S. Ct. 42, 60 L. Ed. ——.

69. Succession of Brown, Man. Unrep. Cas. (La.) 216.

70. Hanks v. Leslie (Tex.), 159 S. W. 1056.

71. Roos v. Basham, 41 Tex. Civ. 551, 91 S. W. 656; Roos v. Basham, 41 Tex. Civ. 551, 91 S. W. 656.

72. Maxson v. Jennings, 19 Tex. Civ. 196, 48 S. W. 781.

73. Couch v. Schwalbe, 51 Tex. Civ. 94, 111 S. W. 1046.

74. Hughes v. Landrum, 40 Tex. Civ. 196, 89 S. W. 85.

75. Litzell v. Hart, 96 Wash. 471, 165 P. 393.

76. Marston v. Rue, 92 Wash. 129, 159 P. 111.

77. Fermier v. Brannan, 21 Tex. Civ. 543, 53 S. W. 699; Irwin v. Irwin (Tex.), 110 S. W. 1011; Hall v. Johns, 17 Ida. 224, 105 P. 71; Word v. Kennon (Tex.), 75 S. W. 334; Lasater v. Jamison (Tex.), 203 S. W. 1151; Hadnot v. Hicks (Tex.), 198 S. W. 359; Snipes v. Morton (Tex.), 144 S. W. 286; Hanks v. Leslie (Tex.), 159 S. W. 1056.

78. Adams v. Wm. Cameron & Co. (Tex.), 161 S. W. 417.

79. Pauy v. Kelly, 52 Cal. 334.

was in fraud of him where both she and they knew of the accounting.[80] Where a wife sought to set aside her deed of community property to her son for fraud, it was held that she could only recover her half of the property, where the son owned his father's share by inheritance.[81] Where a wife joins in a deed of trust of community property, her death does not revoke the power of sale.[82] Where she joins in such an incumbrance she is a principal and not a surety, and her rights in the property may be foreclosed.[83] Under the Arizona statute providing that community personal property may be disposed of by the husband only, it was held that a wife's chattel mortgage of such property was invalid, even though given to secure a note given as her husband's agent, though in her own name.[84] In Louisiana and Washington the wife's mortgage of community property cannot usually be enforced,[85] but is binding where given to secure the purchase price of property bought with community funds.[86] In Nevada the fact that the wife runs a lodging house or community land does not empower her to sell the furniture or rent the land.[87] In Washington those taking community personal property from a wife have the burden of showing unusual facts which enable her to pass title to it.[88] Therefore, her sale of community property to a purchaser who knew that she had acted contrary to her husband's instructions has been held void, where there were no unusual conditions.[89]

§ 603. Lease.

In Washington a husband cannot lease community property without the wife's authority, acquiescence or consent.[90] Therefore, an oral lease of community property cannot be established against a wife not bound by deed, part payment, ratification or estoppel.[91]

80. Messimer v. Echols (Tex.), 194 S. W. 1171.

81. Wade v. Wade (Tex.), 106 S. W. 188.

82. Western Union Tel Co. v. Hearne (Tex.), 40 S. W. 50.

83. Bird v. Steele, 74 Wash. 68, 132 P. 724.

84. Richards v. Warnekros, 14 Ariz. 488, 131 P. 154.

85. Schrepfer v. Florane, Man. Unrep. Cas. (La.) 323; Humphries v. Sorenson, 33 Wash. 563, 74 P. 690.

86. Knoblock & Rainold v. Posey, 126 La. 610, 52 So. 847.

87. Travers v. Barrett, 30 Nev. 402, 97 P. 126.

88 Marston v. Rue, 92 Wash. 129, 159 P. 111.

89. McAlpine v. Kohler & Chase, 96 Wash. 146, 164 P. 755.

90. Snyder v. Harding, 34 Wash. 286, 75 P. 812; Ryan v. Lambert, 49 Wash. 649, 96 P. 232.

91. Spreitzer v. Miller, 98 Wash. 601, 168 P. 179.

Under a written lease from the husband without the wife's joinder the lessee is only a tenant at will.[92]

§ 604. Rights and Liabilities of Purchasers During Coverture.

A purchaser for value of community property from the husband gets a good title as against the wife where the title is in the husband and where the purchaser has no notice that the property belongs to the community,[93] or that the grantor had a wife,[94] or where the land has never been occupied by the community.[95] But if he buys with notice he takes only the grantor's interest,[96] even though the sale was for the purpose of obtaining necessaries.[97] In such case the sale does not operate as a partition, but creates a tenancy in common.[98] The same rules apply to mortgages given by the husband as head of the community.[99] The fact that the title is in one spouse is not notice of the community interests of the other.[1] Where a purchaser of community land under an oral contract with the husband entered and paid the price, it was held that both spouses were presumed to consent and that the vendee was entitled to specific performance, there being no evidence that the fact as to consent was otherwise.[2] Where a husband bought land with community funds and caused the deed to be made to the wife, after which he executed a deed to a third person without consideration, it was held that such third person could not compel

92. Brownfield v. Holland, 63 Wash. 86, 114 P. 890.

93. Alexander v. Barton (Tex.), 71 S. W. 71; Mangum v. White, 16 Tex. Civ. 254, 41 S. W. 80; Derrett v. Britton, 35 Tex. Civ. 485, 80 S. W. 562; Trahan v. Wilson, 130 La. 541, 58 So. 178; Patty v. Middleton, 82 Tex. 586, 17 S. W. 909; Gallup v. Huling, 241 F. 858, 154 C. C. A. 560; Ruedas v. O'Shea (Tex.), 127 S. W. 891; Mitchell v. Schofield, 106 Tex. 512, 140 S. W. 254; Fidelity & Deposit Co. v. Wiseman, 103 Tex. 286, 124 S. W. 621 (mod. reh., 103 Tex. 286, 126 S. W. 1109).

94. Nelson v. Bridge, 39 Tex. Civ. 283, 87 S. W. 885; Magee v. Risley, 82 Wash. 178, 143 P. 1088.

95. Daly v. Rizzutto, 59 Wash. 62, 109 P. 276.

96. Burleson v. Alvis, 28 Tex. Civ. 51, 66 S. W. 235; Gurley v. Dickason, 19 Tex. Civ. 203, 46 S. W. 43; Davidson v. Green, 27 Tex. Civ. 394, 65 S. W. 1110; Eddy v. Bosley, 34 Tex. Civ. 116, 78 S. W. 565; Parker v. Stephens (Tex.), 39 S. W. 164; Summerfield v. King, 98 Tex. 332, 83 S. W. 680 (mod. reh., 84 S. W. 643); Janes v. Stratton (Tex.), 203 S. W. 386; Leury v. Mayer, 122 La. 486, 47 So. 839.

97. Booth v. Clark, 34 Tex. Civ. 358, 80 S. W. 237.

98. McAnulty v. Ellison (Tex.), 71 S. W. 670; George v. Delaney, 111 La. 760, 35 So. 894.

99. Ostrom v. Arnold, 24 Tex. Civ. 192, 58 S. W. 630; Abraham v. Casey, 179 U. S. 210, 21 S. Ct. 88, 45 L. Ed. 156.

1. Mitchell v. Schofield, 106 Tex. 512, 171 S. W. 1121.

2. O'Connor v. Jackson, 33 Wash. 219, 74 P. 372.

the wife to convey him the legal title on the theory that he was an equitable owner.[3]

§ 605. Contracts, Conveyances and Gifts Between Spouses.

A conveyance of community property from one spouse to the other creates a separate estate in the grantee,[4] as between the spouses and their heirs,[5] and subsequent creditors of the husband,[6] if the husband is not insolvent when the conveyance is made,[7] but the conveyance must be direct and not through a third person.[8] A husband may convey a life estate in community property to his wife, with remainder to their children.[9] The fact that a husband causes land purchased with community funds to be conveyed to the wife is not conclusive evidence of a gift,[10] but a gift of community property is sufficiently completed by delivery where a husband deposits money in his own name, and gives her an order enabling her to draw it, when she does so and deposits it in her own name.[11] The California statute requiring a wife's written consent to validate a gift of community property does not apply to a gift to her.[12]

§ 606. Actions; By Spouses.

Actions in reference to community property are usually to be brought by the husband without the joinder of the wife,[13] even

3. Nolan v. Hyatt, 163 Cal. 1, 124 P. 439.

4. Sponogle v. Sponogle, 86 Wash. 649, 151 P. 43; Hayden v. Zerbst, 49 Wash. 103, 94 P. 909; Wall v. Brown, 162 Cal. 307, 122 P. 478; Shorett v. Signor, 107 P. 1033, 58 Wash. 695; Hunter v. Hunter (Tex.), 45 S. W. 820; Collett v. Houston & T. C. R. Co. (Tex.), 186 S. W. 232; Killian v. Killian, 10 Cal. App. 312, 101 P. 806; Powers v. Munson, 74 Wash. 234, 133 P. 453.

5. Emery v. Barfield, 107 Tex. 306, 183 S. W. 386.

6. Amend v. Jahns (Tex.), 184 S. W. 729; City Nat. Bank v. Kinnebrew (Tex.), 190 S. W. 536; Stewart v. Kleinschmidt, 51 Wash. 90, 97 P. 1105.

7. Printz v. Brown, 31 Ida. 443, 174 P. 1012; Peterson v. Badger State Land Co., 86 Wash. 530, 150 P. 1187; Dawson v. Baldridge, 55 Tex. Civ. 124, 118 S. W. 593.

8. Carpenter v. Brackett, 57 Wash. 460, 107 P. 359.

9. Lindly v. Lindly, 102 Tex. 135, 113 S. W. 750.

10. Fanning v. Green, 156 Cal. 279, 104 P. 308.

11. Sprague v. Walton, 145 Cal. 228, 78 P. 645.

12. Kaltschmidt v. Weber, 145 Cal. 596, 79 P. 272.

13. Tell v. Gibson, 66 Cal. 247, 5 Pac. 223; Hawkins v. Front, &c., R. Co., 3 Wash. 592, 28 Pac. 1021; Ezell v. Dodson, 60 Tex. 331; Hynes, v. Colman, &c., Co., 108 Wash. 642, 185 Pac. 617; Malmstrom v. People's Drain Ditch Co., 32 Nev. 246, 107 P. 98; Jackson v. Bradshaw, 28 Tex. Civ. 394, 67 S. W. 438; Galveston H. & S. A. Ry. Co. v. Baumgarten, 31 Tex. Civ. 253, 72 S. W. 78; Gentry v. McCarty (Tex.), 141 S. W. 152; Labonte v. Davidson, 31 Ida. 644, 175 P. 588; Spreckles v. Spreckles, 116 Cal. 339,

though the obligation sued on is payable to her,[14] and even though the action be to recover for the loss of her credit as a merchant and for the loss of her business,[15] but both spouses are proper parties to an action to recover lost personal property, part of which is community property and part the separate estate of the wife.[16] It is generally a good defence to a wife's sole action that it is to recover a community debt,[17] but where she is abandoned she may maintain such an action.[18] In such case she need not be in actual want,[19] but must aver and prove the abandonment and that she has the sole management and control of the community property.[20] She may also recover community property wrongfully and wastefully disposed of by the husband.[21]

In California both parties are necessary to her action for damages for personal injury,[22] or for her false imprisonment.[23]

In Louisiana actions for the wife's personal injuries during the régimé of the community should be brought by her, with the usual authorization, in her own name and for her separate use.[24]

In Washington both spouses are necessary parties to an action to recover rents and profits of community property,[25] and to an action for an assault on her,[26] and are proper parties to an action to quiet title to community land,[27] as well as in an action for her personal injuries, where the community sustained damage for medical services and wages to persons to perform the wife's work,[28]

48 P. 228, 36 L. R. A. 497, 58 Am. St. R. 170; Cone v. Belcher (Tex.), 124 S. W. 149; Campbell v. Kearns, 13 Ida. 287, 90 P. 108; Allemania Fire Ins. Co. v. Angier (Tex.), 214 S. W. 450; Paganini v. Polostrini, 26 Cal. App. 342, 146 P. 1046.

14. Brenneke v. Smallman, 2 Cal. App. 306, 83 P. 302.

15. Ainsa v. Moses (Tex.), 100 S. W. 791.

16. Zeiger v. Woodson (Tex.), 202 S. W. 164.

17. Holton v. Sand Point Lumber Co., 7 Ida. 573, 64 P. 889.

18. Baldwin v. Second, &c., R. Co., 77 Cal. 390, 19 Pac. 644; Hamlett v. Coates (Tex.), 182 S. W. 1144; Vaughn v. St. Louis Southwestern R. Co., 34 Tex. Civ. 445, 79 S. W. 345.

19. Davis v. Davis (Tex.), 186 S. W. 775.

20. Hadnot v. Hicks (Tex.), 198 S. W. 359; Schwuslst v. Neely (Tex.), 50 S. W. 608.

21. Marston v. Rue, 92 Wash. 129, 159 Pac. 111.

22. Paine v. San Bernardino Valley Traction Co., 143 Cal. 654, 77 P. 659; Justis v. Atchison, T. & S. F. Ry. Co., 12 Cal. App. 639, 108 P. 328.

23. Gomez v. Scanlan, 155 Cal. 528, 102 P. 12.

24. Harkness v. Louisana & N. W. R. Co., 110 La. 822, 34 So. 791.

25. Lownsdale v. Gray's Harbor Boom Co., 21 Wash. 542, 58 P. 663.

26. Schneider v. Biberger, 76 Wash. 504, 136 P. 701.

27. Snyder v. Harding, 34 Wash. 286, 75 P. 812.

28. O'Toole v. Faulkner, 34 Wash. 371, 75 P. 975.

but the wife is not a necessary party to such actions,[29] nor to an action by the husband to recover for breach of a contract benefiting land in which she has a community interest.[30] In the same State she may maintain action on a note and mortgage payable to her, though the property is that of the community.[31] Since the statute in that State makes the husband a necessary party to all actions concerning the community property, she cannot maintain such an action alone without showing that he unreasonably refused to join in it.[32]

§ 607. Against Spouses.

Generally an action for a community debt can only be maintained against the husband.[33] Therefore a personal judgment cannot generally be rendered against a wife for a community debt contracted by the husband,[34] but such a judgment may be had where she contracts the debt.[35] A judgment against the wife alone is not a lien against the community estate standing in the name of the husband, though for a community debt.[36]

In an action to try title to community property against spouses, the wife is not a necessary party, since her rights by limitation, if any, inure to the community,[37] even if the property is a homestead.[38] In California a husband may maintain an action against the wife to quiet title to community property.[39] In Louisiana a husband who has the administration of his wife's paraphernal estate can stand in judgment in a suit for damages growing out of the diminution of value.[40] In Washington the wife of the maker of a note is a proper party in an action thereon, for the purpose of determining whether the debt is for the community

29. Ostheller v. Spokane & I. E. R. Co. (Wash.), 182 P. 630.

30. Belt v. Washington Water-Power Co., 24 Wash. 387, 64 P. 525.

31. Nance v. Woods, 79 Wash. 188, 140 P. 323.

32. Hynes v. Colman, &c., Co. (Wash.), 185 P. 617.

33. Graham v. Thayer, 29 La. Ann. 75.

34. Bird v. Steele, 74 Wash. 68, 132 P. 724; Dashiell v. W. L. Moody & Co., 44 Tex. Civ. 87, 97 S. W. 843; Anderson v. Burgoyne, 60 Wash. 511, 111 P. 777; Peacock v. Ratliff, 62 Wash. 653, 114 P. 507.

35. Grote-Rankin Co. v. Brownell, 76 Wash. 335, 136 P. 145.

36. Conley v. Greene, 89 Wash. 39, 153 P. 1089.

37. Hamilton v. Blackburn, 43 Tex. Civ. 153, 95 S. W. 1094; Wilson v. Dickey (Tex.), 133 S. W. 437.

38. Central Coal & Coke Co. v. Henry (Tex.), 47 S. W. 281; Childress v. Robinson (Tex.), 161 S. W. 78.

39. Mitchell v. Moses, 16 Cal. App. 594, 117 P. 685.

40. Lewis v. Colorado Southern, N. O. & P. R. Co., 122 La. 572, 47 So. 906.

or is a separate obligation of a spouse,[41] and the same is true of an action on any community debt,[42] and to an action against the husband for an assault committed by the husband in taking possession of community property,[43] and to an action against a husband on an agreement to save a surety harmless, entered into on behalf of the community.[44] Both spouses are necessary parties to an action to enforce an assessment lien on community property on which they reside,[45] or in an action of tort arising out of the husband's fraud in management of the community property,[46] as well as to an action to foreclose a mortgage on community land.[47]

§ 608. Liabilities Chargeable on Community Property; Community Debts Generally.

A "community debt" is a liability contracted by the husband during coverture.[48] Any debt so created is presumed to be a community debt,[49] even debts created for the improvement of separate property.[50] Community debts include the expense of interdiction proceedings resulting in the appointment of a guardian during coverture,[51] the purchase price of community property,[52] attorney's services rendered to the wife in securing a divorce from bed and board and a separation of property, to be recovered on *quantum meruit*,[53] the antenuptial debts of the wife,[54] especially after her separate estate is exhausted,[55] but not her postnuptial debts incurred for the benefit of her separate estate,[56] the husband's

41. Clark v. Eltinge, 29 Wash. 215, 69 P. 736.

42. Allen v. Chambers, 18 Wash. 341, 51 P. 478.

43. Geissler v. Geissler, 96 Wash. 150, 164 P. 746, 166 P. 1119.

44. National Surety Co. v. Blumauer, 247 F. 937, 160 C. C. A. 127.

45. French v. Taylor, 54 Wash. 624, 104 P. 125; City of Seattle v. Baxter, 20 Wash. 714, 55 P. 320; McNair v. Ingebrigtsen, 36 Wash. 186, 78 P. 789.

46. Miller v. Gerry, 81 Wash. 217, 142 P. 668.

47. Dane v. Daniel, 23 Wash. 379, 63 P. 268.

48. Word v. Colley (Tex.), 143 S. W. 257.

49. Johns v. Clother, 78 Wash. 602, 139 P. 755; Strong v. Eakin, 11 N. M. 107, 66 P. 539; Brown v. Lockhart, 12 N. M. 10, 71 P. 1086; Dever v. Selz, 39 Tex. Civ. 558, 87 S. W. 891; Jones-Rosquist-Killen Co. v. Nelson, 98 Wash. 539, 167 P. 1130.

50. Summerville v. King (Tex.), 80 S. W. 1050 (affd., 98 Tex. 332, 83 S. W. 680; mod. reh., 84 S. W. 643).

51. Succession of Bothick, 52 La. Ann. 1863, 28 So. 458.

52. Neighbors v. Anderson, 94 Tex. 487, 62 S. W. 417; Culmore v. Medlenka, — Tex. Civ. App. 504, 61 S. W. 145.

53. Benedict v. Holmes, 104 La. 528, 29 So. 256.

54. Dunlap v. Squires (Tex.), 186 S. W. 843.

55. Taylor v. Murphy, 50 Tex. 291.

56. Hall v. Johns, 17 Ida. 224, 105 P. 71; Winkie v. Conatser (Tex.), 171 S. W. 1017.

partnership debts,[57] a judgment against a husband on a contract made as principal, though for an undisclosed principal,[58] and the husband's statutory liability on corporate stock bought by him.[59]

Where a wife's health required her to live in a place other than that where the husband's business compelled him to live, her purchase of a home where she lived was not family necessaries, so as to be a charge on the community,[60] a piano purchased by the wife and used by the family was held not a family expense, chargeable against the community,[61] or against the husband's property.[62] The test of the character of a debt, as to whether it is community or separate, is whether the transaction was intended to be for the benefit of the community and not whether it was actually benefited.[63] Neither spouse can create a community debt or use the community property to pay debts after a decree of partition.[64] Community debts are a charge on all community property,[65] except, in Texas, the homestead,[66] even though the wife manages the property and creates the debt,[67] both spouses being equally bound.[68] Community debts attach to the property and need not be recorded to follow it into the hands of third persons.[69] The lien of a judgment against the husband for a community debt against community property is superior to that of the wife in divorce proceedings.[70] Where a husband has both separate and community funds in his

57. Ruuth v. Morse Hardware Co., 74 Wash. 361, 133 P. 587.

58. Lawler v. Armstrong, 53 Wash. 664, 102 P. 775.

59. Shuey v. Adair, 24 Wash. 519, 64 P. 536.

60. Bexar Building & Loan Ass'n v. Heady, 21 Tex. Civ. 154, 50 S. W. 1079.

61. Hall v. Decherd (Tex.), 131 S. W. 1133; Jones-Rosquist-Killen Co. v. Nelson, 98 Wash. 539, 167 P. 1130.

62. Bush & Lane Piano Co. v. Woodard, 103 Wash. 612, 175 P. 329.

63. Way v. Lyric Theater Co., 79 Wash. 275, 140 P. 320; McGregor v. Johnson, 58 Wash. 78, 107 P. 1049, 27 27 L. R. A. (N. S.) 1022; Goodfellow v. Le May, 15 Wash. 684, 47 P. 25; Bird v. Steele, 74 Wash. 68, 132 P. 724; Vinson v. Whitfield (Tex.), 132 S. W. 1095.

64. Moor v. Moor (Tex.), 63 S. W. 347.

65. Calvin Philips & Co. v. Langlow, 55 Wash. 385, 104 P. 610; Horton v. Donohoe-Kelly Banking Co., 15 Wash. 399, 46 P. 409; Williams v. Beebe, 79 Wash. 133, 139 P. 867; Fisher v. Marsh, 69 Wash. 570, 125 P. 951.

66. Williamson v. McElroy (Tex.), 155 S. W. 998.

67. Fielding v. Ketler, 86 Wash. 194, 149 P. 667; Richburg v. McIlwaine, Knight & Co. (Tex.), 131 S. W. 1166.

68. Peterson v. Badger State Land Co., 86 Wash. 530, 150 P. 1187.

69. Thompson v. Vance, 110 La. 26, 34 So. 112.

70. Ghent v. Boyd, 18 Tex. Civ. 88, 43 S. W. 891.

possession, and pays debts therewith, it is presumed that he pays them from the proper fund.[71]

In Louisiana, in establishing the residuum of the community by deducting the debt from the active mass, only community debts are to be deducted, and not debts secured by special mortgage in proceedings in favor of minors.[72] In that State, where a husband administers the separate property of the wife, the debts incurred in such administration, including the expense of cultivating her plantation, are community debts,[73] and the wife is not liable therefor.[74] In Texas funeral expenses of the husband, paid by the wife, are community debts, for which his estate is not liable.[75]

§ 609. Obligations as Surety.

The community is generally liable for the husband's obligations as surety where made for its benefit,[76] but not where the stock was purchased with the husband's separate earnings, and where there was an agreement that such earnings should be his separate property,[77] or where the husband's act was not for the benefit of the community.[78] Where a husband who held stock in a corporation becomes surety for it the liability is a community debt,[79] even though the wife objects to the purchase of the stock.[80]

§ 610. Bills and Notes.

A note made by the husband is presumptively a community debt,[81] especially where made for the benefit of the community,[82] in which case the signature of the wife is not necessary to bind the community.[83] The community is not liable for the husband's accommodation note, even in the hands of a holder in due course

71. *In re* Finn's Estate, 105 Wash. 532, 179 P. 103.

72. Scovell v. Levy's Heirs, 106 La. 118, 30 So. 322.

73. Pior v. Giddens, 50 La. Ann. 216, 23 So. 337.

74. Courrege v. Colgin, 51 La. Ann. 1069, 25 So. 942.

75. Gilroy v. Richards, 26 Tex. Civ. 355, 63 S. W. 664.

76. Peter v. Hensen, 86 Wash. 413, 150 P. 611; Williams v. Hitchcock, 86 Wash. 536, 150 P. 1143.

77. Union Securities Co. v. Smith, 93 Wash. 115, 160 P. 304.

78. Kanters v. Kotick (Wash.), 173 P. 329; American Surety Co. of New York v. Sandberg, 244 F. 701, 157 C. C. A. 149; J. I. Case Threshing Mach. Co. v. Wiley, 89 Wash. 301, 154 P. 437.

79. Horton v. Donohoe-Kelly Banking Co., 15 Wash. 399, 46 P. 409; National Surety Co. v. Blumauer, 247 F. 937, 160 C. C. A. 127.

80. Floding v. Denholm, 40 Wash. 463, 46 P. 409.

81. Reed v. Loney, 22 Wash. 433, 61 P. 41.

82. McLean v. Burginger, 100 Wash. 570, 171 P. 518; Johnson v. Garner, 233 F. 756.

83. Northern Bank & Trust Co. v. Graves, 79 Wash. 411, 140 P. 328.

before maturity,[84] but a joint note of the spouses to pay a note on which the husband was surety is a community debt.[85] A wife abandoned by her husband may bind herself by a note to pay community debts.[86]

Where there is a division of community property, the wife is jointly liable with her husband, to the extent of the property received by her, for a community note executed by her husband, but not for his renewal of the note after the division.[87]

§ 611. Torts.

The community is not liable for the tort of either spouse,[88] unless committed in the management of community property,[89] or for the tort of a servant of the husband.[90] A wife's torts are presumed not to be for the benefit of the community.[91] Where the community is engaged in the business of a notary it may be liable for a false certification made by one of the spouses.[92] In Arizona community property is liable for fines inflicted on a husband in a criminal prosecution.[93]

§ 612. Separate Debts.

The tendency of the courts and legislatures is to make community property liable for community debts alone, and separate property of the wife for her separate debts alone.[94]

In Idaho and Texas community property is liable for the husband's separate debts,[95] but not in Washing-

84. Shuey v. Holmes, 20 Wash. 13, 54 P. 540; Gund v. Parke, 15 Wash. 393, 46 P. 1045.

85. McKee v. Whitworth, 15 Wash. 536, 46 P. 1045.

86. Crowder v. McLeod (Tex.), 151 S. W. 1166.

87. Grandjean v. Runke (Tex.), 39 S. W. 945.

88. Day v. Henry, 81 Wash. 61, 142 P. 439; Schramm v. Steele, 97 Wash. 309, 166 P. 634; Wilson v. Stone, 90 Wash. 365, 156 P. 12; Floding v. Denholm, 40 Wash. 463, 82 P. 738.

89. Oudin v. Crossman, 15 Wash. 519, 46 P. 1047; Woste v. Rugge, 68 Wash. 90, 122 P. 988; Bice v. Brown, 98 Wash. 416, 167 P. 1097; Milne v. Kane, 64 Wash. 254, 116 P. 659.

90. Killingsworth v. Keen, 89 Wash. 597, 154 P. 1096; Milne v. Kane, 64 Wash. 254, 116 Pac. 659, 36 L. R. A. (N. S.) 88.

91. Killingsworth v. Keen, 89 Wash. 597, 154 P. 1096; Patterson & Wallace v. Frazer, 93 S. W. 146 (judgment reversed [Sup.]), 100 Tex. 103, 94 S. W. 324.

92. Kangley v. Rogers, 85 Wash. 250, 147 P. 898.

93. Villescas v. Arizona Copper Co., 20 Ariz. 268, 179 P. 963.

94. Vickers v. Block, 31 La. Ann. 267; La. Code, §§ 2355, 2367, 2399-2412; Lewis v. Winston, 26 La. Ann. 707; Newman v. Eaton, 27 La. Ann. 341; Drumm v. Kleinman, 31 La. Ann. 124.

95. Holt v. Empey, 32 Ida. 106, 178 P. 703; Ochoa v. Edwards (Tex.),

ton.[96] But the separate debt of a spouse becomes, on his death, chargeable against his half of the community property.[97] In Louisiana a husband's funeral expenses are to be charged to his share of the community estate and not to the community.[98] In that State the costs of a proceeding for separation from bed and board taxed against the husband are his separate debt, such costs retroacting to the date of filing the suit.[99]

§ 613. Rights and Remedies of Creditors During Existence of Community.

The right of a community creditor to subject the community property to his debt is not affected though the husband has abandoned the wife and has taken with him community property to the extent of more than half the estate,[1] nor by the fact that the spouses have agreed that the property should be separate estate of the wife.[2] A judgment creditor of the community may sell only the husband's interest, where he does not object, though the wife's interest is also liable.[3]

Where a wife engages in trade, she is presumed to do so with community funds, and the fact that the husband permits her to use his money or property as her own, and to obtain credit on the faith of it, does not estop him from claiming the property as against her creditors.[4]

§ 614. Dissolution of Community; Effect of Abandonment, Separation, Insanity or Divorce.

Abandonment by the husband will enable the wife to maintain an action for her interest in community property,[5] but not for a fraudulent disposition of his wages, since such wages are subject

189 S. W. 1022; Seabrook v. First Nat. Bank of Port Lavaca (Tex.), 171 S. W. 247.

96. La Selle v. Woolery, 14 Wash. 70, 44 Pac. 115, 53 Am. St. R. 855; Ross v. Howard, 31 Wash. 393, 72 P. 74; Harry L. Olive Co. v. Meek (Wash.), 175 P. 33, 178 P. 450; Huyvaerts v. Roedtz, 105 Wash. 657, 178 P. 801; Deering v. Holcomb, 26 Wash. 588, 67 P. 240; Morse v. Estabrook, 19 Wash. 92, 52 P. 531, 67 Am. St. R. 723; Gund v. Parke, 15 Wash. 393, 46 P 408.

97. Crawford v. Morris, 92 Wash. 288, 158 P. 957.

98. Succession of Pizzati, 141 La. 645, 75 So. 498.

99. Gastauer v. Gastauer, 143 La. 749, 79 So. 326.

1. Teague v. Lindsey, 31 Tex. Civ. 161, 71 S. W. 573; Ochoa v. Edwards (Tex.), 189 S. W. 1022.

2. Jordan v. Marcantell (Tex.), 147 S. W. 357.

3. Campbell v. Antis, 21 Tex. Civ. 161, 51 S. W. 343.

4. Bashore v. Parker, 146 Cal. 525, 80 P. 707.

5. Coss v. Coss (Tex.), 207 S. W. 127.

to his disposition for his own purposes although community property.[6] The community is not dissolved by the insanity of a spouse.[7] Divorce will dissolve the community,[8] but not the mere fact that cause for divorce exists.[9] A decree of divorce making no division of community property does not deprive a wife of her rights in the community property as a matter of law,[10] such a decree rendering the spouses tenants in common of the community property.[11]

It is otherwise in Washington, where community property undisposed of by the decree remains such, as between the parties, but may be recovered in another action.[12] Where a divorced wife forms a new community by remarriage, she cannot claim rights under the first community,[13] but a wife who remarries under a belief that her husband has obtained a divorce from her does not forfeit her community rights.[14] A divorced wife claiming to share in the increase of value of her husband's separate property by reason of the expenditure of community funds has the burden of showing the amount of such increase.[15]

Where, during the pendency of an action by the husband to recover community property from a grantee of his wife, a decree of divorce is rendered which awards the property involved to the wife, the husband can recover only costs and damages for the detention.[16]

In Louisiana a community which has been once dissolved cannot be re-established.[17] In the same State a divorce from bed and board dissolves the community.[18] In order to secure a separation of property in that State the wife need only show that the habits

6. Irwin v. Irwin (Tex.), 110 S. W. 1011.

7. Succession of Bothick, 52 La. Ann. 1863, 28 So. 458.

8. Milekovich v. Quinn (Cal.), 181 P. 256; Givens v. Givens (Tex.), 195 S. W. 877.

9. Merrell v. Moore, 47 Tex. Civ. 200, 104 S. W. 514.

10. Moor v. Moor, 24 Tex. Civ. 150, 57 S. W. 992.

11. Southwestern Mfg. Co. v. Swan (Tex.), 43 S. W. 813; Barkley v. American Savings Bank & Trust Co., 61 Wash. 415, 112 P. 495; Johnson v. Garner, 233 F. 756; Jones v. Frazier (Tex.), 201 S. W. 445; Tabler v. Peverill, 4 Cal. App. 671, 88 P. 994; Roemer v. Traylor (Tex.), 128 S. W. 685.

12. Harvey v. Pocock, 92 Wash. 625, 159 P. 771.

13. Bedal v. Sake, 10 Ida. 270, 77 P. 638, 270 L. R. A. 60.

14. Merrell v. Moore, 47 Tex. Civ. 200, 104 S. W. 514.

15. Young v. Rapier, 94 F. 283, 36 C. C. A. 248.

16. Carney v. Simpson, 15 Wash. 227, 46 P. 233.

17. American Hoist & Derrick Co. v. Frey, 127 La. 183, 53 So. 486.

18. Succession of Le Besque, 137 La. 567, 68 So. 956.

and circumstances of the husband make it necessary for her to preserve for her family the earnings from her separate industry and talents.[19] The Texas statute providing that property in the possession of either spouse at the time the marriage is "dissolved," includes a dissolution by divorce as well as one by death.[20]

The rule of the Spanish law that a wife against whom a decree of divorce for adultery has been made forfeits her rights to community property does not obtain in Porto Rico, there being in that territory a rule of limited forfeiture, by which the guilty party forfeits all gifts from the innocent party, who retains everything acquired from the other.[21] By statute in the same territory a divorce carries with it a division of all property and effects between the spouses.[22]

§ 615. Rights and Liabilities of Survivor.

Upon the dissolution of marriage by death, there having been no testamentary disposition to the contrary of the disposable share of deceased, this community property goes, after payment of all community debts, as generally regulated, to the survivor, if the deceased leaves no descendant; otherwise, one half to the survivor,[23] and, in Texas, even if there are living grandchildren, the statute not including them by the word "children;"[24] subject to debts and charges of administration,[25] and subject to the settle-

19. Gastauer v. Gastauer, 131 La. 1, 58 So. 1012.

20. Gameson v. Gameson (Tex.), 162 S. W. 1169.

21. Garrozi v. Dastas, 204 U. S. 64, 27 S. Ct. 224, 51 L. Ed. 369.

22. Garrozi v. Dastas, 204 U. S. 64, 27 S. Ct. 224, 51 L. Ed. 369.

23. La. Code, §§ 2375, 2378; Broad v. Murray, 44 Cal. 228; Johnson v. Harrison, 48 Tex. 257; La Tourette v. La Tourette, 15 Ariz. 200, 137 P. 426; *In re* Pickard's Estate, 169 Cal. 162, 146 P. 425; Kohny v. Dunbar, 21 Ida. 258, 121 P. 544; Peck v. Board of Directors of Public Schools for Parish of Catahoula, 137 La. 334, 68 So. 629; Barnett v. Barnett, 9 N. M. 205, 50 P. 337; Woodward v. Sanger Bros., 246 F. 777, 159 C. C. A. 79 (cert. den., 246 U. S. 674, 38 S. Ct. 425, 62 L. Ed. 932); Schwartz v. West, 37 Tex. Civ. 136, 84 S. W. 282; Slavin v. Greever (Tex.), 209 S. W. 479; Perry v. Rogers, 52 Tex. Civ. 594, 114 S. W. 897; Graves v. Smith (Tex.), 140 S. W. 487; Melton v. Beasley, 56 Tex. Civ. 537, 121 S. W. 574; *In re* Kattenhorn's Estate, 41 Nev. 384, 171 P. 164; Adels v. Joseph (Tex.), 148 S. W. 1154; Myrack v. Volentine (Tex.), 65 S. W. 674; Harle v. Harle (Tex.), 204 S. W. 317; Whisler v. Cornelius, 34 Tex. Civ. 511, 79 S. W. 360; McCown v. Owens, 15 Tex. Civ. 346, 40 S. W. 336; Daniels v. Spear, 65 Wash. 121, 117 P. 737.

24. Ross v. Martin, 140 S. W. 432 (judgment mod. reh., 104 Tex. 558, 141 S. W. 518).

25. *In re* Cannon's Estate, 18 Wash. 101, 50 P. 1021; Thompson v. Vance, 110 La. 26, 34 So. 112; Thatcher v. Capeca, 75 Wash. 249, 134 P. 923; Embree-McLean Carriage Co. v. Johnson (Tex.), 85 S. W. 1021; Martin

ment of accounts between the community and the survivor,[26] being tenant in common with the heirs or devisees of the deceased, if any,[27] even if the heir be a divorced first wife claiming title under her son by the first marriage, who was heir to his father's rights under the second marriage.[28] A survivor has such power over the whole as will enable such survivor to close the business of the community,[29] and pay debts.[30]

In Texas the survivor has a life estate in the homestead,[31] and a surviving husband is life tenant of his deceased wife's share in the community property.[32] In the same State a deserted wife whose husband remarries takes half the community property acquired prior to the remarriage and a fourth of that acquired afterwards.[33]

Where a surviving spouse sells community property and uses more than half for private purposes, the excess over one half is held in trust for the heirs of the deceased.[34] Such a sale will operate as a partition, as between the parties, and the survivor will be estopped to assert title, as against the heirs of the deceased, to the unsold portion if its value does not exceed one half the property.[35] Under the California statute the surviving wife takes one half the community property, plus what her husband's wife gives her.[36] In Louisiana the survivor is owner of half the community property, with the lifetime usufruct of the minor's portion,[37] where a deceased spouse does not dispose by will of his

Davie & Co. v. Carville, 110 La. 862, 34 So. 807.

26. Kelly v. Kelly 131 La. 1024, 60 So. 671.

27. Waterman Lumber & Supply Co. v. Robins (Tex.), 159 S. W. 360; Worst v. Sgitcovich (Tex.), 46 S. W. 72; Ewald v. Hufton, 173 Ida. 373, 173 P. 247; Schlarb v. Castaing, 50 Wash. 331, 97 P. 289; Bullock v. Sprouls (Tex.), 54 S. W. 657 (affd., 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. R. 849).

28. Johnson v. Johnson (Tex.), 207 S. W. 202.

29. Wiener v. Zweib (Tex.), 128 S. W. 699.

30. Stone v. Jackson (Tex.), 210 S. W. 953.

31. Crocker v. Crocker, 19 Tex. Civ. 296, 46 S. W. 870; Janes v. Stratton (Tex.), 203 S. W. 386; Texas Tram & Lumber Co. v. Gwin, 29 Tex. Civ. App. 1, 67 S. W. 892.

32. Richmond v. Sims (Tex.), 144 S. W. 1142.

33. Parker v. Parker, 222 F. 186, 137 C. C. A. 626.

34. Oaks v. West (Tex.), 64 S. W. 1033.

35. Eddy v. Bosley, 34 Tex. Civ. 116, 78 S. W. 565.

36. *In re* Rossi's Estate, 169 Cal. 148, 146 P. 430; *In re* Angle's Estate, 148 Cal. 102, 82 P. 668; *In re* Dargie's Estate (Cal.), 177 P. 165; *In re* Boody's Estate, 113 Cal. 682, 45 P. 858.

37. Mazzei v. Gruis, 128 La. 860, 55 So. 555; Succession of Webre, 49 La. Ann. 1491, 22 So. 390; Succession of Planchett, 29 La. Ann. 520; For-

community interest, if there is issue of the marriage, and until remarriage.[38] Such a usufructuary is bound to pay taxes on the property to which the usufruct attaches,[39] and is merely entitled to the income, but does not become owner of the property.[40] In order that a surviving widow may enjoy that right she must inventory and appraise the property and record an abstract thereof in the book of mortgages for the parish in which the property is situated.[41] The usufruct which ceases on remarriage attaches to the interest in community property inherited by the heirs of the deceased, but a usufruct established by will does not cease on remarriage.[42] The usufructuary right is not affected by the purchase by the widow of the shares of certain heirs, nor does such purchase amount to a partition between the widow and such vendees of shares,[43] nor by the fact that there is an adopted child of the spouses.[44] The statute in that State regulating usufructs generally does not apply to the case of a widow's usufruct after the dissolution of a community.[45] In the same State, where she has taken more than her share of the community property she owes her husband's share to his succession, but is not liable directly to any particular creditor.[46] In the same State, where a putative wife acts in good faith without knowledge of the first marriage, the property acquired by the husband during the second marriage is to be divided between the two wives, their children being not interested.[47] In the same State a widow who converts her husband's property to her own use without notice to the forced heirs, and without an order of court and inventory, as required by the statute, is a spoliator and liable as such.[48]

stall, 28 La. Ann. 107; Hickman v. Thompson, 24 La. Ann. 264.

38. Reems v. Dielmann, 111 La. 96, 35 So. 473.

39. Babin's Heirs v. Daspit, 120 La. 755, 45 So. 597; *In re* Daspit, *Id.*

40. Leury v. Mayer, 122 La. 486, 47 So. 839.

Notes not being capable of use without their being expended or consumed or without their substance being changed are subject to imperfect usufruct under the express provisions of Civ. Code, art. 534, and the usufructuary may dispose of them at his pleasure under the obligation of accounting for their value at the expiration of his usufruct. Miquez v. Delcambre, 125 La. 176, 51 So. 105.

41. Succession of Landier, 51 La. Ann. 968, 25 So. 938.

42. Smith v. Nelson, 121 La. 170, 46 So. 200.

43. Succession of Dielmann, 119 La. 101, 43 So. 972.

44. Succession of Teller, 49 La. Ann. 28, 21 So. 265.

45. Succession of Dielmann, 119 La. 101, 43 So. 972.

46. Martin Davie & Co. v. Carville, 110 La. 862, 34 So. 807.

47. Waterhouse v. Star Land Co., 139 La. 177, 71 So. 358.

48. Tujague v. Courtiade, 140 La. 779, 73 So. 862.

§ 616. Rights of Heirs.

Heirs can have no greater rights in community property than their ancestor would have had.[49] On the death of a spouse such spouse's community interest passes to such spouse's heirs, who are usually his children,[50] in equal shares,[51] as tenants in common with each other,[52] and with the survivor,[53] subject to the homestead rights of the survivor,[54] and subject to the rights of a *bona fide* purchaser from the survivor,[55] whether the survivor administers or qualifies as survivor,[56] and even though after the death of the ancestor the form of the property is changed.[57] The rule is not inclusive of adopted heirs.[58] Heirs cannot recover any specific community property, but only their shares of the balance remaining after a settlement of the property,[59] they having no certain interest in the community property until debts are paid,[60]

49. Lanigan v. Miles (Wash.), 172 P. 894.

50. Coe v. Sloan, 16 Ida. 49, 100 P. 354; Weiss v. Goodhue, 98 Tex. 274, 83 S. W. 178; Carl v. Settegast (Tex.), 211 S. W. 506; Duvall v. Healy Lumber Co., 107 P. 357 (judgment affd. reh., 51 Wash. 446, 109 P. 305); Festivan v. Clement, 135 La. 938, 66 So. 304; Owen v. M. Hanlon's Sons, 136 La. 455, 67 So. 329; Lynch v. Lynch (Tex.), 130 S. W. 461; Merrill v. Bradley, 102 Tex. 481, 119 S. W. 297; Mitchell v. Schofield (Tex.), 140 S. W. 254; Mazzei v. Gruis, 128 La. 860, 55 So. 555; McClure v. Bryant, 18 Tex. Civ. 141, 44 S. W. 3; Sims v. Hixon (Tex.), 65 S. W. 36 (affd., 65 S. W. 35); McAnulty v. Ellison (Tex.), 71 S. W. 670; Belt v. Cetti, 100 Tex. 92, 93 S. W. 1000; Schultze v. Frost-Johnson Lumber Co., 132 La. 366, 61 So. 404; Succession of Kleinert, 125 La. 549, 51 So. 584; Aldredge v. Aldredge (Tex.), 204 S. W. 355.

The rule that on the death of a spouse half the community property goes to the survivor and half to the heirs of the deceased is a rule of property in Washington. Warburton v. White, 18 Wash. 511, 52 P. 233 (affd., 176 U. S. 484, 20 S. Ct. 404, 44 L. Ed. 555); Krieg v. Lewis, 56 Wash. 196, 105 P. 483.

51. Ewald v. Hufton, 31 Ida. 373, 173 P. 247.

52. Miller v. Blackwell, 142 La. 571, 77 So. 285.

53. Wingo v. Rudder, 103 Tex. 150, 124 S. W. 899; Eckert v. Schmitt, 60 Wash. 23, 110 P. 635; Daniel v. Daniel, 106 Wash. 659, 181 P. 215.

54. Barkley v. Stone (Tex.), 195 S. W. 925; Morse v. Nibbs (Tex.), 150 S. W. 766.

55. Woodburn v. Texas Town Lot & Improvement Co. (Tex.), 153 S. W. 365; Loomis v. Cobb (Tex.), 159 S. W. 305; Washington v. Filer, 127 La. 862, 54 So. 128.

56. Belt v. Cetti, 100 Tex. 92, 93 S. W. 1000.

57. *In re* Brady's Estate, 171 Cal. 1, 151 P. 275.

58. Harle v. Harle (Tex.), 204 S. W. 317.

59. Baird v. Stevenson, Man. Unrep. Cas. (La.), 418.

60. Baird v. Stevenson, Man. Unrep. Cas. (La.) 418; Succession of Saux, 2 McGloin (La.) 38; American Nat. Bank of Paris v. First Nat. Bank, 52 Tex. Civ. 519, 114 S. W. 176; Guillory v. Latour, 138 La. 142, 70 So. 66; Belt v. Cetti, 100 Tex.

but nevertheless on the death of the ancestor their rights to the residuum attach at once, and are absolute, if there is a residuum.[61]

The interest of an heir cannot be charged with debts made after the death of the ancestor.[62] On the death of the survivor the heirs may have a partition.[63] A conveyance of community lands by a survivor to his children in severalty, if accepted by them, will constitute a partition as between such heirs.[64] A community survivor cannot devest the interests of such heirs by gift,[65] or will,[66] or by a conveyance of the estate,[67] unless there are community debts sufficient to warrant the sale,[68] or unless the grantee is without notice of the equitable rights of such heirs,[69] or unless the heirs join in the deed,[70] nor are such rights affected by a false inventory of such survivor's estate.[71]

Where community property has been sold by a survivor the heirs of the deceased may have their rights in such property allowed to them out of the survivor's interest in the remaining property,[72] as well as where survivor used money of a deceased spouse in making improvements on community lands.[73] The failure of a husband to plead the Statute of Limitations in an action against him as survivor on a community debt is not a fraud on the heirs of his deceased wife.[74]

Where property was acquired by a man living with a woman

92, 93 S. W. 1000; *In re* Mason's Estate, 95 Wash. 564, 164 P. 205; Stone v. Jackson (Tex.), 210 S. W. 953; American Nat. Bank of Paris v. First Nat. Bank, 52 Tex. Civ. 519, 114 S. W. 176; Succession of Trouilly, 52 La. Ann. 276, 26 So. 851.

61. Bossier v. Herwig, 112 La. 539, 36 So. 557; Colonial & U. S. Mort. Co. v. Thetford, 27 Tex. Civ. 152, 66 S. W. 103.

62. *In re* Mason's Estate, 95 Wash. 564, 164 P. 205.

63. Richmond v. Sims (Tex.), 144 S. W. 1142.

64. White v. Simonton (Tex.), 67 S. W. 1073 Word v. Colley (Tex.), 173 S. W. 629; Sackman v. Campbell, 15 Wash. 57, 45 P. 895.

65. Bass v. Davis (Tex.), 38 S. W. 268.

66. Tomlinson v. H. P. Drought & Co. (Tex.), 127 S. W. 262.

67. Burnham v. Hardy Oil Co. (Tex.), 147 S. W. 330; Ragley-McWilliams Lumber Co. v. Davidson (Tex.), 152 S. W. 856; Evans v. Ashe, 50 Tex. Civ. 54, 108 S. W. 398.

68. Norwood v. King (Tex.), 155 S. W. 366.

69. Wallis, Landes & Co. v. Dehart (Tex.), 108 S. W. 180.

70. Evans v. Ashe, 50 Tex. Civ. 54, 108 S. W. 398.

71. McCord v. Holloman (Tex.), 46 S. W. 114.

72. Williams v. Emberson, 22 Tex. Civ. 522, 55 S. W. 595; Clements v. Maury, 50 Tex. Civ. 158, 110 S. W. 185.

73. Tison v. Gass, 46 Tex. Civ. 163, 102 S. W. 751.

74. Stone v. Jackson (Tex.), 210 S. W. 953.

not his wife, and who was fully aware of the fact that their relations were meretricious, the heirs of such woman by a former marriage were not entitled to share in the property as being community property.[75] A person's expectancy in the community estate of her mother is the subject of a sale by her after the death of her father.[76]

In Louisiana, where a wife dies while the community is indebted to her for paraphernal funds, the claim descends to her children as their property.[77] In the same State counter letters quoad community land, executed by the husband during coverture, are binding on the wife's heirs.[78] The mortgage rights of children upon the interest of their natural tutrix on community property are not greater than her share of the residuum after settlement.[79] In the same State, where by a simulated sale property is conveyed by a husband to a wife on the pretence that it is bought with paraphernal funds, while in reality it is bought by the community, the forced heirs may have the sale annulled and the property returned to the community.[80]

Where minor heirs inherit from their mother a paraphernal claim against the community, and their father qualifies as tutor, the legal mortgage in their favor does not absorb their claim as community creditors, or alter the character of that claim from one due by the community to one due by the tutor.[81] In the same State statutes giving minors the right to dispose of their property *mortis causa* even to the detriment of the usufruct on their property does not confer similar rights on heirs of age.[82]

§ 617. Effect of Remarriage of Survivor.

On the remarriage of a widow her right to settle the community estate of herself and her first husband ceases,[83] so that she cannot

75. *In re* Sloan's Estate, 50 Wash. 86, 96 P. 684.

76. Barre v. Daggett (Tex.), 153 S. W. 120.

77. Zeigler v. His Creditors, 49 La. Ann. 144, 21 So. 666.

78. Sucession of Gurley, 120 La. 810, 45 So. 734.

79. Childs v. Lockett, 107 La. 270, 31 So. 751.

80. Westmore v. Harz, 111 La. 305, 35 So. 578.

81. Scovel v. Levy's Heirs, 118 La. 982, 43 So. 642; Thompson v. Vance, 110 La. 26, 34 So. 112.

82. Reems v. Dielman, 111 La. 96, 3 So. 473.

83. Wingfield v. Hackney, 95 Tex. 490, 68 S. W. 262; Hasseldenz v. Dofflemyre (Tex.), 45 S. W. 830; Oar v. Davis (Tex.), 135 S. W. 710; Davis v. McCartney, 64 Tex. 584; Hames v. Stroud, 51 Tex. Civ. 562, 112 S. W. 775; Richmond v. Sims (Tex.), 144 S. W. 1142.

be sued as the representative of the community.[84] If thereafter she invests community funds in land, she holds it in trust for the heirs of the deceased,[85] and her renewal of community notes will not prevent the running of the statute in favor of such heirs,[86] Her divorce from her second husband will revive her powers as survivor under the first marriage.[87] A surviving husband who remarries after selling less than half of the homestead may require the interest of heirs of the deceased spouse to be satisfied out of the unsold portion.[88]

Where a husband purchases land on deferred payments, the wife takes a community interest, which is not devested where, after her death, he remarries and later completes the payments.[89] Where, after the death of a husband leaving a wife and children, the wife remarries and has a child by the second marriage, after which one of the children by the first marriage dies, the child of the second marriage is one of the heirs of the dead child to the interest of the mother and the first husband.[90]

Under the Louisiana statute property bequeathed to a survivor by the deceased, or inherited from a deceased child, becomes, on the remarriage of the survivor, the property of the children of the first marriage, of which the survivor has thereafter only the usufruct.[91] The right of usufruct of the share of an heir in community property does not extend to the survivor of a second marriage.[92]

In Texas, where a husband qualifies as survivor as required by the statute, his powers as such are not affected by his remarriage, and can only be terminated by the heirs of the deceased wife in a proceeding provided by the statute.[93] There was an exception to this rule under the Spanish law in favor of a woman becoming a widow before majority, which under that law was twenty-five

84. Moore v. Belt (Tex.), 206 S. W. 225.

85. Worst v. Sgitcovich (Tex.), 46 S. W. 72.

86. Proetzel v. Rabel, 21 Tex. Civ. 559, 54 S. W. 373.

87. Summerville v. King, 98 Tex. 32, 83 S. W. 680 (mod. reh., 84 S. W. 643).

88. McBride v. Moore (Tex.), 37 S. W. 450.

89. Guest v. Guest (Tex.), 208 S. W. 547.

90. Woodburn v. Texas Town Lot & Improvement Co. (Tex.), 153 S. W. 365.

91. Zeigler v. His Creditors, 49 La. Ann. 144, 21 So. 666.

92. Hall v. Toussaint, 52 La. Ann. 1763, 28 So. 304.

93. Drought v. Story (Tex.), 143 S. W. 361.

years, but she had the burden of showing that she was within the exception.[94]

§ 618. Accounting or Settlement of Community Rights.

On partition of a community estate a spouse who has expended separate estate in purchasing, repairing or improving it, or discharging claims against it, may have reimbursement for the amount so expended,[95] even for a house which is community property, though the land on which it stands is the separate estate of the deseased,[96] but not for street improvements on property of a husband descending to his heirs, though made with community funds, where such improvements are not a lien on the property.[97] Such survivor becomes a creditor of the community,[98] and may have credit in his account with the heirs of the deceased for the amounts advanced,[99] or, in case of payment of a debt, be subrogated to the rights of the creditor against the community.[1]

Where after divorce the community property is greatly enhanced by the services of the husband, he should be allowed for the value of such services.[2] Alimony allowed *pendente lite* and expenses incurred by a wife in securing a divorce may also be allowed in such a partition, but not counsel fees in an action to compel it.[3]

In Louisiana a husband may take from the live stock remaining at the dissolution of the community a number of head equal to that brought by him to the marriage.[4] The fact that a widow does not claim against her husband's estate for community property used in improving his homestead does not prevent her from later making that claim.[5] In Louisiana a wife's claim against the estate of her former husband for paraphernal funds was held recoverable

94. Childress v. Cutter, 16 Mo. 24.

95. Denegre v. Denegre, 30 La. Ann. 275; Martin v. Martin, 52 Cal. 235; Simms v. Hixson (Tex.), 65 S. W. 36 (affd., 65 S. W. 35); Coons' Heirs v. Stringer, 14 La. Ann. 726; Burns v. Parker (Tex.), 137 S. W. 705; Siverd v. Dumestre, 143 La. 578, 78 So. 969; Succession of Pierce, 119 La. 727, 44 So. 446; Haddad v. Haddad, 120 La. 218, 45 So. 109.

96. Gilroy v. Richards, 26 Tex. Civ. 355, 63 S. W. 664.

97. Gilroy v. Richards, 26 Tex. Civ. 355, 63 S. W. 664.

98. Huey v. Huey, Man. Unrep. Cas. (La.), 264; Fortier v. Barry, 111 La. 766, 35 So. 900.

99. Newman v. Cooper, 50 La. Ann. 397, 23 So. 116.

1. Pior v. Giddens, 50 La. Ann. 216, 23 So. 337; Succession of Saux, 2 McGloin (La.), 38.

2. Johnson v. Garner, 233 F. 756.

3. Garrozi v. Dastas, 204 U. S. 64, 27 S. Ct. 224, 51 L. Ed. 369.

4. Succession of Andrus, 131 La. 940, 60 So. 623.

5. Hillen v. Williams, 25 Tex. Civ. 268, 60 S. W. 997.

though the estate was not sufficient to pay debts and legacies.[6] In the same State a spouse whose separate property has been sold and the proceeds used for the benefit of the community recovers from it the price for which the property was sold and not that which was paid for it originally.[7] The spouse claiming allowance for improvements has the burden of showing with reasonable certainty the amount to which the community property has been enhanced thereby,[8] and that the money used was separate estate,[9] and that it was expended for the benefit of the community.[10]

In Louisiana, since on judgment of separation the wife's paraphernal estate becomes her separate estate, the husband is liable for interest thereon from the date of the judgment.[11] Where, in the same State, the wife obtains a separation and sues for a partition of community property and settlement of accounts, the husband must account for all community property shown by his books to be in his possession a few months before the dissolution of the community.[12] If he is in charge of the property, he must account for revenue or be charged with interest on the wife's share from the date of such possession subsequent to the filing of suit for separation.[13] In the same State a husband who transfers property to a third person to transfer it to the wife in settlement of her money judgment in separation proceedings, and who signs the act by which the third person transfers the property to the wife, is estopped to claim that the two transactions are simulations.[14] Where the husband has used the wife's separate funds for the benefit of her separate estate, that fact is a good defence to an action by her heirs for an accounting.[15]

§ 619. Necessity of Acceptance or Renunciation.

In Louisiana both the surviving wife and her heirs or assigns have the privilege of exonerating themselves from the debts contracted during the marriage, by renouncing the partnership or

6. Succession of McCloskey, 144 La. 438, 80 So. 650; Jones v. Jones, 130 La. 438, 58 So. 140.

7. Succession of McGee, 132 La. 335, 61 So. 394.

8. Munchow v. Munchow, 136 La. 753, 67 So. 819.

9. Succession of Lyons, 50 La. Ann. 50, 23 So. 117.

10. Dillon v. Freville, 129 La. 1005, 57 So. 316.

11. Succession of McCloskey, 144 La. 438, 80 So. 650.

12. Hill v. Hill, 115 La. 490, 39 So. 503.

13. Hill v. Hill, 115 La. 490, 39 So. 503.

14. Nuss v. Nuss, 112 La. 265, 36 So. 345.

15. Murray v. Hawkins, 138 La. 463, 70 So. 476.

community; in which case the wife takes back all her effects, whether dotal, extra-dotal, hereditary or proper;[16] but subject, perhaps, to the intermediate rights of innocent purchasers.[17] A wife's acceptance of her husband's will disposing only of his community rights does not operate as a denunciation of her community rights.[18]

In California a wife's renunciation of community rights under a mistaken theory that she could take under her husband's will in no other way was held void.[19] In Louisiana the surviving wife's usufructuary right does not shield her from the necessity of accepting or renouncing the community when called on to elect.[20] Under the statute in that State a wife is presumed to have renounced the community where she does not accept it within the delays fixed by the statute, or within a prolongation secured within the term.[21] Where she accepts it unconditionally, she is entitled to the protection of the statute in that State excluding parol evidence when sued on notes executed by the husband which are prescribed on their face, on the ground of acknowledgment or promise to pay made by her deceased husband.[22]

In Texas a wife is not bound by her renunciation of her community rights through a trustee where the consideration is inadequate.[23]

§ 620. Sale or Mortgage to Pay Debts.

A survivor may sell or mortgage community property to pay debts,[24]

16. La. Code, §§ 2379-2392.

17. Kirk v. Houston Nav. Co., 49 Tex. 213.

18. Hutchens v. Dresser (Tex.), 196 S. W. 969.

19. *In re* Wickersham's Estate, 138 Cal. 355, 70 P. 1076 (mod. reh., 138 Cal. 355, 71 P. 437).

20. Reems v. Dielman, 111 La. 96, 35 So. 473.

21. Young v. Rapier, 94 F. 283, 36 C. C. A. 248; Lapice v. Lapice, 21 La. Ann. 226.

22. Weil v. Jacobs' Estate, 111 La. 357, 35 So. 599.

23. Suggs v. Singley (Tex.), 167 S. W. 241.

24. Cockburn v. Cherry (Tex.), 153 S. W. 161; Wiseman v. Swain (Tex.), 114 S. W. 145; Davis v. Carter, 55 Tex. Civ. 423, 119 S. W. 724; Jennings v. Borton, 44 Tex. Civ. 280, 98 S. W. 445; Crosby v. Ardoin (Tex.), 145 S. W. 709; Grundy v. Greene (Tex.), 207 S. W. 964; Kidd v. Prince (Tex.), 182 S. W. 725; Burnham v. Hardy Oil Co., 108 Tex. 555, 195 S. W. 1139; Pyle v. Pyle (Tex.), 159 S. W. 488; Cage v. Tucker's Heirs, 14 Tex. Civ. 316, 37 S. W. 180; Crary v. Field, 10 N. M. 257, 61 P. 118; Von Rosenberg v. Perrault, 5 Ida. 719, 51 P. 774; Kane v. Sholars, 41 Tex. Civ. 154, 90 S. W. 937; Morris v. Morris, 47 Tex. Civ. 244, 105 S. W. 242; Barkley v. Stone (Tex.), 195 S. W. 925; Elizardi v. Kelly, 115 La. 712, 39 So. 851; Miller v. Blackwell, 142 La. 571, 77 So. 285; W. C. Belcher Land Mortgage Co. v. Taylor

even the homestead,[25] and, in Texas, without giving an administration bond,[26] even though such spouse is the vendee, if full value is paid,[27] and even if such survivor sells to pay a debt to himself,[28] and even if barred by the Statute of Limitations, if the debt is a valid claim against the community,[29] or even if not due,[30] and even if the proceeds are in excess of the debts,[31] and even if the deed contains false recitals of his authority and acts as guardian of minor heirs of the deceased.[32] Such survivor may renew a mortgage given during coverture with another given as survivor.[33] A presumption of good faith attends such a sale, though the price realized is disproportionate to the vlaue of the property,[34] if the consideration is not grossly inadequate,[35] and where a long time has elapsed since the conveyance of community property by a surviving spouse, it will be presumed that the sale was made to pay debts.[36] The sale must not be in fraud of the heirs of the deceased,[37] who may show the true character of the transaction, regardless of its form.[38] A survivor may also bind the estate by an agreement to pay interest as a consideration for an extension of time in payment of a community debt,[39] and may

(Tex.), 173 S. W. 278; Hinzie v. Robinson, 21 Tex. Civ. 9, 50 S. W. 635; Beck v. Natalie Oil Co., 78 La. 153, 78 So. 430.

25. (Sup. 1911) Wiener v. Zwieb, 105 Tex. 262, 141 S. W. 771; Jung v. Peterman (Tex.), 194 S. W. 202; McDaniel v. Harley (Tex.), 42 S. W. 323; Burkitt v. Key (Tex.), 42 S. W. 231; Barrett v. Eastham, 28 Tex. Civ. 189, 67 S. W. 198; Linson v. Poindexter, 35 Tex. Civ. 358, 80 S. W. 237; Horan v. O'Connell (Tex.), 144 S. W. 1048.

26. Pierce v. Gibson, 108 Tex. 62, 188 S. W. 502.

27. Suggs v. Singley (Tex.), 167 S. W. 241.

28. Sharp v. Zeller, 110 La. 61, 34 So. 129.

29. Stone v. Jackson (Tex.), 210 2. W. 953; Broocks v. Payne (Tex.), 124 S. W. 463; Jackson v. Stone (Tex.), 155 S. W. 960 (holding that the bar of the statute cannot be waived without the authority of the probate court)

30. Rippy v. Harlow, 46 Tex. Civ. 52, 101 S. W. 851.

31. Morgan v. Lomas (Tex.), 159 S. W. 869.

32. Rippy v. Harlow, 46 Tex. Civ. 52, 101 S. W. 851.

33. Echols v. Jacobs Mercantile Co., 38 Tex. Civ. 65, 84 S. W. 1082. It is otherwise in Idaho. Ewald v. Hufton, 173 Ida. 373, 178 P. 247.

34. Crawford v. Gibson (Tex.), 203 S. W. 375.

35. Morse v. Nibbs (Tex.), 150 S. W. 766.

36. Milby v. Hester (Tex.), 94 S. W. 178; Gillett v. Warren, 10 N. M. 523, 62 P. 975; Hasseldenz v. Doffiemyre (Tex.), 45 S. W. 830; Cruse v. Barclay, 30 Tex. Civ. 211, 70 S. W. 358; Stipe v. Shirley, 33 Tex. Civ. 223, 76 S. W. 307.

37. Henry v. Vaughan, 46 Tex. Civ. 531, 103 S. W. 192; Dever v. Selz, 39 Tex. Civ. 558, 87 S. W. 801.

38 Garrison v. Richards (Tex.), 107 S. W. 861.

39. Morris v. Morris, 47 Tex. Civ. 244, 105 S. W. 242.

renew a community obligation and make it a charge on community property.[40]

In Louisiana a sale of community property to pay debts may be ratified at a family meeting held in the interest of the minors.[41] In that State a surviving husband cannot mortgage his wife's heirs' interest in community property unless specifically authorized to do so.[42] In Texas, where a husband does not within four years after the death of the wife leaving children make application to the county court for authority to dispose of the community estate, the court has no jurisdiction to grant such application thereafter.[43]

§ 621. Rights and Liabilities of Purchasers under Sale to Pay Debts.

The purchaser under a sale of community property to pay valid community debts gets a good title, whether there is a necessity for the sale or not,[44] and even though the sale was not made solely to pay debts,[45] the question whether the grantee is a *bona fide* purchaser for value not arising in such case.[46] If the sale is by order of court, the decree protects the purchaser, who need not look beyond it.[47] Therefore, such a purchaser is not bound to take notice of the manner in which the proceeds are applied by the survivor,[48] if the vendee knows that there were community debts at the time of sale,[49] but such grantee has the burden of showing that the sale was to pay debts.[50]

In Louisiana the heirs of a deceased spouse cannot enforce the general mortgage which the law gives them against the estate of the survivor as natural tutrix upon her interest in community

40. Word v. Colley (Tex.), 143 S. W. 257.

41. Elizardi v. Kelly, 115 La. 712, 39 So. 851.

42. Owen v. M. Hanlon's Sons, 136 La. 455, 67 So. 329.

43. Williams v. Steele, 101 Tex. 382,

44. Roy v. Whitaker, 92 Tex. 346, 49 S. W. 367; Sharp v. Loupe, 120 Cal. 89, 52 P. 134; Wolf v. Gibbons (Tex.), 69 S. W. 238; Cage v. Tucker's Heirs, 25 Tex. Civ. 48, 60 S. W. 579; Phoenix Assur. Co. of London v. Deavenport, 16 Tex. Civ. 283, 41 S. W. 399; Dever v. Selz, 39 Tex. Civ. 558, 87 S. W. 891.

45. Cage v. Tucker's Heirs, 29 Tex. Civ. 586, 69 S. W. 425.

46. Therriault v. Compere (Tex.), 47 S. W. 750.

47. Childs v. Lockett, 107 La. 270, 31 So. 751 Messick v. Mayer, 52 La. Ann. 1161, 27 So. 815.

48. Crawford v. Gibson (Tex.), 203 S. W. 375; Linson v. Poindexter, 35 Tex. Civ. 358, 80 S. W. 237; Crary v. Field, 9 N. M. 222, P. 342; Oaks v. West (Tex.), 64 S. W. 1033; Cruse v. Barclay, 30 Tex. Civ. 211, 70 S. W. 358.

49. Jones v. Harris (Tex.), 139 S. W. 69.

50. Waterman Lumber & Supply Co. v. Robins (Tex.), 159 S. W. 360.

property where the property has been sold in the succession of the father to pay a debt secured by vendor's privilege, because the sale extinguishes her right.[51] In the same State the rights of minors in community property are not affected by their failure to question their father's right to sell his interest or their own at the time of sale so as to prevent them from later urging their claims against his grantee.[52]

Where community property is sold for taxes after the death of a spouse, and is reconveyed to the survivor, it remains community property, and where at the instance of a creditor it is sold in such survivor's succession, the sale is not void, but voidable only by a direct proceeding to annul the sale in the succession.[53]

§ 622. Actions by or Against Survivor.

An action may be maintained against a surviving spouse to subject community property in the hands of such spouse to community debts,[54] even before taking out letters of survivorship.[55] A judgment against a survivor for a community debt is valid, even if the heirs of the deceased are not joined as parties.[56] A creditor seeking to enforce his claim against the survivor of a community for such survivor's separate debt should force a settlement of the community and then subject to his debt the interest of his debtor,[57] which attaches only to the residuum after payment of community debts, which have a priority over separate debts,[58] of which the community creditor cannot be deprived, even though he has not registered his claim.[59] In order to charge the separate estate of a spouse with community funds expended for taxes, insurance, betterments, and the like, it must affirmatively appear that such funds were so used.[60]

A divorced wife cannot recover from the estate of her husband

51. Childs v. Lockett, 107 La. 270, 31 So. 751.

52. Thompson v. Vance, 110 La. 26, 34 So. 112.

53. Sicard v. Gumbel, 112 La. 483, 36 So. 502.

54. First Nat. Bank of New Boston v. Daniel (Tex.), 172 S. W. 747; Dashiell v. W. L. Moody & Co., 44 Tex. Civ. 87, 97 S. W. 843.

55. Wiseman v. Swain (Tex.), 114 S. W. 145.

56. Barrett v. Eastham, 28 Tex. Civ. 189, 67 S. W. 198.

57. Pior v. Giddings, 50 La. Ann. 216, 23 So. 337.

58. Zeigler v. His Creditors, 49 La. Ann. 144, 21 So. 606; Child v. Lockett, 107 La. 270, 31 So. 751; Scovel v. Levy's Heirs, 118 La. 982, 43 So. 642.

59. Thompson v. Vance, 110 La. 26, 34 So. 112; Scovel v. Levy's Heirs, 118 La. 982, 43 So. 642.

60. Succession of Meteye, 113 La. 1012, 37 So. 909.

any specific article of community property not appearing to be in the possession of or claimed by the defendant.[61] A surviving wife may recover her proportionate part of damages accruing to the community after the death of her husband.[62]

In Louisiana a wife must establish her right as against her husband's heirs before questioning his donation of community property as in fraud of her.[63] Likewise, in the same State, she must reduce to judgment her claim against his separate estate as community survivor for community funds used to improve such separate estate before causing it to be sold to pay the debt.[64] In the same State a widow is a necessary party to a suit to dissolve a sale of community property made by the husband in his lifetime.[65] In that State where the succession of a spouse is insolvent and unsettled, creditors will be restrained from selling community property, which is the common pledge of all creditors.[66] In the same State a community creditor may enforce his claim against the husband even after the dissolution of the community by the death of the wife,[67] and if he gets judgment against the husband before the community land is sold by the administrator of the wife's succession, he may have priority as to the husband's half over ordinary creditors.[68] In an action after the death of the wife to recover community land for non-payment of the price, the wife's heirs are necessary parties.[69] Under the Texas statute an action may be maintained against a widow for community debts only where the husband left no children or separate estate, no administration being necessary in that case.[70] In such case the creditor must aver the facts making administration unnecessary.[71]

§ 623. Actions By or Against Heirs.

The survivor has only a reasonable time in which to retain control of the community property to pay debts after the death of the deceased, after which an action may be maintained by the

61. Young v. Rapier, 94 F. 283, 36 C. C. A. 248.

62. San Antonio & A. P. Ry. Co. v. Evans (Tex.), 198 S. W. 674

63 Eustis v. Eustis, 236 F. 726, 150 C. C. A. 58.

64. Succession of Casey, 130 La. 743, 58 So. 556.

65. Bankston v. Owl Bayou Cypress Co., 117 La. 1053, 42 So. 500.

66. Petry v. Booth, 10 La. Ann. 682.

67. Simpson v. Bulkley, 140 La. 589, 73 So. 691.

68. Succession of Broussard, 142 La. 99, 76 So. 253.

69. Latour v. Latour, 134 La. 342, 64 So. 133.

70. Whitmire v. Farmers' Nat. Bank (Tex.), 97 S. W. 512.

71. Whitmire v. Farmers' Nat. Bank (Tex.), 97 S. W. 912.

heirs to recover their interests,[72] but such an action may be barred by failure to sue within the period of limitation after repudiation of the community and the rights of the heirs by the survivor.[73] Where there is no such repudiation, the statute will not begin to run till the survivor's death.[74] The interest acquired by the heir of a deceased spouse will support an action to try title.[75] In an action by heirs of a deceased spouse such heirs should not be required to account for the full value of advancements made to them by the survivor of community property.[76]

The rights of heirs of a deceased spouse to the community estate occupied as a homestead are not, as to them, homestead rights, and are therefore subject to execution for their debts, subject to the homestead rights of the survivor.[77] Heirs of a deceased spouse are not proper parties to a proceeding for the foreclosure of a vendor's lien attaching to community property during the lifetime of their ancestor.[78]

In Louisiana the heirs of a deceased spouse are not bound to await the settlement of a community before bringing a petitory action to recover their share in it,[79] whether the community is insolvent or not.[80] Where, in the same State, an heir brought a petitory action both as such and as administrator of his mother's succession, it was held that he could not recover as administrator where it appeared that the other heirs did not authorize the suit but had accepted the succession and made a partition.[81] In the same State an heir to whom his mother's paraphernal claim against the community has descended may enforce it as an ordinary claim.[82]

§ 624. Administration in General.

Administration is usually unnecessary where there are no community debts.[83] Under the Spanish law in force in the Philip-

72. Miller v. Miller, 34 Tex. Civ. 367, 78 S. W. 1085.

73. Heidelberg v. Behrens (Tex.), 85 S. W. 1029.

74. Thomas v. Wilson (Tex.), 204 S. W. 1010.

75. Arnold v. Hodge, 20 Tex. Civ. 211, 49 S. W. 714.

76. Clements v. Maury, 50 Tex. Civ. 158, 110 S. W. 185.

77. Johnston v. Rockhold (Tex.), 171 S. W. 282.

78. Henry v. McNew, 29 Tex. Civ. 288, 69 S. W. 213; Schlieder v. Boulet, 124 La. 658, 50 So. 617.

79. George v. Delaney, 111 La. 760, 35 So. 894; Ogden v. Leland University, 49 La. Ann. 190, 21 So. 685.

80. Levy v. Robson, 112 La. 398, 3 So. 472.

81. Wilson v. Ober, 109 La. 718, 33 So. 744.

82. Thompson v. Vance, 110 La. 26, 34 So. 112.

83. *In re* Wilson's Estate (Ariz.), 168 P. 503; Succession of Ditch, Man.

pines a surviving husband has the right to administer the community property and after his death his administrator is the proper administrator.[84] In Texas the survivor has the right to settle the community property for the payment of debts without administration,[85] his power being not limited to the property described in the inventory, but including all community property and debts.[86] Such right is exclusive if a petition for leave to qualify as survivor is filed within four months after the death of the deceased, though an administrator has been appointed in the meantime.[87] The court may appoint a statutory administrator,[88] or a temporary administrator,[89] or community property may be partitioned between the survivor and the heirs by agreement.[90] The community estate cannot be distributed until a year has expired after the filing of the bonds.[91] A bond given by a survivor describing himself as "administrator" will not qualify him as survivor.[92]

In Arizona, where a will disposes of community property, the court may assume jurisdiction of all community property to determine community debts, and may direct the payment of the debts therefrom.[93] In Louisiana, where a community is unsettled at the death of a survivor and where the heirs of both spouses are their children, the succession of such survivor carrier with it the settlement of the community,[94] but community property cannot be administered in a deceased's spouse's succession except where necessary to pay community debts.[95] A dative tutor appointed for minor children whose mother is survivor may, if creditors and legatees do not object, administer on the succession of the deceased in its entirety without administration *eo nomine* or bond.[96] A widow and sole heir *ab intestato* may invoke the aid of the court

Unrep. Cas. (La.) 312; Molina v. Ramirez, 15 Ariz. 249, 138 P. 17.

84. Enriquez v. Go-Tiongco, 220 U. S. 307, 31 S. Ct. 423, 55 L. Ed. ——.

85. Levy v. W. L. Moody & Co. (Tex.), 87 S. W. 205.

86. Thomas v. First Nat. Bank (Tex.), 127 S. W. 844.

87. *In re* Chapman's Estate (Tex.), 213 S. W. 989.

88. Clark v. First. Nat. Bank (Tex.), 210 S. W. 677.

89. Huth v. Huth (Tex.), 187 S. W. 523.

90. Cheek v. Hart (Tex.), 111 S. W. 775.

91. Houston Fire & Marine Ins. Co. v. Swain (Tex.), 114 S. W. 149.

92. Green v. White, 18 Tex. Civ. 509, 45 S. W. 389.

93. La Tourette v. La Tourette, 15 Ariz. 200, 137 P. 426.

94. Kremer v. Kremer, 121 La. 484, 46 So. 600.

95. Festivan v. Clement, 135 La. 938, 66 So. 304.

96. Succession of Keppel, 113 La. 246, 36 So. 955.

to preserve the community property, if no other person is appointed charged with that duty.[97] The right of usufruct is not defeated because the survivor also takes out administration,[98] and a widow in community is not obliged to give bond as usufructuary of community property inherited by her under her husband's will.[99]

In the same State a surviving husband administering his wife's succession and claiming the usufruct of the deceased's share in the community property cannot claim from a child of the marriage a collation of advances to him during the marriage, nor provoke a settlement between such children by charging them with advances during the lifetime of the deceased, such accounting being available only in partition between the forced heirs of the wife.[1]

In Washington a surviving husband who is solely interested in the community property may bind himself by a contract with a third person to act formally as administrator for a fixed compensation.[2] In the same State the whole community property is subject to administration on the death of a spouse,[3] but administration of the undivided half only cannot be collaterally attacked, though irregular.[4]

§ 625. Control, Management, and Collection of Community Assets.

A surviving husband controls the community assets, by way of administration, however, until the debts of the marriage, which are in effect his debts, are settled, as prior to all claims for a distribution.[5] A survivor is not precluded from claiming com-

97. Barber v. Watson, 105 La. 326, 29 So. 889.

98. Succession of McGee, 132 La. 335, 61 So. 394.

99. Succession of Glancey, 114 La. 1051, 38 So. 826.

1. Succession of Hanna, 126 La. 475, 52 So. 669.

2. *In re* Field's Estate, 33 Wash. 63, 73 P. 768.

3. Magee v. Big Bend Land Co., 51 Wash. 406, 99 P. 16; First Nat. Bank v. Cunningham, 72 Wash. 532, 130 P. 1148.

After a nonintervention will is proven and the estate adjudged solvent and the executors have undertaken their office, the estate is removed from the probate court's jurisdiction, except as otherwise provided by statute so that equity thereafter has jurisdiction to determine such questions as the wife's community interest in the estate. Clark v. Baker, 76 Wash. 110, 135 P. 1025.

4. Wiley v. Verhaest, 52 Wash. 475, 100 P. 1008; *In re* Guye's Estate, 54 Wash. 264, 103 P. 25.

5. Hawley v. Crescent City Bank, 26 La. Ann. 230; Williams v. Fuller, 27 La. Ann. 634; Cordier v. Cage, 44 Tex. 352; Cook v. Norman, 50 Cal. 633.

On dissolution of marriage by divorce, community property must satisfy community debts incurred before institution of the divorce suit. Richey v. Hare, 41 Tex. 336. And see Mann v. Mann, 24 La. Ann. 437.

munity property by the fact that it has been inventoried as separate property,[6] nor from claiming separate property which has been inventoried as community property,[7] but if the administrator of the deceased claims separate property of the survivor as community property, the survivor must litigate the question.[8]

In Louisiana, since the settlement of a deceased wife's estate does not involve a settlement of the community property, her administrator cannot assume control of the latter.[9] A widow, as administratrix of her deceased husband's succession and natural tutrix of her minor children, may maintain ejectment against an alleged lessee of the succession and community property.[10]

In Texas it is held that where the community estate is insolvent, and the will of the deceased empowered his executor to manage his estate in the interest of the creditors, the powers of the executor included both community and separate estate.[11] Under the statute in that State a survivor does not, by qualifying as such, become the owner of community property so as to make the heirs of the deceased the creditors of such survivor for their interests.[12]

§ 626. Accounting and Settlement.

In Louisiana attorney's fees and expenses of administration of a succession and the consequent administration of the community are to be paid by each in proportion to the interest of each.[13] In the same State, to constitute an adjudication of property owned in indivision by a survivor and minor children of the deceased, there must be a decree of court adjudging the property to such survivor, which, or an act of adjudication based on the same, must be

As to the survivor's selling real estate, &c., for payment, there are numerous decisions. Charpaux v. Bellocq, 31 La. Ann. 164; Wright v. McGinty, 37 Tex. 733. It is a long-established principle that a sale of community property, fairly made by the surviving husband for discharging the community obligations, cannot be disturbed by the wife's heirs; and that (independently of later requirements) he is not required to exhaust the personalty bfore selling land for that purpose. Wenar v. Stenzel, 48 Tex. 484; Hawley v. Crescent City Bank, 26 La. Ann. 230.

6. Huey v. Huey, Man. Unrep. Cas. (La.) 264.

7. Koppelman v. Koppelman, 94 Tex. 40, 57 S. W. 570.

8. Lloyd v. Lloyd, 34 Wash. 84, 74 P. 1061.

9. Hawes v. Baxter, 46 La. 1286, 16 So. 198; Succession of Fernandez, 50 La. Ann. 564, 23 So. 457.

10. Campbell v. Hart, 118 La. 871, 43 So. 533.

11. Carleton v. Goebler, 94 Tex. 93, 58 S. W. 829.

12. Faris v. Simpson, 30 Tex. Civ. 103, 69 S. W. 1029.

13. Succession of Webre, 49 Ann. 1491, 22 So. 390; Sims v. Billington, 50 La. Ann. 968, 24 So. 637; Succession of Bothick, 52 La. Ann. 1863, 28 So. 458.

recorded in the mortgage records in the parish where the land lies,[14] but a failure to do so will be cured by the substitution of a special mortgage under the statute.[15] In the same State, where the funds of the community are insufficient to pay the claims of both wife and husband, the claims of the former must be paid before the latter.[16] Where a surviving wife assents to the settlement of her husband's succession by a dative tutor, the settlement carries with it as an incident the settlement of the widow's rights in the community.[17] In Texas a survivor must account for all claims due the estate at the time of qualification as such, with interest, unless the claims are shown to be uncollectible.[18]

14. Succession of Burguieres, 104 La. 46, 28 So. 883.

15. Brewer v. Wright, 130 La. 491, 58 So. 160.

16. Bergey v. Labat, 112 La. 992, 36 So. 829.

17. Succession of Keppel, 113 La. 246, 36 So. 955.

18. Koppelmann v. Koppelmann, 94 Tex. 40, 59 S. W. 827.

CHAPTER XXX.

ACTIONS.

§ 627. Actions Between Spouses at Law.

Neither spouse can sue the other at common law.[19] In States having no sufficient enabling act, and considerate for the old policy of preserving domestic harmony, the married women cannot, even by next friend, sue the husband at law upon a contract made during coverture.[20] But, as we shall hereafter see, equity and modern legislation introduce a different principle.

This disability of the spouses to sue one another is not merely the technical one that, under the old procedure, husband and wife must join, but is founded on the principle that husband and wife are one.[21]

§ 628. In Equity.

Equity is the proper forum in which to enforce contracts between spouses where they cannot sue at law.[22] That is the forum

19. Hobbs v. Hobbs, 70 Me. 381; Shane v. Dickson, 111 Ark. 353, 163 S. W. 1140; Lawler v. Lawler, 107 Ark. 70, 153 S. W. 1113; Gillan v. West, 232 Pa. 74, 81 A. 128; Whiting v. Whiting, 114 Me. 382, 96 A. 500; Fitcher v. Griffiths, 216 Mass. 174, 103 N. E. 471; Copp v. Copp, 103 Me. 51, 68 A. 458.

Lord Harwicke, in Lannoy v. Duchess of Athol, 2 Atk. 448; 1 Bl. Com. 442; 2 Kent Com. 129. The married women's acts in this country have changed the common law greatly as to the mutual right of suit. And see, as to modern rules, Transactions between Husband and Wife..

20. Ritter v. Ritter, 31 Pa. 396. Neither assumpsit nor replevin can thus be maintained. Hobbs v. Hobbs, 70 Me. 381, 383.

21. Blackburn, J., in Phillips v. Barnet, 1 Q. B. D. 436.

22. Heckman v. Heckman, 215 Pa. 203, 64 A. 425, 114 Am. St. R. 953; Greenwood v. Greenwood, 113 Me. 226, 93 A. 360; Perkins v. Blethen, 107 Me. 443, 78 A. 574; Bishop v. Bourgeois, 58 N. J. Eq. 417, 43 A. 655; Spruance v. Equitable Trust Co. (Del.), 103 A. 577; McKie v. McKie, 116 Ark. 68, 172 S. W. 891; Riker v. Riker, 83 N. J. Eq. 198, 693, 92 A. 586; Schomaker v. Schomaker, 247 Pa. 444, 93 A. 460; Abramsky v. Abramsky, 261 Mo. 117, 168 S. W. 1178; *In re* Hoffman, 199 F. 448; *In re* Haynes' Will, 82 Misc. 228, 143 N. Y. S. 570; Crosby v. Clem, 209 Mass. 193, 95 N. E. 297.

In Pennsylvania it is held that this right is not taken away by a statute prohibiting her from suing her hus-

in which to enforce rights accruing to a wife and children under the South Carolina statute providing where the husband of such wife shall convey more than one fourth of his real estate after the payment of debts to a concubine, the excess over shall be void in favor of such wife and children.[23] She may restrain him by injunction from interfering with the peaceable possession of her property.[24]

Where the wife, through threats of bodily injury and fraud, is induced to convey to her husband all her interest in certain property bought chiefly with her money, she is not barred from relief in equity for the duress and fraud by the fact that she condoned his cruelty by returning to him and living with him as his wife. Condonation in its proper sense has reference only to marital rights and liabilities as such, and to none other, and while acts which amount to condonation of marital wrongs as such may be evidence of ratification of an act done under duress, or waiver of a fraud leading to the act, they are not necessarily conclusive. The question is not whether there has been condonation, but whether the act which the plaintiff seeks to have declared void has been in any way ratified by her. If it has been, then she must stand by it, and if it has not been, then, unless barred by estoppel or laches, she may avoid it. And that is so whether or not she has condoned, so far as respects her marital rights, the violence by means of which she was led to the act. Whether there had been ratification is a question, not of law, but of fact.[25]

Where a wife's remedy at law is adequate she cannot sue in equity.[26] In Massachusetts a husband may sue his wife in equity during coverture to try the question of their respective title to property.[27] In the same State the statute forbidding actions between spouses at law, and providing that it shall not be construed to authorize such suits in equity, has been held not to prevent a suit in equity by the wife to recover from her husband her separate property which has been obtained from her by fraud and coercion.[28]

In Michigan a husband who has given his wife no cause for

band, such statute only applying to actions at law. Heckman v. Heckman, 215 Pa. 203, 64 A. 425.

23. Williams v. Halford, 64 S. C. 396, 42 S. E. 187.

24. Lemon v. Lemon, 141 Ga. 448, 81 S. E. 118.

25. Hoag v. Hoag, 210 Mass. 94, 96 N. E. 49, 36 L. R. A. (N. S.) 329. See also Womack v. Womack, 73 Ark. 281, 83 S. W. 937, 1136.

26. Niehaus v. Niehaus, 141 App. Div. 251, 125 N. Y. S. 1071.

27. Lombard v. Morse, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273.

28. Frankel v. Frankel, 173 Mass. 214, 53 N. E. 398, 73 Am. St. R. 266.

divorce may enjoin her from conducting a business in competition with his.[29] In that State a wife need not be represented by a trustee in the enforcement of her contracts with her husband respecting her separate estate.[30]

The Missouri statute giving the wife the right to a decree for the sole possession of her real estate held "in her own right" where she leaves her husband for cruelty is not limited to land of which she holds the legal title, but, being highly remedial, extends to land of which she holds only the equitable title.[31] In the same State she may sue him in equity during coverture to recover her property to which he has wrongfully taken title in his own name.[32] The statute in the same State giving her power to sue him at law does not affect her right to sue him in equity also for the protection of her separate estate.[33] Prior to the Married Women's Act in that State spouses could become each other's debtor and creditor, and enforce their rights in equity as such where the wife has a separate estate.[34]

Under the Pennsylvania and Maryland Married Women's Acts a wife may maintain a bill in equity against her husband to protect her separate estate and enforce property rights.[35] In South Carolina a wife who has purchased a mortgage on property of a partnership of which her husband is a member may foreclose it.[36] In Texas a wife may sue her husband for the protection of separate property in his possession against waste or damage, for its recovery when wrongfully converted, and to have a resulting trust declared.[37] The ignorance of a wife as to her rights under the Virginia Married Women's Act passed after her marriage does not entitle her to recover in equity property the proceeds of which have been expended by her husband.[38] In Vermont she may have specific performance of a contract to convey land to him.[39]

29. Root v. Root, 164 Mich. 638, 130 N. W. 194, 17 Det. Leg. N. 1222.

30. Randall v. Randall, 37 Mich. 563.

31. Sackman v. Sackman, 143 Mo. 576, 45 S. W. 264.

32. Reed v. Painter, 145 Mo. 341, 46 S. W. 1089.

33. Woodward v. Woodward, 148 Mo. 241, 49 S. W. 1001.

34. Grimes v. Reynolds, 184 Mo. 679, 83 S. W. 1132.

35. Masterman v. Masterman, 129 Md. 167, 98 A. 537; Heckman v. Heckman, 215 Pa. 203, 64 A. 425, 114 Am. St. R. 953; Ireland v. Ireland, 244 Pa. 489, 90 A. 911.

36. Youmans v. Youmans, 94 S. C. 88, 77 S. E. 755.

37. Borton v. Borton (Tex.), 190 S. W. 192; Heintz v. Heintz, 56 Tex. Civ. 403, 120 S. W. 941.

38. Throckmorton v. Throckmorton, 91 Va. 42, 22 S. E. 162.

39. Kittredge v. Kittredge, 79 Vt. 337, 65 A. 89.

§ 629. Effect of Statute of Limitations.

At common law the Statute of Limitations does not begin to run against a claim of one spouse against the other till after coverture ceases,[40] but it is otherwise where the statute permits the spouse to sue both at law and in equity.[41]

§ 630. Effect of Divorce or Abandonment.

There is sound policy in discouraging the pair from making of their matrimonial bickerings a cause of action for damages against one another. However it may be, at this day, therefore, as to actions of contract, or proceedings in equity, arising out of their distinct property relations, the wife has no cause of action in damages against her husband for a pure tort committed upon her person during the marriage relation, such as assault or false imprisonment. And as the objection to such actions is not merely one of procedure, the fact that she has since procured a divorce will not enable her to bring such a suit.[42]

A decree *a mensa et thoro* will not, in New Jersey, enable a wife to bring any action at law against him.[43] Under the Connecticut statute only a wife abandoned by her husband may maintain an action against him on a contract.[44]

§ 631. Under Married Women's Acts in General.

But in some States the legislature permits the wife to sue her husband, as well as others, in respect of her separate property.[45] Under the North Carolina statute a wife may maintain an action against her husband.[46] In Alaska a wife cannot maintain an action against her husband for necessaries of life, nor for any other act or failure of duty connected with or arising out of the marital relation.[47] Under the Arkansas statute a wife's representatives may maintain an action against her husband for her wrongful death,[48] and in that State and in Virginia she may sue her hus-

40. *In re* Gracie's Estate, 158 Pa. 521, 27 A. 1083.

41. Rice v. Crozier, 139 Ia. 629, 117 N. W. 984.

42. Phillips v. Barnett, 1 Q. B. D. 436; Abbott v. Abbott, 67 Me. 304.

43. Drum v. Drum, 69 N. J. Law, 557, 55 A. 86.

44. Muller v. Witte, 78 Conn. 495, 62 A. 756; Mathewson v. Mathewson, 79 Conn. 23, 63 A. 285, 5 L. R. A. (N. S.) 611.

45. Davis v. First Nat. Bank, 5 Neb. 242; Hardin v. Gerard, 10 Bush (Ky.), 259; Scott v. Scott, 13 Ind. 225; Chestnut v. Chestnut, 77 Ill. 346.

46. Graves v. Howard, 159 N. C. 594, 75 S. E. 998.

47. Decker v. Kedly, 148 F. 681, 79 C. C. A. 305.

48. Fitzpatrick v. Owens, 124 Ark. 167, 186 S. W. 832, 187 S. W. 460.

band's estate at law.[49] Where a wife may maintain an action against her husband for a personal debt, marriage will not operate to discontinue a suit begun by the wife against the husband before marriage.[50]

§ 632. Implied Statutory Power to Maintain Action.

There is much conflict of authority as to whether the acts removing the disabilities of married women to sue repeal by implication the provisions in the statutes of limitations allowing marred women to sue a certain time after the removal of the "disability" of coverture. The majority of the courts which have passel on this topic hold that there is an implied repeal and that a married woman under the so-called Married Women's Acts must bring suit within the statutory period named for other adults and for the following reasons:

First, that it is the disability as the result of marriage, and not the marriage itself, that is the reason for the exception or saving clause in the general statute. It is the disability that is removed; the marriage status is not in contemplation for removal as an impediment.

Second, the reason for the exception ceasing, the saving clause ceases also, and is no longer protective of the married woman.[51]

The courts which take the opposite view rely on the fact that implied repeal of statutes is not favored and that state the following reasons:

First, the wife is always largely under the influence and control of her husband, and the naked legal right to sue may be of little avail to her if his influence or command be that suit shall not be brought.

49. Free v. Maxwell (Ark.), 212 S. W. 325; De Baun's Ex'x v. De Baun, 119 Va. 85, 89 S. E. 239.

50. Holland v. Riggs, 53 Tex. Civ. 367, 116 S. W. 167.

51. *In the following States* it has been held that there is an implied repeal of the exception in the statutes of limitation by enactment of the married women's acts:

Moody v. Southern P. Co., 167 Cal. 786, 141 Pac. 388 (relying on express language of statute); Perkins v. Crompton, 69 Ga. 736; Castner v. Walrod, 83 Ill. 171, 25 Am. R. 369; Beattie v. Whipple, 154 Ill. 273, 40 N. E. 340; Brown v. Cousens, 51 Me. 301; King v. Merritt, 67 Mich. 194, 34 N. W. 689; Murphy v. J. H. Evans, &c., Co., 52 Neb. 593, 72 N. W. 960; Nissley v. Brubaker, 192 Pa. 388, 43 A. 967; McIrvin v. Lincoln Memorial University, 138 Tenn. 260, 197 S. W. 862, L. R. A. 1918C, 191. England: Lowe v. Fox, L. R. 15 Q. B. Div. 667; Weldon v. Neal, 32 Week. R. 828; Cameron v. Walker, 19 Ont. 212.

Second, mere ability to sue does not create an obligation to do so.

Third, there is no logical impropriety in the legislature providing that a married woman may sue alone, and in providing also that she may be given time to sue after the disability of coverture is removed; therefore, a repeal of the earlier statute by implication is not effected by reason of repugnancy in the two acts.

Fourth, a married woman is not exempted from the operation of the general statute merely because she is not allowed to sue alone, but on account of the marital relation itself, which may be supposed to disable or embarrass her in the assertion of her rights.[52]

§ 633. Torts in General.

At common law marriage extinguished all rights of action by the wife against the husband for antenuptial torts.[53] A wife cannot, even under Married Women's Acts, maintain, either before or after divorce, an action against her husband for a personal tort committed during coverture,[54] In Oklahoma a wife may maintain an action against her husband for a personal tort.[55] The District

52. *In the following States* it has been held that there is no implied repeal by the Married Women's Acts:

Big Sandy Co. v. Ramey, 162 Ky. 236, 172 S. W. 508; Lindell Real Estate Co. v. Lindell, 142 Mo. 61, 43 S. W. 368; Babcock v. Adams (Mo.), 196 S. W. 1118. See Mueller v. Becker, 263 Mo. 165, 172 S. W. 322; Carey v. Paterson, 47 N. J. Law, 365, 1 A. 473; State v. Troutman, 72 N. C. 551; Wilkes v. Allen, 131 N. C. 279, 42 S. E. 616; Ashley v. Rochwell, 43 Ohio St. 386, 2 N. E. 437; Morrison v. Holladay, 27 Ore. 175, 39 Pac. 1100; Wiesner v. Zaun, 39 Wis. 188; Bliler v. Boswell, 9 Wyo. 57, 59 P. 798, 61 P. 867.

A distinction has been laid down in Arkansas which finds no support elsewhere that there is no repeal if the statute provides for action within a specified time after discoverture. Hershy v. Latham, 42 Ark. 305; Cooper v. Newton, 68 Ark. 150, 56 S. W. 867. While there is a repeal by implication if the statute provides for action within a specified time after removal of disability. Garland County v. Gaines, 47 Ark. 558, 2 S. W. 460.

53. Henneger v. Lomas, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848.

54. Abbe v. Abbe, 22 App. Div. 483, 48 N. Y. S. 25; Strom v. Strom, 98 Minn. 427, 107 N. W. 1047; Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287, 5 Det. Leg. N. 145, 72 Am. St. R. 550, 40 L. R. A. 757; Strom v. Strom, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191, 116 Am. St. R. 387; Wilson v. Brown (Tex.), 154 S. W. 322; Sykes v. Speer, 102 Tex. 451, 112 S. W. 422; Peters v. Peters, 156 Cal. 32, 103 P. 219; Butterfield v. Butterfield, 195 Mo. App. 37, 187 S. W. 295; Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382; Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S. W. 628, L. R. A. 1916B, 881.

55. Fiedeer v. Fiedeer, 42 Okl. 124, 140 P. 1022, 52 L. R. A. (N. S.) 189.

of Columbia statute enabling a wife to sue for torts committed against her does not extend to torts committed by her husband against her.[56]

The question of the effect of the modern Married Women's Acts in giving the wife a right to sue the husband for torts committed by him on her depends on the language of each act. Statutes enlarging the rights of married women to contract and to maintain suits both upon contract and for tort the same as that given by law to the husband have been uniformly construed to give no greater rights than the husband had and therefore not to confer the right to sue for a tort for the reason that the husband had no such right.[57]

In other States where there are statutes authorizing the wife to contract either with her husband or with others and providing that she may sue or be sued alone the courts have construed those statutes to refer solely to contractural rights.[58]

In still other States statutes somewhat similar are held merely to give the right to sue upon causes of action which existed at common law and not to otherwise enlarge the common-law rights of a married woman.[59]

It has even been held that a statute giving the married woman the right to sue for torts committed against her as fully and freely as if she were unmarried did not confer upon the wife the right to sue her husband for damages on account of tort committed by him.[60]

Statutes, however, declaring that married women are given all rights as if sole have been held to give a wife the right to sue her husband for tort[61] and therefore her administrator may sue for her death caused by her husband.[62]

56. Thompson v. Thompson, 31 App. D. C. 557.

57. Strom v. Strom, 98 Minn. 427, 6 L. R. A. (N. S.) 191; Drum v. Drum, 69 N. J. Law, 557, 55 A. 86; Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629, 38 L. R. A. (N. S.) 780.

58. Peters v. Peters, 156 Cal. 32, 103 Pac. 219, 23 L. R. A. (N. S.) 699; Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 758.

59. Peters v. Peters, 42 Ia. 182; Abbott v. Abbott, 67 Me. 304, 24 Am. R. 27.

60. Thompson v. Thompson, 218 U. S. 611, 31 Sup Ct. 111, 30 L. R. A. (N. S.) 1153.

61. Fiedler v. Fiedler 42 Okla. 124, 140 Pac. 1022, 52 L. R. A. (N. S.) 189. A declaration that a married woman should hold all property hereafter acquired for her sole and separate use was held to give the wife the right to sue the husband for tort in Brown v. Brown, 88 Conn. 42, 89 A. 889, 52 L. R. A. (N. S.) 185.

62. Fitzpatrick v. Owens, 124 Ark. 167, 186 S. W. 832, 187 S. W. 460, L. R. A. 1917B, 774.

§ 634. Assault by Husband on Wife.

Husband and wife cannot, without express legislation to that effect, be indicted for the larceny or burglary or arson of one another's property, nor sued in tort for damages respecting such mutual property, more than at common law; equity and the Married Women's Acts importing no change in this respect, by the mere creation of a separate estate in the wife's favor.[63] The tendency, however, is to exempt each from the consequences of the other's torts, holding husband or wife liable only for the wrong to others in which he or she participates, nor permitting the incidental and unsanctioned fraud, injury, or negligence of the one to obstruct the legal remedies of the other and innocent one.[64] A husband who communicates syphilis to his wife is guilty of assault and battery.[65] A man who beats a woman with whom he has gone through a marriage ceremony and is living as his wife is liable under the Delaware statute making wife beating a misdemeanor, though the marriage was void.[66] The punishment for such offence may be either a whipping, or fine and imprisonment.[67] Under the Arkansas constitution providing that a wife's separate property acquired either before or during coverture shall remain such, a husband may be guilty of larceny of his wife's property,[68] and the same is true under a similar Indiana statute.[69] Under recent statutes a husband may be prosecuted for slandering his wife.[70] In some States a wife may now maintain an action against her husband for an assault committed by him on her,[71] but under some

63. Thomas v. Thomas, 51 Ill. 162; Snyder v. People, 26 Mich. 106; Morgan v. State, 63 Ga. 307; Overton v. State, 43 Tex. 616.

64. Moore v. Foote, 34 Mich. 443; Flori v. St. Louis, 3 Mo. App. 231; Campbell v. Quackenbush, 33 Mich. 287; Martin v. Robson, 65 Ill. 129.

65. State v. Lankford, 6 Boyce's (Del.), 594, 102 A. 63.

66. State v. Collins (Del.), 99 A. 87.

67. State v. Finley, 4 Pennewill (Del.), 29, 55 A. 1010.

68. Hunt v. State, 72 Ark. 241, 79 S. W. 769, 105 Am. St. R. 34, 65 L. R. A. 71.

69. Beasley v. State, 138 Ind. 552, 38 N. E. 35, 46 Am. St. R. 418.

70. Stayton v. State, 46 Tex. Cr. R. 205, 78 S. W. 1071, 108 Am. St. R. 988; State v. Fulton, 149 N. C. 485, 63 S. E. 145.

71. Gilman v. Gilman, 78 N. H. 4, 95 A. 657, L. R. A. 1916B, 907; Brown v. Brown, 88 Conn. 42, 89 A. 889, 52 L. R. A. (N. S.) 185; Mathewson v. Mathewson, 79 Conn. 23, 63 A. 285, 5 L. R. A. (N. S.) 611; Fitzpatrick v. Owens, 124 Ark. 167, 186 S. W. 832, L. R. A. 1917B, 774, Ann. Cas. 1918C, 772; Johnson v. Johnson, 201 Ala. 41, 77 So. 335.

In Johnson v. Johnson, 201 Ala. 41, 77 So. 335, the court remarks:

"The ancient common law of England, which gave the husband, at least among 'the lower rank of the people,' the right to restrain the wife of her liberty and to chastise her (1 Blk. Com. 444), was never in this State the

Married Women's Acts a wife still cannot maintain an action against her husband for his assault on her.[72]

§ 635. Ejectment.

In Alabama a wife may maintain ejectment against her husband to recover possession of land.[73] Her judgment against the husband to recover her premises which are occupied as the matrimonial abode, must needs be attended with practical difficulties.[74] and so must her entry to foreclose, where she is mortgagee of the land, while her husband holds the equity of redemption.[75]

§ 636. Replevin.

Under the Missouri Married Women's Act either spouse may maintain replevin against the other.[76]

law for any rank or condition of people (Fulgham v. State, 46 Ala. 143). The Legislature, as we have seen, has given the wife an action against the husband for injuries to her property rights, and we can hardly conceive that the Legislature intended to deny her the right to sue him separately in tort for damages arising from assaults upon her person. The language of the statute covers the one form of injury as well as the other, and we hold that the wife was properly allowed to proceed with her suit, defendant's pleas and special charges requested to the contrary nevertheless. The wife's remedies, by a criminal prosecution or an action for divorce and alimony, which in some jurisdictions are allowed to stand as her adequate remedies for wrongs of the sort described in this complaint, so far from being adequate remedies, appear to us to be illusory and inadequate, while, as for the policy which would avoid the public airing of family troubles, we see no reason why it should weigh more heavily against this action than against those which the courts universally allow.''

There is no more breach of public policy involved here than in the awarding of alimony or in allowing the wife to prosecute the husband criminally for assault. Fiedler v. Fiedler (Okla.), 140 Pac. 1022, 52 L. R. A. (N. S.) 189.

72. Osburn v. Kuster (Va.), 96 S. E. 315, 1 A. R. L. 439; Thompson v. Thompson, 218 U. S. 611, 31 S. Ct. 111, 54 L. Ed. 1180; Keister's Adm'r v. Keister's Ex'rs 1918, (Va.) 96 S. E. 315.

73. Cook v. Cook, 125 Ala. 583, 27 So. 918, 82 Am. St. R. 264.

74. Manning v. Manning, 79 N. C. 293. Whether trover lies for fixtures placed by the husband on his wife's land, see Morrison v. Berry, 42 Mich. 389.

75. Tucker v. Fenno, 110 Mass. 311. And so *vice versa*, where her husband desires to foreclose. Cormerais v. Wesselhoeft, 114 Mass. 550.

The policy recognized in several cases, upon this mooted point of statute construction, is to regard the wife as having rights of action, though not permitting the remedy to be fully enforced while coverture lasts; but in others, right and remedy are more decidedly negatived; and in either instance the desire manifested is to uphold the sanctity and peace of conjugal life by discouraging litigious disputes between the united parties. Another objection to admitting such suits is the danger that husband and wife may thus connive to defraud creditors, as where, for instance, the one should default upon an improper claim, and permit his property to be nominally absorbed by the other.

76. Shewalter v. Wood (Mo. 1916), 183 S. W. 1127.

§ 637. Negligence.

Under the Georgia statute a wife cannot maintain an action against her husband for negligence in operating an automobile.[77] Under the Missouri Married Women's Act neither spouse can sue the other for negligence.[78]

§ 638. Contract.

In some States a wife may sue her husband on a contract as though sole,[79] even on a contract made by the husband at marriage to treat his wife as a husband should.[80] In Connecticut and Iowa a wife may maintain an action against her husband on a note given for money loaned him by her,[81] as well as on his note which she has inherited from her father's estate.[82] Under the Arkansas statute a wife may sue her husband's estate for a debt accruing to her before the enactment of the enabling statute, which is of procedure only.[83] In Illinois spouses may sue each other on all contracts except for services to each other.[84] The Iowa statute empowering a spouse to sue the other spouse for property of which such other spouse has obtained possession either before or after coverture, or for any right growing out the same does not enable a wife to maintain an action against her husband on his personal contract.[85] Under the Kentucky statute enabling a wife to sue and be sued, it was held that she might sue for a judicial sale of land owned by them jointly, where it was not capable of division and could not be sold by agreement,[86] and recover any debt he owes her,[87] and may sue a partnership for money loaned to it though her husband was a member and though the money passes through his hands.[88] In Michigan a husband cannot sue his wife on a

77. Heyman v. Heyman, 19 Ga. App. 634, 92 S. E. 25.

78. Shewalter v. Wood (Mo.), 183 S. W. 1127.

79. Trayer v. Setzer, 72 Neb. 845, 101 N. W. 989; McDowell v. McDowell, 37 N. D. 367, 164 N. W. 23; Regal Realty & Investment Co. v. Gallagher (Mo.), 188 S. W. 151.

80. Montgomery v. Mortgomery, 142 Mo. App. 481, 127 S. W. 118.

81. *In re* Deaner's Estate, 126 Ia. 701, 102 N. W. 825, 106 Am. St. R. 374; Mathewson v. Mathewson, 79 Conn. 23, 63 A. 285.

82. Miller Watt & Co. v. Mercer (Ia.), 150 N. W. 694; Heacock v. Heacock, 108 Ia. 540, 79 N. W. 353, 75 Am. St. R. 273.

83. Free v. Maxwell (Ark.), 212 S. W. 325.

84. Hendrickson v. Hendrickson, 198 Ill. App. 442.

85. Heacock v. Heacock, 108 Ia. 540, 79 N. W. 353, 75 Am. St. R. 273.

86. Niles v. Niles, 143 Ky. 94, 136 S. W. 127.

87. Greenup v. United States Fidelity & Guaranty Co., 159 Ky. 647, 167 S. W. 910.

88. Walker's Assignees v. Walker (Ky.), 114 S. W. 338.

purely executory contract.[89] In the same State where a wife holding a note of her husband delivered it to him with the understanding that it was paid, and that he was to use the money till she called for it, it was held that she could recover against him for money loaned, but not on the note.[90] In Massachusetts where a husband gave a wife a note before divorce to be accepted, with other property, in lieu of alimony if the divorce was granted, it was held that after the divorce she could maintain an action upon the note, where the transaction was made known to the court at the time the divorce was granted.[91] Under a statute giving the wife the right to bargain and contract as a married man may do the wife may maintain action against the husband for unusual services rendered under an express agreement that she should be paid for them where the services are in the course of his business outside of the family relation.[92]

§ 639. Partition.

In Oklahoma where an undivided interest in land is awarded to a wife for her child, she may maintain partition against her husband.[93]

§ 640. Amounts Expended for Necessaries.

In Oklahom and in New York a wife who has been forced to support herself by her husband's failure to do so may, under the statute, recover from him the amount so expended.[94]

§ 641. Confession of Judgment.

In Pennsylvania a wife may confess judgment against her husband on a warrant of attorney.[95]

§ 642. Trover.

Under the Arizona statute a wife may maintain an action against her husband for a conversion of her separate estate.[96] Under the Rhode Island Married Women's Act, enabling a wife to sue and be sued alone, she may maintain trover against her

89. Jenne v. Marble, 37 Mich. 319.

90. Letts v. Letts, 73 Mich. 138, 41 N. W. 99.

91. Chapin v. Chapin, 135 Mass. 393.

92. *Re* Cormick (Neb.), 160 N. W. 989, L. R. A. 1917D, 265.

93. Moore v. Moore (Okla.), 158 P. 578.

94. De Brauwere v. De Brauwere, 144 App. Div. 521, 129 N. Y. S. 587; Sodowsky v. Sodowsky (Okla.), 152 P. 390.

95. Harwood v. Harwood, 235 Pa. 532, 84 A. 426.

96. Eshom v. Eshom, 18 Ariz. 170, 157 P. 974.

husband for the conversion of her household furniture.[97] In the same State she may maintain trover against him for property of the wife not included in a separation agreement between them which he has taken.[98] Under the Missouri Married Women's Act either spouse may maintain an action for conversion.[99]

§ 643. Actions by Wife Against Third Persons.

Married Women's Acts enabling the wife to sue alone are prospective in their operation,[1] and being enabling or remedial, should be construed so as to accomplish their purpose.[2] An act providing that a wife may sue or be sued as if sole effects, it would appear, the remedy only, in such a sense as to apply whether the contract was made before or after the law was passed, provided the action be not commenced until after.[3] As such acts are commonly construed, some allegation of separate contract capacity or liability on her part ought to be shown by the pleadings;[4] for, after all, such capacity or liability, as conferred by the Married Women's Acts, is taken to be somewhat exceptional, and courts and legislatures still disincline to permit a married woman to sue and be sued in respect of her contracts, irrespective of her separate property.[5] Since the right of a wife to sue alone is dependent on statute, the question is governed by the law of the forum,[6] both as to liability and damages,[7] even though she could not sue by the law of her domicile.[8] Where a wife, temporarily in Louisiana, was entitled by the law of her domicile to sue in her own name for a tort or trespass to her person, it was held that she might do so in Louisiana for an injury sustained there, though the law

97. Smith v. Smith, 20 R. I. 556, 40 A. 417.

98. Carpenter v. Carpenter, 154 Mich. 100, 117 N. W. 598, 15 Det. Leg. N. 686.

99. Shewalter v. Wood, 183 S. W. 1127.

1. St. Louis Southwestern Ry. Co. v. Purcell, 135 F. 499, 68 C. C. A. 211; Rogers v. Lynch, 44 W. Va. 94, 29 S. E. 507; Snyder v. Jett, 138 Tenn. 211, 197 S. W. 488; Moody v. Southern Pac. Co., 167 Cal. 786, 141 P. 388.

2. Beagles v. Beagles, 95 Mo. App. 338, 68 S. W. 758; Arnold v. Arnold, 140 Ind. 199, 39 N. E. 862.

3. Buckingham v. Moss, 40 Conn. 461.

4. Nash v. Mitchell, 71 N. Y. 199; Magruder v. Buck, 56 Miss. 314; Smith v. New England Bank, 45 Conn. 416; Starke v. Malone, 51 Ala. 169.

5. What qualifications apply in certain States to this rule, the reader will gather from this and the preceding chapters.

6. Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382.

7. Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 130 N. W. 8.

8. Texas & P. Ry. Co. v. Humble, 181 U. S. 57, 21 S. Ct. 526, 45 L. Ed. 747.

of that State is otherwise.[9] Under the Missouri Married Women's Act a wife may maintain there in her own name an action on a contract made in another State, though the common law will control both its construction and effect.[10]

§ 644. In Equity.

In New York and Mississippi it is held that the Married Women's Act does not oust the original jurisdiction of courts of equity in cases affecting the separate estates of married women.[11] Speaking of the legislation in the former State, the court observes that the statutes of 1848 and 1849 are but the legislative adoption of the equitable rules, and their application to all property of the wife whether legal or equitable. "The evil complained of was the too great subjection of the property of the wife, at common law, to the control of the husband and his creditors. The remedy was to apply the rule of this court, in respect to the separate property of married women, to all property belonging to the wife. It is true the property is thus converted into a legal estate, but it is none the less a separate estate, independent of the husband.[12] So, too, in a Michigan case, it is observed that, as regards the wife's individual property, the married women's legislation has done little more than to give legal rights and remedies to the wife, where before, by settlement or contract, she might have established corresponding equitable rights and remedies.[13] That this legislation, properly so called, does not profess to operate upon the family relation, or take from the husband his marital rights, except as pertaining to property, is frequently insisted upon.[14]

"The estate thus assured to the wife," as a Pennsylvania case well observes, "is only analogous to the equitable separate estate, and is seriously modified by the fact that she has no trustee sepa-

9. Williams v. Pope Mfg. Co., 52 La. Ann. 1417, 27 So. 851, 50 L. R. A. 816.

10. Coombes v. Knowlson (Mo.), 182 S. W. 1040.

11. Mitchell v. Otey, 23 Miss. 236; Colvin v. Currier, 22 Barb. (N. Y.) 371. See the recent case of Wood v. Wood, 83 N. Y. 575, where Folger, C. J., observes that the Married Women's Acts, by their own operation, changed the wife's capacity to hold a separate estate as a matter of equity into a legal estate.

12. Colvin v. Currier, 22 Barb. (N. Y.) 382.

13. Snyder v. People, 26 Mich. 106. And see Clawson v. Clawson, 25 Ind. 229.

14. Snyder v. People, 26 Mich. 106. A conveyance to a married woman's separate use does not create in her a separate estate by contract, in opposition to her separate estate by statute, where a large portion of the purchase-money came from her separate statutory estate. Molton v. Martin, 43 Ala. 651.

rate from her husband; and that he, therefore, as the legal guardian of her rights, necesarily becomes, in a large sense, her trustee, but without all of the law's suspicion of his dealing with the trust property, for the community of interests and sympathies of husband and wife forbid this."[15] In general, however, where local statute confers upon the wife the full legal title to her separate property, together with ample remedies, she cannot come into equity unless she can show some special ground of equitable cognizance, such as fraud upon her rights.[16] Chancery has power to reform a wife's conveyance where it is clearly shown that by mistake of the scrivener the land conveyed is wrongly described.[17]

§ 645. Under Married Women's Acts.

Concerning actions, &c., by or on behalf of a married woman, including arbitration. Modern local statutes have in these respects wrought great changes. Doubtless, in various States, the joinder of husband and wife as plaintiffs is still proper even where the wife is the meritorious cause of action.[18] The English act of 1870 permits the married woman to maintain an action in her own name in respect of her separate property.[19] And in some States, a wife may now sue at law, in matters relating to her separate property, without joining her husband,[20] but under some

15. Lowrie, C. J., in Walker v. Reamy, 36 Pa. 410, 414.

16. Daniel v. Stewart, 55 Ala. 278; Furness v. McGovern, 78 Ill. 337.

17. Lewis v. Ferris (N. J.), 50 A. 630; Herring v. Fitts, 43 Fla. 54, 30 S. 804; Christensen v. Holingsworth, 6 Ida. 87, 53 P. 211, 96 Am. St. R. 256.

18. See *supra*, Reinheimer v. Carter, 31 Ohio St. 579; Baird v. Fletcher, 50 Vt. 603. As to actions affecting the wife's real estate, where the adult husband is under guardianship for insanity, &c., see Hamilton v. Colwell, 10 R. I. 39.

19. Act 33 and 34 Vict., ch. 93 (1870).

20 Willis v. J. G. White & Co., 150 N. C. 199, 63 S. E. 942; Sonnemann v. Loeb, 11 App. D. C. 143; Gallagher v. Mjelde, 98 Wis. 509, 74 N. W. 340; Porter v. Taylor, 64 Fla. 100, 59 So. 400; Gotcher v. Haefner, 107 Mo. 270, 17 S. W. 967; Harvey v. Sparks Bros., 45 Wash. 578, 88 P. 1108; Sheldon v Birmingham Bldg. & Loan Ass'n, 121 Ala. 278, 25 S. 820; Campbell v. Galbreath, 12 Bush (Ky.), 459; Corey v. Howard, 19 R. I. 723, 37 A. 946; Moore v. Moore (Okla.), 158 P. 575; Bechtol v. Ewing (Ohio), 105 N. E. 72; Gage v. Gage, 78 Wash. 262, 138 P. 886; Duncan v. Duncan, 6 Cal. App. 404, 92 P. 310; Walker v. Gilman, 45 Me. 28; Ackly v. Tarbox, 31 N. Y. 565; Furrow v. Chapin, 13 Kan. 107; Alexanders v. Goodwin, 54 N. H. 423; Forbes v. Tuckerman, 115 Mass. 115; Peters v. Fowler, 41 Barb. (N. Y.) 467; Emerson v. Clayton, 32 Ill. 493; Leonard v. Townsend, 26 Cal. 435; Weymouth v. Chicago, &c., R. R. Co., 17 Wis. 550; Jordan v. Cummings, 43 N. H. 134; Gee v. Lewis, 20 Ind. 149; Beavers v. Baucum, 33 Ark. 722; Earnhardt v. Clement, 137 N. C. 91, 49 S. E. 49.

such statutes he may join with her in such an action.[21] Under such statutes she may contest a will alone.[22] Under some Married Women's Acts a wife may now sue alone without regard to her separate estate,[23] against persons other than her husband.[24] Where property of each spouse is included in a mortgage under which an illegal sale is made, the wife may sue alone to avoid the mortgage as to both.[25] A wife may maintain an action to have a deed declared a mortgage where she incurred the debt and made the contract under which the property was conveyed and has an interest in the land.[26] Where a contract was assigned to a wife in Illinois, it was held that she might sue on it in Missouri, regardless of the common-law presumption that the common law prevailed in Illinois, which would have obliged her to sue in equity.[27] Under other statutes her husband must be joined.[28] In Louisiana a wife may sue in her own name to recover her paraphernal funds.[29] The proper form of such action in that State is by the wife, with the authorization of the court or her husband.[30] The husband's authorization must appear of record in order to enable her to sue,[31] but it is enough if it is filed before trial on the merits,[32] and is sufficiently shown where he joins in the action,[33]

21. City of New Albany v. Lines, 21 Ind. App. 380, 51 N. E. 346; Mitchell v. Penny, 66 W. Va. 660, 66 S. E. 1003; Clay v. City of St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. R. 883; Cox v. St. Louis, M. & S. E. Ry. Co., 123 Mo. App. 356, 100 S. W. 1096.

22. *In re* Beauchamp's Will, 146 N. C. 254, 59 S. E. 687; Pierce v. Farrar (Tex.), 126 S. W. 932.

23. Child v. Emerson, 102 Mich. 38, 6 N. W. 292; Fox v. Manufacturer's Fire Ins. Co., 31 W. Va. 374, 6 S. E. 929; Howard v. Gibson, 22 Ky Law, 1294, 60 S. W. 491; Wright v. Wright, 97 Ind. 444; Turner v. Gill, 105 Ky. 414, 20 Ky. Law, 1253, 49 S. W. 311; Richmond Ry. & Electric Co. v. Bowles, 92 Va. 738, 24 S. E. 388; Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 A. 285; Holmes v. Leadbetter, 95 Mo. App. 419, 69 S. W. 23; Rice Stix & Co. v. Sally, 176 Mo. 107, 75 S. W. 398; Quirk v. Liebert, 12 App. D. C. 394; Texas City Terminal Co. v. Thomas (Tex.), 178 S. W. 707; Ennis v. Nusbaum, 90 Kan. 296, 133 P. 537.

24. *In re* Hill, 190 F. 390; Schultz v. Christopher, 65 Wash. 496, 118 P. 629.

25. Shew v. Call, 119 N. C. 450, 26 S. E. 33, 56 Am. St. R. 678.

26. Rodda v. Needham, 78 Wash. 636, 139 P. 628.

27. Coombes v. Knowlson (Mo.), 200 S. W. 743.

28. Fink v. Campbell 70 F. 664, 17 C. C. A. 325, 37 U. S. App. 462; Samarzevosky v. Baltimore City Pass. Ry. Co., 88 Md. 479, 42 A. 206.

29. Hart v. Bowen, 86 F. 877, 31 C. C. A. 31 (cert. den., 171 U. S. 688, 18 Sup. Ct. 943).

30. Martin v. Derenbecker, 116 La. 495, 40 So. 849.

31. M. M. Sanders & Son v. Schilling, 123 La. 1009, 49 So. 689.

32. Evans. v. De L'Isle, 24 La. Ann. 248.

33. Delacroix v. Meux, 28 La. Ann. 515.

which is the proper method of showing his authorization.[34] In the same State where a wife is not property authorized to sue, the defendant may be relieved from answering till such authority is obtained.[35] In case of the interdiction of the husband, the court may authorize the wife to sue.[36] Under a later statute such authorization is not necessary to enable the wife to maintain an action for personal injuries.[37] She cannot maintain an appeal without such authorization.[38] An infant wife may sue for partition where aided and assisted by her husband, without the authority of the judge, on the advice of a family meeting.[39] The Michigan statute enabling a wife to sue in her own name for exempt property seized on process against her husband applies only where the seizure was on adversary process against him.[40] Under the South Dakota statute it was held that the wife could maintain an action for injury to her rights by the sale of opium to her husband.[41]

§ 646. Necessity of Joining Husband as Party-at-Law.

At common law both spouses must join to recover on a cause of action accruing to the wife before coverture.[42] Under the California statute a husband need not be joined in an action on a note which is his wife's separate estate, though the consideration of the note was at one time community property,[43] but it is proper to join him.[44] Under the Indiana statute a husband is not a proper party to an action against a wife for breach of an agreement made by him as her agent to make improvements on land demised by her.[45] Though under the Kentucky statute a wife cannot sell her land without her husband's joinder, he is not a necessary party to an action to enforce a lien on such land.[46] In Massachusetts a husband is a proper party to a suit to charge a wife's

34. Jones v. Henry, Man. Unrep. Cas. (La.), 65.

35. Longino v. Webb Press Co., 132 La. 25, 60 So. 707.

36. Cartwright v. Puissigur, 125 La. 700, 51 So. 692.

37. Shield v. F. Johnson & Son Co., 132 La. 773, 61 So. 787.

38. Jurey & Harris v. Hord, Man. Unrep. Cas. (La.), 52.

39. Tobin v. U. S. Safe Deposit & Sav. Bank, 115 La. 366, 39 So. 33.

40. Singer Mfg. Co. v. Cullaton, 90 Mich. 639, 51 N. W. 687.

41. Moberg v. Scott, 38 S. D. 422, 161 N. W. 998, L. R. A. 1917D, 732.

42. Hennessey v. White, 2 Allen (Mass.), 48.

43. Cullen v. Bisbee, 168 Cal. 695, 144 P. 968.

44. Clark v. Koesheyan, 26 Cal. App. 305, 146 P. 904; Garver v. Thoman, 15 Ariz. 38, 135 P. 724.

45. Richardson v. League, 21 Ind. App. 429, 52 N. E. 618.

46. Rhodes v. People's Sav. & Bldg. Ass'n, 107 Ky. 119, 21 Ky. Law, 747, 52 S. W. 1050.

separate estate with a debt created by an invalid mortgage.[47] In some States his joinder is optional with the wife.[48] Where she is neither a necessary or proper party her joinder is fatal to the action.[49] Where the wife should not sue alone in law, it might appear that, in respect of separate property, the husband should sue alone as trustee for her; so that in either case their joint suit would be bad.[50]

§ 647. In Equity.

While, as concerns suits by a wife at law in respect to her separate estate, it may not be deemed necessary to join the husband with her as plaintiff, in equity proceedings it might be different, for here all interested parties are to be embraced in a bill. Thus, where the wife seeks to enforce a vendor's lien for money on land conveyed by her and her husband, but belonging solely to her, it is proper that the husband should be made a party, so as to protect the title from any subsequent claim on his part.[51] But the Massachusetts act is construed as to "suing and being sued," so that the husband need not be made a party complainant, even to a bill in equity brought by the wife, where it concerns her separate property.[52]

Chancery proceedings may be instituted by the wife as it would appear, by her next friend or otherwise, in respect of her separate property, so as to render the husband a party defendant and bind him by the decree.[53] In Florida a husband is a necessary party to a suit to enforce his wife's mortgage.[54] In West Virginia where a bill against spouses jointly on joint and several notes was

47. Heburn v. Warner, 112 Mass. 271, 17 Am. St. R. 86.

48. Bowers v. Starbuck (Ind.), 116 N. E. 301; Normile v. Wheeling Traction Co., 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901.

49. Oakley v. Emmons, 73 N. J. Law, 206, 62 A. 996.

50. Bell v. Allen, 53 Ala. 125. And see Wilson v. Garaghty, 70 Mo. 517.

51. Wing v. Goodman, 75 Ill. 159.

52. Forbes v. Tuckerman, 115 Mass. 115. This appears to be the New Jersey rule. Tantum v. Coleman, 26 N. J. Eq. 128. But cf. Robinson v. Trofitter, 109 Mass. 578; Cantrell v. Davidson, 3 Tenn. Ch. 426, where the husband may be deemed an interested party defendant. So as to restraining the collection of an illegal tax, where both husband and wife occupy the land as their home. Henry v. Gregory, 29 Mich. 68. See further, Koehler v. Bernicker, 63 Mo. 368.

53. Cantrell v. Davidson, 3 Tenn. Ch. 426; Robinson v. Trofitter, 109 Mass. 578; Bennett v. Winfield, 4 Heisk. (Tenn.) 440; Reynaud v. Memphis Ins. Co., 7 Baxt. (Tenn.) 279.

54. Garrison v. Parsons, 45 Fla. 335, 33 So. 525.

dismisesd on demurrer as against the husband, it was held that the action might proceed against the wife.[55]

§ 648. Necessity of Guardian ad Litem or Next Friend.

A married woman sometimes sues properly by a next friend.[56] The object of suing by next friend is to secure the costs, or for convenience, where she is disqualified to act for herself in the matter sued on.[57] Where she is insane, for instance, the law will not in general presume her consent to a bill in equity filed by her husband in their joint names, nor his agency in employing an attorney to represent her; her interests being distinct from his own.[58] A statute guardian is sometimes appointed to protect the separate interests of an insane married woman, with relation to her property, or suits in which she is concerned.[59] Where the action is against the husband, as for divorce or alimony, or in cases involving trusts, title or management or property, etc., no next frend is necessary.[60] In Florida a wife sues by her husband as next friend.[61] Under the New Jersey Married Women's Act a wife may sue in equity without a next friend to recover costs awarded in proceeding for divorce *a mensa et thoro*.[62]

§ 649. Effect of Husband's Refusal to Join.

In Kentucky she may sue alone if he refuses to join.[63] Under that statute desertion and failure to support the wife for several years has been held a refusal to unite with her in actions she may bring against third persons.[64] In Indiana he may be joined as defendant, if he refuses to join as plaintiff.[65] In Pennsylvania if the husband does not join within twenty days after service of a rule to join, the wife may proceed alone.[66] In Texas a husband

55. Skidmore v. Jett, 39 W. Va. 544, 20 S. E. 573.

56. Leftwick v. Hamilton, 9 Heisk. (Tenn.) 310.

57. Wood v. Wood, 56 Fla. 882, 47 So. 560.

58. Stephens v. Porter, 11 Heisk. (Tenn.) 341.

59. Gardner v. Maroney, 95 Ill. 552.

60. Wood v. Wood, 56 Fla. 882, 47 S. 560.

61. Wood v. Wood, 56 Fla. 882, 47 So. 560.

62. Van Orden v. Van Orden (N. J.), 41 A. 671.

63. Baumeister v. Markham, 101 Ky. 122, 19 Ky. Law, 308, 39 S. W. 844, 72 Am. St. R. 397; Anderson v. Anderson, 11 Bush (Ky.), 327 (decided under a former statute).

64. Baumeister v. Markham, 101 Ky. 122, 19 Ky. Law, 308, 39 S. W. 844, 72 Am. St. R. 397; Hart v. Bowen, 86 F. 877, 31 C. C. A. 21 (cert. den., 171 U. S. 688, 18 S. Ct. 943).

65. Logan v. Logan, 77 Ind. 558.

66. Rockwell v. Waverly, S. & A. Electric Traction Co., 187 Pa. 568, 41 A. 324, 43 W. N. C. 105; Donoghue v. Consolidated Traction Co., 201 Pa. 181, 50 A. 952.

may sue, either alone or with his wife, to recover her separate estate, and she may sue alone with the authority of court, if he neglects or refuses to do so.[67]

§ 650. Effect of Separation.

In some States a deserted wife may sue alone,[68] as well as where the spouses are separated,[69] especially where he refuses to join,[70] even though the desertion has not continued long enough to be cause for divorce.[71] In Florida the wife may sue alone if the husband has deserted her and the desertion has continued six months.[72]

§ 651. Compromise of Claim.

A wife may make a compromise and settlement as to claims, by right of her separate estate.[73]

§ 652. Contract.

A wife may sue alone for rent under her lease,[74] or on an agreement to convey real estate to her, which did not name her husband as a party.[75] In Delaware, Georgia, Iowa, Maryland and New York a wife may recover for board furnished by her only with

67. Kingsbury v. Phillips (Tex.), 142 S. W. 73; Western Bank & Trust Co. v. Gibbs (Tex.), 96 S. W. 947.

68. Missouri, K. & T. Ry. Co. v. Allen, 53 Tex. Civ. 433, 115 S. W. 1179; Brown v. Brown, 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242; Koch v. City of Williamsport, 195 Pa. 488; Missouri, K. & T. Ry. Co. v. Hennesey, 20 Tex. Civ. 316, 49 S. W. 917; Word v. Kennon (Tex.), 75 S. W. 365; Heagy v. Kastner (Tex.), 138 S. W. 788; Union Oil Co. v. Stewart, 158 Cal. 149, 110 P. 313; Madden v. Hall, 21 Cal. App. 541, 132 P. 291; Duncan v. Duncan, 6 Cal. App. 404, 92 P. 310; Muller v. Hale, 138 Cal. 163, 71 P. 81.

69. Horton v. City of Seattle, 53 Wash. 316, 101 P. 1091; Work v. Campbell, 164 Cal. 343, 128 P. 943.

70. City of San Antonio v. Wildenstein, 49 Tex. Civ. 514, 109 S. W. 231.

71. Humphrey v. Pope, 122 Cal. 253, 54 P. 847.

72. Saunders Transfer Co. v. Underwood (Fla.) 81 So. 105.

73. Husband v. Epling, 81 Ill. 172; Lewis v. Gunn, 63 Ga. 542.

74. Hayner v. Smith, 63 Ill. 430.

75. Stampoffski v. Hooper, 75 Ill. 241.

For suit for injury to reversion of her land, as distinguished from injury to the joint marital possessions or crops, see Lyon v. Green Bay R., 42 Wis. 548; Indianapolis R. v. McLaughlin, 77 Ill. 275. Where the suit relates to unpaid taxes upon the wife's land, the wife may sue, and show by parol that they are her separate lands, notwithstanding they were taxed to her husband. Dinsmore v. Winegar, 57 N. H. 382. Cf. Williams v. Turner, 50 Tex. 137. The husband cannot maintain trespass *qu. cl. fr.* against one who carries away soil from his wife's farm. Bradford v. Hanscom, 68 Me. 103.

The Statute of Limitations runs, as usual, so far as the coverture disability has been removed under the local act. Hayward v. Gunn, 82 Ill. 385.

her husband's consent.[76] Under the Delaware, Indiana and Missouri Married Women's Acts a wife may recover for her personal labor performed for persons other than her husband,[77] and where the services were rendered jointly the spouses may recover therefor in a joint action.[78] In Iowa where a farm hand contracted to work for a stipulated sum and the board of himself and wife, she to assist in the housework, it was held that he alone could sue for its breach, there being no independent employment of the wife.[79] Under the Michigan statute a wife may recover for her services only where the consent of the husband is communicated to the debtor and where the latter understands that he is contracting with the wife and that she expects compensation.[80] In New Jersey the husband only can recover for such services.[81] In Ohio a wife may recover in her own name for special care and attention given to an invalid for whose board and lodging her husband has already received payment.[82]

§ 653. Confession of Judgment.

A wife cannot usually confess judgment, though it be for a debt incurred for the benefit of her separate estate, as this is not beneficial to her, and its exercise is liable to abuse.[83]

76. Neudecker v. Leister (Md.), 104 A. 47; *In re* Grogan's Estate, 82 Misc. 555, 145 N. Y. S. 285; Broughton v. Nicholson, 150 Ia. 119, 129 N. W. 814; Tucker v. Anderson (Ia.), 154 N. W. 477; Central of Georgia Ry. Co. v. Cheney, 20 Ga. App. 393, 93 S. E. 42; Johnson v. Tait, 97 Misc. 48, 160 N. Y. S. 1000; Briggs v. Devoe, 89 App. Div. 115, 84 N. Y. S. 1063; Vincent v. Ireland, 2 Pennewill (Del.), 580, 49 A. 172; *In re* Dailey's Estate, 43 Misc. 552, 89 N. Y. S. 538; Holcomb v. Harris, 166 N. Y. 257, 59 N. E. 820.

77. Lillard v. Wilson, 178 Mo. App. 609; Arnold v. Rifner, 16 Ind. App. 442, 45 N. E. 618; Lodge v. Fraim, 5 Pennewill (Del.), 352, 63 A. 233.

78. Lambert v. Hodgdon, 172 Mo. 24, 154 S. W. 450.

79. Weeksman v. Powell (Ia.), 160 N. W. 377.

80. Brackett's Estate v. Burnham's Estate (Mich.), 174 N. W. 121; Heral v. McCabe, 171 Mich. 530, 137 N. W. 237.

81. Garretson v. Appleton, 58 N. J. Law, 386, 37 A. 150; Peterson v. Christianson, 68 N. J. Law, 392, 56 A. 288; Wooster v. Eagan, 88 N. J. Law, 687, 97 A. 291; Stevenson v. Akarman, 83 N. J. Law, 458, 85 A. 166.

82. Badger v. Orr, 1 Ohio App. 293, 34 Ohio Cir. Ct. 328.

83. Watkins v. Abrahams, 24 N. J. 72. And see Patton v. Stevens, 19 Ind. 233. Otherwise in some States, for the right itself is theoretically incidental to the liability of being sued as if sole. Bank v. Garlinghouse, 53 Barb. (N. Y.) 615; Travis v. Willis, 55 Miss. 557. See Thomas v. Lowy, 60 Ill. 512.

§ 654. Submission to Arbitration.

A wife may, in some States, bind herself by a submission to arbitration.[84]

§ 655. In Tort; in General.

At common law the husband was entitled to the recompense for all such injuries to the wife's person, property, or character, by suit brought in his own name, or in the name of both, as the case might be.[85] And the rule is the same in all these cases, whether the fraud or injury was committed before or during coverture. But if the wife be a privy to the wrong, or knowingly suffer an injury to be committed upon her, the husband cannot maintain his action; for his right to damages cannot be greater than hers would have been, had she remained single.[86] Nor can an action be maintained where the husband instigates the wrong.[87]

Where the tort was committed before the woman was married, the action, if she marries afterwards, should be brought by husband and wife; or if she marries pending the action, the husband is entitled to be admitted as a plaintiff.[88] Under certain local statutes, too, a wife may now sue a liquor-dealer for damages caused her by selling liquors to her husband,[89] or a gamester for money lost by her husband at gaming.[90]

§ 656. Under Married Women's Acts.

The tendency of modern legislation is to secure to the wife's separate use all compensation in the nature of damages for injuries sustained by her through the negligence or misconduct of others,[91] and the wife sues in her individual name in many States to obtain

84. Palmer v. Davis, 28 N. Y. 242; Duren v. Getchell, 55 Me. 241. As to Mississippi, cf. Handy v. Cobb, 44 Miss. 699; Memphis R. v. Scruggs, 50 Miss. 284.

85. See *supra*, § 157.

86. Pillow v. Bushnell, 5 Barb. (N. Y.) 156.

87. Tibbs v. Brown, 2 Grant's Cases, 39. Nor in slander where the words are not actionable, though the wife become ill in consequence of the slander. Wilson v. Goit, 17 N. Y. 442.

88. Gibson v. Gibson, 43 Wis. 23.

89. Schneider v. Hosier, 21 Ohio St. 98.

90. Read v. Stewart, 129 Mass. 407.

91. Waldo v. Goodsell, 33 Conn. 432; Moody v. Osgood, 50 Barb. (N. Y.) 628; Knapp v. Smith, 27 N. Y. 277.

Where her husband is insane and out of the State, the wife may sue, on her personal wrong, in her own name. Gustin v. Carpenter, 51 Vt. 585.

Where the wife is required to sue alone by statute, the husband's joinder is ground for reversal. Chicago v. Speer, 66 Ill. 154. As to "notice of injury," see Babcock v. Guilford, 47 Vt. 519; Church v. Westminster, 45 Vt. 380.

such compensation.[92] In general damages recovered in a wife's action are her separate property,[93] but in the District of Columbia her separate release will not discharge the cause of action, the cause of action not being her separate property.[94]

§ 657. Trespass.

A wife may sue in trespass.[95] Where land is conveyed to spouses jointly, the wife alone cannot maintain trespass.[96] The wife has such an interest in the homestead, though in her husband's name, as to make a trespass thereon a wrong to her.[97] By statute in California they may sue jointly for trespass to land held in common.[98]

§ 658. Professional Negligence.

The wife, as sole or substantial party, has been allowed to sue for direct injury to herself from another's malpractice,[99] also for the malpractice of a physician.[1] Under the Maryland statute a husband must join in such an action.[2]

§ 659. Assault and Battery.

At common law the spouses must sue jointly for battery of the wife.[3] Under the Oklahoma and South Carolina statutes she may

92. Stoneman v. Erie R. Co., 52 N. Y. 429; Berger v. Jacobs, 21 Mich. 215; Ball v. Bullard, 52 Barb. (N. Y.) 141; Chicago, etc., R. R. Co. v. Dunn, 52 Ill. 260. But the husband is sometimes a necessary party still. Shaddock v. Clifton, 22 Wis. 114; Pancoast v. Burnell, 32 Iowa, 394; Church v. Westminster, 45 Vt. 380; Farmer v. Lanman, 73 Ind. 568; Packet Co. v. Clough, 20 Wall. (U.S.) 28; Anderson v. Anderson, 11 Bush (Ky.), 327. Where the husband must join, the wife should not sue in his name without his assent. Clark v. Koch, 9 Phila. (Pa.) 109; Sims v. Sims, 79 N. J. Law, 577, 76 A. 1063; Dodge v. Rush, 28 App. D. C. 149.

93. P. B. Arnold Co. v. Buchanan (Ind.), 111 N. E. 204; Engle v. Simmons, 148 Ala. 92, 41 So. 1023, 7 L. R. A. (N. S.) 96; Taxarkana Telephone Co. v. Burge (Tex.), 192 S. W. 807.

94. Howard v. Chesapeake & O. Ry. Co., 11 App. D. C. 300

95. Strasburger v. Barber, 38 Mo. 103. See Bradford v. Hanscom, 68 Me. 103; Spencer v. St. Paul R., 22 Minn. 29.

96. Fowles v. Hayden, 130 Mich. 47, 89 N. W. 571, 8 Det. Leg. N. 1159.

97. Lesch v. Great Northern Ry. Co., 97 Minn. 503, 106 N. W. 955, 7 L. R. A. (N. S.), 93.

98. Wagoner v. Silva, 139 Cal. 559, 73 P. 433; Harlow v. Standard Imp. Co., 145 Cal. 477, 78 P. 1045.

99. Mewhirter v. Hatten, 42 Iowa, 288.

1. Even though it afterwards cause her death. Cross v. Guthery, 2 Root (Conn.), 90; Hyatt v. Adams, 16 Mich. 180.

2. Dashiell v. Griffith, 84 Md. 363, 35 A. 1094.

3. Pillow v. Bushnell, 5 Barb. (N. Y.) 156.

recover in her own name for an assault and battery committed on her by a third person, though she lives with her husband.[4]

§ 660. Ejectment and Forcible Detainer.

In States tending to the *feme sole* doctrine in legislation, the wife may accordingly, without joining her husband, not only sue in actions of contract, but bring ejectment,[5] and may, as against all persons except her husband sue alone for the possession of their estate by the entirety.[6] In Minnesota she may maintain forcible entry and detainer without joining her husband.[7]

§ 661. Replevin.

She may maintain replevin without joining her husband.[8] In the same State a joint action of replevin to recover property all of which is owned severally, in part by each spouse, cannot be maintained.[9]

§ 662. Personal Injuries to Wife.

So far as the husband is injured, his right of action is sole; but where the wife is the meritorious cause of action, the spouses join as plaintiffs.

For injuries to the person or character of the wife, therefore, the husband and wife at the common law should sue together.[10] Also for injuries sustained by her through the negligence of a common carrier,[11] and, indeed, not only with reference to separate estate or business, but as to injuries to her person or character generally.[12] A married woman has, also, been permitted to sue a railroad company for personal injuries caused by the carrier's negligence.[13] Under some Married Women's Acts a wife may

4. Casteel v. Brooks (Okla.), 148 P. 158. Long v. McWilliams, 11 Okla. 562, 69 P. 882; Coulter v. Hermitage Cotton Mills (S. C.), 98 S. E. 846.

5. Wood v. Wood, 18 Hun (N. Y.), 350; Betz v. Mullin, 62 Ala. 365. But cf., as to action by husband and wife, Westcott v. Miller, 42 Wis. 454.

6. Holmes v. Kansas City 209 Me. 513, 108 S. W. 9 (reh. den., 108 S. W. 1134).

7. Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785.

8. Montgomery v. Hickman, 62 Ind. 598; Dickson v. Randal, 19 Kan. 212.

9. Gowan v. Stevens, 83 Vt. 358, 76 A. 147.

10. Donoghue v. Consolidated Traction Co., 201 Pa. 181, 50 A. 952; Moody v. Southern Pac. Co., 167 Cal. 786, 141 P. 388; Bing. Inf. & Cov. 247, Am. ed., and cases cited; Lindsay v. Oregon Short Line R. Co., 13 Idaho, 477, 90 P. 984; Basler v. Sacramento Gas & Electric Co., 158 Cal. 514, 111 P. 530.

11. Heirn v. McCaughan, 32 Miss. 17.

12. Townsdin v. Nutt, 19 Kan. 282; Omaha Horse R. v. Doolittle, 7 Neb. 481.

13. Tuttle v. Chicago R., 42 Iowa, 518; Chicago R. v. Dickson, 67 Ill. 122.

maintain an action for personal injuries without joining her husband,[14] even when living with him,[15] whether the injury be the result of force or negligence.[16] Where injury to her unborn child is deemed an injury to her person, both spouses have a cause of action, and both must join in a release.[17] In Massachusetts the wife of a tenant, as such and as a member of the tenant's family, may maintain an action against the landlord for injuries sustained by reason of the unsafe condition of the common premises of the tenement building.[18] Under the Washington statute providing that both spouses may join in actions for personal injuries to either, a wife is a proper party in an action for personal injuries sustained by the husband.[19] In Louisiana, where the husband sues to recover damages for the personal injury to his wife, without objection seasonably made, a judgment for him is proper, but the damages will be the property of the wife.[20] A married woman who is in a buggy when it is hit by an automobile and suffers a miscarriage as a consequence although she is not thrown out can recover as her injuries are not caused by fright alone.[21] In Louisiana the wife may bring action for her personal injuries without the authorization of the husband as damages for such injuries do not form part of the community but always remain the separate property of the wife, recoverable by herself alone. Bills for doctors and nurses and hospital attendance cannot be recovered in such suit as they are expenses of the

14. Hains v. Parkersburg, M. & I. Ry. Co. (W. Va.), 84 S. E. 923; Knoxville Ry. & Light Co. v. Vangilder (Tenn.), 178 S. W. 1117; Michigan Cent. R. Co. v. Coleman, 28 Mich. 440; Capital Traction Co. v. Rockwell, 17 App. D. C. 369; Hatton v. Wilmington City Ry. Co., 3 Pennewill (Del.), 159, 50 A. 633; Texas & P. Ry. Co. v. Humble, 97 F. 837, 38 C. C. A. 502 (affd., 181 U. S. 57, 21 S. Ct. 526, 45 L. Ed. 747); Chicago & M. Electric Ry. Co. v. Krempel, 116 Ill. App. 253; Mageau v. Great Northern Ry. Co., 103 Mnnn. 290, 115 N. W. 651, 15 L. R. A. (N. S.) 511 (reh. den., 103 Minn. 290, 115 N. W. 946, 15 L. R. A. [N. S.] 511); Elliott v. Kansas City, 210 Me. 576, 109 S. W. 627.

15. City of Athens v. Smith, 111 Ga. 870, 36 S. E. 955.

16. Hey v. Prime 197 Mass. 474, 84 N. E. 141.

17. Kirk v. Middlebrook, 201 Mo. 245, 100 S. W. 450.

18. Crudo v. Milton (Mass.), 124 N. E. 30.

19. Apker v. City of Hoquiam, 51 Wash. 567, 99 P. 746.

20. Harkness v. Louisiana & N. W. R. Co., 110 La. 822, 34 So. 791; Cartwright v. Puissigur, 125 La. 700, 51 So. 692.

21. Easton v. United Trade School Contracting Co. (Cal.), 159 Pac. 597, L. R. A. 1917A, 394.

community for which the husband alone is responsible and he alone can recover therefor.[22]

§ 663. Fraud and Deceit.

The spouses must sue jointly for frauds upon the wife, as in case of an action *qui tam* to recover penalties for a fraudulent conveyance.[23] In Kentucky a wife may maintain an action of deceit without joining her husband.[24] In Michigan a wife may sue for fraud in a conveyance to her though the consideration of the conveyance did not pertain to her separate estate.[25] Under the Oklahoma statute, a wife may sue alone for fraud in obtaining title to land owned by her.[26]

§ 664. Libel or Slander.

On these principles it is held that husband and wife must sue together for libel or slanderous words spoken against the latter.[27] It should be observed that, wherever husband and wife are both injured, they have two distinct and separate causes of action, which must not be confounded. Thus, for libel against husband and wife, the husband must sue alone for libel against him, and husband and wife jointly for the libel against her; they cannot sue together for the libel against both.[28] But actions are sometimes consolidated in practice.[29] She may now sue alone for slander.[30] Under the District of Columbia statute enabling a wife to trade and providing that her earnings shall be her separate estate, she has been held enabled to maintain an action for libel concerning

22. Shield v. F. Johnson & Co., 132 La. 773, 61 So. 787, 47 L. R. A. (N. S.) 1080.

23. Fowler v. Frisbie, 3 Conn. 320. But see Crump v. McKay, 8 Jones (N. C.) 32, as to negligence "sounding in contract," not admitted to be cause of action.

24. Kice v. Porter, 22 Ky. Law, 1704; Work v. Campbell, 164 Cal. 343, 128 P. 943.

25. Bissell v. Taylor, 41 Mich. 702, 3 N. W. 194.

26. Wesley v. Diamond, 26 Okla. 170, 109 P. 524.

27. Smalley v. Anderson, 2 Mon. (Ky.) 56; Davies v. Solomon, L. R. 7 Q. B. 112; Throgmorton v. Davis, 3 Blackf. (Ind.) 383. These words must be actionable *per se*. See Beach v. Ranney, 2 Hill (N. Y.) 309; Saville v. Sweeney, 4 B. & Ad. 514; Ryan v. Madden, 12 Vt. 51. As to slander of wife charging her with "adultery," see Shafer v. Ahalt, 48 Md. 171. Special damage should be shown in order to sustain the action. *Ib.;* Allsop v. Allsop, 2 L. T. (N. S.) 290. Words charging her, while unmarried, with fornication, are actionable. Gibson v. Gibson, 43 Wis. 23.

28. Gazynski v. Colburn, 11 Cush. (Mass.) 10; Ebersoll v. King, 3 Binn. (Pa.) 555; Newton v. Hatter, 2 Ld. Raym. 1208.

29. Hemstead v. Gas Light Co., 3 Hurl. & C. 745.

30. Martin v. Robson, 65 Ill. 129; Kovacs v. Mayoras, 175 Mich. 582, 141 N. W. 662.

her with reference to her business without joining her husband.[31] In Kentucky spouses may sue separately for a slander spoken of both, but a verdict and judgment in favor of one are not competent evidence in the action by the other.[32] The Lousisiana statute providing that damages from the "personal injuries" of the wife shall be her separate property has been held to enable her to maintain an action for a libel affecting herself,[33] as well as for abuse and slander.[34] In Missouri the husband must be joined in the wife's action for slander.[35] In Texas such an action by the wife without joining her husband may be maintained without evidence from which the jury may infer that if she had not brought it alone it would not have been brought.[36]

§ 665. Malicious Prosecution.

The spouses must sue jointly for malicious prosecution of the wife.[37] Since under the California statute a husband must be joined in the wife's action, with certain exceptions not including an action of malicious prosecution, the complaint in such an action is not demurrable because it both seeks to recover for her loss of time and for the arrest of both spouses, which is a joint action.[38]

§ 666. Injury to Wife's Personal Property.

Where the right of action for damages is founded on the prior possession of personal property, the husband must sue alone, since his possession is the possession of both.[39] And the joinder of the wife in actions relating to personal property, where the injury was committed after marriage, is good ground of demurrer, or motion to arrest, or even of error after judgment.[40] Whether the same principle applies to property of the wife parted with before marriage is not so clear. This is the rule, however, when the action is for a wrong, which before the marriage was committed in respect to such property.[41] Where household goods belonging in part to

31. Wills v. Jones, 13 App. D. C. 482.

32. Alcorn v. Powell, 22 Ky. Law, 1353, 60 S. W. 520.

33. Times-Democrat Pub. Co. v. Mozee, 136 F. 761, 69 C. C. A. 418.

34. Martin v. Derenbecker, 116 La. 495, 40 So. 849.

35. Adams v. Hannon, 3 Mo. 222.

36. Davis v. Davis (Tex.), 186 S. W. 775.

37. Laughlin v. Eaton, 54 Me. 156; Magnuson v. O'Dea (Wash.), 135 Pac. 640, 48 L. R. A. (N. S.) 327; Magnuson v O'Dea, 75 Wash. 574, 135 P. 640.

38. Williams v. Casebeer, 126 Cal. 77, 58 P. 380.

39. Heyman v. Heyman, 19 Ga. App. 634, 92 S. E. 25; Bing. Inf. & Cov. 253, and cases cited; Cro. Eliz. 133; 1 Chit. Pl. 93; 1 Salk. 114.

40. Rawlins v. Rounds, 27 Vt. 17.

41. 3 Rob. Pract. 188; Milner v.

each spouse is consigned to the husband, he may sue alone for injury to the shipment.[42] Where spouses bring a joint action for personal property levied on as the husband's, no cognizance can be taken of the wife's secret trusts or equities.[43] In Arizona where a husband sold hay cut from his wife's land under an agreement that the buyer should pay part of the proceeds to creditors of the spouses jointly, it was held that an action to compel the buyer to account was maintainable only in the joint names of the spouses.[44] In Florida a husband may ordinarily recover his wife's personalty which has been detained unlawfully.[45] In Michigan it is held that a passenger traveling with his wife is entitled to recover from the railroad in an action of contract for the loss of his wife's jewelry.[46] In New York and Washington an action for the recovery of damages to the wife's personal property should be brought in her name,[47] and she may now sue for her baggage, lost through like negligence.[48]

§ 667. Trover.

Where the trover is laid before the marriage and the conversion afterwards, there has been some controversy, the result of which seems to be that the action is well brought, either with or without joining the wife, though the better course doubtless is to join the wife.[49] The principle sought is whether such a suit amounts to a disaffirmance of the husband's constructive title to the goods on the marriage.[50] The spouses may maintain a joint action for

Milnes, 3 T. R. 627; Fewell v. Collins, 1 Const. 207.

42. Walter v. Alabama Great Southern R. Co., 142 Ala. 474, 39 So. 87.

43. Pawley v. Vogel, 42 Mo. 291.

44. Ives v. Sanguinetti (Ariz.), 85 P. 480.

45. McNeil v. Williams, 64 Fla. 97, 59 So. 562.

46. Withey v. Pere Marquette R. Co., 141 Mich. 412, 104 N. W. 773, 12 Det. Leg. N. 511, 113 Am. St. R. 533, 1 L. R. A. (N. S.) 352.

47. Sherlock v. Denny, 28 Wash. 170, 68 P. 452; Gilligan v. Consolidated Gas Co. of New York, 47 Misc. 658, 94 N. Y. S. 273; Schoenfeld v. Globe Storage & Carpet Cleaning Co., 121 N. Y. S. 332; Holtzclaw v. Gassaway, 52 S. C. 551, 30 S. E. 399.

48. Pierson v. Smith, 9 Ohio St. 98.

49. Powes v. Marshal, 1 Sid. 172; Ayling v. Whicher, 6 Ad. & El. 259; Blackborne v. Haigh, 2 Lev. 107; 3 Rob. Pract., *supra*. There is some uncertainty on this point, however. See Bac. Abr. Baron & Feme (K.); *contra*, Brown v. Fifield, 4 Mich. 322; Wellborn v. Weaver, 17 Ga. 267. Husband and wife cannot sue for malicious replevin of his household furniture with intent to injure her, and resulting in the actual injury of her by the officer, if they begin it pending the action in replevin. O'Brien v. Barry, 100 Mass. 300.

50. As to injuries to the wife's real estate, see *supra*, § 191.

conversion of cottown grown on land owned by them jointly.[51] Under the New York Married Women's Act a wife may maintain an action of tort for conversion without showing that she has a separate estate.[52] The Georgia statute providing that her possession of property shall give a right of action for interference therewith does not enable a husband who has possession of his wife's personalty as agent to maintain an action for its conversion, as the statute contemplates a possession accompanied by either general or special property.[53] In the same State he is not a necessary party to her action for conversion.[54]

§ 668. For Loss of Husband's Consortium and Services.

The wife was never permitted to sue for the loss of her husband's society and services.[55]

A statute providing that the wife shall retain after marriage all the civil and property rights of a single woman and may sue in her own name without joining her husband for any injury to her reputation, person or property, gives the wife the right to sue for loss of consortium caused by sales of drugs to the husband by the defendant contrary to law.[56] It is generally held that the wife cannot maintain an action for consequential damages resulting from her husband's injury, if it is the result of negligence,[57] or

51. Cedartown Supply Co. v. Hooper, 13 Ga. App. 29, 78 S. E. 686.

52. Lumley v. Torsielle, 69 App. Div. 76, 74 N. Y. S. 567.

53. Mitchell v. Georgia & A. Ry. Co., 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622.

54. Bondy v. American Transfer Co., 15 Cal. App. 746, 115 P. 965.

55. 2 Kent, Com. 182; Tuttle v. Chicago R., 42 Iowa, 518; Carey v. Berkshire R., 1 Cush. (Mass.) 475. An action cannot in general be maintained by the wife, there being no misfeasance towards her independently of a contract with the husband alone. Longmeid v. Holliday, 6 Exch. 761; Bernhardt v. Perry (Mo.), 208 S. W. 462; Goldman v. Cohen, 30 Misc. (N. Y.) 336; Brown v. Kistleman, 177 Ind. 692; Emerson v. Taylor, 104 Atl. (Md.) 538; Kosciolek v. Portland Ry., Light & Power Co., 81 Ore. 517; Smith v. Nicholas Bldg. Co., 93 Ohio St. 101; Patelski v. Snyder, 179 Ill. App. 24; Stout v. Kansas City Terminal Ry. Co., 172 Mo. App. 113; Feneff v. N. Y. C. & H. R. R., 203 Mass. 278; Goldman v. Cohen, 30 Misc. 366, 63 N. Y. S. 459; Feneff v. New York C. & H. R. R., 203 Mass. 278, 89 N. E. 436, 24 L. R. A. (N. S.) 1024 Brown v. Kistleman, 177 Ind. 692, 98 N. E. 631, 40 L. R. A. (N. S.) 236; Stout v. Kansas City Terminal R. Co., 172 Mo. App. 113, 157 S. W. 1019; Patelski v. Snyder, 179 Ill. App. 24; Smith v. Nicholas Building Co. (Ohio), 112 N. E. 204, L. R. A. 1916E 700.

56. Moberg v. Scott (S. D.), 161 N. W. 998, L. R. A. 1917D 732.

57. Patelski v. Snyder, 179 Ill. App. 24; Emerson v. Taylor (Md.), 104 A. 538; Kosciolek v. Portland Ry., Light & Power Co., 81 Ore. 517, 160 P. 132; Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N. E. 204; Gold-

for the salary he might have earned but for his injury,[58] even though it entails suffering and anxiety, and imposes on her heavy and arduous duties which she did not have before the injury,[59] or where it results in diminished power to support her.[60] Such damages can be recovered by the wife only for wrongs which directly tend to deprive her of consortium.[61] In such case the tort must be intentional.[62] In Ohio it is held that she may maintain an action for loss of the society and companionship of her husband against a druggist who sells morphine to her husband, a drug addict, in such quantities as to incapacitate him.[63]

§ 669. For Death of Husband.

A wife, of course, could not sue for the death of her husband.[64]

§ 670. Pleading.

In a joint action for personal wrong to the wife, the declaration should conclude " to their damage."[65] And it is a well recognized principle, both in England and America, that whenever the wife is the meritorious cause of action, her interest must appear on the face of the pleadings, or the omission will be considered fatal.[66] Under the California statute the spouses may incorporate in one cause of action a statement of the injuries suffered by the wife, and of the consequential damages sustained by the husband.[67] A much similar statute exists in New Jersey.[68]

§ 671. Defences to Action by Wife.

Neither fraud nor negligence on the husband's part can bar the wife's right of action, she being the injured party.[69] He cannot interfere with her right to claim damages, nor extinguish or release

man v. Cohen, 30 Misc. 336, 63 N. Y. S. 459; Bernhardt v. Perry (Mo.), 208 S. W. 462.

58. Glenn v. Western Union Telegraph Co., 1 Ga. App. 821, 58 S. E. 83.

59. Feneff v. New York Cent. & H. R. R. Co., 203 Mass. 278, 89 N. E. 436.

60. Brown v. Kistleman, 177 Ind. 692, 98 N. E. 631.

61. Stout v. Kansas City Terminal Ry. Co., 172 Mo. App. 113, 157 S. W. 1019. See Clark v. Hill, 69 Mo. App. 541.

62. Gambino v. Manufacturers' Coal & Coke Co., 175 Mo. App. 653, 158 S. W. 77.

63. Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N. E. 102.

64. 2 Kent, Com. 182; Carey v. Berkshire R., 1 Cush. (Mass.) 475.

65. Horton v. Byles, 1 Sid. 387; Smalley v. Anderson, 2 Mon. (Ky.) 56.

66. Staley v. Barhite, 2 Caines (N. Y.) 221; Serres v. Dodd, 5 B. & P. 405; Thorne v. Dillingham, 1 Denio, (N. Y.), 254; Pickering v. De Rochemont, 45 N. H. 67.

67. Meek v. Pacific Electric Ry. Co. (Cal.), 164 P. 1117.

68. Davis v. Public Service Corp., 77 N. J. Law, 275, 72 A. 82, 83.

69. Moore v. Foote, 34 Mich. 443;

it, nor lessen the amount by his sole compromise.[70] In the husband's separate suit for consequential injuries,[71] as to loss of his wife's services, there is some uncertainty;[72] but as he is usually bound still to afford medical attendance, his claim is favorably regarded in that respect at least.[73] An action by the wife for her sole damages, even though the husband be made a nominal coplaintiff under the statute, will not, if withdrawn in her behalf, bar his separate action for his own expenses and damages from the same injury, but this he may bring and conduct at his own discretion.[74]

§ 672. Damages.

Impairment of a wife's capacity to earn may be an element of her damages in a personal injury action,[75] where the statute gives her the right to her earnings,[76] or where it appears that she has an employment apart from her husband,[77] or that her earnings are

Flori v. St. Louis, 3 Mo. App. 231; Knoxville R. & L. Co. v. Vangilder (Tenn.), 178 S. W. 1117, L. R. A. 1916A 1111.

70. Martin v. Robson, 65 Ill. 129; Chicago R. v. Dickson, 67 Ill. 122.

71. See *supra*, § 668.

72. The husband cannot here recover for money expended that belonged to his wife. Walden v. Calrk, 50 Vt. 383. The test seems to be, as to services and earnings, whether the husband is still entitled to his wife's services, and not she to her separate earnings. Klein v. Jewett, 26 N. J. Eq. 474; Brooks v. Schwerin, 54 N. Y. 343.

73. Tuttle v. Chicago R., 42 Iowa, 518. Unless estopped by allowing his wife to recover such expenses. Neumeister v. Dubuque, 47 Iowa, 465.

74. Stepanek v. Kula, 36 Iowa, 563; Smith v. St. Joseph, 55 Mo. 456; Mewhirter v. Hatten, 42 Iowa, 288.

75. Warth v. Jackson County Court, 71 W. Va. 184, 76 S. E. 420; Colorado Springs & Interurban Ry. Co. v. Nichols, 41 Colo. 272, 92 P. 691; Withey v. Fowler, 164 Iowa, 377, 145 N. W. 923; Texas & P. Ry Co. v. Humble, 181 U. S. 57, 21 S. Ct. 526, 45 L. Ed. 747; Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 130 N. W. 8; Kirkpatrick v. Metropolitan St. Ry. Co., 129 Mo. App. 524, 107 S. W. 1025; Hendricks v. St. Louis Transit Co., 124 Mo. App. 157, 101 S. W. 675; Wrightsville & T. R. Co. v. Vaughan, 9 Ga. App. 371, 71 S. E. 681; Schmelzer v. Chester Traction Co., 218 Pa. 29, 66 A. 1005.

76. Snickles v. City of St. Joseph, 155 Mo. App. 308, 136 S. W. 752; Price v. Charlotte Electric Ry. Co., 160 N. C. 450, 76 S. E. 502; West Chicago St. Ry. Co. v. Carr, 170 Ill. 478, 48 N. E. 992; South, Covington & C. St. Ry. Co. v. Bolt, 22 Ky. Law, 906, 59 S. W. 26; Enid City Ry. Co. v. Reynolds, 34 Okla. 405, 126 P. 193.

77. Denton v. Ordway, 108 Iowa, 487, 79 N. W. 271; Elenz v. Conrad, 115 Iowa, 183, 88 N. W. 337; Perrigo v. City of St. Louis, 185 Mo. 274, 84 S. W. 30; Riley v. Lidtke, 49 Neb. 139, 68 N. W. 356; Central City v. Engle, 65 Neb. 885, 91 N. W. 849; Worez v. Des Moines City Ry. Co., 175 Iowa, 1, 156 N. W. 867; Corbin v. City of Huntington, 74 W. Va. 479, 82 S. E. 323; Niemeyer v. Chicago, B. & Q. Ry. Co., 143 Iowa, 129, 121 N. W. 521.

kept apart as her separate estate,[78] or that she was a free trader,[79] or where the husband files a disclaimer of her services,[80] or where she lives apart from him,[81] even though there is no evidence that she ever earned any money,[82] and even though she was married after the accident.[83] She may also recover for pain and anguish of mind,[84] and inability to perform her necessary affairs and business,[85] as well as medical expenses caused by the injury, whether paid or not, if charged against her,[86] or if she has paid them,[87] if not paid with money loaned to her by him,[88] and unless she is equally liable with her husband for such expenses.[89] She cannot recover for loss of services rendered in household duties,[90]

78. Brown v. Third Ave. R. Co., 19 Misc. 504, 43 N. Y. S. 1094.

79. Norfolk Ry. & Light Co. v. Williar, 104 Va. 679, 52 S. E. 380.

80. Smith v. Borough of East Mauch Chunk, 3 Pa. Super. 495.

81. Wrightsville & T. R. Co. v. Vaughan, 9 Ga. App. 371, 71 S. E. 691.

82. Louisville & N. R. Co. v. Dick, 25 Ky. Law, 1831, 78 S. W. 914. But see, *contra*, Becker v. Lincoln Real Estate & Building Co., 118 Mo. App. 74, 93 S. W. 291; Kroner v. St. Louis Transit Co., 107 Mo. App. 41, 80 S. W. 915.

83. Georgia Northern Ry. Co. v. Sharp, 19 Ga. App. 503, 91 S. E. 1045; Booth v. Baltimore & O. R. Co. (Ind.), 87 S. E. 84; Wrightsville & T. R. Co. v. Vaughan, 9 Ga. App. 371, 71 S. E. 691.

84. McGovern v. Interurban Ry. Co., 136 Iowa, 13, 111 N. W. 412; Ohio & M. Ry. Co. v. Cosby, 107 Ind. 32, 7 N. E. 373; Kimmel v. Interurban St. Ry. Co., 87 N. Y. S. 466; Cincinnati, L. & A. St. R. Co. v. Cook, 45 Ind. App. 401, 90 N. E. 1052.

85. Normile v. Wheeling Traction Co., 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901.

86. Adams Exp. Co. v. Aldridge, 20 Colo. App. 74, 77 P. 6; Allen v. Lizer, 9 Kan. App. 548, 58 P. 238; Hickey v. Welch, 91 Mo. App. 4; Ashby v. Elsberry & N. H. Gravel Road Co., 111 Mo. App. 79, 85 S. W. 957; Pomerine Co. v. White, 70 Neb. 177, 98 N. W. 1040; City of Toledo v. Duffy, 13 Ohio Cir. Ct. 482, 7 O. C. D. 113; Town of Elba v. Bullard, 152 Ala. 237, 44 So. 412 Indianapolis Traction & Terminal Co. v. Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143.

87. McLean v. City of Kansas City, 81 Mo. App. 72; Atlantic & D. R. Co. v. Ironmonger, 95 Va. 625, 29 S. E. 319; Krisinger v. City of Creston, 141 Iowa, 154, 119 N. W. 526; Winnett v. Detroit United Ry., 171 Mich. 629, 137 N. W. 539; Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 S. W. 1086.

88. Barker v. Rhode Island Co., 35 R. I. 406, 87 A. 174.

89. Kellar v. Lewis, 116 Iowa, 369, 89 N. W. 1102.

90. Norfolk Ry. & Light Co. v. Williar, 104 Va. 679, 52 S. E. 380; Denver & R. G. Co. v. Young, 30 Colo. 349, 70 P. 688; City of Holton v. Hicks, 9 Kan. App. 179, 58 P. 998; Plummer v. City of Milan, 70 Mo. App. 598; Wallis v. City of Westport, 82 Mo. App. 522; Green v. Town of Nebagamain, 113 Wis. 508, 89 N. W. 520; Flintjer v. Kansas City (Mo.), 204 S. W. 951; Felker v. Bangor Ry. & Electric Co., 112 Me. 255, 91 A. 980; Earl v. Tupper, 45 Vt. 275.

or for the amount paid by her for the services of a domestic during her disability.[91]

A wife whose husband is not a resident of Michigan, and who has not lived with her for six or seven years, during which she has supported herself, may, in an action for personal injuries, recover for a doctor's bill, though she has not paid it.[92] Damages for separation from her husband and from her home cannot be recovered by the wife in an action against her husband for assault and battery.[93]

§ 673. Abatement and Survival of Action.

The damages allowed as compensation for the frauds and injuries sustained by the wife go to the husband, as well as the rest of her personal property, if recovered during his lifetime. But such suits survive to her where she is the meritorious cause of action; and on the death of the husband, pending legal proceedings, the wife may accordingly proceed to judgment and collect the damages for herself; or if her husband had never brought an action, she may then do so in her own right.[94] The husband, on the other hand, has no such interest in the suit at common law that he may prosecute it in his own name after his wife's death. His joinder in the first place was only because of the marriage relation. He may, however, under some statutes, be let in as her administrator, and in such capacity prosecute the suit to its conclusion.[95] If the wife dies after judgment, the husband surviving may take the benefits of the suit; for a judgment debt takes the place of the original cause of action. The death of the wife, pending suit for her personal tort, put an end to the action altogether by the old law.[96] But where the so-called tort is referable rather to some breach of contract, it might survive.[97]

Under such a policy, contrary to the common law, it is held

91. Frohs v. City of Dubuque, 109 Iowa, 219, 80 N. W. 341.

92. Lammiman v. Detroit Citizens St. Ry. Co., 112 Mich. 602, 71 N. W. 153, 4 Det. Leg. N. 134.

93. Johnson v. Johnson (Ala.), 77 So. 335.

94. Bing. Inf. & Cov. 247, 248; Newton v. Hatter, 2 Ld. Raym. 1208; Anderson v. Anderson, 11 Bush (Ky.), 327.

95. Chitty Pl. 74; Norcross v. Stuart 50 Me. 87; Pattee v. Harrington, 11 Pick. (Mass.) 221; Cozier v. Bryant, 4 Bibb (Ky.), 174; Saltmarsh v. Candia, 51 N. H. 71.

96. Bac. Abr. Baron & Feme (K.); Meese v. Fond du Lac, 48 Wis. 323.

97. Long v. Morrison, 14 Ind. 595.

that an action in the name of husband and wife for injuries to the latter will survive to her administrator.[98]

§ 674. Husband's Rights.

It would appear that the husband may release the damages for his wife's injuries, and then recover for the loss arising to himself alone; he may certainly release or compromise.[99] Where the husband is alone entitled to the damages, and in case of his death they would go to his representatives, he must sue alone;[1] and his sole suit will not be defeated by his wife's death before action brought.[2]

A husband cannot recover for consequential injuries to his wife from negligence unless his wife can recover for personal injuries received.[3] He can recover nothing unless the wife recovers for her injuries,[4] nor where the tort was committed on the wife prior to marriage with him,[5] nor where no appreciable time elapses between the wife's injury and her death.[6]

§ 675. For Mental Anguish Suffered by Wife.

The husband cannot recover for the wife's mental anguish or other damages incidental to the joint suit in his sole suit for damages.[7]

§ 676. Seduction of Wife.

Somewhat akin to this is his action for his wife's seduction, founded on the same general marital rights. But the common law still keeps up its legal fiction of the wife's civil incapacity, and treats the seducer as guilty of trespass by force of arms, whether

98. Earl v. Tupper, 45 Vt. 275. As to survivorship of husband's right of action for consequential injuries, see Cregin v. Brooklyn R., 83 N. Y. 595.

99. Southworth v. Packard, 7 Mass. 95; Anderson v. Anderson, 11 Bush (Ky.), 327. One who knowingly assists a wife in violating her duty, as by selling her laudanum, may be sued by the husband for the injury he sustains thereby. Hoard v. Peck, 56 Barb (N. Y.), 202.

1. Wheeling v. Trowbridge, 5 W. Va. 353.

2. *Ib.*

3. Jackson v. Boston Elevated R. Co., 217 Mass. 515, 105 N. E. 379, 51 L. R. A. (N. S.) 1152.

4. Jackson v. Boston Elevated Ry. Co., 217 Mass. 515, 105 N. E. 379, 51 L. R. A. (N. S.) 1152; Savage v. New York, N. & H. S. S. Co., 185 F. 778, 107 C. C. A. 648; Gardner v. Boston Elevated Ry. Co., 204 Mass. 213, 90 N. E. 534.

5. Mead v. Baum, 76 N. J. Law, 337, 69 A. 962.

6. Rogers v. Fancy Farm Telephone Co., 160 Ky. 841, 170 S. W. 178.

7. Hooper v. Haskell, 56 Me. 251; Adams v. Brosius (Ore.), 139 Pac. 729, 51 L. R. A. (N. S.) 37.

the wife actually consent to the guilt or not.[8] The damages which the husband may here recover in his own right are not affected by the social rank or condition of the parties;[9] nor by his own character, save his character as a husband;[10] but they may be materially influenced by the wife's previous character for chastity;[11] while if the husband be privy to the crime or consenting thereto, the law treats him as the seducer, and gives him no damages.[12] But the earlier cases seem to have regarded this last circumstance as tending only to reduce his compensation.[13]

§ 677. For Loss of Consortium and Medical Expenses.

Since the husband is at the common law entitled to the society and services of his wife, two separate causes of action may arise from injuries inflicted upon her person. One, in the name of both for her own injuries, we have just considered; the other is in the name of the husband alone *per quod consortium amisit.*[14] Thus, if the wife be wantonly bruised and maltreated, her husband may bring his special action *per quod* for the loss of her society and his medical expenses. But there can be no special damage recovered by the husband by way of aggravation in the joint suit for his wife's injuries, which is founded in her meritorious claim. Thus, in the joint action for an assault on the wife, the surgeon's bill cannot be recovered; if for slander of the wife, the loss of wages cannot be claimed; there the sole right of the husband

8. 3 Bl. Com. 139, 140. An action on the case is allowable, though not usual. Chamberlain v. Hazlewood, 5 M. & W. 517. See Morris v. Miller, 4 Burr. 2057; Birt v. Barlow, Doug. 171; Freelaconey v. Coleman, 1 B. & Ald. 90; Canefield v. Chamber, 6 East, 244; Tone v. Sumners, 2 Nott & McCord (S. C.), 267; Forney v. Hallaker, 8 S. & R. 159. See Yundt v. Hartrunft, 41 Ill. 9, as to the damages allowable in such cases. A broad rule is here announced in the husband's favor.

9. Norton v. Warner, 9 Conn. 172; per Cheves, J., in Buford v. McLung, 1 Nott & McCord (S. C.), 268, 277; otherwise, according to Blackstone. See 3 Bl. Com. 140.

10. Norton v. Warner, 9 Conn. 172. And see Bromley v. Wallace, 4 Esp. 237.

11. 3 Bl. Com. 140; Bull. N. P. 296. Blackstone (*ib.*) adds the consideration of the husband's obligation, by settlement or otherwise, to provide for those children which he cannot but suspect to be spurious.

12. 1 Greenl. Evid., § 578; Duberly v. Gunning, 4 T. R. 651, per Lord Kenyon; Rea v. Tucker, 51 Ill. 110; Reeve Dom. Rel. 64; Train v. Bayer, 24 Barb. (N. Y.), 614, and cases cited. See Lord Alvanley, in Bromley v. Wallace, 4 Esp. 237.

13. Selw. N. P., *Adultery;* Bull. N. P. 27.

14. 3 Bl. Com. 140; Cro. Jac. 501; *ib.*, 538; Mewhirter v. Hatten, 42 Iowa, 288; Brockbank v. Whitehaven Junction R. R. Co., 7 Hurl. & Nor. 834; Whitcomb v. Barre, 37 Vt. 148; Kavanaugh v. Janesville, 24 Wis. 618; Hooper v. Haskell, 56 Me. 251.

should be sued on in his name.[15] A husband who lives apart from his wife, under articles of separation or a decree of divorce from bed and board, cannot maintain a suit for damages *per quod,* since he has suffered no loss of her society.[16]

Instantaneous death of the husband or wife, at the common law, gave no right of action to the survivor. Nor could the husband, whose wife was thus killed by another's carelessness, sue *per quod,* because he could not be said to have lost her society during any portion of her life.[17] And wherever by special statute some right of action for damages is given (as against a town for a defective highway), some of our courts seem disposed to allow the husband's medical expenses by way of aggravation, in the joint suit of husband and wife, even though he may not be empowered to bring a suit in his own name to recover for them as damages *per quod.*[18] In some of these statutory cases, however, the husband may bring his separate suit *per quod* as before, in addition to the suit for the wife's injury.[19] Where the action is brought in assumpsit, as upon a carrier's contract to carry safely, the considerations are those of contract, not tort.[20]

15. Dengate v. Gardiner, 4 M. & W. 6; Kavanaugh v. Janesville, 24 Wis. 618; King v. Thompson, 87 Pa. 365. See Lewis v. Babcock, 18 Johns. (N. Y.) 443.

16. Reeve Dom. Rel. 64; Fry v. Derstler, 2 Yeates (Pa.), 278. The husband may discharge the cause of action, so as to bar the wife's remedy, even though they are living apart through his fault. Ballard v. Russell, 33 Me. 196. Concerning the effect of a separation pending a suit brought in the joint names of husband and wife, for injuries inflicted upon the latter, see Burger v. Belsley, 45 Ill. 72.

17. Yelv. 89, 90; Baker v. Bolton, 1 Camp. 493; Green v. Hudson R. R. Co., 28 Barb. (N. Y.) 9; Hallenbeck v. Berkshire R. R. Co., 9 Cush. 109. See Georgia R. R. Co. v. Wynn, 42 Ga. 331, which considers a statute providing only for a wife's suit by reason of her husband's death by railroad accident, and not for a husband's suit by reason of his wife's death.

18. Harwood v. Lowell, 4 Cush. (Mass.) 310; Sanford v. Augusta, 32 Me. 536; Hunt v. Winfield, 36 Wis. 154; Fuller v. Naugatuck R. R. Co., 21 Conn. 557. See Carlisle v. Town of Sheldon, 38 Vt. 440, as to right to recover for damages on a highway, defeated by husband's own carelessness.

19. Klein v. Jewett, 26 N. J. Eq. 474; Kavanaugh v. Janesville, 24 Wis. 618; Whitcomb v. Barre, 37 Vt. 148.

Where husband and wife were injured simultaneously and both died, the husband a little before the wife, it was held that the right of action vested although they are living apart through his fault. Ballard v. Russell, 33 Me. 196. Concerning the effect of a separation pending a suit brought in the joint names of husband and wife, for injuries inflicted on the latter, see Burger v. Belsley, 45 Ill. 72.

20. See Pollard v. New Jersey R., 101 U. S. 223.

A husband may recover for loss of the wife's services and consortium as a result of her injury by negligence,[21] or as the result

21. Duffee v. Boston Elevated Ry. Co., 191 Mass. 563, 77 N. E. 1036; Cullar v. Missouri K. & T. Ry. Co., 84 Mo. App. 340; Schaupp v. Turner, 177 N. Y. S. 132; Chicago & M. Electric Ry. Co. v. Krempel, 116 Ill. App. 253; Morrison v. Clark, 196 Ala. 670, 72 So. 305; Southern Ry. Co. v. Crowder, 135 Ala. 417, 33 So. 335; Denver Consol. Tramway Co. v. Riley, 14 Colo. App. 59 P. 476; Chicago & M. Electric Ry. Co. v. Krempel, 116 Ill. App. 253; Southern Kansas Ry. Co. v. Pavey, 57 Kan. 521, 46 P. 969; Kelley v. New York, N. H. & H. R. Co., 168 Mass. 308, 46 N. E. 1063, 60 Am. St. R. 397, 38 L. R. A. 631; Lorf v. City of Detroit, 145 Mich. 265, 108 N. W. 661, 13 Det. Leg. N. 502; Cullar v. Missouri K. & T. Ry. Co., 84 Mo. App. 347; Booth v. Manchester St. Ry., 73 N. H. 529, 63 A. 578; Lyons v. New York City Ry. Co., 49 Misc. 517, 97 N. Y. S. 1033; Baltimore & O. R. Co. v. Glenn, 66 Ohio St. 395, 64 N. E. 438; Reagan v. Harlan, 24 Pa. Super. 27; San Antonio & A. P. Ry. Co. v. Belt, 24 Tex. Civ. 281, 59 S. W. 607; Neville v. Mitchell, 28 Tex. Civ. 89, 66 S. W. 579; Howells v. North American Tarnsportation & Trading Co., 24 Wash. 689, 64 P. 786; Blair v. Bloomington & N. Ry., Electric & Heating Co., 130 Ill. App. 400; Guevin v. Manchester St. Ry. (N. H.), 99 A. 298; Bourland v. Louisville & N. R. Co., 199 Ill. App. 126; Reeves v. Lutz, 179 Mo. App. 61, 162 S. W. 280; Garside v. New York Transp. Co., 146 F. 588; Elling v. Blake-McFall Co., 85 Ore. 91, 166 P. 57; City of Chattanooga v. Carter, 132 Tenn. 609, 179 S. W. 127; People's Home Telephone Co. v. Cockrum, 182 Ala. 547, 62 So. 86; Hey v. Prime, 197 Mass. 474, 84 N. E. 141; Zolawenski v. Aberdeen, 72 Wash. 95, 129 P. 1090; Indianapolis Traction & Terminal Co. v. Menze, 173 Ind. 31, 89 N. E. 370; McCauley v. Detroit United Ry., 167 Mich. 297, 133 N. W. 11; Louisville, etc., R. Co. v. Kinman (Ky.), 206 S. W. 880; Bruce v. United Rys. Co., 175 Mo. App. 568, 158 S. W. 102; Berrien County v. Allen, 13 Ga. App. 777, 79 S. E. 1129; Indianapolis & M. Rapid Transit Co. v. Reeder, 42 Ind. App. 520, 85 N. E. 1042.

The word "services," in the rule allowing a husband to sue for personal injuries to his wife, included any pecuniary injury suffered from the loss of her aid, society, and companionship; and, while the damages from the loss of services, society, and companionship are not susceptible of direct proof, yet, when the facts are shown, the assessment of compensation must be left to the sound discretion of the jury. Indianapolis Traction & Terminal Co. v. Menze (Ind.), 88 N. E. 929 (reh. den., 173 Ind. 31, 89 N. E. 370); Lagergren v. National Coke & Coal Co., 117 N. Y. 92; Townsend v. Wilmington City Ry. Co., 7 Penn. (Del.) 255; McDevitt City of St. Paul, 66 Minn. 14; May v. Western Union Telegraph Co., 157 N. C. 416; Elling v. Blake-McFall Co., 85 Ore. 91; Guevin v. Manchester St. Ry. (N. H.), 99 Atl. 298; Morrison v. Clark (Ala.), 72 So. 305; City of Chattanooga v. Carter, 132 Tenn. 609; Little Rock Gas & Fuel Co. v. Coppedge, 116 Ark. 334; Mageau v. Great Northern Ry. Co., 103 Minn. 290.

In its original application the term "consortium" was used to designate a right which the law recognized in a husband, growing out of the marital union, to have performance by the wife of all duties and obligations in respect to him which she took on herself when she entered into it, and as thus employed it includes the right to society, companionship, conjugal affection, and service. Marri v. Stamford St. R. Co., 84 Conn. 9, 78 A.

of an assault on her,[22] or of a defect in a highway,[23] or sidewalk,[24] or of a nuisance,[25] or of the negligent escape of gas,[26] or of her illness as the result of a slander,[27] or of eating unwholesome pork,[28] or of sale of opium to the wife, resulting in her becoming a drug addict,[29] or of a cold caught at a hospital through negligence, resulting in her death,[30] especially where her injuries prevent sexual intercourse.[31]

The services recovered for may include services rendered by her in his business, where she is so engaged when injured, without intent on the part of the husband to pay for them,[32] and special services, other than those of a servant, which a wife can, and which the wife in question was accustomed to render to him.[33] He may also recover for her diminished capacity to labor in the future, if her injuries are permanent,[34] as well as for medical and other expenses,[35] even where the statute makes family expense a charge

582; Blair v. Seitner Dry Goods Co. (Mich.), 151 N. W. 724.

22. Baer v. Hepfinger, 152 Wis. 558, 140 N. W. 345.

23. Larisa v. Tiffany (R. I.), 105 A. 739; South v. West Windsor Tp. (N. J.), 82 A. 852; Bean v. City of Portland, 109 Me. 467, 84 A. 981.

24. Wright v. City of Omaha, 78 Neb. 124, 110 N. W. 754; McDevitt v. City of St. Paul, 66 Minn. 14, 68 N. W. 178, 33 L. R. A. 601.

25. Adams Hotel Co. v. Cobb, 3 Ind. T. 50, 53 S. W. 478.

26. Little Rock Gas & Fuel Co. v. Coppedge (Ark.), 172 S. W. 885.

27. Garrison v. Sun Printing & Publishing Co., 207 N. Y. 1, 100 N. E. 430.

28. Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785.

29. Holleman v. Harvard, 119 N. C. 150, 25 S. E. 972, 56 Am. St. R. 672, 34 L. R. A. 803.

30. Bailey v. Long, 172 N. C. 661, 90 S. E. 809.

31. City of Dallas v. Jones (Tex.), 54 S. W. 606 (injury to spine).

32. Georgia R. & Banking Co. v. Tice, 124 Ga. 459, 52 S. E. 916; Standen v. Pennsylvania R. Co., 214 Pa. 189, 63 A. 467; Missouri, K. & T. Ry. Co. v. Vance (Tex.), 41 S. W. 167. But see Kirkpatrick v. Metropolitan St. Ry. Co., 129 Mo. App. 524, 107 S. W. 1025.

33. Selleck v. City of Janesville, 104 Wis. 570, 80 N. W. 944, 76 Am. St. R. 892, 47 L. R. A. 691.

34. May v. Western Union Telegraph Co., 157 N. C. 416, 72 S. E. 1059; Kirkpatrick v. Metropolitan St. Ry. Co., 129 Mo. App. 524, 107 S. W. 1025; Townsend v. Wilmington City Ry. Co. (Del.), 78 A. 635.

35. Indiana Union Traction Co. v. McKinney, 36 Ind. App. 86, 78 N. E. 203; Otto v. Milwaukee Northern Ry. Co., 148 Wis. 54, 134 N. W. 157; Washington & G. R. Co. v. Hickey, 12 App. D. C. 269; Birmingham Southern Ry. Co. v. Lintner, 141 Ala. 420, 38 So. 363, 109 Am. St. R. 40; Louth v. Thompson, 1 Pennewill (Del.), 149, 39 A. 1100; Indiana Union Traction Co. v. McKinney, 39 Ind. App. 86; State v. City of Detroit, 113 Mich. 643, 72 N. W. 8, 4 Det. Leg. N. 431; Brickson v. Buckley (Mass.), 120 N. E. 126; Lagergren v. National Coke & Coal Co., 117 N. Y. S. 92; Twedell v. City of St. Joseph, 167 Mo. App. 547, 152 S. W. 432.

on both spouses,[36] and even where the wife paid the bills, on his promise to repay her,[37] and for impairment of her ability to perform wifely duties,[38] and for loss of her earnings, where he is entitled to them,[39] and for her funeral expenses, where she is killed.[40]

In his action for his own personal injuries he may recover the reasonable value of extra services rendered by her in nursing him.[41] He cannot recover for the expense of a servant employed during her incapacity,[42]

A man cannot recover for the loss of consortium of his wife caused by the defendant's negligence where no appreciable length of time intervened between the negligent act complained of and the death during which he might have enjoyed her society;[43] and in case of her death, he can recover for loss of services and consortium only to the time of such death.[44]

The husband's right to recover for damages to his right to the society and services of his wife on account of the negligence of a third person seems by the great weight of authority not to be affected by recent legislation putting the husband and wife on an equality.[45]

In some jurisdictions, however, it is held that this legislation has wiped out the right to sue for loss of consortium due to negligence, as the view is held that this right depends on the husband's

36. West Chicago St. Ry. Co. v. Carr, 170 Ill. 478, 48 N. E. 992; Lifschitz v. City of Chicago, 194 Ill. App. 488.

37. Laskowski v. People's Ice Co. (Mich.), 168 N. W. 940.

38. Gregory v. Oakland Motor Car Co., 181 Mich. 101, 147 N. W. 614; Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545.

39. Robinson v. Metropolitan St. Ry. Co., 34 Misc. 795, 69 N. Y. S. 891; The O'Brien Brothers, 253 F. 855.

40. Cincinnati, H. & D. Ry. v. Taylor, 27 Ohio Cir. Ct. 757.

41. Missouri, K. & T. Ry. Co. v. Holman, 15 Tex. Civ. 16, 39 S. W. 130; Crouse v. Chicago & N. W. Ry. Co., 102 Wis. 196, 78 N. W. 446; Chicago, D. & G. B. Transit Co. v. Moore, 259 F. 490.

42. Hertzberg v. Pittsburgh Taxicab Co., 243 Pa. 540, 90 A. 344.

43. Rogers v. Fancy Farm Telephone Co., 160 Ky. 841, 170 S. W. 178, L. R. A. 1916D, 186.

44. Indianapolis & M. Rapid Transit Co. v. Reeder, 51 Ind. App. 533, 100 N. E. 101; Lane v. Steiniger (Iowa), 156 N. W. 375.

45. Birmingham Southern R. Co. v. Lintner, 141 Ala. 420, 38 So. 363; Blair v. Bloomington & N. R. Electric, etc., Co., 130 Ill. App. 400; Mewhirter v. Hatten, 42 Iowa, 288; Partello v. Missouri, P. R. Co., 141 Mo. App. 162, 107 S. W. 473; Booth v. Manchester Street R. Co., 73 N. H. 529, 63 Atl. 578; Baltimore & Ohio R. Co. v. Glenn, 66 Ohio St. 395, 64 N. E. 438; McMeekin v. Pittsburg R. Co., 229 Pa. 572, 79 Atl. 133.

right to menial and domestic services round the house rather than on his right to her affection and loyalty, and as the former right has been extinguished by law no right of action for damage to such a right can remain.[46]

An action by a husband for loss of consortium of the wife due to a marine accident is cognizable in admiralty. The relation of husband and wife and parent and child are not maritime relations; but such relations or the implied contracts or rights growing out of such relations do not constitute the real ground of action, when a husband, wife, parent or child invoke admiralty relief for injury sustained by a maritime tort. In such cases the thing in action is not the relationship but the tort. The relationship is a mere step or incident to support the action.[47]

It has been held in Massachusetts that where a husband, as administrator, recovered for the death and conscious suffering of his wife, he could not recover separately for loss of consortium,[48] nor where she has recovered full damages for all injuries sustained by her.[49]

Michigan has recently followed the Massachusetts rule that under the Married Women's Acts a man cannot recover for the loss of consortium of his wife in case of her personal injury through negligence.

In this case it appeared that the wife suffered so that her companionship was less pleasant than before. The court held that where there is no intentional wrong the ordinary rule of damages goes no farther than to allow pecuniary compensation for the impairment or injury directly done, and the courts cannot put a pecuniary value on domestic duties and labor performed in and about the family.

If the husband has in fact, on account of his wife's injury, lost a service which she habitually rendered, then as service and according to the pecuniary value of it he ought to be permitted to recover. Recovery ought to be according to the fact. For loss of consortium of the undefined and indefinable influence of either spouse

46. Marri v. Stamford Street R. Co. (Conn.), 78 Atl. 582, 33 L. R. A. (N. S.) 1042; Feneff v. New York C. & H. R. R. Co, 203 Mass. 278, 89 N. E. 436, 24 L. R. A. (N. S.) 1024.

47. New York & Long Branch S. Co. v. Johnson, 195 F. 740, 115 C. C. A. 540, 42 L. R. A. (N. S.) 640.

48. Bolger v. Boston Elevated Ry. Co., 205 Mass. 420, 91 N. E. 389.

49. Whitcomb v. New York, N. H. & H. R. Co., 215 Mass. 440, 102 N. E. 663.

in the family relationship and the pleasure of the relationship neither may recover.[50]

A husband may recover for loss of consortum due to the defendant's sale of laudanum to the plaintiff's wife.[51]

A husband can recover for loss of services and consortium of his wife who contracted pneumonia in a hospital through the negligence of the attendants and died. The rule that at common law there can be no recovery for death does not apply to those who stand in the relation of master, parent or husband to the deceased, for loss of services or society.[52]

The term "consortium," as used at the common law to describe the husband's marital rights, included three elements,— service, society, and sexual intercourse. It is conceded everywhere that any injury to or detention of the wife which interfered with the first of these rights gave the husband a cause of action, as did the infringement of the last by the debauchment of the wife. Until within recent years all American courts have assumed [53] and held that injuries to the second element were also entitled to protection. The great weight of authority is still the same way, although in Massachusetts and some other States it has been held that the recent Married Women's Acts have cut off this right of action.[54]

The better view is that the Married Women's Acts giving her a right to her own separate property and earnings, and the right to sue and be sued as if unmarried, do not mean that she has been devested of all marital duties and obligations either legally or morally, but the husband is still entitled to the whole of his wife's marital affection, and to the whole of such society and comfort as her physical state and mental attitude render her capable of affording him. He who steals any substantial part of that affection, or disables her physically or mentally from rendering such aid and comfort, is guilty of an infringement of the husband's rights, and should be required to make restitution.

50. Blair v. Seitner Dry Goods Co. (Mich.), 151 N. W. 724, L. R. A. 1915D, 524.

51. Hoard v. Peck, 56 Barb. (N. Y.) 202; Holleman v. Harward, 119 N. C. 150, 25 S. E. 972, 34 L. R. A. 803.

52. Bailey v. Long (N. C.), 90 S. E. 809, L. R. A. 1917B, 708.

53. Guevin v. Manchester Street R. Co. (N. H.), 99 Atl. 298, L. R. A. 1917C, 410

54. Feneff v. New York, C. & H. R. Co., 203 Mass. 278, 89 N. E. 436, 133 Am. St. Rep. 291, 24 L. R. A. (N. S.) 1024; Marri v. Stamford Street R. Co., 84 Conn. 9, 78 Atl. 582, Ann Cas. 1912B, 1120, 33 L. R. A. (N. S.) 1042.

So where a married woman is injured through negligence her husband may maintain an action for loss of consortium.[55]

§ 678. For Loss of Services.

Although a husband may not maintain an action for a personal injury to his wife, he may maintain such an action for the consequences to himself of such an injury, such as the loss of her services.[56]

The husband may recover for loss of services of his wife due to the publication of a malicious libel against her which caused her illness. Although in an action for negligence injuries due to mental distress may not be recovered in all cases, still, where the natural result of the libel is mental distress, such mental disturbance and its consequences even in the shape of resulting sickness are fairly to be apprehended. Furthermore, where the act is wilful and malicious the wrongdoer will be responsible for the injuries which he has caused even though they may lie beyond the limits of natural and apprehended results.[57]

There can be but one action for one tort, so where an action is brought for personal injuries and for loss of services of the wife of the plaintiff, and the counts for personal injuries are dismissed, this is a bar to a new action for them.[58]

The statute creating liability for wrongful death should be distinguished from the action for negligence, as the death statute makes earning capacity the test, and in that respect differs from the common law, and therefore the fact that the husband has no right of recovery for death of the wife is no reason why he should not recover for her injury.[59]

§ 679. For Death of Wife.

Where the wife dies in consequence of one's carelessness, as in case of malpractice, the husband may recover damages for the injury accruing to himself before, but not for the injury in consequence of, the death.[60] Modern legislation has supplied many

55. Guevin v. Machester Street R. Co. (N. H.), 99 Atl. 298, L. R. A. 1917C, 410.

56. United States Smelting Co. v. Sisam, 191 Fed. 293, 112 C. C. A. 37, 37 L. R. A. (N. S.) 976.

57. Garrison v. Sun Printing & Publishing Ass., 207 N. Y. 1, 100 N. E. 430, 45 L. R. A. (N. S.) 766.

58. Smith v. Cincinnati, New Orleans, etc., R. Co., 136 Tenn. 282, 189 S. W. 367, L. R. A. 1917C, 543.

59. Guevin v. Manchester Street R. Co. (N. H.), 99 Atl. 298, L. R. A. 1917C, 410.

60. Hyatt v. Adams, 16 Mich. 180; Long v. Morrison, 14 Ind. 595.

new remedies much needed in these classes of cases, particularly with reference to injuries and loss of life occasioned through the carelessness of railroad companies and other common carriers.[61]

§ 680. Necessity of Joinder of Wife.

A wife is not a necessary party to an action for foreclosure of a purchase-money mortgage in which she did not join,[62] nor to a suit by her husband's vendor of land to enforce a vendor's lien,[63] or to foreclose his rights under an executory contract for the sale of land,[64] nor in his suit for specific performance merely because she joined with him in the contract for sale of his property and in a deed tendered in performance by him,[65] nor to an action against the husband for necessaries furnished to her,[66] nor to any action affecting land wherein she has only an inchoate right of dower,[67] or to an action on a contract to which she is not a party,[68] nor, in Texas, to an action on a joint contract of the spouses, where it does not appear that it was made for the benefit of or that the money to be paid thereunder was her separate estate.[69]

She is a necessary party to an action wherein her husband's creditor seeks to subject to his debt her husband's property in her possession,[70] and in ejectment against her husband to try the title to a homestead conveyed to her,[71] and to a suit to remove a levy made on their estate by the entirety in an action against the husband,[72] as well as to any action affecting land of which the record title is in her.[73]

In California it is proper to join the wife in an action against

61. Dickens v. N. Y. Central R. R. Co., 28 Barb. (N. Y.) 41; Stat. 9 & 10 Vict., ch. 93; Mass. Gen. Stats., ch. 63, § 97.

62. Harrow v. Grogan, 219 Ill. 288, 76 N. E. 350.

63. Sarver v. Clarkson, 156 Ind. 316, 59 N. E. 933; Brightman v. Fry, 17 Tex. Civ. 531, 43 S. W. 60; Jackson v. Bradshaw, 28 Tex. Civ. 394.

64. Schaefer v. Purviance, 160 Ind. 63, 66 N. E. 154; Fowler v. Bracy, 124 Mich. 250, 82 N. W. 892, 7 Det. Leg. N. 176 (aff. reh., 124 Mich. 250, 83 N. W. 374, 7 Det. Leg. N. 332).

65. Edmison v. Zborowski, 9 S. D. 40, 68 N. W. 288.

66. Marshall v. Hill, 59 Pa. Super. 481.

67. Riddick v. Walsh, 15 Mo. 519; Herberger v. Zion, 129 Minn. 217, 152 N. W. 268.

68. Loutzenhiser v. Peck, 89 Wash. 435, 154 P. 814.

69. Burke v. Purifoy, 21 Tex. Civ. 202, 50 S. W. 1089.

70. Franck v. Franck, 107 Ky. 362, 21 Ky. Law, 1093, 54 S. W. 195.

71. Hobson v. Van Fossen, 26 Mich. 68.

72. Wight v. Roethlisberger, 116 Mich. 241, 74 N. W. 474.

73. Williamson v. Conner, 92 Tex. 581, 50 S. W. 697.

the husband for necessaries where it is sought to subject her separate estate to the payment of the debt.[74]

§ 681. Actions Against Wife in General.

At common law a wife could not be sued alone.[75] In California and Texas the common-law rule still prevails.[76] Under the Maine statute a wife may sue on her contract as though *sole* and is personally liable thereon.[77] And where a married woman receives money on a parol contract for the sale of her lands, but fails to convey, a personal action cannot be maintained against her to recover the money so paid, nor can it be made a matter of set-off in an action on a promissory note brought by her against the party who has paid such money.[78]

§ 682. Under Married Women's Acts.

Under some Married Women's Acts he is now not a necessary party to an action against her,[79] especially where the contract concerns her separate estate, though both spouses join in negotiating it,[80] or where she is divorced.[81] In Missouri he is not a necessary party to a partition suit against the wife.[82] He is still a proper party where the liability is joint, or joint and several.[83] Under the Alabama Married Women's Act coverture is no longer a defence to an action on a wife's contract.[84]

§ 683. Trover.

A wife is not liable in trover for refusing to surrender a gas machine which the husband has caused to be affixed to her land in such manner as to make it part of the land as a fixture,[85] nor for

74. Evans v. Noonan, 20 Cal. App. 288, 128 P. 794.

75. Salisbury v. Spofford, 22 Ida. 393, 126 P. 400; Farmers' State Bank of Ada. v. Keen (Okla.) 167 P. 207; Stockton v. Farley, 10 W. Va. 171, 27 Am. R. 566; Heyman v. Heyman, 19 Ga. App. 634, 92 S. E. 25.

76. Lemons v. Biddy (Tex.), 149 S. W. 1065; Horsburgh v. Murasky, 169 Cal. 500, 147 P. 147.

77. Perkins v. Blethen, 107 Me. 443, 78 A. 574.

78. Sanford v. Wood, 49 Ind. 165.

79. Black v. Clements, 2 Pennewill (Del.), 499: Arkansas Stables v. Samstag, 78 Ark. 517, 94 S. W. 699; Jones v. Gutman, 88 Md. 355, 41 A. 792; Dobbins v. Thomas, 26 App. D. C. 157.

80. Miller v. Kullesowicz, 41 Pa. Super. 39.

81. Swain v. Hunt, 52 Ind. App. 626, 99 N. E. 529.

82. Estes v. Nell, 140 Mo. 639, 41 S. W. 940.

83. Stanley v. Whitlow, 181 Mo. App. 461, 168 S. W. 840.

84. Moore v. Price, 116 Ala. 247, 22 So. 531.

85. Morrison v. Berry, 42 Mich. 389, 4 N. W. 731, 36 Am. R. 449.

rents of her separate property collected by him after the property has been sequestrated.[86]

§ 684. Actions Against Wife.

Under the Wisconsin Married Women's Act the only contracts which can be enforced against the wife at law are those affecting her separate estate.[87]

Under the Illinois statute making the spouses jointly liable for family expenses, a wife cannot be made liable for rent under a written lease to which she is not a party, though she occupied the premises with her husband as a home, since the statute is not merely remedial, but creates a liability independent of the relation of landlord and tenant.[88] Under the same statute a creditor may recover against the wife after the action against the husband has been dismissed, the statute creating a joint and several liability.[89]

The Maryland statute providing that a wife may be sued jointly with her husband on notes, bills, contracts and agreements applies only to contracts wholly in writing and signed by both.[90] This statute has been held applicable to a joint note, payable to his order, when indorsed by him.[91]

In New Jersey it has been held that where a husband gave his wife's void notes in part payment for property, he continuing liable for that part of the debt, her mortgage to secure such notes might be enforced.[92]

In Nebraska, in order to bind a wife on her note, it must appear that the note was given in reference to and on the credit of and with intent to charge her separate estate.[93] In the same State it is held that since the wife's note given to secure the debt of a third person is void, because in violation of statute, it could not be enforced at law, but might be enforced in equity where the wife received a consideration for her contract.[94]

In Georgia, where a wife's note is in part for her own debt and

86. Grayson County Nat. Bank v. Wandelohr, 105 Tex. 226, 146 S. W. 1186.

87. Mueller v. Wiese, 95 Wis. 381, 70 N. W. 485.

88. Houghteling v. Walker, 100 F. 253 (affd., 107 F. 619, 46 C. C. A. 512).

89. Richardson v. W. L. Robinson Coal Co., 95 Ill. App. 283.

90. Harvard Publishing Co. v. Benjamin, 84 Md. 333, 35 A. 930, 57 Am. St. R. 402.

91. Taylor v. Welslager, 90 Md. 409, 45 A. 476.

92. Colonial Building & Loan Ass'n v. Griffin, 85 N. J. Eq. 455, 96 A. 901.

93. Stenger Benev. Ass'n v. Stenger, 54 Neb. 427, 74 N. W. 846.

94. Hollister v. Bell, 107 Wis. 198, 83 N. W. 297.

in part for the debt of the husband, the payee may recover against her that part which the evidence shows is her own debt.[95] In the same State she is not liable where her note and mortgage given to secure a loan are colorable and intended to subject her estate to her husband's debt, if the lender knows of the collusion.[96]

Under the District of Columbia Married Women's Act a wife may indorse her husband's note to a third person even where it is payable to her, and such third person may maintain an action against the husband thereon.[97]

95. Jones v. Harrell, 110 Ga. 373, 35 S. E. 690.

96. Summers v. Lee, 10 Ga. App. 441, 73 S. E. 602.

97. Bronson v. Brady, 28 App. D. C. 250; Deusenberry v. Deusenberry (W. Va.), 95 S. E. 665.

PART III.

PARENT AND CHILD.

CHAPTER I.

THE RELATION IN GENERAL.

§ 685. Definitions.

A parent is one who has generated a child and is a father or mother,[98] and a "child" means a legitimate child in law.[99]

§ 686. Stepchildren.

It is well settled that in the absence of statutes a person is not entitled to the custody and earnings of stepchildren, nor bound by law to maintain them.[1] At common law a husband is not bound

98. Ellis v. Hewitt, 15 Ga. App. 693, 84 S. E. 185; *In re* Tombo, 149 N. Y. S. 219, 86 Misc. 361 (or. rev., 149 N. Y. S. 688, 164 App. Div. 392).

99. Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052; Landry v. American Creosote Works, 119 La. 231, 43 So. 1016, 11 L. R. A. (N. S.) 387; Batchelder v. Walworth, 82 A. 7; Mutual Life Ins. Co. of New York v. Good, 25 Colo. 204, 136 P. 821.

1. Tubb v. Harrison, 4 T. R. 118; 2 Kent Com. 192; Freto v. Brown, 4 Mass. 675; Worcester v. Marchant, 14 Pick. 510; *supra*, § 237; Attridge v. Billings, 57 Ill. 489; McMahill v. McMahill, 113 Ill. 461; Besondy, *Re*, 32 Minn. 385. If a stepfather qualifies as guardian of the stepchild, and, never having assumed the latter's care and support, charges for necessaries in her accounts, he does not stand *in loco parentis*. Gerber v. Bauerline, 17 Ore. 115. So, too, where he contracts with the child's guardian for its support upon recompense. Ackerman, *Re*, 116 N. Y. 654. The child's right to the beneficial use of his own property, inclusive of a farm on which his stepfather lives with his mother, is regarded on a mutual accounting in such cases. Springfield v. Bethel, 90 Ky. 593; Capek v. Kropik, 129 Ill. 509. As to an adult stepdaughter's claim founded upon expres contract, see Ellis v. Carey, 74 Wis. 176.

to support the children of his wife by a former marriage,[2] and a widow is not bound legally to support her stepchildren.[3]

Yet if a stepfather voluntarily assumes the care and support of a stepchild, he stands *in loco parentis* for the time being; and the presumption then is, that they deal with each other as parent and child, and not as master and servant; in which case the ordinary rules of parent and child will be held to apply; and consequently neither compensation for board is presumed on the one hand, nor for services on the other,[4] and he cannot recover for their support,[5]

2. Kempson v. Goss, 69 Ark. 451, 64 S. W. 224; Freeman v. Freeman, 11 Ky. Law, 822, 13 S. W. 246; Livingston v. Hammond, 162 Mass. 375, 38 N. E. 968; White v. McDowell, 74 Wash. 44, 132 P. 734.

3. Staal v. Grand Rapids & I. R. Co., 57 Mich. 239, 23 N. W. 795; Popejoy v. Hydraulic Press Brick Co., 193 Mo. App. 612, 186 S. W. 1133.

4. Cooper v. Martin, 4 East, 77; Williams v. Hutchinson, 3 Comst. 312; Sharp v. Cropsey, 11 Barb. 224; Murdock v. Murdock, 7 Cal. 511; Gillett v. Camp, 27 Mo. 541; Hussee v. Roundtree, Busbee, 110; Lantz v. Frey, 14 Penn. St. 201; Davis v. Goodenow, 27 Vt. 715; Brush v. Blanchard, 18 Ill. 46; St. Ferdinand Academy v. Bobb, 52 Mo. 357; Smith v. Rogers, 24 Kan. 140; Mowbry v. Mowbry, 64 Ill. 383; Livingston v. Hammond (1894), Mass.; 149 Ill. 195. Homestead rights are thus acquired by a stepfather. Holloway v. Holloway, 86 Ga. 576. As to a stepchild remaining after attaining majority, see Wells v. Perkins, 43 Wis. 160; Harris v. Smith, 79 Mich. 54. For claims upon the estate of a deceased stepson, see Gayle v. Hayes, 79 Va. 542; Chicago Manual Training School Ass'n v. Scott, 159 Ill. App. 350 (duty to support); Burba v. Richardson, 14 Ky. Law, 233; Coakley v. Coakley, 216 Mass. 71, 102 N. E. 930; State *ex rel.* Deckard v. Macom, — Mo. App. —, 186 S. W. 1157.

The stepdaughter may recover for necessaries furnished her imbecile stepfather who was brought to her house by those having charge of his property. Bell v. Rice, 50 Neb. 547, 70 N. W. 25.

Where the stepson has reached his majority and lives separately from the stepfather the latter does not stand *in loco parentis.* Davis v. Gallagher, 55 N. Y. S. 1060, 37 App. Div. 626.

5. *In re* Harris, 16 Ariz. 1, 140 P. 825; Grossman v. Lauber, 29 Ind. 618; Huber v. Roth, 91 Kan. 134, 136 P. 794; Dixon v. Hosick, 101 Ky. 231, 41 S. W. 282, 19 Ky. Law, 387; Swetman v. Swetman, 8 Ky. Law, 266; Hickman v. Tudor, 8 Ky. Law, 424; Rowland v. Manons, 8 Ky. Law, 618; Dawson v. Harper, 12 Ky. Law, 142; Keubler v. Taylor, 15 Ky. Law, 334.

Where the stepfather is needy and becomes the legal guardian of his stepchildren the court may in equity allow him for their support out of their estate. Hill v. Moore, 8 Ky. Law, 538; Livingston v. Hammond, 162 Mass. 375, 38 N. E. 968.

Where the mother's children are provided for by both mother and stepfather there is no presumption that 319—5840--Bender-Domestic Relations the stepfather's support is gratuitous. Eiken v. Eiken, 79 Minn. 360, 82 N. W. 667; Daniel v. Tolon (Okla.), 157 P. 756.

See Kempson v. Goss, 69 Ark. 235, 62 S. W. 582 (where the parent had assumed to support the stepchildren only with their means on their farm, he may be allowed for support he furnishes them).

and can recover for injury to them as if they were his own children where there is loss of services.[6]

The children are not liable for contracts made by the stepparent in the absence of authority.[7] The fact that the stepchild is taken into the family does not prevent his recovery against the stepfather of money loaned by the stepchild to the stepfather.[8] As to third parties, the usual test is whether one has held out the child as a member of his own family.[9]

§ 687. One Standing in Loco Parentis.

One who accepts the gift of a child from the parents stands *in loco parentis,*[10] and has the same rights and duties as the regular

6. Kirchgassner v. Rodick, 170 Mass. 543, 49 N. E. 1015; Eickhoff v. Sedalia, W. & S. W. Ry. Co., 106 Mo. App. 541, 80 S. W. 966; Wessel v. Gerken, 73 N. Y. S. 192, 36 Misc. 221.

7. Butler v. Stark, 25 Ky. Law, 1886, 79 S. W. 204; Stone v. Pulsipher, 16 Vt. 428.

8. Youngblood v. Hoeffle, Tex. Civ. App. 201 S. W. 1057.

9. St. Ferdinand Academy v. Bobb, 52 Mo. 357; Whitaker v. Warren, 60 N H. 20.

For an adopted child the doctrine *in loco parentis* is applied as to services and wages in Brown v. Welsh, 27 N. J. Eq. 429. See *supra,* § 232. In the case of distant relatives and strangers, any presumption that one goes to live in the household on the footing of member of the family instead of servant is less strong than where one is a child; and such presumption is more readily overcome by circumstantial evidence. Thornton v. Grange, 66 Barb. (N. Y.) 507; Tyler v. Burrington, 39 Wis. 376; Neal v. Gilmore, 79 Pa. 421. And as to inferring a claim for a young child's support against the child's own parent, see Carroll v. McCoy, 40 Ia. 38; Thorp v. Bateman, 37 Mich. 68. As to strangers, indeed, when the child is old enough to perform valuable service beyond the worth of support, the presumption is rather that of a contract relation for compensation. In general, the estate of one who has contracted for services to be rendered to the family is liable for the same performed after his death. Toland v. Stevenson, 59 Ind. 485; Frost v. Tarr, 53 Ind. 390; Hauser v. Sain, 74 N. C. 552; Shakespeare v. Markham, 17 N. Y. Super. 311; Schouler, Executors, § 432. But cf. § 474.

10. City of Albany v. Lindsey, 11 Ga. App. 573, 75 S. E. 911; *In re* Korte, 139 N. Y. S. 444, 78 Misc. 276; Hudson v. Lutz, 5 Jones, 217; Butler v. Slam, 50 Pa. 456; Schrimpf v. Settegast, 36 Tex. 296; Hays v. McConnell, 42 Ind. 285; Bixler v. Sellman, 77 Md. 494; Windland v. Deeds, 44 Ia. 98. But the presumption, as between son-in-law and father-in-law, is that they deal on the mutual footing of debtor and creditor. Wright v. Donnell, 34 Tex. 291; Schoch v. Garrett, 69 Pa. 144; Rogers v. Millard, 44 Ia. 466. But cf. *supra,* Hus. & Wife, § 71. All this is matter of evidence upon the facts. Coe v. Wager, 42 Mich. 49; Dissenger's Case, 39 N. J. Eq. 227; Norton v. Ailor, 11 Lea, 563; Ela v. Brand, 63 N. H. 14.

Where the parent by his will leaves to A a devise or legacy to support and educate his child, acceptance by A of the gift obligates him to perform accordingly. Watt v. Pittman, 125 Ind. 168.

parent,[11] and is bound for its maintenance and support,[12] and is not responsible for reasonable punishment given the child.[13] One standing *in loco parentis* can claim allowance for support only where there was an intention at the time to make such charge.[14]

§ 688. Gifts Between Parent and Child.

Gifts between members of the same family are not greatly to be favored; and as to the father's alleged gift to his child, the presumption must be strongly in favor of the father's continued possession as head of the family. Yet where there is sufficient proof of a gift from father to child, fully executed by delivery, it will be upheld as irrevocable.[15] Such a gift should be perfected in order to be sustained afterwards against him, and if by parol it should be direct, positive, and clear. The parent's promise to give cannot be enforced on the child's behalf, against him or his estate, on a mere consideration of love and affection. But the parent in equity may settle property on his children as well as his wife,[16] and a gift by a parent to a child will be supported and there is no presumption of law against its validity,[17] and a con-

11. Kelly v. Illinois Cent. R. Co., 125 Ky. 1, 100 S. W. 239, 30 Ky. Law, 1062; Saunders v. Alvido & Laserre, 52 Tex. Civ. App. 356, 113 S. W. 992.

12. Howard v. Randolph, 134 Ga. 691, 68 S. E. 586.

13. Fortinberry v. Holmes, 89 Miss. 373, 42 So. 799 (although mother stated child not to be whipped); Dix v. Martin, 171 Mo. App. 266, 157 S. W. 133.

14. Smith v. Plew, 171 Ill. App. 222; *In re* Tucker, 74 Mo. App. 131; State *ex rel.* Deckard v. Macom, — Mo. App. —, 186 S. W. 1157.

15. Kellogg v. Adams, 51 Wis. 138. Ordinarily a beneficial deed of real estate, taken by the father in the name of his child, is presumed to be a gift to the child. Francis v. Wilkinson, 147 Ill. 370. Even though the father keeps possession of the deed. Hayes v. Boylan, 141 Ill. 400; Davis v. Garrett, 91 Tenn. 147. And if the deed reserves express rights to the parents, and is recorded, this presumption becomes the stronger. Compton v. White, 86 Mich. 33. But with no apparent intent to deliver and no record, the case may be otherwise. Cazassa v. Cazassa, 92 Tenn. 573. See also Yeakel v. McAtee, 156 Pa. 600; Harrison v. Harrison, 36 W. Va. 556. A note given by the father to the child may be shown to be a gift. Reynolds v. Reynolds, 92 Ky. 556.

16. Bourquin v. Bourquin, 110 Ga. 440, 35 S. E. 710; Bunnell v. Bunnell, 111 Ky. 566, 64 S. W. 420, 23 Ky. Law, 800, 111 Ky. 566, 65 S. W. 607, 23 Ky. Law, 1101.

Possession by a son of his father's farm does not show a contract of sale but was entirely consistent with a license to use it merely. Hubbard v. Hubbard, 140 Mo. 300, 41 S. W. 749; James v. Aller, 66 N. J. Eq. 52, 57 A. 476, 68 N. J. Eq. 666, 62 A. 427, 111 Am. St. R. 654; Powers v. Powers, 46 Ore. 479, 80 P. 1058.

17. Kennedy v. McCann, 101 Md. 643, 61 A. 625 (although the gift prevents the parent from making similar gifts to other children); Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597; James v. Aller, 68 N. J. Eq. 666,

veyance by a parent to minor children will be presumed to be a gift,[18] and a deed by a parent to a child on account of love and affection may be sustained in the absence of evidence of undue influence,[19] and acceptance of a deed recorded executed by a father to his children will be presumed,[20] as it is always presumed that in transactions between them the parent dominates and is free from undue influence,[21] but this presumption may be rebutted, as where the parent is senile.[22]

All family arrangements of the filial kind, whether child or parent be the weaker party, should, in order to stand firmly, be free from fraud or undue influence on either side, and made in good faith; or equity will readily set them aside.[23] And if a valuable consideration be interposed, the settlement is supported more firmly; and specific performance of an executory promise to transfer may be in some instances decreed.[24]

On the other hand, while an adult child may make a binding transfer or conveyance of property to the parent, any such transfer by way of gift or improvident contract, made just after attaining majority, or while in general under undue parental control and

62 A. 427, 111 Am. St. R. 654 (reversing 66 N. J. Eq. 52, 57 A. 476 [although of substantially all the parents property]); Turner v. Turner, 31 Okla. 272, 121 P. 616; Burns & Bell v. Lowe (Tex. Civ. App.), 161 S. W. 942; Brewer v. Lohr, 35 Pa. Super. Ct. 461 (parol gift of land).

18. Reeves v. Simpson, (Tex. Civ. App.), 144 S. W. 361.

19. Becker v. Schwerdtle, 6 Cal. App. 462, 92 P. 398; *In re* Acken's Estate, 144 Ala. 519, 123 N. W. 187.

20. Mullins v. Mullins, 120 Ky. 643, 87 S. W. 764, 27 Ky. Law, 1048; Jenning v. Rhode, 99 Minn. 335, 109 N. W. 597.

21. Neal v. Neal, 155 Ala. 604, 47 So. 66; Hawthorne v. Jenkins, 182 Ala. 255, 62 So. 505; Sanders v. Gurley, 153 Ala. 459, 44 So. 1022; Betz v. Lovell (Ala.), 72 So. 500; Dolberry v. Dolberry, 153 Ala. 434, 44 So. 1018; Vaughn v. Vaughn, 217 Pa. 496, 66 A. 745.

22. Dolberry v. Dolberry, 153 Ala. 434, 44 So. 1018; Nobles v. Hutton, 7 Cal. App. 14, 93 P. 289; *In re* Hoffman's Estate, 32 Pa. Super. Ct. 646.

23. Pevehouse v. Adams, 153 P. 65; Taylor v. Staples, 8 R. I. 170; Van Donge v. Van Donge, 23 Mich. 321; Rider v. Kelso, 53 Ia. 367; Miller v. Simonds, 72 Mo. 669; Jacox v. Jacox, 40 Mich. 473; Mackall v. Mackall, 135 U. S. 167. Cf. Francis v. Wilkinson, 147 Il. 370. See Ellis v. Hogan, 147 Gas. 609, 95 S. E. 4 (relation between stepmother and stepchild is not confidential).

24. As where a writing declared a valuable consideration for the promise to convey land, and actual entry and improvement had taken place upon the faith of the contract. Hagar v. Hagar, 71 Mo. 610. And see Haitt v. Williams, 72 Mo. 214; Kurtz v. Hibner, 55 Ill. 514. As to raising an equity by reason of a meritorious, but not valuable consideration, for enforcing an incomplete gift, see Landon v. Hutton, 50 N. J. Eq. 500.

influence, will be jealously regarded by courts of equity.[25] The principle of equity is, that if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete emancipation, without any benefit moving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child; and that it is the business and the duty of the party who endeavors to maintain such a transaction, to show that such presumption is adequately rebutted; but that the presumption may always be removed.[26]

On the other hand, in transactions between members of the same family, even though that relation subsists between them, from whence the court will infer the moral certainty of the existence of considerable influence, and the probability of its having been exercised, yet if the transaction be one that tends to the peace or security of the family, to the avoiding of family disputes and litigation, or to the preservation of the family property, the principles by which such transactions must be tried are not those applicable to dealings between strangers, but such as on the most comprehensive experience have been found to be most for the interest of families.[27] And even a deed of land from a parent to a child for the consideration of love and affection is not absolutely void as against creditors. The want of a valuable consideration may be a badge of fraud; but if so, it is only presumptive, not conclusive, evidence of it, and may be met and rebutted by opposing evidence.[28] This is the American rule; though, as we have

25. Cooley v. Stringfellow, 164 Ala. 460, 51 So. 321 (deed sustained); Giers v. Hudson, 102 Ark. 232, 143 S. W. 916; Savery v. King, 35 E. L. & Eq. 100. And see Baker v. Bradley, *Ib.* 449; Wright v. Vanderplank, 39 E. L. & Eq. 147; Turner v. Collins, L. R. 7 Ch. 329.

26. Archer v. Hudson, 7 Beav. 551, per Lord Langdale. See Houghton v. Houghton, 11 E. L. & Eq. 134; s. c., 15 Beav. 278, where this subject is fully discussed. See also American case of Bergen v. Udall, 31 Barb. (N. Y.) 9.

27. Master of Rolls in Houghton v. Houghton, *supra.*

An imbecile father living with his grown children may have a notice to quit served by delivery to one of them in such a manner as to entitle the the landlord to maintain ejectment against the father, to whom the notice had been addressed. Tanham v. Nicholson, L. R. 5 H. L. 561. Mortgage by emancipated children over age, to secure a debt of their father, upheld in favor of the mortgagee, but not in favor of the father. Bainbridge v. Brown, 50 L. J. Ch. 522.

28. Hinde's Lessee v. Longworth, 11 Wheat. 213; Seward v. Jackson, 8 Cow. 406; Haines v. Haines, 6 Md. 435; Kain v. Larkin, 131 N. Y. 300; Lord v. Locke, 62 N. H. 566. A father may serve gratuitously as trustee or guardian for his child, and his

seen, the statutes of Elizabeth with reference to voluntary settlements do not receive a uniform interpretation in our State courts. There are doubtless circumstances under which a father's voluntary settlement, whether upon minor or adult children, would be set aside as a fraud upon subsequent and still more upon existing creditors.[29]

§ 689. Clothing, Money, &c., Given to the Child; Right to Insure.

Where a father furnishes his minor child with clothing, such clothing is the property of the father, and he may maintain an action for the loss and injury thereof; but where he intrusts the child with a sum of money for general purposes, without specific directions to its appropriation, and the child buys clothing with it, such clothing is not the property of the father.[30]

The parent may give articles by parol to his child, and afterwards resume them, there being no consideration.[31] If a young child makes foolish and unnecessary outlay, the parent may repudiate the transaction; but he should do so at once, and make restitution, rather than benefit by the transaction.[32]

creditors cannot compel him to charge the trust for their benefit. Ten Broeck v. Fidelity Trust & Safety Vault Co., 88 Ky. 242.

29. See Carter v. Grimshaw, 49 N. H. 100; Wilson v. Kohlheim, 46 Miss. 346; Kayo v. Crawford, 22 Wis. 320; Monell v. Scherrick, 54 Ill. 269; Gardner v. Schooley, 25 N. J. Eq. 150; Guffin v. First Nat. Bank, 74 Ill. 259. No express contract need be proved to enable a son to recover from his father's estate for a house built by the son on the father's land in the lifetime of the latter with the latter's knowledge and consent. Byers v. Thompson, 66 Ill. 421; Kortz v. Hibner, 55 Ill. 514; Hillebrands v. Nibbelink, 44 Mich. 413. Listing the father's personal property for taxation in the son's name affords no presumption of a gift which may not be disputed by evidence. Saunders and Wife v. Greever, 85 Va. 252.

30. Dickinson v. Winchester, 4 Cush. 114; Parmlee v. Smith, 21 Ill. 620; Prentice v. Decker, 49 Barb. 21.

31. Cranz v. Kreger, 22 Ill. 74; Stovall v. Johnson, 17 Ala. 14.

32. See Sequin v. Peterson, 45 Vt. 255, and cases cited. Here the child, eleven years old, having bought cigar-holders, pipes, &c., of a shopkeeper, the father was allowed to recover the money in his own name, upon promptly repudiating the contract and making his demand. Money intrusted to a minor son for a specific purpose, and applied by him without his father's assent in compounding his own crime, may be recovered by the father from the receiver upon a similar principle. Burnham v. Holt, 14 N. H. 367. *Aliter*, if the father assented to the payment, or if the money was paid solely as civil damages in settlement of a trespass. *Ib.* In Condon v. Hughes, 92 Mich. 367, the father was not allowed to repudiate, even with restitution, where he used a colt for some months which the son purchased

A father has a pecuniary interest in the life of a minor child, and an insurance of the life of such child is not within the rule of law by which wager policies are declared void.[33] On the other hand, a minor child has an interest in an insurance policy on the father's life which has been taken out for his benefit, and of this interest he cannot be deprived by arbitrary acts in favor of another.[34] Where a father takes out a policy of life insurance on his own life for the benefit of his children an irrevocable trust is created, and the father cannot, in the absence of some power reserved, surrender the policy. The fact that the father by statute is made the natural guardian of his minor children gives him no right to surrender such a policy, as such statute will be construed to give the father only the rights he had at common law, and by that law guardianship by nature extends only to the custody of the person. It gives the father no right or control over the infant's property, real or personal.[35]

§ 690. Contracts Between Parent and Child.

Contracts between parents and children are to be carefully scrutinized by the courts as being between fiduciaries when the child is the dominant party,[36] but may be binding,[37] and agreements for sale between them will be sustained if sufficient in law.[38]

A contract between parent and child by which the parent transfers property to the child in consideration of support will be upheld if fair.[39]

To support a general contract between a parent and his adult child, as against strangers, a slight consideration is often held

out of his own earnings. See also § 241.

33. Mitchell v. Union, &c., Ins Co., 45 Me. 104. But see Worthington v. Curtis, 1 Ch. D. 419.

34. Ricker v. Charter Oak Ins. Co. 27 Minn. 193; Martin v. Aetna Ins. Co., 73 Me. 25 (an adopted child).

35. Ferguson v. Phoenix Mutual Life Ins. Co. (Vt.), 79 Atl. 997, 35 L. R. A. (N. S.) 844.

36. Allen v. La Vaud, 107 N. E. 570, 213 N. Y. 322 (rev. judg., 144 N. Y. S. 1103, 159 App. Div. 914).

37. Williams v. Canary, 161 C. C. A. 352, 249 F. 344; Epps v. Story, 109 Ga. 302, 34 S. E. 662; Lee v. Page, 8 Ky. Law, 602, 2 S. W. 503; Means v. Baker's Adm'rs, 13 Ky. Law, 876; Tucker v. Tucker, 27 Mich. 204 (parent must be reasonable in executing indefinite contract). See Wamsley v. Wamsley, 62 N. Y. S. 954, 48 App. Div. 330.

38. Brooks v. Buie, 71 Ark. 44, 70 S. W. 464 (oral agreement insufficient); Hodgson v. Macy, 8 Ind. 121.

39. Sanders v. Gurley, 153 Ala. 459, 44 So. 1022; Carter v. McNeal, 86 Ark. 150, 110 S. W. 222.

Where the mother lives with the daughter under such circumstances that no agreement to pay for her services can be implied, there is no consideration for the mother's transfer of property to the daughter in the

sufficient. And a deed of personal property from parent to child, the parent not being indebted at the time, by which it is agreed that the parent shall keep possession during life, is not considered void.[40] So it is held that a bond executed by a son to his parent for $500, with interest semi-annually if demanded, is upon valuable consideration, sufficient to sustain a conveyance of land as a purchase.[41]

Where a son purchases and stocks a farm as a home for an indigent father, who resides and labors thereon, the products are not subject to attachment as the son's property.[42] On the other hand, where a parent permits the child to receive and invest his earnings, the benefit of the investment belongs to the child, especially as against creditors of the father.[43] And in some States, a minor child who improves and settles a tract of land with the father's permission may acquire a title by making valuable improvements as effectually as if he were of age.[44]

§ 691. Suits Between Child and Parents.

It is intimated in a recent case that, while one occupying the *quasi* parental relation towards a minor stranger by blood may claim that the child's services are offset by the maintenance, care, and education he has bestowed upon him, the failure to provide properly while the child rendered services raises a liability for those services which the child, on attaining majority, may enforce.[45] The question, moreover, is sometimes raised in these days, whether a young son or daughter occupying the filial relation may not, on becoming of age, sue the parent or *quasi* parent for alleged maltreatment or other injury.[46] A minor cannot, however, sue his

absence of express contract. Fennimore v. Wagner, N. J. Ch. 1906, 64 A. 698.

40. Bohn v. Headley, 7 Har. & J. 257; Shepherd v. Bevin, 9 Gill, 32.

41. Jackson v. Peck, 4 Wend. 300.

42. Brown v. Scott, 7 Vt. 57.

43. Campbell v. Campbell, 3 Stockt. 268; Stovall v. Johnson, 17 Ala. 14; Wilson v. McMillan, 62 Ga. 16; § 268.

44. Galbraith v. Black, 4 S. & R. 207. See Jenison v. Graves, 2 Blackf. 441. But see Bell v. Hallenback, Wright, 751; Fonda v. Van Horne, 15 Wend. 631; Brown v. McDonald, 1 Hill Ch. 297.

45. Schrimpf v. Settegast, 36 Tex. 296. And in strong cases the child's right of action lies during minority. Watt v. Pittman, 125 Ind. 168.

46. The writer is informed of a *nisi prius* Maine case tried about the close of 1880 (French v. Allen), where a daughter, aged twenty-three, joined with her husband in an action for an alleged assault committed upon her by her parent when she was eleven years old. The trial resulted in a verdict for the defendant, and the plaintiffs did not proceed farther; consequently the case is not reported.

father for a tort unless he has been emancipated,[47] and a minor child cannot recover against his father for injuries inflicted on him by his stepmother.[48]

With reference to a blood parent, however, all such litigation seems abhorrent to the idea of family discipline which all nations, rude or civilized, have so steadily inculcated, and the privacy and mutual confidence which should obtain in the household. An unkind and cruel parent may and should be punished at the time of the offence, if an offender at all, by forfeiting custody and suffering criminal penalties, if need be; but for the minor child who continues, it may be for long years, at home and unemancipated, to bring a suit, when arrived at majority, free from parental control and under counter-influences, against his own parent, either for services accruing during infancy or to recover damages for some stale injury, real or imagined, referable to that period, appears quite contrary to good policy. The courts should discourage such litigation; and so upon corresponding grounds the parent's suit as to any cause of action referable to the period and relation of tender childhood.[49]

47. Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763.

48. McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664, 64 L. R. A. 991, 102 Am. St. R. 787.

49. Clear precedents are wanting on these points; but the policy of the common law appears to be hostile to permitting such suits. And so is the late case of Hewlett v. Ragsdale, 68 Miss. 703; Parent and child do not stand strictly as *sui juris* regarding the world or one another; but infancy is usually taken to be a relation analogous at common law to that of coverture. Now, as to coverture, it is clear that from regard to the peace of society the common law forbade husband and wife to sue one another in damages for breach of the marital rights; though conceding that the breach of obligation on one side might release from obligation on the other; that there might be indirect redress, separation, &c. See Schouler, Hus. & Wife, § 72. Even after a divorce it is recently held that the sanctity of the marriage union shall not be disturbed by such litigation between the divorced sopuses. *Ib.*, § 561; Abbott v. Abbott, 67 Me. 304. Of course one spouse might be held criminally responsible at the time for a personal wrong against the other. Equity with reference to property and adverse interests therein, regards married parties as subject, moreover, to litigation; but that is something quite different so far as public policy and the interests of society are concerned. It seems to us that these analogies have a close application to the filial relation. And suits on an injured infant's behalf ought, if allowable at all, to be allowed at or about the time of the parental breach, only to the infant suing by next friend. And the more essential point is to get rid of the cruel custodian; as a child, under fit circumstances, may. See, as to actions by or against infants, *post*, Part V., ch. 6, § 10155 *et seq.*

Equity, however, regards the rights of parent and child, as well as of husband and wife, and separates their property interests.[50] An oppressive contract relative to property extorted by a parent from the child, or by an adult child from the parent, may doubtless be relieved against.[51]

§ 692. Privileged Communication to Parent.

Communications made to or in the presence of a parent of a minor touching the minor's conduct, by reason of the parent's interest are qualifiedly privileged, if made fairly and in good faith. This is especially true if the interview is sought by the parent. The same rule has been applied where the child, though an adult, is a female living with and under the care and protection of the parent. In other cases, except where the communication was invited or acquiesced in by the traduced person himself, it is no more privileged when made to parents or other kindred than if made to strangers.

But where the interview in the presence of others was either invited or consented to by the person claiming to have been defamed, the occasion is qualifiedly privileged, whether such persons be strangers or kindred. Whether the privilege of the occasion was exceeded depends upon the good faith of the charges made. If charges of theft were then made under an honest suspicion the privilege of the occasion was not exceeded; but if they were made to coerce payment by the father or with any other sinister purpose, the privilege was exceeded.[52]

§ 693. Constitutional Right of Legislature to Interfere with Parent.

The rights of parents in relation to the custody and services of their children may be enlarged, restrained, and limited, as wisdom or policy may dictate, unless the legislative power is limited by some constitutional prohibition.[53] But it is held that the State has no constitutional right to interfere with the parent and take charge of a child's education and custody, on the mere allegation that he is "destitute of proper parental care, and is growing up in mendicancy, ignorance, idleness, and vice."[54] On the other hand,

50. *Post,* Part V., ch. 6.

51. Bowe v. Bowe, 42 Mich. 195.

52. Ecuyer v. New York Life Ins. Co. (Wash.), 172 Pac. 359, L. R. A. 1918E, 536.

53. United States v. Bainbridge, 1 Mason, 71, per Story, J.; Bennet v. Bennet, 2 Beasl. 114; State v. Clottu, 33 Ind. 409.

54. People v. Turner, 55 Ill. 280.

a statute not penal in character, by which the State, as *parens patriæ*, assumes the care and custody of neglected children so as to supply to them the parental custody they have lost, is pronounced constitutional.[55] Nor as to such children do American courts yield greatly to considerations of the parental religion as binding their discretion for the child's welfare.[56]

"Sunday laws" of Vermont do not prevent a father from journeying to see his children, who are properly absent from home. McCrary v. Lowell, 44 Vt. 116.

55. Farnham v. Pierce, 141 Mass. 203; Whalen v. Olmstead, 61 Conn. 263; *In re* N. P. P. B. M. v. Ah Wan, 18 Ore. 339; Ware's Petitioner, 161 Mass. 70.

56. Whalen v. Olmstead, 61 Conn. 263; *In re* N. P. P. B. M. v. Ah Wan, 18 Ore. 339. Where a statute gives to a board of public institutions the power to control the custody and education of children committed to them, its discretion will be favored. Ware's Petitioner, 161 Mass. 70. But in a temporary commitment the parent who can show that the object of the commitment has been accomplished and that the child's welfare would be promoted by a restoration of custody is entitled to be heard. Kelley, Petitioner, 152 Mass. 432.

CHAPTER II.

OF LEGITIMATE CHILDREN IN GENERAL.

§ 694. Parent and Child in General; Children Legitimate and Illegitimate.

The second of the domestic relations is that of Parent and Child; a relation which results from marriage, and is, as Blackstone terms it, the most universal relation in nature.[57] Both natural and politic law, morality, and the precepts of revealed religion alike demand the preservation of this relation in its full strength and purity. In the first period of their existence, children are a common object of affection to the parents, and draw closer the ties of their mutual affection; then comes the education of the child, in which the parents have a common care, which further identifies their sympathies and objects; the brothers and sisters of the child, when they come, bring with them new bonds of affection, new sympathies, new common objects; and the habits of a family take the place of the wishes of an individual. Thus do children give rise to affections which still further tend to bind together the community by links of iron.[58]

Children are divided into two classes, legitimate and illegitimate. The law prescribes different rights and duties for these classes.[59] It becomes proper, then, to consider them in order. *First*, then, as to legitimate children, to which topic alone the relation of parent and child in strictness applies; this will occupy several chapters.[60]

57. 1 Bl. Com. 447.

58. Whewell, Elements of Morality, 100; 2 Kent Com. 189.

59. Bl. Com. 447.

60. The words "child" or "children" in a statute are construed as embracing only legitimate children. Orthwein v. Thomas, 127 Ill. 554.

§ 695. Legitimate Children in General.

A legitimate child is one who is born in lawful wedlock, or is properly brought within the influence of a valid marriage by reason of the time of birth. Legitimacy, as the word imports, will require that the child be born in a manner approved of by the law. If he is begotten during marriage and born afterwards, it is enough;[61] and so, too, if he was begotten before marriage but born in lawful wedlock. We have seen that in some States the loose "contract" or "common-law" marriage is held valid, with the same legal consequences as a ceremonial marriage.[62] Cohabitation and common repute raise the presumption of lawful wedlock sufficiently to dispense, ordinarily, with positive proof of a marriage.[63]

§ 696. Presumption of Legitimacy.

The maxim of the civil law is *Pater est quem nuptiæ demonstrant;* a rule frequently cited with approval by common-law authorities, though, as we shall soon see, differently applied in some respects.[64] A distinguished Scotch jurist pronounces this "a plain and sensible maxim, which is the corner-stone, the very foundation on which rests the whole fabric of human society."[65] Boullenois, a civil-law writer, likewise commends it as "a maxim recognized by all nations, which is the peace and tranquillity of States and families."[66] This maxim implies that it is always sufficient for a child to show that he is born during the marriage. The law draws from this circumstance the necessary presumption that he is legitimate. Every child born in wedlock is presumed to be legitimate, and the child's paternity is provable by reputation. Hence the burden to show illegitimacy is cast on those who allege it in such cases.

Strong, however, as this presumption may be, it is not conclusive at law. For there may be other circumstances: such as long-continued separation of the parents; the impotence of the father; also, if the offspring be posthumous, the length of period which

61. 1 Bl. Com. 447; Fraser, Parent & Child, 1; 1 Burge, Col. & For. Laws, 59.

62. §§ 25-29.

63. § 29; Orthwein v. Thomas, 127 Ill. 554.

64. 1 Bl. Com. 447; Stair, III. 3, 42; 2 Kent Com. 212, *n.;* Fraser, Parent & Child, 1, 2, and authorities cited; 1 Burge, Col. & For. Laws, 59.

65. Ld. Pres. Blair, in Routledge v. Carruthers, 19 May, 1812, cited by Fraser, *supra.*

66. Boullenois, Traité des Status, tome 1, p. 62, also cited by Fraser, *supra.*

has elapsed since the father's death. Such circumstances might render it physically and morally impossible that the child was born and begotten in lawful wedlock. The civil law, therefore, admitted four exceptions to the general maxim: first, the absolute and permanent impotence of the husband; second, his accidental impotence or bodily disability; third, his absence from his wife during that period of time in which, to have been the father of the child, he must have had sexual intercourse with her; fourth, the intervention of sickness, *vel alia causa.*[67] These concluding words admit the classification to be imperfect. The common-law rule, which subsisted from the time of the Year Books down to the early part of the last century, declared the issue of every married woman to be legitimate, except in the two special cases of the impotency of the husband and his absence from the realm.[68] But in *Pendrell* v. *Pendrell* the absurd doctrine of making legitimacy rest conclusively upon the fact of the husband being *infra quatuor maria* was exploded.[69] Some Scotch jurists resolve the grounds upon which the presumption of legitimacy may be overthrown into two: first, that the husband could not have had sexual intercourse with his wife by reason of his impotency; and second, that, having the power, he had in fact no sexual intercourse with her at the time of the conception.[70] This seems to mean, first, that the husband physically could not; second, that he actually did not; but does not the second exception swallow the first? Perhaps the safer course is to abandon all attempts to classify; and to hold, with Chancellor Kent, that the question of the legitimacy or illegitimacy of the child of a married woman is one of fact, resting on decided proof as to the non-access of the husband, and that these facts must generally be left to a jury for determination.[71]

From the peculiarities attending the case of access or non-access, legitimacy or illegitimacy, great indulgence is to be shown by the courts. Said Lord Erskine: "The law of England has been more scrupulous upon the subject of legitimacy than any other, to the extent even of disturbing the rules of reason."[72] Still later was it asserted in English chancery that the ancient policy of the law

67. Dig. lib. 1; tit. 6, l. 6; 1 Burge, Col. & For. Laws, 60.

68. 2 Kent Com. 210; Co. Litt. 244, *a;* 1 Roll Abr. 358.

69. Stra. Rep. 925; 2 Kent Com. 211, and cases cited; Shelley v. —— (1806), 13 Ves. 56.

70. Fraser, Parent & Child, 4.

71. 2 Kent Com. 211; 3 P. Wms. 275, 276; Harg. *n.* 193 to Co. Litt. lib. 2; Rex v. Luffe, 8 East, 193. And to the same effect, see Blackburn v. Crawfords, 3 Wall. 175.

72. Shelley v. ——, 13 Ves. 56.

remained unaltered; and that a child born of a married woman was to be presumed to be the child of the husband, unless there was evidence, beyond all doubt, that the husband could not be the father.[73] And it is at this day admitted that the presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but that the evidence against it ought to be strong, distinct, satisfactory, and conclusive;[74] that mere rumor is insufficient to bastardize issue or to require positive proof either of legitimacy or wedlock.[75]

So far, indeed, is legitimacy favored at law, that neither husband nor wife can be a witness to prove access or non-access, while they lived together. This is clearly established in England;[76] and it is understood to be the law likewise in this country, though the decided cases seem to turn upon the admissibility of the wife's testimony, and the modern legislation of any State may affect the question.[77] Such evidence is treated as *contra bonos mores*. Yet the wife is an admissible witness to prove her own adultery, and in questions of pedigree; and husband and wife may prove facts,

73. Head v. Head, 1 Sim. & Stu. 150 (1823); Banbury Peerage Case, *Ib.* 153; Pendrell v. Pendrell, 2 Stra. 925.

74. Hargrave v. Hargrave, 9 Beav. 552; Archley v. Sprigg, 33 L. J. Ch. 345; Plowes v. Bossey, 8 Jur. (N. S.) 352; 10 W. R. 332; Fox v. Burke, 31 Minn. 319; Watts v. Owens, 62 Wis. 512.

75. Ortwein v. Thomas, 127 Ill. 554.

76 Rex v. Inhabitants of Sourton, 5 Ad. & El. 188; Patchett v. Holgate, 3 E. L. & Eq. 100; 15 Jur. 308; *In re* Rideout's Trusts, L. R. 10 Eq. 41.

77. 2 Stark. Evid., § 404; 1 Greenl. Evid., § 344; Phillips v. Allen, 2 Allen (Mass.), 453; People v. Overseers, 15 Barb. (N. Y.) 286; Parker v. Way, 15 N. H. 45; Dennison v. Paige, 29 Pa. 420. The father's declarations as to a son's illegitimacy are competent. Barnum v. Barnum, 42 Md. 251. A mother may testify that she was always true to the reputed father, her husband, and that no other man could have been the father of the child. Warlick v. White, 76 N. C. 175. *Semble*, such mother's truthfulness may be impeached, but not her general character for chastity. *Ib.* The declarations of deceased parents are admissible against third parties to prove the legitimacy of their children. Jackson v. Jackson (1894), Md. While inadmissible witnesses as to non-access, husband and wife may testify in cases between third parties as to the time of their own marriage, the time of a child's birth, and any other independent facts affecting the issue of legitimacy. Janes's Estate, 147 Pa. 527. The wife's adultery is insufficient to repel the paternity presumption, where her husband had contemporaneous access. Goss v. Froman, 89 Ky. 318; Scott v. Hillenberg, 85 Va. 245; Grant v. Mitchell, 83 Me. 23; Shuman v. Shuman, 83 Wis. 250. And so is the adulterer's own admission. Grant v. Mitchell, 83 Me. 23. The husband cannot on this issue testify as to his own non-access while living with his wife, though he had done so in his divorce suit and gained it. Shuman v. Shuman, 83 Wis. 250.

such as marriage and date of the child's birth; these may be conclusive as to illegitimacy.[78] Much testimony, extremely delicate, is also taken in bastardy and divorce proceedings. When, therefore, the courts shut their eyes so tightly against this proof of access or non-access, perhaps it is not because they are shocked, but lest they should see illegitimacy established.

To carry the presumption of legitimacy so far as to disturb the rules of reason is unjust; for no man should be saddled with the obligations of children which clearly do not belong to him. And the rule of evidence in the English courts which required extraneous proof of impotency of the husband, or his absence from the realm, has been severely and justly criticised, not without some good results.[79] The decision of the House of Lords in the celebrated Banbury Peerage Case proceeded upon the reasonable assumption that moral as well as physical impossibilities may affect the rule of legitimacy. Here husband and wife occupied the same house at the very time the child must have been begotten, and no case of impotency was made out, and yet that child was held not to be the child of the husband; for the testimony by collateral proof as to a moral impossibility was sufficiently strong notwithstanding.[80] This case was confirmed by another, where husband and wife had voluntarily separated, but the husband resided at a distance of only fifteen miles, and sometimes visited his wife; and the wife was delivered of a child, which was pronounced a bastard, from evidence of the conduct of the wife and her paramour. Here it was said, "The case, therefore, comes back to the question of fact."[81] Still later cases strengthen the same doctrine.[82] Impotency of the husband, and his absence from

78. See 1 Greenl. Evid., §§ 343, 344; Caujolle v. Ferrié, 23 N. Y. 90. And see Sale v. Crutchfield, 8 Bush, 636; Dean v. State, 29 Ind. 483.

79. 2 Kent Com. 211, *n.*; Fraser, Parent & Child, 7.

80. 1 Sim. & Stu. 153. See Nicolas on Adulterine Bastardy, 181, a volume written to show that this case overturns the old law of England.

81. Morris v. Davis, 5 Cl. & Fin. 463. And see Barony of Saye & Sele, 1 Cl. & Fin. (N. S.) 507; Sibbett v. Ainsley, 3 L. T. (N. S.) 507; Sibbett v. Ainsley, 3 L. T. (N. S.) 583, Q. B.; Fraser, Parent & Child, 8; King v. Luffe, 8 East, 193; also Hitchins v. Eardley, L. R. 2 P. & D. 248, as to admitting declarations of the person whose legitimacy is at issue.

82. Bosvile v. Attorney-General, 12 P. D. 177. Here a child had been born two hundred and seventy-six days after the last opportunity of intercourse between the husband and wife, or within a very few days later than the usual period of gestation; and there was evidence tending to show that the wife regarded the child as the offspring of her paramour. A still stronger case is Burnaby v. Bailee, 42 Ch. D. 282.

the realm, suggest then but two classes of cases, and those not the only ones, where children may now be pronounced bastards.[83]

In this country, cases have not unfrequently arisen which involve the legitimacy of offspring; and the more reasonable doctrine favors legitimacy to about the same extent as the later English decisions.[84] The presumption of legitimacy is strongly carried, as the cases below cited indicate; though not so far as to exclude proof of non-access of the husband or such other rational facts as might rebut this presumption, and show that the child of a married woman was in reality a bastard.[85] Doubt and suspicion or un-

83. Hargrave v. Hargrave, 9 Beav. 552. "I apprehend," said Lord Langdale, "that evidence of every kind, direct or presumptive, may be adduced, for the purpose of showing the absence of sexual intercourse which, in cases where there has been some society, intercourse, or access, has been called non-generating access. We have, therefore, to attend to the conduct and the feelings, as evidenced by the conduct of the parties towards each other and the offspring, and even to the declarations accompanying acts, which are properly evidence. Such circumstances are of no avail against proper evidence of generating access; but they may have weight, when the effect of that evidence is doubtful. If the weight is not such as to convince the minds of those who have to determine the matter, the effect may only tend to shake, without removing, the presumption of legitimacy, which in such a case must prevail."

84. Patterson v. Gaines, 6 How. (U. S.) 582; 2 Kent Com. 211, and cases cited; Hemmenway v. Towner, 1 Allen, 209; Van Aernam v. Van Aernam, 1 Barb. Ch. 375; Wright v. Hicks, 15 Ga. 160.

85. See Van Aernam v. Van Aernam, 1 Barb. Ch. (N. Y.) 375; Kleinert v. Ehlers, 38 Pa. 439; Phillips v. Allen, 2 Allen (Mass.), 453; Hemmenway v. Towner, 1 Allen (Mass.), 209 State v. Herman, 13 Ire. 502; Tate v. Pene, 19 Martin, 548; Cannon v. Cannon, 7 Humph. 410; State v. Shumpert, 1 S. C. (N. S.) 85; Strode v. Magowan, 2 Bush (Ky.), 621; State v. Lavin, 80 Ia. 555; Blackburn v. Crawfords, 3 Wall. 175; Wilson v. Babb. 18 S. C. 59. Collateral proof of legitimacy is not to be favored. See Kearney v. Denn, 15 Wall. 51. But under suitable circumstances the grant of letters of administration may be conclusive in other courts. Cajolle v. Ferrié, 13 Wall. 465. See cases, § 225.

Formerly, in portions of the United States, slave marriages were deemed unlawful, and the offspring illegitimate. Timmins v. Lacy, 30 Tex. 115. But slavery no longer exists, and the tendency of our legislation is now to uphold as far as possible former marriages of colored persons, and the legitimacy of their offspring, cohabitation continuing. See White v. Ross, 40 Ga. 339; Allen v. Allen, 8 Bush (Ky.), 490; Gregley v. Jackson, 38 Ark. 487; 34 La Ann. 265; Clements v. Crawford, 42 Tex. 601; Daniel v. Sams, 17 Fla. 487; *supra*, § 17.

To impugn a child's paternity, reputation of the mother for unchastity is admissible, if at all, only as to unchastity prior to connection with the reputed father. Morris v. Swaney, 7 Heisk. 591; Warlick v. White, 76 N. C. 175. If the son was colored and the mother an Indian, the color will be presumed to have been derived from he mother rather than disturb the presumption of legitimacy. Illinois Land Co. v. Bonner, 75 Ill. 315. But otherwise where a mulatto child is born of

favorable rumor furnish no sufficient ground for adjudging illegitimacy. In short, the presumption in favor of the legitimacy of a child born in wedlock is not to be taken as a presumption of law, but a presumption which may be rebutted by evidence clear and conclusive, though not resting merely on a balance of probabilities.[86]

§ 697. Legitimation of Illicit Offspring by Subsequent Marriage.

In respect of the legitimation of offspring by the subsequent marriage of their parents, the civil and common-law systems widely differ. By the civil and canon laws, two persons who had a child as the fruit of their illicit intercourse might afterwards marry, and thus place their child to all intents and purposes on the same footing as their subsequent offspring, born in lawful wedlock.[87] But the common law, though not so strict as to require that the child should be begotten of the marriage, rendered it indispensable that the birth should be after the ceremony.[88] Let us notice this point of difference at some length.

It appears that the law of legitimation *per subsequens matrimonium* is of Roman origin; introduced and promulgated by the first Christian Emperor, Constantine, as history alleges, at the instigation of the clergy. This was an innovation upon the earlier Roman system; and the object of its introduction was to put down that matrimonial concubinage which had become so universal in the Empire.[89] Justinian afterwards made this law perpetual.[90] Its first appearance in the canon law is found in two rescripts of Pope Alexander III., preserved in the Decretals of Gregory, and

a white woman whose husband is white; and here expert medical testimony is proper as to the natural impossibility of white parentage on both sides. Bullock v. Knox, 96 Ala. 195. Where parents and other members of the family have long and consistently treated a child as legitimate, this affords strong presumption of legitimacy in any case. Illinois Land & Loan Co. v. Bonner, 75 Ill. 315; Gaines v. Mining Co., 32 N. J. Eq. 86. But not proof indisputable. Bussom v. Forsyth, 32 N. J. Eq. 277.

And as to proof of marriage, see also Schouler, Hus. & Wife, §§ 38, 39.

86. See 12 App. Cas. 312; § 277.

87. 2 Kent Com. 208; 1 Burge, Col. & For. Laws, 92; (1894) App. C. 165.

88. 1 Bl. Com. 454. If the child be born after the ceremony, even though it be but a few weeks later, the presumption of paternity against the husband is almost irrestible, and the burden is on him to show affirmatively to the contrary, in order to establish the child's status as illegitimate. Gardner v. Gardner, 2 App. Cas. 723. Cf. *In re* Corlass, 1 Ch. D. 460.

89. "Licita consuetudo semimatrimonium." Cod. lib. 6, tit. 57.

90. Taylor's Civil Law, 272; Fraser, Parent & Child, 32; 1 Burge, Col. & For. Laws, 92, 93.

issued in 1180 and 1172.[91] These extended the benefits of the marriage to the offspring of carnal love, and not merely to the issue of systematic concubinage. This law of legitimation was introduced into Scotland within the range of authentic hitsory.[92] It is also admitted, with different modifications, into the codes of France, Spain, Germany, and most other countries in Europe.[93]

The principle to which the law of legitimation *per subsequens matrimonium* is to be referred has been a subject of controversy. The canonists based the law not on general views of expediency and justice, but upon a fiction which they adopted in order to reconcile the new law with established rules; for, assuming that, as a general rule, children are not legitimate unless born in lawful wedlock, they declared that, by a fiction of law, the parents were married when the child was born. Such reasoning, by no means uncommon in days when the wise saw more clearly what was right than why it was so, has not stood the test of modern logic; and the Scotch courts have placed the rule once more where its imperial founders left it; namely, on the ground of general policy and justice. "Legitimation is thought to be recommended by these considerations of equity and justice, that it tends to encourage what is at first irregular and injurious to society, into the honorable relation of lawful matrimony; and that it prevents those unseembly disorders in families which are produced where the elder-born children of the same parents are left under the stain of bastardy, and the younger enjoy the status of legitimacy." [94]

This doctrine of the civil law has found great favor in the United States. It has prevailed for many years in the States of Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Missouri, Indiana, and Ohio.[95] So in Massachusetts bastards are to be considered legitimate after the intermarriage of their parents and recognition by the father.[96] And similar statutes are to be found in Maine, New Hampshire,

91. Decr. IV. 17, 1; IV. 17, 6, cited in Fraser, Parent & Child, 33. "Tanta est enim vis sacramenti (matrimonii) ut qui antea sunt geniti post contractum matrimonium habeantur legitimi."

92. Fraser, Parent & Child, 32, 33.

93. 1 Burge, Col. & For. Laws, 101.

94. Fraser, Parent & Child, 35; Munro v. Munro, 1 Rob. H. L. Scotch App. 492.

95. Griffith's Law Regis. *passim;* 1 Burge, Col. & For. Laws, 101. This provision protects the offspring of an adulterous connection as well as that of parents who were free to contract marriage when the children were born. Hawbecker v. Hawbecker, 43 Md. 516.

96. Mass. Gen. Sts. 1860, ch. 91.

Pennsylvania, Vermont, Tennessee, and elsewhere.[97] There is, however, no legal presumption that a man who marries the mother of a bastard child was its actual father;[98] and some recognition of paternity or else an adoption is a usual element in intermarriages of this sort.[99]

§ 698. Legitimation by Subsequent Marriage Not Favored in England.

On the other hand, the English law has very strongly opposed the whole doctrine of legitimation *per subsequens matrimonium.* Even so far back as the reign of Henry III. is found a memorable instance where the peers refused to change the law in this respect, when urged to do so by the English bishops; declaring with one voice, *quod nolunt leges Angliæ mutare, quæ huc usque usitatæ sunt et approbatæ.*[1] Jealousy of canonical influence may partially account for this conduct, if not prejudice against the civil law generally. Certain it is that most English jurists have ever since stubbornly maintained the superiority of their own maxims, which place the immutability of the marriage relation above all the tender promptings of humanity towards innocent sufferers. Even Blackstone vigorously assails the civil-law doctrine, urging against it several rather artificial objections, in the apparent belief that legal consistency is better than natural justice.[2] But on the other hand, Selden mentions that the children of John of Gaunt, Duke of Lancaster, were legitimated by an act of Parliament, in the

97. Maine Laws, 1852, ch. 266; Pa. Laws, 1857, May 14; Vermont, R. S. 1863, ch. 56; Stimson, Stat. Law, §§ 6631-6634; Ind. R. S. 1862, ch. 46. And see Graham v. Bennett, 2 Cal. 503; Starr v. Peck, 1 Hill (N. Y.), 270; Sleigh v. Strider, 5 Call, 439; Danelli v. Danelli, 4 Bush, 51; Adams v. Adams, 36 Ga. 236; Morgan v. Perry, 51 N. H. 559; Brown v. Belmarde, 4 Kan. 41; Williams v. Williams, 11 Lea, 652; Brock v. State, 85 Ind. 397. In some States still another mode of legitimation, for inheritance, if not for all other purposes, is permitted by law as to such offspring; namely, by the father's formal declaration, or that of both parents, properly attested, which is filed in court and recorded. This might be called legitimation by public or judicial record after intermarriage of parents. See Lingen v. Lingen, 45 Ala. 410, 414; Pina v. Peck, 31 Cal. 359; Talbot v. Hunt, 28 La. Ann. 3. Recognition of a less formal character suffices for purposes of inheritance in Iowa. Crane v. Crane, 31 Ia. 296.

98. Jane's Estate, 147 Pa. 527; Brewer v. Hamor, 83 Me. 251; *In re* Jessup, 81 Cal. 408.

99. If the subsequent marriage was not a valid one, the child continues bastardized. Adams v. Adams, 154 Mass. 290.

1. Stat of Merton, 20 Hen. III. ch. 9; 2 Kent Com. 209; 1 Bl. Com. 456.

2. 1 Bl. Com. 454, 455.

reign of Richard II., founded on some obscure common-law custom.[3]

Upon such principles it has been decided by the House of Lords, that where a marriage is in its inception unlawful, being at a time when the woman's first husband must have been alive, children born even after the time when it was presumed that the first husband had died, must be pronounced illegitimate; the mere continuance of the cohabitation after that event being insufficient, without celebration, to change the character of the connection.[4] Nor will an absolute presumption of law be raised as to the continuance of life to support such legitimacy; for in every instance the circumstances of the case must be considered.[5] And so strict is the rule, that where a person, born a bastard, becomes, by the subsequent marriage of his parents, legitimate according to the laws of the country in which he was born, he is still a bastard, so far as regards the inheritance of lands in England.[6] But testamentary provisions for illegitimate offspring as "children" receive an increasing favor in the English courts; and this disability of bastards to "inherit" English lands, notwithstanding a subsequent marriage, is now confined, moreover, to descents upon intestacy.[7]

§ 699. Legitimacy of Offspring Born After Divorce.

As to the status of children born after divorce, partial or complete, little can be stated from the books; for such divorces hardly existed at the common law.[8] They are probably illegitimate *prima facie,* if born of the divorced mother within an unreasonable time after separation.[9] A remarriage by a divorced party in a state or country where such marriages are not prohibited will

3. Selden on Fleta, ch. 9, § 2. And see Barrington, p. 38; 2 Kent, Com. 209.

4. Lapsley v. Grierson (1848), 1 Cl. & Fin. (N. S.) 498; Cunningham v. Cunningham, 2 Dow, 482.

5. Lapsey v. Grierson, *Ib.*, explaining Rex v. Twyning, 2 B. & A. 386.

6. Doe d. Birtwhistle v. Vardill, 6 Bing. N. C. 385; 7 Cl. & Fin. 895. And see ch. 6, *post.*

The only exception permitted by the common law under this general head was that where the child whose parents subsequently married entered into possession of his father's lands after his father's death, and kept possession until his own death, so that they descended to his own issue, no disturbance of title was permitted on the plea of such child's illegitimacy. Bussom v. Forsyth, 32 N. J. Eq. 277.

7. Grey v. Earl of Stamford (1892), 3 Ch. 88, § 231.

8. See Husband & Wife, *supra,* § 22; 2 Bishop, Mar. & Div., 5th ed., § 559; Montgomery v. Montgomery, 3 Barb. (N. Y.) Ch. 132.

9. St. George v. St. Margaret, 1 Salk. 123; 2 Bishop, Mar. & Div., § 740.

make the offspring of such remarriage legitimate in spite of local prohibitions where the divorce was decreed.[10]

§ 700. Legitimacy in Marriages Null but Bona Fide Contracted.

The issue of marriages rendered null and void are on general principles necessarily illegitimate. Opposed to this is the civil-law doctrine of putative marriages, first introduced into the canon law by Pope Innocent III.; which upholds the legitimacy of the children in cases where the parties, or either of them, *bona fide* believing that they could marry, had entered into the contract while there was some unknown impediment existing.[11] This subject is regulated by statute to a great extent in this country; and here again our system conforms to the civil rather than the common law.[12]

§ 701. Legitimation by the State or Sovereign.

Legitimation by rescript of the Emperor appears in the Institutes of Justinian.[13] Still later did the Pope assume the power to grant the status of legitimacy; and in many of the canonical dispensations occur clauses of this sort.[14] The effect of these high-sounding clauses is now of little consequence.[15] The English Parliament, by virtue of its transcendent power, may render a bastard legitimate and capable of inheriting.[16] This same power has been claimed for the legislatures of the United States.[17] And except so far as legislative acts may come under constitutional restraints against impairing the obligation of contracts, there seems no reason why they should not be uniformly upheld.

§ 702. Domicile of Children; Citizenship, &c.

The domicile of a child's origin, or the domicile at any time of his minority, is to be determined by the domicile of his parents;

10. Moore v. Hegeman, 92 N. Y. 521.

11. Fraser, Parent & Child, 22 *et seq.*; 1 Burge, Col. & For. Laws, 96. See Lapsley v. Grierson, 1 Cl. & Fin. (N. S.) 498, cited *supra*.

12. See *supra*, § 22. And see Graham v. Bennett, 2 Cal. 503. Yet there is a case, that of Sir Ralph Sadher, where Parliament gave relief. See Nicolas. Adult Bast. 61-63; Fraser, Parent & Child, 24; Burnett's History, book 1, ch. 19; Riddell, Peer & Cons. Law, 421.

13. Nov. 74, chs. 1, 2; and 89, ch. 9.

14. See Fraser, Parent & Child, 43.

15. *Ib.*

16. 1 Bl. Com. 459. And see Stat. 6, Will. IV., ch. 22

17. Beall v. Beall, 8 Ga. 210; Vidal v. Commajere, 13 La. Ann. 516. It will be presumed that a statute of this kind confers legitimacy only so far as to give the capacity to inherit. Grubb's Appeal, 58 Penn. St. 55.

or, to speak more strictly, of his father, if the latter be alive and not legally deprived of his paternal rights. We speak at this time only of legitimate or of legitimated or adopted children.[18] The domicile of origin remains until another is lawfully acquired. And since minors are not *sui juris,* they may not change their domicile during their minority, though they may when of full age; hence they retain during infancy the domicile of their parents; if the parents change their domicile, that of the infant children follows it; and if the father dies, his last domicile is that of the infant children.[19]

The mother has authority to change the domicile of her minor children, provided she do so without fraudulent views to the succession of their estate; though it would appear that she cannot change it after her remarriage.[20] In general, dwelling at a certain place is *prima facie* proof that a person is domiciled there; and the home of a husband, reasonably chosen in his rightful discretion, is the legal domicile of wife and young children, wherever he may choose to fix it.[21] This question of domicile may be of importance in determining the grant of administration on a deceased infant's estate, or if the child be alive, of his guardian's appointment.

Prima facie, the infant's residence or domicile is that of his parent, and such it will remain during minority, in spite of his temporary absence at school or elsewhere. Nor can he of his own

18. The rule for natural-born children of wedlock applies to children legally adopted, except that the child's domicile in this latter case is that of the adopting parent at the time of adoption. Van Matre v. Sankey, 148 Ill. 536; Woodward v. Woodward, 87 Tenn. 644

19. Story, Confl. Laws, §§ 45, 46, and cases cited; 1 Burge, Col. & For. Laws, 33; Abington v. North Bridgewater, 23 Pick. 170; Taylor v. Jeter, 33 Ga. 195; Daniel v. Hill, 52 Ala. 430; Wharton, Confl., § 41. But see Ishan v. Gibbons, 1 Bradf. Sur. 70; Somerville v. Somerville, 5 Ves. 750.

20. Potinger v. Wightman, 3 Mer. 67; 1 Burge, Col. & For. Laws, 39; Brown v. Lynch, 2 Bradf. Sur. 214; Carlisle v. Tuttle, 30 Ala. 613. The widow's removal from the homestead must not prejudice the children's claim thereto. Showers v. Robinson, 43 Mich. 502. After the mother remarries, the domicile of the child ceases to change, and does not follow that of the stepfather. Ryall v. Kennedy, 40 N. Y. Super. 347. A female infant cannot change her own domicile, even for the purpose of annulling her marriage. Blumenthal v. Tannenholz, 31 N. J. Eq. 194.

Following the usual rule, however, the real estate, even of children, descends according to the law of *situs,* and the personal according to the domicile.

21. *Supra,* §§ 40, 41; Luck v. Luck, 92 Cal. 653.

motion acquire a new domicile, since he is not a person *sui juris*.[22] But his domicile may be changed by his father, if he has one; otherwise, according to the best modern authorities, by the surviving mother until her remarriage; and perhaps even by the guardian himself, although not a relative, provided he act in good faith.[23] The intent of the parent or guardian in such cases is always material; but this intent is to be determined by facts. The original domicile of an infant is that of his parents at the time of his birth.[24] And even an emancipated minor is not usually in a position to acquire a legal domicile while his minority lasts.[25] The rule of a minor's citizenship corresponds; and where the parent removes to another State or country, the minor child's citizenship changes, though he be temporarily left in the former jurisdiction.[26]

Where the parent surrenders the care and custody of his minor child to one who agrees to assume the parent's duty during the entire remaining period of minority, the child acquires the domicile of the person who assumes this responsibility.[27]

§ 703. Conflict of Laws as to Domicile and Legitimacy.

Some writers have said that, when the laws of two countries are in conflict, the legitimacy or illegitimacy of children is to be determined by the domicile of origin.[28] Others, again, that it is dependent upon the *lex loci* of marriage.[29] Between these writers there is no real discrepancy; for in every such case two inquiries are involved, the one whether the marriage was in itself lawful, the other whether the child was legitimate by the marriage. Of the conflict of laws regarding marriage we have already spoken.[30] That involving the status of legitimacy demands further consideration.

A conflict manifestly arises between the laws of domicile of origin and subsequent marriage, and the laws of the actual domicile or *situs* of property, where those of the one country admit legitimation

22. Macphers Inf. 579; Brown v. Lynch, 2 Bradf. 215; Story, Confl. Laws, § 46.

23. Potinger v. Wightman, 3 Mer. 67; 2 Kent, Com. 227, 430; 1 Burge, Col. & For. Laws, 39; Brown v. Lynch, 2 Bradf. 214.

24. See, further, *post*, Part IV., ch. 5. as to Guardian and Ward.

25. North Yarmouth v. Portland, 73 Me. 108. See *Ib.* 583; § 267.

26. Dresser v. Edison Illuminating Co., 49 Fed. R. 257. As to the inchoate citizenship gained under the father's declared intention, see Boyd v. Nebraska, 143 U. S. 135.

27. Allgood v. Williams, 92 Ala. 551; Delaware, L. & W. R. R. Co. v. Petrowsky, 250 Fed. 554, 38 Sup. Ct. Rep. 427.

28. 1 Burge, Col. & For. Laws, 111; Fraser, Parent & Child, 45.

29. Story, Confl. Laws, § 105; Wharton, Confl., §§ 35, 41.

30. See § 33.

per subsequens matrimonium, and those of the other do not. As, for instance, where children are born, and their parents afterwards intermarry in certain of the United States or in Scotland, and then remove with their children to England; or where such children are deemed to have acquired property rights in the last-named country. On this point there is much diversity of opinion. And the English courts long maintained their distinctive policy with considerable zeal in all doubtful cases. Thus particularly was this done in the case of *Birtwhistle* v. *Vardill,* where a child, legitimate to all purposes in Scotland, was sternly denied the full rights of a lawful child as to inheritance in England.[31] Yet the law of foreign countries as to legitimacy is so far respected in England that a person illegitimate by the law of his domicile of birth will be held illegitimate in England.[32] The latest English cases, however, so far recede from this sturdy doctrine as to confine the application of *Birtwhistle* v. *Vardill* to claims of intestate succession to real property in England;[33] and on the other hand, a bequest of pensonalty in an English will to the children of a foreigner is now construed to mean to his legitimate children,— that is to say, on international principle, treating all children as legitimate whose legitimacy is established by the law of their father's domicile.[34] Our recent American cases have repudiated the illiberal English doctrine with little care to discriminate between the kinds of property.[35]

31. 7 Cl. & Fin. 895; 4 Jur. 1076; *Ib.* 5 B. & C. 438; Story, Confl. Laws, § 93 *et seq.,* where the doctrine of Birtwhistle v. Vardill is strongly combated. See Boyes v. Bedale, 12 W. R. 232, before Wood, V. C.; Story, Confl. Laws, 6th ed., § 93 *w.*, n. by Redfield. And see Goodman v. Goodman, 3 Gif. 643.

32. Munro v. Saunders, 6 Bligh, 468; cases cited in Birtwhistle v. Vardill, 9 Bligh, 52. But a foreign legitimation was so far respected in a late case that a succession tax was not laid upon the child as a stranger in blood. Skottowe v. Young, L. R. 11 Eq. 474.

In this country the doctrine of Birtwhistle v. Vardill is sometimes, though rarely, followed in matters of inheritance. Smith v. Derr, 34 Penn. St. 126; Stoltz v. Daering, 112 Ill. 234. And this, notwithstanding the child was begotten in the State where the question of inheritance afterwards arose. Lingen v. Lingen, 45 Ala. 410.

33. Grey v. Earl of Stamford (1892), 3 Ch. 88.

34. Andros v. Andros, 24 Ch. D. 637; Goodman's Trusts, 17 Ch. D. 266.

35. When an illegitimate child has, by the subsequent marriage of his parents, become legitimate by the laws of the State or country where such marriage took place, and the parents were domiciled, he is thereafter legitimate everywhere, and entitled to all the rights flowing from that status, including the right to inherit real or personal estate. Miller v. Miller, 91 N. Y. 315. The same rule applies to a legally "adopted" child under the

The doctrine of general writers is that the status of legitimacy or illegitimacy, or the capacity to become legitimate *per subsequens matrimonium,* is governed by the law of the domicile of the child's origin.[36] And since the domicile of origin is that of the father, the great leading fact to be ascertained in such inquiries will be generally the domicile of the father.[37] A person born before wedlock, who in the country of his birth is considered illegitimate, will not by a subsequent marriage of his parents in another country, by whose laws such a marriage would make him legitimate, cease to be illegitimate in the country of his birth.[38] On the other hand, without a subsequent marriage of his parents, lawful by the laws of the land where celebrated, it is clear that any child must remain illegitimate, whatever be the domicile of his origin.

local statute in the State or country of domicile, even though the child was an illegitimate one thereby legitimated. Blythe v. Ayres, 96 Cal. 533.

36. 1 Burge, Col. & For. Laws, 111. And see Skottowe v. Young, *supra.* As to conflict of laws in adoption, see § 232, *note.*

37. Fraser, Parent & Child, 45.

38. Story, Confl. Laws, § 106. See Sucession of Caballero, 24 La. Ann. 573.

CHAPTER III.

ILLEGITIMATE CHILDREN.

§ 704. Illegitimate Children; Their Peculiar Footing.

Illegitimate children, or bastards, stand upon a different footing from legitimate children. We have already seen that bastards may be legitimated in many of the United States, by the subsequent marriage of their parents or otherwise. The rights and disabilities of bastards, as such, and while continuing illegitimate, require our present attention.

The rights of a bastard are very few at the common law; children born out of a legal marriage having been from the earliest times stigmatized with shame, and made to suffer through life the reproach which was rightfully visited upon those who brought them into being. The dramatist depicts the bastard as a social Ishmaelite, ever bent upon schemes for the ruin of others, fully determined to prove a villain; thus fitly indicating the public estimate of such characters centuries ago in England. The law-writers, too, pronounce the bastard to be one whose only rights are such as he can acquire; going so far as to demonstrate, by cruelly irresistible logic, that an illegitimate child cannot possibly inherit, because he is the son of nobody; sometimes called *filius nullius*, and sometimes *filius populi*.[39] Coke seemed to concede a favor in admitting that the bastard might gain a surname by reputation

39. Fort. de Ll., ch. 40; 1 Bl. Com. 458.

though none by inheritance.[40] Statutes for the benefit of bastards are remedial in nature.[41]

§ 705. Who Are Bastards.

A bastard at common law is a child not born in wedlock or under circumstances such that the husband of the mother could not be the father,[42] or where the marriage of its supposed parents was void.[43] The children of a putative marriage are legitimate,[44] and a child is legitimate when born after the marriage of its parents though begotten before.[45]

Curative statutes designed to make issue of void marriages legitimate do not apply to the children of persons who lived together without any marriage of any kind.[46] An interlocutory decree of divorce does not affect the status of children begotten after its rendition as they are not parties to it.[47]

The status of a child is determined by the law in force at the time of its birth, in the place of its birth and of the domicile of the parents.[48]

40. Co. Litt. 3. The very term "bastard," said to be derived from the Saxon words "base start," expresses contempt. See Fraser, Parent & Child, 119. A legitimacy declaration act in foreign marriages is a feature of modern English law.

41. Wilson v. Bass, — Ind. App. —, 118 N. E. 379. See Wasmund v. Wasmund, 90 Wash. 274, 156 P. 3 (such laws are remedial, permitting beneficiary to take advantage of existing remedies).

42. Briggs v. McLaughlin, 134 La. 133, 63 So. 851; Parker v. Nothomb, 65 Neb. 308, 91 N. D. 395, 93 N. W. 851, 60 L. R. A. 699; Rohwer v. District Court of First Judicial Dist., — Utah, —, 125 P. 671. *The child of a married woman* by one not her husband is a bastard. McLoud v. State, 122 Ga. 393, 50 S. E. 145.

43. Baylis v. Baylis, 207 N. Y. 446, 101 N. E. 176, affirming judgment 131 N. Y. S. 671, 146 App. Div. 517 (where prior divorce relied on was void); *In re* Grande's Estate, 141 N. Y. S. 535, 80 Misc. Rep. 450; Mansfield v. Neff, 43 Utah, 258, 134 P. 1160. See Evatt v. Mier, 114 Ark. 84, 169 S. W. 817. See Cooper v. McCoy, 116 Ark. 501, 173 S. W. 412. See *In re* Shipp's Estate, 168 Cal. 640, 144 P. 143 (ceremonial marriage without license renders children legitimate).

44. Succession of Benton, 106 La. 494, 31 So. 123, 59 L. R. A. 135.

45. Doyle v. State, 61 Ind. 324.

46. *In re* Walker's Estate, 5 Ariz. 70, 46 P. 67; Keen v. Keen, 184 Mo. 358, 83 S. W. 526, 201 U. S. 319, 26 Sup. Ct. 494, 50 L. Ed. 772.

47. *In re* Walker's Estate, 176 Cal. 402, 168 P. 689.

48. Ferrie v. Public Administrator, 3 Bradf. Sur. 151; Holmes v. Adams, 110 Me. 167, 85 A. 492; Green v. Kelley, 228 Mass. 602, 118 N. E. 235 (law of domicile governs). See McGoodwin v. Shelby (Ky.), 206 S. W. 625 (mulatto).

§ 706. Presumption of Legitimacy.

The legitimacy of children of persons who lived openly as husband and wife will be presumed.[49] The presumption of the legitimacy of a child born in lawful wedlock is very strong and can only be rebutted by evidence showing that the child could not have been begotten by the father,[50] and the presumption will even apply

49. *In re* Campbell's Estate, 12 Cal. App. 707, 108 P. 669 (reh. den. [Sup.], 12 Cal. App. 707, 108 P. 676; McGoodwin v. Shelby (Ky.), 206 S. W. 625; Adkins v. Bentley, 177 Ky. 616, 197 S. W. 1086; Skidmore v. Harris, 157 Ky. 756, 164 S. W. 98; Nelson v. Jones, 245 Mo. 579, 151 S. W. 80; *In re* Hall, 70 N. Y. S. 406, 61 App. Div. 266; Locust v. Caruthers, 23 Okla. 373, 100 P. 520.

Proof that couple had lived together in the same house and tilled the same land for 30 years, and that they had six children born to them, which bore their name, held to give rise to presumption of such children's legitimacy. Cave v. Cave, 101 S. C. 40, 85 S. E. 244.

50. Bunel v. O'Day, U. S. C. C. Mo. 1903, 125 F. 303; Adger v. Ackerman, 52 C. C. A. 568, 115 F. 124; Lay v. Fuller, 178 Ala. 375, 59 So. 609; Sims v. Birden, 197 Ala. 690, 73 So. 379, 744; Harkrader v. Reed, 5 Alaska, 668; Kennedy v. State, 117 Ark. 113, 173 S. W. 842; *Ex parte* Madaline, 174 Cal. 693, 164 P. 348; *In re* Mills' Estate, 137 Cal. 298, 70 P. 91, 92 Am. St. Rep. 175; Jones v. State, 11 Ga. App. 760, 76 S. E. 72; Smith v. Henline, 174 Ill. 184, 51 N. E. 227; *In re* Henry's Estate, 167 Iowa, 557, 149 N. W. 605; *In re* Osborn's Estate (Iowa), 168 N. W. 288; Bethany Hospital Co. v. Hale, 64 Kan. 367, 67 P. 848 (denial of paternity by husband will not rebut presumption); Bethany Hospital Co. v. Hale, 64 Kan. 367, 67 P. 848; Dunn v. Garnett, 129 Ky. 728, 112 S. W. 841; Wilson v. Wilson, 174 Ky. 771, 193 S. W. 7; Buckner's Adm'rs v. Buckner, 120 Ky. 596, 87 S. W. 776, 27 Ky. Law Rep. 1032; Vanover v. Steele, 173 Ky. 114, 190 S. W. 667; Bowman v. Little, 101 Md. 273, 61 A. 223, 657; Phillips v. Allen, 84 Mass. 453; Sullivan v. Kelly, 85 Mass. 148; Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260; Jackson v. Phalen, 237 Mo. 142, 140 S. W. 879; Same v. Phelan, 237 Mo. 153, 140 S. W. 882; Lincecum v. Lincecum, 3 Mo. 441; Boyer v. Dively, 58 Mo. 510 (where parents and children are dead); Town of Canaan v. Avery, 72 N. H. 591, 58 A. 509 (evidence that wife is guilty of adultery will not rebut presumption); Vreeland v. Vreeland, 78 N. J. Eq. 256, 79 A. 336; Wallace v. Wallace, 73 N. J. Eq. 403, 67 A. 612; Grates v. Garcia, 20 N. M. 158, 148 P. 493; Ferrie v. Public Administrator, 4 Bradf. Sur. (N. Y.) 28; *In re* Grande's Estate, 141 N. Y. S. 535, 80 Misc. Rep. 450.

It is the policy of law and the duty of the court to preserve the legitimacy of children, where it can be done consistently with the law and the facts. *In re* Stanton, 123 N. Y. S. 458; Flint v. Pierce 136 N. Y. S. 1056; *In re* Kelly's Estate, 95 N. Y. S. 57, 46 Misc. 541; *In re* Kennedy, 143 N. Y. S. 404, 82 Misc. 214; *In re* Leslie's Estate, 161 N. Y. S., 790, 175 App. Div. 108; s. c., 156 N. Y. S. 346, 92 Misc. 663; Powell v. State, 84 Ohio St. 165, 95 N. E. 660; Ossman v. Schmitz, 24 Ohio Cir. Ct. R. 709 (brothers and sisters are presumed to be legitimate); Bell v. Territory, 8 Okla. 75, 56 P. 853; O'Hern v. State, 12 Okla. Cr. App. 505, 159 P. 938; McAllen v. Alonzo, 46 Tex. Civ. App. 449, 102 S. W. 475; Scott v. Hillenberg, 85 Va. 245, 1 S. E. 377 (cir-

where the child is born so soon after the marriage took place that it must have been begotten before,[51] and the presumption will be extended even to children born before marriage of the parents.[52]

Where the husband and wife live apart, non-access may be shown by the facts and circumstances,[53] and this evidence need not go to the extent of showing it impossible that the husband could have been the father of the child, but the rule seems to be that the evidence of non-access must be such as to satisfy the jury beyond a reasonable doubt.[54]

Evidence that the former spouse of one of the parties is still living is insufficient to rebut the presumption of legitimacy,[55] and although the presumption cannot be rebutted by evidence of non-access by the husband, still it may be shown by admissions showing the child to be illegitimate.[56]

There is no presumption of legitimacy where there is no evidence of a marriage,[57] or where the husband was impotent,[58] and where it appears beyond a reasonable doubt that the husband had no possibility of access to the wife at the time of conception the children will be found illegitimate.[59] On an issue of heirship

cumstances showing doubt and suspicion are not enough).

51. Grant v. Stimpson, 79 Conn. 617, 66 A. 166; Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806.

Where a child is born 20 days after the mother was divorced from one husband and 15 days after her marriage to another man who recognized the child as his, and the whereabouts of the first husband did not appear, the child will be presumed as the legitimate child of the second husband. Zachmann v. Zachmann, 201 Ill. 380, 66 N. E. 256, 94 Am. St. Rep. 180; Wallace v. Wallace, 137 Iowa, 37, 114 N. W. 527; Gibbins' Ex'rs v. Gibbins' Guardian, 13 Ky. Law Rep. 300; McRae v. State, 61 So. 977; Jackson v. Thornton, 133 Tenn. 36, 179 S. W. 384.

52. Stein's Adm'r v. Stein, 32 Ky. Law Rep. 664, 106 S. W. 860 Davis v. Davis, 59 N. Y. S. 223, 27 Misc. 455.

53. *Re* Matthews, 153 N. Y. 443, 47 N. E. 901; Wright v. Hicks, 12 Ga. 160, 60 Am. Dec. 687; Orthwein v. Thomas, 127 Ill. 554, 21 N. E. 430, 4 L. R. A. 434.

54. State v. Shaw (Vt.), 94 Atl. 434, L. R. A. 1015F, 1087.

55. Nelson v. Jones, 245 Mo. 579, 151 S. W. 80; Barker v. Barker, 156 N. Y. S. 194, 92 Misc. 390 (judgment mod., 158 N. Y. S. 413); *In re* Biersack, 159 N. Y. S. 519, 96 Misc. 161; Barker v. Barker, 158 N. Y. S. 413, 172 App. Div. 244; s. c., 156 N. Y. S. 194, 92 Misc. 390.

56. Wallace v. Wallace, 137 Iowa, 37, 114 N. W. 527 (child conceived before wedlock); Vulgamore v. Unknown Heirs of Vulgamore, 7 Ohio App. 374. See People v. Case, 171 Mich. 282, 137 N. W. 55.

57. Mace v. Mace, 48 N. Y. S. 831, 24 App. Div. 291.

58. *In re* Walker's Estate, 176 Cal. 402, 168 P. 689; People v. Woodson, 29 Cal. App. 531, 156 P. 378; West v. Redmond, 171 N. C. 742, 88 S. E. 341.

59. *In re* McNamara's Case (Cal.),

there is no presumption that the alleged heirs are the legitimate descendants of the ancestor.[60]

Burden of Proof.— The burden of proof is on one attempting to show the illegitimacy of a child born in lawful wedlock.[61] But the burden is on those claiming as heirs to show the actual marriage of their mother to decedent,[62] and the burden is on an illegitimate child to prove legitimation by recognition.[63]

§ 707. Custody under English Law.

The doctrine that a natural tie connects the illegitimate child peculiarly with his mother was recognized at the civil law; for, under the ordinance of Justinian, the bastard might to a certain extent inherit from his mother.[64] So at the common law have the obligations of consanguinity between the mother and her illegitimate offspring been applied in several instances; and it is usually the mother who is known and who admits herself to be the child's parent, though the father remain unknown. But as concerns any exclusive privilege on behalf of the mother, this does not seem very clear; for in a case which was decided in 1786, the rights of the putative father seemed to be placed on much the same footing as in other cases; and his consent was deemed *prima facie* essential under the Marriage Act of 26 Geo. I.; so was his right apparently admitted to take his illegitimate child out of the parish.[65]

There are, to be sure, occasional *dicta* to the effect that the putative father has no common-law right to the custody of the child as

183 Pac. 552 *In re* Walker's Estate, 176 Cal. 402, 168 P. 689; Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631; Craig v. Shea (Neb.), 168 N. W. 135; West v. Redmond, 171 N. C. 742, 88 S. E. 341; Ewell v. Ewell, 163 N. C. 233, 79 S. E. 509; Timmann v. Timmann, 142 N. Y. S. 298; State v. Shaw, 89 Vt. 121, 94 A. 434, L. R. A. 1915F, 1087 (must be proof beyond a reasonable doubt to rebut the presumption).

60. Osborne v. McDonald, 159 F. 791.

61. Lay v. Fuller, 178 Ala. 375, 59 So. 609; Sergent v. North Cumberland Mfg. Co., 112 Ky. 888, 66 S. W. 1036, 23 Ky. Law Rep. 222; Lewis v. Sizemore, 25 Ky. Law Rep. 1354, 78 S. W. 122; Jackson v. Phalen, 237 Mo. 142, 140 S. W. 879; Same v. Phelan, 237 Mo. 153, 140 S. W. 882; *In re* Matthews' Estate, 153 N. Y. 443, 47 N. E. 901, 37 N. Y. S. 308, 1 App. Div. 231; *In re* Wile's Estate, 6 Pa. Super. Ct. 435, 41 W. N. C. 572. See *In re* Divvers' Estate, 22 Pa. Super. Ct. 436 (separation of parties will rebut presumption).

62. *In re* Fuller's Estate, 250 Pa. 78, 95 A. 382.

63. Trier v. Singmaster (Iowa), 167 N. W. 538.

64. Code, lib. 6, 57. See 2 Kent, Com. 214.

65. King v. Hodnett, 1 T. R. 96, and cases cited *passim;* Macphers. Inf. 67.

against the mother, and that certainly within the age of nurture, that is, under the age of seven, the mother has the exclusive right to the custody. The more correct statement, however, is that pauper children, whether legitimate or not, are under the English system made inseparable from the mother within the years of nurture; and that at common law neither the putative father nor the mother of an illegitimate child had any exclusive right of guardianship.[66] The common-law cases cited in the mother's favor are only to the effect that where a bastard child within the period of nurture is in the peaceable possession of the mother, and if the putative father gets possession of the child by force or fraud, the court will interfere to put matters in the same situation as before.[67] Both Lord Kenyon and Lord Ellenborough — the latter as late as 1806 — expressed doubts as to whether the court would take away the custody of an illegitimate child from the father who had fairly obtained possession, and award it to the mother.[68] Nor do the later English cases aid greatly in clearing up the doubt on this point. Lord Mansfield regarded the law as doubtful in his day, while himself inclining strongly to the opinion that the putative father had no right to his child's custody.[69] In 1841 a case came before the Court of Common Pleas, on a writ of *habeas corpus,* applied for by the mother, the child being then between eleven and twelve years of age, and in the custody of her putative father. But the child was deemed old enough to exercise her own discretion as to where she would go; and as she appeared unwilling to go with her mother, the court would not permit the mother to take her by force.[70]

The chancery courts have in several instances favored the father of an illegitimate child to the exclusion of his mother. Thus, while the practice is not to appoint the putative father guardian of his illegitimate child having no property, unless he makes a settlement upon him; yet, if he does so, his appointment is favorably regarded. No special regard seems to have been paid to the

66. Macphers. Inf. 67.

67. Rex v. Soper, 5 T. R. 278; Rex v. Hopkins, 7 East, 579; Rex v. Moseley, 5 East, 223.

68. Per Lord Kenyon, Rex v. Moseley, *supra* (1798); per Lord Ellenborough, Rex v. Hopkins, *supra.*

69. Strangeways v. Robinson, 4 Taunt. 498. And see Pope v. Sale, 7 Bing. 477.

70. *In re* Lloyd, 3 Man. & Gr. 547. Comparing all the *dicta* in the foregoing cases carefully together, it will be seen that they art not decidedly against the putative father's rights of custody.

mother of such children.[71] And while the committee of a lunatic might petition for an allowance for his bastard offspring, their mother might not.[72] As against strangers, at all events, or those even with whom the mother has temporarily placed her spurious child, the maternal right to determine the child's permanent custody has been strongly upheld in the latest instance; for a mother, though a kept mistress, was permitted to transfer the custody of her young illegitimate daughter to respectable persons of her own choice, from those to whom she had first committed the child and who resisted her right.[73]

§ 708. Custody under American Law.

The custody of an illegitimate child which has not been legitimated belongs to the mother,[74] and the mother of a bastard being bound to maintain it is entitled to recover from a third person the value of its services,[75] but the father may be entitled to it after the death of the mother if able to support it.[76] And the Roman, Spanish, and French laws all deny the power of the putative father over the illegitimate child; this principle being likewise transferred to Louisiana and other States, once under the civil law; though, in Texas at least, the putative father is allowed the guardianship of such child after the mother's death.[77]

The mother does not forfeit her right to the child by allowing someone else to have custody of it for a time,[78] but will lose her rights by renouncing them.[79] In some States, we may add, the

71. Macphers. Inf. 110.

72. *Re* Jones, 5 Russ. 154.

73. Queen v. Nash, 10 Q. B. D. 454. The court laid some stress upon the fact that this new arrangement appeared to be for the child's interest, and held, too, that the child, being only seven years old, was too young for its preferences to be regarded.

74. Lipsey v. Battle, 80 Ark. 287, 97 S. W. 49; Perry v. State, 113 Ga. 936, 39 S. E. 315; Dehler v. State, 22 Ind. App. 383, 53 N. E. 850; Pratt v. Nitz, 48 Iowa, 33; Purinton v. Jamrock, 195 Mass. 187, 80 N. E. 802; *In re* Penny, 194 Mo. App. 698, 189 S. W. 1192; *In re* Moore, 132 N. Y. S. 249, 72 Misc. 644; *Ex parte* Byron, 83 Vt. 108, 74 A. 488. See Baylis v. Baylis, 101 N. E. 176, 207 N. Y. 446 (affirming judgment, 131 N. Y. S. 671, 146 App. Div. 517, where prior divorce relied on was in fact void). People v. Kling, 6 Barb. 366; Robalina v. Armstrong, 15 Barb. 247.

75. Illinois Cent. R. Co. v. Sanders, 61 So. 309.

76. Aycock v. Hampton, 84 Miss. 204, 36 So. 245, 65 L. R. A. 689, 105 Am. St. Rep. 424.

77. Acosta v. Robin, 19 Martin, 337 Barela v. Roberts, 34 Tex. 554.

78. Lipsey v. Battle, 80 Ark. 287, 97 S. W. 49; Hesselman v. Haas, N. J. Ch. 1906, 64 A. 165.

79. *In re* Shapiro, 92 N. Y. S. 1027, 103 App. Div. 303.

superior rights of the mother in binding out her illegitimate child are favorably regarded;[80] and her superior right to custody has been held to carry a right of transfer;[81] but the child's welfare is considered paramount.[82] The mother may make a transfer to the father of her rights to custody, which transfer will be good as to her though not as regards the child if the interests of the child so require,[83] or the court may place the child in the custody of another if the mother is not a fit person to have the child and if the best interests of the child so require.[84] Stratagem and force on the part of the putative father always furnish good grounds for restoration of the child to the mother.[85]

§ 709. Maintenance.

Illegitimate children are not favored in law and have only such rights as are expressly granted by statute.[86] The common-law rule, in absence of statutes, is that the putative father is under no legal liability to support his illegitimate offspring,[87] and a statute providing for punishment of any person who shall neglect his child has no application to illegitimate children,[88] but the mother generally will be bound to support it,[89] and it is sometimes said

80. Alfred v. McKay, 36 Ga. 440; McGunigal v. Mong, 5 Penn. St. 269; Pratt v. Nitz, 48 Iowa, 33; 106 Penn. St. 574. But a putative father who has paid a judgment against himself for breach of a bond to the town for the child's support, and has received the child with authority from the selectmen, has a right to the child's control and custody. Adams v. Adams, 50 Vt. 158. As to the guardian's right of custody to an illegitimate orphan child, see Johns v. Emmert, 62 Ind. 533. And where the child has ben abandoned and apprenticed out by an asylum, see Copeland v. State, 60 Ind. 394.

81. Marshall v. Reams, 32 Fla. 499.

82. *Ibid.*

83. Ousset v. Euvrard (N. J. Ch. 1902), 52 A. 1110.

84. *In re* Hope, 19 R. I. 486, 34 A. 994.

85. Commonwealth v. Fee, 6 S. & R. 255.

86. Bell v. Terry & Tench Co., 163 N. Y. S. 733, 177 App. Div. 123.

87. People v. Green, 19 Cal. App. 109, 124 P. 871; Moss v. United States, 29 App. D. C. 188; Beckett v. State, 4 Ind. App. 136, 30 N. E. 536; State v. Byron (N. H.), 104 A. 401; People *ex rel.* Lawton v. Snell, 216 N. Y. 527, 111 N. E. 50 (reversing order, 153 N. Y. S. 30, 168 App. Div. 410); Bissell v. Myton, 145 N. Y. S. 591, 160 App. Div. 268; State v. Miller, 3 Pennewill (Del.), 518, 52 A. 262; State v. Tieman, 32 Wash. 294, 73 P. 375, 98 Am. St. Rep. 854.

88. Moss v. United States, 29 App. D. C. 188; State v. Byron (N. H.), 104 A. 401.

89. People v. Chamberlain, 106 N. Y. S. 149; *Ex parte* Gambetta, 169 Cal. 100, 145 P. 1005; Wamsley v. People (Colo.), 173 P. 425; Commonwealth v. Callaghan, 223 Mass. 150, 111 N. E. 773 (although husband of mother has supported it); Craig v. Shea (Neb.), 168 N. W. 135. See Creisar v. State, 97 Ohio, 16, 119 N. E. 128; Hooper v. Hooper, 135 P. 205, 67 Ore. 187, 135 P. 525.

that it is the natural and moral duty of the parents to support even illegitimate children.[90]

Moreover, upon the strength of the natural or moral obligation arising out of the relation of the putative father to his child, an action at common law lies for its maintenance and support upon an express promise; and where one admits himself to be the father and adopts (so to speak), while such adoption continues, a promise may be implied in favor of the party providing for it. He may renounce such adoption, and terminate this implied assumpsit, in which case there is no remedy to be pursued unless under a statute. The father can only be charged then upon his contract.[91] But upon his promise to third persons, he may be held liable; and a promise by the putative father to pay the stepfather for the child's support, past and future, if he will continue to support it, is binding.[92] Indeed, where the putative father has expressly agreed to pay the child's relatives for its support during minority, and to make provision by will for that purpose, the child has been allowed to bring action against the father's estate to recover for such support where the father died without making the provision promised.[93]

The statutes, however, which relate to the maintenance of bastard children, supply the want of adequate common-law remedies; the main element in such legislation being public indemnity against the support of such persons. Under the old poor-laws of England, the mother had a compulsory remedy against the putative father; but this was taken away by the act of 4 & 5 Will. IV., c. 76. By the statute of 7 & 8 Vict., c. 101, however, the mother is afforded relief once more, and the father may be summoned before the petty sessions and ordered to pay a weekly sum for the child's maintenance, and the costs of obtaining the order; maintenance to last until the child is thirteen years of age. The money is to be paid

90. Best v. House, — Ky. —, 113 S. W. 849 (greater than duty to collateral kin). *There is a natural obligation* to support even illegitimate children, which the law will enforce. Sanders v. Sanders, 167 N. C. 319, 83 S. E. 490; State v. Rucker, 86 S. C. 66, 68 S. E. 133.

91. Hesketh v. Gowing, 5 Esp. 131; Nichols v. Allen, 3 Car. & P. 36; Furrillio v. Crowther, 7 Dowl. & Ry. 612; Cameron v. Baker, 1 Car. & P. 258; Monerief v. Ely, 19 Wend 405. Claims for maintenance upon the estate of a deceased putative father are not favored, where no express and binding contract to support can be established, nor are verbal declarations readily available to show such a contract. Duncan v. Pope, 47 Ga. 445; Nine v. Starr, 8 Ore. 49; Dalton v. Halpin, 27 La. Ann. 382.

92. Wiggins v. Keizer, 6 Ind. 252.

93. Todd v. Weber, 95 N. Y. 181.

to the mother, and may be recovered by distress and imprisonment.[94] The provisions of law in force in most of the United States are borrowed from the older English statutes, our courts being very generally invested with plenary jurisdiction over such matters; and at the instance of the mother the father may be coerced by arrest and imprisonment, if need be, into giving bonds and furnishing maintenance for his illegitimate child; thus relieving the mother to some extent of the burden to which his criminal misconduct has chiefly contributed, and indemnifying the public against the support of the penniless and unfortunate.[95]

Past seduction has been held sufficient to support a deed. There is an old English case, where equity compelled the specific performance of a deed-poll, made by a man who had seduced a woman and had a child by her; the writing promising to pay £2,000 after his death for the purchase of an annuity for the mother and her child for their lives. Both the man and the child had died before the suit was brought.[96] In Pennsylvania, the same principle is pushed even farther; for it is ruled that seduction of a female and begetting a bastard is sufficient consideration to support a man's promise to give bonds for a sum of money.[97] Statutory lia-

94. And see 2 & 3 Vict., ch. 85; 8 & 9 Vict., ch. 101. The order may be obtained by a married woman, mother of the bastard. Regina v. Collingwood, 12 Q. B. 681. And see Follit v. Koetzow, 24 Jur. 651. In case of death or incapacity of the mother, so that the child becomes chargeable to the parish, the order may be enforced by the guardians or overseers of the parish.

95. 2 Kent, Com. 215, and cases cited; State v. Beatty, 66 N. C. 648; Musser v. Stewart, 21 Ohio St. 353; Marlett v. Wilson, 30 Ind. 240; Barber v. State, 24 Md. 383; Wheelwright v. Greer, 10 Allen, 389. See Bishop and other writers on statutory crimes. In some States certain persons are authorized to make complaint against the father for maintenance of the bastard, where the mother refuses or neglects to do so. *Ib.* The main purpurpose of these bastard acts is to indemnify the public against support of the child, and they appear to be in the nature of civil proceedings. Some codes permit a prosecution while the woman is pregnant and regardless of the future birth of the child. 128 Ind. 397. A man who marries a woman known by him to be pregnant, becomes liable for the support of the child, and an action of bastardy will not lie against the natural father. State v. Shoemaker, 62 Iowa, 343. See § 23.

96. Marchioness of Annandale v. Harris, 2 P. Wms. 433. And see Turner v. Vaughan, 2 Wils. 339.

97. Shenk v. Mingle, 13 S. & R. 29. And see Phillippi v. Commonwealth, 18 Penn. St. 116; Knye v. Moore, 1 Sim. & Stu. 161. The undertaking of a putative father to pay the mother money for the support of the child is not illegal. Hook v. Pratt, 78 N. Y. 371. A negotiable bill might thus be given. *Ib.*

A mother may sue for injuries done her, notwithstanding a bastardy act. Sutfin v. People, 43 Mich. 37.

bility of a father to support his bastard child will sufficiently support his promise to do so.[98] But there must be nothing oppressive or unfair in such transactions.[99] Nor ought agreements as to the wages of sin to be favored.[1]

Whatever may be the mother's legal responsibility for the maintenance of her bastard child while she lives, it appears that an action cannot be maintained against the administrator of her estate for the child's maintenance subsequently to her death.[2]

§ 710. What Law Governs Property Rights.

The rights of the parents of bastards are regulated to a great extent in the United States by statute; and our policy is in general more favorable than that of England as to the mother's rights. An illegitimate child follows the settlement of his mother in New York and some other States.[3] But in Connecticut the rule is that a bastard is settled where born, like any other child, and that his settlement follows that of the putative father.[4]

An illegitimate child which becomes legitimate under the law of the domicile of the parents thereby becomes legitimate everywhere,[5] while the right of a bastard to inherit land depends on the law of the State where the land lies;[6] but where by State law bastards may inherit where openly recognized, they may inherit although such recognition took place in another State where bastards are allowed to inherit.[7] The court may apply the law of the forum even to a foreigner, and if he is entitled by the law of the forum may allow him to inherit even though by the law of his own country he is illegitimate.[8]

98. 53 Ark. 5. See Yearteau v. Bacon, 65 Vt. 516.

99. It seems that a contract made to avoid a threatened prosecution for bastardy will stand. Rohrheimer v. Winters, 126 Penn. St. 253; Merritt v. Fleming, 42 Ala. 234.

1. See Binnington v. Wallis, 4 B. & Ald. 650.

2. Ruttinger v. Temple, 4 B. & S. 491; Druet v. Druet, 26 La. Ann. 323.

3. See 2 Kent, Com. 214; Canajoharie v. Johnson, 17 Johns. 41; Petersham v. Dana, 12 Mass. 429; Lower Augusta v. Salinsgrove, 64 Penn. St. 166; Stimson, §§ 6635-6638.

4. Bethlem v. Roxbury, 20 Conn. 298. And see Smith v. State, 1 Houst. C. C. 107.

5. Moore v. Saxton, 90 Conn. 164, 96 A. 960; Bates v. Virolet, 53 N. Y. S. 893, 33 App. Div. 436; s. c., 54 N. Y. S. 475, 34 App. Div. 629; Finley v. Brown, 122 Tenn. 316, 123 S. W. 359.

6. Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806; Franklin v. Lee, 30 Ind. App. 31, 62 N. E. 78; Ives v. Nicoll, 12 Ohio Cir. Ct. R. 297, 5 O. C. D. 555.

7. Van Horn v. Van Horn, 107 Iowa, 247, 77 N. W. 846, 45 L. R. A. 93.

8. Wolf v. Gall, 32 Cal. App. 286, 163 P. 346, 350.

The property rights of bastards to inherit depend on the law in force at the date of the death of the decedent,[9] and the right to inherit from a bastard depends on the law in force at his death,[10] and the law applicable where one attempts to inherit through a deceased bastard depends on the law in force at his death and the State cannot endow a deceased bastard with heritable blood.[11]

§ 711. Disability of Inheritance at Common Law.

The most important disability of an illegitimate child at the common law is that he has no inheritable blood; that he is incapable of becoming heir, either to his putative father or to his mother, or to any one else; that he can have no heirs but those of his own body.[12] This was likewise the doctrine of the civil law; the language of the Institutes as to spurious offspring, *patrem habere non intelliguntur*, dealing rather more gently with a fact so extremely delicate and painful.[13] At the old canon law a bastard was treated as also disqualified from holding dignities in the church; but this doctrine became exploded long ago. "And really," adds Blackstone, with warmth, as if to atone for a long and fallacious argument against legitimation by a subsequent marriage, " any other distinction but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjust, and cruel to the last degree." [14]

And so might the commentator of the commentaries stigmatize the efforts of those who have nothing better to urge against human rights than the importance of preserving the symmetry of the law unimpaired.

The civil law, while offering in certain cases a hope of legitimation, made a distinction between spurious offspring born of an unfettered promiscuous intercourse, and such as were conceived or born during the marriage of one of the natural parents, or were otherwise the product of a complex, nefarious, or incestuous commerce; presuming that while the former might be rendered legit-

9. *In re* Loyd's Estate, 170 Cal. 85, 148 P. 522; Trout v. Burnette, 99 S. C. 276, 83 S. E. 684.

10. Goughnour v. Zimmerman, 85 A. 874, 237 Pa. 599.

11. McCamey v. Cummings, 130 Tenn. 494, 172 S. W. 311; Turnmire v. Mayes, 121 Tenn. 45, 114 S. W. 478.

12. 2 Kent, Com. 212; 1 Bl. Com. 459.

13. Inst. 1, 10, 12; 2 Kent, Com. 212.

14. 1 Bl. Com. 459.

imate, the latter never could become so.[15] And the rule was more severe with the one class than the other. Natural children of the former kind were to be legitimated *per rescriptum principis*, on the requisition of the father in certain special circumstances, as matter of legal right; but the sovereign rescript was extended to children of the other sort only occasionally as an exercise of sovereign grace and subject to the sovereign conditions.[16] This principle is to be traced in the provisions of the Louisiana Code; children whose father is unknown, and adulterous or incestuous children having no right of inheritance, while other natural or illegitimate children succeed to the estate of their mother in default of lawful children or descendants, and under certain conditions to the estate of the father who has acknowledged them.[17]

§ 712. Inheritance by Bastards under Modern Statutes.

In General.— The well-settled American rule, however, differs considerably from that of both civil and common law. We have already noticed that legitimation by subsequent marriage is a principle admitted very generally in the legislation of the different States.[18] So, too, are there various statutes which permit even bastard children to inherit from the father under certain restrictions; and legitimation by some public act of paternal recognition or adoption is applied by some codes aside from marriage;[19] while the generally recognized doctrine is *partus sequitur ventrem*, and that the illegitimate child and his mother shall mutually inherit from each other; and while, of course, if the bastard leaves lawful issue, such issue inherit like any other legitimate offspring.[20]

15. 1 Dig. 5, 23; Fraser, Parent & Child, 119; *supra*, §§ 226, 229.

16. See Gera v. Ciantar, 12 App. 557. Justinian's Nov. 89 is specific on this matter of legitimation *per rescriptum principis* with this discrimination against offspring of nefarious commerce. By the later civil law, after the dissolution of the Roman Empire, children of parents free to marry at the time of their conception and birth could long be legitimated as matter of right; but children of the other class only at the discretion of the ruling power, and subject to its conditions. And see § 229.

17. See 2 Kent, Com. 213.

18. A child born out of wedlock, but afterwards legitimized by subsequent marriage, is an heir and distributee like the other children, and has all the rights of a legitimate child, so far as the local legislation in favor of such legitimacy can give it this universal effect. Miller v. Miller, 91 N. Y. 315; Williams v. Williams, 11 Lea, 652.

19. *Supra;* 44 Kan. 12.

20. Stimson's Statute Law, §§ 3151-3154; Grundy v. Hadfield, 16 N. J. 579; Lewis v. Eutsler, 4 Ohio St. 354; Opydyke's Appeal, 49 Penn. St. 373; Hawkins v. Jones, 19 Ohio St. 22; Riley v. Byrd, 3 Head, 20; Miller v. Stewart, 8 Gill, 128; Earle v. Dawes,

More than sixty years ago, Kent instanced twelve States where bastards could inherit from, and transmit to, their mothers, real and personal estate, under some modifications; while in New York, the mother and her kindred could inherit from her bastard offspring.[21] There is scarcely a State in the Union which has not departed widely from the policy of the English common law; and statutes, which happily have required as yet very little judicial interpretation, perpetuate the record of our liberal and generous public policy towards a class of beings who were once compelled to bear the iniquities of the parents.[22]

The right of a bastard to inherit is statutory purely, as no such right existed at common law.[23] Statutes as to the inheritance of

3 Md. Ch. 230; Bates v. Elder, 118 Ill. 436; 127 Ill. 425. But cf. Jackson v. Jackson, 78 Ky. 390. As to conflict of laws, in inheriting land from father, etc., see § —; 112 Ill. 234.

21. See 2 Kent, Com. 11th ed., 212, 213, and notes; Keeler v. Dawson, 73 Mich. 600; Stimson, §§ 3151-3154. And as to inheritance from the father, see *supra*, § ——. These statutes of inheritance are not generally to be extended by construction so as to apply to grandchildren and grandparents, in a case of illegitimacy. See Steckel's Appeal, 64 Pa. St. 493; Berry v. Owens, 5 Bush, 452. For construction of the word "illegitimate," see Miller v. Miller, 25 N. Y. Supr. 507. An illegitimate chid can administer on his father's estate as against the father's brother. *Re* Pico, 52 Cal. 84. See Magee's Estate, 63 Cal. 414. As to an illegitimate child unintentionally omitted from its mother's will, see 57 Cal. 484. And see Iowa code making illegitimate children capable of inheriting. 24 Fed. R. 15. In general, an illegitimate child, where there was no subsequent marriage of the parents, nor adoption, cannot inherit from the putative father. As to such acts of inheritance, a child is rendered legitimate only *sub modo*. Neil's Appeal, 92 Penn. St. 193. An adopted illegitimate child died, having inherited land from its adopted mother; and its natural mother was allowed to inherit on the child's death without issue. Krug v. Davis, 87 Ind. 590. Adoption codes in some States would receive a different construction. See § ——.

A child begotten of a mother who had married in good faith, not knowing that a legal impediment to the marriage existed, is treated with favor. Harrintgon v. Barfield, 30 La. Ann. 297. By local statutes the legitimacy of such offspring is preserved in annulling such marriages; as we have see *supra*, Part II., ch. 1. And see Watts v. Owens, 62 Wis. 512.

22. In States which permit illegitimate children "recognized" by the father to inherit from him, such children are "heirs" under a statutory description. 152 U. S. 65; 44 Kan. 12.

23. *In re* Lindsay's Estate, 176 Cal. 238, 168 P. 113 (bastards included under "heirs"); Wolf v. Gall, 32 Cal. App. 286, 163 P. 346, 350; Jackson v. Hocke, 171 Ind. 371, 84 N. E. 830; Truelove v. Truelove, 86 N. E. 1018, transferred from Appellate Court, 43 Ind. App. 734, 86 N. E. 1000. Mandate modified, 88 N. E. 516; L. T. Dickason Coal Co. v. Liddil, 49 Ind. App. 40, 94 N. E. 411; Kotzke v. Kotzke's Estate (Mich.), 171 N. W. 442; State v. McDonald, 59 Ore. 520, 117 P. 281; Rutledge v.

bastards should be construed with the other statutes of descent and distribution,[24] and the word "child" and similar words in statutes of descent mean legitimate children only,[25] although bastards may be included under the term "children,"[26] and "next of kin of the mother" may include her illegitimate children.[27]

Inheritance from Father.— A bastard cannot inherit from the father,[28] except under special statute,[29] as where a man not the father of a bastard married the mother and acknowledged the child, it could inherit as his heir.[30]

Statutes providing that a child omitted from the father's will can claim his distributive share of his estate under certain circumstances include illegitimate children when recognized.[31]

Inheritance from Mother.— Under various statutes a bastard can inherit from his mother,[32] but not from an ancestor of his

Tunno, 69 S. C. 400, 48 S. E. 297; Turnmire v. Mayes, 121 Tenn. 45, 114 S. W. 478; Berry v. Powell, 47 Tex. Civ. App. 599, 105 S. W. 345; Mansfield v. Neff, 43 Utah, 258, 134 P. 1160; Rohwer v. District Court of First Judicial Dist., 41 Utah, 279, 125 P. 671.

24. See Foster v. Lee, 172 Ala. 32, 55 So. 125.

25. Williams v. Witherspoon, 171 Ala. 559, 55 So. 132; Jackson v. Hocke, 171 Ind. 371, 84 N. E. 830; Truelove v. Truelove, 86 N. E. 1018, transferred from Appellate Court, 43 Ind. App. 734, 86 N. E. 1000 (mandate modified, 88 N. E. 516); Wilson v. Bass (Ind. App.), 118 N. E. 379.

26. Rogers v. Weller (Ill.), 5 Biss. 166.

27. Rogers v. Weller, Fed. Cas. No. 12022 (5 Biss. 166).

28. Pair v. Pair, 147 Ga. 754, 95 S. E. 295; Moore v. Moore, 30 Ky. Law Rep. 383, 98 S. W. 1027 (children of void marriage between negro and white woman); Goss v. Froman, 89 Ky. 318, 12 S. W. 387, 11 Ky. Law Rep. 631, 8 L. R. A. 102; Houghton v. Dickinson, 196 Mass. 389, 82 N. E. 481; Banks v. Galbraith, 149 Mo. 529, 51 S. W. 105; *In re* Sollinger's Estate, 40 Pa. Super. Ct. 5, 7; Hayworth v. Williams, 102 Tex. 308, 116 S. W. 43; Lee v. Bolden, Tex. Civ. App. 1905, 85 S. W. 1027.

29. Wolf v. Gall, 32 Cal. App. 286, 163 P. 346, 350 (where legitimates may inherit from mother of deceased father); Borroughs v. Adams, 78 Ind. 160 (where property would otherwise escheat); Cooley v. Powers, 63 Ind. App. 59, 113 N. E. 382 (an adopted child is a "legitimate" child barring inheritance by bastards under the statute); Bates v. Meade, 174 Ky. 545, 192 S. W. 666 (although marriage void and children born before marriage); Davis v. Milford, 85 S. C. 504, 67 S. E. 744.

30. Tieben v. Hapner, 111 N. E. 644 (reh. den., 62 Ind. App. 650, 113 N. E. 310).

31. *Re* Wardell, 57 Cal. 484; Bunce v. Bunce, 14 N. Y. S. 659. *Contra*, Kent v. Barker, 2 Gray (Mass.), 535 (holding that the word child in the statute for the relief of children unintentionally omitted from a will applies only to legitimate children).

32. Moore v. Saxton, 90 Conn. 164, 96 A. 960; Eaton v. Eaton, 88 Conn. 269, 91 A. 191; Smith v. Garber, 286 Ill. 67, 121 N. E. 173; White v. Curtis, 78 Mass. (12 Gray) 54; Hahn v. Hammerstein, 272 Mo. 248, 198 S. W. 833.

If a legitimate child of an illegiti-

mother who survives her,[33] but where the statute makes the child the heir of his mother he may inherit from his maternal grandparents.[34]

A bastard will not inherit from the mother's collateral kindred,[35] unless it is provided that they may inherit as if legitimate,[36] but may by statute take equally with legitimate brothers and sisters.[37] Bastard children of the same mother can inherit from each other.[38]

From Collaterals.— A statute making a bastard the heir of its mother does not suffice to allow him to take from the estate of the mother's relative as the representative of the deceased mother,[39] but a statute allowing a bastard to inherit from and through his mother will allow him to inherit from an illegitimate brother.[40]

A child born out of wedlock after the divorce of his parents is not of kin to the children of his father and his second wife within the meaning of the Federal Employers Liability Act and there-

mate mother can inherit from the mother's legitimate half-brother and sister, he takes through his mother, and not directly. Turnmire v. Mayes, 121 Tenn. 45, 114 S. W. 478; Tigert v. Wells, 134 Tenn. 144, 183 S. W. 737 (statute applies to shares).

The right to inherit "from and through" the mother includes inheritance directly from her and indirectly from any one to whom or from whom kinship can be traced through her, either in ascending or descending line. Berry v. Powell, 47 Tex. Civ. App. 599, 105 S. W. 345; Lee v. Frater, — Tex. Civ. App. —, 185 S. W. 325 (bastard inherits mother's share of community property); Overton v. Overton, 29 Ky. Law, 736, 96 S. W. 469 (capacity to inherit from or to mother gives no right to inherit from legitimate half-brother where mother is dead).

The child of a marriage prohibited by law cannot inherit. Succession of Davis, 126 La. 178, 52 So. 266 (white man and slave).

33. Thigpen v. Thigpen, 136 Ga. 541, 71 S. E. 790; Hogan v. Hogan, 19 Ky. Law, 1960, 44 S. W. 953; Voorhees v. Sharp, 63 N. J. Eq. 216, 49 A. 722.

34. Lawton v. Lane, 92 Me. 170, 42 A. 352. *Contra*, Holmes v. Adams, 110 Me. 167, 85 A. 492.

35. Holmes v. Adams, 110 Me. 167, 85 A. 492; Reynolds v. Hitchcock, 72 N. H. 340, 56 A. 745; *In re* Lauer's Estate, 136 N. Y. S. 325, 76 Misc. 117.

36. Chambers v. Chambers, 249 Ill. 126, 94 N. E. 108; Barron v. Zimmerman, 117 Md. 296, 83 A. 258; Davidson v. Brownlee, 114 Miss. 398, 75 So. 140; Moore v. Moore, 169 Mo. 432, 69 S. W. 278, 58 L. R. A. 451 (from brother of mother); Dennis v. Dennis, 105 Tenn. 86, 58 S. W. 284 (bastard takes as "issue").

37. Laughlin v. Johnson, 102 Tenn. 455, 52 S. W. 816 (bastard shares in estate of legitimate brother). See *contra*, Jackson v. Hocke, 171 Ind. 371, 84 N. E. 830.

38. Berry v. Tullis, 105 S. W. 348.

39. Chambers v. Chambers, 249 Ill. 126, 94 N. E. 108.

40. Berry v. Powell, 101 Tex. 55, 104 S. W. 1044; Berry v. Powell, 47 Tex. Civ. App. 599, 105 S. W. 345 (kinship created on mother's side and not on father's).

fore such children cannot recover for his wrongful death although he had contributed to their support.[41]

§ 713. Inheritance from Bastards.

Putative Father.— A statute providing certain rights of inheritance to the father of an infant does not give the putative father of a bastard any rights.[42]

Mother.— The mother of a bastard child is commonly made by statute his heir[43] and under a statute providing that bastards may inherit from and to their mother the entire estate of a bastard passes to the mother to the exclusion of the father.[44]

Heirs of Mother.— A statute providing for inheritance to the mother of a bastard does not authorize the heirs of a deceased mother to inherit[45] and a statute providing for descent from a bastard to his mother or her heirs does not authorize descent to the father or his heirs.[46]

Husband and Wife.— Where the law provides for the descent of the estate of bastards leaving no "relatives" the word relatives is used in its ordinary sense and includes the husband or wife of the bastard.[47]

Children of Bastard.— At common law a bastard could not have heirs except of his own body,[48] and under a statute making a bastard child the heir of his mother she has no rights in his estate as against his children,[49] but the legitimate children and grandchildren of a bastard can inherit from the mother.[50]

41. Cincinnati, New Orleans, &c., R. Co. v. Stephens, 157 Ky. 460, 163 S. W. 493, 51 L. R. A. (N. S.) 308.

42. Blankenship v. Ross, 95 Ky. 306, 25 S. W. 268, 15 Ky. Law, 708. As to rights of father, see further *ante*.

43. Succession of Lacosst, 142 La. 673, 77 So. 497 (only if child was acknowledged); Reese v. Starner, 106 Md. 50, 66 A. 443 (mother and widow of bastard share his estate).

44. Ford v. Boone, 32 Tex. Civ. App. 550, 75 S. W. 353.

45. McCully v. Warrick, 61 N. J. Eq. 606, 46 A. 949; *In re* Belcher's Estate, 149 N. Y. S. 479; Osborne v. McDonald, 159 F. 791. See Carolina v. Markham, 174 N. C. 338, 93 S. E. 845. See Walker v. Johnston, 70 N. C. 576.

46. Sanford v. Marsh, 180 Mass. 210, 62 N. E. 268.

47. Lewis v. Mynatt, 105 Tenn. 508, 58 S. W. 857; Heller v. Teale, 216 F. 387 ("relatives" of bastard held to include descendants of brother of mother).

48. State v. McDonald, 59 Ore. 520, 117 P. 281; Rohwer v. District Court of First Judicial Dist., 41 Utah, 279, 125 P. 671; L. T. Dickason Coal Co. v. Liddil, 49 Ind. A. 40, 94 N. E. 411.

49. Goodell v. Yezerski, 170 Mich. 578, 136 N. W. 451.

50. Foster v. Lee, 172 Ala. 32, 55 So. 125; McKellar v. Harkins (Ia.), 166 N. W. 1061. See Cooley v. Powers, 63 Ind. App. 59, 113 N. E. 382 (children of deceased bastard do not inherit from the putative father).

Brothers and Sisters.— Bastard children of the same mother may inherit from each other by statute,[51] and where the statute provides that a mother and her heirs may inherit from a bastard child her other illegitimate children may inherit from a bastard child on her death before him,[52] although descent by statute to the brothers or sisters of the deceased bastard may include the legitimate half brothers and sisters,[53] and provision for the descendants of brothers and sisters of a bastard means only legitimate descendants.[54] A provision that in case of the death of a bastard without issue his estate shall descend as if all the childre were legitimate includes brothers and sisters only and has no application to collaterals.[55]

Collaterals.— Where the statute provides that collateral relatives shall inherit only where the bastard dies without a widow the existence of a widow prevents them from inheriting at all although the widow releases her rights or is barred to assert them.[56] A statute providing that the estate of a bastard shall descend to his widow and children confers no rights on collaterals.[57]

What Property Passes.— Statutes governing succession in the property of a bastard apply only to his separate property and not his community property.[58]

Escheat to State.— Where the bastard can transmit his property to no surviving relatives his share will escheat to the State.[59]

§ 714. Bequests and Gifts to Illegitimate Children.

Bequests to illegitimate children, since they are not considered as relatives, are not favored in English law. There have been, it

51. Curlew v. Jones (Ga.), 91 S. E. 15; Huddleston v. Henderson, 181 Ill. App. 176; Ashe v. Camp Mfg. Co., 154 N. C. 241, 70 S. E. 295 (although one of the father's was a negro whose marriage to a white woman was prohibited by law); Yates v. Craddock, — Tex. Civ. App. —, 184 S. W. 276.

52. *In re* De Cigaran's Estate, 150 Cal. 682, 89 P. 833 (not to surviving husband). *Contra,* Eaton v. Eaton, 88 Conn. 269, 91 A. 191; Brown v. Alexander (Miss.), 79 So. 842; Anonymous, 158 N. Y. S. 51; *In re* McCully's Estate, 12 Pa. Super. Ct. 78.

53. Ward v. Mathews, 122 Ala. 188, 25 So. 50.

54. Giles v. Wilhoit, Tenn. Ch. App. (1898), 48 S. W. 268.

55. Bettis v. Avery, 140 N. C. 184, 52 S. E. 584.

56. Hudnall v. Ham, 183 Ill. 486, 56 N. E. 183, 48 L. R. A. 557, 75 Am. St. R. 124 (affirming, 172 Ill. 76, 49 N. E. 985).

57. Hudnall v. Ham, 183 Ill. 486, 56 N. E. 172, 48 L. R. A. 557, 75 Am. Dec. 124 (affirming, 172 Ill. 76, 49 N. E. 985).

58. *In re* De Cigaran's Estate, 150 Cal. 682, 89 P. 833.

59. McSurley v. Venters, 31 Ky. Law, 963, 104 S. W. 365; Succession of Gravier, 125 La. 733, 51 So. 704;

is true, certain *dicta* to the contrary; but Lord Eldon was of the opinion that there must be something to show that the testator put himself *in loco parentis;* and it has since been decided that an illegitimate child is not merely, as such, within the rule, for he is "a stranger to the testator."[60] On the ground of uncertainty in the person, a bequest to an unborn legitimate child was long considered objectionable; but Lord Eldon and others maintained that legacies given to the unborn illegitimate child of a particular woman then pregnant would be good, because the uncertainty of description could here be obviated.[61] But it is now well settled in England that a devise or bequest in favor of other future illegitimate children generally is void,[62] and a bequest by a testator to "any other male child by Mary Ann" his mistress, is void although there was a male child *en ventre* at the testator's death.[63]

Illegitimate children may undoubtedly take by purchase as persons designated, if sufficiently described.[64] The question in cases of this sort is really one of intention. *Prima facie,* the term "children" in a will, however, is intended to mean legitimate children; and if there are legitimate children, or if it be possible that there should be legitimate children of the person named, the English rule is that no illegitimate child can take under the description of children.[65] Yet, if they have acquired the reputation of being the children of a particular person, or if the will shows a clear intention to provide for such persons, they are capable of taking under the description of "children," or "daughters."[66]

Bent's Adm'r v. St. Vrain, 30 Mo. 268.

60. Lowndes v. Lowndes, 15 Ves. 304; Perry v. Whitehead, 6 Ves. 547; *contra,* per Lord Alvanley, Cricket v. Dolby, 3 Ves. 30; Macphers. Inf. 238.

61. Macphers. Inf. 570, and cases cited; Gordon v. Gordon, 1 Mer. 141; Dawson v. Dawson, 6 Madd. 292.

62. Beachcroft v. Beachcroft, 1 Madd. 430; Knye v. Moore, 1 Sim. & Stu. 61; Wilkinson v. Wilkinson, 1 You. & Coll. 657; Medworth v. Pope, 27 Beav. 71.

63. *In re* Homer, 115 L. T. R. 703; see note at 30 Harvard Law Review, 652.

64. Blodwell v. Edwards, Cro. Eliz. 509; Co. Litt. 36; Peachey, Mar. Settl. 885, *n.;* Clifton v. Goodbun, L. R. 6 Eq. 278; Crook v. Hill, L. R. 6 Ch. 311.

65. Gill v. Shelley, 2 Russ. & My. 336; *In re* Wells's Estate, L. R. 6 Eq. 599; Paul v. Children, L. R. 12 Eq. 16; Dorin v. Dorin, L. R. 7 H. L. 568. See as to "nephews," 35 Ch. D. 551.

66. Peachey, Mar. Settl. 885, *n.,* and cases cited; Evans v. Davis, 7 Hare, 501; Owen v. Bryant, 2 De G., M. & G. 697; Hartley v. Tribber, 16 Beav. 510; Leigh v. Byron, 1 Sm. & Gif. 486; Tugwell v. Scott, 24 Beav. 141; Worts v. Cubitt, 19 Beav. 421. And see Williamson v. Codrington, 1 Ves. Sen. 511. Where legitimate children alone answer to the description intended, or are sufficiently designated, they will take under the will. Hill v. Crook, L. R. 6 H. L. 265. And the

In *Medworth* v. *Pope,* the rule was concisely stated to be, that an illegitimate child *in esse* or *en ventre sa mère* may, if properly described, take the benefit of a devise or bequest, and the court will not inquire as to his parentage or origin; but that in respect of future illegitimate children, the law will not let them take under any description whatever. "The reason why the English law so holds is that it considers such a provision for future illegitimate children as *contra bonos mores.*" [67] But the English chancery still wavers in applying this rule, in the absence of a final exposition on last appeal; for it is lately laid down and affirmed that a gift by will to any illegitimate children of a testator in effect who may be *in esse* before the testator's own death is a valid gift.[68]

In this country, the tendency seems to be so far favorable to illegitimate children as to regard wills made in their favor with the same, or nearly the same, consideration as all others. And our courts regard bastards as having strong claims to equitable protection, notwithstanding the criminal indulgence of their parents. In several important cases, specific performance of voluntary settlements made by the father in their favor have been decreed.[69] And a devise, in specific terms, to an unborn natural child of a woman then pregnant, is sustained here as in England.[70]

ultimate right of the crown in case of illegitimacy cannot be evaded by the terms of a trust. *Re* Wilcock's Settlement, L. R. 1 Ch. D. 229.

67. Per M. R., in Medworth v. Pope, 27 Beav. 71. A child *en ventre sa mère* at date of the will, though not born until after testator's death, may take a bequest. Crook v. Hill, 3 Ch. D. 773. And see L. R. 6 H. L. 265. Further important illustrations of the equity doctrine may be seen in the modern cases of Lambe v. Eames, L. R. 6 Ch. 597; Holt v. Sindrey, L. R. 7 Eq. 170; Savage v. Robertson, L. R. 7 Eq. 176. And as to the application of 27 Eliz., ch. 4, to marriage settlements for bastards, see Clarke v. Wright, 6 Hurl. & Nor. 849. As to legacies and devises, see Beachcroft v. Beachcroft, 1 Madd. 430, and cases cited; Durrant v. Friend, 11 E. L. & Eq. 2; Owen v. Bryant, 13 E. L. & Eq. 217; 4 Kent Com. 414; Bagley v. Mollard, 1 Russ. & My. 581.

68. Occleston v. Fullalove, L. R. 9 Ch. 147, Lord Selborne *dis.;* Hastie's Trusts, 35 Ch. D. 728.

69. Gardner v. Heyer, 2 Paige, 11; Bunn v. Winthrop, 1 Johns. Ch. 338; Harten v. Gibson, 4 Desaus. 139; 2 Kent Com. 216; Shearman v. Angel, Bail. Eq. 351; Collins v. Hoxie, 9 Paige, 88. Illegitimate children cannot take under a trust limited to "lawfully begotten children." Edwards's Appeal, 108 Pa. 238. But "heirs" limited to "children" may include illegitimate children under a fair construction. Howell v. Tyler, 91 N. C. 207. See also King v. Davis, *Ib.* 142.

70. Knye v. Moore, 5 Harr. & Johns. 10. As to legacies and devises to illegitimate children under American laws, see 4 Kent Com. 413, 414, and

But whether our tribunals would sanction a bequest to other unborn illegitimate children generally may admit of doubt, provided such child were never legitimated by subsequent marriage or adoption. For, after all, there must be some discrimination made against criminal intercourse.[71]

A deed by a father to his bastard son may be valid,[72] although in some States there are laws nullifying donations by fathers to their illegitimate children,[73] and it is held that the bastards have the burden of proof to show that gifts to them were made for a valuable consideration,[74] and the acknowledgement is to produce evidence of paternity and may be made even before the passage of the statute.[75]

§ 715. Effect of Recognition.

Laws have been passed in many States providing for the legitimation of bastard children by their recognition by the father.[76]

Acknowledgment by the father will by statute frequently legitimate bastards.[77] The recognition is enough if only the father recognizes the bastard as his child and he need not recognize his right to inherit.[78] General and notorious recognition may be re-

cases cited; Hughes v. Knowlton, 37 Conn. 429.

71. A general limitation to a woman's future illegitimate issue is against good morals and public policy. Kingsley v. Broward, 19 Fla. 722.

72. Hall v. Hall, 26 Ky. Law, 610, 82 S. W. 300.

73. Succession of Vance, 110 La. 760, 34 So. 767 (gifts *causa mortis* to bastard are null); Delancy v. Beale, 1 La. 495; O'Hara v. Conrad, 10 La. Ann. 638; Tedder v. Tedder (S. C.), 96 S. E. 157.

74. Tedder v. Tedder, 108 S. C. 271, 94 S. E. 19.

75. Townsend v. Meneley, 37 Ind. App. 127, 76 N. E. 321.

76. Daggy v. Wells, 38 Ind. App. 27, 76 N. E. 524; Tieben v. Hapner, 111 N. E. 644 (reh. den., 62 Ind. App. 650, 113 N. E. 310); Townsend v. Meneley, 37 Ind. App. 127, 74 N. E. 274, 76 N. E. 321; *In re* Barringer's Estate, 61 N. Y. S. 1090, 29 Misc. 457. See Lewis v. Mynatt, 105 Tenn. 508, 58 S. W. 857.

77. Miller v. Pennington, 218 Ill. 220, 75 N. E. 919, 1 L. R. A. 773; Daggy v. Wells, 38 Ind. App. 27, 76 N. E. 524; Brown v. Iowa Legion of Honor, 107 Ia. 329, 78 N. W. 73 (letter saying "kiss our boys for me" enough); Robertson v. Campbell, 147 N. W. 301 (reh. den., 149 N. W. 885) (acknowledgment need not be universal where open to friends of father); Record v. Ellis, 97 Kan. 754, 156 P. 712; Succession of Fortier, 51 La. Ann. 1562, 26 So. 554; *In re* Richmond's Estate, 139 N. W. 435 (acknowledgment in application for pension enough).

78. Alston v. Alston, 114 Ia. 29, 86 N. W. 55; Thomas v. Thomas's Estate, 64 Neb. 581, 90 N. W. 630; *In re* Rohrer, 2 Wash. 151, 60 P. 122, 59 L. R. A. 350.

quired,[79] or recognition in writing,[80] or it may take place by adoption into the family,[81] but adoption of an illegitimae child does not deprive it of its right to inherit as a bastard.[82] The burden of proof to show recognition rests on the bastard.[83]

Where a bastard child is legitimated he will inherit as if legitimate,[84] and others may inherit from him as if legitimate,[85] and his descendants may inherit,[86] or her may take as a "child" under the statute.[87] However, a statute providing only that a bastard recog-

79. Van Horn v. Van Horn, 107 Ia. 247, 77 N. W. 846, 45 L. R. A. 93; Markey v. Markey, 108 Ia. 373, 79 N. W. 258; Johnson v. Bodine, 108 Ia. 594, 79 N. W. 348; McCorkendale v. McCorkendale, 111 Ia. 314, 82 N. W. 754; Allston v. Allston, 114 Ia. 29, 86 N. W. 55; Duffy v. Duffy, 114 Ia. 581, 87 N. W. 500; Britt v. Hall, 116 Ia. 564, 90 N. W. 340 (declarations admitting paternity by the father are admissible as against interest, but declarations denying paternity are not admissible); Murphy v. Murphy, 146 Ia. 255, 125 N. W. 191 (common report in neighborhood is not sufficient to prove general recognition); Tout v. Woodin, 157 Ia. 518, 137 N. W. 1001 (need not be universal).

Where the statute requires general and notorious recognition of an illegitimate child to allow him to take as heir this is not shown by occasional acts of recognition to a few old friends and acquaintances in the town where he used to live where none knew of the affair in the State to which he removed and where he married. Record v. Ellis, 97 Kan. 754, 156 P. 712, L. R. A. 1916E, 654.

80. McKellar v. Harkins (Ia.), 166 N. W. 1061 (signing adoption); Watson v. Richardson, 110 Ia. 673, 80 N. W. 407 (lost contract insufficient); Lind v. Burke, 56 Neb. 785, 77 N. W. 444 (letter by father and speaking of bastard as "my son" is insufficient); Rentie v. Rentie (Okla.), 172 P. 1083; Moen v. Moen, 16 S. D. 210, 92 N. W. 13.

81. Morton's Estate v. Morton, 62 Neb. 420, 87 N. W. 182.

82. McKellar v. Harkins (Ia.), 166 N. W. 1061.

83. Watson v. Richardson, 110 Ia. 673, 80 N. W. 407.

84. Wolf v. Gall, 32 Cal. App. 286, 163 P. 346, 350 (as representative of deceased father); Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806; Haddon v. Crawford, 49 Ind. App. 551, 97 N. E. 811; Luce v. Tompkins, 177 Ia. 168, 158 N. W. 535; Haggard v. Mason, 154 S. W. 907, 153 Ky. 113; Bourriaque v. Charles, 107 La. 217, 31 So. 757; Copeland v. Copeland (Okla.), 175 P. 764; Templeman v. Bruner, 138 P. 152 (judgment affd. on reh., 42 Okla. 6, 139 P. 993) (child still regarded as illegitimate where the rights of the mother are involved); *In re* Oliver's Estate, 184 Pa. 306, 39 A. 72, 28 Pittsb. Leg. J. 164; Scott v. Wilson, 110 Tenn. 175, 75 S. W. 1091; Mansfield v. Neff, 43 Utah, 258, 134 P. 1160; Stewart v. Wells, 47 Ind. App. 228, 94 N. E. 235. See Kotzke v. Kotzke's Estate (Mich.), 171 N. W. 442 (as to civil law).

85. Shelton v. Wright, 25 Ga. 636 (brother and children); Succession of Gravier, 125 La. 733, 51 So. 704 (brothers and sisters of bastard).

86. Morin v. Holliday, 39 Ind. App. 201, 77 N. E. 861; *In re* Garr's Estate, 31 Utah, 57, 86 P. 757 (children of bastard after his acknowledgment take as heirs of father where bastard dies before his father).

87. *In re* Gorkow's Estate, 20 Wash. 563, 56 P. 385.

nized may inherit from the father does not make the bastard legitimate and does not entitle him to take under a will devising to the "lawful issue" of the father.[88] And a statute providing that an illegitimate child shall inherit from the father when recognized means only that he shall have the same rights as a legitimate child and does not prevent the father from disinheriting him by will.[89]

Where an illegitimate child is recognized the will of the father may be revoked by its birth [90] or by his marriage with the mother [91] under statutes giving illegitimates equal rights when recognized.

Where the law makes the mother of a bastard child the heir of its mother its legitimation does not render the father an heir,[92] but the rights of a legitimated child to inherit from the father is not weakened by the fact that the mother has a right superior to the father to the child's person.[93]

Where the statute renders marriage of the father and mother sufficient to legitimate a child this only applies where the father died after the enactment of the statute but death after the passage of the statute will be presumed in the absence of evidence.[94] Where a child of a common-law marriage is illegitimate as born before the death of the first wife it becomes legitimate where the parents continue their cohabitation after the death of the first wife.[95]

Legitimation of children of a slave marriage did not make a second marriage void and the children of the second marriage illegitimate.[96] The recognition of the issue of a polygamous marriage will not, however, be allowed to legitimate such issue even though the polygamous marriage was made in a foreign country where such marriages were legal.[97] An illegitimate sister of the full blood will take to the exclusion of legitimate brothers and sisters even though the bastard had been legally adopted by the father.[98]

88. Brisbin v. Huntington, 128 Ia. 166, 103 N. W. 144.

89. Lepper v. Knox (Ia.), 161 N. W. 454, L. R. A. 1918A, 43; *Re* Gorkow, 20 Wash. 563, 56 P. 385.

90. Milburn v. Milburn, 60 Ia. 411, 14 N. W. 204.

91. Caballero's Succession, 24 La. Ann. 573.

92. Scott v. Wilson, 110 Tenn. 175, 75 S. W. 1091 (property inherited by bastard from his father goes to his mother and not to heirs of his father).

93. Baker v. Miller, 137 Tenn. 55, 191 S. W. 527.

94. Wissel v. Ott, 54 N. Y. S. 605, 34 App. Div. 159.

95. *In re* Schmidt, 87 N. Y. S. 428, 42 Misc. 463, 15 N. Y. Ann. Cas. 1.

96. Irving v. Ford, 179 Mass. 216, 60 N. E. 491.

97. *In re* Look Wong, 4 Haw. 568. See note in 31 Harvard Law Review, 892, doubting the result reached in this case.

98. *In re* Lutz's Estate, 88 N. Y. S. 556, 43 Misc. 230.

§ 716. Persons in Loco Parentis; Distant Relatives, &c.

A person standing *in loco parentis* may sue *per quod servitium* for the abduction of his daughter's illegitimate child.[99] But a perent is not bound to support the illegitimate offspring of his children.[1] Relatives more distant than parents do not, on the whole, seem to have much consideration in matters relating to a bastard; and it is even likely that the assumption of a family name by an illegitimate member is a grievance for which the offended relatives have no redress.[2]

§ 717. Guardianship of an Illegitimate Child.

Testamentary guardianship, of which we are to speak in another connection, is of such a nature that a father cannot by his will appoint a guardian for his illegitimate children, unless the statute so directs;[3] but this does not prevent a court from adopting such a nomination, where no superior claimant petitions for the trust.[4] The putative father of a bastard child has been considered a proper person to petition for a probate guardian, as against all except the mother.[5]

99. Moritz v. Garnhart, 7 Watts, 302.

1. Hillsborough v. Deering, 4 N. H. 86.

2. Du Boulay v. Du Boulay, L. R. 2 P. C. 430. See Vane v. Vane, L. R. 8 Ch. 383. A widowed mother may in a certain sense place herself *in loco parentis* to her illegitimate child. 91 Ga. 564.

3. Sleeman v. Wilson, L. R. 13 Eq. 36. Guardians are of course appointed on occasion for illegitimate minors, as for instance in case such a child has a legacy. Johns v. Emmett, 62 Ind. 533. Or becomes an orphan. 46 N. J. Eq. 521.

4. Ramsay v. Thompson, 71 Md. 315. Where "a testamentary guardian" is simply a trustee for some purpose, appointment has been made. 147 Pa. 85.

5. Pote's Appeal, 106 Pa. 574.

CHAPTER IV.

ADOPTED CHILDREN.

§ 718. Definitions.

By adoption a *quasi* parental relation was sometimes constituted at the civil law. Adoption is the taking or choosing of another's child as one's own,[6] and is the act of the person taking and receiving the child.[7] The mere fact that one cares for an abandoned child does not constitute an adoption.[8] An adopted child may come within the designation of a "child,"[9] but not of "bodily heirs."[10]

§ 719. History.

Adoption exists only by statute being unknown to the common,[11]

6. Inst. I. 11, 1; Bouvier, Law Dict. "Adoption." *In re* Landers' Estate, 166 N. Y. S. 1036, 100 Misc. 635.

7. Smith v. Allen, 53 N. Y. S. 114, 32 App. Div. 374.

8. Non-she-po v. Wa-win-ta, 37 Ore. 213, 62 P. 15, 82 Am. St. R. 749.

9. Virgin v. Marwick, 97 Me. 578, 55 A. 520; U. S. Trust Co. v. Hoyt, 135 N. Y. S. 849, 150 App. Div. 621.

10. Balch v. Johnson, 106 Tenn. 249, 61 S. W. 289.

11. *In re* Darling's Estate (Cal.), 159 P. 606; *In re* Jobson's Estate, 164 Cal. 312, 128 P. 938; Rahn v. Hamilton, 144 Ga. 644, 87 S. E. 1061; Morrison v. Session's Estate, 70 Mich. 297, 38 N. W. 249, 14 Am. St. R. 500 (change of name only an incident); Beach v. Bryan, 155 Mo. App. 33, 133 S. W. 635; *In re* Book's Will (N. J. Prerog.), 105 A. 878; *In re* Thorne's Estate, 155 N. Y. 140, 49 N. E. 661 (affirming 48 N. Y. S. 1116, 23 App.

although recognized under the civil law,[12] and in this country, in States whose jurisprudence is based exclusively on the common law, it exists only by statute.[13] It has, however, been recognized by the civil law from the earliest days of its existence, and on the provisions of that law the statutes of adoption in the different States of the Union have been founded.

By the civil law before the time of Justinian, the effect of adoption was to place the person adopted in the same position he would have held had he been born a son of the adopter. All the property of the adopted son belonged to the adoptive father. The adoptive son was heir to his adoptive father, if intestate, bore his name, etc., and shared the sacred rites of the family he entered. It sometimes happened under this law that a son lost the succession to his own father by being adopted, and to his adopted father by a subsequent adoption. To remedy this, Justinian provided that the son given in adoption to a stranger should be in the same position to his own father as before, but gained by adoption the succession to his adoptive father if he die intestate.[14]

There are various States in which adoption is now permitted, and the rights of the parent by adoption are treated substantially as those of a natural parent.[15] But our local legislation has sometimes discountenanced the adoption of a stranger as co-heir with one's own child.[16]

Div. 624); *In re* Huyck's Estate, 99 N. Y. S. 502, 49 Misc. 391; U. S. Trust Co. v. Hoyt, 135 N. Y. S. 849, 150 App. Div. 621; *In re* Ziegler, 143 N. Y. S. 562, 82 Misc. 346; Anonymous, 141 N. Y. S. 700, 80 Misc. 10; Long v. Dufur, 58 Ore. 162, 113 P. 59.

Adoption, being a creation of statute unknown to the common law, is not a contractual relation, and the laws of the place where it occurred do not become part of the contract so as to govern all the rights, which the parties may have as an incident to the relation, as the right of inheritance in land situated without the place of adoption. Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 266; *In re* Knott (Tenn.), 197 S. W. 1097; Harle v. Harle (Tex. Civ. App.), 166 S. W. 674; Thompson v. Waits, 159 S. W. 82.

12. Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585; *Ex parte* Livingston, 135 N. Y. S. 328, 151 App. Div. 1 (reversing order *In re* Livingston, 134 N. Y. S. 148, 74 Misc. 494); State v. Yturria (Tex.), 189 S. W. 291, 204 S. W. 315.

13. Ross v. Ross, 129 Mass. 243, 37 Am. R. 321; Morrison v. Sessions, 70 Mich. 297, 38 N. W. 249; *Re* Thorne, 155 N. Y. 140, 49 N. E. 661.

14. Sandars' Justinian, 113, 115, 119.

15. Vidal v. Commajere, 13 La. Ann. 516; Sewall v. Roberts, 115 Mass. 262; Rives v. Sneed, 25 Ga. 612; Lunay v. Vantyne, 40 Vt. 501.

16. Teal v. Sevier, 26 Tex. 516. See Johnson's Appeal, 88 Pa. 346; Wagner v. Varner, 50 Ia. 532. An adopted child usually inherits from the adopting parent, and *vice versa*, the natural parent being excluded in preference.

Under the Roman civil law consanguinity was not, as our English common law regards it, an essential basis to the filial relation; for infants were exposed to death, and indifference to blood offspring, as well as to the ties of lawful wedlock, characterized the law of family in the decaying age of the Empire. Adoption was a convenience, however, even thus, for the transmission of wealth and titles; and by adoption, moreover, we find an unfruitful couple at the present day, and in our own country, grafting the tree, in obedience to the best parental instincts.[17]

§ 720. Statutes Permitting Adoption.

Statutes are constitutional authorizing the adoption of children without notice or the consent of the natural parents,[18] and constitutional inhibitions against impairment of contracts are not applicable as the relation of parent and child is a status and not a contract.[19] As statutes for adoption are in derogation of the common law it is usually held that they should be strictly construed,[20]

Davis v. Krug, 95 Ind. 1; Humphries v. Davis, 100 Ind. 274, 369, 422. In Wisconsin the adopted child's real estate follows the general rule of descent. Hole v. Robbins, 53 Wis. 514. An insurance policy in favor of "children" will include an adopted child. Martin v. Ætna Ins. Co., 73 Me. 25. Such child may inherit under a trust to one's "issue," though not where "heir of body" is the expression. Sewall v. Roberts, 115 Mass. 262. And see Ingram v. Soutten, L. R. 7 H. L. 408. The rights of an adopted heir, under the Texas statute, are co-equal with the rights of the other heirs. In this respect the old Spanish law is modified. Eckford v. Knox, 67 Tex. 200. The adopting parent should support and is entitled to the minor child's custody and services. Tilley v. Harrison, 91 Ala. 295; Cofer v. Scroggins, 98 Ala. 342. Unless a contract of adoption expressly provides otherwise, the adopting parent retains the usual right of disposing by will, as in the case of natural offspring. Davis v. Hendricks, 99 Mo. 478. An adopted child who is also grandson of the adopting parent cannot inherit in a twofold capacity; though ordinarily the adopted child's right to inherit from his natural parent is recognized by statute. Delano v. Bruerton, 148 Mass. 619. An adopted child's domicile changes during minority with that of the adopting parent on the usual principle. Woodward v. Woodward, 3 Pickle, 644.

17. The adoption of illegitimate offspring was one method of legitimating subsequently at the civil law, thus dispensing with the parental marriage. Blythe v. Ayres, 96 Cal. 533. Public acknowledgment by the parent was another; and both modes prevail in parts of this country. Stimson, §§ 6632, 6633; p. 353, notes.

18. Purinton v. Jamrock, 195 Mass. 187, 80 N. E. 802; *In re* Beers, 78 Wash. 576, 139 P. 629.

19. *In re* Ziegler, 143 N. Y. S. 562, 82 Misc. 346.

20. *In re* Cozza, 163 Cal. 514, 126 P. 161; *In re* Kelly, 25 Cal. App. 651, 145 P. 156; Appeal of Woodward, 81 Conn. 152, 70 A. 453; Bresser v. Saarman, 112 Ia. 720, 84 N. W. 920; Purinton v. Jamrock, 195 Mass. 187, 80 N. E. 802; Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585; Sarazin v. Union R. Co., 55 S. W. 92, 153 Mo.

and it must be shown that every essential requirement of the statute has been complied with,[21] but it is often held that the intent of such statutes being paternal in nature should be carried out by a liberal construction,[22] and by giving the words used their ordinary meaning.[23]

An act conferring the right of inheritance on adopted children may be construed retrospectively to apply to children already adopted,[24] but a change in the statutes of distribution will not alter rights to inherit expressly granted to adopted children.[25]

§ 721. Contracts to Adopt.

A contract to adopt another is valid,[26] and may, in the absence

479; Thomas v. Malone, 142 Mo. App. 193, 126 S. W. 522; *In re* Book's Will (N. J. Prerog.), 105 A. 878; *In re* Ziegler, 143 N. Y. S. 562, 82 Misc. 346; Long v. Dufur, 58 Ore. 162, 113 P. 59; *In re* Knott (Tenn.), 197 S. W. 1097. See Succession of Caldwell, 114 La. 195, 38 So. 140, 108 Am. St. R. (act as to adoption of minors does not repeal prior act as to adoption of adults). See Succession of Dupre, 116 La. 1090, 41 So. 324 (later act superseding earlier).

21. *In re* Sharon's Estate (Cal.), 177 P. 283.

22. People v. Wethel, 202 Ill. App. 77; Seibert v. Siebert, 170 Ia. 561, 153 N. W. 160; Ferguson v. Herr, 64 Neb. 649, 94 N. W. 542; Ransom v. New York, C. & St. L. Ry. Co., 93 Ohio St. 223, 112 N. E. 586; *In re* Brown's Adoption, 25 Pa. Super Ct. 259.

23. Appeal of Woodward, 81 Conn. 152, 70 A. 453 (not controlled by analogy of Roman adoption); *In re* Evans' Estate, 47 Pa. Super. Ct. 196; Harle v. Harle (Tex. Civ. App.), 166 S. W. 674.

24. *In re* Rasmussen's Estate, 114 Minn. 324, 131 N. W. 325; Dodin v. Dodin, 162 N. Y. 635, 57 N. E. 1108, 44 N. Y. S. 800, 16 App. Div. 42; *In re* Havsgord's Estate, 34 S. D. 131, 147 N. W. 378. See *In re* Bowdoin's Estate (N. J.), 98 A. 514, 100 A. 1069. See Von Beck v. Thomsen, 167 N. Y. 601, 60 N. E. 1121, 60 N. Y. S. 1094, 44 App. Div. 373, 7 N. Y. Ann. Cas. 33 (where child abandoned prior to enactment of statute, consent of parent required by statute is not necessary).

25. Riley v. Day, 88 Kan. 503, 129 P. 524.

26. *In re* Herrick's Estate, 124 Minn. 85, 144 N. Y. 455 (enforced under laws of forum); Barney v. Hutchinson (N. M.), 177 P. 890.

A father, unable to provide for his infant child, may transfer the custody, control, and right to the services thereof to another, subject to the right of a court of equity to interfere in the interest of the child. Judgment (1907) 105 N. Y. S. 1131, 120 App. Div. 903 (affd., Middleworth v. Ordway, 191 N. Y. 404, 84 N. E. 291; Middleworth v. Ordway, 98 N. Y. S. 10, 49 Misc. 74).

An agreement by a father to pay for support of a minor child in an orphanage asylum and on failure to relinquish all control of the child is unilateral and unenforceable, so as to deprive the father of custody. Cleveland Christian Orphanage v. Barcus, 35 Ohio, Cir. Ct. R. 151; *In re* Evans' Estate, 47 Pa. Super. Ct. 196; Clark v. West, 96 Tex. 437, 73 S. W. 797.

Avoiding contract. Harrison v. Harker, 44 Utah, 541, 142 P. 716. See Mulaney v. Cameron, 98 Kan. 620, 159 P. 19, 99 Kan. 70, 424, 161 P. 1180, 99 Kan. 677, 162 P. 1172 (con-

of statutory restriction be oral,[27] when shown by clear and convincing proof,[28] but mere statements of a deceased person and surrender of children to him may not be enough to satisfy the statute,[29] and evidence of adoption may not be enough to show a contract that the adopted child should inherit as an heir.[30]

An oral contract of adoption may be enforced in equity although the statute on the subject is not complied with where the contract is partially executed by taking the child and treating her as a natural child and where the child performs the usual duties of a child.[31] So a contract of adoption made by the adopting parent with the grandmother of the child and ratified by the mother may be enforced at suit of the child as the party for whose benefit the contract was made.[32] The plaintiff in an action to enforce a contract of adoption is not barred by his laches where he brought suit within a few months of the death of the defendant although the plaintiff was thirty years old at the time, where the contract to

sent of court required for legal adoption). See Bowins v. English, 138 Mich. 178, 101 N. W. 204, 11 Det. Leg. N. 517.

27. Odenbreit v. Utheim, 131 Minn. 56, 154 N. W. 741; McElvain v. McElvain, 171 Mo. 244, 71 S. W. 142 (contract performed by child will be enforced in equity); Martin v. Martin, 250 Mo. 539, 157 S. W. 575; Signaigo v. Signaigo (Mo.), 205 S. W. 23; Lindsley v. Patterson, 177 S. W. 826, L. R. A. 1915F, 680; Thomas v. Malone, 142 Mo. App. 193, 126 S. W. 522; Buck v. Meyer, — Mo. App. —, 190 S. W. 997 (enforceable in equity); *In re* Carroll's Estate, 219 Pa. 440, 68 A. 1038; Appeal of Jaquay, *Id.* See *In re* Thorne's Estate, 155 N. Y. 140, 49 N. E. 661. See Smith v. Allen, 161 N. Y. 478, 55 N. E. 1056 (affg. 54 N. Y. S. 1116, 34 App. Div. 624) (private agreements void under statute). See Benson v. Nicholas, 254 Pa. 55, 98 A. 775.

28. *A defective adoption paper* is competent evidence of a contract to adopt. Prince v. Prince, 194 Ala. 455, 69 So. 906; Fisher v. Davidson (Mo.), 195 S. W. 1024 (living with another as his child). Granthem v. Gossett, 182 Mo. 651, 81 S. W. 895; *In re* Lind's Estate, 90 Wash. 10, 155 P. 159.

29. Rahn v. Hamilton, 144 Ga. 644, 87 S. E. 1061; Heath v. Cuppel, 163 Wis. 62, 157 N. W. 527.

30. Felon v. Felon, 95 Neb. 322, 145 N. W. 634.

An agreement to adopt a child "as our own" and provide for and rear him accordingly, though an agreement to make him an heir, could not prevent a free disposal of the property by deed or will. Pemberton v. Perrin, 94 Neb. 718, 144 N. W. 164; Doppmann v. Doppmann, 114 N. Y. S. 620, 137 App. Div. 82 (judg. affd., Same v. Muller (1910), 122 N. Y. S. 1126, 137 App. Div. 82); Masterson v. Harris, 179 S. W. 284 (conforming to answer to certified questions), Sup. 174 S. W. 570; Winke v. Olson, 164 Wis. 427, 160 N. W. 164.

31. Malaney v. Cameron, 98 Kan. 620, 159 P. 21; Fisher v. Davidson (Mo.), 195 S. W. 1024, L. R. A. 1917F, 692.

32. Crawford v. Wilson, 139 Ga. 654, 78 S. E. 30, 44 L. R. A. (N. S.) 773.

adopt had never been repudiated and the plaintiff never knew the identity of her mother until the death of the defendant.[33]

An oral contract of adoption may be enforced in the State where the parents live although the contract was made in another State where the statutes require formal proceedings which have never been complied with where in both States an oral contract of this nature may be enforced in equity.[34]

Where one treats another as his child on the parent's making this a condition of taking the child this shows an executed agreement to adopt the child which is binding in the absence of a deed of adoption.[35] A father may be bound by a contract to adopt although his wife, who does not join in the contract, will not be barred of her rights of inheritance by the adoption,[36] but an unexecuted contract to adopt cannot be enforced by giving the child rights in the estate of the son of the adoptive parent. The equitable relation resulting from the contract makes the child for some purposes the child of the adoptive parent, but cannot give any rights against the property of the relatives of the parent.[37]

It is a sufficient consideration for an agreement to adopt that the child left his parents and lived with the foster parents,[38] but after a divorce awarding custody of a child to the mother, any agreement by the father to allow the child to be adopted by another is void for lack of consideration, as the father has no control over such child.[39]

The measure of damages for breach of a contract to adopt is not the value of the share of the estate which the plaintiff would have inherited if adopted, but is the value of the services rendered or outlay incurred on the faith of the promise.[40]

§ 722. Consent of Parents.

Unless required by statute consent of the natural parents in not necessary to adoption,[41] but the consent of both the natural parents

33. Crawford v. Wilson, 139 Ga. 654 78 S. E. 30, 44 L. R. A. (N. S.) 773.

34. Fisher v. Davidson (Mo.), 195 S. W. 1024, L. R. A. 1917F, 692.

35. Crawford v. Wilson, 139 Ga. 654, 78 S. E. 30; Lynn v. Hockaday, 162 Mo. 111, 61 S. W. 885, 85 Am. St. R. 480.

36. Middleworth v. Ordway, 191 N. Y. 404, 84 N. E. 291.

37. Mulaney v. Cameron (Kan.), 161 Pac. 1180.

38. Lee v. Bermingham, 199 Ill. App. 497.

39. Fugate v. Allen, 119 Mo. 183, 95 S. W. 980.

40. Sandham v. Grounds, 36 C. C. A. 103, 94 F. 83.

41. Clarkson v. Hatton, 143 Mo. 47, 54, 44 S. W. 761, 39 L. R. A. 748, 65 Am. St. R. 635; Haworth v. Haworth, 123 Mo. App. 303, 100 S. W. 531.

is usually required,[42] unless the child is a foundling or abandoned,[43] when the consent of the charitable institution having control of the foundling may be required.[44] An adoption may be sustained where the natural parents are present in court at the time and consent to it, although no formal written consent to the adoption was made by them.[45] A consent obtained by duress is not binding and may be set aside,[46] and a decree of divorce giving one parent

42. *In re* Sharon's Estate (Cal.), 177 P. 283; *In re* Cozza, 163 Cal. 514, 126 P. 161; Mock v. Neffler (Ga.), 95 S. E. 673 (mother not enough unless child is illegitimate or father is dead); Hopkins v. Antrobus, 120 Ia. 21, 94 N. W. 251; Holmes v. Derrig, 127 Ia. 625, 103 N. W. 973 (grandparents where parents both dead); Carter v. Botts, 77 Kan. 765, 93 P. 584; Taber v. Douglass, 101 Me. 363, 64 A. 653.

Where a wife, adopting a child, thereafter became discovert by divorce, her remarriage after two years did not invalidate the adoption. Lindsley v. Patterson, 177 S. W. 826, L. R. A. 1915F, 680; *In re* Wright, 79 Neb. 10, 112 N. W. 311; Tiffany v. Wright, *Id.*

Where the statute does not require that the consent of the natural parents of a child to his adoption be in writing, it is sufficient if such parent is present in court at the hearing of the petition for adoption and makes no objection. Milligan v. McLaughlin, 142 N. W. 675, 46 L. R. A. (N. S.) 1134; Luppie v. Winans, 37 N. J. Eq. 245; *In re* McDevitt, 162 N. Y. S. 1032, 176 App. Div. 418; *In re* Johnston, 137 N. Y. S. 92, 76 Misc. 374; Allison v. Bryan, 26 Okla. 520, 109 P. 934 (mother of bastard must consent); *In re* Bastin, 10 Pa. Super. Ct. 570 (adoption invalid where consenting parent died before petition filed); *In re* Knott (Tenn.), 197 S. W. 1097; *In re* Lease, 99 Wash. 413, 169 P. 816; State v. Wheeler, 43 Wash. 183, 86 P. 394; *In re* McCormick's Estate, 108 Wis. 234, 84 N. W. 148, 81 Am. St. R. 890.

43. Omaha Water Co. v. Schamel, 147 F. 502, 78 C. C. A. 68; *Ex parte* Hart, 130 P. 704; *In re* Kelly, 25 Cal. App. 651, 145 P. 156 (failure of parents to support child for a year is not abandonment); Anderson v. Blakesly, 155 Ia. 430, 136 N. W. 210; Succession of Dupre, 116 La. 1090, 41 So. 324; Taber v. Douglass, 101 Me. 363, 64 A. 653; *In re* Edds, 137 Mass. 346 (court will appoint guardian *ad litem* for such child with parents to consent to adoption); *In re* Wright, 79 Neb. 10, 112 N. W. 311; Tiffany v. Wright, *Id.;* Wood v. Wood, 77 N. J. Eq. 593, 77 A. 91; *In re* Potter, 85 Wash. 617, 149 P. 23.

44. *Ex parte* Martin, 29 Ida. 716, 161 P. 573 (only when legally placed in custody of the institution); *Ex parte* Courtright, 167 Mich. 689, 133 N. W. 820.

Consent by institution. Affidavit of consent to adoption which avers that affiant, the matron of a hospital, having control of the child, consents to adoption *held,* by equally divided court, in compliance with Comp. Laws, § 8777, authorizing adoption. Fisher v. Gardnier, 183 Mich. 660, 150 N. W. 358; Beach v. Bryan, 155 Mo. App. 33, 133 S. W. 635 (only when child placed with institution by order of court); *In re* Korte, 139 N. Y. S. 444, 78 Misc. 276. See Jain v. Priest (Ida.), 164 P. 364 (society appointed guardian may not consent to adoption).

45. Milligan v. McLaughlin (Neb.), 142 N. W. 675, 46 L. R. A. (N. S.) 1134.

46. Phillips v. Chase, 203 Mass. 556, 89 N. E. 1049.

the custody of the child does not render unnecessary the consent of the other.[47]

The consent of the adoptive parents may be assumed,[48] and the consent of the father may be assumed on evidence that the child lived in the family without objection from him,[49] or it may be presumed that a non-consenting mother was living apart from her husband so that her consent was unnecessary.[50]

§ 723. Adoption by Deed or by Judicial Act.

The method of adoption in States which permit it is pointed out by local law. In some States a written instrument must be executed and recorded, and the proceedings are in the nature of a solemn contract,[51] and adoption must be evidenced by a formal deed or other writing,[52] which should be liberally construed according to its intent,[53] and such deed may be valid although the requirements of the statute are not fully complied with,[54] and may be

47. Willis v. Bell, 86 Ark. 473, 111 S. W. 808; Bell v. Krauss, 169 Cal. 387, 146 P. 874. See Seibert v. Seibert, 170 Iowa, 561, 153 N. W. 160 (separation).

48. Sayles v. Christie, 187 Ill. 420, 58 N. E. 480.

49. Lindsley v. Patterson, 177 S. W. 826, L. R. A. 1915F, 680.

50. James v. James, 35 Wash. 655, 77 P. 1082 (false statement of father that mother dead will not invalidate adoption).

51. Tyler v. Reynolds, 53 Iowa, 146; Fouts v. Pierce, 64 Ia. 71; Bancroft v. Heirs, 53 Vt. 9; *In re* Johnson, 98 Cal. 531.

52. Monk v. McDaniel, 120 Ga. 480, 47 S. E. 931 (void where deed did not show residence of parties in county); Patterson v. Carr (Iowa), 166 N. W. 449 (giving residence of parties); Bresser v. Saarman, 112 Iowa, 720, 84 N. W. 920; Manuel v. Beck, 127 N. Y. S. 266, 70 Misc. 357 (proof of the authority of the offi- 1061; Appeal of Landy, *Id.; In re* Hughes' Estate, 225 Pa. 79, 73 A. 1061; Appeal of Landy, *Id.; In re* Phillips' Estate, 17 Pa. Super. Ct. 103 (will mentioning legatee as adopted child is ineffective where legatee dies before testator as will is effective only on death of testator); Powell v. Ott (Tex. Civ. App.), 146 S. W. 1019; Conrad v. Herring, 36 Tex. Civ. App. 616, 83 S. W. 427 (mentioning one as adopted child in deed is insufficient); James v. James, 35 Wash. 650, 77 P. 1080 (void where not recorded). See Moon v. Harness, 33 Ohio Cir. Ct. R. 337 (heir may be created by will without adoption).

53. Fosburg v. Rogers, 114 Mo. 122, 21 S. W. 82, 19 L. R. A. 201. See Thompson v. Waits, 159 S. W. 82 (ineffective where adopting parents have no children and deed provides that adopted child should be only coheir with other heirs).

An indenture of apprenticeship is not an adoption unless clearly so stated. *In re* Bowdoin's Estate (N. J.) 100 A. 1069, 98 A. 514; *In re* Wallace's Estate, 218 Pa. 39, 66 A. 1098; Appeal of Brittain, *Id.*

54. Burnes v. Burnes, 132 F. 485; Gatch v. Same, 70 C. C. A. 357, 137 F. 781 (wives not separately examined); Hilpire v. Claude, 109 Iowa, 159, 80 N. W. 332, 46 L. R. A. 171, 77 Am. St. Rep. 524 (improperly indexed in records); Sires v. Melvin, 135 Iowa, 460, 113 N. W. 106; Horner

void where not acknowledged or recorded as required by law,[55] as where, under a statute requiring the acknowledgment of the parents, an adoption is defective where not acknowledged by the foster father who had previously adopted the child.[56]

A contract of adoption will not be construed as an adoption.[57]

In other States a judicial decree, upon due notice to kindred or their assent, is requisite,[58] and an adoption by deed may have no effect on a court which had previously acquired custody of the

v. Maxwell, 171 Iowa, 660, 153 N. W. 331; Succession of Dupre, 116 La. 1090, 41 So. 324 (certificate of authority of justice who took acknowledgment lacking); Cook v. Bartlett, 179 Mass. 576, 61 N. E. 266 (certificate of acknowledgment incorrect); Lindsley v. Patterson, 177 S. W. 826, L. R. A. 1915F, 680; J. M. Guffey Petroleum Co. v. Hooks, 47 Tex. Civ. App. 560, 106 S. W. 690 (failure of clerk to record as directed).

55. Cook v. Echols, — Ala. App. —, 80 So. 680; Lamb's Estate v. Morrow, 140 Iowa, 89, 117 N. W. 1118; J. M. Guffey Petroleum Co. v. Hooks, 47 Tex. Civ. App. 560, 106 S. W. 690.

56. Long v. Dufur, 58 Or. 162, 113 P. 59.

57. Riley v. McKinney, 167 Iowa, 508, 149 N. W. 603.

58. Ballard v. Ward, 89 Penn. St. 358; Humphrey, Appellant, 137 Mass. 84, 346. The Louisiana statutes, as to adoption, do not mean to abridge the right of a natural tutor to his minor child. Succession of Forstall, 25 La. Ann. 430. The adoption by instrument may require the surviving parent to assent. Long v. Hewittt, 44 Iowa, 363. But the release of parental authority is not revocable at pleasure. Jones v. Cleghorn, 54 Ga. 9. Equity cannot dispense with strict statute compliance as to adoption. Long v. Hewitt, *supra*.

Consent of an orphan asylum from which the child was taken was held essential in *Ex parte* Chambers, 80 Cal. 216. An order based upon the child's abandonment by the parent, without notice to the latter, is invalid. Schiltz v. Roenitz, 86 Wis. 31; *Ex parte* Clark, 87 Cal. 638; In the Matter of Charles B. Clements, 78 Mo. 352. But the putative father of an illegitimate child is not entitled to notice; and the assent of the child's guardian here suffices. Gibson, Appellant, 154 Mass. 378. Where adoption by written instrument prevails, an informal instrument might operate as a contract for specific performance. Healey v. Simpson, 113 Mo. 340.

A statute making an adopted child legally the child of the parents by adoption is not unconstitutional unless interfering with vested rights. Sewall v. Roberts, 115 Mass. 262. Under the rule of comity, adoption in another State may be here recognized under suitable circumstances. Ross v. Ross, 129 Mass. 243; Van Matre v. Sankey, 148 Ill. 536. But not where the courts of that State had not jurisdiction. Foster v. Waterman, 124 Mass. 592. General rules of descent are not necessarily or presumably changed by statutes of adoption; but on death of an adopted child his estates goes to his blood relations. Reinders v. Koppelmann, 68 Mo. 482. As to petitions for adoption, see 137 Mass. 84, 346. That the child who permitted himself to be adopted as an heir knew the adopting parent to be of feeble or unsound mind, is not fraud sufficient to avoid the adoption. Brown *et al.* v. Brown, 101 Ind. 340. The rights conferred by adoption cannot be divested by the will of the adopting parent. Hosser's Succession, 37 La. Ann. 839. As to adoption by

child.[59] Where a petition for adoption is filed in the wrong county, and all parties are there represented and consent to a decree of adoption of a court, whereas the court in another county where the child lived should have entertained the petition, the adopting parent is thereafter estopped to deny the validity of the decree, and the heirs of the adopting parent, in case of her death, are also estopped. The statute limiting jurisdiction to the court where the infant lives was designed for the benefit of the child and to prevent an adoption where the child might be ignorant of his rights and to furnish a record there where he might readily ascertain his status. The statute was not designed to cut down the rights of the child.[60]

The consent of the minor to adoption may be assumed.[61]

§ 724. Parties.

The adopting parties may under the statutes usually be a husband and wife,[62] or persons of sound mind,[63] not non-residents.[64] The statutes sometimes require that both the adopting husband and his wife shall join in the adoption,[65] in which event adoption cannot take place where one of them is insane.[66] The guardian is not a necessary party.[67]

Adoption relates usually to minors and not to adult children,[68] but adults may usually be adopted,[69] and the word "child" in adoption statutes includes an adult.[70] A relative of the adopting

a husband with or without his wife's consent, see Stanley v. Chandler, 53 Vt. 619; Krug v. Davis, 87 Ind. 590.

59. Murphree v. Hanson (Ala.), 72 So. 437.

60. Milligan v. McLaughlin (Neb.), 142 N. W. 675, 46 L. R. A. (N. S.) 1134.

61. Morrison v. Sessions' Estate, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500 (when for benefit of child).

62. Markover v. Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806.

63. *In re* Sharon's Estate (Cal.), 177 P. 283 (that adopting person is ten years older than person adopted); Collamore v. Learned, 171 Mass. 99, 50 N. E. 518 (aged person may adopt vigorous adult).

64. Knight v. Gallaway, 42 Wash. 413, 85 P. 21.

65. Jones v. Bean, 136 Ill. App. 545; Lindsley v. Patterson, 177 S. W. 826, L. R. A. 1915F, 680.

66. Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141.

67. Shirley v. Grove, 51 Ind. App. 17, 98 N. E. 874; Leonard v. Honisfager, 43 Ind. App. 607, 88 N. E. 91. See Egoff v. Board of Children's Guardians of Madison County, 170 Ind. 238, 84 N. E. 151.

68. See Moore, Re, 14 R. I. 38.

69. Succession of Caldwell, 114 La. 195, 38 So. 140, 108 Am. St. Rep. 341; Collamore v. Learned, 171 Mass. 99, 50 N. E. 518; Mellville v. Wickham, Tex. Civ. App., 169 S. W. 1123; *contra*, Succession of Pizzati, 141 La. 645, 75 So. 498. See Bartholow v. Davies, 276 Ill. 505, 114 N. E. 1017.

70. Sheffield v. Franklin, 151 Ala. 492, 44 So. 373; Markover v. Krauss,

parent,[71] or persons of different race from the adopting parents, may be adopted.[72]

§ 725. Evidence.

A presumption of adoption is not raised by the fact that children are living in the family of another,[73] and have taken his name,[74] but after the lapse of time adoption may be presumed on evidence that the child had lived with and been treated as a child of the alleged adopting parent.[75]

Where adoption records have been destroyed they may be proved by oral evidence,[76] but adoption cannot be shown by general reputation of adoption,[77] and a reference in a will to one as adopted is not conclusive evidence of prior adoption.[78] The identity of the adopted child may be shown although not properly named.[79]

The burden of proof is on one attacking an adoption regularly made,[80] but one claiming rights of inheritance as an adopted child has the burden of proving the adoption.[81] One claiming adoption as against the objection of the natural parent must prove it by the clearest evidence.[82]

132 Ind. 294, 31 N. E. 1407, 17 L. R. A. 806 (child); *In re* Moran's Estate, 151 Mo. 555, 52 S. W. 377.

71. Billings v. Head, 184 Ind. 361, 111 N. E. 177 (grandchild). See Hodges' Heirs v. Kell, 125 La. 87, 51 So. 77 (adoption of illegitimate child of white man and negro woman).

72. *In re* Pepin's Estate, 53 Mont. 240, 163 P. 104.

73. *In re* Kuehn's Estate, 170 N. Y. S. 900 Henry v. Taylor, 16 S. D. 424, 93 N. W. 641. See Daniels v. Butler, 149 N. W. 264 (decree modified on rehearing 150 N. W. 1081). See Wales v. Holden, 209 Mo. 552, 108 S. W. 89. See McColpin v. McColpin's Estate, Tex. Civ. App. 1903, 75 S. W. 824.

74. *In re* Huyck's Estate, 99 N. Y. S. 502, 49 Misc. 391. See Baker v. Payne, — Mo. App. —, 198 S. W. 75 (evidence of name is admissible).

75. *In re* Herrick's Estate, 124 Minn. 85, 144 N. W. 455; Martin v. Martin, 250 Mo. 539, 157 S. W. 575; Coombs v. Cook, 35 Okla. 326, 129 P. 698 (where records destroyed. See Roberts v. Roberts, 223 F. 775; 138 C. C. A. 102. See Seibert v. Seibert, 170 Iowa, 561, 153 N. W. 160. See Heath v. Cuppel, 163 Wis. 62, 157 N. W. 527.

76. Kennedy v. Borah, 226 Ill. 245, 80 N. E. 767; Coombs v. Cook, 35 Okla. 326, 129 P. 698. See, however, *In re* Sharon's Estate (Cal.), 177 P. 283 (general statements of persons who saw the records are insufficient).

77. Lane v. Saunders, — Tex. Civ. App. —, 201 S. W. 1018.

78. *In re* Phillips' Estate, 17 Pa. Super. Ct. 103.

79. Sayles v. Chrsitie, 187 Ill. 420, 58 N. E. 480.

80. Succession of Caldwell, 114 La. 195, 38 So. 140, 108 Am. St. Rep. 341.

81. *In re* McCombs' Estate (Cal.), 162 P. 897; Powell v. Ott (Tex. Civ. App.), 146 S. W. 1019. See Townsend v. Perry, 164 N. Y. S. 441, 177 App. Div. 415 (where adoption paper a forgery).

82. Beach v. Bryan, 155 Mo. App. 33, 133 S. W. 635.

§ 726. Effect of Adoption.

Adoption will confer on the adopting parents the right to the custody of the child, and in general places the adopted child in the same position as a natural child,[83] giving the adopting parent the same rights over the property of the child as the natural father,[84] and the adopted child has only the rights which a natural child would have,[85] leaving the adopting parent the right to dispose of his property by will as he pleases,[86] and the adopting parent is bound to support him,[87] though the child be cared for by its natural parents.[88]

83. Scott v. Scott (U. S. D. C. Idaho), 247 F. 976; *In re* Cozza, 163 Cal. 514, 126 Pa. 161.

Religious training. Purinton v. Jamrock, 195 Mass. 187, 80 N. E. 802.

The parent of a child which had been adopted by another has no parental rights over such child, and cannot institute in the county court proceedings for the protection or relief of the child from an improper guardian. State v. Kelley, 32 S. D. 526, 143 N. W. 953; *In re* Knott (Tenn.), 197 S. W. 1097; State v. Yturria (Tex.), 204 S. W. 315, 189 S. W. 291; *contra,* White v. Richeson (Tex. Civ. App.), 94 S. W. 202. See Villier v. Watson, 168 Ky. 631, 182 S. W. 869 (parental control need not necessarily pass with the adoption). See *In re* Puterbaugh's Estate (Pa.), 104 A. 601 (adoption does not make adopted child a child in fact); Baskette v. Streight, 106 Tenn. 549, 62 S. W. 142 (wife who did not join in proceedings not entitled to custody on death of her husband who adopted child). See, however, Harle v. Harle (Tex.), 204 S. W. 317, 166 S. W. 674.

84. Burnes v. Burnes, 70 C. C. A. 357, 137 F. 781; Miller v. Miller, 123 Iowa, 165, 98 N. W. 631; Mundo v. McGraw, 25 Ky. Law Rep. 1644, 77 S. W. 926; Succession of Haley, 49 La. Ann 709, 22 So. 251; Ransom v. New York C. & St. L. Ry. Co., 93 Ohio St. 223, 112 N. E. 586 (action for death of child). See Sarazin v. Union R. Co., 153 Mo. 479, 55 S. W. 92 (where adoption void adopting parent cannot recover for death). See *In re* Clements, 12 Mo. App. 592 (rights as affected by religious belief).

85. Wright v. Green (Ind. App.), 119 N. E. 379 (adopting parent may dispose of property during his life notwithstanding contract of inheritance); Franklin v. Fairbanks, 99 Kan. 271, 161 P. 617; Riley v. Day, 88 Kan. 503, 129 P. 524 (takes name of adopting parents); Odenbreit v. Utheim, 131 Minn. 56, 154 N. W. 741; Steele v. Steele, 161 Mo. 566, 61 S. W. 815.

Civil law as guide. Since the common law did not recognize the adoption of a child as creating any legal rights, as did the civil law, in determining the nature of such rights the civil law may properly be looked to. Clark v. Clark, 76 N. H. 551, 85 A. 758; Kroff v. Amrhein (Ohio), 114 N. E. 267. See Wallace v. Noland, 246 Ill. 535 92 N. E. 956.

86. Malaney v. Cameron, 99 Kan. 70, 161 P. 1180; s. c., 98 Kan. 620, 159 P. 19; 99 Kan. 677, 162 P. 1172; Horton v. Troll, 183 Mo. App. 677, 167 S. W. 1081; Forsyth v. Heward (Nev.), 170 P. 21; Masterson v. Harris, 107 Tex. 73 174 S. W. 570.

87. Mitchell v. Brown, 18 Cal. App. 117, 122 P. 426 (adopting parent may contract with natural parent to support child); Ryan v. Foreman, 181 Ill. App. 262 (judgment affd., 262 Ill. 175, 104 N. E. 189; Beach v. Bryan, 155 Mo. App. 33, 133 S. W. 635.

88. *A natural parent* cannot recover from an adoptive parent for the care

Where a child has once been adopted the natural parents lose all rights in him, and their consent is not necessary to a subsequent adoption.[89]

The act of adoption is to be liberally construed in favor of the child,[90] and the adoption decree is the sole source for determining its status.[91] A statute giving parents a right of action for death of children gives the adopting parents a right to sue for the death of an adopted child.[92] Under an inheritance tax exempting a "direct lineal descendant" neither an adopted child nor a child of an adopted person is exempt, but adopted children are exempt under a clause giving them all the rights and privileges of a legal heir.[93]

Where a woman takes a girl from an orphan asylum and treats her as her own child she has an insurable interest in the life of the child although she has never formally adopted her or been appointed her guardian. It is not necessary that the insured shall be under any legal obligation to the beneficiary or that kinship shall exist between them. If the insured is under a moral obligation to render care and assistance to the beneficiary in the time of the latter's need, then the latter has an insurable interest, other than a mere pecuniary one, in the life of the former.[94]

§ 727. Child's Rights of Inheritance from Parents.

Adoption does not confer on the child any rights of inheritance unless expressly so provided in the statute or by the act of adoption,[95] but the statute usually confers on the adopted child all the

and support of a child while in his own home and custody. McNemar v. McNemar, 137 Ill. App. 504; Greenman v. Gillerman's Estate, 188 Mich. 74, 154 N. W. 82.

89. Order (Sup.), 103 N. Y. S. 1133, 118 App. Div. 907, affd.; *In re* Macrae, 189 N. Y. 142, 81 N. E. 956 (reh. den., 189 N. Y. 538, 82 N. E. 1129), (although adopting parents are dead).

90. Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585.

91. Jones v. Leeds, 41 Ind. App. 164, 83 N. E. 526. *In re* Clements, 12 Mo. App. 592.

92. Ransom v. New York, Chicago, etc., R. Co. (Ohio St.), 112 N. E. 586, L. R. A. 1916E, 704.

93. State v. Yturria (Tex.), 204 S. W. 315, L. R. A. 1918F, 1079. See note as to adopted child as child, etc.

94. Thomas v. National Benefit Association (N. J.), 86 Atl. 375, 46 L. R. A. (N. S.) 779.

95. Moore v. Hoffman, Fed. Cas. No. 9, 764a (2 Hays. & H. 173); *In re* Darling's Estate (Cal.), 159 P. 606; Webb v. McIntosh (Iowa), 159 N. W. 637; Villier v. Watson, 168 Ky. 631, 182 S. W. 869; Leonard v. H. Weston Lumber Co., 65 So. 459; Fisher v. Browning, 107 Miss. 729, 66 So. 132; Beaver v. Crump, 76 Miss. 34, 23 So. 432; Ferguson v. Herr, 64 Neb. 649, 90 N. W. 625, 94 N. W. 542; Dorsett v. Vought (N. J.), 71 So. 492; Townsend v. Perry, 164 N. Y. S. 441, 177 App. Div. 415; Mer-

legal rights of inheritance of a natural child,[96] including interests in remainder which would have passed to the heirs of the parent,[97] but where a husband adopts a child and the wife is not a party to the proceedings the child has no rights of inheritance from the wife.[98]

chant v. White, 79 N. Y. S. 1, 77 App. Div. 539, 12 N. Y. Ann. Cas. 233; *In re* Carroll's Estate, 219 Pa. 440, 68 A. 1038; appeal of Jaquay, *Id.;* Jordan v. Abney, 97 Tex. 296, 78 S. W. 486; Powell v. Ott (Tex. Civ. App.), 146 S. W. 1019; Wall v. McEnnery's Estate (Wash.), 178 P. 631.

96. Scott v. Scott (U. S. D. C. Idaho), 247 F. 976; Appeal of Woodward, 81 Conn. 152, 70 A. 453; Ryan v. Foreman, 181 Ill. App. 262 (judgment affd., 262 Ill. 175, 104 N. E. 189); Nickerson v. Hoover (Ind. App.), 115 N. E. 588; Riley v. Day, 88 Kan. 503, 129 P. 524; Lanferman v. Vanzile, 150 Ky. 751, 150 S. W. 1008; Succession of Hawkins (La.), 71 So. 492 (as forced heir); Cunningham v. Lawson, 111 La. 1024, 36 So. 107; Virgin v. Marwick, 97 Me. 578, 55 A. 520; Stearns v. Allen, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441 (adopted child may inherit property of deceased son of adopting parents); Ultz v. Upham, 177 Mich. 351, 143 N. W. 66; *In re* Klapp's Estate (Mich.), 164 N. W. 381; Fisher v. Gardnier, 183 Mich. 660, 160 N. W. 358; *In re* Herrick's Estate, 124 Minn. 85, 144 N. W. 455; Adams v. Adams, 102 Miss. 259, 59 So. 84; *In re* Cupples' Estate (Mo.), 199 S. W. 556; Lindsley v. Patterson, 177 S. W. 826, L. R. A. 1915F, 680.

Where husband and wife adopted children, and the husband died, leaving the bulk of his estate to the wife, who subsequently died intestate, the adopted children took as her heirs. Horton v. Troll, 183 Mo. App. 677, 67 S. W. 1081; Thomas v. Malone, 142 Mo. App. 193, 126 S. W. 522 (adopted child has rights of child omitted from will); *In re* Pepins' Estate, 53 Mont. 240, 163 P. 104; Martin v. Long, 53 Neb. 694, 74 N. W. 43; Clark v. Clark, 76 N. H. 551, 85 A. 758 (adopted child is an "heir in the descending line"); Von Beck v. Thomsen, 167 N. Y. 601, 60 N. E. 1121 (affg. 60 N. Y. S. 1094, 44 App. Div. 373, except that adoption shall not defeat rights of remaindermen); Middleworth v. Ordway, 191 N. Y. 404, 84 N. E. 291; United States Trust Co. v. Hoyt, 135 N. Y. S. 849, 150 App. Div. 621; *In re* Webb's Estate, 250 Pa. 179, 95 A. 419; Balch v. Johnson, 106 Tenn. 249, 61 S. W. 289 (child may inherit from both husband and wife where both adopt heir); State v. Yturria (Tex.), 204 S. W. 315, 189 S. W. 291; Logan v. Lennix (Tex. Civ. App. 1905), 88 S. W. 364; White v. Holman, 25 Tex. Civ. App. 152, 60 S. W. 437; Evans v. Evans (Tex. Civ. App.), 186 S. W. 815; State v. Yturria (Tex. Civ. App.), 189 S. W. 291. See Patterson v. Carr (Iowa), 166 N. W. 449 (receipt in full of claims against adopting parent or his estate held to cover only claim for wages and not of inheritance). See Westerman v. Schmidt, 80 Mo. App. 344 (under deed of adoption giving child "heir's" portion, adopted child cannot recover any portion of estate disposed of by will).

Where the adopting parent is a life tenant only, the adopted child cannot inherit. Eureka Life Ins. Co. v. Geis, 121 Md. 196, 88 A. 158.

97. Adams v. Merrill, 85 N. E. 114. See Gilliam v. Guaranty Trust Co. of New York, 186 N. Y. 127, 78 N. E. 697 (under statute).

98. *In re* Carroll's Estate, 219 Pa. 440, 68 A. 1038; Appeal of Jaquay, *Id.*

A parol obligation by a person to adopt the child of another as his own, accompanied by a virtual, though not a statutory, adoption, and acted upon by both parties during the obligor's life, may be enforced, upon the death of the obligor, by adjudging the child entitled as a child to the property of the obligor, who dies without disposing of his property by will. Though the death of the promisor may prevent a literal enforcement of the contract, yet equity considers that done which ought to have been done; and as one of the consequences, if the act of adoption has been formally consummated, would be that the child would inherit as an heir of the adoptor, equity will enforce the contract by decreeing that the child is entitled to the fruits of a legal adoption.[99] A statute prohibiting suits against administrators within twelve months of their appointment does not render premature an action within that period by one claiming to be heir by adoption to enjoin sale of the real estate of the decedent.[1]

Where the adoption took place before the passage of a statute giving adopted children a right of inheritance the child may inherit where the adopting parent died after the passage of such a statute,[2] but adoption under an unconstitutional statute will have no effect.[3]

Heirship by adoption is not destroyed by a second adoption after the death of the adopting parent,[4] but if the second adoption takes place before the death of the first adopting parent the child loses all rights to inherit from him.[5] Where a man adopts a child of a deceased child the adopted child inherits as a child only and not as both child and grandchild.[6]

Adoption will not cut off the child's right of inheritance from its natural parents unless so provided by statute.[7]

§ 728. Child's Rights of Inheritance from Kindred of Parents.

A statute making the adopted child the heir of the adopter does not entitle the child to inherit through him from the ancestors of

99. Crawford v. Wilson, 139 Ga. 654, 78 S. E. 30, 44 L. R. A. (N. S.) 773.

1. Bauman v. Kusian, 139 Ga. 654, 78 S. E. 30, 44 L. R. A. (N. S.) 773.

2. Theobald v. Smith, 92 N. Y. S. 1019, 103 App. Div. 200; Rosekrans v. Rosekrans, 148 N. Y. S. 954, 163 App. Div. 730.

3. Albring v. Ward, 137 Mich. 352, 100 N. W. 609, 11 Det. Leg. N. 328.

4. Patterson v. Browning, 146 Ind. 160, 44 N. E. 993; Russell v. Russell, 14 Ky. L. R. 236.

5. *In re* Klapp's Estate (Mich.), 164 N. W. 381.

6. Billings v. Head, 184 Ind. 361, 111 N. E. 177; Morgan v. Reel, 213 Pa. 81, 62 A. 253.

7. *In re* Pillsbury's Estate (Cal.),

the adopting parent,[8] and does not make the adopted child an heir of the kindred of those who adopted it.[9]

The adoption of a child is a contract into which the adopting parents enter with those having the lawful custody of the child, an agreement personal to themselves, and while they have a perfect right to bind or obligate themselves to make the child their heir, they are powerless to extend this right on his part to inherit from others. All inheritance laws are based or built upon natural ties of blood relationship, whereas an adopted child's right to inherit rests upon a contract, and hence only those parties to the contract are bound by it. So an adopted child will not inherit from the mother of his deceased foster parent,[10] or from her brother,[11] nor from the natural children of the adopting parent.[12]

Under a statute giving the adopted child the status of a lawful child except that he shall not be entitled to inherit from the lineal or collateral kindred of his parents, an adopted child cannot inherit from the natural children of his adopting parents. The court notes the general rule that an adopted child cannot inherit from the kindred of the parents, and holds that the exception in the statute cannot be held to enlarge its previous language.[13] So an adopted child will not take bequests made to a predeceased natural son of the adopting parent.[14]

There is, however, a line of cases taking a more liberal view

166 P. 11 (where adoption took place after death of natural parent); Head v. Leak, — Ind. App. —, 111 N. E. 952; *In re* Klapp's Estate (Mich.), 164 N. W. 381; Clarkson v. Hatton, 143 Mo. 47, 44 S. W. 761, 39 L. R. A. 748, 65 Am. St. R. 635; *In re* Landers' Estate, 166 N. Y. S. 1036, 100 Misc. 635 (half-sister of intestate may inherit though adopted by stranger).

8. Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. R. 753. *Contra*, Cooley v. Powers, 63 Ind. App. 59, 113 N. E. 382.

9. Wallace v. Noland, 246 Ill. 535, 92 N. E. 956; Boaz v. Swinney, 79 Kan. 332, 99 P. 621; Merritt v. Morton, 143 Ky. 133, 136 S. W. 133; Van Derlyn v. Mack, 137 Mich. 146, 100 N. W. 278, 1 Det. Leg. N. 207, 66 L. R. A. 437, 109 Am. St. R. 669; Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585; *In re* Burnett's Estate, 219 Pa. 599, 69 A. 74; Rhode Island Hospital Trust Co. v. Humphrey, 32 R. I. 318, 79 A. 829; Batcheller-Durkee v. Batcheller, — R. I. —, 97 A. 378.

10. Merritt v. Morton, 143 Ky. 133, 136 S. W. 133, 33 L. R. A. (N. S.) 139.

11. Moore v. Moore, 35 Vt. 98.

12. Helms v. Elliott, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535. See also to the same effect Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665; Sunderland's Estate, 60 Ia. 732, 13 N. W. 655; Meader v. Archer, 65 N. H. 214, 23 A. 521; Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. R. 753.

13. Durkee v. Batcheller (R. I.) 97 A. 378, L. R. A. 1916E, 545.

14. Gammons v. Gammons, 212 Mass. 454, 99 N. E. 95.

under statutes which in effect seem to place the adopted child in the status of a natural child, and in such cases the adopted child may inherit from the natural children of the adopting parent,[15] or from the ancestors of the adopting parent.[16]

§ 729. Child's Rights of Inheritance by Contract.

The adopted child has generally no greater rights than a natural child, and therefore when the natural child may be disinherited the adopted child may be disinherited also. He may have rights under a contract if the adopting parents have made a contract at adoption performed by the child to give him their property at death, but such a contract cannot be made out of general talk by the adopting parents that the child should be treated as their own and that their property should go to him on their death, as this simply gives her the same rights as a natural child and was not intended as an irrevocable agreement.[17]

A promise made by persons who took two infant orphans from an asylum, where they were well cared for, to treat them as in all respects their children, is not a promise to leave them anything by will. Where the children subsequently expressed a desire to return to the asylum, and the persons taking care of them then promised if they would remain to rear them and educate them in a proper manner and to leave them their property, this is not such an agreement to leave by will as equity will enforce by specific performance. It is not sufficiently definite and certain, it does not clearly appear how long the children were to remain and what they were to do, and it does not appear what they gave up by remaining. There is nothing to indicate that it would have been to the advantage of the children to leave, and it does not appear that the children changed their position in any way in reliance on the promise made.[18]

§ 730. Adoption as Revocation of Will of Adopting Parent.

Statutes in many States provide that the birth of a child will cause a partial revocation of the will of the father previously executed. Under these statutes it is commonly held that where the statute provides that an adopted child has all the rights of a

15. Stearns v. Allen, 183 Mass. 404, 67 N. E. 349, 97 Am. St. R. 441; McManus v. Lloyd (Wash.), 183 Pac. 93.

16. Shick v. Howe, 137 Ia. 249, 114 N. W. 916, 14 L. R. A. (N. S.) 980.

17. Odenbreit v. Utheim (Minn.), 154 N. W. 741, L. R. A. 1916D, 421.

18. Bauman v. Kusian, 164 Cal. 582, 129 P. 986, 44 L. R. A. (N. S.) 756.

natural child the adoption of a child will cause the partial revocation of a will as in case of the birth of a natural child,[19] although the adoption statute was passed before the statute providing for the partial revocation of a will.[20]

§ 731. Rights of Inheritance by Parents.

The adopting parents cannot inherit from the adopted child [21] unless the statute so provides when they will inherit in preference to the natural parents.[22] and the natural parents or natural heirs may inherit in preference to the heirs of the adoptive parents.[23] The general statutes of inheritance are modified and set aside by statutes regulating the effect of adoption only so far as there is some specific provision in the statutes for adoption inconsistent with the application in such cases of the general inheritance statutes. So where the adopting parents are deceased the natural parents may inherit in the absence of a statute changing the general rule on the subject. A statute declaring the

19. Dreyer v. Schrick (Kan.), 185 P. 30; Bourne v. Downer, 184 N. Y. App. Div. 476, 171 N. Y. Supp. 264; Glascott v. Bragg, 111 Wis. 605, 87 N. W. 853; *In re* Sandon's Will, 123 Wis. 603, 101 N. W. 1089. *Contra*, Goldstein v. Hammell, 236 Pa. 305, 84 A. 772, 49 Pa. Super. Ct. 39; Evans v. Evans (Tex.), 186 S. W. 815.

20. Scott v. Scott, 247 Fed. 976; Buckley v. Frazier, 153 Mass. 525, 27 N. E. 768.

21. White v. Dotter, 73 Ark. 130, 83 S. W. 1052 (although parent makes gift to child believing she would inherit); Coleman v. Swick, 120 Ill. App. 381 (judg. affd., Swick v. Coleman, 218 Ill. 33, 75 N. E. 807).

Under an adoption statute providing that the child may inherit from the parent the adopting parent cannot inherit from the child where not expressly so provided. Adopting statutes should be strictly construed and will not be construed to change the common law where not expressly so worded. Furthermore, it would be to the interest of designing persons to adopt children likely to inherit and then to bring about their death. Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19, L. R. A. 1915E, 462.

22. *In re* Darling's Estate (Cal.), 159 P. 606; *In re* Jobson's Estate, 164 Cal. 312, 128 P. 938; Swick v. Coleman, 218 Ill. 33, 75 N. E. 807, 120 Ill. App. 381; Dunn v. Means, 48 Ind. App. 383, 95 N. E. 1015; Lanferman v. Vanzile, 150 Ky. 751, 150 S. W. 1008; *In re* Havsgord's Estate, 34 S. D. 131, 147 N. W. 378; Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 266; Coleman v. Swick, 120 Ill. App. 381 (judg. affd., Swick v. Coleman, 218 Ill. 33, 75 N. E. 807). See Paul v. Davis, 100 Ind. 422 (statute making child the heir casts descent from child to adopting parent).

23. Russell v. Jordan, 58 Colo. 445, 147 P. 693; Maker v. Clowser, 158 Ia. 156, 138 N. W. 837.

Property inherited by an adopted child goes to it in fee, and on its death descends according to the law of descent and distribution to its blood relatives to the exclusion of its adoptive parents. Fisher v. Browning, 107 Miss. 729, 66 So. 132; Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19, L. R. A. 1915E, 462.

rights of inheritance existing between the parent and child by adoption shall be the same as exist between parent and child by lawful birth does not alter the rights of the natural parent where the adopting parent is dead.[24] But the share under a will bequeathed to a predeceased adopted daughter goes to the heirs of the testator rather than to the child's natural parents.[25]

§ 732. Inheritance by Children of Adopted Child.

The childen of an adopted child may take by representation from the estate of the adopting parent,[26] or on the death of the adopted child without issue his heirs may inherit.[27] Our adoption statutes are properly construed having in view the ancient civil law,[28] and a statute declaring that the adopted child has the same right of inheritance between the parties to the adoption as a legitimate child makes the adopted child the legal child of the adopter and he stands as to the property of the adoptive parent in the same position as a child born in lawful wedlock. Furthermore, the relation of parent and child is a correlative one. Where there is a legal child there is a legal father. As a logical sequence the children of such legal child are the grandchildren of the legal father.[29] Therefore, the grandchild is the legal grandchild of the adopter and as such he is entitled to stand in his parent's place and take by right of representation in her place where she dies before the adopting parent.[30]

§ 733. Effect of Adoption on Inheritance by Widow of Adopting Parent.

Where the statute provides that the adopted child shall inherit the widow of the adopting parent has only the same rights under the statute as if her husband left issue,[31] but a husband by a con-

24. Baker v. Clowser (Ia.), 138 N. W. 837, 43 L. R. A. (N. S.) 1056.

25. Warner v. King, 267 Ill. 82, 107 N. E. 837.

26. *In re* Herrick's Estate, 124 Minn. 85, 144 N. W. 455; *In re* Cupples' Estate (Mo.), 199 S. W. 556; Williams v. Rollins (Mo.), 195 S. W. 1009; Bernero v. Goodwin, 267 Mo. 427, 184 S. W. 74; Kroff v. Amrhein, 5 Ohio App. 37, — Ohio —, 114 N. E. 267; *In re* Webb's Estate, 250 Pa. 179, 95 A. 419; Harle v. Harle, 166 S. W. 674; Batchelder v. Walworth, 85 Vt. 322, 82 A. 7.

27. Franklin v. Fairbanks, 99 Kan. 271, 161 P. 617; McMaster v. Fobes, 226 Mass. 396, 115 N. E. 487. *Contra,* Kroff v. Amrhein (Ohio), 114 N. E. 267.

28. Markover v. Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806.

29. Vidal v. Commagere, 13 La. Ann. 516.

30. Batchelder v. Walworth (Vt.), 82 A. 7, 37 L. R. A. (N. S.) 849.

31. Atchison v. Atchison's Ex'rs, 89 Ky. 488, 12 S. W. 942, 11 Ky. Law, 705; Moran v. Moran, 151 Mo. 558, 52 S. W. 378; *In re* McQuiston's Estate, 238 Pa. 313, 86 A. 207.

tract of adoption cannot impair the rights of his widow[32] unless the contract of adoption was made before the marriage when the rights of the widow are subject to the rights of inheritance of the adopted child.[33]

§ 734. Revocation of Adoption.

Proceedings to abrogate the adoption may be brought in equity[34] and the jurisdiction to set aside an adoption by any other court is statutory purely.[35] Adoption may be set aside on the ground of unsoundness of mind of the adopting parent and undue influence on petition begun by the next of kin of the adopting parent,[36] for fraud on the court,[37] that the court had no jurisdiction,[38] that it was made without notice to the parents,[39] or without the parent's consent.[40] Under the New York statute adoption may be abrogated without the consent of a divorced parent.[41]

The heirs may not have the right to rely on defects in the adoption although it might be void as against the parents.[42] The natural parent's rights cease on his death and his heirs cannot after his death carry on proceedings to revoke an adoption.[43]

Where the record of the adoption is valid on its face irregulari-

32. McCann v. Daly, 168 Ill. App. 287.

The adoption of a child is not equivalent to the birth of issue in determining the rights of a surviving husband or wife. Clark v. Clark, 76 N. H. 551, 85 A. 758; Middleworth v. Ordway, 98 N. Y. S. 10, 49 Misc. 74.

33. Lee v. Bermingham, 199 Ill. App. 497.

34. McClure v. Williams (Ala.), 78 So. 853; *In re* Ziegler, 146 N. Y. S. 881, 161 App. Div. 598 (affirming order [Sur.] 143 N. Y. S. 562, 82 Misc. 346); *In re* Beers, 78 Wash. 576, 139 P. 629.

35. *In re* McDevitt, 162 N. Y. S. 1032, 176 App. Div. 418.

36. Tucker v. Fisk, 154 Mass. 574, 28 N. E. 1051; McKay v. Kean, 167 Mass. 524, 46 N. E. 120 (jury may be refused); Phillips v. Chase, 203 Mass. 556, 89 N. E. 1049; Raymond v. Cooke, 226 Mass. 326, 115 N. E. 423; Stevens v. Halstead, 168 N. Y. S. 142, 181 App. Div. 198.

37. Miller v. Higgins, 14 Cal. App. 156, 111 P. 403.

38. *In re* Johnston, 37 N. Y. S. 92, 76 Misc. 374.

39. Bell v. Krauss, 169 Cal. 387, 146 P. 874; *In re* Moore, 132 N. Y. S. 249, 72 Misc. 644; *In re* Keeler's Adoption, 52 Pa. Super. Ct. 516. See Darlington's Adoption, 69 Pa. Super. Ct. 281.

40. Nelson v. Nelson, 127 Ill. App. 422 (that consent given under mistaken belief of approaching death is no ground for setting aside adoption); Coleman v. Coleman, 81 Ark. 7, 98 S. W. 733; *In re* Ziegler, 143 N. Y. S. 562, 82 Misc. 346.

41. Matter of Ziegler, 50 N. Y. L. J. 99.

42. Appeal of Woodward, 81 Conn. 152, 70 A. 453; Jones v. Leeds, 41 Ind. App. 164, 83 N. E. 526 (heirs of wife cannot take advantage of defect in petition).

43. *In re* Young, 259 Pa. 573, 103 A. 344.

ties must be clearly proved to set it aside,[44] and it is not a ground for setting aside an adoption that the adopting parent's home has a bad moral atmosphere,[45] or that it was made for the purpose of preventing a contest over the will.[46]

If an order of adoption is set aside the status of the child is the same as if no proceedings for adoption had been had and the child may be again adopted by the same parties.[47]

One may be estopped to claim irregularities in an adoption[48] as where the guardian procures the adoption by transferring to the adopting parents the property of the ward, he will not be permitted to repudiate it later.[49] Acquiescence for several years by a parent in the claim of adoption does not estop her from claiming the child on the ground that the order of adoption is invalid.[50]

§ 735. Conflict of Laws Relating to Adoption.

An adoption valid where made will entitle the adopted child to inherit under the laws of another State where the property lies,[51] and the right of the adopted child to inherit depends on the law of the domicile of the adoptive parent.[52]

Adoption under a statute of a foreign State conferring rights of inheritance to land will not be sufficient to confer such rights in another State.[53] Adoption in one State will be recognized in another State of similar laws. The legality of the adoption is

44. Simpson v. Simpson, 29 Ohio Cir. Ct. R. 503.

45. Bedford v. Hamilton, 153 Ky. 429, 155 S. W. 1128.

46. Collamore v. Learned, 171 Mass. 99, 50 N. E. 518.

47. *In re* Trimm, 63 N. Y. S. 952, 30 Misc. 493, 7 N. Y. Ann. Cas. 293.

48. Barclay v. People, 132 Ill. App. 338.

49. Chubb v. Bradley, 58 Mich. 268, 25 N. W. 186.

50. *Ex parte* Clarke, 87 Cal. 638, 25 P. 967. See *In re* Brown's Adoption, 25 Pa. Super. Ct. 259 (21 years delay will bar).

51. Appeal of Woodward, 81 Conn. 152, 70 A. 453; Shick v. Howe, 137 Ia. 249, 114 N. W. 916; Brewer v. Browning, 115 Miss. 358, 76 So. 267, 519; Anderson v. French, 77 N. H. 509, 93 A. 1042; Simpson v. Simpson, 29 Ohio Cir. Ct. R. 503; Finley v. Brown, 122 Tenn. 316, 123 S. W. 359; McColpin v. McColpin's Estate (Tex. Civ. App. 1903), 77 S. W. 238; James v. James, 35 Wash. 655, 77 P. 1082; Appeal of Woodward, 81 Conn. 152, 70 A. 453 (foreign adoption presumed valid). See Fisher v. Davidson (Mo.), 195 S. W. 1024 (contract to adopt made in another State may be enforced in Missouri).

52. Shick v. Howe, 137 Ia. 249, 114 N. W. 916.

53. Hood v. McGehee, 35 S. Ct. 718, 237 U. S. 611, 59 L. Ed. 1144 (affg. decree, 199 F. 989, 117 C. C. A. 664, 189 La. 205; Brown v. Finley, 157 Ala. 424, 47 So. 577; Fisher v. Browning, 107 Miss. 729, 66 So. 132; Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 266.

decided by the law of the State where the adoption took place but that relation or status having been established, what the adopted child shall inherit should be determined in the case of personalty by the *lex domicilii* of the owner at the time of his decease and in case of real estate by the *lex rei sitae*.[54]

54. Anderson v. French, 77 N. H. 509, 93 A. 1042, L. R. A. 1916A, 660.

CHAPTER V.

RIGHTS OF PARENTS.

§ 736. Foundation of Parental Rights.

The rights of parents result from their duties, being given them by law partly to aid in the fulfilment of their obligations, and partly by way of recompense.[55] As they are bound to maintain and educate, the law has given them certain authority over their children, and in the support of that authority a right to the exercise of such discipline as may be requisite for the discharge of their important trust. This is the true foundation of parental power.[56]

The legal rights a parent has in respect to his children during minority are not absolute and may be forfeited by his own conduct. They may be modified or suspended against his will by action of the court; and they may, to a certain extent, be transferred by agreement to another, but they cannot be destroyed as between himself and his child, except by statute.[57]

§ 737. Right of Chastisement.

Some of the ancient nations carried the parental authority beyond all natural limits. The Persians, Egyptians, Greeks, Gauls, and Romans tolerated infanticide. Under the ancient Roman laws the father had the power of life and death over his children, on the principle that he who gave had also the power to take away;[58] and thus did law attribute to man those functions which belong only to the Supreme Being. This power of the father was toned down in subsequent constitutions, and in the time of the Emperor Hadrian the wiser maxim prevailed, "*Patria potestas in pietate debet, non in atrocitate consistere;*" for which reason a father was banished who had killed his son. The Emperor Constantine made the crime capital as to adult children;

55. 1 Bl. Com. 452.
56. 2 Kent Com. 203.
57. Appeal of Woodward, 81 Conn. 152, 70 A. 453.
58. Cod. 8, 47, 10; 1 Bl. Com. 452.

and infanticide was under Valentinian and Valens punishable by death. Thus was the doctrine of paternal supremacy gradually reduced, though at the civil law never wholly abandoned.[59]

The common law, far more discreet, gives the parent only a moderate degree of authority over his child's person, which authority relaxes as the child grows older. With the progress of refinement, parents have learned to enforce obedience by kindness rather than severity; and although the courts are reluctant to interfere in matters of family discipline, they will discountenance every species of cruelty which goes by the name of parental rule. The common law gives the right of moderate correction of the child in a reasonable manner; "for," it is said, "this is for the benefit of his education;" [60] and the mother has the same right as the father,[61] and in the absence of the father may call in a stranger to assist her who will not be liable if he only uses reasonable force.[62]

But at the same time the parent must not exceed the bounds of moderation, and inflict cruel and merciless punishment; for if he do, he is liable to be punished by indictment.[63] And he may be found guilty of manslaughter, or even murder, under gross circumstances.[64] Thus, where a father put his child, a blind and helpless boy, in a cold and damp cellar, without fire, during several days in midwinter, giving as his only excuse that the boy was covered with vermin, he was rightly held subject to indictment

59. 1 Bl. Com. 452; 2 Kent Com. 204; 1 Heinec. Antiq. Rom. Jur. 9; Dr. Taylor, Civ. Law, 403-406; Forsyth, Custody, 3.

60. Hutchinson v. Hutchinson, 124 Cal. 677, 57 P. 674 (evidence of the conduct of the children immediately preceding the punishment is sufficient and evidence of prior instances of falsehoods is inadmissible); Hornbeck v. State, 16 Ind. App. 484, 45 N. E. 620; 1 Hawk. P. C. 130; 1 Bl. Com. 452. One *in loco parentis*, as a stepfather may become, has the right of moderate correction. Gorman v. State, 42 Tex. 221; Marshall v. Reams, 32 Fla. 499; State v. Alford, 68 N. C. 322. And see, as to the analogous case of a schoolteacher, State v. Burton, 45 Wis. 150; Danenhoffer v. State, 69 Ind. 295. So, too, as against a criminal prosecution, see Dean v. The State, 89 Ala. 46, concerning an authorized friend of the family.

61. Rowe v. Rugg, 117 Ia. 606, 91 N. W. 903, 94 Am. St. R. 318 (mother may delegate right to punish to another).

62. Vanmeter v. True, 10 Ky. Law, 320.

63. The law reluctantly interferes criminally in such cases unless the parental chastisement produces permanent injury or was maliciously inflicted. State v. Jones, 95 N. C. 588; Dean v. The State, 89 Ala. 46. But cf. Powell v. State, 67 Miss. 719.

64. 1 Russ. Crimes, Grea. ed. 490; Regina v. Edwards, 8 Car. & P. 611; 2 Bish. Crim. Law, § 714.

and punishment for such wanton cruelty.[65] So may a parent at the common law be indicted for exposure and neglect of his children; and the heinousness of the offence depends in a great measure upon the proof of simple negligence or wilful cruelty. The parent, too, who suffers his little child to starve to death, commits murder.[66] But the child's tenderness of age and helplessness are elements in such cases; and when children grow up they are presumed to provide for their urgent wants.

§ 738. Parent's Right to Child's Property.

A parent of a minor child has no right to the possession or use of his property,[67] or to make contracts concerning it,[68] except by statute,[69] and cannot bring suit on account of it,[70] but where a parent occupies the child's property without any agreement to pay rent, no such agreement will be implied in the absence of circumstances showing that such payment was intended.[71] The parent has no authority to settle suits or claims of the minor.[72]

65. Fletcher v. People, 52 Ill. 395; Johnson v. State, 2 Humph. 283; Hinkle v. State, 127 Ind. 490.

66. 4 Bl. Com. 182, 183; 2 Bishop, Crim. Law, §§ 688, 712; Regina v. White, L. R. 1 C. C. 311. Wilfully permitting a child's life to be endangered for want of proper food or medical treatment, legislation sometimes makes an indictable offence as against a parent or one in his stead. Cowley v. People, 83 N. Y. 464.

67. Gaines v. Kendall, 176 Ill. 228, 52 N. E. 141; Paskewie v. East St. L. & Ry. Co., 281 Ill. 385, 117 N. E. 1035, 206 Ill. App. 131; Hopkins v. Lee, 162 Ia. 165, 143 N. W. 1002; Partee v. Partee, 114 Miss. 577, 75 So. 438, 114 Miss. 198, 74 So. 827 (where widowed mother has not been appointed guardian); State v. Staed, 143 Mo. 248, 45 S. W. 50; Bell v. Rice, 50 Neb. 547, 70 N. W. 25; Ficken v. Emigrants' Industrial Sav. Bank, 67 N. Y. S. 143, 33 Misc. 92; Guillou v. Campbell, 35 Pa. Super. Ct. 639; Pickthall v. Steinfeld, 12 Ariz. 230, 100 P. 779; Steinfeld v. Pickthall, *Id.*; Anderson v. Dodge, 143 N. Y. S. 132, 158 App. Div. 201 (father may lease ward's property by statute).

68. Fassitt v. Seip, 249 Pa. 576, 95 A. 273.

69. Darlington v. Turner, 202 U. S. 195, 26 S. Ct. 630, 50 L. Ed. 992 (reversing 24 App. D. C. 573); Varnado v. Lewis, 113 La. 72, 36 So. 893.

70. Miles v. Boyden, 20 Mass. (3 Pick.) 213 (father cannot sue for child's legacy); Morris v. St. Louis, K. C. & N. R. Co., 58 Mo. 78.

71. Wills v. Wills, 34 Ind. 106; Aaron v. Bayon, 131 La. 228, 59 So. 130; Bell v. Dingwell, 91 Neb. 699, 136 N. W. 1128.

Where the child, while living with the mother on property in which he had an interest from his father's estate, earns and pays to the mother wages sufficient for his support, the mother must account to the child for rent. Keeney v. Henning, 58 N. J. Eq. 74, 42 A. 807.

72. Spring Valley Coal Co. v. Donaldson, 123 Ill. App. 196; Leslie v. Proctor & Gamble Mfg. Co., 102 Kan.

The law treats legacies, gifts, distributive shares, and the like, which may vest in a person during minority, as his own property; and the modern practice is to require the appointment of a guardian in such cases, to manage the estate until the child comes of age.[73] Under no pretext may the father appropriate such funds to himself, or use them to pay his own debts; and an administrator or trustee who pays the child's money to the father as parent incurs a personal risk.[74] The same may be said of the child's lands.[75] And the parent's investment of his child's money for the latter's benefit will be protected against all creditors of the former, who are chargeable with notice of the child's rights.[76]

While the parent may be called the natural guardian of the child, this is not such a guardianship as gives the right to control or manage the child's property; for here a chancery or probate appointment should be made; but equity would hold the parent to account like any intermeddler or holder of trust funds.[77] So a widow as the natural guardian of her children is a trustee for them and cannot buy at a foreclosure sale of the homestead property and sell to a third party and thus cut off the rights of her children even though she uses her own money in buying at the foreclosure. By doing so she simply becomes subrogated to the rights of the mortgagee and does not change her relation of trustee to her minor children.[78]

The parent may, however, inherit as heir of the child, and even

159, 169 P. 193; Blake v. Corcoran, 211 Mass. 406, 97 N. E. 1002; Kirk v. Middlebrook, 201 Mo. 245, 100 S. W. 450; Hannula v. Duluth & I. R. R. Co., 130 Minn. 3, 153 N. W. 250 (effect of statute).

73. Keeler v. Fassett, 21 Vt. 539; Jackson v. Combs, 7 Cow. 36; Miles v. Boyden, 3 Pick. 213; Cowell v. Daggett, 97 Mass. 434; Kenningham v. M'Laughlin, 3 Monr. 30. And see Guardian and Ward, *infra*. But see Selden's Appeal, 31 Conn. 548. A father who buys property for himself in his son's name must not perpetrate a fraud upon others. Richardson's Case, L. R. 19 Eq. 588.

74. Perry v. Carmichael, 95 Ill. 519; Clark v. Smith, 13 S. C. 585.

75. As to conveying an easement, see Farmer v. McDonald, 59 Ga. 509. A father, as such, cannot be judicially empowered to sell his son's land. Guynn v. McCauley, 32 Ark. 97. See English Act, 44 & 45 Vict., ch. 41, as to management of an infant's lands.

76. McLaurie v. Partlow, 53 Ill. 340. But as to payments of income by the debtor to the natural guardian, which income is applied to the child's necessary use, see Southwestern R. v. Chapman, 46 Ga. 557.

77. See Bedford v. Bedford, 136 Ill. 354; Guardian & Ward, Part IV, *post*.

78. Sorrels v. Childers (Ark.), 195 S. W. 1, L. R. A. 1917F, 430.

the misconduct of the father will not always exclude him from the benefits of his child's fortune.[79]

§ 739. Child's Duty to Care for Parents.

"The duties of children to their parents," says Blackstone, "arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever after; they who protected the weakness of our infancy are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper ought in return to be supported by that offspring in case they stand in need of assistance."[80] Upon this principle rest whatever duties are enjoined upon children to their parents by positive law. The Athenians compelled children to provide for their father when fallen into poverty.[81] And Kent, enforcing the same precept, cites several other historical precedents less to the purpose.[82]

Perhaps this principle could not have been better expressed than in these words of Blackstone; for it is to be observed that the obligation, as a legal one, is somewhat vague and indefinite, extending little farther than the succor of parents in distress. Gratitude, certainly, is what all parents true to their trust have the right to expect; but whether it is due to those who were negligent and unfaithful to their offspring may admit at this day of much doubt. In other words, honor and reverence are justly awarded according to one's deserts. The child, when full grown, naturally marries and assumes parental liabilities of his own; and in the usual course of things adults, whether father or son, will prudently provide for their future as well as their present wants. Some have thought it the duty of fathers to leave property to their children at their death,— a principle somewhat at conflict with this right to lean upon their children for their own maintenance. Yet exceptional cases must occur where a father, faithful to his own obligations, is yet left, through misfortune, penniless in his old age; and here the voice of nature bids the children aid, comfort, and relieve. Municipal

79. Macphers. Inf. 251. See Allen v. Coster, 1 Beav. 202.

As to the mother's claim for allowance for the child's support out of lands devised to the child, who died, leaving the parents (who had separated) the sole heirs, see Pierce v. Pierce, 64 Wis. 73.

80. 1 Bl. Com. 453.

81. 2 Potter's Antiq. 347, 351.

82. 2 Kent Com. 207.

law quickens the child, and says, "If your parent, however, vagabond and worthless, becomes unable to maintain himself, the public shall not relieve him as a pauper; you, his children, being of sufficient means, must assume the burden." We speak not here of the mother, whose moral claims upon her children, if her own husband prove incapable, are much stronger; yet it must be admitted that the municipal law makes no great distinction on her behalf.

Thus may be explained what appears now a well-settled rule at the common law; namely, that there is no legal obligation resting upon a child to support a parent; that while the parent is bound to supply necessaries to an infant child, an adult child, in the absence of positive statute, or a legal contract on his own part, is not bound to supply necessaries to his aged parent.[83]

But statutes have been enacted, both in England and most parts of the Unitel States, to enforce this imperfect legal obligation, usually to the extent of relieving cities and towns from the support of paupers. Such is the tenor of the English statutes of 43 Eliz. and 5 Geo. I., to which allusion has already been made, which declare, in effect, that the children, being of sufficient ability, of poor, old, lame, or impotent persons, not able to maintain themselves, must relieve and maintain them.[84] Ingratitude, to use the word in a more general sense, the parent may punish still further, as other statutes prescribe, by disinheriting the undutiful children by will;[85] a punishment found by no means terrible in cases which arise under the statute of Elizabeth. The moral obligation of honor and reverence still remains clear and unquestioned, so far as parental faithfulness has earned it; doubtful in its more extended application, yet always a favorite theme of the poet and dramatist, and never to be lightly esteemed among men.[86]

The law does not imply, then, a promise from the child to pay

83. Reeve, Dom. Rel. 284; Rex. v. Munden, 1 Stra. 190; Edwards v. Davis, 16 Johns. 281; Lebanon v. Griffin, 45 N. H. 558; Stone v. Stone, 32 Conn. 142; Becker v. Gibson, 70 Ind. 239.

84. 2 Kent Com. 208; Dierkes v. Philadelphia, 93 Pa. 270. See Smith v. Lapeer County, 34 Mich. 58; Dierkes v. Phila., 93 Pa. St. 270. See § 265.

85. N. Y. Rev. Sts., p. 614; 2 Kent Com. 208; and see *Ex parte* Hunt, 5 Cow. 284.

86. No one can read "King Lear" without recognizing the sublimity of an unquestioning faith in this moral duty. Kent (2 Com. 207) quotes the speech of Euryalus in the Æneid; but the instance of *pius Æneas* himself is still stronger, perhaps the strongest to be found in the classics; devotion to his aged father rendering him more illustrious in song than his heroic

for necessaries furnished without his request to an indigent parent; and the natural obligation can only be enforced in the mode pointed out by statute.[87-88] The promise of a child to pay for past expenditures in relief of an indigent parent is not binding in law.[89] But for necessaries or other goods furnished to the parent, or for the parent's benefit, at a grown child's request, the latter is chargeable, as any one else would be.[90]

In some States it is now the duty of a child to support a parent unable to take care of himself,[91] but it has been held that there is no such legal duty.[92]

The care by children of aged and infirm parents is so clear a dictate of common humanity that such care raises no presumption of agreement for remuneration,[93] which may be recovered, however, on proof of express contract.[94] Also the law will not imply a promise to repay sums voluntarily paid by one child to another for parental support.[95] And it is held, further, that where one of several children renders support at the request of the others, they will be liable on an implied promise to contribute.[96]

achievements, and largely atoning, as some would say, for the sin of conjugal unfaithfulness.

87-88. Rex v. Munden, 1 Stra. 190; Edwards v. Davis, 16 Johns. 281; Dawson v. Dawson, 12 Ia. 512. See Johnson v. Ballard, 11 Rich. 178.

89. Mills v. Wyman, 3 Pick. 207; Cook v. Bradley, 7 Conn. 57. It is otherwise by the Civil Code of Louisiana, art. 245.

90. Lebanon v. Griffin, 45 N. H. 558; Gordon v. Dix, 106 Mass. 305; Becker v. Gibson, 70 Ind. 239. Such a claim might now be enforced, in a suitable case, against the separate estate of a married daughter, on the usual principles applicable to her contracts.

91. Cooley v. Stringfellow, 164 Ala. 460, 51 So. 321; Williams v. Williams (Ala.), 81 So. 41; Tobin v. Bruce (S. D.), 162 N. W. 933; Bruce v. Tobin, 245 U. S. 18, 38 S. Ct. 7, 62 L. Ed. (under statute).

92. Schwerdt v. Schwerdt, 235 Ill. 386, 85 N. E. 613; *In re* Erickson (Kan.), 180 P. 263; Pinel v. Rapid Ry. System, 150 N. W. 897 (no duty until order made under statute); Schwanz v. Wujek, 163 Mich. 492, 128 N. W. 731, 17 Det. Leg. N. 956; Latour v. Guillory, 134 La. 332, 64 So. 130.

93. Borum v. Bell, 132 Ala. 85, 31 So. 454; Maupin v. Gains, 125 Ark. 181, 188 S. W. 552; Cotter v. Cotter, 82 Conn. 331, 73 A. 903; Niehaus v. Cooper, 22 Ind. App. 610, 52 N. E. 761; Wright v. Senn's Estate, 85 Mich. 191, 48 N. W. 545; *In re* Skelly's Estate, 43 N. Y. S. 964, 18 Misc. 719, 2 Gibbons, 176; *In re* Delaney's Estate, 58 N. Y. S. 924, 27 Misc. 398; Nicholas v. Nicholas, 100 Va. 660, 42 S. E. 669, 866; Millis v. Thayer, 139 Wis. 480, 121 N. W. 124. See Duvall v. Duvall, 21 Ky. Law, 530, 54 S. W. 791.

94. Worth v. Daniel, 1 Ga. App. 15, 57 S. E. 898; Falls v. Jones, 107 Mo. App. 357, 81 S. W. 455; Harris v. Orr, 46 W. Va. 261, 33 S. E. 257, 76 Am. St. R. 815.

95. Hough v. Comstock, 97 Mich. 11.

96. Stone v. Stone, 32 Conn. 142. And see Succession of Olivier, 18 La.

but a statute making it the duty of children to support parents will not authorize suit by a mother who is being supported by one child against another child to enforce contribution,[97] and gives the parent no right to enforce such duty by action unless expressly so worded,[98] and where such a statute exists an agreeby a child to support his parent is without consideration.[99]

Ann. 594; Marsh v. Blackman, 50 Barb.. 329.

97. Duffy v. Yordi, 149 Cal. 140, 84 P. 838, 4 L. R. A. 1159, 117 Am. St. R. 125.

98. Schwerdt v. Schwerdt, 141 Ill. App. 386 (judg. affd., 235 Ill. 386, 85 N. E. 613).

99. Schwerdt v. Schwerdt, 235 Ill. 386, 85 N. E. 613.

CHAPTER VI.

PARENTS' RIGHT OF CUSTODY.

§ 740. Common-Law Rule; English Doctrine.

The topic of parental custody is one of absorbing importance in England and America; and its principles have received the most ample discussion in the courts of both countries. The fundamental principle of the common law was that the father possessed the paramount right to the custody and control of his minor children, and to superintend their education and nurture.[1] The mother, as such, had little or no authority in the premises.[2] The Roman law enjoined upon children the duty of showing due reverence and respect to the mother, and punished any flagrant instance of the want of it; but beyond this it seems to have recognized no claim on her part.[3] Indeed, the father is permitted by Anglo-Saxon policy to perpetuate his authority beyond his own life; for he may constitute a testamentary guardian of his infant children.[4]

In case there is no father, then the mother is entitled to the custody of the children; supposing, of course, the rights of no testamentary guradian intervene.[5] She has, as natural guardian, a right to the custody of the person and care of the education of

1. *Ex parte* Hopkins, 3 P. Wms. 151; 2 Story, Eq. Juris., §§ 1341 1342; 2 Kent Com. 205; Forsyth, Custody, 10; People v. Olmstead, 27 Barb. 9, and cases cited; *Ex parte* McClellan, 1 Dowl. P. C. 34.

2. See 1 Bl. Com. 453.

3. Cod. 8, tit. 47, § 4; Forsyth, Custody, 5.

4. Stat. 12 Car. II. ch. 24, re-enacted in most of the United States. See Guardian and Ward, *infra*, § 814.

5. See Guardian and Ward, *infra*.

her children; "and this in all countires," said Lord Hardwicke, "where the laws do not break in."[6] The priority of the surviving mother's right to custody is frequently a matter of statute regulation;[7] but her absolute right on remarriage is not so clearly recognized. Her claims, as we shall see hereafter, may conflict with those of a guardian. If the husband and father deserts his family, his wife becomes fairly entitled to the custody and control of their infant children, at all events as against all third parties and while his desertion continues.[8]

§ 741. Chancery Jurisdiction in Custody; Common Law Overruled.

Were these invariable rules, uncontrolled by the courts, unchanged by statute, this common-law doctrine of custody would be as simple of application as unjust. It is neither. And the courts of chancery, in assuming a liberal jurisdiction over the persons and estates of infants, soon made the claims of justice override all considerations of parental or rather paternal dominion, at the common law.[9] Thus Lord Thurlow, in a case where it appeared that the father's affairs were embarrassed, that he was an outlaw and resided abroad, that his son, an infant, had considerable estate, and that the mother lived apart from her husband and principally directed the child's education, restrained the father from interfering without the consent of two persons nominated for that purpose; and, with reference to the objection that the court had no jurisdiction, he added that he knew there was such a notion, but he was of opinion that the court had arms long enough to reach such a case and to prevent a father from prejudicing the health or future prospects of the child; and he signified that he should act accordingly.[10] But the leading case on this subject is that of *Wellesley* v. *The Duke of Beaufort*, which went on appeal from Lord Eldon to the House of Lords; and in which the learned Lord Chancellor's judgment was unanimously affirmed.[11]

6. Villareal v. Mellish, 2 Swanst. 536; Forsyth, Custody, 11, 109; 2 Kent Com. 506; People v. Wilcox, 22 Barb. 178; Osborn v. Allen 2 Dutch. 388. So where the father is sentenced to transportation. *Ex parte* Bailey, 6 Dowl. P. C. 311.

7. 2 & 3 Vict., ch. 54; Mass. Gen. Sts., ch. 109, § 4; State v. Scott, 10 Fost. 274; Striplin v. Ware, 26 Ala. 87. See Heyward v. Cuthbert, 4 Desaus. 445.

8. Winslow v. State, 92 Ala. 78.

9. 2 Story, Eq. Juris., § 1341. And see Butler v. Freeman, Ambl. 302.

10. Creuze v. Hunter, 2 Bro. C. C. 499, *n.*; 2 Cox, 242. And see Whitfield v. Hales, 12 Ves. 492.

11. 2 Russ. 1; Wellesley v. Wellesley, 2 Bligh (N. S.), 124.

But the result of the English authorities is to establish the principle, independently of statutory provisions, that the Court of Chancery will interfere to disturb the paternal rights only in cases of a father's gross misconduct; such misconduct seeming, however, to be regarded with reference rather to the interests of the child than the moral delinquency of the parent. If the father has so conducted himself that it will not be for the benefit of the infants that they should be delivered to him, or if their being with him will injuriously affect their happiness, or if they cannot associate with him without moral contamination, or if, because they associate with him, other persons will shun their society, the court will award the custody to another.[12] It is held that chancery has nothing to do with the fact of the father's adultery, unless he brings the child into contact with the woman.[13] But unnatural crime is otherwise regarded.[14]

Atheism, blasphemy, irreligion, call for interference, when the minds of young children may be thereby poisoned and corrupted; although in matters of purely religious belief there is of course much difficulty in defining that degree of latitude which should be

In this latter case children were taken from a father who was living in adultery. In the course of his elaborate judgment in this case, Lord Eldon cited with approbation a *dictum* of Lord Macclesfield, to the effect that where there is reasonable ground to believe that the children would not be properly treated, the court would interfere without waiting further, upon the principle that *preventing justice* was better than *punishing justice*. Duke of Beaufort v. Berty, 1 P. Wms. 703, cited in Wellesley v. Duke of Beaufort, *supra*.

The evidence showed that the conduct of the father was of the most profligate and immoral description. It appeared that he had ill-treated his wife, continued his adulterous connection to the time of judicial proceedings, and in his letters to his young children had frequently encouraged them in habits of swearing and keeping low company. Lord Redesdale, in the course of his opinion before the House of Lords, repudiated emphatically the insinuation that paternal power is to be considered more than a trust. "Look at all the elementary writings on the subject," he adds, "they say that the father is entrusted with the care of his children; that he is entrusted with it for this reason, because it is supposed his natural affection would make him the most proper person to discharge the trust." Wellesley v. Wellesley, 2 Bligh (N. S.), 141 (1828).

12. Anonymous, 11 E. L. & Eq. 281; s. c., 2 Sim. (N. S.) 54; Forsyth, Custody, 52; De Manneville v. De Manneville, 10 Ves. 52; Warde v. Warde, 2 Phil. 786.

13. Ball v. Ball, 2 Sim. 35; Lord Eldon, *n.* 6 to Lyons v. Blenkin, Jac. 254. The English Divorce Act indicates the peculiar views prevalent in that country as to adultery committed by a married man. Schouler, Hus. & Wife, § 506.

14. Anonymous, 11 E. L. & Eq. 281; s. c., 2 Sim. (N. S.) 34.

allowed. Says Lord Eldon, "With the religious tenets of either party I have nothing to do, except so far as the law of the country calls upon me to look on some religious opinions as dangerous to society."[15] Mere poverty or insolvency does not furnish an adequate ground for depriving the father of his children; not even though a fund is offered for their benefit, conditioned upon the surrender of their custody.[16] Yet so solicitous is chancery for the welfare of its wards, that it seems indisposed to sacrifice their large pecuniary opportunities to the caprice of the natural protector. Thus far has chancery carried its exception, that if property be settled upon an infant, upon condition that the father surrenders his right to the custody of its person, and he, by acquiescing for a time, and permitting the child to be educated in a manner conformably to the terms of the gift or bequest encourages corresponding expectations, he will not be allowed to disappoint them afterwards by claiming possession of the infant. He has in such a case "waived his parental right." [17]

§ 742. English Rule; Statute.

The English rule, up to the year 1839, was, therefore, that the father is entitled to the sole custody of his infant child; controllable, in general, by the court only in case of very gross misconduct, injurious to the child. Such a state of things was unjust, since it took little account of the mother's claims or feelings in a matter which most deeply interested her. This finally led to the passage of statute 2 & 3 Vict., ch. 54, known as Justice Tal-

15. Lyons v. Blenkin, Jac. 256.

16. *Ex parte* Hopkins, 3 P. Wms. 152; Colston v. Morris, Jac. 257, *n.* 11; Macphers. Inf. 142, 143; Forsyth, Custody, 37; Earl & Countess of Westmeath, Jac. 251, *n. c.* But see *Ex parte* Montfort, 15 Ves. 445.

17. Per Lord Hardwicke, Blake v. Leigh, Ambl. 307; Powell v. Cleaver, 2 Bro. C. C. 499; Creuze v. Hunter, 2 Cox, 242; Forsyth, Custody, 38, 53; Lyons v. Blenkin, Jac. 254, 262.

The English courts of common law likewise interfere in questions relating to the custody of infants by writ of *habeas corpus*, which, in general, lies to bring up persons who are in custody, and who are alleged to be subject to illegal restraint. Macphers. Inf. 152; *Ex parte* Glover, 4 Dowl. P. C. 293; Forsyth, Custody, 17, 54; *In re* Pulbrook, 11 Jur. 185; *In re* Fynn, 2 De G. 457; s. c., 12 Jur. 713; Rex v. Greenhill, 4 Ad. & El. 624. Lord Mansfield once said that the common-law court is not bound to deliver an infant, when set free from illegal restraint, over to anybody, nor to give it any privilege. Rex v. Delarel, 3 Burr. 1436; 1 W. Bl. 409. But the later English rule is that where a clear right to the custody is shown to exist in any one, the court has no choice, but must order the infant to be delivered up to him. Rex v. Isley, 5 Ad. & El. 441. This jurisdiction is less ample than that of the chancery courts, to whose authority it must be

fourd's Act, which introduced important changes into the law of parental custody,[18] but does not appear to have interfered with the father's right of custody further than to introduce new elements and considerations under which that right is to be exercised. This act proceeds upon three grounds: First, it assumes and proceeds upon the existence of the paternal right. Secondly, it connects the paternal right with the marital duty and imposes the marital duty as the condition of recognizing the paternal right. Thirdly, the act regards the interest of the child.[19] If the two considerations of marital duty to be observed towards the wife and of the interest of the child can be attained consistenly with the father's retaining the custody of the child, his common-law paternal right will not be disturbed; otherwise it may be.[20] There is a later infants' custody act (36 & 37 Vict., ch. 12), under which the surrounding circumstances of a case will be still more sedulously regarded, against a father's own application for custody; and paternal right, the marital duty, and the interest of the child are all considered.[21]

§ 743. American Rule.

In this country the doctrine is universal that the courts of justice may, in their sound discretion, and when the morals or safety or interests of the children strongly require it, withdraw their custody from the father and confer it upon the mother, or take the children from both parents and place the care and custody of them elsewhere.[22]

The father is, however, the natural guardian of his minor children and is entitled to their custody if a suitable person [23] in

considered subservient. See Wellesley v. Wellesley, 2 Bligh (N. S.), 136 142; *Ex parte* Skinner, 9 Moore, 278.

18. *Ex parte* Woodward, 17 Jur. 56; Forsyth, Custody, 137. See Forsyth, *Ib.* 139, 140.

19. Per Turner, V. C., in *Ex parte* Woodward, 17 E. L. & Eq. 77; 17 Jur. 56.

20. *Ib.* See also Warde v. Warde, 2 Phil. 787. Stat. 3 & 4 Vict., ch. 90, empowers chancery to assign the care and custody of infants convicted of felony.

21. Under statute 36 & 37 Vict., ch. 12, the custody of a child three years old was given to the mother, her husband having deserted her. *In re* Taylor, 4 Ch. D. 157. And see Brown, *Re*, 13 Q. B. D. 614; Elderton, *Re*, 25 Ch. D. 220. Grounds upon which a parent's right may be interfered with considered, (1893) 2 Q. B. 232.

22. 2 Kent Com. 205, and cases cited; 1 Story, Eq. Juris., § 1341 Richards v. Collins, 45 N. J. Eq. 283.

23. Bailey v. Gaston, 8 Ala. App. 476, 62 So. 1017; Bell v. Krauss, 169 Cal. 387, 146 P. 874; Hernandez v. Thomas, 50 Fla. 522, 39 So. 641, 2 L. R. A. 203; Steele v. Hohenadel, 141 Ill. App. 201 (judg. affd., Hohenadel

preference to the mother.[24] The legal right of the father to the custody of the child where the mother is insane is beyond question unless he is clearly unfit and the parents of the insane mother have no rights whatever to the custody.[25]

Upon the death of the father the mother is *prima facie* entitled to control the child,[26] and so where the mother is abandoned by the father she has a right prior to a stranger.[27] That a mother of

v. Steele, 237 Ill. 229, 86 N. E. 717; Hohenadel v. Steele, 141 Ill. App. 218 (judg. affd., 86 N. E. 717); *In re* Smith's Guardianship (Ia.), 158 N. W. 578 (father is entitled in death of mother who has been awarded custody in divorce); Swarens v. Swarens, 78 Kan. 682, 97 P. 968; Mason v. Williams, 165 Ky. 331, 176 S. W. 1171; Rallihan v. Motschmann, 179 Ky. 180, 200 S. W. 358; Heitkamp v. Ragan (La.), 76 So. 247; Waters v. Gray (Mo. App.), 193 S. W. 33; Howell v. Solomon, 167 N. C. 588, 83 S. E. 609; Atkinson v. Downing, 175 N. C. 244, 95 S. E. 487; Titus v. McGloskey, 67 N. J. Eq. 709, 63 A. 244; Brackett v. Brackett, 77 N. H. 68, 87 A. 252; People v. Rubens, 92 N. Y. S. 121; School Board Dist. No. 18, Garvin County, v. Thompson, 24 Okla. 1, 103 P. 578; Lowe v. Lowe, 53 Wash. 50, 101 P. 704; Adkins v. Hope Engineering & Supply Co., 81 W. Va. 449, 94 S. E. 506; 2 Kent, Com. 205; People v. Mercein, 3 Hill, 399; People v. Olmstead, 27 Barb. 9; Miner v. Miner, 11 Ill. 43; Cole v. Cole, 23 Iowa, 433; Henson v. Walts, 40 Ind. 170; Rush v. Vanvacter, 9 W. Va. 600; State v. Baird, 6 C. E. Green, 384; Smith Pet'r, 13 Ill. 138. But see Gishwiler v. Dodez, 4 Ohio St. 615. Thus the father may commit the child to its grandmother. State v. Barney, 14 R. I. 62.

24. Donk Bros. Coal & Coke Co. v. Leavitt, 109 Ill. App. 385. See Sabine v. Stringer, 15 Mo. App. 586; People v. Sinclair, 95 N. Y. S. 861, 47 Misc. Rep. 230, 17 N. Y. Ann. Cas. 37; *In re* Tierney, 112 N. Y. S. 1039, 128 App. Div. 835 (where mother left her home without cause); People *ex rel.* Snell v. Snell, 137 N. Y. S. 193, 77 Misc. Rep. 538.

Equity jurisdiction In re Tierney, 112 N. Y. S. 1039, 128 App. Div. 835; Buseman v. Buseman (W. Va.), 98 S. E. 574; *contra*, Royal v. Royal, 167 Ala. 510, 52 So. 735 (where father lived outside the State; *contra*, Patterson v. Patterson, 86 Ark. 64, 109 S. W. 1168 (infant given to mother); *contra*, Cole v. Superior Court in and for San Joaquin County, 28 Cal. App. 1, 151 P. 169; *contra*, State v. Beslin, 19 Idaho, 185, 112 P. 1053; *contra*, Cain v. Garner, 169 Ky. 633, 185 S. W. 122 (under Iowa statute); *contra*, Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625 (custody given to parent who is most fit); *contra*, Turner v. Turner, 93 Miss. 167, 46 So. 413; *contra*, People v. Workman, 157 N. Y. S. 594, 94 Misc. Rep. 374 (under statute giving mother joint control). See Russell v. Russell, 20 Cal. App. 457, 129 P. 467 (child ten years old is not necessarily of "tender years."

25. Morin v. Morin, 66 Wash. 312, 119 Pac. 745, 37 L. R. A. (N. S.) 585.

26. *In re* Lindner's Estate, 13 Cal. App. 208, 109 P. 101; Dixon v. Dixon, 77 N. J. Eq. 313, 76 A. 1042 Heitkamp v. Ragan (La.), 76 So. 247; *Ex parte* Smith, 197 Mo. App. 200, 193 S. W. 288 (surviving parent); Brackett v. Brackett, 77 N. H. 68, 87 A. 252 (while unmarried).

27. Waldron v. Childers, 104 Ark. 206, 148 S. W. 1030; *In re* Knoll

a twelve-year-old boy has embraced the Mazadaznan religion and permits him to travel round with a priest of that religion who has written an immoral book does not show that he is neglected or that a guardian should be appointed for him as a delinquent child where there is no evidence that the priest is teaching him immoral things or that the priest is himself an immoral man or that the boy has read the book.[28] Under a statute authorizing the court to use its discretion in awarding the custody of a child according to its best interest the court has no right to take the child out of the custody of an aunt where it is well cared for and award it temporarily to its dissolute and immoral mother to see if the presence of the child will not reform the mother.[29]

The mere fact that the mother of white children has married a man with negro blood in his veins does not justify the court in depriving her of their custody where the children were well cared for in proper surroundings even though the marriage has compelled them to mingle with persons of mixed blood. The mere fact that the mother has married into a family lower in the social scale than that in which she was reared is no reason for depriving her of their custody, where the husband is not possessed of enough negro blood to render him a "colored person" within the meaning of the statute forbidding marriage with colored persons.[30]

§ 744. Welfare of Child.

The tendency of our courts to-day is to consider more and more the rights of the children when opposed to the legal rights of the parents. The modern view is that the right to create children does not include the right to ill-treat them, that the child has a right to a fair start in life and the parent will not be allowed to keep control of him where unwilling or unable property to care for his offspring.

In awarding custody of minors modern courts have often said that the welfare of the child is paramount, but this consideration will not suffice to take children from parents who are decent and responsible, if able to furnish the necessities for their children, although the child's welfare and prospects in life might be bet-

Guardianship, 167 Wis. 461, 167 N. W. 744.

28. Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892, 45 L. R. A. (N. S.) 908.

29. *Re* Lee (Cal.), 131 Pac. 749, 45 L. R. A. (N. S.) 91.

30. Moon v. Children's Home Society, 112 Va. 737, 72 S. E. 707, 38 L. R. A. (N. S.) 418.

tered thereby,[31] but custody may be taken away from parents manifestly unfit by the State standing *in loco parentis* in equity.[32]

31. *In re* Schwartz, 171 Cal. 633, 154 P. 304; Wilson v. Mitchell, 48 Colo. 454, 111 P. 21; Hernandez v. Thomas, 50 Fla. 522, 39 So. 641, 2 L. R. A. 203; State v. Beslin, 19 Idaho, 185, 112 P. 1053; Hohenadel v. Steele, 237 Ill. 229, 86 N. E. 717; Wohlford v. Burckhardt, 141 Ill. App. 321; People v. Hoxie, 175 Ill. App. 563; Cormack v. Marshall, 122 Ill. App. 208; Smiley v. McIntosh, 129 Iowa, 337, 105 N. W. 577; Swarens v. Swarens, 78 Kan. 682, 97 P. 968; Buchanan v. Buchanan, 93 Kan. 613, 144 P. 840; Stapleton v. Poynter, 111 Ky. 264, 62 S. W. 730, 23 Ky. Law. Rep. 76, 53 L. R. A. 784, 98 Am. St. Rep. 411; State *ex rel.* Curtis v. Thompson, 117 La. 102, 41 So. 367; State *ex rel.* Kearney v. Steel, 121 La. 215, 46 So. 215; State v. Thompson, 117 La. 102, 41 So. 367; Commonwealth v. Dee, 222 Mass. 184, 110 N. E. 287; *Ex parte* Smith (Mo. App.), 200 S. W. 681; Newsome v. Bunch, 142 N. C. 19, 56 S. E. 509; *In re* Wilson (N. J. Ch. 1903), 55 A. 160; Titus v. McGloskey, 67 N. J. Eq. 709, 63 A. 244; Giffin v. Gascoigne, 60 N. J. Eq. 256, 47 A. 25; People v. Beaudoin, 110 N. Y. S. 592, 126 App. Div. 505; *Ex parte* Livingston, 135 N. Y. S. 328, 151 App. Div. 1, reversing order *In re* Livingston, 134 N. Y. S. 148, 74 Misc. Rep. 494; Walker v. Finney (Tex. Civ. App.), 157 S. W. 948; Kirkland v. Matthews (Tex. Civ. App.), 174 S. W. 830; Jensen v. Jensen (Wis.), 170 N. W. 735; Case of Waldron, 13 Johns. 418; People v. Mercein, 3 Hill, 399; *Ex parte* Schumpert, 6 Rich. 344; Wood v. Wood, 3 Ala. 756; Gishwiler v. Dodez, 4 Ohio St. 615. And thus may the mother be preferred in a suitable case to the father. See Moore v. Moore, 66 Ga. 336. In the case of several children, and parents equally fit, a division of custody agreeble to the the several interests of the children may be made. Umlauf v. Umlauf, 128 Ill. 378.

32. Wadleigh v. Newhall, 136 F. 941; Saunders v. Saunders, 166 Ala. 351, 52 So. 310; Dunn v. Christian (Ala.), 80 So. 870; Coulter v. Sypert, 78 Ark. 193, 95 S. W. 457; *In re* Lee, 165 Cal. 279, 131 P. 749; Moore v. Dozier, 128 Ga. 90, 57 S. E. 110; *In re* Brown, 117 Ill. App. 332; Swarens v. Swarens, 78 Kan. 682, 97 P. 968; Burke v. Crutcher, 4 Ky. Law Rep. 251; Smith v. Martin (Ky. Super. 1883), 4 Ky. Law Rep. 734; United State v. Green, 3 Mason, 382; Purinton v. Jamrock, 195 Mass. 187, 80 N. E. 802; State *ex rel.* Cave v. Tincher, 258 Mo. 1, 166 S. W. 1028 (even in the absence of statute); Home of the Friendless v. Berry, 79 Mo. App. 566; Waters v. Gray (Mo. App.), 193 S. W. 33; Wood v. Wood, 77 N. J. Eq. 593, 77 A. 91; *In re* Gustow, 220 N. Y. 373, 115 N. E. 995; *In re* Kirschner, 162 N. Y. S. 1126, 176 App. Div. 904 (cruelty to child by parents); People v. Beaudoin, 110 N. Y. S. 592, 126 App. Div. 505; *In re* Murtha, 455 N. Y. S. 47, 32 N. Y. Cr. R. 532 (desertion by father); Allison v. Rryan, 26 Okla. 520, 109 P. 934; *Ex parte* Adams (Okla.), 169 P. 1004; Commonwealth v. Wormser, 260 Pa. 44, 103 A. 500, 67 Pa. Super. Ct. 444.

A father has no property right in a child and a claim that he was deprived of his property without due process of law by taking the child from him cannot be considered. Kenner v. Kenner, 139 Tenn. 700, 202 S. W. 723, 139 Tenn. 211, 201 S. W. 779; Kirkland v. Matthews (Tex. Civ. App.), 162 S. W. 375 (evidence is admissible that a member of the father's family had tuberculosis); Cobb v. Works (Tex. Civ. App. 1910),

There is a strong presumption, however, that the child's welfare will be best subserved in the care and control of its own parents and some of the earlier decisions seem to have treated the right of the father to the custody of the child as paramount but the more recent opinions regard the welfare of the child as paramount. The mere fact that a child is in the control of a parent who is utterly selfish will not alone cut off the right of the parent to that custody.[33]

A statute permitting the court to give the custody of a child to one not the parent does not render the court the guardian of all the children in the State and the unfitness of the parent to care for the child must be positive and the mere fact that he is not so well able to care for the child as another is not sufficient reason for giving the custody to that other. "However poor and unable a father may be, if of good moral character and able to support the child in his own style of life he cannot be deprived of that privilege by any stranger, however brilliant the advantage he may offer." [34]

In determining the custody of a child the highest good of the child must be the paramount consideration, and the court may well refuse to take a child from the custody of proper persons who are treating her kindly and give her to the mother who has remarried after separation to the father of the child who has never seen her and never contributed to her support and is only earning a small sum and living with his wife in two rooms.[35] Although the

125 S. W. 349; Ward v. Ward, 34 Tex. Civ. App. 104, 77 S. W. 829 (mother's reputation for chastity, honesty and veracity may be shown); Matthews v. Kirkland (Tex. Civ. App.), 186 S. W. 423; Kirby v. Morris (Tex. Civ. App.), 198 S. W. 995; Peese v. Gellerman, 51 Tex. Civ. App. 39, 110 S. W. 196 (where stepmother was a bad woman); Bedell v. Bedell, 1 Johns. Ch. 604; Barrere v. Barrere, 4 Johns. Ch. 187, 197; 2 Bishop, Mar. & Div., 5th ed., § 532; *Ex parte* Schumpert, 6 Rich. 344; People v. Chegaray, 18 Wend. 637; Garner v. Gordon, 41 Ind. 92; Corrie v. Corrie, 42 Mich. 509. Courts have refused to allow a widowed mother, who remarried, to take her child from the husband's sister with whom she had left it nine years. Hoxsie v. Potter, 16 R. I. 374; *In re* Gates, 95 Cal. 461. Or to deliver the child to a non-resident mother under disfavoring circumstances. Harris v. Harris (1894), N. C. And see Lally v. Fitz Henry, 85 Iowa, 49; *In re* Vance, 92 Cal. 195. See Kirby v. Morris (Tex. Civ. App.), 198 S. W. 995 (court may require adoptive parents to allow child to visit relatives).

33. Risting v. Sparboe (Iowa), 162 N. W. 592, L. R. A. 1917E, 318.

34. Jamison v. Gilbert (Okla.), 135 Pac. 342, 47 L. R. A. (N. S.) 1133.

35. *Re* Pryse, 85 Kan. 556, 118 Pac. 56, 41 L. R. A. (N. S.) 564.

father, a widower, may have a right to the custody and care of his own child, still this will not oblige the court to order its change from a home where it is well cared for to that of an aunt who does not particularly care to have it.[36]

§ 745. Child's Own Wishes.

It is sometimes a question, in proceedings relative to the custody of minors, how far the child's own wishes should be consulted. Where the object is simply that of custody, the rule, though not arbitrary, rests manifestly upon a principle elsewhere often applied; namely, that after a child has attained to years of discretion he may have, in case of controversy, a voice in the selection of his own custodian. The practice is to give the child the right to elect where he will go, if he be of proper age, and the issue is a doubtful one. If he be not of that age, and want of discretion would only expose him to dangers, the court must make an order for placing him in custody of the suitable person;[37] nor will the choice of the child in any case control the court's discretion,[38] and the affection of the child for others will not suffice to deprive the parents of custody if fit.[39]

§ 746. Custody under Divorce and other Statutes.

Our divorce jurisprudence, being, until recently, quite different from that of England, further opportunity has been furnished for

36. Risting v. Sparboe (Iowa), 162 N. W. 592, L. R. A. 1917E, 318.

37. Proctor v. Rhoads (Ky. Super. 1882), 4 Ky. Law Rep. 453; Rallihan v. Motschmann, 179 Ky. 180, 200 S. W. 358; Forsyth, Custody, 93, etc.; Rex v. Greenhill, 4 Ad. & El. 62. Nine or ten years of age has been considered too young, yet mental capacity appears the real test; and the wishes of children less than fourteen have been regarded. See Anon., 2 Ves. 274; *Ex parte* Hopkins, 2 P. Wms. 152; Curtis v. Curtis, 5 Gray, 535; People v. Mercein, 8 Paige, 47; 95 Cal. 461; *In re* Goodenough, 19 Wis. 274; Regina v. Clarke, 7 El. & B. 186; State v. Richardson, 40 N. H. 272; Spears v. Snell, 74 N. C. 210; 32 Fla. 499. But according to Regina v. Howes, 3 Ell. & Ell. 332, and Mallinson v. Mallinson, L. R. 1 P. & D. 221, sixteen years is now the limit adopted in English courts within which the child's own choice as to custody may be regarded. See, as to children too young, Rust v. Vanvacter, 9 W. Va. 600; Henson v. Walts, 40 Ind. 170.

38. Marshall v. Reams, 32 Fla. 499; People v. Watts, 122 N. Y. 238.

39. Under Code, § 3192, providing that parents are the natural guardians of their minor children, and equally entitled to their custody, a father has a primary right to the guardianship of his minor child as against all person except the mother, so that the father of a child, whose mother is dead, should be given its custody unless he is an unsuitable person, and has forfeited his right thereto by misconduct. Brem v. Swander, 153 Iowa, 669, 132 N. W. 829.

a departure from the common-law rules which favor the paternal right of custody. The same tribunal which hears the divorce cause has power to direct with which of the parties, or what third person, the children shall be, and direct as to their support.[40] Like powers are now conferred upon the English matrimonial court by recent statutes;[41] and the child's custody may be given to either parent or a third person; generally to the innocent parent, though with due regard to the child's welfare; and, in suitable cases, with a right of access to the parent or parents deprived of custody,[42] but a mother to whom minor children were awarded by a divorce decree cannot deprive the father of their custody after her death by will.[43]

Where the custody of a child is the subject of chancery or divorce proceedings, the court will often be justified in making temporary arrangements for his custody.[44] And where there has been no order

A child fourteen years of age cannot at will leave its father's home and choose another person as its guardian, in the absence of essential legal proceedings in the probate court. Grego v. Schneider (Tex. Civ. App.), 154 S. W. 361.

40. See *post*, Vol. II.

41. [1894] P., 295.

42. Stats. 20 & 21 Vict., ch. 85, § 35; 22 & 23 Vict., ch. 61, § 4. See Ahrenfeldt v. Ahrenfeldt, 1 Hoff. Ch. 497; Spratt v. Spratt, 1 Swab. & T. 215; 2 Bishop, Mar. & Div., 5th ed., §§ 532, 544, and cases cited; Bedell v. Bedell, 1 Johns. Ch. 604; Chetwynd v. Chetwynd, L. R. 1 P. & D. 39; Harding v. Harding, 22 Md. 337; Mallinson v. Mallinson, L. R. 1 P. & D. 221; McBride v. McBride, 1 Bush, 15; Goodrich v. Goodrich, 44 Ala. 670; Bush v. Bush, 37 Ind. 164; Harvey v. Lane, 66 Me. 536; Hill v. Hill, 49 Md. 450. The father is strongly preferred to the mother where he obtained divorce for her desertion. Carr v. Carr, 22 Gratt. 168. See *In re* Taylor, 4 Ch. D. 157. Even after divorce with a decree of custody to one parent, occasion may arise for separating the child, in the latter's interest, from both parents as concerns custody. D'Alton v. D'Alton, 4 P. D. 87; *In re* Bort, 25 Kan. 306. Where the divorce court awarded custody to the mother, and the mother on dying left the children to some relative who was appointed their guardian, the father must at least show his fitness to take custody. Bryan v. Lyon, 104 Md. 227; Murphy, *Ex parte*, 75 Ala. 409; Smith v. Bragg, 68 Ga. 650. But as against a stranger in blood, see McGlennan v. Margowski, 90 Ind. 150. Even though a divorce be obtained for the wife's bigamous adultery, the court's discretion in custody is not concluded in the husband's favor. Haskell v. Haskell, 152 Mass. 16; Luther v. Luther, 12 Col. 421.

43. *In re* Neff, 20 Wash. 652, 56 Pa. 383.

44. Hutson v. Townsend, 6 Rich. Eq. 249; Barnes v. Barnes, L. R. 1 P. & D. 463; *Re* Welch, 74 N. Y. 299.

Some American statutes concerning custody are worthy of notice. Following the temper of the times, the New York Legislature of 1860 enacted that "every married woman is hereby constituted and declared to be the joint guardian of her children, with her hus-

of custody but a separation, the husband and father cannot in our later cases rely strongly upon his paramount right against the wife and mother, unless he is free from blame.[45] In short, the welfare of the child becomes in modern practice the paramount consideration, nor are parental rights considered without due regard for parental duties.

§ 747. Parent's Right to Attend Funeral of Child.

A father has no right to attend the funeral services of his child where he has been divorced and the custody of the child given to the mother where the funeral services are held from the house of the wife's father, and the father of the child cannot therefore maintain action against the father-in-law for preventing him from at-

band, with equal powers, rights, and duties in regard to them with her husband." Such a statute, unexplained, might seem to do away altogether with the paramount claims of the husband. But the courts appeared disposed to regard the innovation with little favor; and the law was in 1862 repealed. People v. Brooks, 35 Barb. 85; People v. Boice, 39 Barb. 307. But cf. original Constitution of Kansas; also New York Act, 1893, ch. 175, declaring every married woman "joint guardian" with her husband. The State v. Angel, 42 Kan. 216. In the former case a married woman, who lived apart from her husband, no misconduct on his part being shown, sought under the new statute to obtain custody of the children. An earlier statute of New York provides that if the parents live in a state of separation, without being divorced, and without the fault of the wife, the courts may, on her application, award the custody of the child to the mother. 2 N. Y. Rev. Sts. 148; 2 Kent, Com. 205 *n.*; People v. Mercein, 3 Hill, 399. The discretion thus conferred upon the courts is a judicial one, however, and is to be exercised with due reference to the cause of separation, and the conduct and character of the parties. And see People v. Brooks, *supra*. See N. Y. Act 1862, ch. 172, § 6, which restrains the father from binding his child as apprentice, or parting with his control, or creating a testamentary guardian without the mother's written assent. Legislative provisions of a like tendency are frequently to be met with in other States. Thus in Massachusetts it is enacted that, pending divorce controversies, the respective rights of the parents shall, in the absence of misconduct, be regarded as equal, and that the happiness and welfare of the children shall determine the custody in which they shall be placed. Mass. Gen. Sts., ch. 107, § 37. And under a still more recent statute in New Jersey, the court is to a certain extent deprived of its discretion in disposing of the custody of children whose parents are separated, but not divorced; for by this statute the custody of the children under seven years of age is transferred from the father to the mother. Bennet v. Bennet, 2 Beasl. 114. As to modifying the order of custody after divorce, see Harvey v. Lane, 66 Me. 536.

45. Winslow v. The State, 92 Ala. 78; Giles v. Giles, 30 Neb. 624. Where a divorce court has jurisdiction of the parties, a common-law court disinclines to entertain a ques-

tending the funeral. At common law the duty of providing sepulture and of carrying to the grave the dead body decently covered was cast upon the person under whose roof the death took place; for such a person could not keep the body unburied nor do anything which prevented Christian burial. There was no duty, however, to conduct a public funeral and is not now in this country, and the father-in-law was not therefore required to invite anyone onto his premises simply to see the dead body or to have any sort of burial services for the public. A man's dwelling house is his castle, and no one has the right to enter except upon invitation express or implied. The fact that the father of the child was excluded from the funeral through malice of his father-in-law does not make the act actionable, as the control of one's dwelling is absolute, and therefore the intent with which this control is exercised is wholly immaterial.[46]

§ 748. Contracts Transferring Parental Rights.

It is held in England that an agreement by which the father surrenders custody of his child is not binding; and that he is at liberty to revoke his consent afterwards, and obtain the child by a writ of *habeas corpus*.[47]

In this country there is a conflict of opinion as to whether a contract to surrender the custody of a child by the parent is valid, but even where such a contract is upheld the parent will not be held to have surrendered the custody to a stranger permanently unless it clearly appears that such was his intention. It is not enough that the person taking the custody understood that the parent had granted to him permanent custody; but it must appear clear that there was a corresponding understanding on the part of the parent. The mere fact that the father permitted the grandparents to have custody of the child for some years is not enough to show such transfer of custody.[48] And a father's phrase in a letter of affection to relatives is not to be readily construed into a barrier of his natural rights;[49] nor is his permissive custody to

tion of custody upon *habeas corpus*. *In re* Gladys Morgan, 117 Mo. 249. See Harding v. Harding, 144 Ill. 589; Schroeder v. Filbert (1894), Neb.

46. Rader v. Davis (Iowa), 134 N. W. 849, 38 L. R. A. (N. S.) 131.

47. Regina v. Smith, 16 E. L. & Eq. 221.

48. *In re* Morhoff's Guardianship (Cal.), 178 P. 294; Jamison v. Gilbert (Okla.), 135 Pac. 342, 47 L. R. A. (N. S.) 1133.

49. Scarritt, *Re*, 76 Mo. 565.

others, in the absence of more unfavorable circumstances against him, to be deemed irrevocable on his part.[50]

The general doctrine appears to us, on the whole, to be this: that public policy is against the permanent transfer of the natural rights of a parent; and that such contracts are not to be specifically enforced, unless in the admitted exception of master and apprentice, to constitute which relation requires, both in England and America, certain formalities; and excepting, too, in parts of the United States where the principles of legal adoption are part of the public policy.[51] American courts hold fast, nevertheless, to the true interests and welfare of the child. And hence the contract of a parent unfit to have custody of the child, and more especially of a shiftless widowed mother, which surrenders that child by formal instrument, fair in its terms, to a benevolent institution, for the purpose of having the child brought up in a good family, or to some other suitable third party, has been so far upheld, where the institution or person intrusted has not failed in duty, that the child is suffered to remain where he was placed, for the reason that his welfare requires it, rather than be returned to the parent who seeks to recover custody once more.[52] Thus, there is a Massachusetts case where a child had been given up at its birth, the mother having then died, to its grandparents, who kept it for thirteen years, at their own expense, without any demand

50. Weir v. Marley, 99 Mo. 484; Kelly, Petitioner, 152 Mass. 432. But a fair contract of tranfer on a good and executed consideration, ought not to be set aside and custody restored unless the parent can show that a change will promote the child's welfare. Cunningham v. Barnes, 37 W. Va. 476.

51. See, as to adoption, *supra*, § 721; Legate v. Legate (1894), Tex. ——.

52. 2 Kent, Com. 205; State v. Barrett, 45 N. H. 15; Dumain v. Gwynne, 10 Allen, 270; Commonwealth v. St. John's Asylum, 9 Phila. 571; Bonnett v. Bonnett, 61 Iowa, 198. Where sisters of charity took a female child without legally adopting, the child was transferred afterwards in order to receive the benefit of a grandparent's will. Bullen, *Ex parte*, 28 Kan. 781.

The mother, being a suitable person, was allowed to recover custody, in Wishard v. Medaris, 34 Ind. 168. And see Beller v. Jones, 22 Ark. 92. Mayne v. Baldwin, 1 Halst. Ch. 454; People v. Mercein, 8 Paige Ch. 67; s. c., 3 Hill, 408; State v. Libbey, 44 N. H. 321; State v. Scott, 30 N. H. 274, establish that a parol transfer of custody is insufficient. But this is rather as regards the parent than third parties, or the heirs or kindred of the parent. Assent and transfer was, after long lapse of time, presumed in Sword v. Keith, 31 Mich. 248. That a grandparent, by virtue of transfer to him, may sue a third person for disturbing his custody, see Clark v. Bayer, 32 Ohio St. 299.

made by the father for its restoration; and under these circumstances the court refused afterwards to change the custody.[53]

And there are circumstances, where parental rights have been waived by the voluntary establishment of new relations permissively, under which the curt will, from similar regard for the child's welfare, refuse to disturb a custody voluntarily yielded, in favor of the parent who has long acquiesced in the transfer; thus regarding the ties both of nature and association.[54] And so, too, often, where a shiftless parent permits the child to be brought up by other relatives at their cost, and a change afterwards would be unsuitable.[55]

It is the general American rule that agreements by parents for the transfer to others of the custody of their children are against public policy and are not binding on the parties,[56] especially after

53. Pool v. Gott, 14 Law Rep. 269, before Shaw, C. J. And see *In re* Goodenough, 19 Wis. 274; Bently v. Terry, 59 Ga. 555.

54. Hoxsie v. Potter, 16 R. I. 374; Marshall v. Reams, 32 Fla. 499.

55. Drumb v. Keen, 47 Iowa, 435.

If a father, after making an assignment of the services or society of his minor child, has retaken the child into his own keeping, the assignee's only remedy on his own behalf (if any he have) is by action on the contract. Farnsworth v. Richardson, 35 Me. 267. And see Commonwealth v. McKeagy, 1 Ashm. 248; Lowry v. Button, Wright, 330. An adjudication of the appropriate tribunal on the question of the custody of an infant child, brought up on *habeas corpus*, may be pleaded as *res adjudicata*. Mercein v. People, 25 Wend. 64. The child's welfare and wishes are considered as before stated.

56. *In re* Galleher, 2 Cal. App. 364, 84 P. 352; Hernandez v. Thomas, 50 Fla. 522, 39 So. 641, 2 L. R. A. 203; McCarter v. McCarter, 10 Ga. App. 754, 74 S. E. 308; Cormack v. Marshall, 122 Ill. App. 208; Wood v. Shaw, 92 Kan. 70, 139 P. 1165.

Contract by which the widowed father of an infant surrendered his custody to a home and relinquished all rights over the infant was not contrary to public policy, though it was subject to cancellation on its appearing to be for the best interests of the infant. Bedford v. Hamilton, 153 Ky. 429, 155 S. W. 1128; State *ex rel.* Kearney v. Steel, 121 La. 215, 46 So. 215; Smith v. Young, 136 Mo. App. 65, 117 S. W. 628; Brewer v. Cary, 148 Mo. 193, 127 S. W. 685; Dix. v. Martin, 171 Mo. App. 266, 157 S. W. 133; Marks v. Wooster (Mo. App.), 199 S. W. 446. *Recovery for support.* Gordon v. Wyness, 155 N. Y. S. 162, 169 App. Div. 659; Long v. Smith, (Tex. Civ. App.), 162 S. W. 25; Williford v. Richards (Tex. Civ. App.), 169 S. W. 1139; Peese v. Gellerman, 51 Tex. Civ. App. 39, 110 S. W. 196.

Even though a gift of a child is invalid, in seeking to regain possession of the child, the fact of the gift would place the parent in the attitude of invoking the powers of an equity court, and the fact that the parent has voluntarily surrendered the control of his child should be considered with other facts in determining its best interests and the propriety of giving it again into his control. Peese v. Gellerman, 51 Tex. Civ. App. 39, 110 S. W. 196; *contra,*

the children become of age.[57] It has been held, however, that a father may transfer to another the custody,[58] except that where the statute gives the mother joint control the father can make an agreement for custody only with the consent of the mother.[59] Where the mother dies, and the father tells the great-grandparent that he might take and keep his infant child as long as he and his wife lived, or until the child reaches the age of twenty-one, and the latter does take the child and care for it and keep it until it reaches the age of three years before the father has asserted any claim to it, the father has lost his right of custody. The contract was sufficiently definite to be enforced. The contract cannot be said to be unilateral and without consideration.[60] Agreements between the parents on separation as to the care of minor children valid between themselves will not be sustained to the detriment of the children.[61]

Nor can the father, under the common-law rule, divest himself, even by contract with the mother, of the custody of his children, though he allows them to remain with her for several years.[62]

A parent, if personally suitable, is not debarred from recovering custody of a young child who, without parental consent, has been bound out in some emergency by the public authorities.[63]

And the right of the child's custodian under some parental contract is always strongest and most positive as against third parties.[64]

§ 749. Proceedings to Determine Custody; Prior Adjudication.

Proceedings as to the custody of children are usually, in this country, conducted by writ of *habeas corpus*. And the settled rule with us is that, while the court is bound to free the person from

Wilkinson v. Lee, 138 Ga. 360, 75 S. E. 477.

57. Dittrich v. Gobey, 119 Cal. 599, 51 P. 962.

58. An agreement whereby a father makes a gift of his child to its grandparents, who take it as one of the family, is not without consideration. Eaves v. Fears, 131 Ga. 820, 64 S. E. 269; Proctor v. Rhoads (Ky. Super. 1882), 4 Ky. Law Rep. 453.

59. Order, 110 N. Y. S. 592, 126 App. Div. 505, affd., People v. Beaudoin, 193 N. Y. 611, 86 N. E. 1129; Zink v. Milner, 39 Okla. 347, 135 P. 1.

60. Wilkinson v. Lee, 138 Ga. 360, 75 S. E. 477, 42 L. R. A. (N. S.) 1013.

61. Carpenter v. Carpenter, 149 Mich. 138, 112 N. W. 748, 14 Det. Leg. N. 366.

62. Torrington v. Norwich, 21 Conn. 543; People v. Mercein, 3 Hill, 408. And see Vansittart v. Vansittart, 4 Kay & J. 62; Johnson v. Terry, 34 Conn. 259.

63. Goodchild v. Foster, 51 Mich. 599; Farnham v. Pierce, 141 Mass. 203. See Briaster v. Compton, 68 Ala. 299.

64. Jones v. Harmon, 27 Fla. 238.

illegal restraint, it is not bound to decide who is entitled to the guardianship, or to deliver infants to the custody of any particular person; but this may be done whenever deemed proper. In other words, it is in the sound discretion of the court to alter the custody of the infants, or not.[65]

Under modern statutes, where there has been a voluntary separation the wife may bring up the question of custody of the children by a petition filed in her own name.[66] The petition should ask for the custody of the child and not merely access to it,[67] and should be brought in the court where the parties reside.[68] Custody cannot be taken away from the parents by summary proceedings without notice.[69]

The burden of proof is ordinarily on those who dispute the fitness of the father to have the custody of his child,[70] and it is presumed that the father consents to the mother's care of minor children when not under his immediate control.[71]

In such a proceeding a judgment in divorce may be considered if properly proved,[72] but a decree awarding custody of a child is necessarily temporary in character, and may always be modified on proof of change in circumstances.[73] The right to custody is

65. Commonwealth v. Addicks, 5 Binn. 520; Armstrong v. Stone, 9 Gratt. 102; Case of Waldron, 13 Johns. 418; State v. Smith, 6 Me. 462; State *ex rel.* v. Paine, 4 Humph. 523; Commonwealth v. Briggs, 16 Pick. 203; Ward v. Roper, 7 Humph. 111; Foster v. Alston, 6 How. (Miss.) 406; Stigall v. Turney, 2 Zabr. 286; Mercein v. People, 25 Wend. 64; State v. King, 1 Ga. Dec. 93; State v. Banks, 25 Ind. 495; Bennet v. Bennet, 2 Beasl. 114; *Ex parte* Williams, 11 Rich. 452; State v. Richardson, 40 N. H. 272; State v. Grisby, 38 Ark. 406.

The United States courts have no inherent authority to determine questions of the custody and guardianship of a child; but local State courts deal with such matters. Whether the diverse citizenship of contesting parties may found such a jurisdiction, *qu.* Burrus, Re, 136 U. S. 597.

66. McGough v. McGough, 136 Ala. 170, 33 So. 860; Pearce v. Pearce, 136 Ala. 188, 33 So. 883.

67. Rossell v. Rossell, 64 N. J. Eq. 21, 53 A. 821.

68. State *ex rel.* Norris v. Graham, 141 La. 73, 74 So. 635.

69. *In re* Knoll Guardianship, 167 Wis. 461, 167 N. W. 744.

70. Rallihan v. Motschmann, 179 Ky. 180, 200 S. W. 358; Giffin v. Gascoigne, 60 N. J. Eq. 256, 47 A. 25.

Where the father has given the child away and failed to provide for it, there is no presumption that he is best fitted to care for it. Peese v. Gellerman, 51 Tex. Civ. App. 39, 110 S. W. 196.

71. Berger v. Charleston Consol. Ry., Gas. & Electric Co., 93 S. C. 372, 76 S. E. 1096.

72. State v. Thompson, 117 La. 102, 41 So. 367; Dixon v. Dixon, 76 N. J. Eq. 364, 74 A. 995.

73. Hohenadel v. Steele, 237 Ill. 229, 86 N. E. 717; Green v. Campbell, 35 W. Va. 698.

not rendered *res judicata* by a prior judgment as to it, the primary consideration being the welfare of the child,[74] but where *habeas corpus* is used not as a writ of liberty but as a means of obtaining the possession or control of one whose personal liberty is only in a remote and technical sense involved, as in case of an application for the custody of a child, then the doctrine of *res adjudicata* applies to the case, and the court is bound by a finding previously made where the same issues were tried before.[75] In *habeas corpus* proceedings to determine the custody of a child the decree in divorce awarding the custody of the child to one of the parties is conclusive except for causes arising since the decree, and where the decree awards the child to the father, with the privilege for the mother to visit it, and the father moves to Cuba and marries again and expresses the determination never to allow the child to see its mother again, this presents a case where the court may well in *habeas corpus* proceedings refuse to turn the child over from the mother to the father, where it appears the mother is a suitable person to rear the child.[76]

§ 750. Suit for Harboring or Enticing Away One's Child; Abduction, etc.

Every person who knowingly and designedly interrupts the relation subsisting between parent and child, by procuring the child to depart from the parent's service, or by harboring and keeping him after he has quitted his home, commits a wrongful act, for which he is responsible to the parent. The offence, where force was not used, is known as enticement, and the rule applies to the relation of master and servant. In such cases, again, the parent sues on a principle analogous to that of the master; namely, because of an alleged loss of service; or possibly in trespass *vi et armis* upon the more reasonable allegation of loss of the child's society,[77] and

74. Pearce v. Pearce, 136 Ala. 188, 33 So. 883.

75. Knapp v. Tolan, 26 N. D. 23, 142 N. W. 915, 49 L. R. A. (N. S.) 83.

76. Barlow v. Barlow, 141 Ga. 535, 81 S. E. 433, 52 L. R. A. (N. S.) 683.

77. Lumley v. Gye, 2 El. & B. 224; Kirkpatrick v. Lockhart, 2 Brev. 276; 1 Woodes, Lec. 451; Sargent v. Mathewson, 38 N. H. 54; 3 Bl. Com. 140; Selman v. Barnett, 4 Ga. App. 375, 61 S. E. 501; Soper v. Crutcher, 29 Ky. Law, 1080, 96 S. W. 907; Arnold v. St. Louis & S. F. R. Co., 100 Mo. App. 470, 74 S. W. 5.

At common law the enticing of an infant from the service of his parent was not an offence. State v. Rice, 76 N. C. 194; Wheeler v. Price, 21 R. I. 99, 41 A. 894 (action may be trespass); Howell v. Howell, 162 N. C. 283, 78 S. E. 222.

action will lie although the child renders no services to the parent,[78] and is not actually a member of the household at the time.[79] The *quo animo* of the defendant in such suits is always material. To afford shelter is one thing; to encourage filial disobedience another. The mere employment of a runaway child does not amount to enticement.[80]

The action must be maintained by the father where he is alive and living with the mother,[81] but the action will lie on behalf of the mother after the father's death,[82] or by a mother who was on divorce given the custody of the child.[83] Where a father had divorced his wife and abandoned his minor child to her custody he is not a necessary party to proceedings by the mother to recover for the abduction of the child. But where the stepfather has received the child into his home and supported her he is a necessary party to the proceedings, as the suit is one for loss of services of the child and mental distress and loss of companionship. As the stepfather has assumed the liabilities of a parent the corresponding benefits follow, and the rights of the mother and stepfather in respect to the child are then equal before the law, and he must be joined in any action for loss of services of the child.[84]

Under the early common law the only right of action afforded the parent for abduction of his child was in case of abduction of an heir in whose marriage he had valuable rights.[85] Later the parent was allowed to sue on the ground that he had lost the services of his minor child.[86] The modern American rule seems, however, to be that the parent may sue without alleging or proving

A written notice to defendant, plaintiff's son-in-law, that if he harbored plaintiff's minor son plaintiff would claim his wages, held, a waiver of the father's right to sue defendant in tort for enticing his son away. Wolff v. Vannoy, 154 N. W. 215.

78. Washburn v. Abram, 122 Ky. 53, 90 S. W. 997, 28 Ky. Law, 985. See *contra,* Kenney v. Baltimore & O. R. Co., 101 Md. 490, 61 A. 581, 1 L. R. A. 205.

79. Hare v. Dean, 90 Me. 308, 38 A. 227.

80. Keane v. Boycott, 2 H. Bl. 511; Butterfield v. Ashley, 6 Cush. 249.

81. Soper v. Igo, Walker & Co., 121 Ky. 550, 89 S. W. 538, 28 Ky. Law Rep. 519, 1 L. R. A. 362, 123 Am. St. R. 212.

Under a statute providing that "fathers and mothers shall jointly have the care and custody of the person of their minor children," both parents are properly joined as plaintiffs in a suit for enticement. Hare v. Dean, 90 Me. 308, 38 A. 227.

82. Jones v. Tevis, 4 Litt 25; Moore v. Christian, 56 Miss. 408.

83. Magnuson v. O'Dea, 75 Wash. 574, 135 P. 640.

84. Magnuson v. O'Dea (Wash.), 135 P. 640, 48 L. R. A. (N. S.) 327.

85. Bl. Com. 140.

86. Whitbourne v. Williams (1901), 2 K. B. 722.

loss of services, which seems to be an honest result.[87] The modern authorities have advanced and now the parent can recover damages for the unlawful taking away or concealment of a minor child, and is not limited to cases in which such child is the heir or eldest son nor to cases where the abduction is for immoral purposes nor are the damages limited to the fiction of "loss of services." The real ground of action is compensation for the expense and injury and punitive damages for the wrong done him in his affections and the destruction of his household. It can make no difference that the child at the time she was carried away was not in the immediate custody of the father where he was legally entitled to it or to have it adjudged by the court, and to take her out of it or secrete her was an injury for which he was entitled to damages.[88] So the mere fact that the child has left the parent and gone to work for another is not enough without proof of solicitation.[89]

But where it appears that the defendant, knowing that the son had absconded from his father, boarded him in his family and allowed him to work on his farm as he pleased, doing this with the intention of aiding or encouraging, or with the knowledge that it aids and encourages the son to keep away from the father, he is liable to this action.[90] And to harbor or entice away an innocent child for immoral and corrupt purposes is an outrage criminally

87. Howell v. Howell (N. C.), 78 S. E. 222; Kirkpatrick v. Lockport, 2 Brev. (S. C.) 276; Anthony v. Norton, 60 Kan. 341, 56 P. 529.

88. Howell v. Howell (N. C.), 78 S. E. 222, 45 L. R. A. (N. S.) 867.

89. Arnold v. St. Louis & S. F. R. Co., 100 Mo. App. 470, 74 S. W. 5; Cummins v. State, 36 Tex. Cr. R. 398, 37 S. W. 435.

90. Sargent v. Mathewson, 38 N. H. 54; Everett v. Sherfey, 1 Ia. 356. Indictment lies under fit circumstances for the offence of abduction or enticement of one's minor child. See Langham v. State, 55 Ala. 114; State v. Rice, 76 N. C. 194; Queen v. Prince, L. R. 2 C. C. 154. The doctrine of enticement extends to the relation of Master and Servant, where it will be considered further. See *post*, Part VI. c. 4; Noice v. Brown, 39 N. J. L. 569; Morgan v. Smith, 77 N. C. 37. Where one's minor child is enticed away or harbored against the father's will, and without justification, the offender cannot, of course, recover for the child's board. Schnuckle v. Bierman, 89 Ill. 454. But where one employs a runaway child *bona fide*, without being guilty of this offence, he may offset wages due the father by the expense of actual support of the child. Huntoon v. Hazelton, 20 N. H. 388. The father may sue on the basis of a contract for his absconding child's wages; but he is put to his election, and the suit in tort against the employer, for unlawfully enticing or harboring his minor child, precludes the action of assumpsit as for wages earned. Thompson v. Howard, 31 Mich. 309; Grand Rapids R. v. Showers, 71 Ind. 451.

dealt with besides.[91] Enticement of a minor child may be the basis of a parental suit for damages where fraudulent representation misled both child and parent.[92]

A parent may maintain a libel in the admiralty for the wrongful abduction of the child, a minor, and carrying him beyond the seas.[93] Abduction or kidnapping is an offence similar to enticement, but implying the use of force rather than persuasion; and the parental remedies are similar. Where father and mother live apart, the mother's assent to the child's enlistment as a sailor may sometimes affect the father's remedies.[94] But some parental ratification of the son's contract of enlistment should be shown, in order to defeat the parent's right of action; and similar principles apply in the case of an army enlistment; there being, doubtless, cases where a parent may sue one at law for unlawfully harboring and concealing his young child, and so inducing him to enlist as a soldier.[95]

There must be a reasonable limit to suits by the parent for loss of his child's services or society. Hence it is now well settled in this country that the parent cannot sue for enticing his child into a marriage against the parent's consent.[96] For a forcible abduction, resulting in an imperfect marriage, and aggravated cases of a like nature, where, in fact, there is not a valid union, there might be a remedy. So the marriage statutes not unfrequently provide penalties to be meted out to offenders who aid and encourage infants in evading statutes requiring the consent of parents or guardians. But for drawing children of suitable age into a marriage which

91. People v. Marshall, 59 Cal. 386; State v. Gordon, 46 N. J. L. 432. Whether force or persuasion was used in such abduction of a child does not affect the parental right of action. Lawrence v. Spence, 99 N. Y. 669. But criminal prosecutions for enticing, etc., for purposes of prostitution may fail, where it appears that the child was lewd and went of her own free will, being of suitable age. People v. Plath, 100 N. Y. 590; Jenkins v. The State, 15 Lea, 674, People v. Cummons, 56 Mich. 544.

92. As where a married man gained a female child's affections and induced the father's consent to their marriage by fraudulently representing himself as single, and the girl, on discovering the falsehood, committed suicide. Lawyer v. Fritcher, 130 N. Y. 239.

93. Steele v. Thacher, Ware, 91; Plummer v. Webb, 4 Mason, 380. See Cutting v. Seabury, Sprague, 522; Weeks v. Holmes, 12 Cush. 215.

94. Wodell v. Coggeshall, 2 Met. 89. And see Worcester v. Marchant, 14 Pick. 510.

95. Caughey v. Smith, 47 N. Y. 244.

96. Jones v. Tevis, 4 Litt. 25; Hervey v. Moseley, 7 Gray, 479; Goodwin v. Thompson, 2 Green (Ia.), 329. But see Hills v. Hobert, 2 Root, 48. It is not "kidnapping" to carry away a girl of suitable age and then

pleases themselves, the law affords no redress; nor can it punish for the sake of parental discipline. And even though the match be unhappy, yet marriage must supersede the filial relation.[97] Nor can a parent sue a school teacher, school trustees, or others, for excluding his children from school; the right of action, if any, being in the child,[98] and there being no real loss of services consequent upon the affront. In short, the general rule is to place all actions by the parent on the sole ground of value of the lost services of the child, who is regarded as a servant for the purpose of the suit; not to punish, for the sake of the father, those who wrong the child.[99]

The damages should be measured by the nature of the injury which caused the parent's suffering, and are not to be affected by evidence of his language and conduct at the time.[1]

§ 751. Contests for Custody between Husband and Wife, etc.

Where a father is entitled to the possession of his minor child as against all of the world except its mother, and where the father and mother are equally entitled to its possession, he does not commit the crime of kidnapping by peaceably taking possession of it. And a person who assists the father under such circumstances is not guilty of the crime.[2]

It seems to be well settled that even a parent may be guilty of kidnapping his own child if he takes it away from the other parent to whom its custody has been awarded,[3] but that where a parent has equal right to the custody with the other parent it is no crime

marry her with her consent. Cochran v. State, 91 Ga. 763.

97. Marrying a parent's son and heir was a civil injury at common law, during the continuance of the military tenures, for thereby the parent lost the value of his child's marriage; but this injury ceased long ago, with the right on which it was founded. See 3 Bl. Com. 140, and notes. But see Lawyer v. Fritcher, 130 N. Y. 239.

98. Spear v. Cummings, 23 Pick. 224; Donahue v. Richards, 38 Me. 376; Boyd v. Blaisdell, 15 Ind. 73; Stephenson v. Hall, 14 Barb. 222. *Contra*, Roe v. Deming, 21 Ohio St. 666.

99. Hall v. Hollander, 4 B. & C. 660; Grinnell v. Wells, 7 M. & Gr. 1033; Eager v. Grimwood, 1 Exch. 61. But see *dictum* in Stephenson v. Hall, 14 Barb. 222.

1. Stowe v. Heywood, 89 Mass. 118.

2. State v. Dewey (Ia.), 136 N. W. 533, 40 L. R. A. (N. S.) 478.

A separated mother in possession of a minor child cannot prosecute as a kidnapper the father who gets the child away. Burns v. Commonwealth, 129 Pa. 138.

3. Comm. v. Nickerson, 5 Allen (Mass.), 518; State v. Farrar, 41 N. H. 53; State v. Rhodes, 29 Wash. 61, 69 P. 389.

to take it away.[4] Those agents who assist the parent to take away the child are usually in the same situation as the principal,[5] but it is held in a recent case[6] that although the wife might have a right to entice a child away from the father, still that she could not confer this right even on her second husband, the stepfather of the child, and that he might be held for kidnapping the child for the mother. The decision is supported by the rather inconclusive reasoning that any other construction of the statute would result in requiring the parent to first ascertain whether the party who took the child away is an agent of the other parent before having him arrested. A better reason for the rule is that the object of the statute is to protect the parents from the mental anguish of the disappearance of the child.

A grandmother is justified in shooting her son-in-law when he is trying to break into her house to get his child and threatening to kill the defendant.[7] And where the husband and wife are struggling over the possession of the child, and the husband shoots the wife, it is no defence that the child was being strangled in the struggle where the husband might have prevented this by ceasing the struggle.[8]

4. Hunt v. Hunt, 94 Ga. 257, 21 S. E. 515; State v. Breslin (Ida.), 112 P. 1053; Burns v. Comm., 129 Pa. 138, 18 A. 756; State v. Angel, 42 Kan. 216, 21 P. 1075; Biggs v. State, 13 Wyo. 94, 77 P. 901.

5. State v. Breslin (Ida.), 112 P. 1053; Burns v. Comm., 129 Pa. 138, 18 A. 756; State v. Angel, 42 Kan. 216, 21 P. 1075; People v. Congdon, 77 Mich. 351, 43 N. W. 986.

6. State v. Brandenberg (Mo.), 134 S. W. 529, 32 L. R. A. (N. S.) 845.

7. State v. Perkins, 88 Conn. 360, 91 A. 265, L. R. A. 1915A, 73.

8. State v. Thomson, 153 N. C. 618, 69 S. E. 254.

CHAPTER VII.

PARENT'S RIGHT TO SERVICES OF CHILD.

§ 752. Right of Father to Child's Labor and Services.

Next to the right of custody of infants comes that of the value of their labor and services. The father, says Blackstone, has the benefit of his children's labor while they live with him and are maintained by him; and this is no more than he is entitled to from his apprentices or servants.[9] This right, like that of custody, rests upon the parental duty of maintenance, and furnishes some compensation to the father for his own services rendered the child.

Whether this right remains absolute in the father until the child has obtained full age is apparently a matter of doubt. It is certainly perfect while the period of the child's nurture continues. But if this is all, it can be of little consequence, because the child's labor and services are for that period of little or no value; nor could compensation be thus afforded for the many years when the child was entirely helpless. All will admit that the father's right continues until the child reaches fourteen. And since the father's guardianship by nature extends through the full term of the child's minority; since, too, he may by will place a testamentary guardian of his own choice over the infant; since it is reasonable that the law should set off years of later usefulness against years of earlier helplessness; in short, since the age of majority is fixed as the period when an infant becomes legally emancipated from his father's control,— we may fairly assume that, all other things being equal, the father is actually entitled to the value of his child's labor and services until the latter becomes of age. This is the principle assumed by the elementary writers,[10]

9. 1 Bl. Com. 453; 2 Kent Com. 193.

10. 1 Bl. Com. 453; Reeve, Dom. Rel. 290.

and in most of the judicial decisions;[11] though to such opinion Chancellor Kent appears to yield a somewhat doubtful assent.[12]

The father is in this country, as a general rule, entitled to the services of minor children[13] and to their wages if working for another[14] only during minority,[15] and the minor child has no right to assign his wages to another so as to bar the parent of this right.[16]

We assume that the child lives at home or is supported by the parent. And if a child, being of full age, chooses to remain with the father, or is imbecile and needs to be harbored at home, the relation may continue so as to entitle the parent, either as such

11. Day v. Everett, 7 Mass. 145; Benson v. Remington, 2 Mass. 113; Plummer v. Webb, 4 Mason, 380; Gale v. Parrot, 1 N. H. 28; Nightingale v. Withington, 15 Mass. 272; The Etna, Ware, 462.

12. 2 Kent Com. 193.

13. Williams v. Williams (Ala.), 81 So. 41; Kenure v. Brainerd & Armstrong Co., 88 Conn. 265, 91 A. 185; Central of Georgia Ry. Co. v. Cheney, 20 Ga. App. 393, 93 S. E. 42; Croxton v. Foreman, 13 Ind. App. 442, 41 N. E. 838; Henninger v. McGuire, 146 Ia. 270, 125 N. W. 180; Fuller v. Blair, 104 Me. 469, 72 A. 182; Dembinski's Case (Mass.), 120 N. E. 856; Fox v. Schumann, 191 Mich. 331, 158 N. W. 168; Gurley v. Southern Power Co., 172 N. C. 690, 90 S. E. 943; Young v. Sterling Leather Works (N. J.), 102 A. 395.

The services of illegitimate children, while living with and working for their father under the belief that they are legitimate are presumed gratuitous. Williams v. Halford, 73 S. C. 119, 53 S. E. 88; Adkins v. Hope Engineering & Supply Co., 81 W. Va. 449, 94 S. E. 506; Taylor v. Chesapeake & O. Ry. Co., 41 W. Va. 704, 24 S. E. 631.

The parent's right to the child's wages is founded on the theory of compensation for the support of the child. Biggs v. St. Louis, I. M. & S. Ry. Co., 91 Ark. 122, 120 S. W. 970; Wheeler v. State, 51 Ind. App. 622, 100 N. E. 25; Rounds Bros. v. McDaniel, 133 Ky. 669, 118 S. W. 956; Judgment (1906) 101 N. Y. S. 1119, 115 App. Div. 921, reversed. Doyle v. Carney, 190 N. Y. 386, 83 N. E. 37.

14. Kansas City, P. & G. R. Co. v. Moon, 66 Ark. 409, 50 S. W. 996; Mock v. Neffler (Ga.), 95 S. E. 673; Smith v. Smith, 112 Ga. 351, 37 S. E. 407; Royal v. Grant, 5 Ga. App. 643, 63 S. E. 708; Cox v. W. T. Adams & Co., 5 Ga. App. 296, 63 S. E. 60 (laborer's lien may be enforced by father for son's wages and his own); Benson v. Remington, 2 Mass. 113; Reeder v. Moore, 95 Mich. 594, 55 N. W. 436; Freeman v. Shaw, 173 Mich. 262, 139 N. W. 66; Winebremer v. Eberhardt, 137 Mo. App. 659, 119 S. W. 530; Crete Mut. Fire Ins. Co. v. Patz, 64 Neb. 676, 90 N. W. 546; Galligan v. Woonsocket St. Ry. Co., 27 R. I. 363, 62 A. 376; Kenner v. Kenner, 139 Tenn. 700, 202 S. W. 723, 139 Tenn. 211, 201 S. W. 779; Harper v. Utsey (Tex. Civ. App. 1906), 97 S. W. 508; Dean v. Ore. R. & Nav. Co., 44 Wash. 564, 87 P. 824.

15. Gilman v. C. W. Dart Hardware Co., 42 Mont. 96, 111 P. 550.

16. Southern Ry. Co. v. King Bros. & Co., 136 Ga. 173, 70 S. E. 1109; Greider v. Chicago & E. I. Ry. Co., 140 Ill. App. 246.

or on the principle of master and servant, to recover for the child's wages in the same manner.[17]

Where a minor child is hired under agreement with the father, the hirer cannot discharge the child without notice to the parent and thereupon proceed to make a new contract of hire with the child, independently. The effect of such a new arrangement, if made without the knowledge and assent of the father, is that the latter, on learning of it, may either adopt the contract and claim what was due under it, or repudiate and claim the value of his child's services.[18] If a minor child, without his father's consent, enters into a contract of hire with a third party, the father may promptly and peremptorily command the child to quit the service.[19] So if the permitted service is illegally pursued, the father may terminate it.[20]

§ 753. Mother's Right to Child's Services and Earnings.

At the common law a mother has no implied right to the services and earnings of her minor child; not being bound as a father would be for the child's maintenance. Nor have her rights or liabilities in these respects been usually regarded as equivalent to those of a father, even where she is the only surviving parent.[21] But the modern tendency in this country, if not in England, is certainly to treat a mother's rights with considerable favor, especiallly if she be a widow; and in several late cases her title has been upheld in her minor child's clothing [22] or earnings,[23] or the control of his services so far as concerns third persons; it appearing that

17. Brown v. Ramsay, 5 Dutch. 117; Overseers of Alexandria v. Overseers of Bethlehem, 1 Harr. 122; *infra*, ch. 5.

18. Sherlock v. Kimmel, 75 Mo. 77.

19. State v. Anderson, 104 N. C. 771. Statutes forbidding the enticement of a servant from the master, etc., have no application here. *Ib.*

20. As in Hunt v. Adams, 81 Me. 356, where the employer persisted in keeping the child at work on Sunday in violation of law.

21. 1 Bl. Com. 453; Commonwealth v. Murray, 4 Binn. 487; Riley v. Jamesson, 3 N. H. 29; People v. Mercein, 3 Hill, 400; Morris v. Low, 4 Stew. & Port. 123; Pray v. Gorham, 31 Me. 240; McMahon v. Sankey, 133 Ill. 636; Snediker v. Everingham, 3 Dutch. 143. See Clapp v. Greene, 10 Met. 439; Campbell v. Campbell, 3 Stockt. 268.

22. Burke v. Louisville R., 7 Heisk. 451.

23. McElmurray v. Turner, 86 Ga. 215; Hollingsworth v. Swedenborg, 49 Ind. 378, 19 Am. R. 687; Tague v. Hayward, 25 Ind. 427; Horgan v. Pacific Mills, 158 Mass. 402, 33 N. E. 581, 35 Am. St. R. 504; Scamell v. St. Louis Transit Co., 103 Mo. App. 504, 77 S. W. 1021; Franklin v. Butcher, 144 Mo. App. 660, 129 S. W. 428; Trinity Lumber Co. v. Conner, — Tex. Civ. App. —, 187 S. W. 1022 (or in case of his imprisonment or desertion).

she was the surviving parent, and that the child had no probate guardian and was not emancipated; and especially where she had borne the burden of the child's support.[24] Whether such title on her part could be so well enforced against the child's own consent, and to the extent of depriving the child of the fruits of his own toil, especially if the mother remarries, or does not support him, may be reasonably doubted,[25] but the evident tendency of the more recent decisions is to regard the mother as having the same rights as the father when she steps into his place for any reason.

§ 754. Loss of Right to Child's Services.

But the duties and rights of parents are limited, mutually dependent, and in a great degree correspondent with one another. When the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, and especially wherever he has been remiss in his own parental duties, our courts are reluctant to admit his right to the child's services. Under such circumstances, says a New Hampshire court, "there is no principle but that of slavery which continues his right to receive the earnings of his child's labor."[26]

It may appear that the parent has waived or released his right to the child's services,[27] but the mere fact that the child is re-

24. Horgan v. Pacific Mills, 158 Mass. 402.

25. See Matthewson v. Perry, 37 Conn. 435; Hammond v. Corbett, 50 N. H. 501; Hays v. Seward, 24 Ind. 352; Holingsworth v. Swedenborg, 49 Ind. 378; Lind v. Sullestadt, 21 Hun, 364.

26. Thompson v. Chicago, M. & St. P. Ry. Co., U. S. C. C. Neb. 1900, 104 F. 845; Southern Ry. Co. v. Flemister, 120 Ga. 524, 48 S. E. 160; Newton v. Cooper, 13 Ga. App. 458, 79 S. E. 356; Briseo v. Price, 275 Ill. 63, 113 N. E. 881; P. J. Hunyeutt & Co. v. Thompson, 159 N. C. 29, 74 S. E. 628; Chaloux v. International Paper Co., 75 N. H. 281, 73 A. 301; Woods, J., in Jenness v. Emerson, 15 N. H. 489. But in this case the principle seems to be assumed that the parent's obligation to support and his right to receive wages commence together, continue together, and ought always to terminate together. See Benson v. Remington, 2 Mass. 113.

27. *In re* Kanter, 215 F. 276; Culberson v. Alabama Const. Co., 127 Ga. 599, 56 S. E. 765, 9 L. R. A. (N. S.) 411; Orr v. Wahfeld Mfg. Co., 179 Ill. App. 235; Story & Clark Piano Co. v. Davy, — Ind. App. —, 119 N. E. 177; Gray v. Grimm, 157 Ky. 603, 163 S. W. 762; Zongker v. People's Union Mercantile Co., 110 Mo. App. 289, 90 S. W. 728.

Waiver need be made before the services begin but may take place while they are in progress. McMorrow v. McDowell, 116 Mo. App. 289, 90 S. W. 728.

The parent's conduct while the services were in progress may be sufficient to show waiver which need not take place when the services were comenced. McMorrow v. Dowell, 116

ceiving his own wages is not enough to show waiver.[28] Where the father permits the son to make his own contracts and collect and use his own wages they belong to the son who can recover them from the employer,[29] and where a minor has been paid in full for his services the parent cannot recover therefor from the employer,[30] but the parent's right to recover for the child's services is not lost by the fact that they were performed under a contract to which the parent was not a party.[31]

The parent may voluntarily relinquish the right to his child's earnings, and may permit the child to earn for himself, receive his earnings, and appropriate them at pleasure. He is not obliged to claim such earnings for the benefit of his own creditors.[32] And if the parent authorize a third person to employ and pay the child, or even, as it is held, where he knows that the infant contracted on his own account and does not object, payment to the child and not to the parent will be a sufficient discharge. Such an agreement may be in express terms, or it may be implied from circumstances.[33] An American court favorably regards contracts of this nature, for the child's benefit, as they are in conformity with the spirit of free institutions.[34] An a New York statute provides that unless the parent notifies the minor's employer,

Mo. App. 289, 90 S. W. 728; Liberman v. Third Ave. R. Co., 54 N. Y. S. 574, 25 Misc. 296, 55 N. Y. S. 677, 25 Misc. 704; Sweet v. Crane, 39 Okla. 248, 134 P. 1112; Kuchenmeister v. Los Angeles & S. L. R. Co. (Utah), 172 P. 725 (where child was supporting himself); Jackson v. Jackson, 96 Va. 165, 31 S. E. 78; Riley v. Riley, 38 W. Va. 283, 18 S. E. 569.

28. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788.

29. Vance v. Calhoun, 77 Ark. 35, 90 S. W. 619, 113 Am. St. R. 111; Penrose v. Baker, 171 S. W. 482; Merrill v. Hussey, 101 Me. 439, 64 A. 819; Daniel v. Atlantic Coast Line R. Co., 86 S. E. 174.

30. Ping Min. & Mill Co. v. Grant, 68 Kan. 732, 75 P. 1044.

31. Scamell v. St. Louis Transit Co., 103 Mo. App. 504, 77 S. W. 1021.

32. Even if the father is insolvent, he may thus relinquish, provided this be done in good faith. Wilson v. McMillan, 62 Ga. 16; Atwood v. Holcomb, 39 Conn. 270; Wambold v. Vick, 50 Wis. 456; Clemens v. Brillhart, 17 Neb. 335. But the executory promise to relinquish is revocable. Stovall v. Johnson, 17 Ala. 14.

33. See Campbell v. Cooper, 34 N. H. 49; Jenness v. Emerson, 15 N. H. 489; Cloud v. Hamilton, 11 Humph. 104; Armstrong v. McDonald, 10 Barb. 300; Atkins v. Sherbino, 58 Vt. 248.

34. Snediker v. Everingham, 3 Dutch. 143; Cloud v. Hamilton, 11 Humph. 104. An infant may sue for breach of contract for employment, even though the father might also sue; relinquishment of the latter's right being implied from circumstances. Benziger v. Miller, 50 Ala. 206. See *post*, ch. 5.

within thirty days after the commencement of service, that he claims the wages, payment to the minor will be good.[35]

The father may by his own delay and laches forfeit the right of action for his son's wages; as where the minor agrees to work at certain monthly wages to be paid to himself, and the father, knowing of the agreement, gives no notice of his objection, but waits until the work has been done and payment is made to the child, before making a demand.[36] But if the father has given seasonable notice of his dissent and demand to the stranger hiring his son, the fact that the son continues to work against his express dissent, and that the stranger notified him to come and take his son away and he neglected to do so, will not preclude him from recovering the wages.[37] Nor does the fact that the son has agreed with his father to buy out his time for the remainder of his minority by paying a certain sum therefor, which has not been paid, prevent the father from recovering his wages pending the payment of such sum.[38]

We may add that, whatever private arrangement may exist between the father and his son, unless it is brought to the employer's notice, it cannot be set up to justify payment to the minor himself. As, for instance, where father and son had secretely agreed that the latter should have his own wages.[39] And the publication, by a parent, of a notice of his son's emancipation, more liberal to the latter than the actual agreement between them, will not, as against one who has no knowledge of the publication, estop the father from insisting on such right to his son's wages as the contract between them actually gives.[40] But the usage of father and son may be alleged.[41]

A contract by the parent to assign the services of the child and to place him in the control of the assignee is not contrary to public policy if it is not prejudicial to the child's welfare.[42]

One who employs the minor son of another cannot be liable to

35. Watson v. Kemp, 59 N. Y. S. 142, 42 App. Div. 372; Langer v. Kaufman, 157 N. Y. S. 825, 94 Misc. 216; N. Y. Laws, 1850, p. 579; Herrick v. Fritcher, 47 Barb. 589. And see Everett v. Sherfey, 1 Ia. 356.

36. Smith v. Smith, 30 Conn. 111.

37. *Ib.*

38. Cahill v. Patterson, 30 Vt. 592. And see Kauffelt v. Moderwell, 21 Penn. St. 222; Cloud v. Hamilton, 11 Humph. 104; Whiting v. Earle, 3 Pick. 201.

39. Kauffelt v. Moderwell, 21 Penn. St. 222.

40. Mason v. Hutchins, 32 Vt. 780.

41. Perlinau v. Phelps, 25 Vt. 478; Canovar v. Cooper, 3 Barb. 115.

42. Anderson v. Young, 54 S. C. 388, 32 S. E. 448, 44 L. R. A. 277.

the father as for breach of contract, because of such minor's delinquencies. Hence it is held, that where the father contracts that his minor son shall work for a specified time and price, and the son leaves his employer before the expiration of the time, though against his father's will, the father can only recover for the time of actual employment, although the employer assented to the departure;[43] and the child's breach of specified conditions of notice before quitting bars the father's recovery of wages accordingly.[44] But where the minor is hired to serve for a specified time, the employer who contracted with the parent should notify the latter of any failure of duty on the child's part before discharging the child, nor should he discharge without notice to the parent.[45] Where a father and his minor son agree that the latter shall work for B. until his majority, and be paid the wages, this does not debar the father from suing B. for a breach of the agreement and recovering the expense of finding other employment for the son.[46]

If a father place his minor son to work for another, for no illegal purpose, and without knowledge and assent as to his illegal employment in fact, he is still entitled to compensation for his son's services; as where a son is employed by another in unlawfully selling intoxicating liquors, the father being ignorant of the nature and character of the services while they were being performed.[47]

Wages due a minor seaman belong to his father, and the latter may sue for them in admiralty.[48] And payment of such wages to the son, while he was known by his employer to have been less than twenty-one at the time of making the contract, furnishes no defence to an action by the father, who had no knowledge

43. Hennessy v. Stewart, 31 Vt. 486. See Schoenberg v. Voight, 36 Mich. 310, where, the employment being *quantum meruit*, the employer could show that the son had embezzled more than his services were worth. But cf. The Lucy Anne, 3 Ware, 253.

44. Tennessee Man. Co. v. James, 91 Tenn. 154.

45. Day v. Oglesby, 53 Ga. 646. *Semble*, a child may be discharged for suitable reason without giving notice to the parent. Sherlock v. Kimmel, 75 Mo. 77.

46. Dickinson v. Talmage, 138 Mass. 249. As to the effect of mere notice by the father to the employer, that he shall exact payment, see Williams v. Williams, 132 Mass. 304.

47. Emery v. Kempton, 2 Gray, 257.

48. Gifford v. Kollock, 3 Ware, 45. As to the effect of desertion by the child after attaining majority, see Coffin v. Shaw, 3 Ware, 82.

of his hiring until after the wages were earned.[49] Nor is the father, in such case, affected by the terms of the shipping articles, because it is an express contract which, as against him, the son has no right to make; he can claim under a *quantum meruit* for the value of the services. But mercantile custom may determine certain questions as to the remedy.[50]

As to enlistments in the army or navy of the United States, the laws contemplate that the contract is personal and for the benefit of the infant; and pay, bounties, and prize-money in general, though earned under State laws, are held to belong to the son, and not to the father.[51]

The parent may lose the right to the child's services by operation of law as where the child marries his new obligations to his wife are considered superior to those to his parents and the parents have no further rights in his wages,[52] and the parent has no remedy for loss of earnings if the son is lawfully committed to jail for a crime.[53] When the parent is a pauper and is maintained by a town, such town is held not entitled to the earnings of a minor child who is not himself a pauper.[54]

§ 755. Parent's Right of Action for Child's Labor.

The parent may recover the wages of the minor child in an action for work and labor,[55] and not in the name of the

49. White v. Henry, 24 Me. 531. See Weeks v. Holmes, 12 Cush. 215.

50. Bishop v. Shepherd, 23 Pick. 492,

51. United States v. Bainbridge, 1 Mason, 84; Baker v. Baker, 41 Vt. 55; Banks v. Conant, 14 Allen, 497; Mears v. Bickford, 55 Me. 528; Carson v. Watts, 3 Doug. 350; Cadwell v. Sherman, 145 Ill. 348; Magee v. Magee, 65 Ill. 255. But cf. Ginn v. Ginn, 38 Ind. 526.

52. A father may recover for loss of services of an adult daughter who though married was separated from her husband and a member of such father's family, where such loss of services was the result of an illegal carnal assault. Palmer v. Baum, 123 Ill. App. 584; Comomnwealth v. Graham, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 35 Am. St. Rep. 504. An infant son who marries must use his earnings to support his wife. Commonwealth v. Graham, 157 Mass. 73.

53. People v. Masten, 79 Hun, 580.

54. Jenness v. Emerson, 15 N. H. 486.

55. Cannon v. McKenzie, 3 Cal. App. 286, 85 P. 130; Weaver v. Thompson, 143 Ga. 526, 85 S. E. 698; Sapp. v. Parrish, 3 Ga. App. 234, 59 S. E. 821; Kooser v. Housh, 78 Ill. App. 98; Weeks v. Holmes, 66 Mass. 215.

The employer may deduct any loss caused by the unfaithfulness of the child or his absence without leave. Moulton v. Trask, 50 Mass. (9 Metc.) 557.

The mere fact that the father notifies the employer that he shall expect to receive the wages of his minor son is not enough to entitle him to them,

child[56] unless waived,[57] or unless the child has been emancipated[58] and the employer may set off the reasonable value of necessaries furnished the child.[59]

The right of action to recover for the services of a minor is presumed to be in his father.[60] And the father may charge services rendered by his son, as a master for his apprentice or hired laborer, and consider it his own work.[61] The defendant has the burden of proving any special contract set up, as that the minor's services were in remuneration for board and care for him.[62]

§ 756. Child's Right of Compensation for Services to Parent.

Where parents and children are living together in the same family there is no presumption that legal liability is raised between them by work done by the child or by financial transactions between them relating to family expenses but these questions are for the jury to consider.[63] A minor son who occupies the position of a son in his father's household is not entitled to compensation for services rendered in caring for his father and mother in

as where he has failed to provide for the son and he is working for his grandfather. Wililams v. Williams, 132 Mass. 304; Inness v. Meyer, 93 Neb. 43, 139 N. W. 836; Wolf v. Vannoy, 154 N. W. 215; Daniel v. Atlantic Coast Line R. Co., 86 S. E. 174.

Defenses. Fanton v. Byrum, 26 S. D. 366, 128 N. W. 325; Letts v. Brooks, Hill & Den. 36; Van Dorn v. Young, 13 Barb. 286.

56. Fuller v. Blair, 104 Me. 469, 72 A. 182; Trinity County Lumber Co. v. Conner (Tex. Civ. App.), 187 S. W. 1022. See Langer v. Kaufman, 157 N. Y. S. 825, 94 Misc. 216 (infant's right under statute).

57. Biggs v. St. Louis, I. M. & S. Ry. Co., 91 Ark. 122, 120 S. W. 970; Allen v. Allen, 60 Mich. 635, 27 N. W. 702; McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728.

58. *In re* Haskell, 228 F. 819; Freeman v. Shaw, 173 Mich. 262, 139 N. W. 66; Woodward v. Donnell, 146 Mo. App. 119, 123 S. W. 1004.

59. Culberson v. Alabama Const. Co., 127 Ga. 599, 56 S. E. 765, 9 L. R. A. (N. S.) 411; Newton v. Cooper, 13 Ga. App. 458, 79 S. E. 356; Rounds Bros. v. McDaniel, 133 Ky. 669, 118 S. W. 956.

60. Dufield v. Cross, 12 Ill. 397; Shute v. Dorr, 5 Wend. 204; Hollingsworth v. Swedenborg, 49 Ind. 378; Monaghan v. School District, 38 Wis. 100. See Campbell v. Cooper, 34 N. H. 49.

61. Brown v. Ramsay, 5 Dutch. 117. But see Jones v. Buckley, 19 Ala. 604.

62. Pierce v. Coffee, 160 Iowa, 30, 139 N. W. 1092.

63. Hilbish v. Hilbish, 71 Ind. 27; Allen v. Allen, 60 Mich. 635, 27 N. W. 702; Classen v. Pruhs, 69 Neb. 278, 95 N. W. 640; Hollingsworth v. Beaver, Tenn. Ch. App. 1900, 59 S. W. 464; Myers v. Myers, 47 W. Va. 487, 35 S. E. 868 (unjust litigation of undutiful son not countenanced).

Right of adult child living with parents to recover for services rendered. See *post*, § 806.

the absence of an express contract to that effect,[64] and whether a child was to be paid for services is a question depending on all the circumstances.[65] Where minor children of a widow assist her to run the deceased father's business there is no consideration for an agreement on her part that they shall be partners, if one was made.[66] A father, after emancipating his minor child, may make a contract with him for services.[67]

64. *In California* by statute there is a presumption that money paid between parents and children is due, and this applies to money turned over by child to parents. Smith v. Smith (Cal. App.), 176 P. 382; Farley v. Stacey, 177 Ky. 109, 197 S. W. 636, 1 A. L. R. 1181.

65. Cole v. Fitzgerald, 132 Mo. App. 17, 111 S. W. 628; Officer v. Swindlehurst, 41 Mont. 126, 108 P. 583.

66. Tuite v. Tuite, 72 N. J. Eq. 740, 66 A. 1090.

67. McDaniel v. Parish, 4 App. D. C. 213; Granrud v. Rea, 24 Tex. Civ. App. 299, 59 S. W. 841. A parent's contract to pay his minor child for services is evidence of emancipation. Granrud v. Rea, 24 Tex. Civ. App. 299, 59 S. W. 841.

CHAPTER VIII.

ACTIONS FOR INJURY TO CHILD.

§ 757. Actions for Injury to Child; In General.

Two rights of action arise for the negligent injury of an infant, one in the father to recover for the loss of the services of his child from the date of the injury until he attains his majority and for the expense he has incurred in effecting or attempting to effect a cure, and compensation for his care and attention;[68] the other in the child to recover for his pain and suffering and the impairment of his power to earn money after he reaches his majority.[69]

But the parent may waive his right to assert his claim for the damages to which he is entitled, and permit the child to recover the full amount to which he would be entitled if separate suits were brought by each. Such a waiver takes place when the parent has actual notice of the suit brought by his child and of the nature and extent of the amount he is seeking to recover, and he fails to interpose any objection or bring for himself an independent action before there has been a trial and judgment in the action brought by his child,[70] and after the father has prosecuted

68. Grinnell v. Wells, 7 M. & Gr. 1041; Rogers v. Smith, 17 Ind. 323; Hartfield v. Roper, 21 Wend. 615; Dennis v. Clark, 2 Cush. 347.

69. Akers v. Fulkerson, 153 Ky. 228, 154 S. W. 1101.

70. Louisville, H. & St. L. R. Co. v. Lyons, 155 Ky. 396, 156 Ky. 222, 159 S. W. 971, 160 S. W. 942, 48 L. R. A. (N. S.) 667; Chesapeake & O. Ry. Co. v. Davis, 22 Ky. Law Rep. 748, 58 S. W. 698, 119 Ky. 641, 60 S. W. 14, 22 Ky. Law Rep. 1156.

A father cannot be held to have

a suit as next friend of the child for all damages he cannot later bring action on his own behalf.[71]

Hence it is the general rule in this country that recovery for personal injuries to the minor child may be had by the parent,[72] and the action for services during minority must be brought by the parent and not by the child.[73]

waived his right to sue for injuries to his minor son, where he is not shown to be connected with his son's suit therefor in any way, or to have had notice thereof, beyond the fact that his son lived with him. Helm v. Phelps, 157 Ky. 795, 164 S. W. 92.

The fact that a child, by her father as next friend, has recovered damages for a personal injury, does not bar the father's subsequent action for loss of services from the same injury. Wilton v. Middlesex R., 125 Mass. 130. Here the child reached majority before the father sued.

71. Furste v. Henderson Lothographing Co., 33 Ohio Cir. Ct. R. 645.

72. St. Louis, I. M. & S. Ry. Co. v. Waren, 65 Ark. 619, 48 S. W. 222; Shoemaker v. Jackson, 128 Iowa, 488, 104 N. W. 503, 1 L. R. A. 137; Howell v. Iola Portland Cement Co., 86 Kan. 450, 121 P. 346; Henry v. Missouri, K. & T. Ry. Co., 98 Kan. 567, 158 P. 857; Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013; 23 Ky. Law Rep. 461, 53 L. R. A. 789, 96 Am. St. Rep. 475; Ballard v. Smith (Ky.), 210 S. W. 489 (when child employed in dangerous work without knowledge of parent); Slaughter v. Nashville C. & St. L. Ry. Co., 28 Ky. Law Rep. 665, 90 S. W. 243, 28 Ky. Law Rep. 1343, 91 S. W. 713 Cincinnati, N. O. & T. P. R. Co. v. Pemberton, 7 Ky. Law Rep. 669; Davern v. Bridgeford, 13 Ky. Law Rep. 971.

Even the parent of a bastard is entitled to his services, so where the parent has released action for injuries, this bars the child's action for loss of earning capacity. Cincinnati, N. O. & T. P. R. Co. v. Pemberton, 7 Ky. Law Rep. 670; Dennis v. Clark, 56 Mass. 347, 48 Am. Dec. 671; McGreevey v. Boston Elevated Ry. Co. (Mass.), 122 N. E. 278.

A statute authorizing suit by the father for injuries to the minor child is not unconstitutional as assuming to transfer a cause of action from the child to the father. Hess v. Adamant Manuf'g Co. of America, 66 Minn. 79, 68 N. W. 774; Nyman v. Lynde, 93 Minn. 257, 101 N. W. 163 (criminal abuse of minor child); Sabine v. Stringer, 15 Mo. App. 586; Scamell v. St. Louis Transit Co., 103 Mo. App. 504, 77 S. W. 1921.

If the injury was not due to the negligence of the defendant employer the father cannot recover for loss of services of the son. Williams v. Southern Ry. Co., 121 N. C. 512, 28 S. E. 367; Gurley v. Southern Power Co., 172 N. C. 690, 90 S. E. 943; Callaghan v. Lake Hopatcong Ice Co., 69 N. J. Law, 100, 54 A. 223; Kenner v. Kenner, 139 Tenn. 700, 202 S. W. 723, 139 Tenn. 211, 201 S. W. 779; Texas & P. Ry. Co. v. Hervey (Tex. Civ. App.), 89 S. W. 1095; Gulf, C. & S. F. Ry. Co. v. Johnson (Tex. Civ. App. 1897), 43 S. W. 583; Rishworth v. Moss (Tex. Civ. App.), 191 S. W. 843; Trow v. Thomas, 70 Vt. 580, 41 A. 652; Otey v. Bradley, 63 Wash. 500, 115 P. 1045; Taylor v. Chesapeake & O. Ry. Co., 41 W. Va. 704, 24 S. E. 631.

73. Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583, 123 Ill. App. 550 (the child may recover for loss of services after reaching his majority only); Western Union Tel. Co. v.

The action was originally framed on the basis of the parent's loss of services and some of the early cases refuse relief where the child was too young to render service and there is no evidence that he was of value to the parent, but the modern cases in this country regard the loss of services as a fiction and allow recovery even in the absence of evidence that the child rendered any service whatever.[74]

In an early English case where the plaintiff brought an action against the defendant for carelessly driving over and injuring the plaintiff's child, so that the plaintiff was obliged to expend a large sum of money in doctors and nurses, and it appeared that the child was only two years and a half old, and incapable of performing any act of service, it was held that the parent's action was not maintainable.[75] "The gist of the action," it is here said, "is the loss of services, and, therefore, though the relation of parent and child subsists, yet, if the child is incapable of performing any services, the foundation of the action fails.[76] And it is doubtful whether the father, as such, can even maintain a special action for the expenses necessarily incurred by him in having so young a child cured of the injury.[77]

In this country the rule appears to be more liberal towards the parent. A New York court observes that it is really questionable whether the father can be deprived of his right to sue for the loss of services on account of the child's youth; though, of course, the right may be forfeited by the parent's culpable negligence.[78] And in Massachusetts it is decided that if an infant child, a member of his father's household, and too young to be capable of rendering any service to his father, is wounded or otherwise injured by a third person, or by a mischievous animal owned by a third person, under such circumstances as to give the child himself an action against such person for the personal injury, and the father is thereby necessarily put to trouble and expense in the care and cure of the child, he may maintain an action against such person for indemnity. The court laid down the rule, however, with much caution.[79] In general, by our American rule, the parent may now

Woods, 88 Ill. App. 375; Gulf, C. & S. F. Ry. Co. v. Grisom, 36 Tex. Civ. App. 630, 82 S. W. 671.

74. Rice v. Norfolk-Southern R. Co., 167 N. C. 1, 82 S. E. 1034.

75. Hall v. Hollander, 7 Dowl. & Ry. 133.

76. Bayley, J., in *ib.*

77. See Addison, Torts, 697; Grinnell v. Wells, 8 Scot. N. R. 741. *Contra*, Hall v. Hollander, *supra*.

78. Hartfield v. Roper, 21 Wend. 615.

79. Dennis v. Clark, 2 Cush. 347.

recover for loss of the child's services during minority, or at least while incapacitated, and the reasonable expense of the child's sickness and restoration to health.[80] The child's pecuniary services are liberally estimated.[81] The father's action is predicated on pecuniary loss,[82] and is dependent on the child's right of action.[83]

The father may sue for illegal sales of drug to minor,[84] but not for libel against his daughter.[85] Trespass lies *per quod* for loss of services occasioned by assault and battery of the child.[86] The true question here, as elsewhere, seems to be, whether a loss of service was consequent upon the injury. For assault and battery on the high seas, there is likewise a remedy in admiralty.[87]

And where an injury is inflicted upon a child while living with and in the service of another, the proper remedy of the father is trespass on the case for the reversion, as it were, of the child's services; as where a person who hired the son of another put him

A parent may recover the expense of nursing and healing his minor child of such tender years that it is incapable of rendering him any service, from one who wilfully or negligently injures such child. Sykes v. Lawlor, 49 Cal. 236; Connell v. Putnam, 58 N. H. 534. Cf. Karr v. Parks, 44 Cal. 46; Sawyer v. Sauer, 10 Kan. 519.

80. Evansich v. Gulf R., 57 Tex. 123; Frick v. St. Louis R., 75 Mo. 542.

81. But here, as in other suits for damages, indirect and unreasonable items of damage should be excluded, as, for instance, the father's relinquishment of a lucrative business as nurse, while nursing his child. Barnes v. Keene, 132 N. Y. 13. The loss of the child's prospective society, solace, and comfort, is not a basis in such suits, but the pecuniary value of service during minority or as a servant. Railroad Co. v. Watly, 69 Miss. 145; The Louisville, New Albany & Chicago v. Rush, 127 Ind. 545; Leahy v. Davis, 121 Mo. 227. If the child be a burden, instead of a support, in earning capacity, this should be considered. Ala. Connelsville Coal & Coke Co. v. Pitts, 98 Ala. 285.

82. Sorrels v. Matthews, 129 Ga. 319, 58 S. E. 819, 13 L. R. A. (N. S.) 357; Tidd v. Skinner (N. Y.), 122 N. E. 247; Miles v. Cuthbert, 122 N. Y. S. 703 (loss of love and affection is not enough).

83. Benson v. City of Ottumwa, 143 Iowa, 349, 121 N. W. 1065; Thompson v. United Laboratories Co., 221 Mass. 276, 108 N. E. 1042; Regan v. Superb Theater, 220 Mass. 259, 107 N. E. 984 (defendant's negligence must be shown); Balke v. Otis Elevator Co., 164 N. Y. S. 287, 177 App. Div. 499 (claim defeated by failure to give notice and by limitation under Employers' Liability Act).

84. Tidd v. Skinner, 156 N. Y. S. 885, 171 App. Div. 98.

85. Pattison v. Gulf Bag Co., 116 La. 963, 41 So. 224, 114 Am. St. Rep. 570.

86. Hammer v. Pierce, 5 Harring. 171; Hoover v. Heim, 7 Watts, 62; Plummer v. Webb, Ware, 75; Cowden v. Wright, 24 Wend. 429. But as to indictments, see Hearst v. Sybert, Cheves, 177.

87. Plummer v. Webb, Ware, 75

upon a vicious horse, so that he was thrown and had his leg broken.[88]

The death of the child after the injury, though it may, on familiar principles, terminate the right to sue for the child's tort, does not affect the parent's consequential right of action.[89] The death occurring before the commencement of the suit, if in consequence of the injury, only aggravates the parent's remedy; if the death is occasioned by other causes, it leaves the remedy as it stood before.[90]

§ 758. Statutes Affecting Right of Action.

This right is affected by various local statutes[91] and may be brought under the Employers' Liability Acts.[92] Statutes authorizing suits for injuries in the name of the minor child prevent action by the father for loss of services especially where it is provided that he may sue for expenses in caring for the injured child.[93] A statute requiring notice in an action for personal injury does not apply to an action by a father for loss of services and medical attendance resulting from an injury to the son.[94]

88. Wilt v. Vickers, 8 Watts, 227.

89. Loss of services from the time of the child's injury to the time of his death may be recovered, as well as incidental expenses incurred for nursing and medical attendance. Natchez R. v. Cook, 63 Miss. 38.

90. Plummer v. Webb, Ware, 80; Winsmore v. Greenbank, Bull. N. P. 78; Ihl v. Street R., 47 N. Y. 317.

91. *A statute* authorizing recovery for personal injuries by the employee does not authorize recovery by the parent. Woodward Iron Co. v. Cook, 124 Ala. 349, 27 So. 455. And a statute authorizing the parent to recover for death of a minor child has no application where death does not ensue. Bube v. Birmingham Ry. Light & Power Co., 140 Ala. 276, 37 So. 285, 103 Am. St. Rep. 33; Jackson v. Pittsburg, C. C. & St. L. Ry. Co., 140 Ind. 241, 39 N. E. 663, 49 Am. St. Rep. 192; Adams Hotel Co. v. Cobb, 3 Ind. T. 50, 53 S. W. 478; Gibson v. Kansas City Packing Box Co., 85 Kan. 346, 116 P. 502; Alexander v. Standard Oil Co. of Louisana, 140 La. 54, 72 So. 806 (violation of statute prohibiting employment of minor under 14 creates no liability to a parent); Mackin v. Detroit-Timkin Axle Co., 153 N. W. 49; Brunette v. Minneapolis, St. P. & S. S. M. Ry. Co., 118 Minn. 444, 137 N. W. 172 (statute applicable to non-resident minor); Valenti v. Mesinger, 162 N. Y. S. 30, 175 App. Div. 398 (Employers' Liability Act inures to benefit of parent); Dobra v. Lehigh Valley Coal Co., 250 Pa. 313, 95 A. 465; St. Louis, I. M. & S. Ry. Co. v. Leazer, 119 Tenn. 1, 107 S. W. 684; Stevenson v. W. M. Ritter Lumber Co., 108 Va. 575, 62 S. E. 351, 18 L. R. A. (N. S.) 316.

92. Balke v. Otis Elevator Co., 164 N. Y. S. 287, 177 App. Div. 499.

93. Tennessee Cent. Ry. Co. v. Doak, 115 Tenn. 720, 92 S. W. 853.

94. Wysocki v. Wisconsin Lakes Ice & Cartage Co., 125 Wis. 638, 104 N. W. 707.

Statutes providing that the mother and father are jointly liable for all necessaries used by the family and are jointly entitled to their custody make no material change in the duty imposed on the father to support the family and therefore the father alone may bring an action for loss of services in case of injury to the child.[95]

§ 759. Surgeon's Liability for Operation on Child.

A surgeon is not liable for amputating the foot of a child which is crushed in the absence of the parents and without their consent where it is a case of emergency and prompt action is necessary to save the life of the patient, and he uses his best judgment that an amputation is necessary, where also he inquires as to the parents and is informed that they are not available.[96]

§ 760. Dangerous Employment; Father's Consent.

An employer who uses one whom he knows to be a minor or might in the exercise of reasonable care know to be such in a dangerous employment is liable to the father for injuries suffered in such employment,[97] but not where the employer did not know that the child was a minor or in the exercise of ordinary care could not find it out, the child appearing to be of age.[98]

If the father consents to the employment of his minor child in a certain employment he is chargeable with all the risks of the employment whether he knew of them or not.[99] and cannot recover for the negligence of a fellow-servant,[1] but consent to employment

95. Ackeret v. Minneapolis, 129 Minn. 190, 151 N. W. 976, L. R. A. 1915D, 1111.

96. Luka v. Lowrie (Mich.), 136 N. W. 1106, 41 L. R. A. (N. S.) 290.

97. Illinois Cent. R. Co. v. Henon, 24 Ky. Law Rep. 298, 68 S. W. 456.

A newsboy receiving a commission from a news company for the sale of papers is in the employment of such company and the company is liable in a suit by the widowed mother for injury to the boy. Union News Co. v. Morrow, 20 Ky. Law Rep. 302, 46 S. W. 6.

98. Chesapeake & O. Ry. Co. v. De Atley, 151 Ky. 109, 151 S. W. 363.

99 Woodward Iron Co. v. Curl, 153 Ala. 205, 44 So. 974; Reaves v. Anniston Knitting Mills, 154 Ala. 565, 45 So. 702 (although the employment of minors in the work was prohibited by statute); Harris v. Union Cotton Mills (Ga. App.), 98 S. E. 192; Chesapeake & O. Ry. Co. v. De Atley, 151 Ky. 109, 151 S. W. 363; Rowland v. Little, 140 Ky. 309, 131 S. W. 20; Hetzel v. Wasson Piston Ring Co., 89 N. J. Law, 205, 98 A. 308; Texas & P. Ry. Co. v. Putman (Tex. Civ. App.), 89 S. W. 1095; Pecos & N. T. Ry. Co. v. Blasengame, 42 Tex. Civ. App. 66, 93 S. W. 187.

1. Harris v. A. J. Spencer Lumber Co., Inc., 64 So. 557; Woodward Iron Co. v. Cook, 124 Ala. 349, 27 So. 455; Jordan v. New England Structural

in a particular task does not involve consent to a different work.[2] A contract by which a father releases the employer of his son from liability for injuries suffered is binding and will prevent recovery for such injuries.[3]

It is well settled that the father may stipulate as to the kind of work his child may be employed in, and the consent of the parent that the child may be employed at one kind of labor is not consent that he be placed in another and a more dangerous kind of work.[4] It is a general rule that an employer putting a minor servant, against his parent's consent, to do work by which the child is injured, commits an actionable wrong for which the employer is liable to the parent, although there is no other evidence of negligence upon his part.[5] And under such circumstances the minor servant's contributory negligence is no defence to such action.[6] So one who employs a minor in a dangerous employment without the consent of the parent is liable to the parent for any loss of the minor's services due to the employment, without reference to whether the loss resulted from negligence of the master.[7] Consent may appear from acquiescence and failure to object after knowledge of the particular employment.[8]

Co., 197 Mass. 43, 83 N. E. 332; Texas & P. R. v. Hervey (Tex. Civ. App.), 89 S. W. 1095.

2. Marbury Lumber Co. v. Westbrook, 121 Ala. 179, 25 So. 914; Dimmick Pipe Co. v. Wood, 139 Ala. 282, 35 So. 885; Braswell v. Garfield Cotton Oil Mill Co., 7 Ga. App. 167, 66 S. E. 539; Berry v. Majestic Milling Co. (Mo. App.), 210 S. W. 434; Haynie v. North Carolina Electric Power Co., 157 N. C. 503, 73 S. E. 198; Southwestern Telegraph & Telephone Co. v. Coffey (Tex. Civ. App.), 167 S. W. 8.

3. New v. Southern Ry. Co., 116 Ga. 147, 42 S. E. 391, 59 L. R. A. 115; *contra*, Texas & P. Ry. Co. v. Putnam (Tex. Civ. App.), 63 S. W. 910 (recovery for injuries received from negligence of employer not barred).

4. Braswell v. Garfield Cotton Oil Mill Co., 7 Ga. App. 167, 66 S. E. 539; Hendrickson v. Louisville & N. R. Co., 137 Ky. 562, 126 S. W. 117, 30 L. R. A. (N. S.) 311; Hillsboro Cotton Mills v. King, 51 Tex. Civ. App. 518, 112 S. W. 132.

5. Union P. R. Co. v. Fort, 17 Wall. 553, 21 L. ed. 739.

6. Marbury Lumber Co. v. Westbrook, 121 Ala. 179, 25 So. 914; Haynie v. North Carolina Electric Power Co., 157 N. C. 503, 73 S. E. 198, 37 L. R. A. (N. S.) 580.

7. Woodward Iron Co. v. Curl, 153 Ala. 205, 44 So. 974; Jefferson Fertilizer Co. v. Burns, 10 Ala. App. 301, 64 So. 667; King v. Floding, 18 Ga. App. 280, 89 S. E. 451; Hendrickson v. Louisville & N. Ry. Co., 137 Ky. 562, 126 S. W. 117; Boutotte v. Daigle, 113 Me. 539, 95 A. 213; Webb v. Southern Ry. Co., 104 S. C. 89, 88 S. E. 297; Cook v. Urban (Tex. Civ. App.), 167 S. W. 251.

8. Warrior Mfg. Co. v. Jones, 155 Ala. 379, 46 So. 456; Tennessee Coal, Iron & R. Co. v. Crotwell, 156 Ala. 304, 47 So. 64; King v. Floding, 18 Ga. App. 280, 89 S. E. 451; Louis-

§ 761. Suits for Seduction of a Child.

Even in seduction suits the same technical principle is rather absurdly, though not always unkindly, applied. The foundation of the action by a father to recover damages against the wrong-doer for the seduction of his daughter has been uniformly placed, from the earliest times, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which he is supposed to have a legal right or interest.[9] At common law the seduced woman herself has no cause of action against her seducer.[10] And without some allegation and proof of loss of service in a parent or master the action is not maintainable. Our local statutes, however, sometimes change this basis of action in favor rather of a loss of society and solace.[11]

Thus, where it was alleged by the father that his daughter was a poor person, maintaining herself by her labor and personal services, and not of sufficient ability to maintain herself otherwise; and that, by being debauched, she became unable to work, and had to be maintained by her father at considerable expense,— all this was held insufficient allegation of loss of service.[12] So it is not enough to show that the father had apprenticed his daughter to the defendant to learn millinery, and had paid him a large sum of money to instruct her in a trade, but that the defendant seduced her and rendered her unable, by reason of pregnancy, to learn the trade.[13]

But the evidence of service may be very slight; for the making tea, milking cows, or doing any household work at the command of the parent, is esteemed quite sufficient to constitute the relationship of master and servant, when the girl is residing with her father and mother;[14] and the right of action once clear, damages far in excess of the loss of service are usually recoverable, damages

ville & N. R. Co. v. Davis, 32 Ky. Law Rep. 306, 105 S. W. 455; Mauck v. Southern Ry. Co. in Kentucky, 148 Ky. 122, 146 S. W. 28.

9. Grinnell v. Wells, 7 M. & Gr. 1033; Eager v. Grimwood, 1 Exch. 61; Van Horn v. Freeman, 1 Halst. 322; McDaniel v. Edward, 7 Ired. 408; Sutton v. Huffman, 32 N. J. L. 58; Knight v. Wilcox, 14 N. Y. 413; Bartley v. Richtmeyer, 4 Comst. 38.

10. Woodward v. Anderson, 9 Bush, 624.

11. Graham v. McReynolds, 90 Tenn. 673; Stoudt v. Shepherd, 73 Mich. 588.

12. Grinnell v. Wells, 7 M. & Gr. 1033.

13. Harris v. Butler, 2 M. & W. 539.

14. 1 Addison, Torts, 698, 701; Bennett v. Allcott, 2 T. R. 166; Thompson v. Ross, 5 Hurl. & Nor. 16; Manvell v. Thomson, 2 Car. & P. 303; Vossel v. Cole, 10 Mo. 634; 2 Kent, Com. 205, 12th ed., and cases cited.

which practically regard the wrong done by her disgrace to the young woman's household and to her own character and prospects. Thus will justice, seeing the goal clearly, drive straight towards it, regardless of obstructions; either finding an avenue or making one.

But to render this action maintainable, the parent must have a genuine right to his daughter's services, however slight the services which may be exacted. If, therefore, the daughter, at the time she was seduced, was at the head of an establishment of her own, and her father was living with her as a visitor in her own house, she cannot be treated as holding the subordinate position of a servant, and the action will not lie.[15] Nor can a parent sue, as the stricter rule is laid down, where the child is really in the service of another, and, by permission of her mistress, comes home to render slight assistance from time to time.[16] Nor where the child is seduced while in the service of another, and then returns home and remains there in a state of pregnancy.[17] Nor where one's daughter had been left to shift for herself and was another's household servant.[18] But if the daughter is away only on a temporary visit, and still forms part of her father's family, and makes herself serviceable to him while she is at home, such temporary absence constitutes no impediment to an action by the father for damages.[19] In a word, the question is whether there was, at the time the injury was committed, a *bona fide* relation of constructive service between parent and child, which suffered by the wrongful act of the defendant.

This rule of constructive service is, however, carried very far, by many of our later and humane decisions.[20] Such cases illustrate

15. Manley v. Fields, 7 C. B. (N. S.) 96.

16. Thompson v. Ross, 5 Hurl. & Nor. 16; Hedges v. Tagg, L. R. 7 Ex. 283; Blaymire v. Haley, 6 M. & W. 55. And see Kinney v. Laughenour, 89 N. C. 365.

17. Davies v. Williams, 10 Q. B. 725.

18. Ogborn v. Francis, 44 N. J. L. 441.

19. Griffiths v. Teetgen, 15 C. B. 344; 28 E. L. & Eq. 371. See, further, 1 Addison. Torts. 698; Evans v. Walton. L. R. 2 C. P. 615.

20. There is a New Jersey case, where it appeared in evidence that the daughter was about twenty-two years of age when seduced, and was living a part of the time with her brother, who occupied a farm about a mile from her father, and part of the time with her father. While the rule was fully approved that the father and daughter must have stood in the relation of master and servant at the time the injury was committed, it was further held that it was not necessary that the daughter should be in the actual service of the father at the time of the seduction, if the relation of master and servant then existed between them; in other words, that the service rendered need not be

the generous disposition with which the courts uphold a parent's right of action in seduction suits; and it is probably at any point short of her abode in another household where the parent has relinquished the right of her service past the power of recall, that the bounds should be placed to this rule of a daughter's service entitling the parent to sue for damages.[21]

house service, nor service from day to day, but that any accustomed service lost by the injury would sustain the action. Sutton v. Huffman, 32 N. J. L. 58. And see Greenwood v. Greenwood, 28 Md. 370; Ellington v. Ellington, 47 Miss. 329; Emery v. Gowen, 4 Me. 33; Simpson v. Grayson, 54 Ark. 404. In these and some other cases there is a manifest tendency to exclude a presumption of emancipation, so as to leave the parent's remedy unimpaired. The rule in Virginia is more strict. Lee v. Hodges, 13 Gratt. 726. In New York, the doctrine of Martin v. Payne, 9 Johns. 387, and other cases, led to much confusion, by permitting suits to be brought where there was in reality no loss of services sustained. But in the later cases the courts have returned to the strictness of the English rule. Bartley v. Richtmeyer, 4 Comst. 38. And cf. earlier and later notes to 2 Kent, Com. 205. In a recent English case the plaintiff's daughter, being under age, left his house and went into service. After nearly a month the master dismissed her at a day's notice, and the next day, on her way to her father's house, the defendant seduced her. It was held that as soon as the real service was terminated by the master, whether rightfully or wrongfully, the girl intending to return home, the right of the father to her services revived, and that there was, therefore, sufficient evidence of service to maintain an action for the seduction. Terry v. Hutchinson, L. R. 3 Q. B. 599 (1868). And see Evans v. Walton, L. R. 2 C. P. 615. This, the court admitted, was carrying the doctrine of constructive service very far. "The action, no doubt, is founded on the special ground of loss of service (this is not very creditable, perhaps, to our law), but the action is substantially for the aggravated injury that the father has sustained in the seduction of the child." Per Cockburn, C. J., in Terry v. Hutchinson, L. R. 3 Q. B. 599.

21. Where the father verbally agrees that his daughter shall reside as servant in a stranger's family for a certain number of years, this does not debar his right to recover for her seduction during minority by her employer's son. Mohry v. Hoffman, 86 Pa. St. 358. Cf. White v. Murtland, 71 Ill. 252. In other words, the father may sue *per quod* where he does not relinquish the daughter's services, but retains the right to command them, though she resides elsewhere. Mohry v. Hoffman, *supra;* Blagge v. Ilsley, 127 Mass. 191. Very slight service at home every Sunday, where the daughter is employed by another, suffices. Kennedy v. Shea, 110 Mass. 147; Riddle v. McGinnis, 22 W. Va. 253.

Enticing one's daughter away for the purpose of prostitution or concubinage or seduction, is made an indictable offence in some States. Slocum v. People, 90 Ill. 274; State v. Breice, 27 Conn, 319; Wood v. State, 48 Ga. 192; Boyce v. People, 55 N. Y. 644; Bowers v. State, 29 Ohio St. 542; Galvin v. Crouch, 65 Ind. 56. And see Bishop and other general writers on Criminal Law and Torts. The female under such statutes, ought in general to be of good repute for chastity previous to the offence, and unmarried. But statutes differ. See

It is not necessary that the daughter should be under age in order that the parent may maintain the action for seduction. The important question is, whether emancipation in fact had taken place at the time of the injury; for if the relation of master and servant exists between the father and his grown-up daughter, however this relation may have been created, the right of action is complete.[22] And even where a married woman, separated from her husband, returned to her father's house and lived with him, performing various acts of service, it was held that, as against a wrong-doer, it was sufficient to prove that there was the relationship of master and servant *de facto*.[23]

So where one stands *in loco parentis*, he may recover damages, as an actual parent would; as in the case of an orphan living with a relation, or a friend and benefactor, and rendering such domestic attendance and obedience as is usually rendered by a daughter to her father.[24] But the parent cannot maintain an action for the seduction of a daughter over twenty-one and working out on her own account.[25] And while, as surviving parent, the mother may sue for her daughter's seduction under circumstances showing service rendered her, it is held that a mother cannot maintain an action for the seduction of her daughter while the father was alive, though the illicit offspring was not born until after the father's death.[26]

The wrongful act for which the parent sues must be the natural and direct cause of the injury for which damages are sought, and

State v. Jones, 16 Kan. 608. The woman might have reformed. Illicit intercourse alone does not constitute what is known as seduction. People v. Clark, 33 Mich. 112.

22. 1 Addison, Torts, 700; Sutton v. Huffman, 32 N. J. L. 58; Greenwood v. Greenwood, 28 Md. 370; Stevenson v. Belknap, 6 Ia. 97; Wert v. Strouse, 38 N. J. L. 184. An imbicile daughter over twenty-one, who lives at home still, is not emancipated in any sense to debar a suit. Hahn v. Cooper, 84 Wis. 629.

23. Harper v. Luffkin, 7 B. & C. 387.

24. 1 Addison, Torts, 700; Irwin v. Dearman, 11 East, 23; Edmonson v. Machell, 2 T. R. 4; Williams v. Hutchinson, 3 Comst. 312; Maguinay v. Saudek, 5 Sneed, 146; Ball v. Bruce, 21 Ill. 161.

25. George v. Van Horn, 9 Barb. 533.

26. Vossel v. Cole, 10 Mo. 634; Gray v. Durland, 50 Barb. 100. Statutes enlarging the rights of married women sometimes extend the mother's action. Badgley v. Decker, 44 Barb. 577. A widowed mother whose minor child is actually in her service has the right of action. Gray v. Durland, 51 N. Y. 424. A mother remarried may have the right to sue. Lampman v. Hammond, 3 Thomp. & C. 293. See Hobson v. Fullerton, 4 Ill. App. 282; Furman v. Van Sise, 56 N. Y. 435. But not one in whose household a girl

the damages recoverable its necessary and proximate consequence. To this principle is to be referred a curious case in New York.[27] But mental illness directly resulting from the injury is, of itself, sufficient to support an action for loss of services; and such a suit might be maintainable, notwithstanding seduction was followed neither by pregnancy nor sexual disease.[27a]

Where a person hires a girl as a servant for the purpose of withdrawing her from her family and seducing her, this is fraud, and the parent's right of action is not thereby forfeited; for in such a case the new relation of master and servant is not *bona fide* created, and the former relation may be held to have continued.[28] Fraudulent marriage virtually resulting in a seduction may be treated as enticement.[29] It would seem as though the previous unchasteness of a girl — considering, too, her age, and her apparent want of parental oversight — ought to affect the right of such suits and the damages; but at all events it is the general rule that the daughter's consent does not bar the parental suit whether the daughter was willing or not, and whether the person debauching her accomplished his end by force or by insinuating arts; nor is "seduction" commonly applied here in its most literal sense.[30] But we may finally observe that the latest legislation in some States tends to place seduction suits on a more natural footing, by enabling the woman to sue an offender directly in damages for her own seduction and the consequent injury.[31]

§ 762. Parent's Action for Death.

Though natural equity may assert otherwise, the common law does not permit a father to recover for injuries causing the immediate death of his child, either on the ground of loss of services or

stays temporarily without any definite agreement of service. Blanchard v. Ilsley, 120 Mass. 487.

A grandfather standing *in loco parentis*, and with due rights and obligations, may thus sue. Certwell v. Hoyt, 13 N. Y. Supr. 575.

27. Knight v. Wilcox, 14 N. Y. 413. See Eager v. Grimwood, 1 Exch. 61; Boyle v. Brandon, 13 M. & W. 738; Reddie v. Scoolt, Peake, 240; 1 Addison, Torts, 701, as to the various grounds of defence in seduction suits.

27a. Manvell v. Thomson, 2 Car. & P. 303; Seager v. Sligerland, 2 Caines, 219; Abrahams v. Kidney, 104 Mass. 222.

28. Speight v. Oliviera, 2 Stark. 435; 2 Kent Com. 205; 1 Addison, Torts, 699; Dain v. Wyckoff, 18 N. Y. 45.

29. Lawyer v. Fritcher, 130 N. Y. 239.

30. Damon v. Moore, 5 Lansing (N. Y.) 454; Graham v. Reynolds, 90 Tenn. 673.

31. Thompson v. Young, 51 Ind. 599; Watson v. Watson, 49 Mich. 540; Weiher v. Meyersham, 50 Mich. 602. To sue thus, alleging that she per-

for burial expenses.[32] And since, as we have seen, the parent's right of suit is founded upon the loss of a child's services, irrespective of the child's own suit for damages, there are circumstances under which such suits might be brought, notwithstanding the child was of age, contrary to the general rule,[33] or where one stood to a child not his own in place of a parent.[34]

However, statutes enlarging the rights of widows, dependent parents, and others, in torts occasioned by the negligence of railroad corporations and other common carriers, are to be found in England and America. Under such statutes it is frequently provided that, where a child is thus killed, the child's administrator may sue for the parent's benefit. The English statute, known as Lord Campbell's Act, 9 & 10 Vict., c. 93, has given rise to suits of this kind; but the rule is laid down that such actions are not maintainable without some evidence of actual pecuniary damage, some loss of service.[35]

Under statutes giving a right of action for death of the child to the parent like the Federal Employers' Liability Statute, the

mitted seduction in consideration of a promise to pay money which the defendant failed to keep, is a bar to the action. Wilson v. Ensworth, 85 Ind. 399. But previous chastity need not be averred. Hodges v. Bales, 102 Ind. 494. Nor special damage. McIlvain v. Emery, 88 Ind. 298. A female of nonage may thus sue. McCoy v. Trucks, 121 Ind. 292.

32. Osborn v. Gillett, L. R. 8 Ex. 88, and cases cited; Edgar v. Castello, 14 S. C. 20; McDowell v. Georgia R., 60 Ga. 320; Carey v. Berkshire R., 1 Cush. 475. Parental suit not allowed against the seller of a revolver to a boy of fifteen, in violation of law, with which the boy carelessly shot himself. Poland v. Earhart, 70 Ia. 285. But suit allowed against one who employed a child, without the father's consent, in dangerous service, and negligently caused the child's death. Fort Wayne R. v. Beyerle, 110 Ind. 100. As to circumstances of such employment and knowledge that the child was a minor, cf. Railway Company v. Redeker, 67 Tex. 190; T. & N. O. Ry. Co. v. Crowder, 61 Tex. 262. And see Sherman v. Johnson, 58 Vt. 40. In suits for damages caused by corporate negligence, our juries, and sometimes the courts and legislature, incline to extravagant computation of a punitive sort. See rule of statute held constitutional in 84 Ga. 345. Burial expenses, if the child dies of the injury, are recoverable. 121 Mo. 227. Prospective services of the child during minority, less the cost of support, should be considered in case the child is killed, and actual pecuniary damage estimated, 95 Cal. 510. Whether the statutory action by administrator and the parental action coexist, see 53 Ark. 117.

33. Pennsylvania R. v. Keller, 67 Pa. St. 300; Mercer v. Jackson, 54 Ill. 397. And see *infra*, § 262.

34. Whitaker v. Warren, 60 N. H. 20; § 273.

35. Duckworth v. Johnson, 4 Hurl. & Nor. 653. See, further, Frank v. New Orleans, &c., R., 20 La. Ann. 25; Pennsylvania R. v. Banton, 54 Pa.

extent of the damage is to be measured by the pecuniary loss sustained by the beneficiaries rather than by the loss to the estate of the deceased. The damages must in the case of parents be limited to the present worth of gifts which the parents could reasonably have expected to have received from the adult child in the course of their lives. This involves an inquiry into the means and earning capacity of the decedent on the one hand and the means and earning capacity of the parents on the other hand.[36]

The mother of a child who is divorced from the father and is obliged by statute to support the child is entitled to recover for his wrongful death,[37] and where a father deserts his family entirely and leaves the mother to take care of them, and she negligently allows him to undertake a dangerous occupation, she is his agent so far that her negligence will bar a suit for the death of the child brought for his benefit.[38] So where the damages recovered for the death of a minor child under the statute would be community property, no recovery can be had for the benefit of the wife where the husband is barred by his negligence or misrepresentation, as there is no way of allowing the mother a recovery without allowing the father to profit by his own wrong.[39] A statute providing for action for death to the parents of an "unmarried" woman covers a case of one who dies in an accident about thirty minutes after her husband.[40]

§ 763. Father's Liability for Fraudulent Misstatement of Age.

Where a person is induced by the misrepresentation of another to do an act which, in consequence of such misrepresentation, he, without negligence on his part, believes to be neither illegal nor immoral, and which would not be illegal or immoral if the representation were true, but which is in fact a criminal offence, he may recover from the maker of the representation any damages sustained by him proximately resulting from the act.

The rule that a minor suffering an injury while engaged in an employment which the law forbids him to be engaged in on account

St. 495; Gann v. Worman, 69 Ind. 458; Perry v. Carmichael, 95 Ill. 519; Mayhew v. Burns, 103 Ind. 328.

36. McCullough v. Chicago, Rock Island & Pacific R. Co. (Ia.), 142 N. W. 67, 47 L. R. A. (N. S.) 23.

37. Clark v. Detroit & Mackinac R. Co. (Mich.), 163 N. W. 964, L. R. A. 1917F, 851.

38. Swope v. Keystone Coal & Coke Co. (W. Va.), 89 S. E. 284, L. R. A. 1917A, 1128.

39. Crevelli v. Chicago, Milwaukee, &c., R. Co. (Wash.), 167 Pac. 66, L. R. A. 1918A, 206.

40. Myers v. Denver & Rio Grande R. Co. (Colo. 1), 157 Pac. 196, L. R. A. 1917D, 287.

of his age cannot be barred of his recovery nor subjected to an action or counterclaim for damages because he misrepresented his age when he was employed does not apply to the father or other third person upon the faith of whose false representations the minor was employed. The law prohibiting the employment of children of tender years at dangerous occupations is for the protection of the children themselves, and public policy forbids that they should be capable of dispensing with its provisions. The same consideration, however, does not apply to the act of the parent. No good reason is perceived why he should not answer for his wrong. Hence one who employs a minor, relying on the false representations of the father as to his age, may recover of the father the expenses to which he was subjected by recovery against him by the minor in an action under the statute for employment of a minor in a dangerous occupation.[41] So an action brought by the surviving parent for the death of his minor child is barred by the fraud of the parent in misrepresenting the age of the child in obtaining employment for him. To allow a recovery would be a violation of the policy of the law which forbids that one shall reap a benefit for his own misconduct, and the rule is the same where the father brings the action as administrator of the son for his own benefit.[42]

§ 764. Parties.

Action for injury to the minor child should be brought in the name of the father, if alive,[43] or if he is dead at the time of the injury in the name of the mother,[44] but under a statute giving both

41. Stryk v. Mnichowicz, 167 Wis. 265, 167 N. W. 246, 1 A. L. R. 297.

42. Crevelli v. Chicago, Milwaukee, &c., R. Co. (Wash.), 167 Pac. 66, L. R. A. 1918A, 206.

43. Louisville, N. A. & C. Ry. Co. v. Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. R. 371; Adams v. Louisville & N. R. Co., 153 Ky. 42, 154 S. W. 392; Ackeret v. City of Minneapolis, 151 N. W. 976.

44. Union News Co. v. Morrow, 20 Ky. Law, 302, 46 S. W. 6; Crowley v. Pennsylvania R. Co., 231 Pa. 286, 80 A. 175.

The fact that the mother since the injury has become unfit to have the care and custody of the child does not prevent action in her name. Union News Co. v. Morrow, 20 Ky. Law, 302, 46 S. W. 6; Creagh v. New Orleans Ry. & Light Co., 128 La. 305, 54 So. 828.

The mother cannot sue where the father is living. Kaufman v. Clark, 141 La. 316, 75 So. 65; Franklin v. Butcher, 144 Mo. App. 660, 129 S. W. 428.

Death or desertion of the father may be enough to warrant action by the mother under statute, but the father's death or desertion must appear in the petition. Martin v. City of Butte, 34 Mont. 281, 86 P. 264; McGarr v. Nat. & Providence Worsted Mills, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122, 96 Am. St. R. 749; Forsyth v. Central Mfg. Co., 103

parents equal rights in minor children it is proper for both to join in an action to recover for loss of services of a minor child.[45]

Suit may be brought in some States by statute by a deserted wife,[46] or where it appears that by mutual arrangement the mother has taken the care of the child and the father has relinquished his rights to the child's earnings,[47] or by anyone standing *in loco parentis* to the child.[48]

A divorce decree giving the mother care and custody of the children does not release the father from the duty of support, and therefore does not entitle her to sue for injury to a child.[49] Where the father dies pending suit and the mother is substituted a judgment in her name in her own right cannot be obtained.[50]

§ 765. Negligence of Parent.

The negligence of the parent in failing to take care properly of his minor child will bar the parent from action for injury to the child where the parent's negligence contributes to the injury,[51] as

Tenn. 497, 53 S. W. 731; Natchez R. v. Cook, 63 Miss. 38. Some late cases prefer to say that the right is based upon the parental relation, as distinct from, though analogous to, that of master and servant. Netherland-American Steam Nav. Co. v. Hollander, 59 Fed. 417. See Sorenson v. Balaban, 42 N. Y. S. 654, 11 App. Div. 164, 4 N. Y. Ann. Cas. 7.

45. Bailey v. College of Sacred Heart, 52 Colo. 116, 119 P. 1067; Thomas v. St. Louis, I. M. & S. Ry. Co., 180 S. W. 1030.

46. American Steel & Wire Co. v. Tynan, 183 F. 949, 106 C. C. A. 289 (unless remarried); Tornroos v. R. H. White Co., 220 Mass. 336, 107 N. E. 1015; Yost v. Grand Trunk Ry. Co., 163 Mich. 564, 128 N. W. 784, 17 Det. Leg. N. 911.

47. McGarr v. National & Providence Worsted Mills, 24 R. I. 447, 53 A. 320, 60 L. R. A. 122, 96 Am. St. R. 749.

48. City of Albany v. Lindsey, 11 Ga. App. 573, 75 S. E. 911.

49. Keller v. City of St. Louis, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391.

50. Kelly v. Pittsburg & B. Traction Co., 204 Pa. 623, 54 A. 482.

51. *Defendant's failure to warn.* In an action by a parent for injury to a minor, based upon defendant employer's failure to instruct her as to the dangers of the employment, that the parent knowingly permitted the minor to go unprotected among defendant's machinery, knowing the place to be dangerous, etc., is insufficient to show contributory negligence, defeating right to recovery. Reaves v. Anniston Knitting Mills, 154 Ala. 565; 45 So. 702; s. c., 166 Ala. 645, 52 So. 142; St. Louis, I. M. & S. Ry. Co. v. Colum, 72 Ark. 1, 77 S. W. 596; Thomas v. Chicago, M. & St. P. Ry. Co., 114 Ia. 169, 86 N. W. 259; Feldman v. Detroit United Ry., 162 Mich. 486, 127 N. W. 687, 17 Det. Leg. N. 707; Mattson v. Minnesota & N. W. R. Co., 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 503, 111 Am. St. R. 483; Peterson v. Martin (Minn.), 164 N. W. 813; Mattson v. Minnesota & N. W. R. Co., 98 Minn. 296, 108 N. W. 517; Berry v. St. Louis, M. & S. E. R. Co., 214 Mo. 593, 114 S. W. 27; Winters v. Kansas City

where the parent was at work and unable to have personal oversight of the child.[52] If the defendant's negligence was the proximate cause of the injury the parents may still recover although negligent in some jurisdictions.[53] The negligence of a parent is not to be imputed to a minor child. So where the father is driving a horse and sleigh with his child as passenger the father's negligence is not to be imputed to the child.[54]

§ 766. Contributory Negligence of Child.

The contributory negligence of the child will be a defence to an action by the parent if it proximately contributed to the injury.[55]

§ 767. Pleadings.

The petition should set forth the injury received and the relation of the plaintiff as parent,[56] and that as a consequence thereof

Cable Ry. Co., 99 Mo. 509, 12 S. W. 652, 6 L. R. A. 536, 17 Am. St. R. 591 (parents' negligence must be the proximate cause of injury); Harrington v. Butte, A. & P. Ry. Co. (Mont., 1908), 95 P. 8 (*prima facie* evidence); Conway v. Monidah Trust, 52 Mont. 244, 157 P. 178; O'Shea v. Lehigh Val. R. Co., 79 N. Y. S. 890, 79 App. Div. 254; Rapaport v. Pittsburgh Rys. Co., 247 Pa. 347, 93 A. 493; Kuehne v. Brown, 257 Pa. 37, 101 A. 77; Pollack v. Pennsylvania R. Co., 210 Pa. 634, 60 A. 312, 105 Am. St. R. 846; Watson v. Highland Grove Traction Co., 68 Pa. Super. Ct. 332; Kilpatrick v. City of Spartanburg, 85 S. E. 775; Berger v. Charleston Consol. Ry., Gas. & Electric Co., 93 S. C. 372, 76 S. E. 1096; Gulf, C. & S. F. Ry. Co. v. Johnson (Tex., 1899), 51 S. W. 531, 53 S. W. 374; Pierce v. Millay, 62 Ill. 133; Smith v. Hestonville R., 92 Pa. St. 450; Kreis v. Wells, 1 E. D. Smith, 74; Glassey v. Hestonville, &c., R., 57 Pa. St. 172.

In the following cases negligence of the parent did not appear: Cohn v. W. E. Cody Sales Stable Co., 14 Ga. App. 234, 80 S. E. 661 (eight-year-old boy riding tricycle in street); Winters v. Kansas City Cable Ry. Co., 99 Mo. 509, 12 S. W. 652, 6 L. R. A. 536, 17 Am. St. R. 591 (where usual care used); Quinn v. City of Pittsburgh, 243 Pa. 521, 90 A. 353 (crossing foot-bridge); Enright v. Pittsburg Junction R. Co., 204 Pa. 543, 54 A. 317 (strolling on railroad tracks); Texas & P. Ry. Co. v. Ball, 96 Tex. 622, 75 S. W. 4, 73 S. W. 420 (crossing railroad track).

52. Addis v. Hess, 29 Pa. Super. Ct. 505; Weida v. Hanover Tp, 30 Pa. Super. Ct. 424; Distasio v. United Traction Co., 35 Pa. Super. Ct. 406.

53. Danna v. City of Monroe, 129 La. 138, 55 So. 741.

54. Brennan v. Minnesota, &c., R. Co., 130 Minn. 314, 153 N. W. 611, L. R. A. 1915F, 11.

55. Marbury Lumber Co. v. Westbrook, 121 Ala. 179, 25 So. 914; Wueppeshal v. Connecticut Co., 87 Conn. 710, 89 A. 166; Ballard v. Smith (Ky.), 210 S. W. 489 (where child without knowledge of employer undertook dangerous work); Tidd v. Skinner(N. Y.), 122 N. E. 247; Kenner v. Rader, 170 N. Y. S. 957.

Where a minor was induced by his employer to engage in hazardous employment without the consent of his father the minor's contributory negligence is no defence. Webb v. Southern Ry. Co., 104 S. C. 89, 88 S. E. 297.

56. Woodward Iron Co. v. Curl, 153 Ala. 205, 44 So. 974 (child presumed

the parent lost his services.[57] In actions against an employer the petition should state that the work was dangerous,[58] and that the employment was without the consent of the parent.[59]

§ 768. Evidence.

The evidence in an action by a parent for injury to his minor child may cover the relationship of the parent and child,[60] the expense of supporting and caring for the child while ill,[61] and the due care of the parent and child,[62] and the character of the dangerous occupation.[63] Evidence is not admissible of an action for the same injury by the child unless expenses of care were claimed in it,[64] or that plaintiff depended for a living on the wages of the child.[65]

The burden is on the plaintiff to prove all the allegations of the complaint,[66] and the burden is on the defendant to prove emancipation.[67] The unexplained presence of a young child in a dangerous place makes out a *prima facie* case of negligence in the parents.[68]

§ 769. Questions for Jury.

The question of the parent's negligence is for the jury, in most cases,[69] and so is the question of emancipa-

to be a member of the family); Binford v. Johnston, 82 Ind. 426, 42 Am. R. 508; Larson v. Berquist, 34 Kan. 334, 8 P. 407, 55 Am. R. 249; Webb v. Southern Ry. Co., 104 S. C. 89, 88 S. E. 297; Markus v. Thompson, 51 Tex. Civ. App. 239, 111 S. W. 1074; Woodward Iron Co. v. Curl, 153 Ala. 205, 44 So. 974 (employment and its dangerous nature).

57. Birmingham Ry., Light & Power Co. v. Chastain, 158 Ala. 421, 48 So. 85; Reaves v. Anniston Knitting Mills, 154 Ala. 565, 45 So. 702.

58. Woodward Iron Co. v. Curl, 153 Ala. 205, 44 So. 974.

59. Reaves v. Anniston Knitting Mills, 154 Ala. 565, 45 So. 702; Interstate Coal Co. v. Trivett, 155 Ky. 795, 160 S. W. 731; Hetzel v. Wasson Piston Ring Co., 89 N. J. Law, 205, 98 A. 308.

60. Woodward Iron Co. v. Cook, 124 Ala. 349, 27 So. 455 (consent of employment presumed); Brunke v. Missouri & K. Telephone Co., 112 Mo. App. 623, 87 S. W. 84; Dean v. Ore. R. & Nav. Co., 38 Wash. 565, 80 P. 842.

61. Sawyer v. Sauer, 10 Kan. 519.

62. Cameron v. Duluth-Superior Traction Co., 94 Minn. 104, 102 N. W. 208; Woeckner v. Erie Electric Motor Co., 182 Pa. St. 182, 37 A. 936.

63. Huntsville Knitting Mills v. Butner (Ala.), 76 So. 54.

64. Sondheim v. Brooklyn Heights R. Co., 73 N. Y. S. 543, 36 Misc. 339.

65. Gulf, C. & S. F. Ry. Co. v. Johnson, 99 Tex. 337, 90 S. W. 164.

66. King v. Floding, 18 Ga. App. 280, 89 S. E. 451 (that child given dangerous work without parent's consent).

67. Memphis Steel Const. Co. v. Lister, 138 Tenn. 307, 197 S. W. 902.

68. Conway v. Monidah Trust, 52 Mont. 244, 157 P. 178.

69. Huntsville Knitting Mills v.

tion,[70] but the child's competency to care for himself should not be so submitted when the father testifies that the child is competent and the child evidently appears such.[71]

§ 770. Damages for Injuries or Enticement.

In suits for injuries, such as for enticement, the measure of damages applied is liberal, though the rule is somewhat conflicting in different States. It is a general principle that where servants are enticed away, or forcibly abducted, the jury may award ample compensation for all the damage resulting from the wrongful act.[72] A parent can recover damages for the prospective value of the services of a young child permanently injured or killed by an act of negligence;[73] and a reasonable expectation of pecuniary benefit is favorably considered where the parent is old and infirm.[74]

Medical expenses for the care and cure of the child, with the expense of nursing, are of course recoverable. And even the expense of the mother's sickness, which was caused, in an extreme case, by the shock to her feelings, has been treated as a proper item of special damage.[75] So, it would seem, are the costs of prosecuting the suit.[76] But the parent cannot recover for lacerated feelings, as well as for other injuries personal to the child, as in seduction suits.[77] But local statutes will sometimes affect the

Butner (Ala.), 76 So. 54; Koersen v. Newcastle Electric St. Ry. Co., 198 Pa. 30, 47 A. 851; Jones v. United Traction Co., 201 Pa. 346, 50 A. 827; Muhlhause v. Monongahela St. Ry. Co., 201 Pa. 244, 50 A. 940; Herron v. City of Pittsburg, 204 Pa. 509, 54 A. 311, 93 Am. St. R. 798; Trow v. Thomas, 70 Vt. 580, 41 A. 652.

70. Shawnee-Tecumseh Traction Co. v. Campbell (Okla.), 155 P. 697.

71. Henderson v. Detroit Citizens' Street Ry. Co., 116 Mich. 368 74 N. W. 525, 4 Det. Leg. N. 1205.

72. Gunter v. Astor, 4 Moore, 15; 1 Addison, Torts, 704; Lumley v. Gye, 2 El. & Bl. 216; Magee v. Holland, 3 Dutch. 86.

73. *Supra*, § 760; Drew v. Sixth Avenue R. R. Co., 26 N. Y. 49; Ford v. Monroe, 20 Wend. 210; Hoover v. Heim, 7 Watts, 62; Franklin v. Southeastern R. R. Co., 3 Hurl. & Nor. 211. But see Williams v. Hutchinson, 3 Comst. 314. For the loss of service for the remainder of the period of minority, a parent may usually recover if such loss necessarily result; while if the injury continue beyond that period further right is usually in the child. Traver v. Eight Avenue R., 4 Abb. App. 422; McDowell v. Georgia R., 60 Ga. 320; Houston R. v. Miller, 49 Tex. 322; Hussey v. Ryan, 64 Md. 426.

74. Duckworth v. Johnson, 4 H. & N. 653; Franklin v. Southeastern R., 3 H. & N. 211.

75. Ford v. Monroe, 20 Wend. 210. Such damages appear exceptional. Harford Co. v. Hamilton, 60 Md. 340.

76 Wilt v. Vickers, 8 Watts, 227.

77. Pa. R. R. Co. v. Kelly, 31 Pa. St. 372; Sawyer v. Sauer, 10 Kan. 519; Cowden v. Wright, 24 Wend. 429. But see, as to battery of a child,

question of damages here as well as the right of action itself.[78]

The damages resulting from loss of services may be estimated, although they cannot be exactly computed, and a reasonable verdict therefor will be allowed to stand,[79] and may include permanent loss of services during minority if proved,[80] and the increase in the value of the child's services with age may be considered,[81] but not injury to the child's health,[82] or loss of the child's society.[83] Where the injury results in death the parent may, in the absence of statute, recover only for the loss of the child's services between the injury and his death.[84]

The damages recoverable for enticing a child away from her mother and keeping her in a school are compensatory only and not punitive,[85] and one who entices a minor daughter to work for him without the parent's consent is not liable for her seduction by his son, as this is too remote to be assessed as damages.[86]

§ 771. Damages for Seduction.

As to the amount of damages, cases of seduction stand on a peculiar footing. The ground of action is the loss of services; yet the rule is well established that neither this nor the medical expenses, such as her lying-in, are all that the parent can recover. Lord Ellenborough, in his day, declared the principle inveterate, and not to be shaken, that in estimating damages the jury might go beyond the mere loss of service, and give damages for the distress and anxiety of mind which the parent had sustained in being

Klingman v. Holmes, 54 Mo. 304. See also Rooney v. Milwaukee Chair Co., 65 Wis. 397.

78. M'Carthy v. Guild, 12 Met. 291; Kennard v. Burton, 25 Me. 39.

79. Vanderveer v. Moran, 79 Neb. 431, 112 N. W. 581; Blackwell v. Memphis St. Ry. Co., 124 Tenn. 516, 137 S. W. 486.

80. Wennell v. Dowson, 88 Conn. 710, 92 A. 663; Travers v. Hartman, 92 A. 855; Orr v. Wahlfeld Mfg. Co., 179 Ill. App. 235; Shawnee Gas & Electric Co. v. Hunt, 32 Okla. 368, 122 P. 673; Northern Texas Traction Co. v. Crouch (Tex. Civ. App.), 202 S. W. 781 (only during minority).

81. Shawnee Gas & Electric Co. v. Motesenbocker, 41 Okla. 454, 138 P. 790.

82. Western Union Telegraph Co. v. Erwin (Tex. Civ. App.), 147 S. W. 607.

83. Birmingham Ry., Light & Power Co. v. Baker, 161 Ala. 135, 49 So. 755; Werbolovsky v. New York & Boston Despatch Express Co., 117 N. Y. S. 150, 63 Misc. 329. See Simpson v. Mills Mfg. Co., 104 S. C. 78, 88 S. E. 288 (penalty only recovered).

84. Verlinde v. Michigan Cent. R. Co., 165 Mich. 371, 130 N. W. 317, 17 Det. Leg. N. 1238; Chaloux v. International Paper Co., 75 N. H. 281, 73 A. 301.

85. Magnuson v. O'Dea (Wash.), 135 Pac. 640, 48 L. R. A. (N. S.) 327.

86. Stewart v. Strong, 20 Ind. App. 44, 50 N. E. 95.

deprived of the society and comfort of his child.[87] So must the situation in life and circumstances of the parties be taken into consideration in estimating the household disgrace.[88]

A parent cannot maintain an action for injury to feelings by reason of the betrayal of a daughter still living. There is no precedent for an action by one person for injuries to feelings as a consequence of injury to another still living. The only basis for this action is in case of loss of services, and where this is lacking there can be no recovery.[89]

In an action by the father for seduction of the daughter exemplary damages may be allowed in some States, although not specially provided by the statute, and even though the defendant may be liable to exemplary damages by the daughter also. The rule of "double jeopardy" has no application to civil cases. A verdict of $6,000 exemplary damages was supported. Damages may also include a doctor's bill for attendance on the daughter, and the time lost by the daughter at the ordinary wages of household help even though there was no evidence that the father had anything for the daughter to do during the period.[90]

87. Irwin v. Dearman, 11 East, 23.

88. Andrews v. Askey, 8 Car. & P. 9.

"In point of form," observes Lord Eldon, "the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort, as well as the service, of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example." Bedford v. McKowl, 3 Esp. 120. And see Robinson v. Burton, 5 Harring. 335; Klopfer v. Bromme, 26 Wis. 372; Pence v. Dozier, 7 Bush, 133; Dain v. Wyckoff, 18 N. Y. 45; White v. Murtland, 71 Ill. 250. See further, on this subject, White v. Campbell, 13 Gratt. 573; Sellars v. Kinder, 1 Head, 134; 1 Addison, Torts, 703; Eager v. Grimwood, 1 Exch. 61; Richardson v. Fouts, 11 Ind. 466; Reed v. Williams, 5 Sneed, 580; Russell v. Chambers, 31 Minn. 54; Vossel v. Cole, 10 Mo. 634; 2 Kent Com. 205, 9th ed. *n.;* Bigelow on Torts. Exemplary damages have been denied where the daughter's willing misconduct appeared. Comer v. Taylor, 82 Mo. 341. And where before confinement the daughter marries another man, the father's damages may prove merely nominal. Humble v. Shoemaker, 70 Ia. 223. Under statutes changing the old rule, the parent's suit is allowed to embrace not only the loss of peace and comfort to the family, but the effect upon the character and prospects of the girl herself. Stoudt v. Shepherd, 73 Mich. 588.

89. Kaufman v. Clark (La.), 75 So. 65, L. R. A. 1917E, 756.

90. Reutkeimer v. Nolte (Ia.), 161 N. W. 290, L. R. A. 1917D, 273.

CHAPTER IX.

THE PARENT'S DUTIES AND LIABILITIES.

§ 772. Leading Duties of Parents Enumerated.

Three leading duties of parents as to their legitimate children are recognized at the common law: *first,* to protect; *second,* to educate; *third,* to maintain them. These duties are all enjoined by positive law; yet the law of the natural affections is stronger in upholding such fundamental obligations of the parental state.[91]

§ 773. Duty of Protection; Defence, Personal and Legal.

First, as to protection: that cover or shield from evil and injury which is afforded by the parent. This duty the stronger owes to the weaker, and especially does the father owe it to his child, so long as the latter remains comparatively helpless. This obligation may be shifted in time, as age adds to the strength of the one and the infirmities of the other. The duty of giving personal care and protection to children is distinct from the duty of support.[92]

It is to the credit of our civilization that the natural duty of protection is rather permitted than enjoined by any municipal laws; nature in this respect "working so strongly," to use the forcible words of Blackstone, "as to need rather a check than a spur."[93] The strongest illustration of protection at the common law which is furnished by this learned writer, — that of a father who revenged his son's injury by going near a mile and beating the offender to death with a cudgel, — though affording a questionable legal principle, as he puts it, shows at least what the verdicts of our juries are constantly confirming, that the sympathies of human

91. 1 Bl. Com. 447; 2 Kent Com. 189; Taylor's Civil Law, 383; Puff. b. 4, c. 11, §§ 4, 5.

92. Courtright v. Courtright, 40 Mich. 633.

93. Bl. Com. 450.

tribunals are with him who defends his own offspring, even when his zeal outruns his discretion.[94]

A parent may, by the common law of England, maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels.[95] He may also justify an assault and battery committed in defence of the persons of his children.[96] So where a father finds a man attempting to rape his daughter he has a right to protect her by any means in his power and if he kills the assailant in good faith on an appearance of necessity he will be acquitted although it may afterwards appear that he might have prevented the crime by other means.[97]

The culpability of the father going to the defence of his son is measured not by the intent of the son in engaging in a conflict but by the intent with which the father acted. So where the father in ignorance of the circumstances comes upon a fight between the son and another in which his son is apparently in imminent peril of his life and the father kills the son's opponent it would be on his part a homicide in self-defense although the son was originally the aggressor in the fight.[98]

On the other hand, as we shall hereafter see, where he is cruel and devoid of natural affection, his children may be taken from his personal keeping; nay, he may be subject to punishment for his own misconduct.[99] The doctrine of parental protection seems to have required little or no special judicial discussion in modern times.

§ 774. Duty of Education.

The second duty of parents is that of education; a duty which Blackstone pronounces to be far the greatest of all these in importance.[1] This importance is enhanced by the consideration that the usefulness of each new member of the human family to society depends chiefly upon his character, as developed by the training he receives in early life. Not the increase of population, but the increase of a well-ordered, intelligent, and honorable population is

94. See 1 Hawk. P. C. 83, cited in 1 Bl. Com. 450; and *n.* by Coleridge, citing Fost. 294, and 2 Ld. Raym. 1498, in opposition to Blackstone's remark.

95. 2 Inst. 564. But a parent is not bound to employ counsel to defend the suits of his minor children. Hill v. Childress, 10 Yerg. 514.

96. 1 Hawk. P. C. 131; 1 Bl. Com. 450.

97. Litchfield v. State, 8 Okla. Crim. Rep. 164, 126 Pac. 707, 45 L. R. A. (N. S.) 153.

98. Mayhew v. State (Tex.), 144 S. W. 229, 39 L. R. A. (N. S.) 671.

99. See *post*, § 801.

1. 1 Bl. Com. 450.

to determine the strength of a State; and, as a civil writer observes, the parent who suffers his child to grow up like a mere beast, to lead a life useless to others and shameful to himself, has conferred a very questionable benefit upon him by bringing him into the world,[2] and the education should be consistent with the station in life of the parties.[3] Solon excused the children of Athens from maintaining their parents, if they had neglected to train them up in some art or profession.[4] So intimately is government concerned in the results of early training, that it interferes, and justly, too, both to aid the parent in giving his children a good education, and in compelling that education, where the parent himself, and not the child, is delinquent in improving the opportunities offered.[5] But schemes of education, in cases of disagreement among guardians, are still prescribed in chancery.[6] So the rights of the guardian as judge of the place of his ward's education have been sometimes enforced in equity against the ward's own wishes.[7] The father's educational scheme has been permitted to put restrictions on the intercourse of a daughter with her own mother.[8] Courts of chancery, in short, have jurisdiction to superintend the education of infant children. Yet the English courts seem to have acted rather for the purpose of securing the control of the child's education to the proper person, or upholding the father's wishes, than to make independent regulations of their own according to the child's welfare.[9] In this respect, as well as in enforcing the disabilities of the law against Roman Catholics and dissenters, chancery was manifestly influenced by considerations of national policy.

Should such a subject come before the courts of this country,

2. Puff. Law of Nations, b. 6, c. 2, § 12.

3. *In re* Putney, 114 N. Y. S. 556, 61 Misc. 1; School Board Dist. No. 18, Garvin County, v. Thompson, 24 Okla. 1, 103 P. 578.

4. Plutarch's Lives; 2 Kent, Com. 195.

5. Under existing statutes a parent may be prosecuted for neglecting to educate his child. School Board v. Jackson, 7 Q. B. D. 502.

6. Campbell v. Mackay, 2 Myl. & Cr. 34; Macphers. Inf. 555.

7. Tremain's Case, Stra. 168; Hall v. Hall, 3 Atk. 721. In Tremain's case, an "infant" went to Oxford contrary to the orders of his guardian, who wished him to study at Cambridge. The court sent a messenger to carry him from Oxford to Cambridge; and upon his repeated disobedience there went another *tam* to carry him to Cambridge, *quam* to keep him there. See Macphers. Inf. 121, 141.

8. Agar-Ellis v. Lascelles, 24 Ch. D. 317.

9. See 2 Story, Eq. Juris., § 1342; Wellesley v. Wellesley, 2 Bligh (N. S.), 124.

they might fairly take a different course, more in accordance with American legislation. Our municipal laws in general provide for the infant's educational wants; and this whole jurisdiction is one of great embarrassment and responsibility.[10] But there are several decisions concerning the right of public school boards to issue general regulations concerning the admission, suspension, or dismissal of pupils, or the subjects of study. And in some States the father of a child may apply for *mandamus* against the board to compel them to admit to the public school his child, who has been unlawfully excluded.[11]

§ 775. Duty of Providing a Trade or Profession.

The parent's duty, according to some authorities, also extends to providing the children with a profession or trade as well as a suitable education. How far the duty of competent provision extends, must depend upon the condition and circumstances of the father. Kent observes that this duty is not susceptible of municipal regulations, and is usually left to the dictates of reason and natural affection.[12]

§ 776. Religious Education.

The father has the absolute right at common law to determine the religious education of his children.[13] Questions of parental, and more particularly religious, education arise often in English law under the will of the father. It is laid down as the rule, that where one has left no direction in his will as to the religion in which his children are to be educated, it will be presumed that his wishes were that they shall be educated in his own religion.[14]

10. See the topic of Custody, *supra*, § 740 *et seq.*; Jones v. Stockett, 2 Bland, 409.

11. People v. Board of Education, 18 Mich. 400; Sheibley v. School District, 31 Neb. 552, maintaining a father's right to make a reasonable selection for his own child from the studies prescribed. See further, Burdick v. Babcock, 31 Ia. 562; Hodgkins v. Rockport, 105 Mass. 475. A pupil cannot be expelled from a public school because of mere negligence, neither wilful nor malicious. Holman v. School District, 77 Mich. 605. A minor child's right to local public education is not entirely dependent upon a local domicile in the strict sense. School Dist. of Waukesha v. Thayer, 74 Wis. 48; Yale v. West Middle School Dist., 59 Conn. 489.

12. 2 Kent, Com. 202. It is within the police power of the legislature to prohibit a parent from putting a young female child upon exhibition as a professional dancer, on considerations of injury, whether to the child's health or morals. People v. Ewer, 141 N. Y. 129.

13. *Ex parte* Flynn, 87 N. J. Eq. 413, 100 A. 861.

14. *In re* North, 11 Jur. 7, V. C. Bruce; Macphers. Inf. 555; Campbell v. Mackay, 2 Myl. & Cr. 34.

Further, that the religious education of an infant of fifteen will not be changed unless the infant wishes it.[15] But no regard is paid to the wishes of a child ten years old.[16] The father is allowed to designate the plan of education to be followed with respect to his children after his death. And while, as Lord Cottenham has observed, he has no power to prescribe a particular religion to his child, yet he has indirectly the power of effecting his object by the choice of a guardian.[17]

The English courts of chancery have indeed exercised considerable jurisdiction over the education of minor wards: a topic which very seldom engages the attention of American tribunals. While the penal laws against Roman Catholics were in full force in England, it was considered the duty of the court of chancery, by analogy to the statute law, to see that all infants under its control should be brought up in the Protestant religion.[18] A case is reported in which Lord Cowper ordered a Roman Catholic girl to be sent to a Protestant school, evidently with a view to her conversion.[19] With the progress of religious toleration came a different rule of practice; and it is now a question whether, under any circumstances, the court would interfere with the testamentary guardian, and the infant's religion as designated by the father; indeed, according to many late decisions, the Roman Catholic faith appears in this respect as much favored as the Protestant.[20] And the courts are disposed to uphold the father in his reasonable views against the mother's religious convictions, or those of the children themselves.[21] Our various constitutional provisions for religious

15. Witty v. Marshall, 1 You. & C. N. C. 68.

16. Regina v. Clarke, 7 El. & B. 186. And see Hawksworth v. Hawksworth, L. R. 6 Ch. 539.

17. Talbot v. Earl of Shrewsbury, 18 L. J. 125; Macphers. Inf. 126. See also Hill v. Hill, 8 Jur. (N. S.) 609. And see Fraser, Parent & Child, 82.

18. Macphers. Inf. 123; Lady Teynham's Case, 9 Mod. 40.

19. Hill v. Filkin, 2 P. Wms. 5. And see Blake v. Leigh, Ambl. 306; Jac. 264, *n; In re* Bishop, Reg. Lib. 1774, cited in Macphers. Inf. 124.

20. Talbot v. Earl of Shrewsbury, 18 L. J. 125, per Lord Ch. Cottenham. And see Regina v. Clarke, 7 El. & B. 186; Hawksworth v. Hawksworth, L. R. 6 Ch. 539; Clarke, *Re*, 21 Ch. D. 817. But cf. Agar-Ellis v. Lascelles, L. R. 10 Ch. D. 49; D'Alton v. D'Alton, L. R. 4 P. D. 87.

21. In several late English cases, where the young children, under the mother's influence, were likely to become either Roman Catholics or atheists, chancery interposed to carry out the father's wishes and bring them under Protestant influence; and this, notwithstanding a voluntary or judicial separation of the parents which had given the mother the children's custody. Agar-Ellis v. Lascelles, L. R. 10 Ch. D. 49; Besant, *In re*, L. R. 11

freedom produce, moreover, local disputes on the subject of religious or race instruction in the public schools.[22]

In this country the Constitutions of most of the States contain guarantees of religious freedom which have affected the attitude of the courts and made them remarkably timid about laying down any set rules on the subject. It has been held that the father alone has the right to decide his child's religion,[23] or that no rule will be laid down but each case considered on its merits for the good of the child,[24] or that religious distinctions and questions will not be considered by the court at all.[25] There are very few decisions on the subject in this country as the questions involved have not usually been considered important enough to carry to courts of last resort.[26]

§ 777. Parent's Liability for Torts of Child.

As to the parent's liability to action, where the child is the injuring party. The question is sometimes asked, how far a father is responsible in damages for the torts and frauds of his infant child. We have already seen that the husband's responsibility for his wife's injuries at the common law is founded upon his right, by marriage, to her property. Very different is the relation of parent and child, where, it is now plain, the father has little more than the right to claim his child's wages, so far as the infant's property is concerned.[27] Yet some have been misled into the belief that the two cases are entirely analogous; and they would hold the father liable for his son's wrongful acts, as a husband for the wife's. It is held in Pennsylvania that the father may be sued in trespass for an injury committed by his son, when they ride together in the

Ch. D. 508. In D'Alton v. D'Alton, L. R. 4 P. D. 87, both parents had been Roman Catholics, and the father afterwards became a Protestant. And see *In re* Scanlan, Infants, 40 Ch. D. 200.

22. As to studying languages, see Board of School Comm'rs of Indianapolis v. The State, 129 Ind. 14. As to religious instruction and the use of the Bible, see Hysong v. School District (1894), Pa.; State v. District Board, 76 Wis. 177. Separate schools for white and colored children may be rightfully established. Lehew v. Brummell, 103 Mo. 546.

23. Hernandez v. Thomas, 50 Fla. 522, 39 So. 641.

24. Purington v. Jamrock, 195 Mass. 187, 80 N. E. 802.

25. Jones v. Bowman, 13 Wyo. 79, 77 Pac. 439.

26. See learned article on the religious education of children in 29 Harvard Law Review, 485. See Matter of McConnon, 60 Misc. 22, 112 N. Y. Supp. 590.

27. Nor can the parent make the infant child's real estate itself liable, even for a necessary debt of his own creation. Cox v. Storts, 14 Bush, 502.

father's team, and the act is committed in the latter's presence.[28] Whether the principle can be safely carried further is extremely doubtful. In Missouri, on the other hand, and with better reason, it is decided that a father is not responsible for an independent assault committed by his infant son, without his sanction; not even though the child was known by him to be of a vicious temper.[29] The same rule, with more caution, has been applied in New York, in a case where it was shown that a minor daughter, in her father's absence, and without his authority or approval, wilfully set his dog, not ordinarily a vicious animal, upon the plaintiff's hog, which was thereby bitten and killed.[30]

But for injuries occasioned by the infant with his father's direct sanction or participation, or while in the due course of employment by the father, the latter is held answerable to others. Thus, a minor son, under a contract with his father to clear a parcel of land, did it so negligently as to destroy a neighbor's property by fire; and for this the parent was held to damages at the neighbor's suit.[31] In Wisconsin, a father was held liable for injury sustained by a passer-by whose horse took fright, because he carelessly permitted his young children to fire pistols and shout on the highway and thus contributed to the injury.[32] And while a parent is not liable for an independent trover and conversion committed by his child, he becomes liable where he learns of it and continues to enjoy the benefit of the wrong.[33-34]

For all such injuries (subject to the usual scope of negligent performance as another's agent or servant) an infant is answer-

28. Strohl v. Levan, 39 Pa. St. 177. And see Lashbrook v. Patten, 1 Duvall, 316.

29. Baker v. Haldeman, 24 Mo. 219; Paul v. Hummel, 43 Mo. 119.

30. Tifft v. Tifft, 4 Denio, 175. And see McManus v. Crickett, 1 East, 106; Foster v. Essex Bank, 17 Mass. 479. The responsible occupation of premises on which vicious animals are kept is sometimes a legal element.

Nor was the father held liable in damages where his son set another's property on fire, in Edwards v. Crume, 13 Kan. 348. And see Baker v. Morris, 33 Kan. 580. See also Paulin v. Howser, 63 Ill. 312; Chandler v. Deaton, 37 Tex. 406; Smith v. Davenport, 45 Kan. 423. The want of parental knowledge or sanction here appeared. For the peculiar rule of the Louisiana code as to parental liability in such cases, see Marionneaux v. Bougier, 35 La. Ann. 13, 891; Mullins v. Blaise, 37 La. Ann. 92.

31. Teagarden v. McLaughlin, 86 Ind. 476.

32. Hoverson v. Noker, 60 Wis. 511. Evidence was admitted that the father knew his children had thus misconducted before. Cf. Hagerty v. Powers, 66 Cal. 368.

33-34. Hower v. Ulrich, 156 Pa. St. 410.

able at law, out of his own estate; at least, if he is old enough to have known better.[35] But how as to the parent's liability? For that is the present issue. The principles of the Roman law cannot be cited to much advantage, in support of such liability, on the score of agency, or otherwise; since under that system the child was little better than the slave of his father; and even as to slaves, it was considered at the time of the Institutes that it would be very unjust, when a servant did a wrongful act, to make the master lose anything more than the servant himself.[36] The modern rule of the civil law, in European countries, is to make every person responsible for injuries caused by the act of persons and things under his dominion; but a father incurs no responsibility for the act of his minor child, if he can prove that he was not able to prevent the act which gives rise to the liability.[37]

On the whole it may be stated as a rule of our common law that

35. Campbell v. Stakes, 2 Wend. 137; *post*, § 1028 *et seq.;* Smith v. Davenport, 45 Kan. 423.

36. Smith's Dict. Greek and Roman Antiq., "Novalis Actio." Inst. lib. 4, tit. 8, by Saunders.

37. Civil Code France, art. 1384; Cleaveland v. Mayo, 19 La. 414. See Baker v. Haldeman, 24 Mo. 219.

This point received some attention in a modern English case, where the father of a young man, about seventeen or eighteen, was sued for trespass and false imprisonment. The plaintiff was property-man at a theatre, of which the defendant was lessee. The young man, minor son of the defendant, acted as his father's treasurer. The plaintiff, in his character of property-man, presented to the treasurer an account, containing some wrongful items of disbursement. The defendant, conceiving this to be an intentional fraud on the part of the plaintiff, dismissed him from his employment. His son thereupon, without consulting the father, indiscreetly caused the plaintiff to be apprehended by a policeman, and taken to the station on a charge of obtaining money by false pretences. The plaintiff went before a magistrate, and was remanded, but was ultimately discharged. After the remand, the son told his father what he had done; the latter did not prohibit him from proceeding in the matter, but said that as the son had begun it, he would not interfere. The court decided that these facts showed neither a previous authority nor a subsequent ratification by the father, sufficient to render him liable for his son's conduct, and on that ground dismissed the suit. Moon v. Towers, 8 C. B. (N. S.) 611. The opinions of the several judges in this case, though expressed by way of *dicta*, exhibit considerable reluctance to hold the father liable, as a trespasser, for his son's torts. Says Willes, J., approved by Byles, J., *ib.;* Williams, J., *dub.:* "The tendency of juries, where persons under age have incurred debts or committed wrongs, to make their relatives pay, should, in my opinion, be checked by the courts. No man ought as a general rule, to be responsible for acts not his own." And says the Chief Justice: "Suppose the son had knocked the plaintiff down, and the father had said, 'I think it served him right,' would that be such a ratification of the son's act as to make the father liable as a trespasser?" Per Erle, C. J., *ib.* As to the injuries of a

a father is not liable in damages for the torts of his child, committed without his knowledge, consent, participation, or sanction, and not in the course of his employment of the child.

A parent is not liable as such in this country for the torts of his minor child in the absence of evidence of authority express or implied,[38] but may be if the acts were done under his direction[39] or with his knowledge.[40]

§ 778. Liability for Acts of Insane Child.

Parents of an insane person are not liable for his acts in the absence of negligence of the parents in caring for him.[41] If the condition of mind of an adult son mentally incompetent is such that he is dangerous or that danger to others might reasonably be expected from his acts it is the duty of the parent while the son is in his custody to use such measures of restraint and control as would result in rendering it impossible for him to have possession of a weapon. This is on the same theory that the owner of a domestic animal is answerable in damages for injury done by that animal when its vicious nature is known to the owner. But evidence that the son's only overt act of violence had been committed

servant, and his master's liability, see Master and Servant, *infra*, §§ 488-491.

38. Parker v. Wilson, 179 Ala. 361, 60 So. 150; Chastain v. Johns, 120 Ga. 977, 48 S. E. 343, 66 L. R. A. 958; Harris v. Jones, 87 S. E. 713; Schumer v. Register, 12 Ga. App. 743, 78 S. E. 731; Wilkins v. Barnes, 11 Ga. App. 350, 75 S. E. 361; Arkin v. Page (Ill.), 123 N. E. 30; Kitchen v. Weatherby, 205 Ill. App. 10; Dick v. Swenson, 137 Ill. App. 68; Palm v. Ivorson, 117 Ill. App. 535; Malmberg v. Bartos, 83 Ill. App. 481; Lemke v. Ady (Iowa), 159 N. W. 1011; Zeeb v. Bahnmaier (Kan.), 176 P. 326; Mirick v. Suchy, 74 Kan. 715, 87 P. 1141; Barry v. Same, *Id.*; Paulsey v. Draine, 9 Ky. Law Rep. 693, 6 S. W. 329; Miller v. Meche, 111 La. 143, 35 So. 491; Winn v. Haliday, 69 So. 685; Hays v. Hogan, 273 Mo. 1, L. R. A. 1918C, 715, 200 S. W. 286; Bassett v. Riley, 131 Mo. App. 676, 111 S. W. 596; Brittingham v. Stadiem, 151 N. C. 299, 66 S. E. 128; McCarthy v. Heiselman, 125 N. Y. S. 13, 140 App. Div. 240; Muller v. Barker, 90 N. Y. S. 388 (forged check); Herndobler v. Rippen, 75 Ore. 22, 146 P. 140; Fanton v. Byrum, 26 S. D. 366, 128 N. W. 325; Ritter v. Thibodeaux (Tex. Civ. App.), 41 S. W. 492; Lessoff v. Gordon (Tex. Civ. App. 1909), 124 S. W. 182; Klapproth v. Smith (Tex. Civ. App.), 144 S. W. 688; Mopsikov v. Cook (Va.), 95 S. E. 426 (slander); Kumba v. Gilham, 103 Wis. 312, 79 N. W. 325; Taylor v. Seil, 120 Wis. 32, 97 N. W. 498.

39. Harrington v. Hall (Del. Super. 1906), 63 A. 875.

40. Stewart v. Swartz, 106 N. E. 719; Johnson v. Glidden, 11 S. D. 237, 76 N. W. 933, 74 Am. St. R. 795.

41 Whitesides v. Wheeler, 158 Ky. 121, 164 S. W. 335; Bollinger v. Rader, 153 N. C. 488, 69 S. E. 497.

twelve years before is insufficient to charge the parent with such knowledge or liability.[42]

§ 779. Parent's Liability for Child's Acts in Drivng Automobile, etc.

An injured party may recover on account of the parent's negligence in caring for the child for placing in his hands a dangerous instrumentality which he was not fitted to use, as an automobile[43] or a gun.[44]

There is a conflict of authority on the question whether a father is liable for the negligence of his minor child in driving an automobile which the father has furnished for him. Some cases hold that the father is liable on the theory that he has furnished the car for the pleasure of his family and therefore must be responsible for their driving[45] while other courts have taken the view that the father is not liable unless the son is driving on the parent's business and that the mere fact that the father permits a capable child to use his car for his own pleasure does not imply that the father has undertaken the occupation of entertaining the son and made him his agent in this business.[46] The father may be of course liable if he permits an incompetent child to run his car. It seems to be settled that an automobile is not such a dangerous agency that the father should be liable for intrusting it to the child.[47] In some States the parent is liable for the negligence of his child driving the parent's automobile where the car is supplied by the parent for the use of the family and the father allows the son to drive it,[48] but

42. Whitesides v. Wheeler, 158 Ky. 121, 164 S. W. 335, 50 L. R. A. (N. S.) 1104.

43. Gardiner v. Solomon (Ala.), 75 So. 621; Crittenden v. Murphy (Cal. App.), 173 P. 595; Walker v. Klopp, 99 Neb. 794, 157 N. W. 962; Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134; Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096; Salisbury v. Crudale (R. I.), 102 A. 731. *Contra*, Watkins v. Clark (Kan.), 176 P. 131. *Contra*, Warren v. Norguard (Wash.), 174 P. 7. See Stephens v. Stephens, 172 Ky. 780, 189 S. W. 1143; Schultz v. Morrison, 154 N. Y. S. 257, 91 Misc. 248 (judg. affd., 156 N. Y. S. 1144. See Fleming v. Kravitz, 260 Pa. 428, 103 A. 831.

44. Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013, 23 Ky. Law, 461, 53 L. R. A. 789, 96 Am. St. R. 475; Sutton v. Champagne, 141 La. 469, 75 So. 209; Souza v. Irome, 219 Mass. 273, 106 N. E. 998; Charlton v. Jackson, 183 Mo. App. 613, 167 S. W. 670.

45 Farnham v. Clifford (Me.), 101 Atl. 468.

46. Blair v. Broadwater (Va.), 93 S. E. 632, L. R. A. 1918A, 1011.

47. Blair v. Broadwater (Va.), 93 S. E. 632, L. R. A. 1918A, 1011.

48. Griffin v. Russell, 144 Ga. 275, 87 S. E. 10; Anthony v. Kiefner, 96 Kan. 194, 150 P. 524, L. R. A. 1915F, 876; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761; Uphoff v. McCormick, 139 Minn. 392, 166 N. W. 788; Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091; Daily v. Maxwell, 152 Mo. App. 415, 13 S. W. 351; McNeal v. McKain, 33 Okla. 449, 126 P. 742,

the father is not responsible for the negligence of the son in driving the family automobile on his own business in the absence of evidence of agency express or implied.[49]

Where a father had provided his family with an automobile as a means of recreation and amusement, and the son in the use of the car for that purpose is engaged in driving his sister and her friends and negligently injures a third person he is not performing an independent service of his own but is carrying out what within the spirit of the matter was the business of the father, even though the father was ignorant of this particular trip.[50]

It is settled law that a father is not liable for the tort of a minor child, with which he was in no way connected, which he did not ratify and from which he did not derive any benefit, merely because of the relation of parent and child.[51] He may, however, be liable for the acts of the child when acting as his agent as in driving the family automobile, but not when he took the car without his father's permission on an errand of his own.[52] A mother is not liable for the negligence of her son in driving his automobile when riding as his guest although she did ask him to do an errand for her on the way, which was a mere incident of the trip.[53]

Where certain persons borrowed an automobile from the owner to make a trip and invited the owner's son to accompany them and he was driving at the time of the accident the owner is not liable as the son was not at the time his servant engaged in his business.[54] The father is not liable for the negligence of the son in driving his car where he had lent the car on the day in question to a third

41 L. R. A. (N. S.) 775; Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020 (opinion modified on rehearing, 135 P. 821); *contra*, Maher v. Benedict, 108 N. Y. S. 228, 123 App. Div. 579; McFarlane v. Winters, 155 P. 437.

49. Erlick v. Heis, 69 So. 530; Dougherty v. Woodward (Ga. App.), 94 S. E. 636 (father's expressions of sympathy and promise to do the right thing do not amount to ratification); Sultzbach v. Smith, 156 N. W. 673; Mast v. Hirsh, 199 Mo. App. 1, 202 S. W. 275; Lewis v. Steele, 52 Mont. 300, 157 P. 575; Kunkle v. Thompson, 67 Pa. Super. Ct. 37; King v. Smythe, 140 Tenn. 217, 204 S. W. 296; Blair v. Broadwater, 121 Va. 301, 93 S. E. 632.

50. Stowe v. Morris, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224.

51. Griffin v. Russell, 144 Ga. 275, 87 S. E. 10, L. R. A. 1916F, 216.

52. Sultzbach v. Smith (Ia.), 156 N. W. 673, L. R. A. 1916F, 228.

53. Anthony v. Kiefner, 96 Kan. 194, 150 Pac. 524, L. R. A. 1915F, 876.

54. Halverson v. Blosser, 101 Kan. 683, 168 Pac. 863, L. R. A. 1918B, 498.

party who had without his knowledge persuaded the son to drive for him.[55]

The liability of a parent for the tort of a child is governed by the principles of law applicable to the relation of principal and agent and it does not arise out of a mere relation of parent and child. But where the parent is accustomed to leave his automobile unlighted on the street at night and the son knew of it then the father would be liable for the act of the son in doing the same thing upon the ground of an implied sanction to so leave it.[56]

55. McFarlane v. Winters (Utah), 155 Pac. 437, L. R. A. 1916D, 618.

56. Jaquith v. Worden, 73 Wash. 349, 132 Pac. 33, 48 L. R. A. (N. S.) 827.

CHAPTER X.

PARENT'S DUTY OF SUPPORT.

§ 780. Duty of Maintenance in General.

The third parental duty is that of maintenance. It is a plain precept of universal law that young and tender beings should be nurtured and brought up by their parents; and this precept have all nations enforced. So well secured is the obligation of maintenance that it seldom requires to be enforced by human laws.[57] Are we brought into this world to perish at the threshold by suffering and starvation? No; but to live and to grow. Some one, then must enable us to do so; and upon whom more justly rests that responsibility than upon those who brought us into being? Hence, as Puffendorf observes, the duty of maintenance is laid on the parents, not only by Nature herself, but by their own proper act in bringing the children into the world. By begetting them, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved.[58]

57. 1 Kent, Com. 189.

58. Puff. Law of Nations, b. 4, c. 11; 1 Bl. Com. 447.

Maintenance is that support which one person gives to another for his living. This word, used by common-law writers, corresponds with the civil-law term "aliment."[59] The obligation on the parent's part to maintain the child continues until the latter is in a condition to provide for his own maintenance; and it extends no further, at common law, than to a necessary support.[60] The Roman system carried this obligation so far that it would not suffer a parent at his death totally to disinherit his child without expressly giving his reasons for so doing.[61] And the laws of Athens were to the same purport.[62] Blackstone does not appear to approve of carrying natural obligation so far. And he cites Grotius in support of a distinction which limits the child's natural right to necessary maintenance; what is more than that, depending solely upon the favor of parents, or the positive constitutions of the municipal law,[63] Coke observes that it is "nature's provision to assist, maintain, and console the child."[64]

§ 781. Father's Support.

The father is liable for support to his children, usually by statute in this country,[65] but equity will not interfere to force a

59. Cf. Macphers. Inf. 210, and Fraser, Parent & Child, 85.

60. Kent, Com. 190; 1 Bl. Com. 448.

61. Dig. 28, 230; Nov. 115, c. 3. The statutes of some of the United States favor this doctrine to nearly the same extent. A child is not disinherited, at least by mere omission from the will.

62. 2 Potter, Greek Antiq. 351.

63. Grot. De J. B. et P., I. 2, c. 7, *n.* 3; 1 Bl. Com. 448.

64. See 2 Kent, Com. 190.

65. Cook v. Echols (Ala. App.), 80 So. 680; *In re* Guertin's Child, 5 Alaska, 1.

In a suit by an adult invalid child against his parents for maintenance, evidence of the latter's ability to contribute to complainant's support was admissible on a preliminary application for maintenance, costs, and counsel fees *pendente lite.* Paxton v. Paxton, 150 Cal. 667, 89 P. 1083; McKeon v. Byington, 70 Conn. 429, 39 A. 853; State v. Miller (Del. 1902), 3 Pennewill, 518, 52 A. 262; McConnell v. Bogaert, 208 Ill. App. 582; Wheeler v. State, 51 Ind. App. 622, 100 N. E. 25; Guthrie County v. Conrad, 133 Ia. 171, 110 N. W. 454; Rounds Bros. v. McDaniel, 133 Ky. 669, 118 S. W. 956; Bailey v. Penick (Ky. Super. 1888), 10 Ky. Law, 239; Burrill v. Sermini, 229 Mass. 248, 118 N. E. 331; Lufkin v. Harvey, 154 N. W. 1097; Robinson v. Robinson, 168 Mo. App. 639, 186 S. W. 1032, 154 S. W. 162; White v. White, 180 S. W. 1004; Walters v. Niederstadt (Mo. App.), 194 S. W. 514; Finkelstein v. Finkelstein, 161 N. Y. S. 166, 174 App. Div. 416; State v. Langford (Ore.), 176 P. 197; *In re* Henkel's Estate, 13 Pa. Super. Ct. 337; Memphis Steel Const. Co. v. Lister, 138 Tenn. 307, 197 S. W. 902; White v. McDowell, 74 Wash. 44, 132 P. 734 (although mother remarried); *In re* Northcutt, 148 P. 1133.

father to support his minor child in the absence of statutory authority as no legal obligation to support is recognized.[66]

Where a father abuses his children they may under statute be released from parental control,[67] but this does not release him from the duty to support,[68] and although the child has left home this does not revoke an order he has given for support.[69]

The father's obligation to support must be governed by the law of the domicile of the father. So where an adult son was a pauper living in a jurisdiction where an adult pauper son is entitled to support from his father, but the father lived in a jurisdiction where there is no such obligation the father is not bound to support the son.[70]

§ 782. Mother's Support.

The mother is not at common law, during the life of the father, bound to support the child,[71] even if the father is imprisoned for crime,[72] and the mother can compel the father to support.[73]

The mother, however, after the death of the father, becomes the head of the family. She has the like control over the minor children as he had when living; and she is then bound to support them, if of sufficient ability.[74] This we hold to be the rule most conformable to natural justice; though there are cases and statutes which would seem to exempt her from such obligations.[75] A court of chancery will not readily make the support and education of infant children a charge upon the property of their widowed mother, nor upon that of a stepfather who has not undertaken to stand in place of a father, while their own means are ample.[76] In

66. Rawlings v. Rawlings (Miss.), 83 So. 146; Huke v. Huke, 44 Mo. App. 308. See Alling v. Alling, 52 N. J. Eq. 92, 27 Atl. 655.

67. Hutchinson v. Hutchinson, 124 Cal. 677, 57 P. 674.

68. Leibold v. Leibold, 158 Ind. 60, 62 N. E. 627; Rankin v. Rankin, 83 Mo. App. 335.

69. McKeon v. Byington, 70 Conn. 429, 39 A. 853.

70. Coldingham Parish Council v. Smith (1918), 2 K. B. 90.

71. Leake v. J. R. King Dry Goods Co., 5 Ga. App. 102, 62 S. E. 729; *In re* Lyons' Estate, 137 N. Y. S. 171. See State v. Beslin, 19 Ida. 185, 112 P. 1053 (mother's duty under statute).

72. Gleason v. City of Boston, 144 Mass. 25, 10 N. E. 476.

73. Alvey v. Hartwig, 106 Md. 254, 67 A. 132, 11 L. R. A. (N. S.) 678.

74. Dedham v. Natick, 16 Mass. 140; Missouri Pac. Ry. Co. v. Palmer, 55 Neb. 559, 76 N. W. 169.

75. Whipple v. Dow, 2 Mass. 415; Dawes v. Howard, 4 Mass. 97; 2 Kent, Com. 191, and cases cited; *supra*, § 237.

76. Mowbray v. Mowbray, 64 Ill. 383. A widow, on her remarriage, is not liable for the maintenance of a child by a former husband. Besondy, *Re*, 32 Minn. 385. Where a mother has maintained her infant child without the order of the court, it is held

such connection, again, it is worth considering whether the child renders any valuable services to a remarried mother or stepfather, or confers a right to such services.[77] In general, a married woman is not liable for the support and education of her children during the lifetime of a husband; and if she renders such support she is entitled, at all events, to an allowance from the estates of the children,[78] or if she dies her estate is not to be charged at the husband's instance.[79]

If the father is alive and unable to maintain his child, maintenance will be allowed without considering the ability of the mother, though she may have a separate income.[80]

§ 783. Mother's Pension Acts.

The so-called mother's pension acts are upheld in a recent case. A statute authorizing the court to find that children are dependent and permitting them to remain in the custody of the mother, and fixing the amount that the county shall contribute to their support, is valid. The State as *parens patriae* has the power to assume the custody and control of a child upon the sole ground of the parent's inability to support it. In a state of organized society the rights of the parent are largely subordinate to those of the community, and whenever a breach of the parental trust occurs, no matter from what cause, of such a nature that the fundamental welfare of the child is endangered, at that moment the State's right to assume its guardianship arises. The State has power in the premises whenever the child's poverty reaches a menacing stage.[81]

that, upon his decease, she can claim for past maintenance only such sum as will effectually indemnify her for what she has spent, without reference to the amount of his fortune. Bruin v. Knott, 9 Jur. 979. She may have made a gift of maintenance to him so as to be precluded from claiming anything afterwards by way of recompense. *In re* Cottrell's Estate, L. R. 12 Eq. 566. But in any case the widowed mother is entitled to a reasonable allowance out of her children's estate for their maintenance, where her own means are limited. Wilkes v. Rogers, 6 Johns. 566; Heyward v. Cuthbert, 4 Desaus. 445; Osborne v. Van Horn, 2 Fla. 360; Bradshaw v. Bradshaw, 1 Russ. 528; Pyatt v. Pyatt, 46 N. J. Eq. 285. But the widowed mother who undertakes to support the children from her own means cannot be compelled by her creditor to charge their fund. Hanford v. Prouty, 133 Ill. 339.

77. Englehardt v. Yung, 76 Ala. 534.

78. Gladding v. Follett, 95 N. Y. 652.

79. Phelps v. Daniel, 86 Ga. 363.

80. Macphers. Inf. 224; Haley v. Bannister, 4 Madd. 275.

81. State v. Klasen, 123 Minn. 382, 143 N. W. 984, 49 L. R. A. (N. S.) 597.

§ 784. Ability of Parent to Support Child.

Where the inability of the father to comply with an order of the court to support children is *bona fide* the court cannot compel the father to learn a new trade or to acquire a profession or find employment where his own trade becomes temporarily unprofitable,[82] but the fact that the father, a mining engineer, is unable to get work in his profession is no defence to a charge for failure to provide for his child, as he should, if he cannot get the kind of work which he wants, do any kind of work he can get.[83]

§ 785. Duty to Stepchildren.

In absence of special statutes to the contrary, the father-in-law is not obliged in this country to maintain his stepchildren, and consequently is not entitled to their earnings,[84] but if a husband adopts a minor child of his wife by a former marriage, and holds him out to the world as his own, he will be liable for his support.[85]

A stepfather may be held liable for necessary medical attention furnished his stepson where the stepson was treated at the home of a relative and the defendant had paid other bills for him, and the boy lived with the defendant before and after the illness and during the illness the defendant visited the boy and saw the plaintiff attending him there and made no complaint although he had not hired him. Under these facts the jury might well find that the defendant stood in the relation of a parent to the boy and had assumed the obligation of providing him with necessaries.[86]

§ 786. Value of Parental Education, Support, &c.

In assessing damages recoverable by a minor child for the death of a parent by the negligence of carriers, courts incline sometimes to consider the reasonable prospective expectation of pecuniary benefit to that child by way of education and support, and physical and moral training, had that parent survived.[87]

82. Wells v. Wells (Wash.), 169 Pac. 970, L. R. A. 1918C, 291.

83. Hunter v. State (Okla. Crim. Rep.), 134 Pac. 1134, L. R. A. 1915A, 564.

84. Commonwealth v. Hamilton, 6 Mass. 253, 275; Freto v. Brown, 4 *Ib* 675; Worcester v. Marchant, 14 Pick. 510; Besondy, *Re*, 32 Minn. 385; McMahill v. Estate of McMahill, 113 Ill. 461; Bond v. Lockwood, 33 Ill. 212; § 273, *post*.

85. Murray v. Redell, 21 Hun, 409. See Monk v. Hurlburt, 151 Wis. 41, 138 N. W. 59.

86. Monk v. Hurlburt (Wis.), 138 N. W. 59, 42 L. R. A. (N. S.) 535.

87. Tuteur v. Chicago R., 77 Wis. 505; Railway Co. v. Maddry, 57 Ark. 306.

§ 787. Liability of Parents to Third Persons in Absence of Agreement.

There can be no doubt that a parent is under a natural obligation to provide necessaries for his minor children. But how that obligation is to be enforced is not so clear.[88] In fine, either an express promise, or circumstances from which a promise by the father can be inferred, is essential.[89]

The English decisions are clearly against allowing the child to pledge his father's credit for necessaries to enforce a moral obligation. There must be some contract, express or implied, in order to charge him. If a child be turned upon the world by his father, he can only apply to the parish, and they will compel the father, if of ability, to pay for his support. Says Lord Abinger: "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no inference in point of law." [90]

Yet the rule of principal and agent is to be reasonably enforced; and in all cases where there appears neither palpable moral delinquency on the part of the parent, nor evidence of authority actually conferred upon his son, nor a contract by the parent himself or his other agents, the parent cannot be held liable for the general contracts of the child. A conditional offer to pay for goods ordered of a stranger by the child must have been clearly accepted in order

88. 1 Bl. Com. 447; Edwards v. Davis, 16 Johns. 285; *In re* Ryder, 11 Paige, 188; 2 Kent, Com. 190. In New York there is some confusion of opinion. Cf. Raymond v. Loyl, 10 Barb. 483, with New York cases, *supra*. But the doctrine of an implied agency of necessity, upon the minor child's pledge, was applied in the late case of Porter v. Powell, 79 Ia. 151, where the minor daughter while living away from home, and supporting herself by permission from her own earnings, fell sick and incurred a bill for medical attendance without her father's knowledge. And see Cooper v. McNamara (1894), Ia.

89. McMillen v. Lee, 78 Ill. 443; Freeman v. Robinson, 38 N. J. L. 383; Tomkins v. Tomkins, 3 Stockt. 517. As to the wife's authority to bind her husband for the child's necessaries, see Schouler, Hus. & Wife, § 101; *supra*, §§ 61, 237, 239. One who encourages wife and child to live apart from the husband and father is the less entitled to recover for the necessaries of either. Schnuckle v. Bierman, 89 Ill. 454.

90. Mortimore v. Wright, 6 M. & W. 482. And see Shelton v. Springett, 11 C. B. 452, 20 E. L. & Eq. 281; Seaborne v. Maddy, 9 Car. & P. 497.

to constitute such ratification as will bind the parent who makes it.[91] And in numerous instances have courts refused to make the father liable on the ground of an implied agency to the child.[92] Under the most favorable aspect of the infant's right to bind his father as agent, a third person furnishing goods must take notice, at his peril, or what is necessary for the infant according to his precise situation.[93] And the oral promise of a father to pay a debt of his child not incurred for necessaries, in consideration of the creditors forbearing to sue the child, must be treated as a promise to pay the debt of another, and hence, under the Statute of Frauds, not enforceable.[94]

There is a strong current of American authority holding the father liable in such cases on the theory of quasi-contract. A parent is under a natural duty to furnish necessaries for his infant children; and if the parent neglect that duty, any other person who supplies them is deemed to have conferred a benefit on the delinquent parent for which the law raises an implied promise to pay on the part of the parent.[95] The liability at common law of the parent to support the child was not well defined, but in most American States it has been held that the obligation is not merely moral but legal and enforceable as a legal common-law duty. It follows, therefore, that if the parent neglects that duty any other person who supplies such necessary attention to the child is deemed ordinarily to have conferred a benefit on the delinquent parent for which the law raises an implied promise to pay on the part of the parent.[96]

Parents are bound to supply a minor child with the necessaries

91. Andrews v. Garrett, 6 C. B. (N. S.) 262.

92. Eitel v. Walter, 2 Bradf. Sur. 287; Raymond v. Loyl, 10 Barb. 483; Bushnell v. Bishop Hill Colony, 28 Ill. 204; Tyler v. Arnold, 47 Mich. 564. See Loomis v. Newhall, 15 Pick. 159.

93. Van Valkenburg v. Watson, 13 Johns. 480; Gotts v. Clark, 78 Ill. 229. Cf. Murphy v. Ottenheimer, 84 Ill. 39.

94. Dexter v. Blanchard, 11 Allen, 365. Goods being sold to the minor without the father's knowledge, order, or consent, his subsequent promise to pay therefor is without binding consideration. Freeman v. Robinson, 38 N. J. L. 383.

This rule of agency is sometimes allowed to operate for the parent's own benefit as against a third party; the child who could not bind himself being treated as the parent's agent. Darling v. Noyes, 32 Ia. 96.

95. Van Valkinburgh v. Watson, 13 Johns. 480, 7 Am. Dec. 395; De Brauwere v. De Brauwere, 203 N. Y. 460, 96 N. E. 722.

96. Wallace v. Cox (Tenn.), 188 S. W. 611, L. R. A. 1917B, 690 (medical services).

Where the parental duty is not neglected there is no liability on the

of life. They may be held liable to pay for necessaries furnished by a third person to a minor child without their contract or consent where there is an omission of duty on their part to furnish necessaries, as where the need exists and the parents refuse or neglect to act, or in case of some special exigency rendering the interference of the third person reasonable and proper, as in case of illness at a distance from the parental home.[97] So where a stranger took a child under an agreement by the father to leave it with the stranger until the child came of age, and the father after a time took the child back in breach of his agreement, the stranger can recover in *quantum meruit* for maintenance already furnished to the child,[98] but a stranger attempting to recover from a father for support to a minor child must prove the father's neglect to provide.[99]

The father has a right to furnish the support at his own home, and hence a child who leaves his home without good cause cannot pledge his father's credit even for necessaries.[1] Whenever a minor son or daughter has left the father's home, the cause should be ascertained; for the disobedience of children is not to be encouraged in any event,[2] and the father has also a right to furnish the support in his own way, hence is not liable where the child has

father in the absence of express contract. So where a minor son left home to attend school contrary to his father's wishes the father is not liable for medical services furnished to the son without his knowledge where information of the son's illness could easily have been given to the father. Sassaman v. Wells, 178 Mich. 167, 144 N. W. 478.

97. Huffman v. Hatcher, 178 Ky. 8, 198 S. W. 236, L. R. A. 1918B, 484; Lufkin v. Harvey, 131 Minn. 239, 154 N. W. 1097, L. R. A. 1916B, 1112.

98. Gordon v. Wyness, 155 N. Y. Supp. 162.

99. Smith v. Gilbert, 80 Ark. 525, 98 S. W. 115; Dumser v. Underwood, 68 Ill. App. 623; Sassaman v. Wells, 178 Mich. 167, 144 N. W. 478; (1911), De Brauwere v. De Brauwere, 96 N. E. 722, 203 N. Y. 460 (affirming order 129 N. Y. S. 587, 144 App. Div. 521, which affirms judgment, 1910, 126 N. Y. S. 221, 69 Misc. 472); Loucks v. Dutcher, 112 N. Y. S. 269; Snell v. Ham (Tex. Civ. App.), 151 S. W. 1077; Gordon v. Potter, 17 Vt. 348.

1. Glynn v. Glynn, 94 Me. 465; 48 A. 105; Dyer v. Helson, 117 Me. 203, 103 A. 161; Brosius v. Barker, 154 Mo. App. 657, 136 S. W. 18. See, however, Bradley v. Keen, 101 Ill. App. 519. See Miller v. McKinney, 45 Ill. App. 447. Where parents after divorce agreed that the father should have custody of the minor son, and the latter goes to live with his mother without good cause or consent, the mother cannot render the father liable for his son's board against the father's refusal. Cushman v. Hassler, 82 Ia. 295.

2. Raymond v. Loyl, 10 Barb. 483; Angel v. McLellan, 16 Mass. 28; Weeks v. Merrow, 40 Me. 151.

services performed by a person different from the one authorized by the father.[3] A claim against a parent for his minor child's necessaries may be outlawed by limitations.[4]

§ 788. Child as Agent for Parent.

Let us here inquire how far the child may bind his father as agent. A father is not bound by the contracts or debts of his son or daughter, even for necessaries, as a rule, unless the circumstances show an authority actually given or to be legally inferred.[5] The principles of agency as between father and child might seem analogous to those which govern the relation of husband and wife; which last have already been considered at some length. On the one hand, the father should be compelled to discharge his legal and moral obligations as a parent, by providing suitable necessaries; on the other, he should not be prejudiced by the acts of his imprudent child.

If, then, the infant child resides at home, it is to be presumed that the father furnishes whatever is necessary and proper for his maintenance; and a proper support being rendered, under such circumstances, a third person cannot supply necessaries and charge the father. So far, all is clear. Wherever the infant is *sub potestate parentis* in fact, there must be a clear and palpable omission of duty in this respect, on the part of the parent, to render him chargeable, unless he has conferred actual authority or made express contract.[6] The converse of this rule has more than once been suggested in our American courts; namely, that where the father abandons his duty, so that his infant child is forced to leave his house, he is liable for a suitable maintenance furnished the child elsewhere.[7] And upon this doctrine was a Connecticut case based many years ago, where an infant child had "eloped" from

3. Sullivan v. Liggins, 149 N. Y. S. 517.

4. Pryor v. West, 72 Ga. 140.

5. 2 Kent, Com. 192; Cromwell v. Benjamin, 41 Barb. 558; Gordon v. Potter, 17 Vt. 348; Pidgin v. Cram, 8 N. H. 350; Raymond v. Loyl, 10 Barb. 483; Tomkins v. Tomkins, 3 Stockt. 512; Van Valkenburg v. Watson, 13 Johns. 480; Mortimore v. Wright, 6 M. & W. 482; Kelley v. Davis, 49 N. H. 187.

6. Tomkins v. Tomkins, 3 Stockt. 512; Townsend v. Burnham, 33 N. H. 27; Clinton v. Rowland, 24 Barb. 634; Keaton v. Davis, 18 Ga. 457; Gotts v. Clark, 78 Ill. 229; Rogers v. Turner, 58 Mo. 116. The parent's contract or failure to supply must be averred and shown by the claimant. McLaughlin v. McLaughlin, 159 Pa. St. 489; Conboy v. Howe, 59 Conn. 112. And ratification by allowing the child to wear or consume requires suitable proof. *Ib.*

7. Owen v. White, 5 Port. 435, and cases cited in the two preceding notes.

his father's house for fear of personal violence and abuse; and his necessary support and education were furnished by a stranger.[8]

The child may be the agent of the parent as shown by the circumstances,[9] but the acts of the child do not make the parent liable in the absence of special authority,[10] and the mere relationship of parent and child does not authorize a presumption of general agency between them,[11] although the child's agency as to necessaries may be implied in case of abandonment by the parent.[12]

A child dealing at a store as a known agent for the parent does not become personally liable although he has come of age,[13] but a special power of attorney given by a parent to a child does not authorize the child to make a conveyance to herself of the parent's property.[14]

The mere relationship of parent and child is not enough to

8. Stanton v. Wilson, 3 Day, 37. But the point decided was a different one.

9. Apgar v. Connell, 140 N. Y. S. 705, 79 Misc. 531; Center v. Rush, 71 N. Y. S. 767, 35 Misc. 294; A. Alschuler & Sons v. Anderson, 142 Ill. App. 323; Anderson v. Lemker (Ia.), 162 N. W. 7 (father liable to tradesman furnishing goods which he had authorized son to order whether tradesman knew of authority and whether or not goods were necessaries).

10. Doyle v. Peerless Motor Car Co. of New England, 226 Mass. 561, 116 N. E. 257; Rishworth v. Moss (Tex. Civ. App.), 191 S. W. 843; Hood & Johnson v. Pelham, Sitz & Co., 5 Ala. App. 471, 59 So. 767.

Plaintiff sold a piano to defendant's infant son, who did not state that he bought as agent, but merely stated that he had to consult his folks before buying. A receipt for a part payment was issued to the infant in his own name, and plaintiff took the infant's individual note for the balance, and brought suit thereon, which he discontinued when learning of the infancy. Defendant had paid for necessary articles for use on his farm bought by the infant son. Held, not to show that the son acted as the agent of defendant in making the purchase, or that plaintiff was justified in assuming that he so acted, precluding a recovery from him for the balance due. Fisher v. Lutz, 146 Wis. 664, 132 N. W. 592; McMahon v. Smith, 121 N. Y. S. 736, 136 App. Div. 839; Cousins v. Boyer, 100 N. Y. S. 290, 114 App. Div. 787; Peacock v. Linton, 22 R. I. 328, 47 A. 887, 52 L. R. A. 192 (tutoring in vacation); Hickox v. Bacon, 17 S. D. 563, 97 N. W. 847; Cox v. W. A. Chanslor & Son (Tex. Civ. App.), 181 S. W. 560.

Where the parent sends the child to a particular dentist and he goes to another, he is a special agent only and the dentist cannot recover. Dumser v. Underwood, 68 Ill. App. 121; Coe v. Moon, 260 Ill. 76, 102 N. E. 1074; Starcher v. Thompson, 35 S. D. 311, 152 N. W. 99.

11. Mott v. Scholes, 131 N. Y. S. 811, 147 App. Div. 82; Habhegger v. King, 149 Wis. 1, 135 N. W. 166; McDonald v. City of Spring Valley (Ill.), 120 N. E. 476, 209 Ill. App. 7 (parent not agent of child).

12. Finn v. Adams, 138 Mich. 258, 101 N. W. 533, 11 Det. Leg. N. 552.

13. Emery-Bird-Thayer Dry Goods Co. v. Coomer, 87 Mo. App. 404.

14. *In re* Acken's Estate, 144 Ala. 519, 123 N. W. 187.

charge the parent on contracts not for necessaries entered into by the child, and some express or implied authority must be shown. So a minor son operating his father's car for his own pleasure who, without fault on his part, injures a boy, has no authority to engage a doctor to attend the boy so as to render the father liable for the doctor's fees.[15]

The son's purchases may be ratified by the father[16] by his promise to pay for it,[17] but where a son did not assume to act as the agent of the father in a transaction, and he had no authority to act therein, there can be no ratification.[18]

§ 789. Agreements to Support.

An agreement by the father to pay another for support of the children is enforceable,[19] and such an agreement may bind the father although no specific sum for support is named in it,[20] and he is also liable for purchases made by the child with the father's knowledge and consent.[21]

But very slight evidence may sometimes warrant the inference that a contract for the infant's necessaries is sanctioned by the father; so zealous is the court to enforce a moral obligation wherever it can. English authority to the same effect is not equally pointed;[22] but the American rule is certainly humane and liberal in this respect. Thus, the father is held bound for necessaries,

15. Habhegger v. King (Wis.), 135 N. W. 166, 39 L. R. A. (N. S.) 881.

16. White v. King, 133 N. Y. S. 962; Poe v. Pevsner, 175 Ill. App. 394.

17. Smith v. Church, 5 Hun, 109; Bisbee v. McManus, 229 Mass. 124, 118 N. E. 192; Wells v. Scofield, 141 N. Y. S. 657, 157 App. Div. 8.

18. Fisher v. Lutz, 146 Wis. 664, 132 N. W. 592.

19. William & Vashti College v. Shatford, 203 Ill. App. 390; Myers v. Saltry, 173 S. W. 1138, 163 Ky. 481 (motion to file record denied, Myers v. Same, 164 Ky. 350, 175 S. W. 626); Medlock v. Isaacs, 144 Ky. 787, 139 S. W. 948; Marks v. Wooster (Mo. App.), 199 S. W. 446; Maxwell v. Boyd, 123 Mo. App. 334, 100 S. W. 540; Johnson v. Johnson, 142 N. Y. S. 416, 157 App. Div. 289.

20. Flugel v. Henschel, 6 N. D. 205, 69 N. W. 195.

21. Auringer v. Cochrane, 225 Mass. 273, 114 N. E. 355.

Where children, while members of their father's family, acted for him in the purchase of necessaries, or where the necessaries were purchased by the children without his authority, but were used by members of his household, with his knowledge, or where the necessaries were purchased without his authority, but brought to his home by his children, and he knew the facts, and made no objection thereto, he was liable for reasonable value of the goods. Martz v. Fullhart, 142 Mo. App. 348, 126 S. W. 964; Armstrong Clothing Co. v. Boggs, 90 Neb. 499, 133 N. W. 1122.

22. Blackburn v. Mackey, 1 Car. & P. 1; Law v. Wilkin, 6 Ad. & El. 781; cases of doubtful legal authority. See Macphers. Inf. 514, 515.

where he knows the circumstances, and makes no objection.[23] And for the expenses of education and maintenance furnished on his general consent, and in his negligence.[24] So, too, being liable once to a third person, the father may be held liable afterwards by implication, unless his revocation is made clear and consistently adhered to.[25] Doubtless any father may contract for supplies, necessary or unnecessary, on his child's account, if he chooses to.[26]

§ 790. What Constitutes Support or "Necessaries."

"Necessaries" for the furnishing which a tradesman can hold the father include food, clothing,[27] washing, medicines, instruction and suitable places of residence. The tradesman must show that the goods were such as children in like condition of life are usually supplies with.[28]

§ 791. Medical Expenses.

Maintenance and care include the duty to furnish proper medical attendance,[29] including even a surgical operation of doubtful advantage which the mother alone ordered.[30] The duty of the parent to care for the child involves the duty of procuring for him when seriously ill proper medical attendance, and religious belief

23. Swain v. Tyler, 26 Vt. 9; Thayer v. White, 12 Met. 343; Fowlkes v. Baker, 29 Tex. 135. As where he knew that another was boarding his minor child with expectation of reward. Clark v. Clark, 46 Conn. 586. Or upon written agreement with his divorced wife, who retains the children. Courtright v. Courtright, 40 Mich. 633. Cf. Baldwin v. Foster, 138 Mass. 449.

24. Thompson v. Dorsey, 4 Md. Ch. 149.

25. Plotts v. Rosebury, 4 Dutch. 146; Murphy v. Ottenheimer, 84 Ill. 39. And see Deane v. Annis, 14 Me. 26. Notice to a third person may be waived afterwards by the parent's acts. Bailey v. King, 41 Conn. 365.

26. Bryan v. Jackson, 4 Conn. 288. And see Brown v. Deloach, 28 Ga. 486; Deane v. Annis, 14 Me. 26; Harper v. Lemon, 38 Ga. 227.

27. Bisbee v. McManus, 229 Mass. 124, 118 N. E. 192 (hats and veils necessaries).

Unnecessary hats and gowns for minors cannot be charged to father without his consent. Auringer v. Cochrane, 225 Mass. 273, 114 N. E. 355.

28. Dembinski's Case (Mass.), 120 N. E. 856; Gately Outfitting Co. v. Vinson, 182 S. W. 133; Cheever v. Kelly, 96 Kan. 269, 150 P. 529.

29. Simoneau v. Pacific Electric Ry. Co., 159 Cal. 494, 115 P. 320; Leach v. Williams, 30 Ind. App. 413, 66 N. E. 172; Lamson v. Varnum, 171 Mass. 237, 50 N. E. 615; Sassamen v. Wells, 178 Mich. 167, 144 N. W. 478; Des Mond v. Kelly, 163 Mo. App. 205, 146 S. W. 99; Ketchem v. Marsland, 42 N. Y. S. 7, 18 Misc. 450 (person with whom child is temporarily residing cannot pledge's father's credit for dentist's bill which is not a matter of immediate necessity); Homeopathic Hospital of Albany v. Chalmers, 157 N. Y. S. 1000, 94 Misc. 600; Howell v. Blesh, 19 Okla. 260, 91 P. 893.

30. French v. Burlingame, 155 Mo.

is no excuse for failure to do so. The correct rule requires medical attendance in such a manner and on such occasions as an ordinarily prudent person solicitous for the welfare of his child and anxious to promote its recovery would provide. Religious belief can never be an excuse for omitting any legal duty.[31]

Gross neglect of a parent to procure medical attention to a child whose feet are frozen, as a result of which neglect the child died, is murder. The fact that defendant was a laboring man with no means to pay for medical attendance is no defence where his neighbors were all ready to help him if called upon and the city furnished a competent city physician and the defendant made no request to anyone for over ten days, at the end of which time it was too late to save the child's life.[32]

§ 792. Funeral Expenses.

A father is, in general, liable for the decent funeral expenses of his deceased minor child,[33] or even of an adult child who is incompetent.[34] A father is liable for the burial expenses of his minor son, incurred without his express authority, if the son had been living with the father at the time of his death; and there is no liability if the son leaves the home of the father voluntarily and without fault on the part of the father. Where, however, the father drove the son from home, he had lost the right to his earnings, but there would be no emancipation which would relieve the father from the duty of providing necessities for the son in the event of his illness and the father remains liable for his burial expenses.[35]

At common law a father is bound only to give his child decent burial. There is no rule of law prescribing what is decent burial. A poor man commits no crime where he clothes the corpse and puts it in a paper box and digs a grave in a wood lot and buries it there without religious ceremony of any kind. He is left to determine what kind of a casket shall be used and what, if any, cere-

App. 548, 134 S. W. 1100. *Contra*, Detwiler v. Bowers, 9 Pa. Super. Ct. 473.

31. People v. Pierson, 176 N. Y. 201, 68 N. E. 243, 63 L. R. A. 187; Owens v. State (Okla. Crim. Rep.), 116 Pac. 345, 36 L. R. A. (N. S.) 633.

32. Stehr v. State, 92 Neb. 755, 139 N. W. 676, 45 L. R. A. (N. S.) 559.

33. P. J. Hunycutt v. Thompson, 159 N. C. 29, 74 S. E. 628; Gobber v. Empting, 129 N. Y. S. 4. See Sullivan v. Horner, 41 N. J. Eq. 299; Bair v. Robinson, 108 Pa. St. 247.

34. *In re* Van Denburgh, 164 N. Y. S. 966, 178 App. Div. 237.

35. P. J. Huneycutt & Co. v. Thompson (N. C.), 74 S. E. 628, 40 L. R. A. (N. S.) 488.

monies should be had. He also commits no crime in refusing to invite his wife's relatives or friends, as they had no legal right to be present. There is also no law requiring a religious ceremony.[36]

§ 793. Maintenance, &c., in Chancery; Allowance from Child's Fortune.

We pass from maintenance under statute to chancery maintenance, a topic considered in connection with education. Maintenance as ordered by courts of equity, or allowed in settlement of a trust account, has grown into a topic of considerable magnitude, especially under the English system. The rule is, that where an infant has property of his own, and his father is dead, or is not able to support him, he may be maintained and educated as may be fit, out of the income of property absolutely his own, by the person in whose hands the property is held; and a court of equity will allow all payments made for this purpose, which appear upon investigation to have been reasonable and proper.[37] As a general rule, the father must, if he can, maintain as well as educate his infant children, whatever their circumstances may be; and no allowance will be made him out of their property while his own means are adequate for such purposes,[38] and especially not where

36. Seaton v. Comm., 149 Ky. 498, 149 S. W. 871, 42 L. R. A. (N. S.) 211.

37. Macphers. Inf. 213; 2 Story, Eq. Juris., § 1354; Williams v. Williams (Ala.), 81 So. 41; Cooley v. Stringfellow, 164 Ala. 460, 51 So. 321; State v. Layton (Del. Super. 1834), 1 Har. 324; First Nat. Bank v. Greene (Ky. 1908), 114 S. W. 322; Funk's Guardian v. Funk, 130 Ky. 354, 113 S. W. 419; Commonwealth v. Lee, 120 Ky. 433, 86 S. W. 990, 27 Ky. Law, 806, 120 Ky. 433, 89 S. W. 731, 28 Ky. Law, 596; Riley v. Riley's Adm'r, 11 Ky. Law, 859; (1906), Peters v. Scoble, 28 Ohio Cir. Ct. R. 541 (judgment affirmed, *In re* Peter's Estate (1907), 76 Ohio St. 564, 81 N. E. 1193) (stepmother). See Coler v. Callahan, 174 N. Y. S. 504.

38. *In re* Harris, 16 Ariz. 1, 140 P. 825; Rowe v. Raper, 23 Ind. App. 27, 54 N. E. 770, 77 Am. St. R. 411; Cox's Guardian v. Storts, 77 Ky. 502; Nunnelly's Guardian v. Nunnelly, 180 Ky. 131, 201 S. W. 976; Clay v. Clay, 27 Ky. Law, 1020, 87 S. W. 807; Milliken v. Deming, 15 Ky. Law, 332; Burba v. Richardson, 14 Ky. Law, 233; *In re* Wilber's Estate, 57 N. Y. S. 942, 27 Misc. 53; *In re* Davis' Estate, 90 N. Y. S. 244, 98 App. Div. 546, 184 N. Y. 299, 77 N. E. 259; *In re* Jeffrey's Estate, 137 N. Y. S. 168; Exchange Banking & Trust Co. v. Finley, 73 S. C. 423, 53 S. E. 649; Hollingsworth v. Beaver (Tenn. Ch. App. 1900), 59 S. W. 464.

It is the duty of a father to support his minor children out of his own estate, though they have some property of their own. United States Fidelity & Guaranty Co. v. Hall (Tex. Civ. App.), 173 S. W. 892; Macphers. Inf. 154, 219, Wellesley v. Beaufort, 2 Russ. 28; Butler v. Butler, 3 Atk. 60; 2 Kent, Com. 191; Darley v. Darley, 3 Atk. 399; Cruger v. Heyward, 2 Desaus. 94; Matter of Kane, 2 Barb.

the child's services rendered to the parent were equal in value to the cost of maintenance,[39] and where the family is living on land belonging to the minor child this fact should be considered.[40] And the strict rule of the common law regarded the parent as without legal right to reimbursement for his outlay in this direction.

But if the father is unable to maintain his children, the court of chancery will order maintenance for them out of their own property,[41] and where a child marries and leaves the parent's home recovery may be had by the parent if the child later returns and lives with him.[42] And where the question turns upon the father's ability, maintenance is given, not only in case of his bankruptcy or insolvency, but whenever it appears that he is so straitened in his circumstances that he cannot give the child a maintenance and education suitable to the child's fortune and expectations.[43] The amount of such fortune, as well as the situation, ability, and circumstances of the father, will be taken into account by the court in all such cases. And where a father has himself made no charge for maintaining his infant children, the court will not make it for him in order to benefit his creditors.[44]

The estate of the child cannot be charged with services rendered on the credit of the father, the child having no estate at the time.[45]

Courts now look with great liberality to the state of facts in each particular case of this kind before them. Thus, there are precedents in the English courts where the father had a large income,

Ch. 375; Addison v. Bowie, 2 Bland, 606; Harland's Case, 5 Rawle, 323; Myers v. Myers, 2 McCord, Ch. 255; Tompkins v. Tompkins, 3 C. E. Green, 303; Tanner v. Skinner, 11 Bush, 120; Buckley v. Howard, 35 Tex. 565; Ela v. Brand, 63 N. H. 14; Dessenger Case, 39 N. J. Eq. 227; Kinsey v. State, 98 Ind. 351; Beardsley v. Hotchkiss, 96 N. Y. 201; Bedford v. Bedford, 136 Ill. 354. As to liability in cultivating a plantation, owned in common by father and child, see Succession of Trosclair, 34 La. Ann. 326.

39. Leake v. Goode, 96 S. W. 565, 29 Ky. Law Rep. 793; Same v. Rhodes, 29 Ky. Law Rep. 793, 96 S. W. 566; Hamilton's Adm'r v. Riney, 140 Ky. 476, 131 S. W. 287; Commonwealth v. Lee, 120 Ky. 433, 86 S. W. 990, 27 Ky. Law Rep. 806, 120 Ky. 433, 89 S. W. 731, 28 Ky. Law Rep. 596; Bell v. Dingwell, 91 Neb. 699, 136 N. W. 1128.

40. Commonwealth v. Lee, 120 Ky. 433, 86 S. W. 990, 27 Ky. Law Rep. 806, 120 Ky. 433, 89 S. W. 731, 28 Ky. Law Rep. 596.

41. 2 Kent, Com. 191; Macphers. Inf. 220.

42. Bell v. Moon, 79 Va. 341.

43. Buckworth v. Buckworth, 1 Cox, 80; Macphers. Inf. 220; Newport v. Cook, 2 Ashm. 332; Matter of Kane, 2 Barb. Ch. 375; Lagger v. Mutual Loan Co., 146 Ill. 283; Bedford v. Bedford, 136 Ill. 354.

44. Beardsley v. Hotchkiss, 96 N. Y. 201.

45. Gaston v. Thompson, 129 Ga. 754, 59 S. E. 799.

and yet was allowed for the maintenance of his infant children, they having an income still larger;[46] though the increasing liberality of the courts in that country is now chiefly exhibited in their construction of written directions for maintenance now so common in deeds of settlement and other instruments, by which property is secured to the infant.[47] In this country there are many instances where the father has been allowed for his child's maintenance, though not destitute. As in a case where the father was guardian of his children, labored for their support, and had been put to increased expense by the death of their mother.[48] And again, where his resources were very moderate, and the two children, young ladies, had a comfortable income between them.[49] So where the father was poor and disabled, and his daughter lived with him.[50]

Chancery in all such cases endeavors to pursue the course which is best calculated to promote the permanent interest, welfare, and happiness of the children who come under its care. "And these," says Chancellor Walworth, "are not always promoted by a rigid economy in the application of their income, regardless of the habits and associations of their period of minority."[51] In other words, to liberally educate and make due use of such social advantages as the child's own means permit is incumbent upon every judicious parent, since each child should be trained with reference to his own opportunities; and hence a child with fortune should not be straitened in his bringing up because the parent is without one. One may maintain suitable to his own condition in life, while it is fair that his children should be supported according to theirs.[52]

The father may be allowed for the expenses of past maintenance and education, if special circumstances exist; not otherwise, ac-

46. 2 Kent, Com. 191; Jervois v. Silk, Coop. Eq. 52, 2 Story, Eq. Juris., § 1354 *et seq.*; Greenwell v. Greenwell, 5 Ves. 194; Hoste v. Pratt, 3 Ves. 730; *Ex parte* Penleaze, 1 Bro. C. C. 387, *n.*

47. See Macphers. Inf. 221-223; Heysham v. Heysham, 1 Cox, 179. And see Allen v. Coster, 1 Beasl. 201.

48. Harring v. Coles, 2 Bradf. Sur. 349.

49. Matter of Burke, 4 Sandf. Ch. 617.

50. Watts v. Steele, 19 Ala. 656. And see Godard v. Wagner, 2 Strobh. Eq. 1; Newport v. Cook, 2 Ashm. 332; Otte v. Becton, 55 Mo. 99; Trimble v. Dodd, 2 Tenn. Ch. 500; Holtzman v. Castleman, 2 MacArthur, 555; Baines v. Barnes, 64 Ala. 375. Cf. McKnight v. Walsh, 23 N. J. Eq. 136, 296.

51. Matter of Burke, 4 Sandf. Ch. 619.

52. See Haase v. Roerschild, 6 Ind. 67; Sparhawk v. Sparhawk's Ex'r, 9 Vt. 41.

mording to the English rule of the present day.[53] But the father's non-residence, and consequent inability to make a seasonable application for maintenance, is held a special circumstance to justify such allowance.[54] While the old rule was to make no allowance for past maintenance, that rule, with the increase of wealth and liberal living, has been greatly relaxed in modern times. In this country, too, as to retrospective allowance, chancery does not appear to be very strict as concerns the parent, though special circumstances should always be chosen for making it.[55] Every such case must depend on its own facts. We apprehend that, both in England and America, maintenance would be allowed the parent from the estate of a full-grown child only on proof of some contract.[56]

A father, even if he be not in needy circumstances, may maintain his children out of any fund which is duly vested in him for that express purpose.[57] One may also contract that certain property shall be applied to the maintenance and education of his children, in which case also the contract may be enforced in his favor, without regard to the question of ability; and on this ground provisions for maintenance in an antenuptial settlement have been construed in favor of the husband and father.[58] But it is clear, from the cases, that where the fund is given as a mere bounty, notwithstanding a provision for maintenance, the father, if of ability, must support the child;[59] and this principle is extended to the father's postnuptial and voluntary settlement upon his children as distinguished from antenuptial contracts.[60] This will not prevent a court from construing such provisions in a father's favor, where the facts show that he ought, on general principles, to receive

53. 2 Story, Eq. Juris., Redf. ed., § 1354a; Carmichael v. Hughes, 6 E. L. & Eq. 73; per Lord Cranworth; *Ex parte* Bond, 2 Myl. & K. 439; Brown v. Smith, L. R. 10 Ch. D. 377.

54. Carmichael v. Hughes, 6 E. L. & Eq. 71. And see Stopford v. Lord Canterbury, 11 Sim. 82; Bruin v. Nott, 1 Phill. 572; Simon and Others v. Barber, 1 Tamlyn, 22.

55. Matter of Kane, 2 Barb. Ch. 375; Matter of Burke, 4 Sandf. Ch. 619; Myers v. Meyers, 2 McCord Ch. 214; Trimble v. Dodd, 2 Tenn. Ch. 500; Otto v. Peeton, 55 Mo. 99.

56. See *In re* Cottrell's Estate, L. R. 12 Eq. 566; *infra*, ch. 5; Otte v. Beston, 55 Mo. 99.

57. Macphers. Inf. 220; Hawkins v. Watts, 7 Sim. 199; Andrews v. Partington, 2 Cox, 223; Kendall v. Kendall, 60 N. H. 527.

58. Mundy v. Earl Howe, 4 Bro. C. C. 224; Stocken v. Stocken, 4 Sim. 152; Macphers. Inf. 220; Ransome v. Burgess, L. R. 3 Eq. 773.

59. Hoste v. Pratt, 3 Ves. 729; Hamley v. Gilbert, Jac. 354; Myers v. Myers, 2 McCord, Ch. 255; Jones v. Stockett, 2 Bland, 409.

60. *In re* Kennison's Trusts, L. R. 12 Eq. 422.

assistance.[61] It will presently appear that the parent's right to his child's services becomes, as the child grows older, a partial offset to the cost of support; and there can be no justice in letting the father receive the child's useful services at home, or his earnings, and charge an allowance out of the child's property at the same time, regardless of that pecuniary advantage.[62]

§ 794. Chancery Maintenance; Out of Income or Principal.

Courts of chancery, following a well-known principle, usually restrict the extent of a child's maintenance to the income of his property.[63] But where the property is small, and the income insufficient for his support, the court will sometimes allow the capital to be broken;[64] though rarely for the purpose of a child's past maintenance when his future education and support will be left thereby unprovided for.[65]

We have assumed, in the cases already considered, that there was some fund in which the infants had an absolute right or interest. Where the interest is merely contingent the rule is necessarily strict.[66] Maintenance cannot be allowed to infants out of a fund which, upon the happening of the event contemplated by the testator in the bequest of the fund, will not belong to the infants but to some other person.[67] The right to charge a child's fund as

61. See Andrews v. Partington, 2 Cox, 223, commented upon in Hoste v. Pratt, 3 Ves. 729.

Where the trustee for an infant, in the exercise of rightful discretion, has paid over to the father, at his request, certain sums of money out of the income of the trust property, the father being a bankrupt, it is held that no promise can be implied under such circumstances, on the part of the father, to repay to the trustee the sums of money thus applied when he afterwards becomes able to do so; there should be something to show an express promise of repayment. Pearce v. Olney, 5 R. I. 269. See *In re* Stables, 13 E. L. & Eq. 61.

62. Livernois, Re, 78 Mich. 330.

63. 2 Story, Eq. Juris., § 1355; Macphers. Inf. 252.

64. *Ib.;* Barlow v. Grant, 1 Vern. 255; Bridge v. Brown, 2 You. & C. C. 181; *Ex parte* Green, 1 Jac. & W. 253; Osborne v. Van Horne, 2 Fla. 360; Newport v. Cook, 2 Ashm. 332. See *In re* Coe's Trust, 4 Kay & J. 199; Matter of Bostwick, 4 Johns. Ch. 100; Donovan v. Needham, 15 N. J. 193. The terms of the trust may impose special restrictions. McKnight v. Walsh, 23 N. J. Eq. 136.

65. See Otte v. Beeton, 55 Mo. 99; Cox v. Storts, 14 Bush, 502.

66. *Ex parte* Kebble, 11 Ves. 604.

67. *Ib.;* Errat v. Barlow, 14 Ves. 202; Turner v. Turner, 4 Sim. 430; Matter of Davison, 6 Paige, 136. Where the father has permitted the child to squander sums paid regularly for maintenance, he cannot claim reimbursement. Smith v. Smith, 3 Dem. (N. Y.) 556. As to rule of procedure in securing maintenance, see Macphers. Inf. 214 *et seq.*, and works on equity procedure. Maintenance is further considered under Guardian and Ward, *post*, § 337.

guardian for his education or maintenance in any case is at the most a discretionary right and not to be compelled.[68]

§ 795. When Duty Ceases.

The parent's obligation to support ceases when the child comes of age,[69] as where a child has attained full age, the presumption is that he will bind himself by his own contracts. Under the latter circumstances, a mere request to furnish necessaries does not bind the father, though the son be living with him; while it is very clear that the father may even thus bind himself by his own independent promise.[70] In general, the legal obligation of the father to maintain his child under the common law ceases as soon as the child is of age, however wealthy the father may be, unless the child becomes chargeable to the public as a pauper.[71]

If a parent gives a child to another, who takes the child, this releases the parent's duty to support,[72] but an agreement between the father and another by which the other person for consideration agrees to support the children does not relieve the father as between himself and his children.[73]

Furthermore, for supplies furnished the infant after the parent's

68. Reynold v. Reynold, 92 Ky. 556; Hanford v. Prouty, 133 Ill. 339.

69. Voras v. Rosenberry, 85 Ill. App. 623; Haynes v. Waggoner, 25 Ind. 174; Studebaker Bros. Mfg. Co. v. De Moss, 62 Ind. App. 635, 113 N. E. 417, 111 N. E. 26.

One's duty to care for his child does not necessarily terminate when the child becomes an adult, and the parent must support a helpless adult child, if able to do so. Crain v. Malone, 130 Ky. 125, 113 S. W. 67; Commonwealth v. Willis (Ky. Super. 1886), 7 Ky. Law Rep. 677; *In re* Willis' Estate, 158 N. Y. S. 985, 94 Misc. 29; Skidmore v. Skidmore, 145 N. Y. S. 939, 160 App. Div. 594.

70. Boyd v. Sappington, 4 Watts, 247; Patton v. Hassinger, 69 Penn. St. 311. And see Mills v. Wyman, 3 Pick. 207; Wood v. Gills, Coxe, 449; Norris v. Dodge's Adm'r, 23 Ind. 190; Kernodle v. Caldwell, 46 Ind. 153; White v. Mann, 110 Ind. 74.

71. 2 Kent, Com. 192; Parish of St. Andrew v. De Breta, 1 Ld. Raym. 699. The father, having a fair capital, may be liable under statute for the support of his adult pauper daughter as of "sufficient ability," even though his income be less than his expenses and his health infirm. Templeton v. Stratton, 128 Mass. 137.

72. Davis v. Davis, 85 Ind. 157. *Contra,* Murphy v. Riecks (Cal. App.), 180 P. 15.

73. Hohenadel v. Steele, 237 Ill. 229, 86 N. E. 717; Edelson v. Edelson, 179 Ky. 300, 200 S. W. 625; Brice v. Brice, 50 Mont. 388, 147 P. 164; Rennie v. Rennie, 95 A. 571; Wright v. Leupp, 70 N. J. Eq. 130, 62 A. 464; Hazard v. Taylor, 78 N. Y. S. 828, 38 Misc. 774; Sanger Bros. v. Trammell (Tex. Civ. App.), 198 S. W. 1175 (fact that father has furnished mother with money for children does not relieve him from duty of support). See *In re* Stowell, 159 N. Y. S. 84, 172 App. Div. 684.

death, the parent's executor or administrator should not be sued; it is rather the infant's new guardian, and the fund accruing to the child on distribution of the parental estate, to which the claimant must look for indemnity.[74]

§ 796. Separation or Divorce of Parents.

In a state of voluntary separation, the husband *prima facie*, and not the wife, is liable for the support of children living with her; and if the wife be justified in leaving her husband's house and taking the child with her, she may pledge his credit for the child's necessaries as well as her own, so long as he neglects to make reasonable effort to regain the child's custody.[75]

Where a father abandons his minor children and thereby compels the divorced wife to support them, the law implies a promise on the part of the father to pay for the nurture of his children by their mother.[76] Where the husband absconds and leaves the wife and four minor children, whom she supports for four years until she obtains a divorce, she can recover from the husband the expense of supporting them up to the time of her divorce. The obligation of the father being personal, it must be enforced where he can be found or property belonging to him can be attached. But since the obligation does exist, and exists in favor of the mother, the law is not so impotent as to leave her remediless.[77] But circumstances, even where the husband deserts his wife, may repel the idea of an agency thus conferred upon her.[78]

If the wife leaves her husband without cause, taking the minor child with her, she has apparently no right as agent to pledge her husband's credit for the child's necessaries, whatever might be the husband's legal duty of providing for the child's support.[79] For

74. Burns v. Madigan, 60 N. H. 197. Slight evidence will support the allegation of a promise by a father to pay for his child's support. Jordan v. Wright, 45 Ark. 237, p. 380.

75. Rumney v. Keyes, 7 N. H. 571; Kimball v. Keyes, 11 Wend. 32; Walker v. Laighton, 11 Fost. 111; Gill v. Read, 5 R. I. 343. And see Reynolds v. Sweetser, 15 Gray, 78; Grunhut v. Rosenstein, 7 Daly, 164.

76. Beigler v. Chamberlin (Minn.), 165 N. W. 128, L. R. A. 1918B, 215; *contra*, Hancock v. Merrick, 10 Cush. 41; Fitler v. Fitler, 33 Penn. St. 50; Burritt v. Burritt, 29 Barb. 124.

77. Rogers v. Rogers, 93 Kan. 114, 143 Pac. 410, L. R. A. 1915A, 1137.

78. As where he deserted before the child was born. Lapworth v. Leach, 79 Mich. 16; Ramsey v. Ramsey, 121 Ind. 215.

79. "In Bazeley v. Forder, L. R. 3 Q. B. 559, it was conceded that a wife had no power to charge her husband for the support of a child, unless she was living apart from him justifiably, and her power to do it in

the mother has her own moral and legal obligation to support, nourish, and educate her own children to the extent of her ability and means. And while in case of either separation or divorce, without orders of custody, the obligation in general continues as before, it may be materially affected by the special circumstances of each case; while a judicial award of children to the mother should be presumed to carry with it a transfer of parental duties, as well as of parental rights.[80] But a father, as against the public and his children, cannot, it is often held, escape the duty of providing for the children's support; not even if they remain with their mother after divorce.[81] And although a wife by her fault may forfeit her own claim to support, she cannot forfeit that of the children.[82]

The courts to-day are considering the good of the children rather than protection of the father, and it seems to be the view of the

that case was put on the ground that the reasonable expenses of the child were part of her reasonable expenses. But assuming it to be true, as laid down in several more or less considered *dicta*, that the law of Massachusetts imposes a duty upon a father to support his children, and that, when he wrongfully turns his wife and children out of doors, his liability for the latter arises out of that duty (Reynolds v. Sweetser, 15 Gray, 78; Brow v. Brightman, 136 Mass. 187), still all the cases show very plainly that, when the wife leaves without cause, taking her child with her, the fact that her husband does not attempt to compel her to give up the custody of the child does not of itself authorize her to bind him for its support.'' Holmes, J., in Baldwin v. Foster, 138 Mass. 449.

The father is liable for support although the wife leaves him without just cause. Birdsong v. Birdsong (Ky.), 206 S. W. 22.

80. Brow v. Brightman, 136 Mass. 187. Stanton v. Wilson, 3 Day, 37, appears to carry the mother's right much further; but its authority is questionable. We must admit, however, that in a late English case, presenting a strong state of facts, a woman who lived apart from her husband for sufficient cause, having with her, against her husband's will, their child, of whom a court had given her the custody, was allowed (Cockburn, C. J., dis.) to pledge the husband's credit for the child's reasonable expenses; she having no adequate means of support. Bazeley v. Forder, L. R. 3 Q. B. 559. See as to a child's right to bind as agent, *ante*, § 788.

81. Courtright v. Courtright, 40 Mich. 633; Conn v. Conn, 57 Ind. 323; Thomas v. Thomas, 41 Wis. 229; Welch's Appeal, 43 Conn. 342; Buck v. Buck, 60 Ill. 105. Local statutes affect this question considerably; and the award of alimony is a matter of judicial discretion in divorce suits.

When custody of a child is given to the mother on her divorce from the child's father, the latter, having no right to the child's services, is free from liability to the mother for the child's maintenance. Husband v. Husband, 67 Ind. 583. Especially if the mother remarries, and her second husband assumes the place of father. Johnson v. Onsted, 74 Mich. 437, 121 Ind. 215.

82. But alimony decrees may regulate such matters. *Ex parte* Gordon, 95 Cal. 374.

most recent cases on the subject that divorce does not change the father's liability to support. Hence the father will still be liable for the support of his minor child although the parents have separated and the mother has taken the children,[83] but a mother-in-law who has caused the separation by interference cannot recover against the father for support she gave the children.[84]

In a state of separation or divorce, too, she has her own obligations toward the minor child in her separate custody. The statute of Elizabeth, to which we have already referred, expressly includes the mother. And since the tendency of the day is to give the mother a more equal share in the parental rights, it follows that she should assume more of the parental burdens. It is nevertheless clear that the courts show special favor to the mother, as they should; and if the child has property and means of his own they will rather in any case charge the expenses of his education and maintenance upon such property than force her to contribute;[85] but a divorced woman to whom the custody of the child has been awarded may be liable for their support primarily.[86]

It seems to be the weight of authority that a wife who obtains a divorce and the custody of her child, the decree being silent as to its maintenance, can recover from the husband the expense of caring for the child after the divorce.[87] The same result is reached

83. Shields v. O'Reilly, 68 Conn. 256, 36 A. 49; Rogers v. Rogers, 93 Kan. 114, 143 P. 410; McGarvey's Guardian v. McGarvey's Adm'r, 163 Ky. 242, 173 S. W. 765; *contra*, Brow v. Brightman, 136 Mass. 187; Assman v. Assman, 179 S. W. 957; Ahrens v. Ahrens (Okla.), 169 P. 486; Stockwell v. Stockwell, 87 Vt. 424, 89 A. 478. See O'Brien v. Galley-Stockton Shoe Co. (Colo.), 173 P. 544 (only if father's promise to pay can be implied); Cowls v. Cowls, 3 Gilm. 435; McCarthy v. Hinman, 35 Conn. 538. Cf. Harding v. Harding, 144 Ill. 589.

84. Howell v. Solomon, 167 N. C. 588, 83 S. E. 609.

85. *In re* Ryan's Estate, 174 Mo. App. 202, 156 S. W. 759 (although divorced); *Ib.;* Haley v. Bannister, 4 Madd. 275; Hughes v. Hughes, 1 Bro. C. C. 338. And see Lanoy v. Dutchess of Athol, 2 Atk. 447; *Ex parte* Petre, 7 Ves. 403; Macphers. Inf. 224; Beasley v. Magrath, 2 Sch. & Lef. 35; Pyatt v. Pyatt, 46 N. J. Eq. 285; Anne Walker's Matter, Cas. temp. Sugd. 299. Mother's discretion overruled. *In re* Roper's Trusts, L. R. 11 Ch. D. 272.

86. Ellis v. Hewitt, 15 Ga. App. 693, 84 S. E. 185.

87. Bennett v. Robinson, 180 Mo. App. 56, 165 S. W. 856; Winner v. Shucart (Mo.), 215 S. W. 905; Desch v. Desch, 55 Colo. 79, 132 P. 60; Hall v. Hall, 141 Ga. 361, 80 S. E. 992 Stockwell v. Stockwell, 87 Vt. 424, 89 Atl. 478; *contra*, Stone v. Duffy (Mass.), 106 N. E. 595; Bondies v. Bondies, 40 Okla. 164, 136 Pac. 1089.

even though the husband obtains the divorce where the wife keeps and cares for the child.[88]

Where the court takes away from the father the care and custody of the children, chancery does not call in aid of their own means the property of the father, and it directs maintenance out of their own fortunes, whatever may be their father's circumstances.[89] Local statutes sometimes affect the rule in this country; while in the divorce courts an order of maintenance for children will sometimes be made on somewhat the same principle as alimony for the wife, notwithstanding the guilty husband loses their custody.[90]

§ 797. Pleadings and Evidence in Actions for Support.

The complaint in an action by a stranger against a father to obtain reimbursement for support must show that the child was at the time under age,[91] but need not allege a special promise to pay,[92] if the allegation is made that the support given was necessary and that the father negligently failed to furnish it,[93] and the burden is on the plaintiff to show that there was a necessity for articles furnished without express order of the parent,[94] but there can be no recovery if it appears that the father sent the son remittances to pay his board,[95] and these questions are for the jury to decide.[96]

There is authority that equity has jurisdiction independently of

88. Schoennauer v. Schoennauer, 77 Wash. 132, 137 Pac. 325. The financial ability of the parties to support the child may be considered. White v. White, 169 Mo. App. 40, 154 S. W. 872.

Where a divorce decree gives the mother the custody of the child this relieves the father from his duty to support, but he remains morally bound to assist it, and any payments he makes towards the support of the child will be presumed as made in fulfilment of this moral duty and cannot be charged against the child's separate estate. Exchange Banking & Trust Co. v. Finley, 73 S. C. 423, 53 S. E. 649.

89. Wellesley v. Duke of Beaufort, 2 Russ. 1; Macphers. Inf. 224.

90. Milford v. Milford, L. R. 1 P. & D. 715; Schouler, Hus. & Wife, § 555; Wilson v. Wilson, 45 Cal. 399; Holt v. Holt, 42 Ark. 495.

91. Humphreys v. Bush, 118 Ga. 628, 45 S. E. 911 (failure to allege minority should be set out by plea and not by special demurrer).

92. Bradley v. Keen, 101 Ill. App. 519; McCrady v. Pratt, 138 Mich. 203, 101 N. W. 227, 11 Det. Leg. N. 529 (burden is on plaintiff to prove that the father authorized the son to procure credit for board).

93. O'Brien v. Galley-Stockton Shoe Co. (Colo.), 173 P. 544; Davis v. Davis, 85 Ind. 157; Lamson v. Varnum, 171 Mass. 237, 50 N. E. 615; Smith v. Church (N. Y. Sup. 1875), 5 Hun, 109; Cousins v. Boyer, 100 N. Y. S. 290, 114 App. Div. 787.

94. Dyer v. Helson, 117 Me. 203 103 A. 161.

95. McCrady v. Pratt, 138 Mich. 203, 101 N. W. 227, 11 Det. Leg. N. 529.

96. Kubic v. Zemke, 105 Iowa, 269, 74 N. W. 748; Cory v. Cook, 24 R. I.

statute of a suit by a wife to compel her husband to support their minor children.[97] A judgment for support renders the question of paternity *res judicata*.[98]

§ 798. English Statute Enforcing Support.

The statute 43 Eliz., c. 2, slightly amended by 5 Geo. I., c. 8, points out the English policy in this respect. It is provided by this statute that the father and mother, grandfather and grandmother, of poor, old, blind, lame, and impotent persons shall maintain them at their own charges, if of sufficient ability; and if a parent runs away and leaves his children, the municipal authorities, by summary judicial process, may seize upon his rents, goods and chattels, and dispose of them toward their relief.[99] No person is bound to provide a maintenance for his issue, except where the children are impotent and unable to act, through infancy, disease, or accident, and then is only obliged to furnish them with necessaries, the penalty on refusal being no more than twenty shillings a month. "For the policy of our laws, which are ever watchful to promote industry," says Blackstone, "did not mean to compel a father to maintain his idle and lazy children in ease and indolence; but thought it unjust to oblige the parent against his will to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favors."[1] Lord Eldon, viewing the same subject afterwards in the light of equity principles, was differently impressed by these penal provisions, and founded the jurisdiction of chancery upon the very meagreness of the common-law remedies against keeping the child from starvation.[2]

The statute 43 Eliz. may be considered as having been transported to the United States as part of our common law. Its pro-

421, 53 A. 315. (It is a question for the jury whether a commercial education in bookkeeping is a necessity.)

97. Leibold v. Leibold, 158 Ind. 60, 62 N. E. 627.

98. Commonwealth v. Bednarek, 62 Pa. Super. Ct. 118.

99. 1 Bl. Com. 448; Stubb v. Dixon, 6 East, 166; Macphers. Inf. 210. These statutes did not extend to illegitimates or stepchildren. Tubb v. Harrison, 4 T. R. 118; Cooper v. Martin, 4 East, 76. But this is changed by statute 4 & 5, Will. IV., ch. 76.

1. 1 Bl. Com. 449; Winston v. Newcomen, 6 Ad. & El. 301.

2. "Is it," says he, "an eligible thing that children of all ranks should be placed in this situation, that they shall be in the custody of the father: although looking at the *quantum* of allowance which the law can compel the father to provide for them, they may be regarded as in a state little better than that of starvation? The courts of law can enforce the rights of the father, but they are not equal to the office of enforcing the duties

visions have also been re-enacted in many of our States, as in New Hampshire, Connecticut, and South Carolina. In New York, Massachusetts, and some other States, the provision as to grandparents is omitted.[3] This feeble and scanty provision of statute law was intended, as Kent observes, for the indemnity of the public against the maintenance of paupers.[4] Some local statutes at this day authorize courts and magistrates to award to the overseers of the poor the custody of children who are found to be neglected by their parents and growing up without education or salutary control.[5]

Under the pauper acts it is held that the father's obligation to support his vagabond son, who cannot support himself, does not accrue until after legal proceedings have been instituted; and the furnishing of previous supplies constitutes no legal consideration to support a new promise.[6] Nor is an insane mother, herself a pauper, under obligation to support a minor child, or entitled to his earnings.[7] And as the language of statute 43 Eliz. rendered it inapplicable to stepchildren, so does it apply to blood relations only; and the husband is not liable for the expense of maintaining his wife's mother;[8] nor the father for his daughter's husband;[9] nor a man who marries for his pauper stepchildren.[10] But a *quasi* parental relation may sometimes be established; and one may stand *in loco parentis* to another, and thus become responsible for the maintenance and education of the latter, on the principle that the child is held out to the world as part of his family.[11]

§ 799. American Penal Statutes Enforcing Support.

Statutes have been passed in many States making desertion and abandonment of children an indictable offence, and all the elements of such offence as set out in the statutes must be alleged and

of the father.'' Wellesley v. Duke of Beaufort, 2 Russ. 23 (1827).

3. 2 Kent, Com. 191, and note; Dover v. McMurphy, 4 N. H. 162; Comm'rs of Poor v. Gansett, 2 Bail. 320. And see Hayne's Adm'r v. Waggoner, 25 Ind. 174.

4. 2 Kent, Com. 191.

5. Farnham v. Pierce, 141 Mass. 203. For criminal prosecution under a local statute for failure to support, see State v. Sutcliffe (1894), N. J.

6. Mills v. Wyman, 3 Pick. 207; Loomis v. Newhall, 15 *Ib.* 159.

7. Jenness v. Emerson, 15 N. H. 486. And see Sanford v. Lebanon, 31 Me. 124; Farmington v. Jones, 36 N. H. 271.

8. Rex v. Munden, 1 Stra. 190.

9. Friend v. Thompson, Wright, 636.

10. Brookfield v. Warren, 128 Mass. 127.

11. See as to stepchildren, Ela v. Brand, 63 N. H. 14.

proved,[12] including a lawful marriage between the father and mother.[13]

The crime is made out if the children become destitute after the father leaves them,[14] and although the child is born after deser-

12. State v. Garrison, 129 Minn. 389, 152 N. W. 762; Floyd v. State, 86 S. E. 460 (demand for support need not be shown); State v. Clark (La.), 80 So. 578; State v. Langley, 248 Mo. 545, 154 S. W. 713; Irving v. State (Tex. Cr. App.), 166 S. W. 1166 (name of son must be proved); Moore v. State, 1 Ga. App. 502, 37 S. E. 1016 (conduct of mother no defence); Jackson v. State, 1 Ga. App. 723, 58 S. E. 272; Moore v. State, 34 Ohio Cir. Ct. R. 487 (notice of necessity not essential). See State v. Sparegrove, 134 Iowa, 599, 112 N. W. 83 (guilt of person to whom parent gave child); State v. Teal, 77 Ohio St. 77, 83 N. E. 304 (demand on father unnecessary); *Ex parte* Mitchell, 19 Cal. App. 567, 126 P. 856; Parrish v. State, 10 Ga. App. 836, 74 S. E. 445; Sanders v. Sanders, 167 N. C. 319, 83 S. E. 490; *In re* Cordy, 146 P. 534 (affirming judgment, 169 Cal. 150, *Id.* 532, intent necessary); judgment (1907), 103 N. Y. S. 881, 119 App. Div. 143, aff'd.; Goetting v. Normoyle, 191 N. Y. 368, 84 N. E. 287 (effect of bond required); State v. Langford (Ore), 176 P. 197; Daniels v. State, 8 Ga. App. 469, 69 S. E. 588; Adams v. State, 164 Wis. 223, 159 N. W. 726; State v. Gipson, 92 Wash. 646, 159 P. 792; State v. Beers, 77 Conn. 714, 58 A. 745; Gay v. State, 105 Ga. 599, 31 S. E. 569, 70 Am. St. Rep. 68; Dalton v. State, 118 Ga. 196, 44 S. E. 977; Baldwin v. State, 118 Ga. 328, 45 S. E. 399; Williams v. State, 121 Ga. 195, 48 S. E. 938; Brown v. State, 122 Ga. 568, 50 S. E. 378; Mays v. State, 123 Ga. 507, 51 S. E. 503.

Absence is a necessary element in the crime of abandoning destitute children. Brown v. State, 122 Ga. 568, 50 S. E. 378; Shannon v. People, 5 Mich. 71.

The question by whose advice the parent left the place where his children were is irrevelant. State v. Peabody, 25 R. I. 544, 56 A. 1028; State v. Donaghy, 6 Boyce (Del.), 344 99 A. 720; State v. Eckhardt, 232 Mo. 49, 133 S. W. 321 ("expose" defined); People v. Schlott, 162 Cal. Cal. 347, 122 P. 846; Rimes v. State, 7 Ga. App. 556, 67 S. E. 223 "his child" sufficient description); State v. Shouse (Mo.), 186 S. W. 1064 ("necessary food, clothing or lodging" defined).

Where the child had the same sort of food and lodging as defendant, who had not deserted her, the evidence of neglect is insufficient. State v. Shouse (Mo.), 186 S. W. 1064; State v. Vogt, 141 La. 764, 75 So. 674; State v. Clark (La.), 80 So. 578.

13. Cunningham v. State, 13 Ga. App. 80, 78 S. E. 780; Martin v. People, 60 Colo. 575, 155 P. 318 (must show that mother the legal wife of father); Wynne v. State, 86 S. E. 823 (common-law marriage). See People v. Connell, 136 N. Y. S. 912, 151 App. Div. 943 (paternity must be proved where defendant marries mother of illegitimate child). See State v. Veres, 75 Ohio St. 138, 78 N. E. 1005 (pendency of bastardy proceeding no defence); People v. Fitzgerald, 152 N. Y. S. 641, 167 App. Div. 85 (father of illegitimate not guilty under statute as a "parent"); Creisar v. State, 97 Ohio, 16, 119 N. E. 128 ("minor" means legitimate child).

14. Brown v. State, 122 Ga. 568, 50 S. E. 378; People v. Lewis, 116 N. Y. S. 893, 132 App. Div. 256.

tion,[15] and although there is no notice or demand on the parent.[16]

Abandonment has two elements: separation from the child and failure to supply its needs,[17] and wilful and voluntary abandonment includes actual desertion.[18]

Where the custody of the child was awarded to the wife in her divorce suit, his failure to support will not make him criminally liable under the statute,[19] but it is held that the fact that the mother improperly keeps the children does not relieve him of responsibility for their support.[20]

Temporary absences leaving the child in charge of another will not constitute abandonment,[21] but a father cannot relieve himself by contract of the duty of supporting his children.[22]

The father cannot be imprisoned for neglect to provide as ordered by the court unless it is shown that he has the ability to comply with the order.[23] Support may include proper medical treatment.[24]

§ 800. Support by Others as a Defence.

Abandonment under some statutes is not proved where the child is supported by others,[25] while under other statutes punishing de-

15. Moore v. State, 1 Ga. App. 502, 57 S. E. 1016; Jackson v. State, 1 Ga. App. 723, 58 S. E. 272; Spicer v. State (Tex. Cr. App.), 179 S. W. 712; Shelton v. State, 19 Ga. App. 618, 91 S. E. 923 (if father persists in abandonment after birth of child); Campbell v. State, 20 Ga. App. 190, 92 S. E. 951.

16. Elem v. State, 5 Ohio App. 12.

17. Phelps v. State, 10 Ga. App. 41, 72 S. E. 524.

18. Gay v. State, 105 Ga. 599, 31 S. E. 569, 70 Am. St. Rep. 68.

19. People v. Hartman, 23 Cal. App. 72, 137 P. 611; People v. Dunston, 173 Mich. 368, 138 N. W. 1047. See, however, *Ex parte* McMullin, 19 Cal. App. 481, 126 P. 368; State v. Coolidge, 72 Wash. 42, 129 P. 1088; *Ex parte* Perry (Cal. App.), 174 P. 105. See People v. Champion, 30 Cal. App. 463, 158 P. 501.

20. Beilfuss v. State, 142 Wis. 665, 126 N. W. 33; Adams v. State, 164 Wis. 223, 159 N. W. 726.

21. *In re* Snowball's Estate, 156 Cal. 240, 104 P. 444.

22. Laws v. People, 59 Colo. 562, 151 P. 433.

23. *Ex parte* McCandless, 17 Cal. App. 222, 119 P. 199; Raborn v. State, 71 Fla. 387, 72 So. 463; People v. Forester, 29 Cal. App. 460, 155 P. 1022.

24. Owens v. State, 6 Okla. Cr. 110, 116 P. 345.

25. State v. Anderson, 189 Mo. App. 611, 175 S. W. 259; Richie v. Commonwealth, 23 Ky. Law Rep. 1237, 64 S. W. 979. See People v. Rubens, 92 N. Y. S. 121. See State v. Thornton, 232 Mo. 298, 124 S. W. 519 (defendant is not guilty where mother supplies child with "necessary food;") State v. Neuroth, 181 S. W. 1061; State v. Tietz, 186 Mo. App. 672, 172 S. W. 474; People *ex rel.* Mueller v. Mueller, 150 N. Y. S. 204, 164 App. Div. 386; People v. Smith, 150 N. Y. S. 731, 88 Misc. 136; Wheeler v. State, 51 Ind. App. 622, 100 N. E. 25; Williams v. State, 126 Ga. 637, 55 S. E. 480; People v. Meads, 28 Cal. App. 140, 151 P. 552 (where mother left him, taking

sertion the fact that the child is supported by others is no defence.[26]

The question whether the father is liable under a penal statute for failing to contribute to the support of his children when they are well taken care of by others may depend on the language of the statute. Where the statute defines the crime as failing to provide, leaving the child destitute, the father is not liable where others provide for it,[27] and the same result is reached where the statute includes a reckless disregard of the life or health of the child.[28] But where the statute punishes mere failure to provide necessary food, clothing, etc., the crime may be complete although the child is well taken care of by others.[29] It is held no defence to a prosecution for the crime of non-support of children that their necessities had been relieved by others where the children would be in necessitous circumstances if they had not been so provided for,[30] as this would introduce a new provision into the statute and make a parent's guilt depend on the concurrent failure and neglect of other persons to provide for his child. Men cannot shift their burdens upon the shoulders of others in this way.[31]

§ 801. Proceedings to Compel Support.

The proceeding for non-support is criminal in nature and may be prosecuted by the public authorities,[32] and in the court designated by the statute,[33] under an indictment detailing the offence

child); Order (1906), 98 N. Y. S. 863, 112 App. Div. 717, aff'd.; People v. Joyce, 189 N. Y. 518, 81 N. E. 1171.

26. Bowen v. State, 56 Ohio St. 235, 46 N. E. 708; State v. Stouffer, 65 Ohio St. 47, 60 N. E. 985.

In a place. The fact that the statute provides for abandonment "in a place" is important and means that the child must be left in some definite place and it is not enough to show that the child was left in the custody of the mother. People v. Joyce, 98 N. Y. S. 863, 112 App. Div. 717, 20 N. Y. Cr. R. 101, 189 N. Y. 518, 81 N. E. 1171. See Goffe v. State, 14 Ga. App. 275, 80 S. E. 519 (child need not be destitute, it is enough that father does not provide for it); State v. Boss, 137 P. 829; State v. Waller, 90 Kan. 829, 136 P. 215; Hunter v. State, 10 Okla. Cr. 119, 134 P. 1134; State v. Wellman, 102 Kan. 503, L. R. A. 1918D, 949, 170 P. 1052.

27. Dalton v. State, 118 Ga. 196, 44 S. E. 977; Williams v. State, 121 Ga. 195, 48 S. E. 138, 126 Ga. 637, 51 S. E. 480.

28. Richie v. Comm., 23 Ky. L. Rep. 1237, 64 S. W. 979; State v. Thornton (Mo.), 134 S. W. 519, 32 L. R. A. (N. S.) 841.

29. State v. Stouffer, 65 Ohio St. 47, 60 N. E. 985.

30. State v. Wellman (Kan.), 170 Pac. 1052, L. R. A. 1918D, 949.

31. Hunter v. State (Okla. Crim. Rep.), 134 Pac. 1134, L. R. A. 1915A, 564.

32. State v. Peabody, 25 R. I. 178, 55 A. 323.

33. Steele v. People, 88 Ill. App. 186. See Keller v. Commonwealth, 71 Pa. 413 (as to proceedings in dif-

particularly,[34] supported by competent evidence[35] as to neglect before and after the time set in the indictment.[36]

The crime of failing to support children is a crime of omission, and the crime occurs where the omission takes place. Therefore, where a man deserts his family and removes to another State the crime occurs at the place of the residence of the children, as he owes the duty of support at that point, and therefore he may be punished if brought there although the non-support charge took place while he was in another State.[37] Whether a father can be prosecuted in Kansas for not taking care of his son there when the father lived in Texas depends on whether he permitted the mother to remove the son to Kansas under such circumstances that he was obligated for his support and with knowledge or reasonable means of knowledge that his child was destitute and likely to become a public burden. The mere fact that without fault of the parents the child was brought to Kansas by his mother and was, at some time after the father had been brought to Kansas in custody of an officer, actually in destitute circumstances, would not of itself constitute a crime.[38]

The judgment of the court may be conditional,[39] and may be modified on proof of change of circumstances,[40] and the court may

ferent counties); Commonwealth v. Acker, 197 Mass. 91, 83 N. E. 312 (no defence that child living in foreign country); *In re* Fowles, 89 Kan. 430, 131 P. 598 (non-resident parent must be shown to have knowledge); State v. Barilleau, 128 La. 1033, 55 So. 664; State v. Sanner, 81 Ohio St. 393, 90 N. E. 1007 (though parent a resident of another State at the time); State v. Yocum, 106 N. E. 705 (in county where children living). See People v. Clairmont, 111 N. Y. S. 613, 58 Misc. 517 (no jurisdiction where offence committed outside the State); Noodleman v. State (Tex. Cr. App.), 170 S. W. 710 (although desertion in another State); State v. Tujague, 134 La. 576, 64 So. 417; Martin v. People (Colo.), 168 P. 1171.

34. Richie v. Commonwealth, 23 Ky. Law Rep. 1237, 64 S. W. 979; Shannon v. People, 5 Mich. 71; State v. Block (Mo. App. 1904), 82 S. W. 1103; State v. Donaghy, 6 Boyce (Del.), 344, 99 A. 720; Utsler v. State (Tex. Cr. App.), 195 S. W. 855.

35. Donaghy v. State, 6 Boyce (Del.), 467, 100 A. 696, 99 A. 722 (marital relations between father and mother immaterial); Campbell v. State, 20 Ga. App. 190, 92 S. E. 951; Poindexter v. State, 137 Tenn. 386, 193 S. W. 126 (evidence of defendant's father's efforts to induce mother to return to him immaterial); Joiner v. State (Tex. Cr. App.), 196 S. W. 523.

36. Watke v. State (Wis.), 163 N. W. 258.

37. State v. Wellman (Kan.), 170 Pac. 1052, L. R. A. 1918D, 949.

38. *Re* Fowles, 89 Kan. 430, 131 Pac. 598, 47 L. R. A. (N. S.) 227.

39. Spade v. State, 44 Ind. App. 529, 89 N. E. 604.

40. Hirstius v. Gottschalt, 31 Ohio Cir. Ct. R. 406.

by statute order a guaranty bond to be furnished,[41] with a right of appeal provided by statute.[42]

41. State v. Clark (La.), 78 So. 742.

42. Donaghy v. State, 6 Boyce (Del.), 344, 100 A. 696, 99 A. 720; State v. Clark (La.), 78 So. 742.

CHAPTER XI.

RIGHTS OF CHILDREN.

§ 802. Rights of Children in General.

The rights of children with reference to their parents may be considered more at length. We have already had occasion to observe that the child may to a certain extent bind the parent as agent, not only for necessaries, but in some other transactions, where the child acts within the scope of authority properly conferred. But general transactions require proof of actual authority; and a son has ordinarily no more right, as such, to lend his father's goods than a stranger.[43] And proof that in one instance the use, by a son, of his father's name upon negotiable paper discounted at a bank, was known and acquiesced in by the father, is not proof that the son was authorized to sign subsequent notes in the same manner.[44] The principles of agency are here applied.[45] A child cannot recover on the ground of relationship upon a promise made for his benefit to his parent, if the consideration came wholly from the parent.[46]

§ 803. Claims Against the Parental Estate for Services Rendered.

Claims for services rendered to a parent, or to some one standing in place of a parent, are not unfrequently presented against the parental estate after decease. Thus, where an adult child resides with and performs valuable service for the parent, an understanding may be shown between them of recompense either in money or by way of testamentary provision under the parent's will. In meritorious instances, and particularly where the parent was long sick and infirm, and the child, or some particular child, performed indispensable functions, or where by personal labor and skill the

43. Johnson v. Stone, 40 N. H. 197; *supra*, § 788. But see Bennett v. Gillett, 3 Minn. 423.

44. Greenfield Bank v. Crafts, 2 Allen, 269.

45. See also Sequin v. Peterson, 45 Vt. 255; *supra*, § 689.

46. Marston v. Bigelow, 150 Mass. 45.

child enhanced the value of the parental estate, a mutual intention to this effect may be inferred from the circumstances; and where, from some consistent cause, no such testamentary provision has been made, compensation will be allowed out of the deceased parent's estate upon the usual footing of a creditor's claim.[47] Presumptions, however, as we have seen, are unfavorable, and must be overcome;[48] and especially if the child seeks an advantage over other heirs, some express contract or affirmative evidence of intention ought to appear; and so, too, presumptions are against the reimbursement of parental care and trouble bestowed upon one's offspring.[49]

Where the relationship was more distant, or the parties concerned were not kindred at all or united by marital ties, the inference of a promise to recompense the service rendered is of course more readily raised, whether the claim be presented against the person served, or against his estate, upon his decease.[50]

§ 804. Advancements.

If the father, during his lifetime, makes an advancement to any of his children, towards their distributive share in his estate, the rule is to reckon this in making the distribution.[51] In England it

47. Freeman v. Freeman, 65 Ill. 106; Markey v. Brewster, 17 N. Y. Supr. 16. Specific performance has been decreed of a promised conveyance in consideration, even though the will were insufficient. Hiatt v. Williams, 72 Mo. 214. As to persons in general performing service in expectation of a legacy, mere expectation cannot create an enforceable contract; but a mutual understanding, if shown, may afford the basis of a valid claim against an estate. See Shakespeare v. Markham, 17 N. Y. Supr. 311, 322, and cases cited. Hudson v. Hudson, 87 Ga. 678.

48. Zimmerman v. Zimmerman, 729 Penn. St. 229; § 269; Erhart v. Dietrich, 118 Mo. 418; Hudson v. Hudson, 90 Ga. 581. But an agreement to make a will in the child's favor, though invalid in a testamentary sense, imports a contract to be sued upon. Ellis v. Cary, 74 Wis. 176.

49. Seitz's Appeal, 87 Penn. St. 159. See *supra*, § 238; Reando v. Misplay, 90 Mo. 251, where necessary services were rendered to an insane mother.

50. Briggs v. Briggs, 46 Vt. 571; Morton v. Rainey, 82 Ill. 215; Broderick v. Broderick, 28 W. Va. 378.

51. Rhea v. Bagley, 63 Ark 374, 38 S. W. 1039, 36 L. R. A. 86; Hughes v. Nicholson, 105 P. 692, affd. on reh.; Plowman v: Nicholson, 81 Kan. 210, 106 P. 279; Brooks v. Summers, 100 Ky. 620, 38 S. W. 1047, 18 Ky. Law Rep. 1026; Ayler v. Ayler (Mo.), 186 S. W. 1068; Taylor v. Draper, 71 N. J. Eq. 309, 63 A. 844; Cowden v. Cowden, 28 Ohio Cir. Ct. R. 71; Kern v. Howell, 180 Pa. St. 315, 36 A. 872, 40 W. N. C. 93, 57 Am. St. Rep. 641; Schouler, Executors, §§ 499, 500; Edwards v. Freeman, 2 P. Wms. 435. And so is it with one standing *in loco parentis*.

The father must account for the rents and profits of any property

would appear that acts of the father have often been so construed, under the statute of distributions, with less reference to intention of the parties than the requirements of equal justice. Thus annuities are reckoned an advancement; contingent provisions; large premiums for a trade or profession; and loans of considerable importance to a son.[52] But small and inconsiderable sums for current expenses, ornaments, and the education of children are not so reckoned.[53] Nor is the payment to the daughter's husband of £1,000, jocularly stated by the father to be in exchange for his snuff-box, to be considered an advancement to the daughter.[54]

The rule in this country does not appear to be very strict; and in some States the statutes of distributions, unlike those of England, permit nothing to be reckoned as an advancement to a child by the father, unless proved to have been so intended and chargeable on the child's share by certain evidence prescribed.[55] And it is laid down that whether a provision of the deceased in his lifetime be a gift or an advancement is a question of intention; but that if it was originally intended by both as a gift, it cannot subsequently be treated by the father as an advancement, at least without the son's knowledge or consent;[56] nor set off as an advance-

which he has given as an advancement; Guthrie v. Mitchell, 38 Okl. 55, 132 P. 138.

52. Smith v. Smith, 3 Gif. 263; 2 Wms. Ex'rs, 1385; Edward v. Freeman, 2 P. Wms. 435; Boyd v. Boyd, L. R. 4 Eq. 305.

53. 2 Wms. Ex'rs, 6th Am. ed. 1498-1505. And see Miller's Appeal, 40 Pa. St. 57.

54. McClure v. Evans, 29 Beav. 422. And see Stock v. McAvoy, L. R. 15 Eq. 55.

In a modern English case a father lent the sum of £10,000 to his son, to assist him in forming a partnership in the business of a sugar-refiner, and took his promissory note for the repayment of that sum on demand. It appeared that the son engaged in business at the urgent desire of his father; that finding it was a losing concern he became desirous of retiring, but remained at the urgent request of his father and continued the business with reluctance, sustaining heavy losses. The father on his deathbed caused the promissory note to be burned, and died intestate. It was held that although the circumstances under which the note had been destroyed amounted to an equitable release of the debt; yet that the sum which remained due on it must be considered an advancement to the son. Gilbert v. Wetherell, 2 Sim. & Stu. 254, per Sir John Leach, M. R. But see Auster v. Powell, 31 Beav. 583, and *n*. And see Bennett v. Bennett, L. R. 10 Ch. D. 474.

55. Osgood v. Breed's Heirs, 17 Mass. 356. Mere declarations of a father held insufficient to raise a presumption of his intention to treat money paid to his son for which he had taken the latter's notes as advancements. Harley v. Harley, 57 Md. 340.

56. Lawson's Appeal, 23 Pa. St. 85; Sherwood v. Smith, 23 Conn. 516. See Black v. Whitall, 1 Stockt. 572; Storey's Appeal, 83 Pa. St. 89.

ment to the son in settling the father's estate.[57] Yet it is also ruled that if a son during his father's life receipts for and actually receives his "full proportion," he can claim nothing more from the etsate after his father's death.[58] Advancements do not bear interest, unless, at all events, the intention to that effect be very clear.[59]

Where the child of a father dying intestate has received an advancement, in real or personal estate, and wishes to come into the general partition or distribution of the estate, he may bring his advancement into *hotchpot* with the whole estate of the intestate, real and personal; and shall thereupon be entitled to his just proportion of the estate. This is the English rule, and it prevails likewise in many of the United States.[60] In such case the value of the property at the time of advancement governs in the distribution.[61] The principle of this rule is equality of distribution of the ancestor's personal estate among his children and their de-

57. Thurber v. Sprague, 17 R. I. 634. The suggestion that an unequal distribution among children results, will not avail. *Ib.*, Burt v. Quisenberry, 132 Ill. 385. And see Francis v. Wilkinson, 147 Ill. 370. But cf. Culp v. Wilson, 133 Ind. 294. As to insurance on his own life for the child's benefit, see Cazassa v. Cazassa, 92 Tenn. 573.

58. Cushing v. Cushing, 7 Bush, 259.

59. Osgood v. Breed's Heirs, 17 Mass. 356; Nelson v. Wyan, 21 Mo. 347; Porter's Appeal, 94 Pa. St. 232. A transaction between parent and child may constitute a loan rather than either gift or advancement. Bruce v. Griscom, 16 N. Y. Super. 280, 29 Beav. 422. As where the parties habitually keep memoranda to this effect, 67 Miss. 413. As to proof of an advancement, see Bulkley v. Noble, 2 Pick. 337; and see Hartwell v. Rice, 1 Gray, 587; Miller's Appeal, 40 Pa. St. 57; Smith v. Smith, 59 Me. 214; Vanzant v. Davies, 6 Ohio St. 52; 2 Story, Eq. Juris. § 1202; Brown v. Burk, 22 Ga. 574; Cleaver v. Kirk, 3 Met. (Ky.) 270; Hodgson v. Macy, 8 Ind. 121; Vaden v. Hance, 1 Head, 300. Fulton v. Smith, 27 Ga. 413; Montgomery v. Chaney, 13 La. Ann. 207. A conveyance of land to the husband of a daughter is not an advancement to the daughter. Rains v. Hays, 6 Lea, 303. But where an adult child accepts a deed which explicitly declares that it is accepted by said child "as his full and entire share of his father's estate," and the child puts the deed on record, enters into possession, and enjoys the property thus conveyed, he cannot deny the deed to be binding upon him to that effect. Kershaw v. Kershaw, 102 Ill. 307; Roberts v. Coleman, 37 W. Va. 143. See further, 2 Schouler, Wills.

60. 2 Bl. Com. 516; 2 Wms. Ex'rs, 1386; 2 Kent, Com. 421; Jackson v. Jackson, 28 Miss. 674; Barnes v. Hazleton, 50 Ill. 429; Schouler, Executors, §§ 499, 500.

61. See Jenkins v. Mitchell, 4 Jones, Eq. 207. For the New York rule, see Terry v. Dayton, 31 Barb. 519; Beebe v. Estabrook, 18 N. Y. Supr. 523.

scendants. A fiduciary debt from parent to child must of course be separately accounted for out of his estate.[62]

§ 805. Child's Rights of Inheritance.

The sale of expectant estates by heirs is not to be encouraged; one reason being that it opens the door to taking undue advantage of an heir in distressed and necessitous circumstances; the other that public policy should prevent an heir from shaking off his father's authority and feeding his extravagance by disposing of the family estate.[63] The principle was formerly laid down with much emphasis in Massachusetts.[64] But the present rule of chancery is to support such sales to others, if made *bona fide*, and for valuable consideration; and in case of an heir apparent, if the instrument be made with the knowledge and consent of the father.[65] Whether, however, the son can release to the father himself, so as to operate further than as a receipt for property advanced to him, is more doubtful.[66]

Where a legacy is given by a parent to his child, or by one *in loco parentis*, by way of maintenance, the child as legatee is privileged in being allowed interest thereon from the testator's death; this, so as to secure the child's prompt and full support. And the presumptive right to interest is held to be all the same, notwithstanding the child has no guardian,[67] or the testator was not obliged to render support;[68] but not where the will makes other express provision for maintenance.[69]

The child's right of inheritance from his parent, it may be added, is strongly favored both in England and America. But while in the former country the eldest son is so far preferred to the other children that he shall take the whole real estate by descent to himself, the American rule is that all children shall inherit alike,

62. Concha v. Murrieta, 40 Ch. D. 543.

63. Per Lord Thurlow, 1 Bro. C. C. 10; Co. Litt. 265, *a;* Sugden, Vendors, 314, and cases cited; 1 Story, Eq. Juris. §§ 336-339.

64. But see Trull v. Eastman, 3 Met. 121; *contra,* Boynton v. Hubbard, 7 Mass. 112. See Varick v. Edwards, 1 Hoff. Ch. 383; 2 Kent, Com. 475, and cases cited.

65. Curtis v. Curtis, 40 Me. 24.

66. See Robinson v. Robinson, Brayt. 59; Walker v. Walker, 67 Pa. St. 186. The agreement of children without their father's knowledge to release all rights of inheritance in land to one, if that one would maintain the father for life, is not against public policy, but may be upheld in equity. Walker v. Walker, *Ib.*

67. Kent v. Dunham, 106 Mass. 586; Fowler v. Colt, 22 N. J. Eq. 44.

68. For the testator might have intended support from the legacy. Brown v. Knapp, 79 N. Y. 136.

69. *In re* George, 47 L. J. Ch. 118.

whether sons or daughters. And a father's will is to be construed with favor to his own offspring; indeed, some of our local statutes expressly provide that when a testator omits to provide for any children, they shall take the same share of the testator's estate, both real and personal, that would have passed to them if the parent had died intestate, unless they had other provision during the testator's life, or it clearly appears that the omission was intentional on his part.[70]

A child has no absolute right of inheritance, and even equity will not interfere to raise a constructive trust where a man conveys land to his second wife, even though the result is to deprive his children by his first wife of all rights as heirs in the land. The mere fact that a conveyance works apparent injustice is not enough where the father was the owner in fee.[71]

§ 806. Rights of Full-grown Children.

A child, on arriving at full age, becomes emancipated,[72] and the legal rights and duties existing at common law between parent and child last only during the minority of the child, and after that the duties arising from the relation are not legal but moral except for statute.[73]

But whether son or daughter, the child, by continuing with the parent and living at the same home, may still be legally in the service of the parent. On this point there is no dispute; but in settling the presumptions of law there is apparently some conflict of authorities. Thus, where the parent sues for loss of services because of the seduction of a grown-up or minor daughter, a strong disposition is frequently manifested to rule against complete emancipation so as to give damages. Where, however, the conflict is between parent and an adult child, over work done for a stranger, the tendency is in favor of complete emancipation, and to allow the child, attained to full age, the right to control his own wages; this being for the child's benefit. So, too, a parent is not liable to third parties for the board or necessaries of his adult children, in the absence of an express promise, or of facts from which an implied promise may be inferred;[74] while as between a parent and his

70. See Mass. Gen. Stats, ch. 92, § 25; 2 Kent, Com. 421; 4 Kent, Com. 471; 1 Jarm. Wills, 5th Am. ed. 129, *n.*; Schouler, Executors, §§ 499, 500.

71. Clester v. Clester, 90 Kan. 638, 135 P. 996, L. R. A. 1915E, 648.

72. 2 Kent, Com. 206; Poultney v. Glover, 23 Vt. 328; Hardwick v. Paulet, 36 Vt. 320; *supra*, § 252.

73. Appeal of Woodward, 81 Conn. 152, 70 A. 453.

74. Hawkins v. Hyde, 55 Vt. 55.

own adult children, unless peculiar circumstances have arisen, courts are reluctant to infer a pecuniary recompense from the performance of filial or parental duties such as humanity enjoins.[75]

If a child, then, after arriving at the age of twenty-one years, continues to live, labor, and render service in the father's family, with his knowledge and consent, but without any agreement or understanding as to compensation, the law raises no presumption of a promise to enable the child to maintain an action against the father to recover compensation.[76] The presumption here is, that the parties do not contemplate a payment of wages for sevrices, on the one hand, nor a claim for board and lodging, on the other. For where the relation of parent and child exists, the law will not readily assume that of debtor and creditor likewise; and board and services may constitute a fair mutual offset in the general household. But this presumption may be overthrown, and the reverse established, by proof of an express or implied contract to that effect; an implied contract being proven by facts and circumstances which show that both parties, at the time the services were performed, contemplated or intended pecuniary recompense.[77]

75. Zimmerman v. Zimmerman, 129 Pa. St. 229; Switzer v. Ker, 146 Ill. 577; *ante*, § 803. Such contracts are strictly personal, and no specific performance lies against the personal representatives of one deceased. Campbell v. Potter, 147 Ill. 576.

76. Dye v. Kerr, 15 Barb. 444; Lipe v. Eisenlerd, 32 N. Y. 229; Mosteller's Appeal, 30 Pa. St. 473; Ridgway v. English, 2 N. J. 409; Andover v. Merrimack County, 37 N. H. 437; Williams v. Barnes, 3 Dev. 348; Prickett v. Prickett, 5 C. E. Green, 478; Perry v. Perry, 2 Duv. (Ky.) 312; Heywood v. Brooks, 47 N. H. 231; Wilson v. Wilson, 52 Ia. 44; Gardner v. Schooley, 25 N. J. Eq. 150; Guffin v. First Nat. Bank, 74 Ill. 259; Pellage v. Pellage, 32 Wis. 136; Reynolds v. Reynolds, 92 Ky. 556.

Whether a father is liable for necessaries (*e. g.*, medical treatment) furnished to his adult daughter at her request while she is a member of his family, and the extent of her agency, see Blachley v. Laba, 63 Ia. 22. At common law a father is not liable for necessaries furnished an adult child, even though the child be at the father's home when the necessaries are furnished; unless at least a suitable agency to bind him be shown. *Ib.*; Crane v. Baudoine, 55 N. Y. 256; Mills v. Wyman, 3 Pick. 201; Boyd v. Sappington, 4 Watts, 247; § 788.

77. Miller v. Miller, 16 Ill. 296; Fitch v. Peckham, 16 Vt. 150; Hart v. Hart, 41 Mo. 441; Updike v. Ten Broeck, 3 Vroom, 105; Freeman v. Freeman, 65 Ill. 106; Van Schoyck v. Backus, 16 N. Y. Supr. 68; Hilbish v. Hilbish, 71 Ind. 27; Steel v. Steel, 12 Pa. St. 66; Kurtz v. Hibner, 55 Ill. 514; Young v. Herman, 97 N. C. 280. See Reando v. Misplay, 90 Mo. 251, where the parent was insane. The law implied here a contract by the insane person to pay for necessaries. See Tremont v. Mount Desert, 36 Me. 390; Leidig v. Coover's Ex'rs, 47 Pa. St. 534. But see Putnam v. Town, 34 Vt. 429.

Where a child continues after his majority to render his father services of the same character as rendered while a minor no recovery can be had for them in the absence of special agreement,[78] as the mere fact that the child after becoming of age continues to live with his parent as before is not sufficient to create an expectation or contract to pay.[79] As a general rule even an adult child living with his parents is not entitled to compensation for services rendered to the parent. Some courts have held that to entitle recovery an express promise by the parent to pay must be proved,[80] but the better rule is that recovery may be had even though there was no express promise of compensation if the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made for them.[81] The whole question is properly for the jury to consider, and if the circumstances authorized the person rendering the services reasonably to expect payment therefor, by way of furtherance of the intention of the parties or because reason and justice require compensation, the law will imply a contract.[82]

So recovery may be had where the daughter, a nurse by profession, goes to her mother's house at her request and takes care of her during the last two years of her life and the mother remarks that she will make it up to her when she gets ready.[83] So where an adult daughter is living with her parents and performing household services for them gratuitously, the father may recover for loss of services caused by her injury.[84]

If a daughter lives with her mother after marriage and performs household duties the mother cannot recover for board furnished the daughter in the absence of agreement.[85]

If an express contract by the parent to pay for the child's services be thus shown, but not the rate of compensation, a recovery may be had upon a *quantum meruit* for what these services were

78. Reser v. Johnson, Smith (Ind.), 81.

79. Heck v. Heck, 9 Ky. Law Rep. 682.

80. Hinkle v. Sage, 67 Ohio St. 256, 65 N. E. 999; Zimmerman v. Zimmerman, 129 Pa. 229, 18 Atl. 129.

81. Guild v. Guild, 15 Pick. (Mass.) 130.

82. Heffron v. Brown, 155 Ill. 326, 40 N. E. 583; Crampton v. Logan, 28 Ind. App. 408, 63 N. E. 52; Scully v. Scully, 28 Ia. 548; Sammon v. Wood, 107 Mich. 506, 65 N. W. 529.

83. Mathias v. Tingey (Utah), 118 P. 781, 38 L. R. A. (N. S.) 749.

84. Union Pac. Ry. Co. v. Jones, 21 Colo. 340, 40 P. 891.

85. Terry v. Warder, 25 Ky. Law Rep. 1486, 78 S. W. 154.

fairly worth.[86] That valid contracts of this kind between parent and adult child can be made is unquestionable.[87]

The declarations of parents in matters of this sort, if somewhat vague, are not apt to be construed in the child's favor. And, on the other hand, the presumption is equally against regarding the services of a father who lives with his son, and does work for him, as rendered for compensation; although here, too, the reverse might be established by evidence of a contract.[88]

Circumstances which show an unusual burden assumed by the son, or special advantages reaped by the father, are sometimes favorably construed in the child's favor. As where a grown-up son purchases his father's farm and continues to support the father and an adult idiot brother upon it.[89] So where the adult son assumes entire control and management of the business, works the farm, and adds largely to the family profits by his extraordinary skill.[90] So where he works in his father's general business.[91] So where the son takes a deed of the farm on his agreement to support his parents there for the rest of their lives.[92] Such cases are by no means uncommon among the enterprising settlers of our Western country, who cultivate the soil and live in little colonies; and American courts cannot be insensible to the merits of young persons who adorn the filial relation. As to use and occupation of real estate, where the occupant is the son of the owner, it is held that while payment of rent may be presumed, slight evidence is sufficient to show the contrary.[93] But the rule in some of the older States is rather strict as against inferring that either support or service can create a debt.[94] In all cases of this kind some distinct understanding is always desirable.[95] And such relation may ex-

86. Byrnes v. Clark, 57 Wis. 13; Friermuth v. Friermuth, 46 Cal. 42; Swartz v. Hazlett, 8 Cal. 118.

87. Ulrich v. Ulrich, 136 N. Y. 120.

88. Harris v. Currier, 44 Vt. 468.

89. House v. House, 6 Ind. 60.

90. Adams v. Adams, 23 Ind. 50. And see Fisher v. Fisher, 5 Wis. 472.

91. Second Nat. Bank v. Merrill, 81 Wis. 142.

92. Pratt v. Pratt, 42 Mich. 174; Brown v. Knapp, 79 N. Y. 136.

93. See Oakes v. Oakes, 16 Ill. 106; Hays v. Seward, 24 Ind. 352. And see Whipple v. Dow, 2 Mass. 415.

94. Davis v. Goodenow, 27 Vt. 717; Seavey v. Seavey, 37 N. H. 125; Dodson v. McAdams, 96 N. C. 149.

As to stepchildren, grandchildren, and others standing in a *quasi* filial relation, similar considerations will apply. § 785; Broderick v. Broderick, 28 W. Va. 378; Dodson v. McAdams, 96 N. C. 149.

95. Upon the marriage of a daughter, all obligation of her parents for support ceases; yet there is no presumption of liability for her support if she continues in the parental abode. Perkins v. Westcoat, 3 Col. App. 338. There ought to be a distinct understanding shown.

tend, as with natural parents, beyond the child's minority under suitable circumstances.[96]

96. Bixler v. Sellman, 77 Md. 494; Stock v. Stoltz, 137 Ill. 349, 403; Hogg v. Laster, 56 Ark. 382; Wells v. Perkins, 43 Wis. 160; Harris v. Smith, 79 Mich. 54.

CHAPTER XII.

EMANCIPATION.

§ 807. The Emancipation of a Child.

A father may emancipate his young child and thus give him a right to his own earnings. What, then, is emancipation as used with reference to the child? Plainly, the term "emancipation" is borrowed from the Roman law, and may be referred to the old formality of enfranchisement by the father. This in ancient times was done by an imaginary sale, but Justinian substituted the simpler proceeding of manumission before a magistrate.[97] At the English law, the term "emancipation" is generally used with reference to matters of parochial settlement and the support of paupers.[98] But in American cases it often has a significance more nearly approaching that of the civil law; though we are apt to use the word without much regard to precision.

We find in the English books little said as to the emancipation of minor children by their fathers. In fact, the English municipal system is so different from ours that the paternal authority during the period of minority, except as to custody, gives rise to little controversy. But there is a case where an infant was held not to have been emancipated by his enlistment.[99] And in this and some other instances the principle of emancipation was somewhat discussed; and the doctrine has been maintained by Lord Kenyon and others, that during the minority of the child he will remain, under almost any circumstances, unemancipated; that in fact there can be no emancipation of an infant unless he marries, and so becomes himself the head of a family, or contracts some other relation, so as to wholly and permanently exclude the parental control.[1]

Emancipation is not so strictly construed in this country. The American doctrine, as frequently stated, is that a father may

97. Burrill, Law Dict. "Emancipation"; Bouvier, *Ib.*; Inst. 1, 12.

98. See 7 Q. B. 574, *n.*

99. Rex v. Rotherfield Grays, 1 B. & C. 347.

1. Rex v. Roach, 6 T. R. 247; Rex v. Wilmington, 5 B. & Ad. 525.

"emancipate" his child for the whole remaining period of minority, or for a shorter term; that this emancipation may be by an instrument in writing, by verbal agreement or license, or by implication from his conduct; and that emancipation is valid against creditors, and to some extent against the father.[2]

"Emancipation" of a child is the relinquishment by the parent of control and authority over the child, conferring on him the right to his earnings and terminating the parent's legal duty to support the child. It may be express, as by voluntary agreement of parent and child, or implied from such acts and conduct as import consent; it may be conditional or absolute, complete or partial. The emancipation of a minor is not to be presumed and must be proved; and the burden of proof is on the father claiming immunity because of it.[3] This doctrine of emancipation is peculiarly favored where both the child and parent invoke it in order to protect the minor's earnings against the unfortunate parent's creditors. Let us see then, *first,* how emancipation may in this country be legally brought about; *second,* what is its legal effect.

§ 808. What Constitutes Emancipation.

Under the English common law, emancipation of children by their parents was quite unknown. In the United States the doctrine of emancipation has been applied with some liberality. Emancipation is not, however, to be presumed. It must be proved.[4]

A minor may be emancipated by an instrument in writing, by verbal agreement, or by implication from the conduct of the parties.[5] There may be complete emancipation even though the minor continues to reside with his parents.[6] Emancipation may, however, be partial. A minor may be emancipated for some purposes and not for others. The parent may authorize his minor child to make contracts of employment and collect and spend the money

2. Abbott v. Converse, 4 Allen, 530, per Chapman, J.; 2 Kent, Com. 194, *n.;* Whiting v. Earle, 3 Pick. 201; Burlingame v. Burlingame, 7 Cow. 92; Varney v. Young, 11 Vt. 258; Rush v. Vought, 55 Pa. St. 437.

3. Wallace v. Cox (Tenn.), 188 S. W. 611, L. R. A. 1917B, 690.

4. Lisbon v. Lyman, 49 N. H. 553.

5. Clay v. Shirley, 65 N. H. 644, 23 Atl. 521.

6. Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763; Beaver v. Bare, 104 Pa. 58, 49 Am. R. 567.

earned and still not emancipate him from parental custody and control.[7]

Emancipation may be express or implied,[8] and will not be presumed.[9] Emancipation may take place by parol or in writing, or may be shown by circumstantial evidence,[10] and may take place suddenly by express arrangement or gradually by conduct implying mutual assent.[11]

Emancipation may be either by instrument in writing or by parol agreement, or it may be inferred from the conduct of the parent. As to instruments in writing, usually known as indentures, the statutes of the different States are quite explicit; and the same general doctrines apply to children who are bound out as to apprentices generally.[12] But such deeds, so far as they derogate from the child's personal independence and welfare, are not greatly favored; they are usually construed with great strictness as between the minor and his parent, guardian, or master; and the policy of American law is to require the consent of the child himself to the instrument, where he has passed the period of nurture.[13] The subsequent conduct of the parent and child may be inquired into to determine this question.[14]

Emancipation occurs where the parent voluntarily surrenders

7. Porter v. Powell, 79 Ia. 151, 44 N. W. 295, 7 L. R. A. 176; Hunycutt & Co. v. Thompson, 159 N. C. 29, 74 S. E. 628, 40 L. R. A. (N. S.) 488.

8. Jackson v. Citizens' Bank & Trust Co., 53 Fla. 265, 44 So. 516; Donk Bros. Coal & Coke Co. v. Rezloff, 229 Ill. 194, 82 N. E. 214; Longhofer v. Herbel, 83 Kan. 278, 111 P. 483; Lewis v. Missouri, K. & T. Ry. Co., 82 Kan. 351, 108 P. 95; Rounds Bros. v. McDaniel, 133 Ky. 669, 118 S. W. 956; Sherry v. Littlefield (Mass.), 122 N. E. 300; Merithew v. Ellis, 116 Me. 468, 102 A. 301 (where mother conveyed homestead to daughter); Fox v. Schumann, 191 Mich. 331, 158 N. W. 168; Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763; Brosius v. Barker, 154 Mo. App. 657, 136 S. W. 18; George Adams & Burke Co. v. Cook, 118 N. W. 662; Weese v. Yokum, 62 W. Va. 550, 59 S. E. 514.

9. Winebremer v. Eberhardt, 137 Mo. App. 659, 119 S. W. 530; Wallace v. Cox, 136 Tenn. 69, 188 S. W. 611.

10. Bristor v. Chicago & N. W. Ry. Co., 128 Ia. 479, 104 N. W. 487.

11. Schoenberg v. Voight, 36 Mich. 310.

12. 4 Com. Dig. 579; State v. Taylor, 2 Penning. 467; Bolton v. Miller, 6 Ind. 262. See Master and Servant, *infra,* § 457; Nickerson v. Easton, 12 Pick. 110.

13. The minor child of pauper parents is not emancipated so as to gain a settlement by the indenture of the selectmen. Frankfort v. New Vineyard, 48 Me. 565. But an indenture inoperative against the child by reason of informality may yet afford proof that the parent meant to relinquish the child's earnings. Kerwin v. Wright, 59 Ind. 369.

14. Carthage v. Canton, 97 Me. 473, 54 A. 1104.

control over the minor child and renounces the duties of his position in a manner inconsistent with any further performance of them,[15] and may be shown by abandonment of the child,[16] or by allowing him to have his own earnings.[17] In some cases a mere waiver by the parent of his right to the child's earnings will not constitute an emancipation.[18]

Emancipation, strictly so called, is not to be presumed; it must be proved. It is a question of fact to be implied from the circumstances and from the conduct of the parties interested. Where it appears that the father, by parol, places his daughter in a certain family, that by the terms of the agreement the employer may turn her away when dissatisfied, that the father may rescind the contract at pleasure, and reclaim his daughter; these, and similar circumstances, may be sufficient to entitle the child to her own wages for the time being, but they cannot constitute emancipation as against the father.[19] We are to distinguish, in fact, between a license for the child to go out and work temporarily, and the more positive renunciation of parental rights. Thus, if the father agrees to pay his son so much for every day he may labor for another, but without intending to give him his time, and merely as an incentive to industry, this is not to be construed into a con-

15. Lafollett v. Kyle, 51 Ind. 446; Carthage v. Canton, 97 Me. 473, 54 A. 1104.

Although the father is insolvent still he may emancipate the son and will then not be entitled to his wages. Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. R. 30. See Bristor v. Chicago & N. W. Ry. Co., 128 Ia. 479, 104 N. W. 487.

16. *In re* Riff, 205 F. 406; Swift & Co. v. Johnson, 71 C. C. A. 619, 138 F. 867; Smith v. Gilbert, 80 Ark. 525, 98 S. W. 115; Robinson v. Hathaway, 150 Ind. 679, 50 N. E. 883; Inhabitants of Thomaston v. Inhabitants of Greenbush, 106 Me. 242, 76 A. 690; Gulf Cooperage Co. v. Abernathy, 54 Tex. Civ. App. 137, 116 S. W. 869. See Hunt v. State, 8 Ga. App. 374, 69 S. E. 42

17. Mathews v. Fields, 12 Ga. App. 225, 77 S. E. 11; Story & Clark Piano Co. v. Davy (Ind. App.), 119 N. E. 177; Mott v. Purcell, 98 Mo. 247, 11 S. W. 564; McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728; Ingram v. Southern Ry. Co., 152 N. C. 762, 67 S. E. 926; Lowrie v. Oxendine, 153 N. C. 267, 69 S. E. 131; Holland v. Hartley, 171 N. C. 376, 88 S. E. 507; Crowley v. Crowley, 72 N. H. 241, 56 A. 190; Berla v. Meisel (N. J. Ch. 1902), 52 A. 999; Giovagnioli v. Ft. Orange Const. Co., 133 N. Y. S. 92, 148 App. Div. 489; Turner v. Brown (Tex. Civ. App.), 200 S. W. 1161. See Livesley v. Heise, 48 Ore. 147, 85 P. 509.

18. Smith v. Gilbert, 80 Ark. 525, 98 S. W. 115; Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763; Luffkin v. Harvey, 131 Minn. 238, 154 N. W. 1097, L. R. A. 1916B, 1111. See Hill County Cotton Oil Co. v. Gathings (Tex. Civ. App.), 154 S. W. 664.

19. Sumner v. Sebec, 3 Me. 223. See Clark v. Fitch, 2 Wend. 459; Clinton v. York, 26 Me. 167.

tract of emancipation, but rather as a mere gratuity to encourage the son in the formation of industrious and useful habits.[20] But other circumstances may raise a special contract on the minor's behalf, or indeed be held to emancipate him altogether. It is a well-settled rule in this country that if the parent absconds, turns his child out of doors, or leaves him to shift for himself, the son is entitled to his own wages;[21] and our courts are very liberal in allowing children to avail themselves of any breach of parental obligation so as to earn an honest livelihood by their own toil.[22] The presumption raised in such cases may be termed a presumption of necessity. So where the husband abandons his child to the care of the mother, his subsequent claims for the earnings of either are to be regarded with very little favor.[23] Or where he is able to support the child, and yet forces the child to labor abroad unsuitably to the child's social position.[24] Even slighter circumstances, which impute no misconduct to the father, but evince a consent for his son to leave the parental roof and go into the world to seek his own fortune, are often construed into emancipation.[25] But the desertion of a minor from his father's home, with vagrancy and crime, does not of itself constitute emancipation.[26] The father may practically emancipate from a prudent regard to his own circumstances and the child's benefit; he may relinquish all right to his infant child's future earnings as against his own creditors.[27] And there may be complete emancipation, although the minor continues to reside with his father.[28] In general, according to modern American authorities, a parent's relinquishment,

20. Arnold v. Norton, 25 Conn. 92.

21. And an insolvent father may give his son his time and future earnings, so as to benefit the child as against the father's own creditors. Atwood v. Holcomb, 39 Conn. 270; *supra*, § 754.

22. Clinton v. York, 26 Me. 167; Cloud v. Hamilton, 11 Humph. 104; Nightingale v. Withington, 15 Mass. 275; Stansbury v. Bertron, 7 W. & S. 362; Everett v. Sherfey, 1 Ia. 356; The Etna, Ware, 462; Gary v. James, 4 Desaus. 185; Conovar v. Cooper, 3 Barb. 115; Jenison v. Graves, 2 Blackf. 440; Lyon v. Bolling, 14 Ala. 753; Ream v. Watkins, 27 Mo. 516.

23. Wodell v. Coggeshall, 2 Met. 89. See Dennysville v. Trescott, 30 Me. 470.

24. Farrell v. Farrell, 3 Houst. 633.

25. Campbell v. Campbell, 3 Stockt. 268; Johnson v. Gibson, 4 E. D. Smith, 231; Dicks v. Grissom, 1 Freem. Ch. 428; Dodge v. Favor, 15 Gray, 82; Boobier v. Boobier, 39 Me. 406. But see Stiles v. Granville, 6 Cush. 458.

26. Bangor v. Readfield, 32 Me. 66.

27. Clemens v. Brillhart, 17 Neb. 335; Dickinson v. Talmadge, 138 Mass. 249; Atwood v. Holcomb, 39 Conn. 270.

28. McClosky v. Cyphert, 27 Pa. St. 220; Dierker v. Hess, 54 Mo. 246; Donegan v. Davis, 66 Ala. 362.

by agreement and consent, of all claims to the earnings of his minor child in any particular service, may be implied from circumstances;[29] and it is a question to be determined by the given circumstances, and may rest in parol. But there is such a thing as partial and incomplete emancipation of a child, even though the latter be allowed by the parent to work and control his own earnings.[30]

The marriage of an infant with his parent's consent removes him from parental control, and gives him a right, as against the father, to apply all his earnings to the support of his family;[31] but whether all the consequences of legal emancipation must necessarily follow has been held doubtful. Marriage, without the consent of the parent, ought to confer the same right upon an infant, inasmuch as the claims of wife and child in either case are paramount, and the consequences of all marriages are much the same, but in Maine it has been decided otherwise, and that the disobedient infant is punishable by being compelled to pay his father his earnings; though what is to become of the wife meantime does not clearly appear.[32] A minor daughter is emancipated by her marriage with her father's consent; and here, at least, it is ruled that

29. *Supra*, § 754; Monaghan v. School District, 38 Wis. 100; Dierker v. Hess, 54 Mo. 246; Clay v. Shirley, 65 N. H. 644. And this doctrine is applied the more strongly as aginst a parent's creditors and others, who, against the will of both parent and child, maintain that the child's earnings are not his own. The proof should be sufficient and clear as against the parent who denies such relinquishment. Monaghan v. School District, 38 Wis. 100. And see West Gardiner v. Manchester, 72 Me. 509. Where the son of one of the partners was apprenticed to the firm, it was held a question for the jury (the firm having assigned to creditors), whether the father had emancipated his son. Beaver v. Bare, 104 Pa. St. 58. An indenture binding out his son so that compensation shall be paid to the son, does not emancipate in such a sense as to debar the father from suing the employer for breach of the covenant; at least where the son, having joined in the indenture, does not dissent. Dickinson v. Talmadge, 138 Mass. 249.

Remarriage of a widowed mother, whose new husband does not assume the paternal functions towards the child, favors the idea of emancipation. Hollingsworth v. Swedenborg, 49 Ind. 378. A widowed mother may relinquish all claim. Lind v. Sullestadt, 21 Hun, 364. But as to a second marriage affecting the child's pauper settlement, see Hampden v. Troy, 70 Me. 484.

30. § 809; Porter v. Powell, 79 Ia. 151; Tennessee Man. Co. v. James, 91 Tenn. 154.

31. Taunton v. Plymouth, 15 Mass. 203; Dicks v. Grisson, 1 Freem. Ch. 428; Craftsbury v. Greensboro' (1894), Vt.; 157 Mass. 73; Vanatta v. Carr, 229 Ill. 47, 82 N. E. 267.

32. White v. Henry, 24 Me. 531, doubted by Field, C. J. in 157 Mass. 73. See Burr v. Wilson, 18 Tex. 367.

his consent may be inferred from circumstances.[33] It may well be stated, as the later and truer theory, that if the infant's marriage be a legal and valid one, though contracted in defiance of the parent's wishes, parental rights and control must yield to the new and superior status which the child has thereby assumed.[34]

Evidence short of this will not show an emancipation.[35] So there is no emancipation shown where a father has not freed the son from parental control but supports him, although the father gives the son, who is nineteen years of age, sums of money from time to time in pay for work done. A son nineteen years old is surely entitled to some spending money, and as his earnings belonged wholly to his father it would be strange, indeed, if his father did not give him such sums for his own purposes. Many fathers, to encourage their sons to form habits of industry and frugality and to learn the value of money, make these donations dependent to a greater or less extent upon the conduct and services of the child. But such payments in no sense work an emancipation of the child himself.[36] Emancipation does not appear simply from evidence that a seventeen-year-old daughter lived and worked away from home, thirty miles from her father's home, earning and controlling her own wages with the consent of her father. This relieved the father's burden and was only a partial emancipation from service for an indefinite time. The father had a right at any time to require her to return home and serve him, and she had a right at any time to return and claim his care and support.[37]

Evidence that a minor son eighteen years old was living at home with his parents and had worked out for about two years on a job which he had secured himself, where he collected his own wages, spent his own money, and paid board at home, shows only a partial emancipation, consisting only of an assent on the part of the parents that the boy should hire out and collect and spend what he

33. Bucksport v. Rockland, 56 Me. 22.

34. Aldrich v. Bennett, 63 N. H. 415; Commonwealth v. Graham, 157 Mass. 73; Sherburne v. Hartland, 37 Vt. 528.

35. Farrar v. Wheeler, 75 C. C. A. 386, 145 F. 482; Lockerby v. O'Gara Coal Co., 147 Ill. App. 311; Guthrie County v. Conrad, 133 Ia. 171, 110 N. W. 454; Jacobs v. Jacobs, 130 Ia. 10, 104 N. W. 489, 114 Am. St. R. 402; Nicholaus v. Synder, 56 Neb. 531, 76 N. W. 1083; Hardy v. Eagle, 54 N. Y. S. 1045, 25 Misc. 471 (affg., 51 N. Y. S. 501, 23 Misc. 441); Blivin v. Wheeler, 25 R. I. 313, 55 A. 760.

36. Aetna Life Ins. Co. v. Industrial Accident Commission, 175 Cal. 91, 165 Pac. 15, L. R. A. 1918F, 194.

37. Wallace v. Cox (Tenn.), 188 S. W. 611, L. R. A. 1917B, 690.

earned. Such an arrangement does not destroy the filial relation, but a gift to the son of his wages has no more effect on that relation than a gift of money would have, and if it is not sufficient to supply the son with necessaries the parents remain liable for any necessaries which the wages are not sufficient to supply. They therefore are liable for medical expenses furnished for an operation on the son performed with their knowledge and consent.[38]

In some States by statute emancipation may take place by court action where the parental authority has been abused.[39] In Louisiana, the emancipation of minors is expressly recognized and regulated by law, and decrees of emancipation are judicially made.[40]

In a well-considered Massachusetts case it is decided that the emancipation of a minor child by parol agreement and without consideration is revocable, until acted upon,[41] but an agreement for emancipation is irrevocable.[42]

Yet there can be little doubt at the present day that a father can verbally sell or give his minor son his time; and that after payment or performance the son is entitled to his earnings.[43] A special contract with a third person, authorizing him to employ and pay the child himself, will bind the parent, and payment to the child will be a defence against any action brought by his father against the employer. Parol agreements are, however, within the statute of frauds.[44]

§ 809. Effect of Emancipation.

As to the effect of emancipation. The consequence is, on the one hand, to give the child the right to his own wages, the disposal of his own time, and, in a great measure, the control of his own person; on the other hand, to relieve the parent of all legal

38. Lufkin v. Harvey (Minn.), 154 N. W. 1097, L. R. A. 1916B, 1111.

39. Sweet v. Crane, 39 Okla. 248, 134 P. 1112.

40. Code, art. 367 *et* seq.; Allison v. Watson, 36 La. Ann. 616.

41. Abbott v. Converse, 4 Allen, 530. See Morris v. Low, 4 Stew. & Port. 123. But see Chase v. Smith, 5 Vt. 556.

42. Weese v. Yokum, 62 W. Va. 550, 59 S. E. 514; *contra*, Hood & Johnson v. Pelham, Sitz & Co., 5 Ala. App. 471, 59 So. 767. See Ibanez v. Hongkong & Shanghai Banking Corp., 246 U. S. 621, 38 S. Ct. 410, 62 L. Ed. 903.

43. Shute v. Dorr, 5 Wend. 204; Snediker v. Everingham, 3 Dutch. 143; Gale v. Parrott, 1 N. H. 28; United States v. Metz, 2 Watts, 406; Corey v. Corey, 19 Pick. 29.

44. Shute v. Dorr, 5 Wend. 204.

obligation to support,[45] and severs all filial relations as if the child were of age.[46]

Emancipation gives the child all rights he would have if of age to receive his own earnings.[47] Moreover, the emancipated child's earnings go to his administrator upon his decease, to be distributed according to law;[48] and it is the child's legal representative and not the father who should sue for arrears,[49] and a father who has emancipated his son is not liable to third persons for his board.[50]

In brief, the minor who is released from his father's service stands, as to his contracts for labor either with strangers or with him, upon the same footing as if he had arrived at full age; and such being the case, the father may himself contract to employ and pay the child for his services, and be bound in consequence like any stranger to fulfil his agreement.[51]

If the father receives his son's earnings after giving the son his time, it will be a good consideration for any promise from the father.[52] And he cannot sue for the services of such son performed within the period embraced by the agreement, although he has given notice to the party employing the son not to pay his wages to him.[53] Still less can the father's creditors attach such earnings, or property which was purchased therewith for the infant's benefit.[54] But the child sues in such case for his own wages.[55] And if he is actually emancipated by his father, and an express promise

45. Nightingale v. Withington, 15 Mass. 272; Corey v. Corey, 19 Pick. 29; Hollingsworth v. Swedenborg, 49 Ind. 378; Varney v. Young, 11 Vt. 258; Johnson v. Gibson, 4 E. D. Smith, 231.

46. Memphis Steel Const. Co. v. Lister, 138 Tenn. 307, 197 S. W. 902.

47. Kenure v. Brainerd & Armstrong Co., 88 Conn. 265, 91 A. 185; Wabash R. Co. v. McDoniels, 107 N. E. 291; Haugh, Ketcham & Co. Iron Works v. Duncan, 2 Ind. App. 264, 28 N. E. 334; Woodward v. Donnell, 146 Mo. App. 119, 123 S. W. 1004; Revel v. Pruitt, 42 Okla. 696, 142 P. 1019.

48. Smith v. Knowlton, 11 N. H. 191.

49. Bell v. Bumpus, 63 Mich. 375.

50. Holland v. Hartley, 171 N. C. 376, 88 S. E. 507.

51. Francisco v. Benepe, 6 Mont. 243; § 756.

52. Jenney v. Alden, 12 Mass. 375.

53. Morse v. Welton, 6 Conn. 547; Wodell v. Coggeshall, 2 Met. 89; Bray v. Wheeler, 29 Vt. 514.

54. Chase v. Elkins, 2 Vt. 290; Weeks v. Leighton, 5 N. H. 343; McCloskey v. Cyphert, 27 Pa. St. 220; Bobo v. Bryson, 21 Ark. 387; Lord v. Poor, 23 Me. 569; Lyon v. Bolling, 14 Ala. 753; Johnson v. Silsbee, 49 N. H. 543; Dierker v. Hess, 54 Mo. 246; Mott v. Purcell, 98 Mo. 247; Lind v. Sullestadt, 21 Hun, 364. As to an infant's suits, see *post*, Part V., ch. 6. And see Benziger v. Miller, 50 Ala. 206. Recovery by the son in a suit will bar an action by the father. Scott v. White, 71 Ill. 287.

55. Ream v. Watkins, 27 Mo. 516.

is made to pay him for his labor, with the consent of his father, no other notice of his emancipation is necessary to charge the defendant and enable the minor to sue.[56] All this presupposes that the father has *bona fide* emancipated the child, and does not support and claim earnings and services for himself in fraud of his own creditors.[57]

Property purchased by the emancipated minor with his own means, too, is undoubtedly his own, and not subject to the parent's control or disposal.[58]

When emancipation of the minor child is complete the father's right to recover for loss of services due to injury to the child is cut off, as the emancipation is not revocable, but when the emancipation is partial it is revocable, and the parent's right to recover for loss of services is not affected. Emancipation is partial only where the father has never formally set the child free and permits him to work and keep his own wages where the child lives at home and contributes to the family support.[59] So a father may give to his son a part instead of the whole period of his minority, in which case the rights of the latter are limited accordingly, and the parental control and duties are still upheld.[60]

The father cannot maintain action after emancipation for injury to the child involving loss of services, as the father has no longer any right to such services,[61] and emancipation is a defence which

56. Wood v. Corcoran, 1 Allen, 405. The earnings of an emancipated child cannot be attached by trustee process for the father's debts. Manchester v. Smith, 12 Pick. 113. And see Bray v. Wheeler, 29 Vt. 514.

The father cannot retract his consent that the child shall have his own wages, after the wages are earned. Torrens v. Campbell, 74 Pa. St. 470.

57. Moody v. Walker, 89 Ala. 619. Cf. McCarthy v. Boston & Lowell Railroads, 148 Mass. 550. But an insolvent father's emancipation of his child is not unfavorably regarded. Trapnell v. Conklyn, 37 W. Va. 242. Even though the child should then work for his mother. *Ib.* Emancipation may occur, upon the divorce of parents, so far as the father is concerned, so as to give the child the right to help support the mother and to sue strangers for his services in doing so. Grimm v. Taylor, 96 Mich. 5.

58. Steel v. Steel, 12 Pa. St. 64; Hall v. Hall, 44 N. H. 293; Wright v. Dean, 79 Ind. 407; Kain v. Larkin, 131 N. Y. 300. An emancipated child ceases to follow the settlement of his father. Orneville v. Glenburn, 70 Me. 353. Cf. North Yarmouth v. Portland, 73 Me. 108.

59. Memphis Steel Construction Co. v. Lister (Tenn.), 197 S. W. 902, L. R. A. 1918B, 406.

60. Tillotson v. McCrillis, 11 Vt. 477. And see Porter v. Powell, 79 Ia. 151; Winn v. Sprague, 35 Vt. 243; *supra*, § 756; Tennessee Mfg. Co. v. James, 91 Tenn. 154.

61. Memphis Steel Const. Co. v. Lister, 138 Tenn. 307, 197 S. W. 902 (father can recover after partial

may be set up by one sued by a father for injury to the minor child,[62] but must be pleaded and proved,[63] and a defendant father claiming emancipation has the burden of proving it.[64]

emancipation); Arnold v. Norton, 25 Conn. 92; Texas R. v. Crowder, 61 Tex. 262.

62. Scott v. O'Leary, 157 Ia. 222, 138 N. W. 512; Daly v. Everett Pulp & Paper Co., 31 Wash. 252, 71 P. 1014. But see Sawyer v. Sauer, 10 Kan. 519; Texas & P. Ry. Co. v. Adkins (Tex. Civ. App. 1910), 126 S. W. 954.

63. McClellan v. Louis F. Dow Co., 114 Minn. 418, 131 N. W. 485; Singer v. St. Louis, K. C. & C. Ry. Co., 119 Mo. App. 112, 95 S. W. 944; Pecos & N. T. Ry. Co. v. Blasengame, 42 Tex. Civ. App. 66, 93 S. W. 187.

64. Holland v. Hartley, 171 N. C. 376, 88 S. E. 507.

PART IV.

GUARDIAN AND WARD.

CHAPTER I.

OF GUARDIANS IN GENERAL: THE SEVERAL KINDS.

§ 810. Guardianship Defined; Applied to Person and Estate.

The *guardian* is a person intrusted by law with the interests of another, whose youth, inexperience, mental weakness, and feebleness of will disqualify him from acting for himself in the ordinary affairs of life, and who is hence known as the *ward*.

Guardianship usually applies to minor children; and in this sense the guardian may be either their natural protector, whose authority is founded upon universal law, or some person duly chosen to act on their behalf. Thus, the father (and sometimes the mother) exercises the right of custody and nurture as the child's natural guardian; while, if the parents are dead, someone must be selected to supply their place. And since the parental control does not extend to the estate of a minor, the appointment of a guardian may be both necessary and proper, when property becomes vested in a child under age. Guardianship applies also at the present day to idiots, lunatics, spendthrifts, and the like;

and the guardian of such person derives his authority from statute law and a special appointment. This guardian is sometimes designated as the *committee.*

The law of guardianship is most naturally divided into guardianship of the person and guardianship of the estate. Guardianship of the person is a relation essentially the same as that of parent and child, though not without some important differences, as we shall see hereafter. Hence the guardian has been called "a temporary parent." [65] Guardianship of the estate bears a closer resemblance to trusteeship; guardians and trustees being alike bound to manage estates with fidelity and care, under the supervision and direction of the chancery courts. The same person is often guardian of both the person and estate of the ward; but not necessarily, for these may be kept distinct. So, too, there may be joint guardians, as in other trusts.

§ 811. English Doctrine; Guardianship by Nature and Nurture.

Guardianship by nature and nurture denotes hardly more or less than the natural right of parents to the care and custody of their children. It has been usual to treat of guardians by nature as distinct from guardians by nurture; but in reality the latter constitute, for practical purposes, only a species of the former. Mr. Macpherson considers them together, and doubts whether guardianship by nature, as known in the old law, has existed since the time of Charles II., when feudal tenures were abolished; for it appears to have originated in the practice of selling the marriage of the heir.[66]

Guardianship by nature and nurture belongs exclusively to the parents: first, to the father, and, on his death, to the mother. The father's right was formerly preferred to the mother's in all cases; while the modern tendency is otherwise. The office of natural guardian lasted during the minority of the child; but guardianship by nurture ceased when he attained the age of fourteen. So guardianship by nature applied to the heir apparent or presumptive, and guardianship by nurture to the other children. Guardianship by nature was something higher than guardianship

65. 1 Bl. Com. 460; 2 Kent, Com. 220. A money corporation may be guardian in modern times, under appropriate statutes, notwithstanding the ancient objections of a want of conscience or of parental feelings, —— v. ——, 40 Minn. 7; *In re* Rise, 42 Mich. 528, 4 N. W. 284.

66. Macphers. Inf. 52, 58. See also 1 Bl. Com. 461, and Harg. notes 1 & 3; 2 Kent, Com. 21, 220.

by nurture.[67] But it is, nevertheless, clear that the father has a right, recognized by general law, to the custody of all his children, not only during the period of nurture, but until the age of majority. So, too, the mother, if not superseded by the infant's election at fourteen, or by the appointment of a new guardian, has, in the absence of a father, the legitimate care of the child for the same period.[68]

The authority of such guardians extends only to the ward's person. They have no right to intermeddle with his property.[69] Blackstone says that, if an estate be left to an infant, the father is, by common law, the guardian, and must account to his child for the profits. But this is only because the law holds him and all others responsible as a *quasi* guardian; and it is well settled at the present day, that if a child becomes vested with property during his father's lifetime, there is no one strictly authorized to take it until a guardian has been duly appointed.

Guardianship by nature and nurture is inferior to guardianship in socage; and it yields to every kind of guardianship which exists by strict appointment, so far as the ward's property is concerned, though not necessarily as to his person.

§ 812. Classification of Guardians in England; Obsolete Species.

The law of guardianship, in England, is one of irregular growth. Guardians, until chancery jurisprudence became fully developed, were recognized only for certain limited purposes. Their powers were restricted, and new classes were created from time to time, as the exigency arose. One species of guardianship would fall into disuse and another spring up in its place. Hence it is found difficult to attempt a classification, or reduce the general authority of guardians to a definite system. An English text-writer enumerates no less than eleven different kinds of guardians, many of which are obsolete, and others of merely local application.[70] Among them may be mentioned *guardianship in chivalry*, an incident of the feudal tenure, more in the nature of a hardship than a

67. 1 Bl. Com. 461, and Harg. notes; 2 Kent, Com. 220, 221.

68. Macphers. Inf. 61, 65; *supra*, §§ 740, 756.

69. 1 Bl. Com. 461, and Harg. notes; 2 Kent, Com. 220, 221; Hyde v. Stone, 7 Wend. 354; Kline v. Beebe, 6 Conn. 494; Fonda v. Van Horne, 15 Wend. 631. And see Wall v. Stanwick, 34 Ch. D. 763, as to liability for rents and profits of land.

70. Macphers. Inf. 2 *et seq.*, to which the reader is referred for a full account of these kinds of guardianship, including guardianship under Stat. 4 & 5 P. & M., ch. 8, alluded to

privilege, so far as the ward was concerned, which was finally abolished in the time of Charles II.; *guardianship by special custom,* which was confined to London and certain other localities, and appears to exist no longer; *guardianship by appointment of the spiritual courts,* traces of which still exist in the appointment of administrators *durante minore ætate; guardianship by prerogative,* applicable only to the royal family; and *guardianship by election of the infant,* which appears to us more properly considered at this day in connection with the appointment of chancery guardians. But *guardianship by nature and nurture, guardianship in socage, testamentary guardianship,* and *chancery guardianship* require special consideration, and these will be taken up in order.

§ 813. English Doctrine; Guardianship in Socage.

Guardianship in socage arises, at common law, whenever an infant under fourteen acquires title to real estate; the chief object of the trust being the protection of such property and the instruction of the young heir in the pursuit of agriculture.[71] It applies only when the infant inherits land, and cannot exist if his estate be merely personal. His title, too, must be *legal* and not merely *equitable;* hence it would seem that there cannot be a guardian in socage where the interest of the ward is only reversionary.[72] This species of guardianship was anciently assignable, so far at least as the custody of the infant was concerned; but by the doctrine and practice of later times it became regarded as a strictly personal trust, neither transmissible by succession, nor devisable, nor assignable.[73]

The duty of the guardian in socage is to take possession of the heir's person and real estate, to receive the rents and profits until the heir reaches the age of fourteen, to keep his evidences of title safely, and to bring him up well.[74] His powers are commensurate with his duties. He acquires by virtue of his office an actual estate in the ward's land, though not to his own use;[75] he may

in 1 Bl. Com. 461, and repealed by 9 Geo. IV., ch. 31. See also 1 Bl. Com. 461, and Harg, notes.

71. 1 Bl. Com. 461, and Harg. *n.;* 2 Kent, Com. 220; Dagley v. Tolferry, 1 P. Wms. 285.

72. Macphers. Inf. 19; 2 Bl. Com. 88.

73. Macphers. Inf. 20 *et seq.;* 2 Bl. Com. 561, and Harg. *n.;* 2 Kent, Com. 223.

74. Co. Litt. 89; Macphers. Inf. 28.

75. Plowd., ch. 293; Macphers. Inf. 28; Rex v. Sutton, 3 Ad. & El. 597.

gain a settlement by actual residence upon it;[76] and he can grant leases terminable, and perhaps even void, when the ward reaches the age of fourteen.[77] A guardian in socage cannot be removed from office, but the ward may supersede him, at this age, by a guardian of his own choice.[78]

Guardianship in socage has been said to extend to the heir's personal property; but there is insufficient legal authority for such a supposition, though it is likely that the farm-stock and household chattels of the ward were included; and when this guardianship was common, personal property consisted of little else.[79]

One peculiarity of this guardianship was that the trust belonged only to such next of blood to the child as could not possibly inherit, and it devolved upon him without appointment; the common law, with a characteristic distrust of human nature, deeming it imprudent to confide the child's interests to one who expected the succession. For, as Fortescue and Sir Edward Coke affirmed, to commit the custody of the infant to such a person was like giving up a lamb to a wolf to be devoured.[80] Guardianship in socage has passed into disuse, though it cannot be said to have been actually abolished.

§ 814. English Doctrine; Testamentary Guardianship.

Testamentary guardianship was instituted by the statute of 12 Car. II., c. 24, and for this reason testamentary guardians are sometimes called *statute* guardians.[81] This statute provided that any father, whether an infant or of full age, might, by deed executed in his lifetime, or by his last will and testament, dispose of the custody and tuition of his child, either born or unborn, to any person or persons in possession or remainder, other than popish recusants; such custody to last till the child attained the age of twenty-one, or for any less period, and to comprehend, meantime, the entire management of his estate, both real and personal. So far as popish recusants are concerned, this statute has since been modified; and all religious disabilities as to the office are now removed;[82] and since the statute of 1 Vict., c. 26, an

76. Rex v. Oakley, 10 East, 491; Macphers. Inf. 28.

77. Bac. Abr. Leases, i. 9; 1 Ld. Raym. 131; Rex v. Sutton, 5 Nev. & M. 353; Macphers. Inf. 35, 36.

78. Co. Litt. 89a; Macphers. Inf. 41.

79. Macphers. Inf. 31; Bedell v. Constable, Vaugh. 185. But see Harg. *n.*, 67 to Co. Litt. 89.

80. Co. Litt. 88b; 1 Bl. Com. 462.

81. 1 Bl. Com. 462.

82. 31 Geo. III., ch. 32; 4 Mont. & C. 687; Corbet v. Tottenham, 1 Ball v. B. 59.

infant, though the father, cannot exercise the right of testamentary appointment; otherwise, the statute remains in force. Under this English law it matters not what are the father's religious opinions.[83] But a mother cannot appoint, nor a putative father, nor a person *in loco parentis*.[84]

The important question arises, under this statute, whether the words "by deed executed in his lifetime" permits the father to dispose of his children by any instrument not testamentary he may see fit to make. Lord Eldon was of the opinion that he could not, but was confined to a testamentary instrument in the form of a deed, which cannot operate during life and may be revoked at pleasure; or to a will.[85] Such is doubtless the English law at the present day.[86]

Testamentary guardianship gives the custody of the ward's person, and of all his real and personal estate; and it embraces not only such property as comes to the ward through descent, devise, bequest, or inheritance from the father, but all that he may acquire from any person whomsoever, and whether real or personal. This shows that the guardian's interest is derived not from the father, but from the law itself, for the father could give him no interest over that which was never his own.[87]

Besides having the advantage of full control over the ward's entire estate, the testamentary guardian stands better than the guardian in socage, inasmuch as his power lasts until the ward reaches his majority, unless the father has seen fit to limit his trust to a less period.

Testamentary guardianship, as now understood, was unknown to the common law. Lord Alvanley said, in *Ex parte Ilchester:* "It is clear, by the common law, a man could not, by any testamentary disposition, affect either his land or the guardianship of his children. The latter appears never to have been made the subject of testamentary disposition till the statute 12 Charles II." [88] But it seems probable, from some expressions of Lord Coke, that, so far as the custody of the ward's person was con-

83. Villareal v. Mellish, 2 Swanst, 538.

84. Macphers. Inf. 83; 1 Bl. Com. 462, Harg. *n.;* Vaugh. 180; 3 Atk. 519.

85. *Ex parte* Earl of Ilchester, 7 Ves. 367; Earl of Shaftesbury v. Lady Hannam, Finch. Rep. 323.

86. Macpherson intimates a different opinion. See Macphers. Inf. 84; Lecome v. Sheires, 1 Vern. 442. And see Desribes v. Wilmer, 69 Ala. 25.

87. Macphers. Inf. 91. See also Gilliat v. Gilliat, 3 Phillim. 222.

88. 7 Ves. 370.

cerned, though not as to his lands, testamentary dispositions were not unknown to the old common law, and that this testamentary guardian, sometimes confounded with the guardian for nurture, had the care of the child until he reached the age of fourteen, with power to dispose of his chattels.[89]

§ 815. English Doctrine; Chancery Guardianship.

Guardians by appointment of a court of equity, or *chancery guardians,* as they are termed, have, within the last century, assumed such importance as almost to supersede, in the English practice, the other kinds, except perhaps the testamentary guardian. The earliest known instance of such an appointment occurred in 1696.[90] Blackstone speaks of the practice in his day as applicable chiefly to guardians with large estates, who sought to indemnify themselves and to avoid disagreeable contests with their wards, by placing themselves under the direction of the court of chancery.[91] The origin of this guardianship is obscure. Mr. Hargrave considered it an act of usurpation by the Lord Chancellor, but admitted the jurisdiction to have been fully established in his time.[92] Fonblanque warmly controverts the charge of usurpation, claiming that the jurisdiction exercised by the court of chancery over infants flows from its general authority, as delegated by the crown.[93] This latter view has met with the best judicial approval; for, as Lord Hardwicke and others have expressed it, the State must place somewhere a superintending power over those who cannot take care of themselves; and hence chancery necessarily acts, representing the sovereign as *parens patriæ.*[94] From the peculiar nature and restrictions of the other kinds of guardianship, many orphans, whose fathers had failed to appoint a testamentary guardian for them, would be otherwise without protection either of person or property. Whatever may be the origin of the jurisdiction by virtue of which courts of chancery appoint guardians in such cases, the right of making such appointments, and in general of controlling the persons and estates of minors, has long been firmly established, and cannot at this day be shaken.

89. Co. Litt. 87b; Co. Cop., § 23; Macphers. Inf. 68.

90. Case of Hampden. See Co. Litt. 88b, Harg. *n.*

91. 1 Bl. Com. 463.

92. Co. Litt. 89a, Harg. *n.* 70.

93. 2 Fonb. Eq. 228, *n.*, 5th ed.; 2 Story, Eq. Jur., § 1333.

94. Butler v. Freeman, Ambl. 301. See Lord Thurlow, in Powell v. Cleaver, 2 Bro. C. C. 499; Lord Eldon, in De Manneville v. De Manneville, 10 Ves. 52.

An infant is constituted a ward in chancery whenever anyone brings him in as party plaintiff or defendant, by a bill asking the directions of the court concerning his person or estate, or the administration of property in which he is interested.[95] In this character he is treated as under its special protection. Again, a petition may be presented for the appointment of a chancery guardian, alleging that the infant has estate, real or personal. But the mere appointment of a guardian, in this instance, will not make him a ward in chancery.[96] Where a suit is pending, the court appoints a guardian of *the person* only; in other cases a guardian of *the person and estate*.[97] So chancery will appoint a guardian on petition, where testamentary guardians decline to act; and, if necessary, determine on petition the right of a guardian already appointed.[98]

As to the general jurisdiction of chancery over infants, it may be observed that in the appointment and removal of guardians, in providing suitable maintenance, in awarding custody of the person, and in superintending the management and disposition of estates, the chancery court wields large powers for the benefit of the young and helpless. This jurisdiction, being clear of technical rules and dependent upon the discretion of the Chancellor, adapts itself far more readily to the various grades of society, the intention of testators, the wants and wishes of the infants themselves, and the different varieties of property, than all the other guardianships combined.[1] By compelling trust officers to give security, to invest under its direction, and to keep regular accounts, the court exerts a wholesome restraint on the ward's behalf, while at the same time it arms the guardian against all attacks of a capricious heir, by affording its sanction to his official acts.

Chancery guardians are, in general, only appointed where there is property; but this is because guardianship can scarcely be necessary otherwise. Chancery, as Lord Eldon observed, cannot take on itself the maintenance of all the children in the kingdom.[2] Hence persons desiring to call in the authority of the court for the protection of an infant sometimes resort to the expedient of settling a sum of money upon him.[3] The great objection to chancery

95. Macphers. Inf. 103; Ambl. 302, *n*.

96. Macphers. Inf. 104.

97. *Ib*. 105.

98. *Ib*. 104.

1. 1 Bl. Com. 463, Harg. *n*.

2. Wellesley v. Duke of Beaufort, 2 Russ. 21.

3. Macphers. Inf. 103.

Though doubts were formerly en-

guardianship is its expense; and the lavish outlay of money which becomes requisite at every step renders the practical benefit to the minor often questionable. Less cumbrous machinery would remedy this evil. There are some English statutes relating to the poor, the employment of apprentices, and the like, which, in connection with the writ of *habeas corpus,* are designed to supersede, in a measure, the necessity of personal guardianship, for those who are without property and yet need protection.[4]

§ 816. English Doctrine; Guardianship by Election of Infant.

Guardianship by election of the infant deserves a passing notice. We have seen that the infant in socage had the right of choosing a guardian at the age of fourteen. This age was recognized also as the limit to guardianship by nurture; the law choosing to yield somewhat to the ward's discretion thenceforth. The socage ward might therefore, if he had no testamentary guardian, choose one to act on his behalf until majority, by executing a deed for that purpose. But little is really known on this subject, and the instances mentioned in the books are exceedingly rare.[5] Blackstone again, speaking of guardians for nurture, adds that, in default of father or mother, the ordinary usually asigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education.[6] The practice in the spiritual court was to permit the minor, when of suitable age, to nominate his guardian, subject to its approval. This was but a limited privilege, after all, though it seems to have been granted to all children between seven and twenty-one.[7] It is manifestly different from the right of election allowed the socage ward. The authority of spiritual courts to appoint a guardian of the person and estate was emphatically denied by Lord Hardwicke, and chancery afterwards took this guardianship completely into his own keeping. The infant, above the age of fourteen, is still permitted to nominate

tertained, it appears clear that English chancery could exercise some very limited interference over the guardians of children who had no property. Spence *Re,* 2 Ph. 247; Scanlan *Re,* 40 Ch. D. 200. By virtue of this power, aided by the Act of 1886 (49 & 50 Vict., ch. 27), chancery has now a jurisdiction over infants who are not wards of the court and have no property; but it is limited to the appointment and removal of guardians, and does not extend to schemes for their maintenance or education. McGrath *Re* (1893), 1 Ch. 143.

4. 1 Bl. Com. 463, Harg. *n.*, and acts there enumerated.

5. Co. Litt. 88b, Harg *n.* 16; Macphers. Inf. 77.

6. 1 Bl. Com. 461.

7. Fitzgib. 164; Co. Litt. 88b, Harg. *n.* 16.

his guardian before the court of chancery; but his nomination does not supersede the authority of the court, whether he be a socage ward or not.[8] Guardianship by election of the infant has thus become a misnomer, for he does not absolutely elect.

§ 817. Guardians by Nature and Nurture in This Country.

Guardianship in the United States differs considerably from guardianship in England. Here the whole subject is controlled in a great measure by local statutes. There are fewer kinds of guardians found in American practice, though some of the more important classes are recognized to a limited extent. Thus guardianship by nature and nurture, or the parental right of custody, prevails in most of the States with the restraints upon meddling with a child's property already noticed.[9] But as all children, male and female, inherit alike with us, guardianship by nurture is not here so clearly distinguished from guardianship by nature, as in the English practice.[10]

The father is the natural guardian of his minor child,[11] and on his death the mother,[12] and on death of both parents the grandfather or grandmother when next of kin,[13] but other relatives of the child have no natural right to its custody.[14]

The natural guardian has the control of the ward's person only and not of his property.[15]

8. Co. Litt. 88b, Harg. *n.* 16; Hughes v. Science, 3 Atk. 631, Macphers. Inf. 74, 78.

9. But here as in England, intermeddling with the ward's property subjects the parent to the *quasi* guardian's liability. Bedford v. Bedford, 136 Ill. 354.

10. 2 Kent, Com. 221; Reeve, Dom. Rel. 315; Macready v. Wilcox, 33 Conn. 321. That the grandfather or grandmother, when the next of kin, may, on the death of father or mother, be guardian by nature, see Darden v. Wyatt, 15 Ga. 414; Lamar v. Micou, 114 U. S. 218, 222.

11. *In re* Galleher, 8 Cal. App. 364, 84 P. 352; Succession of Watt, 111 La. 937, 36 So. 31 (father cannot abdicate his guardianship); Smith v. Young, 136 Mo. App. 65, 117 S. W. 628; Oehmen v. Portmann, 153 Mo. App. 240, 133 S. W. 104; *In re* Knott, 17 Det. Leg. N. 471, 126 N. W. 1040; Jain v. Priest (Idaho), 164 P. 364.

12. Smith v. Young, 136 Mo. App. 65, 117 S. W. 628.

13. Homes v. Derrig, 127 Ia. 625, 103 N. W. 973.

14. Willet v. Warren, 34 Wash. 647, 76 P. 273.

15. McKinnon v. First Nat. Bank (Fla.), 82 So. 748; Ringstad v. Hanson, 150 Ia. 324, 130 N. W. 145; Miles v. Boyden, 20 Mass. (3 Pick.) 213 (cannot recover legacy); Power v. Harlow, 57 Mich. 107, 23 N. W. 606; *In re* Schuler's Estate, 94 N. Y. S. 1063, 46 Misc. 373; Vinyard v. Heard (Tex. Civ. App.), 167 S. W. 22; Ferguson v. Phœnix Mut. Life Ins. Co., 84 Vt. 350, 79 A. 997; McDodrill v. Pardee & Curtin Lumber Co., 40 W. Va. 564, 21 S. E. 878.

§ 818. Chancery and Probate Guardianship in This Country.

Chancery guardianship may be considered as adopted to some extent in this country. The supreme courts in many States have now full chancery powers, as in England, over the persons and estates of infants; they may order investments, decree care and custody of the person, take children under their protection as wards of the court in certain cases, regulate the conduct of guardians, and otherwise exercise the important functions which vest in the English equity courts. But English chancery jurisprudence is one thing, and that of the United States another. While in one country the appointment, removal, and general supervision of guardians belong immediately to the equity courts, in the other a special tribunal is usually created by local statute for such matters. It is this special tribunal — somewhat resembling the English ecclesiastical court — which alone issues letters of guardianship, revokes them, and superintends trust accounts in the first instance. The guardians thus chosen have, in general, the rights and duties of chancery guardians of the person and estate.

The propriety of distinguishing between chancery guardians and those appointed by the special courts of this country — whether known as the probate, orphans', ordinary's or surrogate's court — is obvious when the origin of our probate jurisdiction is considered. At the time America was colonized, chancery guardianship was unknown in England. The ecclesiastical or spiritual courts, independent of all temporal authority, controlled the estates of orphans and their deceased parents. The necessity of some tribunal with probate jurisdiction was soon apparent to our ancestors; but, rejecting the idea of a church establishment, they distributed probate and equity powers among the common-law courts. Their judicial system was at first simple: that of local county courts with a supreme tribunal of appeal. With the growth of population came a division of these powers in the inferior courts. New county tribunals were erected for business appertaining to estates of the dead, testamentary trusts, and the care of orphans; a blending, as it were, of ecclesiastical and equity functions. The old county courts were left to their common-law jurisdiction, while the supreme tribunal retained control over them all, exercising appellate powers in common law, equity, and ecclesiastical suits. Such, in a word, is the general origin of guardianship by judicial ap-

pointment in this country.[16] While the English chancery court was slowly extending its rights over the persons and estates of infants, another system was in process of growth on this side of the water, borrowing from English law as occasion offered, and adapting itself to the increasing wants of our own community. This system, fostered doubtless by a strong prejudice against chancery practice, with its expensiveness and prolixity of pleadings, a prejudice widely prevalent during the last century, especially in New England, spread gradually into the new States and Territories, the creature of statute law wherever it went.

Much confusion has arisen in our courts wherever this distinction has not been kept in view. The law of guardianship is often discussed as though we inherited the English chancery system, when in truth our usual practice is without its counterpart abroad. The only American text-writers of authority on this subject, Reeve and Kent, have contributed to this perplexity. The former was not precise in his classification.[17] The latter unwisely confused American and English appointments, applying the term *chancery guardians* to both.[18] But the courts have sometimes perceived the necessity of a separate name for guardians appointed by courts of probate jurisdiction. Accordingly, they have been called *guardians of the person and estate;*[19] but this name is quite as appropriate to others. So, too, they are designated as *statute guardians;* but there are statute modifications applied to all kinds of guardians, and besides, this name was long ago bestowed by English writers upon *testamentary guardians.* We shall apply, then, in these pages, for want of something better, the distinguishing term *probate guardians,* this being sufficiently precise and suggestive; though it is admitted that the appointing power is not lodged in tribunals styled probate courts in every State, nor necessarily separated from courts exercising common-law functions.

Guardians are in this country statutory officers having no inherent powers, but only such as are prescribed by statute,[20] and are not public officers.[21]

16. See Smith (Mass.), Prob. Pract. 1-5; 9 Mackey (Dist. Col.), 134.

17. Reeve, Dom. Rel. 311.

18. 2 Kent, Com. 226.

19. See Arthur's Appeal, 1 Grant (Pa.), 55. See Jordan v. Smith, 5 Ga. App. 559, 63 S. E. 595 ("guardian of the person" defined).

20. Scott v. Royston, 223 Mo. 568, 123 S. W. 454. See Cobleigh v. Matheny, 181 Ill. App. 170 (guardian is an officer of the court).

21. Linderholm v. Ekblad, 92 Kan. 9, 139 P. 1015.

Guardianship is a trust dual in nature involving two separate functions, the control of the person and of the estate.[22]

§ 819. Guardians in Socage in This Country.

Guardianship in socage was never common in the United States. But traces of its existence are to be found in New York and New Jersey. Thus, in 1809, a guardian in socage, in New York, was permitted to bring trespass and ejectment.[23] This species of guardianship is now almost wholly superseded. In fact, it could seldom have arisen, since half-blood and whole-blood relatives in this country inherit alike; so that a blood relation who cannot possibly inherit could rarely be found, to assume the duties of the office.[24] A father who holds lands for life, with the remainder vested in his children, cannot be their guardian in socage.[25] And the lease of his ward's lands by any such guardian may be defeated by the appointment of another guardian, pursuant to the statute, who elects to avoid it.[26] The powers and duties of the guardian in socage, where recognized in this country, have been limited to the ward's real estate and the personalty connected therewith, such as animals and farm implements, and do not extend to the ward's general personal property;[27] and all such rights are superseded by those of an ordinary legal guardian.[28]

§ 820. Testamentary Guardians in This Country.

We have testamentary guardians, with essentially the same powers and duties as in England. The statute of 12 Charles II. has been enacted in most of the United States, with the language somewhat changed. No religious disabilities are imposed in our law. But while some States follow the words of the ancient statute as to minor fathers, the right is elsewhere restricted to such as are competent to make a will; and this is a preferable expression. For precise modifications the student should consult the

22. United States v. Hall, 171 F. 214.

23. Byrne v. Van Hoesen, 5 Johns. 66. See also Jackson v. De Walts, 7 Johns. 157. The widowed mother of an infant who owns real estate is in this State a general guardian with the rights, powers, and duties of a guardian in socage. Hynes *Re*, 105 N. Y. 560. See *In re* Wagner, 135 N. Y. S. 678, 75 Misc. 419. See Ferguson v. Phœnix Mut. Life Ins. Co., 84 Vt. 350, 79 A. 997 (guardianship in socage defined).

24. 2 Kent, Com. 222, 223; Reeve, Dom. Rel. 315, 316.

25. Graham v. Houghtalin, 1 Vroom, 552.

26. Emerson v. Spicer, 46 N. Y. 594.

27. Foley v. Mutual Life Co., 138 N. Y. 333.

28. Stimson, § 1103.

laws of his own State. Some statutes use the words "deed or will." The Ohio statute drops the word "deed" altogether. And not uncommonly is it found in America that testamentary guardians can only be appointed by a will executed with the usual solemnities.[29]

The right of testamentary appointment is still confined to the father in most States. But an Illinois statute permits the mother, if not remarried, to appoint such a guardian, provided no appointment was previously made by the father. In New York, the consent of the mother, if living, was lately required to a testamentary appointment by the father,[30] a provision afterwards repealed.[31] So, too, the English principle prevails, that the testator can appoint a guardian over his own children only; the right extending, however, to posthumous offspring. He cannot appoint guardians for other children, though he give them his property.[32] But where a statute provides that a child may be adopted by one with the same rights as if the offspring were his own, it seems just that the father, thus constituted, should have the right of appointing a testamentary guardian for his adopted child, just the same as for other children.[33] A grandfather has no right to appoint a testamentary guardian.[34]

29. See 2 Kent, Com. 225, 226; Hoyt v. Hellen, 2 Edw. Ch. 202; Matter of Pierce, 12 How. Pr. 532; Vanartsdalen v. Vanartsdalen, 14 Pa. St. 384; Wardwell v. Wardwell, 9 Allen, 518. In New York the father's right to appoint a testamentary guardian is derived exclusively from the local statute. Thomson v. Thomson, 55 How. (N. Y.) Pr. 494. A mother has no power to appoint unless the statute is explicit. *Ex parte* Bell, 2 Tenn. Ch. 27. Even in appointments by "deed," the deed does not take effect until the parent's death, and the guardian named must then qualify like any testamentary guardian. 84 Cal. 592.

See New York statute authorizing the surviving parent to appoint a testamentary guardian, 77 Hun, 201.

30. N. Y. Stat. 1862, ch. 172. And see Sackett's Estate, 1 Tuck. (N. Y. Surr.) 84.

31. Stat. 1871, construed in Fitzgerald v. Fitzgerald, 31 N. Y. Supr. 370.

32. Brigham v. Wheeler, 8 Met. (Mass.) 127; 2 Kent, Com. 225.

33. As to divorced parents, the question of testamentary guardianship is presented under a new aspect. Where a mother is allowed by statute or otherwise to dispose of the guardianship of her minor child, by will, she is assumed to have been the survivor of her husband. A divorced wife, invested with the custody of the minor child by order of court, has presumably, as such, no real right to appoint, especially if divorced for her fault. McKinney v. Noble, 37 Tex. 731. Divorce, it would appear, does not *per se* take away the father's power to appoint a testamentary guardian. See Hill v. Hill, 49 Md. 450, where custody of the child was given to the father with a right of access to the mother.

34. Fullerton v. Jackson, 5 Johns.

§ 821. Guardians of Idiots, Lunatics, Spendthrifts, &c.

The different kinds of guardianship for minors having been considered, we proceed to speak briefly of guardians for idiots, lunatics, and spendthrifts, though this subject comes hardly within our scope. Under the king's sign-manual, the Lord Chancellor was invested with jurisdiction over the persons and estates of insane persons. For this reason did chancery claim authority; not by virtue of the king's prerogative as *parens patriæ;* for idiots and lunatics, it is said, were not under the protection of the sovereign until the time of Edward II.[35] Lunatic asylums are provided by law, and regulated from time to time. For legally determining the question of insanity in any case, chancery grants a commission in the nature of a writ, directed to masters in lunacy; and if the subject be found *non compos,* the court commits his person, together with a suitable allowance for his maintenance, to some person who is then called his *committee.*[36] Blackstone states that the rule in his day was to refuse this guardianship to the lunatic's next of kin, "because it is his interest that the party should die;" but this rule has long been disregarded in practice.[37] The committee manages his ward's estate much the same as other guardians, being held to a strict account to the court of chancery, and to the ward, if he recovers, or otherwise to his personal representatives after his death. There are receivers appointed, with a salary, in case others refuse to act; but such officer is considered as a committee and gives proper security.[38] Guardians of insane persons are appointed in this country; but in general by the courts exercising jurisdiction in case of minors, which derive also their authority from local statutes.[39] The civil law likewise assigned tutors and curators to such persons.[40]

Guardianship for spendthrifts was something recognized by the

Ch. 278; *Ex parte* Bell, 2 Tenn. Ch. 327.

35. 2 Story, Eq. Juris., §§ 1335, 1336; 1 Bl. Com. 303, 3 P. Wms. 108.

36. 1 Bl. Com. 306. See Lunacy Regulation Act 1853, 16 & 17 Vict., ch. 70.

37. *Ex parte* Cockayne, 7 Ves. 591.

38. 1 Bl. Com. 306. See *Ex parte* Warren, 10 Ves. 622.

39. See Century Digest "Insane Persons." Shroyer v. Richmond, 16 Ohio St. 455; Angell v. Probate Court, 11 R. I. 187. Where one is incapable to manage his own estate because of mental unsoundness, the appointment is generally authorized without reference to the cause of such unsoundness. Robertson v. Lyon, 24 S. C. 266; Barbo v. Rider, 67 Wis. 598; 108 Ind. 545. The general guardian's right is subject to the superior right of the State to put the ward into an asylum. 17 R. I. 37.

40. 1 Bl. Com. 306.

civil law. Where a man by notorious prodigality was in danger of wasting his estate, he was looked upon as *non compos,* and committed to the care of curators or tutors by the prætor.[41] And by the laws of Solon, such persons were branded with perpetual infamy.[42] Such guardianship is, however, unknown in England, and Blackstone considered it unsuitable to the genius of a free nation.[43] It has nevertheless been introduced into several of the United States.[44] Being the creature of statute law, the rights and powers of such a guardian, and the method of appointment, are strictly construed.

Guardians may be appointed for illegitimate[45] or neglected children,[46] or for aged persons incapable of managing their property.[47]

§ 822. Guardians of Married Women.

The modern statutes relating to married women in this country have rendered some special provisions necessary for their benefit. While their husbands had the full enjoyment of their property, no guardian was necessary, and the main object of these statutes seems to be to provide a suitable trustee of the estate, in caes a minor or insane wife is abandoned by her husband, or he is likewise mentally unfitted for the trust. Such statutes are to be strictly construed as in derogation of the common law.[48]

§ 823. Special Guardians; Miscellaneous Trusts.

Besides guardians with general powers, there are guardians created by law for special purposes. Such are guardians under the English Marriage Act, appointed for giving formal consent to the

41. Ff. 27, 10, 6, 16.

42. Potter, Antiq. b. 1, ch. 26.

43. 1 Bl. Com. 306.

44. See Mass. Rev. Laws, ch. 145, § 7.

45. *Ex parte* Chambers, 221 Mass. 178, 108 N. E. 1070.

46. State v. Issenhuth, 34 S. D. 218, 148 N. W. 9.

47. Kutzner v. Meyers, 108 N. E. 115.

The fact that a man seventy-six years of age desires to marry is no reason for the appointment of a guardian for him. The fact that the old man had become infatuated with a woman is no reason for a guardian. There is no reason why an old man has not the same right to be infatuated with a woman as a sixteen-year-old boy or a thirty-year-old man. Men of all ages are continually becoming infatuated with all sorts of women, and unless the infatuation goes to the extent of destroying the freedom of will and reason, it furnishes absolutely no ground for the appointment of a guardian. Hogan v. Leeper (Okla.), 133 P. 190, 47 L. R. A. (N. S.) 475.

48. Smith, Prob. Pract. 87. See Pace v. Richardson (Ark.), 202 S. W. 852.

marriage of a minor, and guardians to release dower and homestead rights of insane married women. All such guardians derive their sole authority from statutes, and, having performed the duty prescribed, they have no further concern with the ward. Nor do they act except in default of a general guardian. There are also public officers appointed for charitable purposes on behalf of the State, sometimes known as guardians,— such as guardians of the poor; but, except for this appellation, they have no connection whatever with our subject.[49] Special guardians, too, are found under some statutes, their rights and duties being merely temporary, pending some controversy over the appointment of a general guardian; just as special administrators are sometimes appointed in a case of emergency, and where the appointment of the general administrator is necessarily delayed.[50]

§ 824. Guardian ad Litem and Next Friend.

Finally, there is the guardian *ad litem,* who is simply a guardian for a special purpose; being one chosen to represent the ward in legal proceedings to which he is a party defendant, and where he has no general guardian to appear on his behalf. Where the ward is plaintiff he appears by next friend. In either instance the father's natural right is respected.[51] The powers and duties of guardians *ad litem* are similar in England and the United States.[52]

§ 825. Guardians de Facto.

The relationship of guardian and ward may arise as a matter of fact where one not duly appointed assumes to act as guardian, and on doing so will be held liable to the obligations of a guardian. Hence, one who enters on an estate of an infant will be treated as a guardian *de facto de son tort,* and will be held acountable for the principal and interest of the estate,[53] and he may be held as a *de*

49. See Macphers. Inf. 164; Smith, Prob. Pract. 87.

50. Campau v. Shaw, 15 Mich. 226; Swartwout v. Oaks, 52 Barb. 622; Brown v. Snell, 57 N. Y. 286; Bond v. Dillard, 50 Tex. 302. And see *In re* Fortier, 31 La. Ann. 50.

51. See Woolf v. Pemberton, 6 Ch. D. 19.

52. Macphers. Inf. 358; 2 Kent, Com. 229. See *post,* § 1058. A guardian *ad litem's* special functions in a suit are not superseded by the appointment of a general (insane person's) guardian. 79 Wis. 465. See O'Reilly v. Reading Trust Co. (Pa.), 105 A. 542.

53. Bedford v. Bedford, 136 Ill. 354; Smith v. Cameron, 16 Det. Leg. N. 563, 122 N. W. 564, 138 Mich. 174 (entitled to credit for proper expenditures); Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754 (liable for services of ward); McClure v. Commonwealth, 80 Pa. St. 167; Anderson's Adm'r v. Smith, 102 Va. 697, 48 S. E. 29.

facto guardian charged with the duty of caring for his person,[54] but one never properly appointed has no authority to act and bind the estate as guardian,[55] or to act so as to bind the person of the ward as by consenting to his adoption.[56]

§ 826. Guardianship by the Civil Law.

By the civil law, minority was divided into two distinct periods: the first lasting until the age of puberty, fourteen in males, and twelve in females; the second continuing from that time until majority. During the first period the guardian was called *tutor,* and the children *pupils.* During the second period the guardian was called *curator,* and the children *minors;* the *curator* being appointed with special reference to the management of property.[57] The same general divisions are to be found in the law of continental Europe at the present day, though modified somewhat by custom; also in Scotland;[58] also in Louisiana, and other parts of this country, which were formerly under French and Spanish dominion. But the term *curator* is in some codes applied to the guardian of the estate of the ward as distinguished from the guardian of the person.[59] So the civil law recognized three kinds of guardianship: *tutela testamentaria,* conferred by testament; *legitima,* by the law itself; *dativa,* by the authority of the judge.[60] These divisions have their corresponding analogies in English and American law; since we may place testamentary guardians in the first class, socage and natural guardians in the second, and chancery and probate guardians in the third.

54. *In re* Harris' Guardianship, 17 Ariz. 405, 153 P. 422. See Starke v. Storm's Ex'r, 79 S. E. 1057 (master is not *de facto* guardian of infant servant).

55. Young v. Downey, 150 Mo. 317, 51 S. W. 751; Stephens v. Hewett, 22 Tex. Civ. App. 303, 54 S. W. 301.

56. *Ex parte* Martin, 29 Idaho, 716, 161 P. 573.

57. Story, Confl. Laws, § 493; 3 Burge, Col. & For. Laws, 930, 1001-1014.

58. Fraser, Guardian & Ward, 145.

59. 2 Kent, Com. 224; Duncan v. Crook, 49 Mo. 116.

60. Co. Cop., § 23; Macphers. Inf. 573; 3 Burge, Col. & For. Laws, 931.

CHAPTER II.

APPOINTMENT OF GUARDIANS.

§ 827. Constitutional Power of Legislature.

The legislature has in general full power to provide for control through guardianship of the person and estate of those incompetent to act for themselves, and no constitutional right of the ward is thereby infringed.[61] The legislature has the power to prescribe the forms of guardianship.[62]

§ 828. Authority of Courts in General.

The proper courts have in general authority over the appointment and control of guardians in the management of the affairs

61. *Ex parte* Sharp, 15 Idaho, 120, 96 P. 563 (appointment of guardian is constitutional and infringes no right of minor).

A statute providing for the appointment of a guardian over a delinquent boy and subjecting him to proper restraint is constitutional. Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892, 45 L. R. A. (N. S.) 908.

62. Duncan v. Mutual Life Ins. Co. of New York, 164 N. Y. S. 97, 99 Misc. 280.

of the ward,[63] and the courts cannot divest themselves of this authority and duty.[64]

§ 829. Jurisdiction in General.

The court of chancery exercises a large discretion. Its authority over the persons and estates of infants, idiots, and lunatics cannot be questioned elsewhere. No tribunal short of the legislature can interpose a check upon its powers. But it is different with probate courts. Their jurisdiction is founded upon local statutes, maintained in derogation of the common law, made subject to the supervision of supreme tribunals, and confined to the exercise of special powers sparingly conferred. From the fact that the English equity courts are unfettered in their authority, chancery courts in this country incline to the same direction; hence they construe strictly the powers of the probate courts, while maintaining their own; a matter of little difficulty, since the supreme authority is in their hands, whether in matters of probate, equity, or common law. With especial strictness are the powers of probate tribunals scrutinized in matters which do not grow out of the settlement of estates of deceased persons.[65]

It may devolve on chancery to appoint guardians where testamentary guardians decline or are disqualified to act. So where there are two or more testamentary guardians and they fail to

63. *In re* Lundberg, 143 Cal. 402, 77 P. 156; Cobleigh v. Matheny, 181 Ill. App. 170 (guardian an officer of court); Euler v. Euler, 102 N. E. 856; Reeves v. Hunter (Iowa), 171 N. W. 567 (probate court); Miller v. Mills (Ky. Super. 1885), 7 Ky. Law Rep. 221; *In re* Stockman, 71 Mich. 180, 38 N. W. 876; *In re* Brown, 141 N. Y. S. 193, 80 Misc. 4; Strubbe v. Kings County Trust Co., 169 N. Y. 603, 62 N. E. 1100 (affg. 69 N. Y. S. 1092, 60 App. Div. 548).

64. Davis v. White (Tex. Civ. App.), 207 S. W. 679 (order of court divesting itself of rental of estate is void).

65. See, for instance, as to insane persons and spendthrifts, Holden v. Scanlin, 30 Vt. 177; Sears v. Terry, 26 Conn. 273; Strong v. Birchard, 5 Conn. 357; Cooper v. Summers, 1 Sneed, 453; Hovey v. Harmon, 49 Me. 269. And see, as to minors, *Re* Horsford, 2 Redf. 168. There are many local statutes relating to the appointment of guardians over persons of unsound mind, whose consideration is foreign to our present purpose. See 89 Ind. 300; 90 Ind. 417; 53 Wis. 612, 625; 61 N. H. 261; 58 Mich. 549. The jurisdiction of a probate court to appoint such guardians is wholly statutory, and the formalities of the statute should be carefully observed. North v. Joslin, 59 Mich. 624. Jurisdiction may also arise in a given case to appoint a guardian both on the grounds of infancy and insanity. King v. Bell, 36 Ohio St. 460. The wife rather than the father is entitled to the control of an insane husband of full age. Robinson v. Frost, 54 Vt. 105.

agree.[66] And it is the English rule that testamentary guardianship does not go over upon the guardian's death, no successor having been indicated in the will; but chancery must supply the vacancy.[67] The same may be said of the courts in this country with probate jurisdiction.[68]

It would appear to be the general rule in this country, that a probate or statute guardian cannot be appointed for a minor where the minor is not within the jurisdiction or domiciled there, and has no property therein; and moreover, that bringing an infant into the State by stratagem for the purpose of giving a colorable jurisdiction will not avail.[69] And in general, whether a guardian shall be appointed or not for an infant is a matter resting in the sound discretion of the court; for an appointment is made on the supposition that occasion at least exists for making it.[70]

§ 830. What Courts May Appoint.

It may be premised that in England all guardians are appointed by the court of chancery in the exercise of inferior or appellate powers. Chancery guardians have been appointed in this country, but not frequently; and county courts of probate jurisdiction at the present day generally act in the first instance, issuing letters of guardianship, as well as of administration, under their official seal. Thus, in New England and most of the Western States, probate guardians are appointed by the judge of probate; in New York, by the surrogate; in New Jersey, by the orphans' court or the ordinary; in Pennsylvania and Maryland, by the orphans' court; in Ohio, by the court of common pleas with chancery powers; in California, by the district courts possessing a similar jurisdiction. In Virginia, North and South Carolina, the chancery and county courts have exercised a sort of concurrent jurisdiction; in others of the Southern States there are orphans' courts; in Louisiana the civil law has prevailed.[71]

66. Macphers. Inf. 113; *Ib.* 104.

67. Bac. Abr. Guardian & Ward, A.

68. See People v. Kearney, 31 Barb. 430; Judge of Probate v. Hinds, 4 N. H. 464.

69. *Re* Hubbard, 82 N. Y. 90. The status of an Indian tribe does not invalidate jurisdiction in appointng a guardian. Farrington v. Wilson, 29 Wis. 383.

70. Vandewater *Re*, 115 N. Y. 669; Newton v. Janvrin, 62 N. H. 440. Where a testamentary trustee, though never qualifying as guardian, has honestly and faithfully performed those functions while the children most needed them, a court disinclines to appoint some one else their guardian from merely formal considerations. 89 Tenn. 63.

71. See 2 Kent, Com. 226, 227, and notes; Glascott v. Warner, 20 Wis.

§ 831. Domicile or Residence of Minor.

Most important is the requirement of an actual residence within the jurisdiction; especially for a general guardianship and in States where the authority of courts with probate jurisdiction is strictly limited to their respective counties. Letters of guardianship in the case of a resident person obtained in the wrong county are invalid; it has been even held that they are null and void, and may be collaterally impeached in any court.[72]

The court of the domicile of the ward has jurisdiction over his guardianship.[73] The last domicile of a father is on his death the

654; Herring v. Goodson, 43 Miss. 392; Duke v. State, 57 Miss. 229. For rules which prevail in California while under Mexican rule, and the powers of alcades over guardianship, see Braly v. Reese, 51 Cal. 447. As between a limited guardian appointed by chancery and a general guardian appointed under statute by the local county court, see Lake v. McDavitt, 13 Lea, 26.

Probate court. Hudson v. Von Weise, 7 Ind. T. 238, 104 S. W. 602; Brack v. Morris, 90 Kan. 64, 132 P. 1185. *In re* Dunlap, 100 Me. 397, 61 A. 704; De Ferrari v. De Ferrari, 220 Mass. 38, 107 N. E. 404 (not in superior court); *Ex parte* Ingenbohs, 173 Mo. App. 261, 158 S. W. 878 (Court of Appeals has no power); *In re* Breck, 252 Mo. 302, 158 S. W. 843; State *ex rel.* Tebbetts v. Holtcamp, 252 Mo. 333, 158 S. W. 853; State *ex rel.* Baker v. Bird, 253 Mo. 569, 162 S. W. 119; Brewer v. Cary, 148 Mo. App. 193, 127 S. W. 685; Brooks v. Brooks, 77 N. H. 547, 94 A. 196 (not in superior court); Ury v. Brown, 129 N. C. 270, 40 S. E. 4 (superior court on appeal); McAdams v. Wilson (Tex. Civ. App.), 164 S. W. 59 (administration of will by an independent executor does not deprive court of jurisdiction to appoint guardian over minor's interest in estate).

Surrogate's Court. In re Wagner, 135 N. Y. S. 678, 75 Misc. 419 (jurisdiction not affected by decree of foreign court or by agreement of parents); *In re* Lamb's Estate, 139 N. Y. S. 685; *In re* De Saulles, 167 N. Y. S. 445, 101 Misc. 447 (chancery guardians).

Orphan's Court. In re Carter's Estate, 254 Pa. 518, 99 A. 58.

In equity. Thomas v. Thomas, 250 Ill. 354, 95 N. E. 345; Hamerick v. People, 126 Ill. App. 491. See Bell v. Bell Guardian, 167 Ky. 430, 180 S. W. 803 (only under will or other instrument).

County court. Parker v. Lewis, 45 Okla. 807, 147 P. 310. See State v. Parsons, 131 Wis. 606, 111 N. W. 710 (special guardian).

Other courts. Russner v. McMillan, 37 Wash. 416, 79 P. 988 (superior court); *In re* Klein, 95 Wis. 246, 70 N. W. 64 (act of county judge in fixing custody is no bar to appointment by circuit court of a different person as guardian).

72. Ware v. Coleman, 6 J. J. Marsh. 198; Sears v. Terry, 26 Conn. 273; Dorman v. Ogbourne, 16 Ala. 759; Munson v. Munson, 9 Tex. 109; Lacy v. Williams, 27 Mo. 280; Herring v. Goodson, 43 Miss. 392; Duke v. State, 57 Miss. 229.

73. Dunn v. Christian (Ala.), 80 So. 870 (although ward was actually residing elsewhere at time); Hayslip v. Gillis, 123 Ga. 263, 51 S. E. 325; *In re* Brady, 10 Idaho, 366, 79 P. 75 (jurisdiction retained until accounts rendered and he is discharged); Connell v. Moore, 70 Kan. 88, 78 P. 164,

domicile of his minor children, where application for guardianship should primarily be made.[74] After the death of both parents, infants who take up their residence at the home of a paternal grandparent and next of kin in another State, will acquire such grandparent's domicile.[75]

A natural guardian may in good faith change his ward's domicile, as this amounts to no more than that the domicile of the parent is the domicile of the child, but where the parents are both dead a relative has no right to change the domicile of the infant, especially where he has not given bond as guardian. Such removal does not take away the right of the court of the parent's domicile to appoint a guardian for him.[76] But where custody of an infant whose parents are dead is taken by a relative whose custody is confirmed by the court, the place of domicile of the guardian becomes the domicile of the child.[77]

Where a person has left a domicile with no intention of returning, and dies before he establishes another, the court of the old domicile is not necessarily the only court which can appoint a guardian for the child.[78] The court of residence of the ward may by statute have jurisdiction.[79] And statute jurisdiction is taken where minor orphans are in fact resident in a State at the time,

109 Am. St. Rep. 408; Jewell v. De Blanc, 110 La. 810, 34 So. 787; Sudler v. Sudler, 121 Md. 46, 88 A. 26 (domicile is "residence"); Smith v. Young, 136 Mo. App. 65, 117 S. W. 628; *In re* Connor, 93 Neb. 118, 39 N. W. 834; *In re* Wildberger's Estate, 55 N. Y. S. 1135, 25 Misc. 582. See Maloy v. Maloy, 131 Ga. 579, 62 S. E. 991 (jurisdiction on formation of new county); Southwestern Surety Ins. Co. v. Taylor (Okla.), 173 P. 831, 835 (removal of case to another county); MaHarry v. Eatman, 29 Okla. 46, 116 P. 935; Domicile of Infants, see 49 L. R. A. 860, note.

74. Hindorff v. Sovereign Camp of Woodmen of the World, 150 Ia. 185, 129 N. W. 831 (although minor resided elsewhere); *Ex parte* McCoun, 96 Kan. 314, 150 P. 516; Wells v. Andrews, 60 Miss. 373; *In re* Murray, 28 Ohio Cir. Ct. R. 652. See Cox v. Boyce, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483; Cox v. Hunter, 152 Mo. 584, 54 S. W. 1102 (where father has released child to grandfather, the latter's domicile is that of the ward).

75. Lamar v. Micou, 114 U. S. 218.

76. Sudler v. Sudler, 121 Md. 46, 88 Atl. 26, 49 L. R. A. (N. S.) 860.

77. Churchill v. Jackson, 132 Ga. 666, 64 S. E. 691, 49 L. R. A. (N. S.) 875.

78. *In re* Rice, 42 Mich. 528, 4 N. W. 284.

79. Kelsey v. Green, 69 Conn. 291, 37 A. 679, 38 L. R. A. 471; Louisville & N. R. Co. v. Kimbrough, 115 Ky. 512, 74 S. W. 229, 24 Ky. Law Rep. 2409 (abandoned child cared for by county authorities); South Covington & C. St. Ry. Co. v. Lee, 153 Ky. 621, 156 S. W. 99; Estes v. Presswood (Tex. Civ. App. 1911), 137 S. W. 145; Hagan v. Snider, 44 Tex. Civ. App. 139, 98 S. W. 213. See Dickerson v.

even if the legal domicile be elsewhere; the appointment giving at all events an authority to be recognized within such State.[80]

Where a person is appointed guardian by two different courts the court of the domicile may retain exclusive jurisdiction.[81] And letters once properly issued in the proper county of residence are not revoked by the ward's removal to another county within the same general jurisdiction.[82]

The infant's place of residence at the time when a guardian is to be appointed determines the jurisdiction of the court. Hence the county court which appointed the first guardian of a ward may not always appoint his successor.[83]

Where the domicile of the minor is removed out of the jurisdiction of the court pending proceedings for guardianship, an order of appointment in that jurisdiction cannot be made,[84] as the court of the jurisdiction to which a ward moves may have jurisdiction over the appointment of a guardian for him.[85]

And a request by the father that a certain person be appointed guardian of his children has no effect after his death to change their domicile or to empower a court out of their domicile to appoint a guardian.[86]

§ 832. Necessity of Property.

Two important elements enter into this jurisdiction over the ward,— possession of property and actual residence within the judicial limits. Property in the infant has usually been deemed essential in chancery practice.[87] But in a case which came before Lord Chancellor Cottenham, in 1847, it was held that the court should interfere on behalf of infants without property, so as to

Bowen, 128 Ga. 122, 57 S. E. 326 (approval of ordinary required where appointment outside of jurisdiction).

80. Ross v. Southwestern R., 53 Ga. 514; *Re* Hubbard, 82 N. Y. 90.

81. Cobleigh v. Matheny, 181 Ill. App. 170.

82. Randall v. Wadsworth, 130 Ala. 633, 31 So. 555; Shorter v. Williams, 74 Ga. 539; Netting v. Strickland, 18 Ohio Cir. Ct. R. 136, 9 O. C. D. 841 (or even the removal of the trust property).

83. Harding v. Weld, 128 Mass. 587; Brown v. Lynch, 2 Bradf. (N. Y.) 214.

84 *In re* Taylor's Estate, 131 Cal. 180, 63 P. 345.

85. Cobleigh v. Matheny, 181 Ill. App. 170. See Landreth v. Henson, 173 S. W. 427. See, however, Crosbie v. Brewer (Okla.), 158 P. 388 (court of old county may retain jurisdiction where moves after removal of guardian).

86. Modern Woodmen of America v. Hester, 66 Kan. 129, 71 P. 279; Royal Neighbors of America v. Same, 66 Kan. 764, 71 P. 1129. See *In re* Majilton, 164 N. Y. S. 745, 98 Misc. 490 (testamentary guardian).

87. See Macphers. Inf. 103.

award custody of the person. "I have no doubt about the jurisdiction," was his emphatic language.[88] What may be called guardians of the person and estate in chancery are still appointed, however, on the allegation of property. In the United States letters issue to probate guardians, whenever there is occasion for their appointment, the statute rarely prescribing narrower limits to the judge's authority; and as our practice is simple and attended with little expense, the same necessity for inquiry into the means of the infant does not manifestly arise as in the case of chancery guardianship. But statute and practice generally have reference to cases of property.[89]

Where the minor's only property is left in the hands of trustees for him there is no need for the appointment of a guardian, and one should not be appointed.[90]

Situs of Property Giving Jurisdiction.— Where the ward is a non-resident, guardianship is frequently recognized for the collection and preservation of his estate in the jurisdiction; and in such cases the court where the property is situated, upon due notice, appoints some friend of the minor on his behalf, requiring proper security; the existence and *situs* of the property determining the right of jurisdiction.[91] Such cases serving some special emergency,

88. *In re* Spence, 2 Ph. 247. In a case where an infant grandchild was born abroad of a natural-born British subject, and the surviving parent was a French woman to whom objections were entertained and who had begun proceedings for guardianship in France, the English chancery court appointed a guardian of the child, although the infant was resident abroad and had no property in Great Britain. Willoughby *Re*, 30 Ch. D. 324, 40 Ch. D. 200; McGrath *Re* (1893), 1 Ch. 143.

89. People v. Kearney, 31 Barb. (N. Y.) 430.

90. Studebaker v. Hogen (Wash.), 176 P. 339.

91. Nunn v. Robertson, 80 Ark. 350, 97 S. W. 293; People v. Medart, 166 Ill. 348, 46 N. E. 1095 (affg. 63 Ill. App. 111); Williams v. Chicago, B. & Q. Ry. Co., 169 Mo. App. 468, 155 S. W. 64 (right of action is on "estate"); Hartung v. Northwestern Mut. Life Ins. Co., 174 Mo. App. 289, 156, S. W. 980; Clark v. Cordis, 4 Allen, 466; Rice's Case, 42 Mich. 528. See Hope v. Hope, 27 E. L. & Eq. 249; *Re* Horsford, 2 Redf. 168; Neal v. Bartleson, 65 Tex. 478. This jurisdiction is often conferred by statute as to personal property. *Ib.* So, too, as to real property at the local *situs*, or to either real or personal property. Maxwell v. Campbell, 45 Ind. 360; Seaverns v. Gerke, 3 Sawyer, 353. Such statutory authority as to non-residents is valid. Davis v. Hudson, 29 Minn. 27. And while it only aplies to a non-resident's local property, and cannot extend to his person, informal recitals in a decree to the latter effect may be treated as surplusage. 45 Minn. 380. Where the land of a minor, not residing in the State, is to be sold, see 40 Minn. 254. See Andrews v. Town-

a general guardian need not first be appointed invariably where the ward is domiciled.[92]

§ 833. Where Father is Alive.

Where the father of an infant is living, and in charge of the child, courts have ever been unwilling to assume jurisdiction. Chancery, according to the old rule, as we understand Blackstone to mean,[93] could not appoint a guardian except for fatherless children. But the correctness of this principle was afterwards doubted; and when the rule became settled, in Lord Thurlow's time, that the father could not give a valid receipt for his child's legacy, the necessity of appointing a guardian to collect and hold personal property was apparent.[94] And since the substitution of chancery and probate wards in practice for socage wards, guardianship of the minor in the father's lifetime has frequently been sought in the courts.[95]

But the English chancery reluctantly interferes with the father's rights in such cases. Lord Chancellor Hart in 1828 refused to bestow the chancery guardianship of a minor upon a third person, on the ground that the father is guardian of his own children by paramount title and common right. And while he admitted that the court should in all cases assume the superintendence of the child's fortunes, he added, that during the father's life no other could be placed over the child, except under very peculiar circumstances, and even then rather as a curator than a guardian.[96] And the later decisions are to the same effect; as, for instance, *Fynn's Case,* where Vice-Chancellor Bruce refused to make the mother a chancery guardian of her children against the father's wishes, though satisfied that the latter was unable to maintain them, and was such a person as would not have been selected for the guardianship of another person's children.[97]

shend, 53 N. Y. Super. Ct. 522. See Modern Woodmen of America v. Hester, 66 Kan. 129, 71 P. 279; Royal Neighbors of America v. Same, 66 Kan. 764, 71 P. 1129 (holding that presence of an insurance certificate in a State will not give jurisdiction to appoint guardian).

92. West Land Co. v. Kurtz, 45 Minn. 380.

93. 3 Bl. Com. 427.

94. Cooper v. Thornton, 3 Bro. C. C. 96; Dagley v. Tolferry, 1 P. Wms. 285; 2 Kent, Com. 220, and cases cited; Lang v. Pettus, 11 Ala. 37.

95. See *Ex parte* Bond, 8 L. J. Ch. 252.

96. Barry v. Barry, 2 Moll. 210.

97. 12 Jur. 713. And see Spence's Case, 2 Ph. 247; Ball v. Ball, 2 Sim. 35.

The great difficulty which arises in the English chancery practice, where guardianship is sought by a stranger, namely, that a father's custody of his own children is thereby disturbed, has been frequently obviated in this country by statute. And in many States, while the father is living, probate guardians are appointed, whose powers, being limited to the infant's estate, do not come in conflict with the parental right to the ward's person.[98] Yet in other States the probate courts can only grant guardianship to orphans, that is, to fatherless children;[1] and where this is the case, chancery might assume jurisdiction in an extreme case, though the father were living. A father who is alive is not bound usually by proceedings for the guardianship of his child, to which he was not a party.[2]

§ 834. Parents or Relatives Preferred.

The court should appoint a parent if a proper person,[3] the father,[4] the mother on death of the

98. Clark v. Montgomery, 23 Barb. 464. See *In re* Tombo, 149 N. Y. S. 219, 86 Misc. 361, judg. rev., 149 N. Y. S. 688 (guardian for child of insane mother); *In re* De Saulles, 167 N. Y. S. 445, 101 Misc. 447 (may appoint during temporary incapacity of parents).

1. Poston v. Young, 7 J. J. Marsh. 501; Hall v. Lay, 2 Ala. 529; Friesner v. Symonds, 46 N. J. Eq. 521; Poston v. Young, 30 Ky. 501; Jordan v. Smith, 5 Ga. App. 559, 63 S. E. 595 (unless parental rights forfeited); Williams v. Hewitt (Okla.), 181 P. 286 (unless estate being wasted by parents).

2. Bowles v. Dixon, 32 Ark. 92; Tong v. Marvin, 26 Mich. 35. But see 58 N. H. 15.

3. Campbell v. Wright, 130 Cal. 380, 62 P. 613; *In re* Mathews (Cal.), 164 P. 8; *In re* Moore's Guardianship (Cal.), 176 P. 461; *In re* Wise's Estate (Cal.), 177 P. 277; Succession of Haley, 49 La. Ann. 709, 22 So. 251. See Heinemeier v. Arlitt, 29 Tex. Civ. App. 140, 67 S. W. 1038 ("parent" does not include stepfather).

4. *In re* Iler, 16 Ariz. 323, 145 P. 143; *In re* Salter, 142 Cal. 412, 76 P. 51 (appointment of another is void though temporary); *In re* Forrester, 162 Cal. 493, 123 P. 283 (father preferred to grandmother); *In re* Mathews, 169 Cal. 26, 145 P. 503; Andrino v. Yates, 12 Idaho, 618, 87 P. 787; *In re* Alexander, 127 La. 853, 54 So. 125 (no abandonment of child by leaving with grandparents); *In re* Guardianship of Tully Infants, 105 N. Y. S. 858, 54 Misc. Rep. 184 (father passed over only if not a fit person); *In re* Wagner, 135 N. Y. S. 678, 75 Misc. 419 (although divorced) *In re* Munn, 167 N. Y. S. 443, 101 Misc. 171 (where mother dead); *In re* Mancini, 178 N. Y. S. 57. See Crosbie v. Brewer (Okla.), 158 P. 388 (waiver by parents withdrawn).

The surviving father has a natural right to be appointed guardian of his minor children unless he is unfitted for the trust. The court has no right to appoint another simply because the father is lacking in integrity — does not pay his debts — or that his reputation for sobriety had been bad. The court cannot deprive the father of the custody of his child merely be-

father.[5] It is improper to appoint the mother without some information as to the father's family.[6] On the other hand, the court refuses to select guardians for infants residing with their mother until she has indicated her own wishes,[7] but where the mother marries again she will not necessarily be appointed.[8] So a grandparent[9] or the nearer relatives may be preferred.[10]

cause he is dishonest in his business transactions. Intemperance will bar him only when it appears that he is an habitual drunkard and that his conduct would have a tendency to demoralize and degrade his children. Mere occasional hilarity is insufficient. Where the father is able to transact his own business and is not otherwise unsuitable he should be appointed. *Re* Crocheron, 16 Ida. 441, 101 Pac. 741, 33 L. R. A. (N. S.) 868.

5. *In re* Snowball's Estate, 156 Cal. 240, 104 P. 444; Chevalley v. Pettit, 115 La. 407, 39 So. 113; *In re* Burdick, 84 N. Y. S. 932, 41 Misc. 346; Studebaker v. Hogen (Wash.), 176 P. 339; *In re* Tank's Guardianship, 129 Wis. 629, 109 N. W. 565 (although formerly immoral).

A mother may be appointed guardian of her daughter, three years old, where a stranger might not be appointed, were the evidence of character, affecting suitableness, the same. Davis' Adm'r v. Davis, 162 Ky. 316, 172 S. W. 665.

6. Cooke's Case, 6 E. L. & Eq. 47.

7. Lockwood v. Fenton, 17 E. L. & Eq. 90; *In re* Thomas, 21 E. L. & Eq. 524. As to other relatives, see Macphers. Inf. 112.

The American rule is clearly stated in a New Jersey case: namely, that the mother, and after the mother the next of kin of an infant under fourteen is entitled to preference and that such claim cannot be disregarded unless for some satisfactory reason. Albert v. Perry, 1 McCart. 540. Access of the mother to the child may be made a condition where a third person is appointed. 4 Dem. 295. And see Read v. Drake, 1 Green, Ch. 78; Allen v. Peete, 25 Miss. 29; People v. Wilcox, 22 Barb. 178; Ramsay v. Ramsay, 20 Wis. 507; Good v. Good, 52 Tex. 1; Leavel v. Bettis, 3 Bush, 74; Lord v. Hough, 37 Cal. 657. There may be a probate guardian appointed over a child against the wishes of a man and wife who have agreed in writing with the mother to take care of the child under certain stipulations. Gloucester v. Page, 105 Mass. 231. It is not proper for a court to appoint a mother, and, upon her failure to give bond within the limited time, appoint a stranger without notice to her. Weldon v. Keen, 37 N. J. Eq. 251; cf. *Ib.* 245.

It is further stated, in this case, that a greater latitude is allowed to the court, as between relatives having no legal claim to the services of the child and the natural guardian; and reasons which might be deemed insufficient to bar the mother's rights might decide as between other relations. Albert v. Perry, 1 McCart. 540.

8. Jewell v. De Blanc, 110 La. 810, 34 So. 787; State *ex rel.* Rutledge v. Holman, 93 Mo. App. 611, 67 S. W. 747.

9. Parker v. Lewis, 45 Okla. 807, 147 P. 310 (where father relinquishes right).

10. *In re* Brinckwirth's Estate (Mo.), 186 S. W. 1048; Woodruff v. Snoover (N. J. Prerog. 1900), 45 A. 980; *In re* Curtin, 158 N. Y. S. 131, 93 Misc. 394; *In re* De Saulles, 167 N. Y. S. 445, 101 Misc. 447 (rights of paternal relatives are superior to maternal if proper persons); Jones v. Bowman, 13 Wyo. 79, 77 P. 439, 67 L. R. A. 860. See *In re* Reimen-

In case of adoption the adopting parent is entitled.[11]

§ 835. Testamentary Guardianship, How Constituted.

Testamentary guardianship is the only recognized instance of authority derived from parental appointment. Guardians thus appointed require at the old law no further qualification; not even the probate of the will which appoints them.[12]

At common law the father had the exclusive power to appoint a testamentary guardian for his minor children even to the exclusion of the surviving mother.[13] But testamentary guardianship exists in this country chiefly by force of local statutes, which also regulate the form and authentication of wills. And we find many modifications of the old English rule; none more important than those of several States which render a probate of the will necessary before a testamentary guardian can act; while it is not unfrequently found that the appointment remains subject to the approval of the court, and requires the person appointed to qualify with or without sureties.[14] A guardian appointed by a parent by will may be recognized by the court in its discretion,[15] but in many States those having parental power over a minor have no power to appoint a testamentary guardian.[16]

schneider (Ia.), 164 N. W. 736 (maternal aunt not removed on claim of paternal grandmother that she has greater rights).

11. Sucession of Haley, 49 La. Ann. 709, 22 So. 251; *In re* Masterson's Estate, 45 Wash. 48, 87 P. 1047 (although interested in preventing marriage of ward); *contra, In re* Brown, 120 La. 50, 44 So. 919.

12. Brigham v. Wheeler, 8 Met. 127; Hoyt's Case, 2 Edw. Ch. 113; *In re* Hart, 2 Con. & L. 375; Lady Chester's Case, Vent. 207. See 7 Ves. 365; Gilliat v. Gilliat, 3 Phillim. 222. The validity of the testamentary appointment being in dispute, a court of common law over a question of custody has directed an issue in order to establish the same. *In re* Andrews, L. R. 8 Q. B. 153.

13. Kellogg v. Burdick, 96 N. Y. S. 965, 110 App. Div. 472, 18 N. Y. Ann. Cas. 44, 187 N. Y. 355, 80 N. E. 207; People v. Small, 237 Ill. 169, 86 N. E. 733. See Dupuy v. Hardaway (Va.), 4 Leigh, 584.

14. *Re* Taylor, 3 Redf. (N. Y.) 259; Wadsworth v. Connell, 104 Ill. 369; Buckley v. Herder (Tex. Civ. App. 1911), 133 S. W. 703 (provision that guardian appointed by will shall not be subject to control of court is void).

15. *Ex parte* McCoun, 96 Kan. 314, 150 P. 516 (if proper person); Nation v. Green (Ind.), 123 N. E. 163; Hudson's Guardian v. Hudson, 160 Ky. 432, 169 S. W. 891; *In re* Stockman, 71 Mich. 180, 38 N. W. 876; Henicle v. Flack, 3 Ohio App. 444 (must be appointed by court).

16. Lamar v. Harris, 117 Ga. 993, 44 S. E. 866; Succession of Le Blanc, 128 La. 1055, 55 So. 672; Campbell v. Mansfield, 104 Miss. 533, 61 So. 593 (where mother living); Kellogg v. Burdick, 96 N. Y. S. 965, 110 App. Div. 472, 18 N. Y. Ann. Cas. 44, 187 N. Y. 355, 80 N. E. 207; Stuebaker v. Hogen (Wash.), 176 P.

An appointment by the mother of a testamentary guardian may be a nullity.[17] By statute in some States the parent has the right to appoint a testamentary guardian for his minor children only with the consent of the surviving parent.[18]

Trustee.— Where a will appoints one a testamentary guardian for the children, which provision is ineffectual by reason of the fact that the mother is still living, still the person appointed guardian holds the property as trustee for the children.[19]

A decree of divorce giving one parent custody of the child may deprive the other of the right to object to the appointment of a testamentary guardian by the parent given custody.[20]

The parol appointment of a testamentary guardian is insufficient.[21] But the instrument which designates him need not invariably be executed with the same formality as a will; for the father, as the old statute intimates, may appoint by testamentary deed. It has been held that the appointment of guardians by a will not duly attested was made good by a codicil duly attested, written on the same paper, making certain alterations in the will, and confirming it in other respects.[22]

339. See Thompson v. Thompson, 20 Ky. Law Rep. 979, 47 S. W. 1088 (testamentary guardian not entitled to land). See Otjen v. Frohbach, 148 Wis. 301, 134 N. W. 832 (appointment valid in so far as property is concerned).

17. *In re* Moore's Estate and Guardianship (Cal.), 176 P. 461 (where father living though divorced); Hernandez v. Thomas, 50 Fla. 522, 39 So. 641, 2 L. R. A. 203; Edwards v. Kelly, 83 Miss. 144, 35 So. 418 (father and not mother may appoint guardian by will); *In re* Waring's Will, 94 N. Y. S. 82, 46 Misc. 222 (mother's appointment void where father survives).

18. *In re* Baker's Estate, 153 Cal. 537, 96 P. 12 (consent by mother after death of father is sufficient); *In re* Snowball's Estate, 156 Cal. 240, 104 P. 444; *In re* Wagner, 135 N. Y. S. 678, 75 Misc. 419; *In re* Pearce, 137 N. Y. S. 755, 77 Misc. 415; *In re* Tombo, 149 N. Y. S. 688 (reversing order [Sur.] 149 N. Y. S. 219, 86 Misc. 361) (where marriage annulled for insanity of mother); *In re* Wohlers, 164 N. Y. S. 936, 98 Misc. 500 (only during minority); Camp v. Pittman, 90 N. C. 615. See Heitkamp v. Ragan (La.), 76 So. 247; *In re* Gibbs, 160 N. Y. S. 686, 96 Misc. 537. See Churchill v. Jackson, 132 Ga. 666, 64 S. E. 691 (guardian named over property and not person); *In re* Scoville, 131 N. Y. S. 205, 72 Misc. 310.

Consent by a mother to the probate of the will does not waive her statutory right to object to the testamentary guardian. Ohrns v. Woodward, 134 Mich. 596, 96 N. W. 950, 10 Det. Leg. N. 591.

19. Campbell v. Mansfield (Miss.), 61 So. 593, 45 L. R. A. (N. S.) 446.

20. People v. Small, 237 Ill. 169, 86 N. E. 733. See *In re* Allen's Estate (Cal.), 124 P. 237 (divorced father must consent to appointment by mother).

21. Macphers. Inf. 84. See Johnstone v. Beattie, 10 Cl. & Fin. 42.

22. De Bathe v. Lord Fingal, 16

It is sometimes difficult to determine what language will constitute testamentary guardianship. The statute uses the words "custody and tuition" in reference to the children; and such assignment of the children as confers, expressly or by implication, a power thus extensive, ought to suffice. Thus, where a testator gives the "care and custody" of his children, further directing that the person so intrusted shall be guided by the advice of his executors, as to the children's education, this is held to be a good appointment.[23] So it is held that testamentary guardianship was constituted, where a testator directed the trustees of his will to procure a suitable house for the residence of his children, who were infants, and to engage a proper person for the purpose of taking the management and care of the house and of his children during their minority; and requested his late wife's sister, if she should be alive at his decease, to take such management and care on herself.[24] And in general testamentary guardians need not be expressly designated as such; albeit, in order to constitute them by implication, the powers essential to the office must be conferred.[25]

The devise of certain property "in trust" for infants is not a devise of guardianship. Thus it was said by Lord Vaughan that, where a testator devised land to a trustee, to be held in trust for his heir, and for his maintenance and education until he should be of age, this was no devise of the custody within the statute, for he might have done this before the statute.[26] The same may be said generally of legacies and bequests in trust.[27] But where a testator divided the residue into equal parts, a certain number of which he gave to a minor child and appointed the executors "guardians and trustees," there was really no trust, in effect, and the executors were not constituted trustees, but guardians simply.[28]

Ves. 167. But see Marshall, C. J., in Gaines v. Spann, 2 Brock. 81; Wardwell v. Wardwell 9 Allen, 518. A testamentary guardian can only be appointed by an instrument admitted to probate, which names such person, and indicates that he is to have the care and nurture of the infant. Desribes v. Wilmer, 69 Ala. 25; Blacksher Co. v. Northrup, 176 Ala. 190, 57 So. 743.

23. See Corrigan v. Kiernan, 1 Bradf. 208; 69 Ala. 25.

24. Miller v. Harris, 14 Sim. 540. See Mendes v. Mendes, 1 Ves. 89; s. c., 3 Atk. 619.

25. Games v. Spann, 2 Brock. 81; Peyton v. Smith, 2 Dev. & Batt. Eq. 325; Johnstone v. Beattie, 10 Cl. & Fin. 42; Balch v. Smith, 12 N. H. 437; 90 Ga. 236.

26. Bedell v. Constable, Vaugh. 177.

27. Kevan v. Waller, 11 Leigh, 414; Dunham v. Hatcher, 31 Ala. 483.

28. Hawley, *Re*, 104 N. Y. 250.

Testamentary guardians, to use the statute expression, may be appointed "either in possession or remainder;" that is, successors in the guardianship may be designated. So they may be authorized to act during the full term of the infant's minority or for a less period. So the will may give authority to the surviving guardian to nominate a person in the place of his co-guardian who has died; although it appears to be a general rule that one testamentary guardian cannot appoint another, since his office is personal, and not assignable.[29] In other words, the testator is allowed a liberal discretion in his selection and in limiting authority. The paper which creates a person testamentary guardian becomes thus the test of his official powers and responsibility. Letters of guardianship from the chancery or probate court give his appointment no additional force, unless required by statute. In fact, such letters, however regarded in his dealings with strangers, are as a rule, and independently of positive statute expression, issued without jurisdiction.[30] In general, a firm cannot be made testamentary guardian of an infant; nor could formerly a corporation;[31] though financial corporations are sometimes chartered at this day with express power to assume fiduciary trusts.[32]

The testator's power of appointment extends to all his lawful

29. Goods of Parnell, L. R. 2 P. & D. 379; Macphers. Inf. 82; Vaugh. 177.

30. Robinson v. Zollinger, 9 Watts, 169; Morris v. Harris, 15 Cal. 226; Holmes v. Field, 12 Ill. 424; Copp v. Copp, 20 N. H. 284. See Macphers. Inf. 84, 86; Stone v. Dorrett, 18 Tex. 700. But statutes may provide that letters of guardianship shall issue to a testamentary guardian who must first qualify. Hence a non-resident alien is held incapable of serving. *Re* Taylor, 3 Redf. (N. Y.) 259. And see *post*, § 303. If the testator's will prescribes that the wife shall be testamentary guardian of the children, "as long as she shall remain his widow," her authority ceases on her remarriage, and a new appointment becomes necessary. Corrigan v. Kiernan, 1 Bradf. Sur. 208; Holmes v. Field, 12 Ill. 424.

In a New York case, it was held, on appeal from the surrogate, that no probate guardian could be appointed after the fathers' decease, where the father, being a man of indigent circumstances, had surrendered his children to a charitable institution by an instrument in writing, executed during his lifetime, and not long before his death, in presence of two witnesses, which purported to "commit and surrender" the children to the said institution pursuant to its charter. There were no testamentary expressions used, nor did the instrument appear to have been executed in contemplation of death. The decision of the court appears to rest on statutory interpretation. People v. Kearney, 31 Barb. 430.

31. See Macphers. Inf. 109; De Mazar v. Pybus, 4 Ves. 644.

32. Rice's Case, 42 Mich. 528; *Re* Cordova, 4 Redf. 66; Minnesota Co. v. Beebe, 40 Minn. 7.

children surviving at his decease, being still minors and unmarried. Posthumous children are, likewise, included. And the testator's appointment of his wife as testamentary guardian is not revoked by the birth of such issue, subsequent to the execution of the will or testamentary deed appointing her; the analogy of distribution of one's property failing to affect this case.[33] A testator cannot appoint a testamentary guardian except to his own children; but an attempt to appoint one for others may create a trust.[34]

§ 836. Parent's Choice.

The father's testament constitutes a guardian; but when the appointment is too informal to take effect under the statute, as constituting testamentary guardianship, a chancery or probate guardian must be appointed. In such case, the choice thus informally indicated carries great weight with the court.[35] And on general principle the death-bed wishes of the father are considered by the court; so those of the mother, in States where the mother's choice is favored at all.[36] Such wishes are not conclusive upon the court; and yet they may sometimes be sufficient to turn the scales.[37] but a parent's request will not give the court jurisdiction where it is otherwise lacking,[38] and gives the person suggested by the parent no legal right to be appointed.[39] The nomination of some suitable third person as guardian by the party having a prior right carries weight; but one who has thus procured another's appointment cannot claim letters for himself.[40]

33. Hollingsworth's Appeal, 51 Pa. St. 518; 2 Bro. C. C. 538; Macphers. Inf. 87.

34. Camp v. Pitman, 90 N. C. 615.

35. Hall v. Storer, 1 Yo. & C. 556; Marcellin, Matter of, 31 N. Y. Supr. 207.

36. Knott v. Cottee, 2 Ph. 192; Kaye's Case, L. R. 1 Ch. 387; Lady Teynham v. Lennard, 4 Bro. P. C. 302; s. c., cited in 2 Atk. 315; Bennett v. Byrne, 2 Barb. Ch. 216; Cozine v. Horne, 1 Bradf. 143; Watson v. Warnock, 31 Ga. 716. *In re* Turner, 4 C. E. Green, 433; Badenhoof v. Johnson, 11 Nev. 87. A father upon his wife's death placed his infant child in A.'s care, and afterwards died; and A.'s claim was held inferior to that of an aunt of the child. Cleghorn v. James, 68 Ga. 87. The mother's appointment by her will must not disturb a guardian appointed at her request while she was alive. Potts v. Terry (Tex. 1894), 47 Ore. 242.

37. As to appointing a firm of a corporation, see *Re* Cordova, 4 Redf. 66; 40 Minn. 7; 42 Mich. 528; *In re* Wagner, 135 N. Y. S. 678, 75 Misc. 419 (agreement of parents is not binding as to appointment of guardian).

38. Modern Woodmen of America v. Hester, 66 Kan. 129, 71 P. 279; Royal Neighbors of America v. Hester, 66 Kan. 764, 71 P. 1129.

39. Hutchins v. Brown, 77 N. H. 105, 88 A. 706.

40. Kahn v. Israelson, 62 Tex. 221.

§ 837. The Best Interest of the Ward as a Test.

In selecting the proper person as guardian, the judge is allowed to exercise a liberal discretion, and his decision will not be disturbed on appeal except for good and sufficient cause. Such is the rule both in England and America.[41]

The leading consideration for the court should be the interest and welfare of the child; and this, which becomes almost the only rule of choice between distant kindred, may control even the selection of the father himself. The courts are in these days paying more and more attention to the best interests of the ward in making appointments. While it is still true that a surviving parent should be appointed if fit, still the court is not bound to appoint a parent or relative where such appointment is not for the best interests of the ward.[42] The court should only appoint one physically and mentally fit,[43] and not one of improper life.[44]

41. Kaye's Case, L. R. 1 Ch. 387; Battle v. Vick, 4 Dev. 294; White v. Pomeroy, 7 Barb. 640; Nelson v. Green, 22 Ark. 367.

42. *In re* Bedford's Estate, 158 Cal. 145, 110 P. 302; *In re* Allen's Estate, 162 Cal. 625, 124 P. 237; *In re* Lew Choy Foon (Cal.), 159 P. 440; Harding v. Brown, 227 Mass. 77, 117 N. E. 638; Taff v. Hosmer, 14 Mich. 249; *In re* Stockman, 71 Mich. 180, 38 N. W. 876 (relatives preferred when competent); State *ex rel.* Mills v. Mast, 104 Mo. App. 348, 78 S. W. 833; State *ex rel.* Young v. Cook, 183 S. W. 365; Hutchins v. Brown, 77 N. H. 105, 88 A. 706 (uncle no legal right to be appointed merely because deceased father desired it); *In re* Lamb's Estate, 139 N. Y. S. 685; (Sur.) *In re* Cross' Guardianship, 155 N. Y. S. 1020, 92 Misc. Rep. 89 (dec. affd., Sup., *In re* Cross, 159 N. Y. S. 1108); *In re* Erickson's Estate, 175 N. Y. S. 95; *In re* White, 160 N. Y. 685, 55 N. E. 1101 (affg. 57 N. Y. S. 862, 40 App. Div. 165) (father need not be appointed); Bennett v. Byrne, 2 Barb. Ch. 216; Compton v. Compton, 2 Gill, 241; Succession of Fuqua, 27 La. Ann. 271; Badenhoof v. Johnson, 11 Nev. 87; Janes v. Cleghorn, 63 Ga. 335; 2 Dem. 43; Vandewater, *Re*, 115 N. Y. 669. Late English courts show an increasing regard for the child's welfare. Violet Nevins *Re*, (1891) 2 Ch. 299; § 886. See, however, Heinemeier v. Arlitt, 29 Tex. Civ. App. 140, 67 S. W. 1038.

A minor child, inheriting from his mother, or otherwise acquiring property independently of the father, may at this day require a guardian to collect and hold such property for him; and while ordinarily a father will be appointed guardian of his motherless child, such appointment will be refused in American practice where it is apparent that he is an unsuitable person and that the child's best interests require some one else appointed, whether on the father's nomination or adversely to him. Heinemann's Appeal, 96 Pa. St. 112; Griffin v. Sarsfield, 2 Dem. 4; 58 N. H. 15; Prime v. Foote, 63 N. H. 52. In Heinemann's Appeal, *supra*, a father neglected to provide proper medical treatment for his wife and three children, all of whom died; and a guardian of the surviving minor children was appointed against his wishes.

43. Weil v. Schwartz, 51 La. Ann. 1547, 26 So. 475.

44. LeBlanc's Succession, 37 La. Ann. 546; Succession of Hoyle, 109

Where two are equally qualified, the fact that the child has lived with one of the applicants and is attached to him may be considered.[45] The appointment of one who holds adverse religious opinions may be refused, though there is at this day far more toleration than formerly on this point, and perhaps more still in the United States than in Great Britain.[46] And the objection that a particular appointment will subject the ward's estate to extraordinary expense ought to be considered.[47] In general, it is the duty of the court to regard the general character of the person who applies for letters of guardianship; the influence he is likely to exert, and, if the estate be difficult to manage, his business qualifications and financial standing.

On the other hand, no fanciful reasons should be allowed to determine the selection of the court between distant relations. The circumstance that the infant inherited the principal part of his property through one line of the family is not to prejudice his next of kin in the other.[48] Although the prudent choice of a minor arrived at fourteen may be almost conclusive, as we have already seen, yet it would seem that while under that age his preferences are entitled to no consideration. The separation of young children from one another is to be avoided, unless in other respects quite desirable.[49]

§ 838. Administrator; One Having Adverse Interest.

One interested adversely to the minor's estate should not be appointed,[50] and there is much force in the position taken by many courts that they will not appoint as guardian of an infant the

La. 623, 33 So. 625; Albert v. Perry, 1 McCart. (N. J.) 540; *In re* Jacquet, 82 N. Y. S. 986, 40 Misc. 575 (father convicted of intoxication and larceny); Russner v. McMillan, 37 Wash. 416, 79 P. 988 (drinking man); McChesney v. De Bower, 106 Wis. 315, 82 N. W. 149 (father who had treated family cruelly and had committed adultery, etc.).

45. Albert v. Perry, 1 McCart. (N. J.) 540; Foster v. Mott, 3 Bradf. (N. Y.) 409; Willett v. Warren, 34 Wash. 647, 76 P. 273.

46. Underhill v. Dennis, 9 Paige, 202; Macphers. Inf. 113; *Ex parte* Whitfield, 2 Atk. 315; Voullaire v. Voullaire, 45 Mo. 602. See Jones v. Bowman, 13 Wyo. 79, 77 P. 439, 67 L. R. A. 860 (religious differences not considered).

47. Bennett v. Bryne, 2 Barb. Ch. (N. Y.) 216.

48. Underhill v. Dennis, 9 Paige, 202; Albert v. Perry, 1 McCart. 540. See 58 N. H. 15, as to disregarding the expectation of one who had left the child a legacy.

49. Marcellin, Matter of, 4 Redf. (N. Y.) 299.

50. Davis v. Hammack (Tex. Civ. App. 1908), 107 S. W. 112.

administrator of the parent's estate as administrators settle with the guardians.[51]

§ 839. Married Women.

As concerns the right of a married woman to be appointed guardian, there is doubt and uncertainty. The *dicta* are apt to go one way and the decisions another; doubtless out of judicial deference to the sex. Some hold that married women are at common law capable of becoming guardians; but they draw their conclusions rather from the analogies of administration than from positive authority in their favor. When it is considered that chancery and probate guardians are a modern creation, the ancient cases, from such species of guardianship as are now extinct, are hardly worth looking after. It is true there are several cases which sustain the acts of married women while acting as guardians, or rather *quasi* guardians; at the same time clear precedents for their actual appointment are wanting.[52] It has been held in the English chancery court, that, while a married woman may be co-guardian with a man, her sole appointment is improper.[53] In spite of the liberal tendency of the age, we conclude that while such guardianship would not be deemed absolutely void, and is in fact sometimes sanctioned without investigation, public policy is decidedly against the appointment. Not the least important objection is the inability of married women to furnish proper recognizance and to manage trust property, without constantly encountering legal

51. Scobey v. Gano, 35 Ohio St. 550; Kramer v. Mugell, 153 Pa. St. 493. But cf. 17 R. I. 480, where the ward was sole residuary legatee; Crutchfield's Case, 3 Yerg. 336; Isaacs v. Taylor, 3 Dana, 600; Massingale v. Tate, 4 Hayw. 30; Parker v. Lincoln, 12 Mass. 17; Sudler v. Sudler, 121 Md. 46, 88 Atl. 26, 49 L. R. A. (N. S.) 860. See Sparkman v. Stout (Tex. Civ. App.), 212 S. W. 526.

52. Wallis v. Campbell, 13 Ves. 517. This was the case of an illegitimate child. As cited in Macphers. Inf. 111, it might be considered authority for the appointment of married women as guardians.

53. *In re* Kaye, L. R. 1 Ch. 387. See Macphers. Inf. 111; Anon., 8 Sim. 346; Gornall's Case, 1 Beav. 347. See further, Jarrett v. State, 5 Gill & Johns. 27; Palmer v. Oakley, 2 Doug. 433; Farrer v. Clark, 29 Miss. 195; Kettletas v. Gardner, 1 Paige, 488; *Ex parte* Maxwell, 19 Ind. 88. Recent statutes in States now empower a married woman to serve as guardian, besides so increasing her powers and liabilities as to obviate objections stated in the text. See Beard v. Dean, 64 Ga. 248; Goss v. Stone, 63 Mich. 319. A woman may be appointed guardian of the person and estate of her child, although she has married again and lives with her new husband. Hermance, *Re*, 2 Dem. 1, overruling Holley v. Chamberlain, 1 Redf. 333.

obstacles, all the more troublesome from the present uncertainty of the law of husband and wife.[54] Hence the English rule has been, on the marriage of a female guardian, to choose another in her stead, on the ground that she is no longer *sui juris,* and has become liable to the control of her husband; while she is said to be still at liberty to go before the master to propose herself as her own successor.

In this country it has been held that a married woman may not be guardian of a minor,[55] but the Married Woman's Acts have authorized the appointment of a married woman as guardian either of her own or of another's child.[56]

§ 840. Non-residents.

Persons residing out of the jurisdiction will not usually be appointed guardians, although one who was out of the State might yet control from a distance; for, it is said, there must be some one answerable to the court.[57] But if the sureties on the guardian's bond reside within the jurisdiction and are pecuniarily responsible, is not someone answerable to the court? And might not one have an attorney within the jurisdiction answerable for process, under statute? The cases, however, are rare where such an appointment would be advantageous to the ward for business reasons; and hence others are usually chosen, both in chancery and probate. In some of the United States, the appointment of non-residents is prohibited by statute; and even without such prohibition the court is justified in withholding letters of guardianship at discretion, where the petitioner is beyond the reach of State process.[58] But the person selected need not reside within the jurisdiction of the county court making the appointment. Where infants are domiciled abroad, someone at home will be appointed, if a guardian is required, even though the father wishes it otherwise.[59] Exceptions to this rule have been made in strong cases, and a non-resident guardian appointed.[60] So it has been held that

54. Logan v. Fairlee, Jacob, 193.

55. Campbell v. Scott, 3 Ind. T. 462, 58 S. W. 719; Carolina v. Montgomery (Okla.), 177 P. 612 (appointment voidable and not void).

56. Byrom v. Gunn, 102 Ga. 565, 31 S. E. 560; *In re* O'Connell, 102 Ia. 355, 71 N. W. 211; Wright v. Wright (Tex. Civ. App.), 155 S. W. 1015.

57. Logan v. Fairlee, Jacob, 193.

58. Finney v. State, 9 Mo. 227. There is no such prohibition in Maine. Berry v. Johnson, 53 Me. 401.

59. Stephens v. James, 1 M. & K. 627; Lethem v. Hall, 7 Sim. 141.

60. Daniel v. Newton, 8 Beav. 485; *In re* Thomas, 21 E. L. & Eq. 524. A non-resident alien may be precluded. *Re* Taylor, 3 Redf. (N. Y.) 259.

the fact that an applicant is a non-resident is no bar where otherwise qualified,[61] and the fact that one applying for guardianship is a resident of another State to which he proposes to remove the ward is no ground for refusing to appoint him and for preferring a resident.[62]

§ 841. Corporations.

It is the general rule that corporations will not be appointed as guardians of the person of wards,[63] except by statute permitting homes or other charitable corporations to act as guardians,[64] and corporations are now often permitted to act as guardians of the estate, but not of the person.[65]

§ 842. Prior Petition Preferred.

Where the courts of two or more counties have concurrent jurisdiction, as if a non-resident has property lying in different places, the general principle is that the court where proceedings are first commenced retains jurisdiction.[66]

Where two persons whose petitions are equal seek guardianship the first may be preferred.[67]

§ 843. Guardians by Nature.

Guardians by nature and nurture act under authority of the law, which designates, first, the father; and, after his death, the mother. These are the only natural guardians possible.[68] It has been said that the infant's next of kin succeed to the natural guardianship when both parents are dead.[69] This cannot be correct according to the sense of the term as used at this day. The mother is considered the natural guardian of a bastard, in this country,

61. *In re* Dobb, 9 La. Ann. 354; *In re* Welsh's Estate, 63 N. Y. S. 737, 50 App. Div. 189. See *In re* Zeller's Estate, 54 N. Y. S. 926, 25 Misc. 137, 2 Gibbons, 577 (non-resident alien barred).

62. Succession of Oliver, 113 La. 877, 37 So. 862.

63. *In re* Rice, 42 Mich. 528, 4 N. W. 284.

64. Jain v. Priest (Ida.), 164 P. 364.

65. Murphree v. Hanson, 197 Ala. 246, 72 So. 437 (by statute banking companies may act as guardian of the estate but not of the person. —— v. ——, 40 Minn. 7; *In re* Buckler, 89 N. Y. S. 206, 96 App. Div. 397 (may appoint one as guardian of person and corporation as guardian of estate); *In re* Wyckoff, 124 N. Y. S. 625, 67 Misc. 1 (trust company). See *In re* Rice, 42 Mich. 528, 4 N. E. 284.

66. Danneker, Re, 67 Cal. 643.

67. Brugier v. Biron, 13 La. 77.

68. Co. Litt. 88 *b;* 1 Bl. Com. 461; 2 Kent, Com. 220; Macphers. Inf. 52; Jarrett v. State, 5 Gill & Johns. 27; Eldridge v. Lippincott, Coxe, 397; Fields v. Law, 2 Root, 320.

69. See Reeve, Dom. Rel. 315.

as against its putative father;[70] though the common law regarded such children as without a natural guardian.[71] On principle, it would seem that the natural guardianship of a child is shifted to the mother when custody is awarded her because of her husband's personal unfitness. And the modern tendency is to regard both husband and wife as guardians, by nature, of their own children;[72] at the same time that this gives no right to control a child's property without a legal appointment such as we shall presently notice.

Socage guardians also derived their authority from the law, and not from a special appointment.[73]

§ 844. Guardianship by Appointment of Infant; Right to Nominate.

Guardianship by sole appointment of the infant cannot now be said to exist. But at the common law there was one instance where it arose; namely, when the heir above the age of fourteen chose to supersede his guardian in socage by one of his own choice, under a deed of appointment.[74] Infants have still the privilege of nominating, though not appointing, a guardian in court, after arriving at this age; and if judicially sanctioned, their choice is good. In the appointment of chancery guardians, the custom is for the court to approve such nomination without the usual reference to a master.[75] But this is not an invariable rule.[76] Testamentary guardians cannot be superseded in this way, nor chancery guardians.[77] Statutes giving the right of selecting their own probate guardians to infants above fourteen have been enacted throughout the United States,[78] even though the wards are non-

70. Wright v. Wright, 2 Mass. 109; Hudson v. Hills, 8 N. H. 417; People v. Kling, 6 Barb. 366; Dalton v. State, 6 Blackf. 357.

71. Macphers. Inf. 67.

72. People v. Boice, 39 Barb. 307.

73. 2 Kent, Com. 223.

74. Co. Litt. 89 *a*.

75. *Ex parte* Edwards, 3 Atk. 519; Macphers. Inf. 78, 109.

76. *Ex parte* Watkins, 2 Ves. 470; Curtis v. Rippon, 4 Madd. 462; Coham v. Coham, 13 Sim. 639.

77. Palmer, 22; Andrew, 313; Matter of Dyer, 5 Paige, Ch. 534; Matter of Nicoll, 1 Johns. Ch. 25; Matter of Reynolds, 18 N. Y. Supr. 41. Nor the mother as natural guardian. Beard v. Dean, 64 Ga. 258. As to a non-resident father whose infant son of fourteen prefers another person, see 4 Dem. 36.

78. *In re* McSwain's Estate (Cal.), 168 P. 117; *In re* Wyckoff, 124 N. Y. S. 625, 67 Misc. 1 (infant cannot prevent appointment by nominating one not acceptable to court, and in case of controversy a trust company may be appointed); Burns v. Parker (Tex. Civ. App.), 155 S. W. 673. See Ham v. Ham, 15 Gratt. 74; Dibble v. Dibble, 8 Ind. 307; Pitts v. Cherr, 14 Ga. 594; Arthur's Appeal, 1 Grant, 55; Sessions v. Kell, 30 Miss. 458; Montgomery v. Smith, 3 Dana, 599; Palmer v. Oakley, 2 Doug. 433, 62 N.

residents.[79] Yet the ward cannot set aside a testamentary or chancery guardian in this country; nor, on principle, should he be allowed to supersede a probate guardian properly appointed, unless authorized to do so by a positive statute.[80] Having once exercised his right of choice, he is bound by the appointment, and cannot nominate again, as his fancy pleases.[81] In any event the court must sanction the infant's selection, and issue letters before the guardian can act; so that this is guardianship by appointment rather of the court than of the infant, but not of course by judicial appointment at arbitrary discretion.

§ 845. English Practice.

The usual practice in chancery is for the court, as soon as the petition is presented, to make an order for a reference to a master to approve of a proper person for the guardianship. For this purpose, the master is attended by all proper parties; and, after a full hearing, he makes his report, in which he mentions the infant's age and fortune, the evidence and legal grounds on which his approval of the guardian is based, and the maintenance proper for the child. The Vice-Chancellor confirms or varies the report at his discretion, and then makes the appointment. From his decision appeal lies to the full court.[82]

The guardian thus appointed, if guardian of the person and estate, is required to enter into a recognizance, with sufficient sureties, to account regularly or whenever called upon by the court. But, according to the modern English practice, guardians of the person and not of the estate are exempted from this requirement.[83] In some cases, guardians are appointed by the court without reference to a master. Thus, where the father applies, or the infant

H. 440. The minor's choice under statute cannot be disapproved at the arbitrary discretion of the judge; but if one choice be injudicious, the minor may choose another, and upon the choice of an unobjectionable person the minor has a right to have him appointed. Adams's Appeal, 38 Conn. 304.

79. McVaw v. Shelby, 25 Ky. Law Rep. 309, 75 S. W. 227; State *ex rel.* Pinger v. Reynolds, 121 Mo. App. 699, 97 S. W. 650 (although attending school in another State); Whittelsey v. Conniff, 182 S. W. 161.

80. Dyer's Case, 5 Paige, Ch. 534.

81. Lee's Appeal, 27 Pa. St. 229. See also E. B. v. E. C. B., 28 Barb. 299. But see Adams's Appeal, 36 Conn. 304, showing that local statutes vary on this point. The court has sometimes regarded the wishes of a child under fourteen where the scales are balanced; but only at its ample discretion. 91 Ga. 90.

82. Macphers. Inf. 106, 107, and cases cited; 2 Kent, Com. 227.

83. Macphers. Inf. 107, 108; 2 Kent, Com. 227.

above fourteen makes a selection, the court acts without reference, out of regard for their special privilege.[84] And where the property of the infant is very small, the same favor has been granted, in order to save legal expense to the estate.[85] The child should usually be present at the hearing; but, in a recent Irish case, the court dispensed with the requirement, on evidence that the child was less than a month old and of delicate health.[86]

§ 846. American Practice; Notice; Trial by Jury.

Our American practice in the appointment of probate guardians is usually more simple. Petition is presented by the person desiring the appointment, whereupon a citation is issued, for all parties interested to appear on a certain court day. The judge, upon the day specified, after a summary hearing, appoints the guardian, and issues letters of guardianship upon filing bond with proper security. Appeal may be taken within a limited time by any person aggrieved, and the tribunal of last resort then hears the parties, determines the choice, and makes a final decree,— to which the lower court conforms and issues letters of guardianship accordingly. The infant, if under fourteen, is rarely produced in court, nor does the judge make an order of reference.[87] Assent or attendance in such proceedings dispenses with a formal notice so far as those interested are concerned.[88]

84. Macphers. Inf. 78, 109.

85. *Ex parte* Bond, 11 Jur. 114.

86. Stutely v. Harrison, 1 Ired. Eq. 256; 13 Jur. 800. And see Benison v. Worsley, 15 E. L. & Eq. 317.

87. For practice in particular States, see local statutes; also Smith's (Mass.), Prob. Practice; Comst. Dig.; Reese (Ga.), Manual; Watson v. Warnock, 31 Ga. 716. Next of kin may appeal. Taff v. Hosmer, 14 Mich. 249. And see *Re* Feeley, 4 Redf. 306. The Georgia code requires appointment made in open and regular court. 72 Ga. 125.

As to the requisites in appointing guardian for an insane person, see Angell v. Probate Court, 11 R. I. 187. Where the intended ward is of full age, notice to him is the only notice needful, unless the statute prescribes otherwise. Hamilton v. Probate Court, 9 R. I. 204. But statutes differ on this point. Morton v. Sims, 64 Ga. 298.

A minor entitled to his own choice, or fourteen years old, may appeal if that choice is not respected by the court. Adams's Appeal, 38 Conn. 304; *supra*, § 301; Witham, *Re*, 85, Me, 360; 128 Mass. 592. Where appointment is made on the ground of estate, the ward being non-resident, statute requirements as to notice must be strictly pursued, or all subsequent proceedings may be rendered void. Seaverns v. Gerke, 3 Sawyer, 353. Liberal discretion of lower court in a selection or deciding to appoint, favored in 115 N. Y. 669.

88. 83 Cal. 344. A master is not entitled to notice of proceedings for the guardianship of his apprentice. 62 N. H. 252.

No notice need be given to the minor, in the absence of a statute requiring it, of an application for the appointment of a guardian of the minor,[89] and a sale of the minor's property by such guardian is not a deprivation of his property without due process of law.[90] Such proceedings are not regarded as adversary in character, but are intended for the benefit of the minor and simply to change the investment for the benefit of the minor. But if the judge appoint without giving reasonable notice, so that parties interested have not a fair opportunity to be heard upon the petition, his appointment may, according to the better practice, be set aside on appeal at the instance of an aggrived party,[91] and the father should be notified.[92]

A trial by jury need not be provided in proceedings for the restraint and guardianship of a delinquent boy. This is not a proceeding according to the common law, in which a trial by jury is guaranteed, but the proceeding is statutory. Such children are properly treated as wards of the State, and this duty is properly regarded as one of the most important of governmental functions.[93]

§ 847. Effect of Appointment; Conclusiveness of Decree, etc.

The appointment of a chancery guardian is of itself an act exercised by the court of highest authority in such matters. The appointment cannot be impeached elsewhere, nor set aside by a common-law tribunal. The court which creates the guardian superintends his acts and removes him if necessary. Such is the nature of chancery jurisdiction wherever it exists. But the effect

89. Children's Guardians v. Shutter, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740; Wallace v. Tiney, 145 Ia. 478, 122 N. W. 936, 139 Am. St. R. 448; Mahan v. Steele, 109 Ky. 31, 58 S. W. 446; Peacock v. Peacock, 61 Me. 211; Packard v. Ulrich, 106 Md. 246, 67 A. 246, 12 L. R. A. (N. S.) 895; Gibson's Appeal, 154 Mass. 378, 28 N. E. 296; Kurtz v. West Duluth Land Co., 52 Minn. 140, 53 N. W. 1132; Amy v. Bazille, 81 Minn. 370, 84 N. W. 120; Whitelsey v. Conniff, 266 Mo. 567, 182 S. W. 161, 1 A. L. R. 913; Hanley v. Russell, 63 N. H. 614; Credle v. Baugham, 152 N. C. 18, 67 S. E. 46, 136 Am. St. R. 787; State v. Madden, 12 Ohio S. & C. P. Dec. 83; Shroyer v. Richmond, 16 Ohio St. 455; Farrar v. Olmstead, 24 Vt. 123.

90. Whittelsey v. Conniff, 266 Mo. 567, 182 S. W. 161, 1 A. L. R. 913.

91. Underhill v. Dennis, 9 Paige, 202; Bowles v. Dixon, 32 Ark. 92. A maternal grandparent ought not to be appointed without notice to the paternal grandparent, if there be one. *Re* Feeley, 4 Redf. 306. See 37 N. J. Eq. 245, 251; 58 N. H. 15.

92. Bowles v. Dixon, 32 Ark. 92; Tong v. Marvin, 26 Mich. 35.

93. Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892, 45 L. R. A. (N. S.) 908.

of appointments made by probate authority is not the same. In general, the same principles apply as in grants of administration; probate jurisdiction being much the same, whether over the estates of deceased persons or of infants. For fraud or excess of jurisdiction, letters of probate guardianship may be attacked collaterally; not otherwise. But a person sued in the common-law courts cannot defend on the ground that the guardian is unsuitable for his trust; the letters of guardianship sufficiently disprove it; they are the guardian's credentials of authority everywhere, and, if improperly issued, should be revoked by the court which issued them.[94] The later and safer tendency, here, as in grants of administration, is to sustain the court's decree against indirect and collateral attacks.[95] An oral appointment as guardian is not to be shown to antedate that shown by judicial records; but the records themselves, with recorded judicial action in confirmation of the recorded appointment, should be respected elsewhere.[96]

The decree of the court appointing a guardian is *prima facie* evidence of the ward's disability;[97] and is even held conclusive in some cases. It would be unreasonable to compel the guardian of an insane person or spendthrift to furnish proof of his ward's condition in every collateral suit on his behalf, and to encounter

94. Speight v. Knight, 11 Ala. 461; Kimball v. Fisk, 39 N. H. 110; Mathews v. Wade, 2 W. Va. 464; Warner v. Wilson, 4 Cal. 310. As to the effect of defective notice in probte appointments, see Davidson v. Johonnot, 7 Met. 388; Breed v. Pratt, 18 Pick. 115; Brigham v. Boston, etc. R. R. Co., 102 Mass. 14; Cleveland v. Hopkins, 2 Aik. 394; Redman v. Chance, 32 Md. 42; Chase v. Hathaway, 14 Mass. 222; People v. Wilcox, 22 Barb. 178; Palmer v. Oakley, 2 Doug. 433; Sears v. Terry, 26 Conn. 273; Gronfier v. Puymirol, 19 Cal. 629. As to other informalities, see State v. Hyde, 29 Conn. 564; Lee v. Ice, 22 Ind. 384. The letter of guardianship need not recite the mode and particulars of nomination, but is in the nature of a certificate or commission. King v. Bell, 36 Ohio St. 460; Burrows v. Bailey, 34 Mich. 64. A guardian appointed by the probate court of a State in rebellion, must be reappointed when the rightful government is re-established. Troy v. Ellerbe, 48 Ala. 621.

Where there was jurisdiction for appointment both on grounds of lunacy and infancy, presumption is favored after lapse of time that the court made the appointment cover both grounds, or performed its full duty. King v. Bell, 36 Ohio St. 460. Here a new bond was taken after the ward arrived at full age. Under the Georgia code an appointment made in chambers by the judge is void. 72 Ga. 125. Cf. 65 Ia. 629.

95. See Schouler, Executors, § 160; 153 Pa. St. 493.

96. 53 Ark. 37; Holden v. Curry, 85 Wis. 504.

97. White v. Palmer, 4 Mass. 147.

new investigations of facts already established, concerning which men's minds greatly differ. But the *prima facie* evidence of infancy is generally simple and easily obtained. The authority of his guardian turns upon a simple question of fact,— the date of birth. And while we apprehend that the recitals contained in letters of guardianship afford *prima facie* proof on this point, in all contests involving the guardian's authority, the presumption thus raised must be very slight, since it is common to issue letters of probate guardianship upon the mere allegation of infancy in the petition and without special proof.[98]

One who has been appointed guardian, and acted as such, cannot deny the jurisdiction of the court which appointed him in a collateral suit.[99] If he ascertains that his appointment was without jurisdiction, he should surrender his letters at once and cease to act. But, as we shall presently see, a liability may exist from the fact that one irregularly or wrongly appointed undertakes the office of guardian.[1] The court's appointment of a guardian does not relate back like that of an executor or administrator.[2]

§ 848. Civil-law Rule of Appointing Guardians.

The principles of the civil law, as later adopted in Holland, France, and Spain, with reference to the jurisdiction and method of appointing guardians, differ not greatly from ours. The jurisdiction competent to make the selection was that of the domicile of the minor, or in which his property was situated. Under the French Code, a family council is called together at the instance of the parties interested, and nominates a suitable person or persons to take the trust, where the children are orphans and not otherwise provided for; and these persons, when they are approved by the judge, take an oath well and faithfully to discharge their

98. Leonard v. Leonard, 14 Pick. 280. See Chamberlayne, Evidence, §§ 1199, 1200.

99. Thurston v. Holbrook's Estate, 31 Vt. 354; Hines v. Mullins, 25 Ga. 696; Fox v. Minor, 32 Cal. 111; State v. Lewis, 73 N. C. 138.

1. A general appointment will be construed as an appointment with reference to certain property only, when otherwise it would not be valid. Davis v. Hudson, 29 Minn. 27.

2. Prior acts of the guardian respecting the ward's property are not validated by his new credentials. Holden v. Curry, 85 Wis. 504; Huntsman v. Fish, 36 Minn. 148. *Qu.* as to a testamentary guardian. Nor do the *quasi* guardian's mistaken acts or representations estop the infant or his guardian duly appointed. Sherman v. Wright, 49 N. Y. 228; 78 Tex. 378.

trust and complete the necessary qualifications. In Louisiana, the selection is made by the family council in a similar manner.[3]

3. 3 Burge, Col. & For. Laws, 938-943; 2 Kent, Com. 231; *In re* Stanbrough, 51 La. Ann. 1324, 26 So. 276; Succession of Fried, 106 La. 276, 30 So. 839; Succession of Carbajal 111 La. 944, 36 So. 41; *In re* Supple Minors for Family Meeting, 123 La. 939, 49 So. 648; Blandin v. Blandin, 53 So. 15, 126 La. 819.

CHAPTER III.

TERMINATION OF THE GUARDIAN'S AUTHORITY.

§ 849. How the Guardian's Authority is Terminated.

Guardianship lasts until the end of the period for which it was instituted. But it may be sooner terminated by the death or marriage of the ward, or by the death, resignation, removal, or supersedure of the guardian himself; or, if the guardian be a female, by her marriage. These topics will be considered in order.

§ 850. Natural Limitation; Ward of Age, etc.

As the relation of guardian and ward usually exists for merely temporary purposes, it is plain that, when those purposes are fulfilled, the trust must terminate. The object of guardianship, in the case of infants, is fulfilled when the infant becomes of age, for he is then free and competent, under the law, to transact his own business and control his own person. No guardian, therefore, of an infant, whether a socage, natural, testamentary, chancery, or probate guardian, can act in such capacity after the ward is twenty-one years old or has reached majority; but should present his account and settle with the late ward.[4] Termination thus of

4. *In re* Kincaid's Estate, 120 Cal. 203, 52 P. 492; Curtis v. Devoe, 121 Cal. 468, 53 P. 936; Coon v. Cook, 6 Ind. 268 (although ward is insane); Jones v. Jones, 91 Ind. 378; Probate Judge v. Stevenson, 55 Mich. 320, 21 N. W. 343; State *ex rel.* Scott v. Greer, 101 Mo. App. 669, 74 S. W. 881; Lynch v. Munson (Tex. Civ. App. 1901), 61 S. W. 140 (though no record of termination of guardianship); Buckley v. Herder (Tex. Civ. App. 1911), 133 S. W. 703 (testamentary guardians); American Surety Co. of New York v. Hardwick (Tex. Civ. App.), 186 S. W. 804; Armstrong's Heirs v. Walkup (Va.), 12 Grat. 608; Lyons v. McElroy (Wash.), 177 P.

the guardianship is equivalent to the discharge of the guardian, as various codes are construed;[5] subject, however, to the appointing court's jurisdiction over the guardian to compel final account and settlement of his trust.[6]

But the natural limitation of the guardian's authority may be even sooner, if derived from testamentary appointment. For the testator may designate a shorter period or some particular event which shall determine the relation. Thus, if he appoints his wife to be guardian until her marriage, her trust terminates on marrying again.[7] And if no successor was indicated in the will, a chancery or probate appointment must supply the vacancy.[8]

The legal authority of guardians in socage also terminated, strictly speaking, when the infant became fourteen.[9] So did that of guardians for nurture, as distinguished from those by nature.[10] This was because the ward was recognized as partially qualified to act for himself, having passed through the period of nurture. He was then allowed to elect a guardian.[11] Still the guardianship continued effectual during minority in both cases, unless a new choice was made by the ward.[12] But no guardians in socage, for nurture, testamentary, or by judicial appointment, were ever rendered devoid of power by the mere fact that the infant had passed the period of nurture. An anomalous exception is found in Ohio, where it has been held that probate guardianship wholly ceases when the ward reaches twelve if a female, or fourteen if a male, and that a new appointment must then be made.[13] This rule is, however, one of statutory construction; and while the ward, on arriving at fourteen, may have the statute right to choose a new probate guardian, the general rule is that such guardian should be first designated, judicially approved and qualified before the

312 (court cannot order compromise of ward's claim after he becomes of age); 1 Bl. Com. 461, 462, Harg. *n.*; 2 Kent, Com. 221-227. Statutes relative to guardianship are sometimes explicit on this point. Bourne v. Maybin, 3 Woods, C. C. 724; Stroup v. State, 70 Ind. 495.

5. Tate v. Stevenson, 55 Mich. 320.

6. People v. Seelye, 146 Ill. 189.

7. Selby v. Selby, 2 Eq. Ca. Ab. 488; Holmes v. Field, 12 Ill. 424; Corrigan v. Kiernan, 1 Bradf. 208.

8. Macphers. Inf. 104, and cases cited.

9. 1 Bl. Com. 461, Harg. *n.*; 2 Kent, Com. 222.

10. *Ib.*

11. 1 Bl. Com. 462, Harg. *n.*

12. Rex v. Pierson, Andr. 313; Mendes v. Mendes, 3 Atk. 624. And see Macphers. Inf. 41, 65; Byrne v. Van Hoesen, 5 Johns. 66.

13. Perry v. Brainard, 11 Ohio, 442; Maxson v. Sawyer, 12 Ohio, 195. See Dibble v. Dibble, 8 Ind. 307; Matter of Dyer, 5 Paige, 534.

former guardian can be considered as discharged from his trust.[14]

No more precise limit can be assigned to the authority of guardians over insane persons and spendthrifts, than that of the ward's necessities. When he becomes sufficiently restored to reason, or is otherwise fit to control his own person and estate, this guardianship ceases; for the purposes of the trust are felt no longer. But a period so difficult to fix should be judicially determined; for which cause a formal discharge from guardianship is to be sought and obtained, and meantime the guardian's authority will continue.[15]

§ 851. Death of the Ward.

Death of the ward necessarily terminates guardianship. And after the ward's death the guardian's only duty is to settle up his accounts and pay the balance in his hands to the ward's personal representatives, whereupon his trust is completely fulfilled.[16] Where administration is granted upon the estate of a deceased ward, the assets vest at once in the administrator, whose title dates back by relation to the ward's decease.[17]

§ 852. Marriage of the Ward.

The lawful marriage of any ward, whether male or female, must necessarily affect the rights of the guardian. So far as the ward's person is concerned, there can be no question that the guardianship ends. Marriage is paramount to all other relations, and its proper continuance being inconsistent with guardianship of the person, the latter yields to it, whichever may be the sex of the ward. But as to the estate, the rule, in view of late married women's statutes, is not so clear. If, however, a male ward marries a female,

14. Bryce v. Wynn, 50 Ga. 332.

15. Dyce Sombre's Case, 1 Phil. Ch. 437; Hovey v. Harmon, 49 Me. 269; Wendell's Case, 1 Johns. Ch. 600; Kimball v. Fisk, 39 N. H. 110; Chase v. Hathaway, 14 Mass. 222; Hooper v. Hooper, 26 Mich. 435; 55 Mich. 320. The issue here is whether the ward has sufficiency of reason to manage his own estate. Cochran v. Amsden, 104 Ind. 282.

16. State Fair Ass'n v. Terry, 74 Ark. 149, 85 S. W. 87; *In re* Livermore's Estate, 132 Cal. 99, 64 P. 113, begun. Richmond v. Adams Bank, 84 Am. St. R. 37; Whittemore v. Coleman, 239 Ill. 450, 88 N. E. 228; Martin v. Caldwell, 49 Ind. App. 1, 96 N. E. 660; Hersey v. Purington, 96 Me. 166, 51 A. 865. In some States the guardian is charged with administering his deceased ward's estate. Beavers v. Brewster, 62 Ga. 574.

17. Sommers v. Boyd, 48 Ohio St. 648. A guardian cannot sue on behalf of his ward after the latter's death. Barrett v. Provincher (1894, Neb.). Nor continue a suit already 152 Mass. 359. And see Mechanics v. Bank v. Waite, 150 Mass. 234.

whether she be minor or adult, his guardian retains power over his estate, as before, until he becomes of age.[18]

Hence arises a difficulty where a male and female ward marry, both being minors and having estates in the hands of their respective guardians. Does the husband, though under age, take all the rights of an adult husband? Or does the wife's estate remain in keeping of her guardian until the husband is old enough to control it in person? The better opinion is that it goes to the husband, whatever his age. The inevitable consequence is that the husband's guardian must take it from the wife's guardian, and hold both estates during minority. This seems an awkward arrangement, but it is nevertheless the lawful one. More troublesome would be a case under the recent statutes in this country relative to married women, concerning which we do not find an important decision. But it seems the technical rule applies, as before, to the detriment of the female ward's interests. It might be well to declare by statute that the wife's guardian shall continue to manage her estate during her minority.[19]

The marriage of the female ward, it is said, does not, *ipso facto,* determine the authority of her guardian over her estate. Hence an order of court, transferring the custody of the property to the husband, is first necessary; to which order the husband will be entitled upon motion. Such is the rule declared in New York.[20] But while in England the court of chancery never appoints a guardian for a female infant after marriage, neither does it discharge an order for a guardian because of marriage; because, as Mr. Macpherson thinks, the marriage of a female, if valid, supersedes guardianship, of its own force.[21] Probate wards in this country are frequently married, and their guardians settle their accounts without order of court or revocation of letters, on the supposition that the marriage *ipso facto* puts an end to their authority. In some cases of alleged trespass on a female infant's lands, it has

18. Reeve, Dom. Rel. 328; 2 Kent, Com. 226; Bac. Abr. Guardian (E.); Eyre v. Countess of Shaftesbury, 2 P. Wms. 103; Mendes v. Mendes, 3 Atk. 619; *Ib.,* 1 Ves. 89; Jones v. Ward, 10 Yerg. 160. The guardian of an infant husband is clothed with the husband's power of reducing to possession. Ware v. Ware, 28 Gratt. 670.

19. See Reeve, Dom. Rel. 328; 2 Kent, Com. 226; Anon. 8 Sim. 346.

20. Whitaker's Case, 4 Johns. Ch. 376. But see *contra,* Jones v. Ward, 10 Yerg. 160; Nicholson v. Wilborn, 13 Ga. 467; Anon. 8 Sim. 346; Armstrong v. Walkoup, 12 Gratt. 608.

21. Macphers. Inf. 113, citing Roach v. Garvan, 1 Ves. 160; 8 Sim. 336.

been ruled that the adult husband succeeds to the place of her guardian, all other guardianship ceasing at her marriage.[22] And it is held that a female infant's guardian is not responsible to her for money which was hers, and which he has paid over to her adult husband, in good faith, without any notice or presumption of her non-concurrence.[23] The local statute is sometimes explicit enough to relieve one of doubt on the main question.[24]

The recent cases hold that the guardianship of an infant female terminates on her marriage[25] to a man of full age,[26] and the husband succeeds to his place as guardian.[27]

§ 853. Death of Guardian.

On death of a guardian the relationship ceases,[28] and the ward's relation to the estate of his former guardian becomes that of creditor.[29] But the ward does not thereby necessarily become free, for a successor in the trust continues to control him. The executor or administrator of the guardian, as such, has no authority; for guardianship is a personal trust and not transmissible. But he should close the accounts of the deceased guardian in court, and pass the balance over to the successor. This successor is the person next indicated in the will appointing testamentary guardians, or the survivor of joint guardians, or some one appointed in chancery or probate to fill the vacancy, as the case may be.[30]

22. Poreh v. Fries, 3 C. E. Green (N. J.) 204; Bartlett v. Cowles, 15 Gray (Mass.), 445.

23. Beazley v. Harris, 1 Bush, 533. See, as to the wife's remedies, Story v. Walker, 64 Ga. 614.

24. Some local codes declare that when the female ward marries an adult the guardianship shall cease. Bourne v. Maybin, 3 Woods, C. C. 724; Kidwell v. State, 45 Ind. 27; State v. Joest, 46 Ind. 235. In Alabama the married ward may call her guardian to account. Wise v. Norton, 48 Ala. 214. See, as to adult husband's settlement, 60 Ind. 41. And see as to intermarriage of guardian and his ward, 1 Ind. App. 441.

25. Mouser v. Nunn, 142 Ky. 656, 134 S. W. 1148; *contra*, Mayo v. Bank of Gleason (Tenn.), 205 S. W. 125.

26. State v. Joest, 46 Ind. 233, 235; Decker v. Fessler, 146 Ind. 16, 44 N. E. 657 (may appoint guardian for female minor married to a minor); State v. Parrish, 1 Ind. App. 441, 27 N. E. 652.

27. Bartlett v. Cowles, 81 Mass. 445; Fowler v. McLaughlin, 131 N. C. 209, 42 S. E. 589.

28. Roe v. Caldwell, 138 La. 652, 70 So. 548.

29. American Bonding Co. of Baltimore v. Logan (Tex. Civ. App. 1910), 132 S. W. 894.

30. Co. Litt. 89; Bac. Abr. Guardian (E.); Connelly v. Weatherly, 33 Ark. 658. When a guardian, whose authority has terminated on the ward's arrival at majority, becomes administrator of the ward's estate, the ward dying soon after and before the guardianship accounts are closed, his liability for the property is that of administrator. Hutton v. Williams,

On death of a guardian his executor should pay over funds of the estate into court,[31] but the administrator will not be liable for the devastavit of the decedent.[32]

The executors of a deceased guardian may be ordered to account and to pay the amount due by sale of property if necessary.[33]

§ 854. Resignation of the Guardian.

The office of a guardian was regarded as something so honorable at the common law that it could not be easily refused, much less resigned. Natural guardians, of necessity, could not resign. We have seen, in another connection, how far the natural guardian may practically surrender his children's custody, by allowing others to adopt them, by placing them in a charitable institution, and the like; which is the only sense in which this guardianship may be considered as voluntarily transferred. So guardians in socage, being designated by the law, could not in strictness resign; if they could shift their authority at all, it must have been by assignment. There is reason to believe that, before the statute of Marlbridge,[34] they could assign, but only to the extent of placing the ward's body in custody of another. In later times, no assignment whatever has been permitted. For, as Lord Commissioner Gilbert observed, guardianship in socage is an interest, not of profit, but of honor, committed to the next of kin, inherent in the blood; and therefore not assignable.[35]

The resignation of a testamentary guardian is not, as a rule, permitted. In 1752 the guardians of the young Earl of Spencer, who was then in his eighteenth year, petitioned the court of chancery that they might be discharged from their trust, as he was then going abroad on his travels, and would not be under their care.

60 Ala. 107. As to settlement of a guardian's account by his administrator, see 66 Ala. 283; 156 Pa. St. 297. Or where the guardian died without making a settlement, and long after the ward's minority. 65 Cal. 228.

31. *In re* Hicks, 170 N. Y. 195, 63 N. E. 276. See McKay v. McKay's Adm'rs, 33 W. Va. 724, 11 S. E. 213.

32. Newberry v. Wilkinson, 199 F. 673, 118 C. C. A. 111, affirming decree (C. C.) 190 F. 62. See Mitchell v. Kelly, 82 Kan. 1, 107 P. 782.

33. Nelson v. Cowling, 89 Ark. 334, 116 S. W. 890; Allen v. Conklin, 112 Mich. 74, 70 N. W. 339, 3 Det. Leg. N. 813.

Contra. After the death of a guardian without having accounted after his wards had reached majority, his executors had no authority to present his account to the probate court. Miller v. Ash, 156 Cal. 544, 105 P. 600.

34. 52 Hen. III., ch. 17.

35. Gilb. Eq. Rep. 175. For full discussion, see Macphers. Inf. 25-27; Co. Litt. 88b, Harg. *n.* 13, and authorities cited.

Lord Hardwicke (as the reporter says) refused it with some warmth, as a thing which had never been done at the request of the guardians themselves; and added, that, if they would not continue to act in the trust, as they had accepted it, he should compel them. But afterwards, at the importunity of counsel, finding that the mother and the infant also acceded to the request, he yielded so far as to allow a petition to be filed on behalf of the infant, upon which he made an order that the care and direction of the infant's education and person should be committed to two near relatives until further order, and that the allowance for his maintenance and education should be paid to them. But in doing so the Lord Chancellor declared that while the special circumstances of this case justified his action, he would not in general comply with such petitions, nor should this case be drawn into precedent. The court, he added, must take care of the infant, even though it did not punish the guardian for not doing so.[36] Though this was a case of testamentary guardianship, we presume the rule to be equally strict, or nearly so, in case of a chancery guardian. In either instance the court can make an order, as deemed best for the infant's interests. There need be no summary removal. Chancellor Kent, in *Ex parte Crumb,* claimed that chancery could doubtless discharge or charge a guardian, even if appointed by a surrogate; but that in the case of a testamentary guardian there should be very special reasons for interference. He refused here, however, to make any change, there being no special cause shown.[37]

It is now frequently provided by statute that probate guardians and other trust officers may, in the discretion of the court, be allowed to resign. But in absence of such legislation it would appear that no such guardian can resign as a matter of right; nor can the probate court legally accept his resignation and appoint a successor. Yet it is held in Illinois that, under a statute which permits the judge "to remove guardians for good and sufficient cause," he may consider resignation a sufficient cause, and thereupon discharge the guardian.[38] There is something harsh and offensive in the removal of a guardian from office. Moreover, numerous unforeseen emergencies may arise, so as to render the

36. Spencer v. Earl of Chesterfield, Ambl. 146.

37. *Ex parte* Crumb, 2 Johns. Ch. 439. See 2 Kent, Com. 227.

38. Maloy v. Maloy, 131 Ga. 579, 62 S. E. 991; Wackerle v. People, 168 Ill. 250, 48 N. E. 123; *In re* Minors Long, 118 La. 689, 43 So. 279; Young v. Lorain, 11 Ill. 624. See Pepper v. Stone, 10 Vt. 427.

continuance of the trust improper; as if the guardian should become a confirmed invalid, or make himself obnoxious to the ward and his relations, or display a want of prudence in managing the estate not inconsistent with good intentions nor sufficiently gross to justify a court in removing him. He might be fully aware of the advantage of a change to all parties concerned, and might desire to be relieved, provided he could withdraw with honor, and without submitting to a humiliating investigation of petty and insufficient grounds of complaint. This opportunity is afforded in allowing him to resign. So, too, the guardian's convenience, apart from all other considerations, might lead him to withdraw. And further, as one has observed of testamentary appointees, "it can never be for the infant's benefit to continue him in the care of a negligent or reluctant guardian." [39]

A valid resignation accepted will be operative although the new guardian has not qualified,[40] but although the resignation has been accepted and a new guardian appointed and qualified, the old guardian may still be authorized to enforce a judgment he had obtained before his accounts are settled.[41]

Where the resignation of the guardian is accepted and a new guardian appointed, the liability of the old guardian to account and on his bond continues.[42]

The court may have authority to discharge a guardian,[43] and an order discharging a guardian on payment of court costs is valid only on showing that the costs were paid.[44]

A judgment discharging a guardian may be operative although defective in form.[45]

39. Macphers. Inf. 128, commenting upon Spencer v. Earl of Chesterfield, *supra*. As to a guardian's resignation, see King v. Hughes, 52 Ga. 600 (guardianship of a lunatic). Where a guardian tenders his resignation, the more correct form of judicial order would be that the resignation is accepted; yet it is held that the probate court may without error enter an order removing such guardian. Brown v. Huntsman, 32 Minn. 466.

40. Smiley v. McIntosh, 129 Ia. 337, 105 N. W. 577. See Weil v. Schwartz, 51 La. Ann. 1547, 26 So. 475.

41. Longino v. Delta Bank, 75 Miss. 407, 23 So. 178.

42. Fresno Estate Co. v. Fiske, 172 Cal. 583, 157 P. 1127. See Puckett v. Glendenning (Ark.), 205 S. W. 454.

43. Jain v. Priest (Idaho), 164 P. 364; Fidelity & Deposit Co. of Maryland v. Husted, 128 Md. 275, 97 A. 370.

44. Gillean v. Witherspoon (Tex. Civ. App. 1909), 121 S. W. 909.

45. Stewart v. Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899; Meeker v. Mettler, 50 Wash. 473, 97 P. 507.

§ 855. Removal; Who May Remove.

The chancery court may undoubtedly remove all guardians of its own appointment, and substitute others at discretion for proper cause. This rule extends still further; for, according to American authority, chancery may remove all guardians, whether appointed by the court itself, by probate tribunals, by testament, or even by express act of the legislature, whenever the guardian abuses his trust or the interests of the ward require it.[46] This statement is somewhat too sweeping, so far as the English courts are concerned. So, too, probate tribunals are authorized in most if not all of the States to remove guardians of their own appointment on good and sufficient cause[47] And the removal of a guardian by a decree of the appellate probate tribunal terminates summarily the guardianship granted below.[48]

And as two persons, or sets of persons, cannot at the same time hold the same trust, it follows that one guardian must be removed, or a vacancy otherwise created, before the court can make a new appointment. This principle, apparently simple, has sometimes been overlooked; when, for instance, a court has issued new letters without revoking the old, or seeks to supersede a testamentary by a probate guardian. The appointment of a new guardian does not of itself terminate the authority of one previously chosen. It is an act without jurisdiction, and void. But natural guardians need not be formally removed, nor guardians in socage. The rule applies only to guardians testamentary and guardians by judicial appointment, who hold by a higher authority than either of these.[49]

46. Murphee v. Hanson, 197 Ala. 246, 72 So. 437 (may be removed in equity though appointed by probate court). Cowls v. Cowls, 3 Gilm. 435. See *Ex parte* Crumb, 2 Johns. Ch. 439; Disbrow v. Henshaw, 8 Cow. 349. A testamentary guardian, in many States, may now be removed on the same grounds which warrant the removal of a probate guardian. Damarell v. Walker, 2 Redf. 198. But sound discretion should be used. Sanderson v. Sanderson, 79 N. C. 369. See Champlin v. Slocum (R. I.), 103 A. 706.

47. Simpson v. Gonzales, 15 Fla. 9; *Re* Clement, 25 N. J. Eq. 508; McPhillips v. McPhillips, 9 R. I. 536. An order of removal, where the court may remove at its own instance, is not invalid because based on a defective petition. Cherry v. Wallis, 65 Tex. 442. See State v. Kelly, — S. D. —, 143 N. W. 953 (guardian appointed by circuit court cannot be removed by county court).

48. Willwerth v. Leonard, 156 Mass. 277, 31 N. E. 299 (even though the case is sent back to the lower tribunal for further proceedings). When a guardian who has been removed from office appeals, and another has been appointed and qualified in his stead, the office devolves, pending a final decision. State v. McKown, 21 Vt. 503.

49. Bledsoe v. Britt, 6 Yerg. 458;

If a guardian does not behave to the satisfaction of the court of chancery, orders regulating his conduct are frequently made upon him; and if any such steps be taken as to induce suspicion that the infant will suffer by the conduct of the guardians, the court will interpose.[50] This is the English rule as to guardians in general. But in this country probate guardianship is usually determined for misconduct by a summary removal.

We have seen that chancery courts in this country claim the right of removing testamentary guardians. In England, the rule is not laid down so strongly. Testamentary guardians are not removed, but superseded in their functions: a refinement adopted, it is said, out of deference to the act of Parliament.[51] In this sense are to be understood certain expressions of Lord Hardwicke and Lord Redesdale, which would seem to extend the authority of the court to actual removal from office.[52] Lord Nottingham, in *Foster* v. *Denny,* said that he could not remove a guardian constituted by act of Parliament.[53] This is still the doctrine of the English chancery; but it exercises full jurisdiction in ordering infants to be made wards of court, with suitable directions for their maintenance and education; and it will restrain the testamentary guardian from interference with the person and estate of wards thus taken under its protection.[54]

§ 856. Removal; Procedure.

The removal may take place at the instance of the infant or someone representing him or upon the court's own motion.[55] A mere stranger cannot apply to have a guardian removed; it must be a party in interest.[56] Nor can one who has been properly re-

Grant v. Whitaker, 1 Murph. 231; Robinson v. Zollinger, 9 Watts, 169; Fay v. Hurd, 8 Pick. 528; Thomas v. Burrus, 23 Miss. 550; 2 Ch. Cas. 237; Morgan v. Dillon, 9 Mod. 141; Copp v. Copp, 20 N. H. 284.

50. Roach v. Garvin, 1 Ves. 160; Duke of Beaufort v. Berty, 1 P. Wms. 705.

51. Macphers. Inf. 128.

52. Lord Hardwicke, in Roach v. Garvan, 1 Ves. 160; Lord Redesdale, in O'Keefe v. Casey, 1 Sch. & Lef. 106.

53. 2 Ch. Cas. 237.

54. Smith v. Bate, 2 Dick. 631; Ingham v. Bickerdike, 6 Madd. 275. See also McCullochs, *In re,* 1 Dru. 276; 12 Jur. 100.

55. Dickerson v. Bowen, 128 Ga. 122, 57 S. E. 326 (ward by next friend); Clay's Guardian v. Clay, 28 Ky. Law Rep. 398, 89 S. W. 500; King v. King, 73 Mo. App. 78; *In re* Ford, 157 Mo. App. 141, 137 S. W. 32. See Gray v. Parke, 155 Mass. 433, 29 N. E. 641 (effect of motion to dismiss petition because petitioners are not next friends).

56. Colton v. Goodson, 1 How. (Miss.) 295; *In re* Murray, 28 Ohio Cir Ct. R. 652 (uncle).

moved, though the mother herself, claim any right of recommending a successor.[57]

Removal can be ordered only on a ground alleged in the petition.[58] But the guardian is entitled to notice before removal, that he may appear in defence; and, if removed without such notice, unless he has waived it by his voluntary appearance in court, he has good ground for appeal; and it is doubtful whether a new appointment under such circumstances has any validity whatever.[59] The authorities are clear in requiring notice wherever proceedings for removal involve the guardian's personal character; but where the discharge is sought on other grounds, and the ward's rights are deemed of paramount importance, as when one under guardianship for insanity is restored to reason, or a ward arrived at fourteen wishes to exercise the privilege of nominating a successor, removals without notice are sometimes sustained;[60] still the better opinion is in favor of notice in all cases.[61]

As in making appointments, the court is allowed a liberal discretion over removals, and its decision will not be reversed on appeal unless palpable injustice has been done.[62] And the judge

The surety cannot compel the guardian to give additional security or be removed. Kaspar v. People, 230 Ill. 342, 82 N. E. 816, affg. 132 Ill. App. 1.

57. Hamilton v. Moore, 32 Miss. 205.

58. Hopkins v. Richmond, 29 R. I. 527, 73 A. 308.

59. Martin v. Moore, 20 Ga. App. 569, 93 S. E. 223; Jain v. Priest (Ida.), 164 P. 364 (charitable corporation); Wackerle v. People, 168 Ill. 250, 48 N. E. 123, reversing 65 Ill. App. 423; Smith v. Haas, 132 Ia. 493, 109 N. W. 1075; Phillips v. Williams, 118 Ky. 757, 82 S. W. 379, 26 Ky. Law Rep. 654; *In re* Guardianship of McCloskey, 76 Minn. 323, 79 N. W. 176 (unless his residence is unknown); United State Fidelity & Guaranty Co. v. Jackson, 111 Miss. 752, 72 So. 150 (in vacation); State *ex rel.* Mount v. Smith, 171 Mo. App. 67, 153 S. W. 494; *In re* Carter's Estate, 254 Pa. 518, 99 A. 58; Hart v. Gray, 3 Sumn. 339; Gwin v. Vanzant, 7 Yerg. 143; Myers v. Pearsall, 17 Ind. 405; Croft v. Terrell, 15 Ala. 652. An order of removal for embezzlement *ex parte* and without notice is void. Colvin v. State, 127 Ind. 403. As to a revocation of letters where the trust has never been fully assumed, or the appointment was illegal, less strictness is requisite. See Scobey v. Gano, 35 Ohio St. 550.

60. Hovey v. Harmon, 49 Me. 269.

61. Montgomery v. Smith, 3 Dana, 599; Copp v. Copp, 20 N. H. 284; Lee v. Ice, 22 Ind. 384. But see Cooke v. Beale, 11 Ired. 36.

62. Johnson v. Metzger, 95 Ind. 307; Runnels v. Clark — Ia. —, 146 N. W. 462; *In re* Spurling's Guardian, 165 Ky. 349, 176 S. W. 1139; Macgill v. McEvoy, 85 Md. 286, 37 A. 218 (legal and not arbitrary discretion granted); Owen v. Pye, 115 Md. 400, 80 A. 1007; Nicholson's Appeal, 20 Pa. St. 50; Isaacs v. Taylor, 3 Dana, 600; Young v. Young, 5 Ind. 513.

may exercise a liberal discretion in taking evidence for his own information.[63]

A receiver appointed on removal of a guardian and before the appointment of a new guardian has not the authority of a guardian but must act only as given specific authority by the court.[64] The right of the guardian to appeal from an order for his removal is doubtful as he is not considered to have any pecuniary interest in his office.[65]

§ 857. Removal; Causes of.

There can be no removal of a probate guardian without cause shown.[66] Courts of chancery are equally bound to observe this principle; but their discretion is absolute. Some of our codes make it imperative that a statutory ground exist for removing one guardian and appointing another;[67] and where a statute enumerates the grounds of removal, grounds not enumerated authorize no removal.[68] Removal may be ordered on failure after order to give a sufficient bond,[69] or to file an inventory,[70] or to account,[71] or where the guardian has moved out of the State.[72]

63. He may consider material facts bearing upon the issue at the date of the hearing, though not existing when the petition was filed. Gray v. Parke, 155 Mass. 433, 29 N. E. 641.

64. Temple v. Williams, 91 N. C. 82.

65. People v. Buck, 149 Ill. App. 283.

66. Whitney v. Whitney, 7 S. & M. 740.

67. 2 Dem. (N. Y.) 439; 4 Dem. 153. Mere delay or omission to file an inventory or account which involves no injury is insufficient ground for removal; the guardian should first be ordered at least to file them. 2 Dem. 439; Johnson v. Metzger, 95 Ind. 307. Nor misconduct of others, at which the guardian himself did not connive. 4 Dem. 153.

68. State v. Bird, 253 Mo. 569, 162 S. W. 119; Kahn v. Israelson, 62 Tex. 221; 2 Dem. 430.

69. Gill v. Riley, 28 Ky. Law Rep. 639, 90 S. W. 2.

70. People v. Buck, 149 Ill. App. 283; Brown v. Brown (Tex. Civ. App. 1911), 142 S. W. 23 (in discretion of court).

The failure to file an inventory may be justifiable. Johnson v. Metzger, 95 Ind. 307; Succession of Burrell, 118 La. 1076, 43 So. 882 (where property is of small value and guardian did not know of its existence).

71. Kimmel v. Kimmel, 48 Ind. 203; Dickerson v. Dickerson, 31 N. J. Eq. 652; *In re* Nelson, 148 Ia. 118, 126 N. W. 973 (may refuse to remove where account filed late); Clay's Guardian v. Clay, 28 Ky. Law Rep. 398, 89 S. W. 500; *In re* Dixon, 156 N. C. 26, 72 S. E. 71; *contra*, Smith v. Young, 160 S. W. 822 (where guardian has not mismanaged, but has increased estate). See Heath v. Maddock, 81 N. J. Eq. 469, 86 A. 945 (failure unattended by fraud to file accounts is not ground for removal).

72. Watts v. Hicks, — Ark. —, 178 S. W. 924; Dickerson v. Bowen, 128 Ga. 122, 57 S. E. 326; Mahan v. Steele, 109 Ky. 31, 58 S. W. 446, 22 Ky. Law Rep. 546; Estridge v.

For the same reason that non-residents are held incompetent for appointment, guardians must surrender their authority when they move out of the jurisdiction, or the court will take it from them. This rule is not uniform, however, in all the States. Under the statutes now, as formerly, in Indiana, Alabama, and some other States, removal from the State constitutes *per se* a ground for displacement from office.[73] But since, as we have seen, non-residents may sometimes be appointed guardians on filing security, the more reasonable rule is to make them liable to displacement whenever, as non-residents, they could not have been appointed in the first instance.[74]

Letters of guardianship are not *ipso facto* revoked by the removal of the guardian from the jurisdiction.[75] Removal from the jurisdiction with the ward's funds may justify summary proceedings;[76] and so may allowing the wards to go into another State by themselves and neglecting their interests.[77]

Removal may be ordered whenever the guardian is not a fit person,[78]

Estridge, 28 Ky. Law Rep. 1076, 76 S. W. 1101.

73. Nettleton v. State, 13 Ind. 159; Cockrell v. Cockrell, 36 Ala. 673.

74. See Speight v. Knight, 11 Ala. 461; also *supra*, § 840; Succession of Bookter, 18 La. Ann. 157. Going into the Confederate lines during the war did not forfeit tutorship. Clement v. Sigur, 29 La. Ann. 798.

75. Watts v. Hicks, 178 S. W. 924; Becnel v. Louisiana Cypress Lumber Co., 134 La. 467, 64 So. 380.

76. State v. Engelke, 6 Mo. App. 356. Under Alabama Code, if the surviving mother of minor children for whom a guardian is appointed in the county of the late father's domicile, removes with them into another county, another guardian may be there appointed for them who will supersede the former. Moses v. Faber, 81 Ala. 445.

77. Watt v. Allgood, 62 Miss. 38.

78. *In re* Harris' Guardianship, 17 Ariz. 405, 153 P. 422; Voliva v. Moffit, 30 Ind. App. 225, 65 N. E. 754; Morgan v. Anderson, 5 Blackf. 503; West v. Forsythe, 34 Ind. 418; Barnes v. Powers, 12 Ind. 341; Sweet v. Sweet, Speers Eq. 309; O'Neil's Case, 1 Tuck. (N. Y. Surr.) 34; Cottrell v. Booth, 166 Ind. 469, 76 N. E. 546; Davis' Adm'r v. Davis, 162 Ky. 316, 172 S. W. 665 (lack of interest in ward); Chew's Estate, 4 Md. Ch. 60; Cooper's Case, 2 Paige, Ch. 34. See Lord Thurlow, in Smith v. Bates, 2 Dick. 631; Slattery v. Smiley, 25 Md. 389; Gray v. Parke, 155 Mass. 433; Clark v. Smith (Miss.), 70 So. 897 (convicted of embezzlement despite appeal); King v. King, 73 Mo. App. 78 (when insolvent and wasting estate of ward); Kettletas v. Gardner, 1 Paige, Ch. (N. Y.) 488 (habits of intoxication); Nicholson's Appeal, 20 Pa. St. 50 (ignorance or imprudence); 13 Phila. 402 (criminal conviction). See Gill v. Riley, 26 Ky. Law Rep. 639, 90 S. W. 2.

Such conduct of a guardian as tends to alienate his infant ward's affections from the mother, who is a person of good character, will justify his removal, notwithstanding the mother may have remarried. Perkins v. Finnegan, 105 Mass. 501. Where dereliction of duty as to the person of the ward is charged, and

or has interests adverse to the ward.[79]

On the question of his fitness evidence may be put in showing his unfitness down to the time of the hearing.[80] He may be removed where he mingles guardianship funds with his own or uses them for his own profit,[81] or sells the ward's property without leave,[82] or failure to support the ward with income ample for doing so, especially if the guardian be the father;[83] appointment to the trust without proper notice to other parties interested,[84] or abandonment of the trust.[85] Guardians may in some States be removed wherever it will be for the ward's interest.[86]

No removal will be ordered unless it clearly appears that the guardian is acting contrary to the best interests of the ward.[87] Nor is intermeddling with the estate before qualification as guardian a ground for removal, if in good faith and by advice of counsel.[88] Different local codes will be found to prescribe varying rules in this respect.

Religious opinions were formerly made a test of the guardian's capacity to act. But such conflicts seldom arise at the present day, and now difference of belief on religious subjects constitutes no

not mismanagement of the estate, this is insufficient as to guardianship of estate. 66 Cal. 240.

Where affection has sprung up between the guardian and ward the guardian should not be removed except for the most cogent reasons. State v. Baker, 253 Mo. 569, 162 S. W. 119.

79. Succession of Desina, 135 La. 402, 65 So. 556; *In re* Padgett's Estate, 114 Mo. App. 307, 89 S. W. 886 (one making adverse claim); *In re* Mansfield's Estate, 206 Pa. 64, 55 A. 764 (where guardian adverse to minor).

Though adverse interest, such as being executor or administrator of an estate in which the ward was interested, is an objection to appointing one guardian, it is not, after long lapse of time, to be set up equally as a cause of removal. Dull's Appeal, 108 Pa. St. 604.

80. Gray v. Parke, 155 Mass. 433, 29 N. E. 641.

81. *In re* Allard, 49 Mont. 219, 141 P. 661; Dickerson v. Dickerson, 31 N. J. Eq. 652; Ury v. Brown, 129 N. C. 270, 40 S. E. 4 (guardian using ward's money in his own business); *In re* Guardianship of Chambers, 148 P. 148 (wasting assets); Snavely v. Harkrader, 29 Gratt. (Va.) 112.

82. Macgill v. McEvoy, 85 Md. 286, 37 A. 218 (not where guardian acted honestly and his bond protects estate from loss).

83. *Re* Swift, 47 Cal. 429.

84. Morehouse v. Cooke, Hopk. 226; Ramsay v. Ramsay, 20 Wis. 507.

85. Lefever v. Lefever, 6 Md. 472.

86. *Ex parte* Crutchfield, 3 Yerg. (Tenn.) 336.

87. Bell v. Bell's Guardian, 167 Ky 430, 180 S. W. 803 (overcharging estate); Clay v. Cunningham, 26 Ky. Law Rep. 520, 82 S. W. 973; Hickey v. Kimball, 109 Me. 433, 84 A. 943; Kester v. Alexander, 47 W. Va. 329, 34 S. E. 819. See *In re* La Plant, 83 Minn. 366, 86 N. W. 351.

88. Stone v. Dorrett, 18 Tex. 700.

cause for a guardian's removal, if no harsh or unfair means have been used to erase the impressions left by the parents on the child's mind.[89] English cases sometimes present such conflicts over religious influence.[90]

By the common law, certain persons, as idiots, lunatics, deaf and dumb persons, persons under outlawry or attainder, and lepers removed by writ of leprosy, were passed over in the guardianship. And where a guardian became incapable of acting, the office devolved upon the next person to whom the inheritance could not descend.[91] Such guardians do not appear to have been removed from office. But there can be little doubt that the insanity of a probate or chancery guardian would be good cause for his removal or supersedure; and a final settlement of his guardianship accounts would properly be required from his own guardian.[92] It appears that there may be a combination of circumstances to justify the removal.[93]

§ 858. Appointment of Successors — Duties.

A new guardian cannot be appointed until the removal of the previous guardian,[94] and the effect of an appeal from an order of removal of a guardian is to stay proceedings and prevent the appointment of a new guardian.[95]

The old guardian will not be allowed to contest the appointment of his successor especially where it appears that he is doing this in order to delay passing over the money.[96] A guardian may be charged with loss caused by his failure to collect money of the estate due from a former guardian,[97] and a guardian succeeding

89. State *ex rel.* Baker v. Bird, 253 Mo. 569, 162 S. W. 119; *In re* Dixon, 254 Mo. 663, 163 S. W. 827; Nicholson's Appeal, 20 Pa. St. 50. See *In re* McConnon, 112 N. Y. S. 590, 60 Misc. 22 (religious differences may be good reason for removal).

90. McGrath *Re* (1892), 2 Ch. 496.

91. Co. Litt. 88, 89; Macphers. Inf. 24, 25.

92. Modawell v. Holmes, 40 Ala. 391; Damarell v. Walker, 2 Redf. 198.

93. Windsor v. McAtee, 2 Met. (Ky.) 430.

94. Gilbert v. Stephens, 106 Ga. 753, 32 S. E. 849; Cotton's Guardian v. Wolf, 77 Ky. 238; Estridge v. Estridge, 25 Ky. Law Rep. 1076, 76 S. W. 1101; Brown v. Fidelity & Deposit Co. of Maryland, — (Tex.) —, 76 S. W. 944; *In re* Guardianship of Chambers (Okla.), 148 P. 148; Crosbie v. Brewer (Okla.), 158 P. 388 (without notice). See *In re* White, 57 N. Y. S. 862, 40 App. Div. 165, 160 N. Y. 685, 55 N. E. 1101. See *In re* Henning's Estate, 128 Cal. 214, 60 P. 762, 79 Am. St. Rep. 43.

95. *In re* Van Loan, 142 Cal. 429, 76 P. 39.

96. *In re* Twichell, 102 N. Y. S. 163, 117 App. Div. 301.

97. Title Guaranty & Surety Co. v.

another will be charged with a loan made to him by his predecessor.[98]

§ 859. Marriage of Female Guardian.

The marriage of a female guardian may terminate one's authority, though that of a male guardian never does. The old rule of the common law appears to have been, that when a female guardian in socage married, her husband became guardian in right of his wife; but that on her death guardianship ceased on his part, and went to the infant's next relation.[99] Testamentary guardianship in England seems to be left to the operation of the will in such cases: chancery refusing to interfere with the testator's own directions.[1] But it is customary for the father to designate successors in the event of marriage. What has already been said on the subject of appointing married women guardians applies, likewise in this connection.[2] Certainly, if marriage does not absolutely put an end to the guardian's authority, it has the common-law effect of joining her husband in the trust;[3] and yet, according to some American statutes, the fact of marriage would only render her liable to removal, and the courts would protect such guardian's *bona fide* acts against collateral attack.[4] In Louisiana the widow by marrying again forfeits her rights as guardian,[5] but by the

Cowen (Okla.), 177 P. 563; *In re* Schenkel's Estate, 250 Pa. 504, 95 A. 703; Kunz v. Ragsdale (Tex. Civ. App.), 200 S. W. 269.

98. *In re* Ward, 98 N. Y. S. 923, 49 Misc. 181.

99. Co. Litt. 89a; Bac. Abr. Guardian & Ward (E.). See 7 Vt. 372.

1. Macphers. Inf. 129; Morgan v. Dillon, 9 Mod. 135; Dillon v. Lady Mount Cashell, 4 Bro. P. C. 306. See Corbet v. Tottenham, 1 Ball & B. 59.

2. Martin v. Foster, 38 Ala. 688; Elgin's Case, 1 Tuck. (N. Y. Surr.) 97; Leavel v. Bettis, 3 Bush. 74.

3. Wood v. Stafford, 50 Miss. 370. Statutes in some States change the old rule, and expressly authorize a married woman to be guardian. Schouler, Hus. & Wife, appendix. As to requiring in such case the husband's written consent to the wife's continuance in office, see Hardin v. Helton, 50 Ind. 319. In New York *semble* the widowed mother's remarriage terminates her guardianship, and under the statute she can be removed. Swartwout v. Swartwout, 2 Redf. 52. The female guardian who marries must not abandon her rights of custody; her marriage does not, in Kentucky, extinguish her authority. Cotton v. Wolf, 14 Bush, 238.

4. See Hood v. Perry, 73 Ga. 319; § 825; 54 Ark. 480.

The marriage of a female guardian does not terminate the office of guardian, but with the consent of her husband, she may remain as guardian. Brimingham Coal & Iron Co. v. Doe *ex dem.* Arnett, 181 Ala. 621, 62 So. 26; Cotton's Guardian v. Wolf, 77 Ky. 238.

5. Succession of Marinovich, 105 La. 106, 29 So. 500; Succession of Carbajal, 111 La. 944, 36 So. 41.

advice of a family meeting previous to her remarriage, she may be retained in the tutorship of her minor children, notwithstanding her remarriage;[6] but if she fails to procure such advice, she loses the tutorship.[7]

§ 860. Other Cases Where a New Guardian is Appointed.

There are some other cases in which it is said that a new guardian may be appointed, as though guardianship had already determined. Thus, where a testamentary guardian has not acted, and declines to act, chancery may appoint a successor.[8] So in other cases where the guardian renounces his appointment.[9] Filing a bond, with proper security, is sometimes regarded as the condition precedent to a probate appointment, and it is thought that letters need not be revoked in such a case. But this is by no means a settled rule.[10] Letters of guardianship obtained through material false representations may be revoked.[11]

Outlawry and attainder of treason — or what is known as civil death — did not put an end to guardianship in socage; because, it was said, the guardian had nothing to his own use, but to the use of the heir.[12] The same principle doubtless applies to other guardians. But a guardian might be properly removed on such grounds. In the United States, local statutes largely regulate the general subject of terminating a guardian's authority.

6. Gaudet v. Gaudet, 14 La. Ann. 112.

7. Keene v. Guier, 27 La. Ann. 232.

8. *Ex parte* Champney, 1 Dick. 350; O'Keefe v. Casey, 1 Sch. & Lef. 106.

9. McAlister v. Olmstead, 1 Humph. 210; Lefever v. Lefever, 6 Md. 472; Simpson v. Gonzalez, 15 Fla. 9.

10. Russell v. Coffin, 8 Pick. 143; Fay v. Hurd, *Ib.* 528; Barns v. Branch, 3 McCord, 19; Clarke v. Darnell, 8 Gill & Johns. 111. See West v. Forsythe, 34 Ind. 418; Fant v. McGowan, 57 Miss. 779.

11. *Re* Clement, 25 N. J. Eq. 508. The Orphans' Court may thus revoke. *Ib.*

12. Co. Litt. 88b; Macphers. Inf. 25.

CHAPTER IV.

NATURE OF THE GUARDIAN'S OFFICE.

§ 861. Guardianship Relates to Person and Estate.

The powers and duties of a guardian relate either to the person of the ward, or to the ward's estate, or to both person and estate. As guardian of the person, he is entitled to the custody of the ward; he is bound to maintain him in a style suitable to the latter's means and condition in life; if the ward be a minor, he superintends his education and directs him in the choice of a pursuit; and in general, he supplies the place of a judicious parent. As guardian of the estate, he manages the ward's property, both real and personal, with faithfulness and care, changes investments whenever necessary, with permission of the court, pays the just debts of the ward, collects his dues, puts out his money on interest, manages his investments, keeps regular accounts, and is, in effect, the ward's trustee.[13] Whether the guardianship be in socage, testamentary, or by chancery or probate appointment, these powers and duties are essentially the same; although, as we have seen, socage guardianship was created with special reference to the ward's real estate.[14] Moreover, as will fully appear in the succeeding chapters, chancery and probate guardians are brought more closely under judicial control and supervision than either guardians in socage or testamentary guardians.

But while guardianship of the person resembles the relation of parent and child, it is not altogether like it. The parent must support his child from his own means; and in return the child's

13. 2 Kent, Com. 230-233.

14. *In re* Stockman, 71 Mich. 180, 38 N. W. 876; *Supra*, ch. 1, § 813.

labor and services belong to him. But the guardian is not bound to supply the wants of his ward, except from the ward's own estate in his hands and the liberality of others, though it were to keep the child from starving. On the other hand, the guardian has no more right to the labor and services of his ward than any stranger. Nor are guardians of the estate vested with an interest precisely like that of trustees; for while the latter may sue and be sued in their official capacity, suits by and against infants are brought in the name of the ward and not the guardian.[15]

Guardians in socage acquired authority as guardians of the ward's estate; and guardianship of the estate drew after it, in such case, guardianship of the person; so that they were guardians of both person and estate.[16] Testamentary guardians under the statute of Charles II. acquire authority through the father's devise to them of the "custody and tuition" of his children; and this devise of the person carries with it, as incident, a devise of the estate; so that they, too (subject to statute modifications), are guardians of both person and estate.[17] But chancery guardians are not always invested with such powers; for the court will make such orders as are needful in all cases. Chancery sometimes appoints a guardian of the person only, for a special and temporary purpose.[18] Where a suit is pending, and it becomes necessary to appoint a guardian, chancery appoints a guardian of the person only, the estate being under the direction of the court. But where no suit is pending, and proceedings are commenced by petition, the guardian is appointed for both person and estate.[19] Probate guardianship is subject, in great part, to local legislation; but it may be safely asserted, as a general principle, that all probate guardians are guardians of both person and estate, save so far as a natural guardian's rights over the person are reserved by express statute or otherwise, and that the court cannot commit guardianship of the person to one and guardianship of the property to another.[20]

15. See *infra*, § 1055.

16. But see Bedell v. Constable, Vaugh. 185.

17. Stat. 12, Car. II, ch. 24, §§ 8, 9, Vaugh. 178.

18. Macphers. Inf. 114; *Ex parte* Becher, 1 Bro. C. C. 556; *Ex parte* Woolscombe, 1 Madd. 213.

19. Macphers. Inf. 105; 2 Kent, Com. 229.

20. See Tenbrook v. McColm, 7 Halst. 97. But some State codes permit a separation of the functions with separate guardians accordingly. 84 Iowa, 362. And see 17 R. I. 760; Order, 110 N. Y. S. 622, 126 App. Div. 155, affd.; *In re* McMillan, 193 N. Y. 651, 86 N. E. 1127 (committee of person and estate of infant not needed).

The guardian is not always entitled to the custody of the infant's person; but chancery will exercise its discretion for the benefit of the latter, as to delivering him up to the guardian or permitting him to remain elsewhere, and as to the persons who are to have access to him, and the circumstances attending such access, and generally as to his education.[21] And it is the policy of our legislation to leave the child's person in his parents' keeping so far as possible. But the guardian may be a "guardian of the person and estate" notwithstanding.

The guardian may act through an agent where necessary.[22]

§ 862. Whether a Guardian is a Trustee.

In discussing the rights and duties of a guardian, this question next meets us at the outset: Is or is not the guardian's office substantially that of a trustee in interest? This will be best seen by examining the different kinds of guardians, as they respectively arose.

Guardianship in socage arose very early at common law, and is the first in order. These guardians were considered as trustees. According to the old authorities, the guardian in socage had not a bare authority, but an actual estate and interest in the land, though not to his own use.[23] Hence he might elect whether to let the estate or occupy it for the ward's benefit. He was considered as entitled to the possession of the ward's property, and incapable of being removed from it by any person. In other words, this guardian had the legal, but not the beneficial interest. Not long after the statute of Charles II. chancery was called upon to determine the nature of testamentary guardianship. Lord Macclesfield, in the case of *Duke of Beauford* v. *Berty*,[24] stated that testamentary guardians were but trustees; that the statute merely empowered the father to appoint a different person as guardian and to continue the relation beyond the age of fourteen, and until the ward became twenty-one; and that both socage and testamentary guardians were equally trustees. And in the important case of *Eyre* v. *Countess of Shaftsbury*,[25] this principle, though with another admitted difference as to succession, was again affirmed.

21. Macphers. Inf. 119; Anon. 2 Ves. Sen. 374.

22. Becnel v. Louisiana Cypress Lumber Co., 134 La. 467, 64 So. 380; Flach v. Fassen, 3 Mo. App. 562. See, however, Simpson v. Roberts, 205 Ill. App. 35.

23. Co. Litt. 90a; Plowd., ch. 23. See *ante*, § 813.

24. 1 P. Wms. 703.

25. 2 P. Wms. 102.

This general rule has received judicial sanction in England much more recently.[26]

Chancery guardianship, of still later origin, resembles in its nature testamentary guardianship. The same principles are constantly asserted in regard to both. In either case, the guardian has a vested interest in his ward's estate, may bring actions relative thereto, and make leases during the minority of the infant. He has in all respects the dominion *pro tempore* of the infant's estate, and possesses more than a naked authority.[27] The same may be said of probate guardianship in this country, which, under statute modifications, has become, if anything, more like trusteeship than the other kinds. [28] And in *Thompson* v. *Boardman*[29] the analogies of the old law have been extended to the case of a spendthrift's guardian.

It is often difficult to say what in strictness is a trustee, since every trust is limited by the instrument which creates it. The powers of a guardian differ greatly from those of an executor or administrator. But so far as guardianship of the estate is concerned, a guardian is in fact a trustee; for he holds the legal estate for the benefit of another.[30] To apply the term "agent" to the guardian's office seems therefore harsh and unnatural, whatever may be the ward's position.[31]

§ 863. Joint Guardians.

Where there are two or more testamentary guardians, and one of them dies or is removed, the survivor or survivors shall continue.

26. Gilbert v. Schwenck, 14 M. W. 488; s. c., 9 Jur. 693.

27. People v. Byron, 3 Johns. Cas. (N. Y.) 53.

28. See Truss v. Old, 6 Rand. 556; Isaacs v. Taylor, 3 Dana, 600; Alexander v. Alexander, 8 Ala. 796; Pepper v. Stone, 10 Vt. 427; Lincoln v. Alexander, 52 Cal. 482.

29. 1 Vt. 370.

30. See Wall v. Stanwick, 34 Ch. D. 765, citing with approval Mathew v. Brise, 14 Beav. 341.

The guardian is a trustee of the estate of the ward and held accountable for prudent management. Smith v. Smith, 210 F. 947; Reynolds v. Garber-Buick Co., 183 Mich. 157, 149 N. W. 985, L. R. A. 1915C, 362; *In re* Pinchefski, 166 N. Y. S. 204, 179 App. Div. 578. See Walker v. Thompson, 145 Ky. 597, 140 S. W. 1045.

31. But see *dictum* of Shaw, C. J., in Manson v. Felton, 13 Pick. 206; Muller v. Benner, 69 Ill. 108. And Soule, J., observes, in Rollins v. Marsh, 128 Mass. 116, that guardians of minor spendthrifts or insane persons have only a naked power not coupled with an interest.

As the rights and duties of such guardians, probate guardians included, depend so greatly upon local statutes, local jurisdictions may be found to differ as to the nature of the guardian's office, which, after all, is *sui generis*.

The very nature of the trust demands it.[32] In England, it is otherwise with joint guardians by chancery appointment; for if one dies, the office determines.[33] But the survivors will be appointed without a reference,[34] so that after all the rule is only formal. In this country the more reasonable doctrine prevails, as to both chancery and probate guardianship, that the survivors shall continue the trust, like co-executors, and on the same principle. This was declared to be the rule as to joint chancery guardians in a leading New York case.[35] And a Vermont court applies it likewise to probate guardians.[36] The statutes enacted in many of the States remove all further doubt on the subject.

Of two or more persons appointed joint guardians under a will, one may qualify without the other;[37] and where one declines to act, all the rights and powers created by the appointment under the will may devolve upon the other.[38] But while a joint guardian who had once declined the trust has no further right to be appointed, he may yet be selected in preference to others to fill a vacancy. Thus it has been held that where three testamentary guardians, one of whom was the mother, were named by the father in his will, and the mother became sole guardian by the refusal of the others to act with her, they were properly selected by the court, after the mother's death, on their own application, in preference to the person nominated in her will.[39]

The authority of joint guardians must in general be exercised by both together,[40] and on the principle that guardians are trustees, it is held that joint guardians may sue together on account of any joint transaction founded on their relation to the ward, even after the relation ceases.[41] Also that the receipt of one is the receipt of all.[42] Also that one can maintain trespass against the other for forcibly removing the child against his wishes; as one

32. See Bac. Abr., Guardian (A.).

33. Bradshaw v. Bradshaw, 1 Russ. 528.

34. Hall v. Jones, 2 Sim. 41.

35. People v. Byron, 3 Johns. Cas. 53.

36. Pepper v. Stone, 10 Vt. 427. See also remarks of Chancellor Sanford, in Kirby v. Turner, Hopk. 309, as to the nature of joint guardianship.

37. Kevan v. Waller, 11 Leigh, 414.

38. Matter of Reynolds, 18 N. Y. Supr. 41.

39. Johnston's Case, 2 Jones & Lat. 222.

40. Sargent v. Shaver (Okla.), 172 P. 445.

41. Shearman v. Akins, 4 Pick. 283.

42. Alston v. Munford, 1 Brock. 266.

of two joint trustees cannot act in defiance of the other.[43] And where one guardian consents to his co-guardian's misapplication of funds, he is liable.[44] The fact that one joint guardian is dead will not prevent the co-guardian's prior accounts from being opened on a final settlement in court.[45] Guardians, like other trustees,— executors and administrators excepted,— may portion out the management of the property to suit their respective tastes and qualifications, while neither parts irrevocably with the control of the whole; and in such case each is chargeable with no more than what he received, unless unwarrantable negligence in superintending the other's acts can be shown.[46] And the discharge of one who has received no part of the estate relieves him from liability.[47] On the other hand, it is presumed that the survivor of joint guardians received the whole estate, in absence of proof to the contrary.[48]

Guardianship over several minors is not a joint relationship, but involves duties that are several.[49]

§ 864. Judicial Control of the Ward's Property.

In English practice, the court of chancery holds the ward's property within its grasp with a tightness unknown to American tribunals. The regular course is to get in all the money due the infant, and to invest it in the public funds. A receiver is, if necessary, appointed to facilitate collections, and generally the same person is made a permanent receiver of the ward's real estate, to collect all rents. Where there is an executor he will not be interfered with, except under strong circumstances of suspicion, but an administrator is treated with less consideration.[50] Even executors who are also testamentary guardians must bring their funds into court after settling up the estate of their testator.[51] Chancery, thus managing actively the ward's property, makes its own scheme for maintenance, and allows the guardian a certain fixed income accordingly.[52]

Probate guardianship in this country is quite different.

43. Gilbert v. Schwenk, 14 M. & W. 488.

44. Pim v. Downing, 11 S. & R. 66. See Clark's Appeal, 18 Pa. St. 175.

45. Blake v. Pegram, 101 Mass. 592.

46. Jones's Appeal, 8 Watts & S. 143.

47. Hocker v. Woods, 33 Pa. St. 466.

48. Graham v. Davidson, 2 Dev. & Bat. Eq. 155.

49. Probate Judge v. Stevenson, 55 Mich. 320, 21 N. W. 348.

50. Macphers. Inf. 268, and cases cited.

51. Macphers. Inf. 118; Blake v. Blake, 2 Sch. & Lef. 26.

52. Macphers. Inf. 213 *et seq.*

Schemes of maintenance are seldom heard of. Nor are receivers appointed. The guardian usually collects his ward's dues, whether from the executor of the parent or others, and manages the property on his own responsibility, with little judicial interference. He regulates at discretion the sum proper for annual expenditure, and changes the rate when expedient. Of course he is held accountable, on legal principles, much the same as those of the English chancery; but he seldom applies to the court for directions, unless some perplexity arises, or it becomes expedient to sell real estate, or when the ward cannot be supported without breaking in upon the principal fund.

§ 865. Guardianship and Other Trusts Blended.

The same person is frequently executor under the parent's will and also guardian of the minor children. Hence the question will sometimes arise whether he holds the fund in the one or the other capacity. It is clear that where one is both guardian and executor, he cannot be sued in both capacities; nor are both sets of sureites liable.[53] He is in the first instance liable as executor; and in general, to render him liable as guardian, there should be some distinct act of transfer. His plain duty is to keep the trusts distinct and not blend them. In the former case, his accounts rendered will show the transfer of the legacy or distributive share from his account as executor to his account as guardian; and thereby his liability as guardian will become fixed.[54] But in the latter case, or if no clear evidence appears elsewhere of an actual transfer, can it be presumed? The better opinion is that, after the time limited by law for the settlement of the estate has elapsed, and there is no evidence of intent to hold longer as executor, he shall be presumed a guardian; on the principle that what the law enjoins upon him to do shall be considered as done.[55] And certainly very slight evidence would confirm any possible doubt; such as the division of the parent's estate among other heirs, the pay-

53. Wren v. Gayden, 1 How. (Miss.) 365.

The court may decline to appoint an executor guardian of a child interested in the estate on account of the fact that the executor must account to the guardian, see *ante*, § 838.

54. Alston v. Munford, 1 Brock. 266; Burton v. Tunnell, 4 Harring. (Del.) 424; *contra*, Conkey v. Dickinson, 13 Met. 51; Stillman v. Young, 16 Ill. 318; Foteaux v. Lepage, 6 Clarke (Ia.), 123; Scott's case, 36 Vt. 297.

55. Watkins v. State, 4 Gill & Johns. 220; Karr v. Karr, 6 Dana, 3; Crosby v. Crosby, 1 S. C. (N. S.) 337; Wilson v. Wilson, 17 Ohio St.

ment of legacies, or where he has placed some of the chattels on the ward's farm,[56] or has charged himself in the new capacity, crediting himself in the former one.[57] But the rule may be otherwise with joint executors or administrators;[58] and we need hardly add that this doctrine applies in strictness only to personal assets which pass through administration; since real estate, ordinarily, goes at once to the heir. Acts, too, inconsistent with the purpose of holding as guardian, and consistent with that of continuing administrator or executor, should not readily be construed to a ward's prejudice; but rather, if need be, serve to repel the presumption of guardianship, and in any event to aid the beneficiary who seeks redress.[59]

If a legacy is given under a will to an infant, which he is not to receive unless he attain full age, it would appear that the simpler course is for the executor to retain the fund during the infant's minority; yet it is held that a probate guardian may, at the court's discretion, be appointed to receive the fund and hold it subject to the restriction contained in the will.[60] If a guardian has duly qualified, the child's legacy or distributive share should be paid over to the guardian. A guardian of the estate of minors may contest the account of an executor or administrator in an estate where his wards are interested.[61]

A guardian cannot blend distinct trusts of guardianship by appointment. Thus, where a person was appointed guardian of an infant who became insane shortly before reaching his majority, and the same guardian continued to act, styling himself guardian of "A. B., an idiot," it was held that his trust properly expired

150; Townsend v. Tallant, 33 Cal. 45; *Re* Wood, 71 Mo. 623; Weaver v. Thornton, 63 Ga. 655.

56. Johnson v. Johnson, 2 Hill, Ch. 277; Drane v. Bayliss, 1 Humph. 174.

57. Adams v. Gleaves, 10 Lea, 367. And see Thurston v. Sinclair, 79 Va. 101.

58. Watkins v. State, 4 Gill & Johns. 220; Coleman v. Smith, 14 S. C. 511.

59. In doubtful cases of this kind, the modern inclination is to let the ward sue both sets of sureties, or either, leaving them to adjust their equities among themselves. Harris v. Harrison, 78 N. C. 202. And see Coleman v. Smith, 14 S. C. 511. So, too, where a guardian subsequently becomes trustee. State v. Jones, 68 N. C. 554; Perry v. Carmichael, 95 Ill. 519.

60. Gunther v. State, 31 Md. 21; Moody *Re*, 2 Dem. 624. For the rule concerning money paid under rules of the U. S. Treasury, see Low v. Hanson, 72 Me. 104. See also Landis v. Eppstein, 82 Mo. 99.

61. Appointment of an attorney to represent the minors does not supersede the guardian's rights in this respect. Rose's Estate, 66 Cal. 241.

with the infancy of the minor.[62] Nor does it matter that the probate court recognizes a continuation of the trust by passing his accounts; for an actual appointment, after the regular form, is always essential to a guardian's authority.[63] But the guardian of a minor has sufficient authority to act during the ward's minority, whether the ward be of sound or unsound mind; and those things which a guardian may lawfully do for his infant ward are none the less lawful because it turns out afterwards that the ward was insane.[64]

§ 866. Administration Durante Minore Aetate.

Where the person designated as executor of a will is under age, it becomes necessary to appoint an administrator during minority, which appointment was at common law denominated *durante minore ætate*.[65] So when the next of kin is under age, the English practice in such cases is to appoint the infant's guardian, unless there be some other next of kin competent to act; though the rule is not invariable.[66] And in the English case of *John* v. *Bradbury* it is affirmed that the guardian of an infant sole next of kin shall not only administer in preference to creditors, but shall be exempted from security, except in very strong cases, notwithstanding the creditors request it.[67] So he is preferred to the husband of a married woman who died after a judicial separation.[68] But in this country, while there are statutes in some States favoring similar doctrines, in others the court has full discretion in selecting a substitute for the child.[69] Such administrator has for the time being all the powers of a general administrator, but his term of office is restricted to the infant's minority.[70]

§ 867. Guardians de Facto.

A *quasi* guardianship often arises at law where there has been no regular appointment, or an appointment without jurisdiction or some intermeddling; or even where the minor's property is pur-

62. Coon v. Cooke, 6 Ind. 268.

63. But see King v. Bell, 36 Ohio St. 460.

64. Francklyn v. Sprague, 121 U. S. 215.

65. 1 Wms. Ex'rs, 419, 420; 2 Redf. Wills, 92, 93.

66. *Ib.*

67. John v. Bradbury, L. R. 1 P. & D. 245.

68. Goods of Stephenson, L. R. 1 P. & D. 287. But the husband usually administers. See *post*, Vol. II.

69. 1 Wms. Ex'rs, 419.

70. 1 Wms. Ex'rs, 428, and notes; Schouler, Executors, §§ 132, 135.

chased by one confidentially related to him.[71] The general principle thus recognized is that any person who takes possession of an infant's property takes it in trust for the infant. Hence courts of equity will always protect the helpless in such cases by holding the person who acts as guardian strictly accountable. The father may thus be a *quasi* guardian.[72] So may a step-parent,[73] or a step-grandparent,[74] or a widowed mother who marries again,[75] or one whose appointment as guardian was irregular or null;[76] but not an executor or administrator in rightful possession of the infant's property, for he holds in a different capacity.[77] A son who takes charge of an incompetent father's estate, with the latter's acquiescence, may make his father an equitable ward.[78] Chancery has full jurisdiction over the transactions of all persons standing *in loco parentis*,[79] and a guardian *de facto* may be ordered to account in equity but not in the probate court.[80]

On the same principle, one regularly appointed guardian of an infant is held responsible for acts committed before qualifying as such by giving bonds.[81] And although his authority ceases when the ward attains majority, he continues personally responsible so long as his possession and control of the property continues.[82]

§ 868. Extra-territorial Rights of Guardians in General.

The guardian's authority is limited to the jurisdiction which appoints him, and does not extend to foreign countries, unless permitted by foreign laws. Every nation is sovereign within its own borders, but powerless beyond them. The rights of foreign guardians have been to some extent admitted, however, on the

71. See Hindman v. O'Connor, 54 Ark. 627. See *supra*, § 825.

72. Pennington v. Fowler, 3 Halst. Ch. 343; Alston v. Alston, 34 Ala. 15.

73. Espey v. Lake, 15 E. L. & Eq. 579.

74. 54 Ark. 627.

75. Wall v. Stanwick, 34 Ch. D. 763.

76. Crooks v. Turpin, 1 B. Monr. 185; Earle v. Crum, 42 Miss. 165; McClure v. Commonwealth, 80 Pa. St. 167; State v. Lewis, 73 N. C. 138.

77. Bibb v. McKinley, 9 Port. 636; Minfee v. Ball, 2 Eng. 520.

78. Jacox v. Jacox, 40 Mich. 473. See also Munroe v. Phillips, 64 Ga. 32; Sherman v. Wright, 49 N. Y. 227.

79. Espey v. Lake, 15 E. L. & Eq. 579.

80. Campbell v. O'Neill, 69 W. Va. 459, 72 S. E. 732.

81. Magruder v. Darnall, 6 Gill (Md.) 269.

82. Mellish v. Mellish, 1 Sm. & Stu. 138; Armstrong v. Walkup, 12 Gratt. 608. Whether a woman's letters abate or not on her marriage, she is liable if she allows her husband to use the ward's property. Hood v. Perry, 73 Ga. 319.

principle of comity.[83] These rights may be considered, *first*, as to the person of the ward; *second*, as to his estate.

§ 869. Rights of Foreign Guardian as to Ward's Person.

First, as to the ward's person. Many writers on public law claim that the guardian's authority extends everywhere. Others again deny that it extends beyond the jurisdiction which appoints.[84] In England, the paternal authority is recognized, even in aliens; but if an infant has a guardian appointed by any other authority out of the jurisdiction, the appointment fails as soon as the infant comes to England, and the court of chancery will thereupon appoint a guardian on petition.[85] Yet in an English case liberal favor was shown toward the foreign guardian of wards domiciled abroad. He had sent them to England to be educated, and wished to remove them to their own country in order to complete their education. The court refused to interfere with their removal, and allowed the exclusive custody to the foreign guardian; at the same time, however, refusing to discharge an order appointing English guardians.[86]

In this country, the rights and powers of guardians over the ward's person are considered strictly local, even as between different States,[87] though the paternal right would probably be recognized as in England.[88] But the custody of a child may be awarded to a foreign guardian, as while he has no absolute right to the child, his office will be deemed an important element in determining to whom custody should be given.[89]

83. See Story, Confl. Laws, §§ 492-529. Interference by English appointment with a French guardianship declined, where the infant lived in France. 41 Ch. D. 310.

84. See Story, Confl. Laws, §§ 495-497, and authorities cited.

85. Macphers. Inf. 577; *Ex parte* Watkins, 2 Ves. 470.

86. Nugent v. Vetzera, L. R. 2 Eq. 704. See 27 E. L. & Eq. 451.

87. Story, Confl. Laws, § 499; Morrell v. Dickey, 1 Johns. Ch. 153; Kraft v. Wickey, 4 Gill & Johns. 332; Burnet v. Burnet, 12 B. Monr. 323; Boyd v. Glass, 34 Ga. 253; Whart. Confl. Laws, §§ 261-264; Rice's Case, 42 Mich. 528. We have seen that the courts of a State or country will take jurisdiction for the time being where the ward *bona fide* resides in the jurisdiction, though not perhaps domiciled there. *Supra*, § 831. Such appointment may not clothe the guardian with extra-territorial authority, yet it is not void.

88. See Townsend v. Kendall, 4 Minn. 412.

89. Woodworth v. Spring, 4 Allen (Mass.), 321; *In re* Crosswell's Petition, 28 R. I. 137, 66 A. 55.

§ 870. Rights of Foreign Guardian as to Ward's Property.

Second, as to the ward's property. A distinction has been made between movables and immovables. As to immovable property, such as real estate, it is almost universally admitted that the law *rei sitæ* shall govern.[90] But writers do not agree as to movable property, such as goods and personal chattels, whether the law of the domicile shall prevail over that of the situation. Judge Story considered the weight of foreign authority in this respect, in favor of admitting the guardian's rights to prevail everywhere to the same extent as they are acknowledged by the law of the domicile.[91] And this seems to be the Scotch doctrine.[92] But according to the doctrine of the common law, now fully established both in England and America, the rights of a guardian over all property whatsoever are strictly territorial, and are recognized as having no influence upon such property in other countries where different systems of jurisprudence are established. No foreign guardian can, by virtue of his office, exercise his functions in another country or State, without taking out other letters of guardianship or otherwise conforming to the local law; while, on the other hand, local courts consider their own authority competent within the jurisdiction, if the ward's property be located there. Such is the rule in both countries.[93] And hence a foreign general guardian is often required to take out ancillary letters in the courts of a State in which he desires recognition.[94]

90. Story, Confl. Laws, §§ 500-502. And see *post,* § 943. As between West Virginia and Virginia, see Rinker v. Streit, 33 Gratt. 663.

91. Story, Confl. Laws, § 503; Schouler, Pers. Prop. 347-385; Wharton, Confl. Laws, §§ 265, 266.

92. Story, Confl. Laws, § 503; Fraser, Parent & Child, 604.

93. Story, Confl. Laws, § 504; *supra,* § 303; Rice's Case, 42 Mich. 528; Weller v. Suggett, 3 Redf. 249; Hoyt v. Sprague, 103 U. S. Supr. 613; Leonard v. Putnam, 51 N. H. 247. As to a contract by a person under guardianship, made in another State and valid there, see Gates v. Bingham, 49 Conn. 275. Where an infant, domiciled and having a guardian in one State, is taken to another State without the guardian's assent, the courts of the former State incline to uphold the guardian of their jurisdiction against a guardian appointed in the other State as to rents of lands. Munday v. Baldwin, 79 Ky. 121. Before permitting an infant's property to be transferred beyond the State limits, the court must be satisfied that the guardian has been regularly appointed according to the laws of the State where the ward resides, that the guardian is fit for the appointment, and that sufficient security has been given. Cochran v. Fillans, 20 S. C. 237. A guardian properly constituted in the State of the ward's residence is favored. Watt v. Allgood, 62 Miss. 38.

94. Gunther *Re,* 3 Dem. 386.

But the rigor of this rule is sometimes abated. In England, personal property will, under certain circumstances, be paid to an owner who, if domiciled and resident in that country, would not be allowed to receive it.[95] In this country there are local statutes which permit non-resident guardians to sue on compliance with certain formalities, or even without them,[96] and it is commonly provided by statute that a non-resident guardian may be appointed guardian in the State by filing a transcript showing his appointment,[97] which transcript must, however, show whether he is guardian of the person or of the estate,[98] but a foreign guardian has no greater authority than a domestic guardian and cannot sell the real estate without special license.[99]

Letters of guardianship have no extra-territorial effect, and hence a guardian cannot bring suit in one State by virtue of foreign letters,[1] unless admitted to do so on compliance with local statute or possibly by comity.[2] And this seems to be the English rule likewise.[3] Nor will the courts of one State enforce the obligation of a probate guardian's official bond with sureties given in another

95. Macphers. Inf. 577; Goods of Countess Da Cunha, 1 Hag. 237.

96. *Ex parte* Heard, 2 Hill Ch. 54; Hines v. State, 10 S. & M. 529; Sims v. Renwick, 25 Geo. 58; Grist v. Forehand, 36 Miss. 69; Martin v. McDonald, 14 B. Monr. 544; Carlisle v. Tuttle, 30 Ala. 613; Warren v. Hofer, 13 Ind. 167; *Re* Fitch, 3 Redf. 457; Shook v. State, 53 Ind. 403.

97. *Ex parte* Huffman, 167 F. 422; McGoodwin v. Shelby (Ky.), 206 S. W. 625; Orr v. Wright (Tex. Civ. App. 1898), 45 S. W. 629.

98. Gill v. Everman, 94 Tex. 209, 59 S. W. 531, 60 S. W. 913; Orr. v. Wright (Tex. Civ. App. 1898), 45 S. W. 629.

99. Woolridge v. Woolridge, 26 Ky. Law Rep. 97, 80 S. W. 775; Curtis v. Union Homestead Ass'n, 126 La. 959, 53 So. 63; Adkins v. Loucks, 107 Wis. 587, 83 N. W. 934. See Landreth v. Henson, 173 S. W. 427.

1. *In re* Kingsley, 160 F. 275; Pulver v. Leonard, 176 F. 586; Hoffman v. Watkins (Tex. Civ. App. 1910), 130 S. W. 625; Morrell v. Dickey, 1 Johns. Ch. 153; Kraft v. Wickey, 4 Gill & Johns. 322; Rogers v. McLean, 31 Barb. 304. This is the rule, too, in Louisiana. Succession of Shaw, 18 La. Ann. 265; Succession of Stephens, 19 La. Ann. 499. But as to instituting proceedings to call the resident guardian to account, see 109 Ill. 294; 33 S. C. 350.

2. Miller v. Cabell, 81 Ky. 178, 4 Ky. Law Rep. 962; Berluchaux v. Berluchaux, 7 La. 545; Curtis v. Union Homestead Ass'n, 126 La. 959, 53 So. 63; *In re* Rice, 42 Mich. 528, 4 N. W. 284; Hanrahan v. Sears, 72 N. H. 71, 54 A. 702; Pennsylvania Co. v. Raub, 30 Ohio Cir. Ct. R. 542; *In re* Crosby, 42 Wash. 366, 85 P. 1. See Smith v. Madden, 78 F. 833 (in federal court).

3. Story considers it doubtful. Beattie v. Johnston, 1 Phillips, Ch. 17; 10 Cl. & Fin. 42; *contra*, Morrison's Case, cited in 4 T. R. 140, and 1 H. Bl. 677, 682.

State.[4] The question whether the foreign jurisdiction has conferred similar privileges upon citizens of the local forum carries some weight.[5] But a court having general chancery jurisdiction over matters of guardianship may, it appears, in the exercise of sound discretion, and upon principles of comity, equity, and justice, order assets of the ward in the possession of a guardian resident within its jurisdiction to be delivered to the guardian abroad.[6]

A foreign guardian has no authority to settle a cause of action of the ward in the State.[7] A foreign guardian may be sued in the foreign State only if qualified to sue in the foreign State,[8] and not otherwise.[9]

Though the power of the guardian is local to the State in which he receives his appointment, yet he is competent to receive the property or custody of the ward in a foreign State to be taken to the State where both belong if he makes proof of his guardianship,[10] although the guardian obtains no title to the property which remains in the ward,[11] but the transfer to the foreign jurisdiction is not a matter of strict right, but rests in the sound discretion of

4. Probate Court v. Hibbard, 44 Vt. 597.

5. 13 Phila. 385, 389. The authority of a guardian of a non-resident minor is limited usually to the particular local property which confers a jurisdiction. Linton v. First Nat. Bank, 10 Fed. R. 894. See Hart v. Czapski, 11 Lea, 151. But in accounting for his investments a non-resident guardian should not be held to a narrower range of securities than the law of the ward's domicile allows. Lamar v. Micou, 114 U. S. 218.

6. Earl v. Dresser, 30 Ind. 11.

7. Devine v. American Posting Service, 174 Ill. App. 403; McGoodwin v. Shelby (Ky.), 206 S. W. 625.

8. Fenner v. Succession of McCann, 49 La. Ann. 600, 21 So. 768.

9. Boyle v. Griffin, 84 Miss. 41, 36 So. 141.

10. Carlisle v. Tuttle, 30 Ala. 613; Sturtevant v. Robinson, 133 Ga. 564, 66 S. E. 890; Warren v. Hofer, 13 In. 167; Vick v. Hibbs, 18 Ky. Law Rep. 820, 38 S. W. 711 (even where ward has removed after appointment of guardian in the State where the property still remains); McKee v. Stein's Guardian, 4 Ky. Law Rep. 900; Boyle v. Griffin, 84 Miss. 41, 36 So. 141 (without filing letters in this State); Mitchell v. People's Sav. Bank, 20 R. I. 500, 40 A. 502 (notice need not be served on ward, nor a guardian *ad litem* appointed); Snavely v. Harkrader, 29 Grat. (Va.) 112; Fidelity Trust Co. v. Davis Trust Co., 74 W. Va. 763, 83 S. E. 59.

An amended petition for the transfer of property out of the resident guardian's hands, pursuant to Code 1913, ch. 84, §§ 3, 5 (§§ 3981, 3983), held not vitiated by its failure to refer to the original petition. *Id.* See Central Trust Co. of Illinois v. Hearne, 78 W. Va. 6, 88 S. E. 450.

11. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850.

the court,[12] which may require good security,[13] or direct the payment of a regular allowance,[14] or refuse payment altogether;[15] the welfare of the infant being always considered in such cases.

A foreign guardian who improperly removes funds of his ward out of the State may be ordered to bring them back if jurisdiction over them can be obtained.[16]

The principles applicable to non-resident guardians in this country appear in many respects similar to those in case of foreign executors and administrators, and the rules we have stated might be subjected to modification by the mutual treaty stipulations of two independent governments.[17] The law of domicile controls properly as to the ward's capacity and the time when the law frees him from the disabilities of infancy.[18]

§ 871. Constitutional Questions Relating to Guardianship.

As each legislature in this country derives its authority from a written constitution, questions sometimes arise in our courts as to the validity of certain statutes, which in Great Britain are of no importance, since there an act of Parliament is the supreme

12. Earl v. Dresser, 30 Ind. 11, 95 Am. Dec. 660; Marts v. Brown, 56 Ind. 386; Blanchard v. Andrews, 90 Mo. App. 425; Banning v. Gotshall, 62 Ohio St. 210, 56 N. E. 1030.

13. Hoffman v. Watkins (Tex. Civ. App. 1910), 130 S. W. 625 (must give bond to pay local debts); Case of Andrews' Heirs, 3 Humph. 592; Martin v. McDonald, 14 B. Monr. 544; *Re* Fitch, 3 Redf. 457.

14. McNeely v. Jamison, 2 Jones, Eq. 186. And see *Ex parte* Dawson, 3 Bradf. 130; McLiskey v. Reid, 4 Bradf. 334.

15. See 2 Story, Eq. Juris., § 1354b; Stephens v. James, 1 M. & K. 627. Letters are thus granted in the State having property, ancillary to the guardianship in child's domicile or residence. Metcalf v. Lowther, 56 Ala. 312; Marts v. Brown, 56 Ind. 386. As to the right of foreign guardian to petition for appointment of guardian *ad litem* without ancillary letters, see Freund v. Washburn, 17 Hun, 543; Shook v. State, 53 Ind. 403. As to a foreign guardian's right to transfer stock, see Ross v. Southwestern R., 53 Ga. 514. An order of court does not authorize a foreign guardian beyond its own terms. Williams v. Duncan, 92 Ky. 125. Suit cannot be brought in a federal court. Morgan v. Potter, 157 U. S. 195.

16. Clendenning v. Conrad, 91 Va. 410, 21 S. E. 818.

17. Comomnwealth v. Rhoads, 37 Pa. St. 60. And see Pratt v. Wright, 13 Gratt. 175. The guardian of a minor who receives property of his ward in a foreign country or State must account for it, unless he can show that he has accounted for it abroad. Secchi's Estate, Myrick's Prob. 225. As to the proper course for care and transfer of the ward's money when a ward removes from the jurisdiction, and a new guardian is appointed in the State of his new domicile, see Snavely v. Harkrader, 29 Gratt. 112.

18. Woodward v. Woodward, 87 Tenn. 644.

law. Thus it is not uncommon for our legislatures to authorize or confirm the sale of lands held by guardians and other trustees by special statutes; and such statutes have been attacked either as an interference with the property rights of infants and their heirs, or as an usurpation of judicial functions.[19] Such acts are, however, constitutional, unless expressly forbidden, according to the best authorities, where at least the object is simply to provide for a change of investment for the beneficiary, and not to divest the latter of property rights.[20] But in a New Jersey case it was intimated by the Chancellor that, if fraud or sinister motives on the guardian's part were shown, the special act might be judicially avoided.[21] An act of the legislature may authorize a certain guardian to sell the real estate of his infant ward, subject to the approval of the sale by the probate court.[22] It is held that the legislature may enable a foreign guardian to sell lands within the State.[23] So a general law may be enacted for enabling guardians and other trustees to enter into agreements as to the disposition of property held by them, consistently with constitutional provisions which protect the rights of individuals; notwithstanding the rights of persons remotely interested in the estate, who are either not in existence or only contingently concerned, may be thereby compromised without their assent.[24] Doubtless the wiser policy of the legislature is to refer all cases of this kind to the courts under general laws; and thus do some State constitutions expressly require.[25]

19. See Davison v. Johonnot, 7 Met. 388, for a full discussion of the question.

20. Clarke v. Van Surlay, 15 Wend. 436; Cochran v. Van Surlay, 20 Wend. 365; Davison v. Johonnot, 7 Met. 388; Snowhill v. Snowhill, 2 Green, Ch. 20; Brenham v. Davidson, 51 Cal. 352; Hoyt v. Sprague, 103 U. S. Supr. 613. But see opinion of Justices, cited in 4 N. H. 572; Jones v. Perry, 10 Yerg. 59.

21. Snowhill v. Snowhill, 2 Green, Ch. 20.

22. Brenham v. Davidson, 51 Cal. 352.

23. Boon v. Bowers, 30 Miss. 246; Nelson v. Lee, 10 B. Monr. 495.

24. Clarke v. Cordis, 4 Allen, 466.

25. *Per curiam*, in Brenham v. Davidson, 51 Cal. 352. An act of the legislature cannot authorize a stranger, apart from guardianship, to sell an infant's land or other property as an individual, and so confer a good title; and certainly no act will be readily interpreted to mean this. The sale is supposed to be authorized as of one in the guardian or trust capacity, and to require or to respect his due appointment. Paty v. Smith, 50 Cal. 153; Lincoln v. Alexander, 52 Cal. 382. See, further, *Ex parte* Atkinson, 40 Miss. 17, to the effect that under the former constitution of that State no probate guardian could be appointed over a child whose father was living.

CHAPTER V.

RIGHTS AND DUTIES OF GUARDIANS CONCERNING THE WARD'S PERSON.

§ 872. Division of This Chapter.

As the guardian of a minor stands in the place of a parent, *sub modo,* his rights and duties, so far as concerns the person of his ward, are to be considered correspondingly with those of a parent. His rights relate chiefly to the ward's personal custody. His duties are those of protection, education, and maintenance. These rights and duties will be considered at length in the present chapter.

§ 873. Guardian's Right of Custody.

Guardianship, generally, carries with it the custody of the ward's person. This is especially true where the ward's parents are both dead or incompetent to act, for natural guardians have the prior claim to custody while alive. Someone must exercise the right of custody of the infant when the natural protector is wanting; and who is more suitable than the officer invested by law with the responsibility of paying for the child's education and maintenance? Hence the guardian's title is, in this respect, higher than that of relatives and friends; and he may insist upon taking the child from the control of a stepmother or grandmother, or from any

person to whom the father has informally committed the care.[26] For such considerations, however material in determining the selection of a guardian, become superseded by the actual appointment. And it has been said that the decision of the court as to the guardian's appointment is a final decision as to the care and custody of the ward,[27] but guardianship of a minor's estate gives no right to custody of his person,[28] although custody of the person may be given to the guardian of the estate.[29]

But the custody of infants, as we have seen, is a subject within the free discretion of courts of equity; and where the interests of the ward require it, the care of his person will be committed to others,[30] and the court may even make some temporary provision for custody *pendente lite*.[31] Chancery jurisdiction applies in this respect to testamentary and chancery guardianship. The good of the child is superior to all other considerations. Of this the court will judge in each case by the circumstances, and make orders accordingly, both as to actual custody and as to the persons who may have access to the child. In determining where the infant shall reside, the infant's inclination shall have considerable weight, if he be of sufficient age; but not, it would appear, during the period of nurture.[32] As to probate guardians, it is to be added that the more natural course, so far at least as strangers and distant

26. Coltman v. Hall, 31 Me. 196; Bounell v. Berryhill, 2 Cart. 613; Johns v. Emmert, 62 Ind. 533.

27. Cottrell v. Booth, 166 Ind. 469, 76 N. E. 546; Mason v. Williams, 165 Ky. 331, 176 S. W. 1171; *In re* Brown, — La. —, 44 So. 919; *In re* Lamb's Estate, 139 N. Y. S. 685; Senseman's Appeal, 21 Pa. St. 331; Stringfellow v. Somerville, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623.

28. *In re* Healther, 50 Mich. 261, 15 N. W. 487. See Bell v. Bell's Guardian, 167 Ky. 430, 180 S. W. 803 (one removed as guardian of estate may be retained as guardian of the person).

29. Stone v. Duffy, 219 Mass. 178, 106 N. E. 595 (if parent unfit). See Sparkman v. Stout (Tex. Civ. App.), 212 S. W. 526 (custody not awarded in proceedings for appointment).

30. Roach v. Garvin, 1 Ves. 160; Macphers. Inf. 119; Story, Eq Juris. § 1341; Ward v. Roper, 7 Humph. 111.

31. *In re* North, 11 Jur. 7. See Anderton v. Yates, 15 E. L. & Eq. 151; Smith v. Haas, 132 Ia. 493, 109 N. W. 1075 (although guardian already appointed). See McLain v. Brewington (Ark.), 211 S. W. 174 (court may properly refuse to transfer custody during contest over guardianship).

32. Anon. 2 Ves. Sen. 374; Regina v. Clark, 40 E. L. & Eq. 109; People v. Wilcox, 22 Barb. 178; Bounell v. Berryhill, 2 Cart. 613; Rex v. Greenhill, 4 Ad. & El. 642; Garner v. Gordon, 41 Ind. 92. See *supra*, §§ 873-875, as to custody.

The wishes of the ward will not displace the rights of the guardian as to custody. Palin v. Voliva, 158 Ind. 380, 63 N. E. 760.

relatives are concerned, is, in controversies over custody, to apply for the removal of the guardian already appointed, and for the appointment of another competent to take actual control of the ward's person.[33]

In a contest over the custody of a minor between guardians appointed by different courts the best interests of the ward should be considered.[34]

§ 874. Testamentary Guardians.

Testamentary guardians cannot be controlled in their rights by expressions, in other parts of the will appointing them, which amount to a mere recommendation. A case of this sort came before Lord Chancellor Cottenham in 1847. The testator had appointed testamentary guardians over his children in due form, but had further expressed the wish that in case of his wife's death during their minority they should be placed under the care of certain female relatives. The wife having died, the female relatives desired to assume full control. The Lord Chancellor refused to accede to this extent; but, upon his suggestion, an arrangement was effected, satisfactory to all parties, so as to give the immediate custody to the relatives, while preserving to the testamentary guardian that general control and superintendence which it was his duty to exercise under the will.[35]

§ 875. Parent's Rights to Custody.

The English cases are numerous where the mother's claim has been postponed to that of the testamentary or chancery guardian.[36] And where the mother clandestinely removes her child, the court has ordered him to be delivered up to the guardian.[37] So where she procures his marriage in violation of the statute.[38] But the

33. Under a State code which provides that a guardian shall not be entitled to the custody of the ward as against the parent if the latter be "a suitable person," the court on appointing a guardian should leave open the question whether the parent is suitable. McDowell v. Bonner, 62 Miss. 278. A guardian is not, as of right, entitled to the custody of his ward under fourteen years of age, but the interest of the ward will be considered. Heather, *Re*, 50 Mich. 261.

One of the child's grandfathers was appointed its guardian; afterwards another one adopted it, the parent before dying giving it orally to the latter; but the guardian's right to the child's custody was treated as superior. Burger v. Frakes, 67 Ia. 460.

34. Kelsey v. Green, 69 Conn. 291, 37 A. 679, 38 L. R. A. 471.

35. Knott v. Cottee, 2 Ph. 192.

36. See Macphers. Inf. 119-121.

37. Wright v. Naylor, 5 Madd. 77.

38. Eyre v. Countess of Shaftesbury, 2 P. Wms. 103; Gilb. Eq. 172.

court interferes with reluctance as against the mother, where no misconduct on her part appears, especially if the infant is of tender years or delicate constitution, and requires maternal care and nourishment. And Lord Eldon observed, in a case where the mother's rights came in conflict with those of the testamentary guardian, that though the effect of the appointment of a guardian is to commit the custody with the guardianship, the court looks with great anxiety to the execution of the duty belonging to the guardian, and the attention expected to be paid to the reasonable wishes of the natural parent.[39]

The right of chancery courts to regulate the personal custody of infants subject to probate guardianship has also been asserted in this country. This principle determined the decision of the court in the New York case of *People* v. *Wilcox*.[40] Here it appeared that the parents had separated, the father being a man of intemperate habits. The child, by the father's permission, was subsequently brought up at the house of his paternal grandparents. Upon the father's death, the grandparents secured letters of guardianship, without notice to the mother, who was resident elsewhere. She afterwards came forward and claimed control of her child, then only nine years old. It appeared that the child was happy and well provided for at the home of his grandparents. But it also appeared that the mother was a person of good character, and that no sufficient reason existed for depriving her of her natural offspring. The child was therefore taken from the legal guardian and his custody awarded to the mother; the interest of the child being duly taken into consideration.

But whatever might have been the language of the court in this case, it is apparent that the circumstances were of a peculiar character. This decision turned not merely upon chancery powers. It recognized the deeper principle of natural law, that the relation of parent and child shall not be roughly severed. And thus we find probate guardianship in this country frequently limited by positive enactment, so as to reserve to the parents, or in other words to the natural guardians, the natural control of their own children and the right to educate, when alive and competent to transact business.[41]

39. Earl of Ilchester's Case, 7 Ves. 380.

40. The People v. Wilcox, 22 Barb. 178.

41. See Smith's Prob. Prac. 82 87; Ramsay v. Ramsay, 20 Wis. 507; *ante*, § 817.

In the following cases the right of

Where a guardian is appointed on account of the temporary disability of the mother the child may be remitted again to her care when she recovers.[42] As our former discussion of the subject of parental custody may have led the reader to infer, the American rule is not uniform in this respect; and as to testamentary and probate guardians, the widowed mother is in some States preferred to the guardian, while in others the guardian is preferred to the mother; the legislature frequently supplying the definite rule of guidance.[43]

§ 876. Parent's Right of Access.

Chancery will grant access in certain cases while awarding the custody of the infant to other persons. Not only have orders of access been made in the mother's favor, but, after her death, access has been allowed to her representatives.[44] And where Lord Hardwicke appointed a grandmother guardian in preference to the father's executor, he ordered that the latter should have free access to the infants.[45] So in a Georgia case the court, while confirming the guardian's right of custody, allowed access to a near relative on her request.[46] Where, too, a decree of divorce gives the right of access to a certain parent, not even a testamentary guardian can refuse obedience.[47]

§ 877. Habeas Corpus to Determine Custody.

Proceedings on a writ of *habeas corpus* may determine the question of legal custody in cases of this kind. But a child in the personal keeping of his guardian is in legal custody; nor can

a guardian to the custody of a child was held superior to that of the mother: Macready v. Wilcox, 33 Conn. 321; Hovey v. Morris (Ind.), 7 Blackf. 559; *Ex parte* Chambers, 221 Mass. 178, 108 N. E. 1070 (illegitimate child). While in the following cases the guardian's rights to the custody of the child were held inferior to those of the parents: McKinnon v. First Nat. Bank (Fla.), 82 So. 748; Rallihan v. Motschmann, 179 Ky. 180, 200 S. W. 358 (where parent fit); Mathews v. Wade, 2 W. Va. 464. See *Ex parte* Brown, 98 Kan. 663, 159 P. 405.

42. *In re* De Saulles, 167 N. Y. S. 445, 101 Misc. 447.

43. Lord v. Hough, 37 Cal. 657; Ramsay v. Ramsay, 20 Wis. 507; *contra*, Macready, v. Wilcox, 33 Conn. 321. And see Peacock v. Peacock, 61 Me. 211.

44. Ord v. Blackett, 9 Mod. 116; Macphers. Inf. 120.

Where the parents are fit persons the court will allow them to have access to children. *In re* Ross' Guardianship, 92 P. 671; *In re* De Saulles, 167 N. Y. S. 445, 101 Misc. 447.

45. Hunter v. Macrae, 17 Oct. 1738; cited in Macphers. Inf. 121.

46. *Ex parte* Ralston, 1 R. M. Charlt. 119.

47. Hill v. Hill, 49 Md. 450.

unlawful imprisonment or restraint be imputed from the guardian's refusal to surrender such child to the parent.[48] On the other hand, the court cannot entertain *habeas corpus* to restore to the guardian a child forcibly removed by the parent, unless the child is actually restrained of liberty.[49] Besides the writ of *habeas corpus,* there is a remedy by petition to the court of chancery.[50] In proceedings at the present day, English and American, whether by *habeas corpus* or in chancery, the inclination grows to make the welfare of the child paramount and to treat the award of custody as an equitable matter; even though the wishes of a parent or a testamentary guardian should thereby be disregarded.[51]

§ 878. Guardian's Right to Change Ward's Domicile or Residence.

The question whether the guardian may change the ward's domicile from one country or State to another has given rise to much discussion. In England, it was decided that the surviving parent, being also the guardian, was competent to do so.[52] The case came before Sir William Grant, and was argued by counsel with great learning and ability. It was here shown that the best Continental jurists supported these views; among them, Voet, Rodenburgh, Bynkershoek, and Pothier. This is the leading case on the subject, and its authority has been fully recognized in the United States.[53] The great objection to a change of the infant's domicile is that the right of succession to personal property may be thereby affected; and it seems probable that, if the change is made with fraudulent intent, to the ward's injury or the custodian's private advantage, it will not be sustained. Moreover, as the case above referred to was that of a parent, it has been doubted whether a guardian, as such, not being a parent, has the right to change his

48. People v. Wilcox, 22 Barb. 178; Townsend v. Kendall, 4 Minn. 412; *In re* Andrews, L. R. 8 Q. B. 153. The guardian's assent to a temporary custody does not conclude him. Commonwealth v. Reed, 55 Pa. St. 425.

49. Foster v. Alston, 6 How. (Miss.) 406.

50. Story, Eq. Juris., § 1340, and cases cited. Concerning statute procedure for custody, see Peacock v. Peacock, 61 Me. 211.

51. (1893), 2 Q. B. 232; People v. Watts, 122 N. Y. 238; Lally v. Fitz Henry, 85 Ia. 49.

Even a mother, free from misconduct, who is appointed legal guardian of a daughter sixteen years old cannot assume custody of the child where the latter's welfare opposes. Reg. v. Gungall (1893) 2 Q. B. 232.

52. Potinger v. Wightman, 3 Mer. 67. And see preceding chapter.

53. Holyoke v. Haskins, 5 Pick. 20; 2 Kent Com. 227, *n.*

ward's domicile. In Pennsylvania such a guardian's authority has been denied, independently of a court's permission, and the power confined to the parents.[54] But Chancellor Kent expresses dissatisfaction with such a doctrine, and considers the objection against the guardian's power too refined and speculative.[55] Other American authorities sustain his view, though in general assuming the principle, rather than asserting it, and not without some bias as to the particular consequences to result.[56] The particular question does not seem to have been raised in England. With the facilities of modern travel and the liberal intercourse of nations, the tendency increases in favor of the guardian's power to change in good faith his ward's residence, if not the domicile, and even though not endowed with parental authority. This principle is the more readily admitted, so far as different counties in the same State are concerned.[57] And it would be unwise for American courts to apply, as between States united under one general government, the same rigidly exclusive doctrines which foreign countries differing in religion, customs, and civil institutions, may see fit to adopt in their intercourse with one another. For such a change might be for the direct benefit of the ward's health, education, or personal surroundings, and the same guardian might procure a new appointment in the State of new residence.[58]

54. School Directors v. James, 2 Watts & Serg. 568; and see Story, Confl. Laws, §§ 494, 504; Estate Anna M. Fulton, 14 Phila. 298.

55. 2 Kent, Com. 227, *n.* (c), where this subject is fully discussed.

56. See Lamar v. Micou, 114 U. S. 218, where with the guardian's assent the infants acquired a grandmother's domicile.

Where clearly disadvantageous to the ward and the ward's kindred and connections this right is not favored. The guardian's right to change the domicile is denied where such change affects the ward's testamentary capacity. Daniel v. Hill, 52 Ala. 430. Or where he sent the ward away to prevent a marriage against his wishes; such marriage not being an objectionable one. Wynn v. Bryce, 59 Ga. 529.

57. *Ex parte* Bartlett, 4 Bradf. 221. But the guardian's intention to change the ward's domicile, especially in the case of a very young child, is not to be presumed. Marheineke v. Grothaus, 72 Mo. 204. Here the question arose as to whether, the guardian having died, a successor in the trust was to be appointed in a different county; which would have been disadvantageous to the ward.

58. In Wilkins's Guardian, 146 Pa. St. 585 (1891), School Directors v. James, *supra*, is denied or distinguished; and a guardian was permitted to change his ward's residence for *bona fide* and salutary reasons, without consent of the domiciliary court, by bringing the ward into this State and taking letters in the new jurisdiction of residence.

A mere custodian of the child under the guardian's sanction has of course no right to change the ward's domicile. Mills v. Hopkinsville, Am.

The English chancery court reluctantly permits its wards to be carried out of the national jurisdiction. The Chancellor in *De Manneville* v. *De Manneville* restrained a father, himself an alien, from removing his child to a foreign country.[59] In other cases, permission has been granted under stipulations for the benefit of the child; the guardian being required to transmit regular returns to the court with vouchers, and to bring back the ward within a specified time.[60] Similar orders in chancery have been made in this country, though rarely.[61]

§ 879. Right to Personal Services of Ward.

The guardian has not the same right as a father to the personal services of the infant, where he does not undertake to stand *in loco parentis*,[62] which he sometimes does. For as his duty to educate and maintain is limited by law to the ward's resources, and is not, like the responsibility of a parent, absolute, so his rights are those of a representative, who should seek to add to the trust fund in his hands, and not to his own private emolument.[63]

Dig. 1889; Allgood v. Williams, 92 Ala. 551.

A guardian may change the domicil of the ward for his benefit. Smidt v. Benenga, 140 Ia. 399, 118 N. W. 439. *In re* Kiernan, 77 N. Y. S. 924, 38 Misc. 394.

59. 10 Ves. 52. See Dawson v. Jay, 27 E. L. & Eq. 451.

60. Jeffreys v. Vanteswartsworth, Barn. 141; Jackson v. Hankey, Jac. 265, *n.;* Stephens v. James, 1 M. & K. 627; Lethem v. Hall, 7 Sim. 141; Talbot v. Earl of Shrewsbury, 18 L. J. 125. See Macphers. Inf. 129-132.

61. *Ex parte* Martin, 2 Hill, Eq. 71. Lord Chancellor Cottenham has observed, on this subject, that while circumstances may occur, such as the ill-health of the ward, so as to render his removal necessary, the general rule ought to be against permitting an infant ward to be taken out of the jurisdiction. He further declared his regret that this rule had not been more strictly adhered to, and his conviction that a permanent residence abroad was injurious to the future prospects of English children, inasmuch as they were thus deprived of their religious opportunities, separated from their natural connections, estranged from the members of their own families, withdrawn from those courses of education which their contemporaries were pursuing, and accustomed to habits and manners which were not those of their own country, and were constantly becoming from day to day less and less adapted to the position which they should afterwards occupy in their native land. Campbell v. Mackay, 2 M. & C. 31.

62. Phillips v. Davis, 2 Sneed, 520; Calhoun v. Calhoun, 41 Ala. 369; Crosby v. Crosby, 1 S. C. (N. S.) 337; Armstrong v. Walkup, 12 Gratt. 608. Among the miscellaneous items which have been allowed a guardian in his accounts may be mentioned that of *bona fide* expenses incurred in removing the ward to another State. Cummins v. Cummins, 29 Ill. 452; Champlin v. Slocum (R. I.), 103 A. 706.

63. See Bass v. Cook, 4 Port. 390; Bouv. Dict. "Guardian;" Bannister v. Bannister, 44 Vt. 624; Haskell v.

Where a father who is guardian of his minor children cultivates a farm belonging to them on his own account he will be entitled to its proceeds though he uses their labor in cultivating it if he has not lost the right to their services by failing to maintain and educate them.[64] The value of the ward's services to the guardian is not property for which the guardian is bound to account.[65]

The guardian should keep the ward employed when of suitable age and capacity so that he may not exhaust the estate by his maintenance,[66] and the guardian, acting *in loco parentis,* may bind out his ward as an apprentice whenever the father could do so. This, however, is a matter almost exclusively of statute regulation. And while the father is usually held liable in damages for his son's breach of contract, it would seem that the guardian is not personally responsible for his ward unless the statute makes him so.[67]

As the guardian is bound to promote the moral welfare of the person intrusted to his care, he may warn off from the ward's premises any persons improper for him to associate with, and, if necessary, expel them forcibly. This right is to be reasonably construed; and in the use of means and the amount of force necessary to effect his object, he is allowed a liberal discretion, such as a parent might exercise under like circumstances.[68] And in many other respects the rights of a guardian resemble closely those of a parent *pro tanto.*[69]

§ 880. Guardian's Duties as to Ward's Person; In General.

The guardian's duties as to the ward's person are those of protection, education, and maintenance. In exercising them, he is bound to regard the ward's best interests. Guardians, as we have

Jewell, 59 Vt. 91. A guardian commits no breach of duty towards his ward who is nearly of age, in permitting the ward to devote all his wages towards keeping together and supporting his orphan brothers and sisters. Shurtleff v. Rile, 140 Mass. 213. Otherwise *semble* if the guardian allowed such wages to be devoted to vicious and improper uses. *Ib.*

64. Parlin & Orendorff Co. v. Webster, 17 Tex. Civ. App. 631, 43 S. W. 569.

65. Champlin v. Slocum (R. I.), 103 A. 706.

66. Marquess v. La Baw, 82 Ind. 550.

67. Velde v. Levering, 2 Rawle, 269.

68. Wood v. Gale, 10 N. H. 247.

69. Insane persons and spendthrifts cannot manifestly be subjected to the same personal restraint and custody as infants. But the fact that such ward occupies his own house affords him no special immunity against his guardian. Accordingly, it has been held that the guardian of a spendthrift may enter the dwelling-house of the latter, in the performance of official duties, without his permission and

seen, are seldom appointed where there is not some property. But even though the ward be penniless, we are not to suppose that one vested with the full right of custody can neglect with impunity those offices of tenderness which common charity as well as parental affection suggest. For to the orphan he stands in some sense in the place of a parent, and supplies that watchfulness, care, and discipline which are essential to the young in the formation of their habits, and of which being deprived altogether, they had better die than live.

§ 881. Liability for Support of Ward.

It is, however, to be always borne in mind that while the father is bound to educate and maintain his minor children absolutely and from his own means, with a right to their services as an offset, no such pecuniary responsibility is imposed upon a guardian who is not the parent or does not undertake to stand in place of one. The latter, by virtue merely of such trust, need only use for that purpose the ward's fortune. Hence, in supplying the wants of his wards, he is to consider, not the style of life to which they have been accustomed, so much as the income of their estate at his disposal. Whatever their social rank may have been, he may, provided they are left destitute, place them at work, or, if they are too young or feeble, surrender them to some charitable institution; they should, if old enough and able, be kept at work earning their support. An agreement may thus be made between the guardian and some relative of the child or a stranger, for the fair support of the ward in exchange for his services. He should, however, act with delicacy and prudence; he may properly consider in this connection the habits and tastes of the children and the wishes of their relatives; and he can relieve himself of responsibility by asking judicial guidance. The courts show a liberal disposition to protect the guardian from personal liability on account of his ward. And if a guardian has permitted the ward, at his own cost, to remain in the care and custody of another, without express contract as to the period of time, he may, whenever he pleases, terminate his own personal liability by giving notice. Nor does it affect the case that his ward is then too sick to be removed.[70]

against his will. State v. Hyde, 29 Conn. 564.

70. Spring v. Woodworth, 4 Allen, 326; Overton v. Beavers, 19 Ark. 623; Bredin v. Dwen, 2 Watts, 95; Hussey v. Roundtree, Busb. 110; Gwaltney v. Cannon, 31 Ind. 227; McDaniel v. Mann, 25 Tex. 101; Ford v.

On the other hand, the guardian may make himself liable for his ward whenever he chooses to do so, and makes that choice manifest, like anyone else *in loco parentis*. If a guardian contracts with another to support his ward, he may become personally bound by his failure to limit the right for indemnity to the estate in his hands.[71]

Where the guardian supports the wards without expectation of reimbursement, he cannot be credited with the expense of support.[72] The discretion of the guardian in maintaining the ward

Miller, 18 La. Ann. 571; Brown v. Yaryan, 74 Ind. 305. As soon as one not a parent or *in loco parentis* is appointed guardian he may charge for the support of the ward. Pratt v. Baker, 56 Vt. 70; Moyer v. Fletcher, 56 Mich. 508. A guardian who is also stepfather, and maintains the wards in his family and receives their services, may be allowed a reasonable sum for their support. Latham v. Myers, 57 Ia. 519; Marquess v. Le Baw, 82 Ind. 550; In the Matter of Estate of Mabel Ward, 73 Mich. 220. The guardian cannot charge his ward's estate for money expended in board and education, unless there was no parent able or willing to provide, and the estate justified the expenditure. State v. Roche, 91 Ind. 406. Nor can he squander his ward's money in paying others for the ward's maintenance. Conant v. Souther, 80 Wis. 656.

Some State codes require that the guardian of a minor who has a father or mother shall not expend anything for the ward's support without a precedent order of court. Darter v. Speirs, 61 Miss. 148. And see Stigler v. Stigler, 77 Va. 163. If the guardian pays in such cases at all, it does not follow that he must pay into the parent's own hands. Quinn v. Hill, 6 Dem. Sur. 39. As to orders authorizeing expenditure for the support of a lunatic, see Hambleton's Appeal, 102 Pa. St. 50.

71. See Lewis v. Edwards, 44 Md. 333, as to offset for the services of the ward to one who sues the guardian for his board. On the principle of the text, a case in Vermont was decided a few years ago. The guardian had contracted for the board of his ward, at a dollar and a half a week, fixing no limitation as to time. The person furnishing the board afterwards notified him that he should raise the price to two dollars a week, and that if this was not satisfactory the ward must be taken away. The guardian did not take the ward away, nor on the other hand did he expressly accede to the new contract. But the court inferred from the circumstances that he had made himself personally liable for the increased rate. It was observed in this case that the guardian has the possession and control of the ward's estate, for his support and maintenance, and has the power of indemnifying himself for any contracts he may make; that it is his business to know the amount and situation of the estate, and that he is not obliged to incur any liability beyond it. If he do so, it is his own fault, for which others, who cannot be so well possessed of this knowledge, ought not to suffer. But the court also held that under the above contract the guardian was not personally liable for extra charges against the ward, such as repairs on clothing, washing, care and medical attendance while sick, and burial expenses. Hutchinson v. Hutchinson, 19 Vt. 437.

72. Forbes v. Ware, 172 Mass. 306, 52 N. E. 447; *In re* Dahlmier, 78

will not usually be reviewed,[73] and he may be allowed for such board and maintenance of his ward as would have been allowed if he had made prior application.[74] Advances may be made to the ward in a proper case.[75] The guardian cannot relieve himself from responsibility by delegating the duty of support to the ward himself or to a third person.[76]

§ 882. Support by Guardian Before and After Guardianship.

The guardian may be allowed for payments made out of the estate after the ward comes of age for the ward's support,[77] and not usually for maintenance of infants prior to his appointment.[78]

§ 883. Board Furnished by Guardian.

The guardian may be allowed for board furnished the ward,[79] but where the guardian furnishes board for the ward without intending to charge for it he cannot later make a charge for it.[80] So where the guardian took a bequest made to him by the father of the ward conditioned on his caring for the ward until he became of age, he cannot be allowed for board furnished.[81]

Minn. 320, 80 N. W. 1130 (where second husband used farm of children of wife by first husband as his own and supported all out of it); Abrams v. United States Fidelity & Guaranty Co., 127 Wis. 579, 106 N. W. 1091, 5 L. R. A. 575, 115 Am. St. R. 1091. See Trouth v. Brown, 186 Ill. App. 225 (no charge made for board where ward did housework and no charge intended).

73. *In re* Boyes' Estate, 151 Cal. 143, 90 P. 454; Gott v. Gulp, 45 Mich. 265, 7 N. W. 767. See Wheeler v. Duke, 29 Tex. Civ. App. 20, 67 S. W. 909 (holding order to be void which delegates to the guardian the duty of determining the sum necessary for education).

74. *In re* Boyes' Estate, 151 Cal. 143, 90 P. 454 (apportioned numerically among wards); Wilson v. Fidelity Trust Co., 30 Ky. Law Rep. 263, 97 S. W. 753 (not out of principal); *In re* Ward, 98 N. Y. S. 923, 49 Misc. 181.

75. *In re* White, 91 N. Y. S. 513, 101 App. Div. 172.

76. Bliss v. Spencer (Va.), 98 S. E. 593.

77. *In re* Boyes' Estate, 151 Cal. 143, 90 P. 454.

78. Farris v. Bingham, 164 Ky. 444, 175 S. W. 649. *Contra*, State *ex rel.* Strickland v. Strickland's Adm'r, 80 Mo. App. 401 (even before his appointment). See Logan v. Gay, 99 Tex. 603, 87 S. W. 852, 90 S. W. 861 (as to claims for necessaries furnished before the guardianship commenced).

79. *In re* Boyes' Estate, 151 Cal. 143, 90 P. 454; Miller v. Lindemann, 206 Ill. App. 130; Rhodes v. Frazier's Estate (Mo. App.), 204 S. W. 547; Cutting v. Scherzinger, 40 Ore. 353, 68 P. 393, 69 P. 439; Mumford v. Rood, 153 N. W. 921; De Cordova v. Rogers, 97 Tex. 60, 75 S. W. 16; Logan v. Gay, 99 Tex. 603, 90 S. W. 861 (reversing 87 S. W. 852).

80. State *ex rel.* Garesche v. Slevin (Mo. 1887), 6 S. W. 71. See Diffie v. Anderson (Ark.), 208 S. W. 428.

81. *In re* Klein, 142 N. Y. S. 557, 80 Misc. 377.

§ 884. Services of Ward to Guardian to be Credited.

The guardian cannot be allowed anything for support where he has had services from the ward equal in value to the expense of maintenance,[82] and whenever he takes the ward into his own household as a boarder, the value of the child's services received must be computed as against any charge of the guardian for care and maintenance.[83]

§ 885. Allowance to Parent for Ward's Support; Chancery Rules.

As to the guardian's own charges for the maintenance of wards, there can be no question that he is neither obliged as such to maintain his wards at his own expense, nor justified in appropriating their earnings to himself. But as the services of children and the cost of their board are always mutual offsets, the courts are reluctant to allow charges of this sort, for or against a guardian who brings up his ward in his own family; more especially where the claim seems to have been made up from afterthought, and without previous stipulation. Intention, on his part, to maintain the ward gratuitously may be inferred from circumstances. In this sense we understand certain *dicta* of the courts to the effect that a guardian cannot charge for board where he has offered to bring up the ward at his home free of expense; for it is to be supposed that there is mutuality in all contracts, and that reasonable notice might terminate any liability which had no fixed limit.[84] But there are circumstances under which a guardian's promise to the ward not to charge him for board would be void for want of consideration.[85]

82. Campbell v. Clark, 63 Ark. 450, 39 S. W. 262; Marquess v. La Baw, 82 Ind. 550; Sims v. Billington, 50 La. Ann. 968, 24 So. 637.

83. Otis v. Hall, 117 N. Y. 131; Marquess v. Le Baw, 82 Ind. 550; Starling v. Balkum, 47 Ala. 314; Dawson v. Mann, 6 Ky. Law Rep. 296; Clement v. Hughes, 13 Ky. Law Rep. 352; 17 S. W. 285; Hedges v. Hedges, 24 Ky. Law Rep. 2220, 73 S. W. 1112.

84. Manning v. Baker, 8 Md. 44; Armstrong v. Walkup, 9 Gratt. 372; Hayden v. Stone, 1 Duv. 396; Hendry v. Hurst, 22 Ga. 312; Cunningham v. Pool, 9 Ala. 615. Owen v. Peebles, 42 Ala. 338, recognizes a guardian's claim for keeping his ward's horse, in a proper case. Equity disinclines to charge for a ward's maintenance for the benefit of the guardian's general creditors. Griffith v. Bird, 22 Gratt. 73. Or to allow the guardian for supporting the ward before his appointment, except under strong circumstances. Olsen v. Thompson, 77 Wis. 666. Trumped-up claims of maintenance are of course disallowed. *In re* Eschrich, 85 Cal. 98; Taylor and Others v. Hill, 86 Wis. 99.

85. Keith v. Miles, 39 Miss. 442.

As the father is bound to support his own children, he cannot, when guardian, claim the right to use the income of their property for that purpose; much less to disturb the principal.[86] But, as we have seen, a father is allowed, when his means are small, to claim assistance from their fortunes, to bring them up in becoming style.[87] And where the father, when acting as guardian for his own children, might have reimbursed himself, any other person, as guardian, may help him; rather, however, for the future than for the past.[88]

Where the father is a fit person to have custody of the child the court may refuse to order him to pay for its support to a guardian who refuses to allow the father to have custody,[89] but where the

86. Leach v. Williams, 30 Ind. App. 413, 66 N. E. 172; Corblay v. State, 81 Ind. 62; *In re* Tolifaro, 113 Ia. 747, 84 N. W. 936; *In re* Carter, 120 Ia. 215, 94 N. W. 488; Clement v. Hughes, 13 Ky. Law, 352, 17 S. W. 285; Huffman v. Hatcher, 178 Ky. 8, 198 S. W. 236; Windon v. Stewart, 43 W. Va. 711, 28 S. E. 776; Town of Fairhaven v. Howland, 216 Mass. 149, 103 N. E. 302 (grandfather by statute made liable for support of indigent grandchildren). See *In re* Putney, 114 N. Y. S. 556, 61 Misc. 1.

87. Corbaley v. State, 81 Ind. 62 (father unable to work); Hedges v. Hedges (Ky. 1902), 67 S. W. 835; Harper v. Payne, 24 Ky. Law. Rep. 2301, 73 S. W. 1123; Watson v. Watson (Ky.), 209 S. W. 524; McGreary v. McGreary, 181 Mass. 539, 63 N. E. 917; *In re* Ward's Estate, 73 Mich. 220, 41 N. W. 431; Fitzsimmons v. Fitzsimmons, 81 Mo. App. 604.

88. Macphers. Inf. 219; Clark v. Montgomery, 23 Barb. 464; Beasley v. Watson, 41 Ala. 234; Welch v. Burris, 29 Ia. 186; Myers v. Wade, 6 Rand. 444; Walker v. Crowder, 2 Ired. Eq. 478. See *supra*, §§ 793, 794. As to parents, and those like a stepfather who choose to stand in place of a parent, the rules of maintenance which have already been stated apply to such allowances, in a guardian's accounts. If the guardian, or the person with whose claim he charges himself, was of adequate means, and bound legally to maintain the child as parent, or fully undertook to supply the place of parent, education and support cannot generally be allowed from the ward's estate. Bradford v. Bodfish, 39 Ia. 681; Douglas's Appeal, 82 Pa. St. 169; Snover v. Prall, 38 N. J. Eq. 207; Horton's Appeal, 94 Pa. St. 62. The expense of past maintenance is the less readily allowable. Folger v. Heidel, 60 Mo. 284. Yet future maintenance is chargeable where the ward's means were disproportionate to the parent's and needful to provide in suitable style; and even past maintenance may be thus allowed. *Supra*, §§ 793, 794. And if one in place of parent has undertaken the function upon some such proviso, the ward's income may be used. The circumstances may always be considered and the proportionate means as between the ward and the person fulfilling the parental functions. Voessing v. Voessing, 4 Redf. 360. The guardian of an insane ward may properly charge for the expense of boarding the ward at an insane asylum; the ward's estate being sufficient for such expenditure. Corcoran v. Allen, 11 R. I. 567.

89. *In re* Ross' Guardianship, 92 P. 671.

guardian is appointed because the father is unfit there is an implied promise on his part to pay for support. A probate guardian who is step-father to his wards will readily be presumed to stand to them in the place of a father, so far as liability for their support and a right to their services are concerned; and this rule may apply where he occupies their house for many years,[90] but in a proper case a stepfather not being bound to support the child may have an allowance for such support.[91]

And the widow will not usually be allowed for the board of her child[92] unless she is in straitened circumstances.[93] And a widow who is primarily liable for the support of her children will usually be allowed for their support only the income from their estate.[94] A mother who is the guardian of her infant child cannot be allowed for motherly services rendered to it, but only for cash expenditures.[95]

The allowance of money for the maintenance and education of infants constitutes an important branch of the English as contrasted with our American chancery jurisprudence. Generally speaking, whenever application is made for the appointment of a chancery guardian, maintenance is also applied for; and the guardian receives no more than the annual sum fixed by the court. The ward's whole fortune is held at the disposal of the court, whether the infant was made a ward by suit or otherwise. If a suit be pending, the guardian receives his allowance through the receiver or some other officer of the court. If there be no suit pending, the executor or trustee pays the annual sum fixed by the court; and if the whole proceeds of real estate be ordered for maintenance, the tenants are safe in attorning to the guardian. But parties making payment are discharged only to the extent of the allowance decreed.[96]

90. Mulhern v. McDavitt, 16 Gray, 404; *supra*, § 686.

91. Miller v. Lindemann, 206 Ill. App. 130 (only after notice to guardian that he will claim allowance); Cutting v. Scherzinger, 40 Ore. 353, 68 P. 393, 69 P. 439. See *In re* Klunch, 68 N. Y. S. 629, 33 Misc. 267.

92. *In re* Grant, 166 N. Y. 640, 60 N. E. 1111; Donnell v. Dansby (Okla.), 159 P. 317; J. H. Cox & Co. v. Fisher (Okla.), 161 P. 171.

93. Williams v. Clarke, 81 N. Y. S. 381, 82 App. Div. 199; Wing v. Hibbert, 20 Ohio Cir. Ct. R. 404, 11 O. C. D. 190.

94. Ellis v. Soper, 111 Ia. 631, 82 N. W. 1041.

95. Keeney v. Henning, 64 N. J. Eq. 65, 53 A. 460. See *In re* Boyes' Estate, 151 Cal. 143, 90 P. 454 (under some circumstances mother may be paid for services).

96. Macphers. Inf. 106; *Ex parte* Starkie, 3 Sim. 339. Chancery will

Testamentary guardians are, however, frequently authorized by the testator to apply at discretion from the income of the infant's fund, or from the capital, for his support; and such discretion will not be controlled so long as the guardian acts in good faith. But trustees and guardians frequently procure an order of maintenance, notwithstanding, in order to relieve themselves of all responsibility.[97] Doubts were formerly entertained of the power of chancery to interfere in these and other cases where the infant had not been made a ward of chancery by suit. No such doubts now exist, however; and the court will, on petition, and without formal proceedings by bill, settle a due maintenance.[98]

A decree of court authorizing the guardian to apply the entire income of the estate to the support of the child will be applied to the successor of the guardian even though the father.[99]

§ 886. Secular and Religious Education of Ward by Guardian.

Courts of chancery treat the guardian as the proper judge of the place where his ward shall be educated, and will, if necessary, issue orders to compel obedience. But if guardians disagree as to the mode of their ward's education, the court will exercise its own discretion, and will not consider itself bound by the wishes of the majority.[1]

It is the duty of the guardian to give the ward suitable education in the business which he will be called upon to follow.[2] Parol evidence of the deceased father's wishes is admissible, and the

control the discretion of trustees as to allowance. *In re* Hodges, L. R. 7 Ch. D. 754.

Macphers. Inf. 213; Livesey v. Harding, Taml. 460; French v. Davidson, 3 Madd. 396; Collins v. Vining, 1 C. P. Cooper, 472. In Mississippi the sum for maintenance and education must be fixed in chancery. Dalton v. Jones, 51 Miss. 585. But as to personal estate, the American rule is, usually, that if the court would have authorized the expenditure upon application before it was made, the expenditure will be sanctioned upon settlement of the guardian's accounts. Rinker v. Streit, 33 Gratt. 663.

97. Goods of Sartoris, 1 Curteis, 910.

98. Story, Eq. Juris., § 1354, and cases cited. And see Kettletas v. Gardner, 1 Paige, 488.

Trustees may be authorized by the terms of the trust to expend a certain sum for maintenance and support of children. It is generally understood that the expenses of education are thus included. Breed's Will, 1 Ch. D. 226. Trustees under a will thus authorized, and in effect testamentary guardians, are not compelled to pay over such moneys to a statute or probate guardian. Capps v. Hickman, 97 Ill. 429.

99. *In re* Plumb, 53 N. Y. S. 558, 24 Misc. 249, 2 Gibbons, 447.

1. Story, Eq. Juris., § 1340; Macphers. Inf. 121; Tremain's Case, Stra. 168; Hall v. Hall, 3 Atk. 721.

2. Perrin v. Lepper, 72 Mich. 454,

court will pay attention to such wishes, although informally expressed, in judging of the mode of education of children as well as in the appointing of a guardian,[3] and the parent's wishes as to the religious education of the ward should be followed.[4]

The subject of a child's religious education received much consideration in a late English case, where, notwithstanding the father's directions in his will appointing a testamentary guardian who was, like himself, a Roman Catholic, a daughter nine years old was allowed to remain with her mother, a Protestant, and to be brought up in the same religious faith; and this against the guardian's wishes, tardily expressed. An antenuptial agreement, made between the husband and wife, stipulating that boys of the marriage should be educated in the religion of the father, and girls in that of the mother, was indeed declared of no binding force as a contract; and yet it was added that this agreement would have weight with the court in considering, after the father's death, whether he had abandoned his right to educate this daughter in his own religion. The welfare of the child was, under the circumstances, deemed a very important consideration.[5] In a still later case chancery considered that it was most for the benefit of the child to be educated as a Roman Catholic.[6] But on the whole, in cases of doubt the English courts incline to favor Protestant education as for the child's welfare.[7]

§ 887. Use of Income or Principal.

The doctrine has been repeatedly declared that no guardian can expend more than the income of his ward's estate without proper judicial sanction. This is the settled rule in chancery, and it is universally applicable in the United States.[8] And a similar prin-

40 N. W. 859; *In re* Alexander, 79 N. J. Eq. 226, 81 A. 732.

3. Anon., 2 Ves. Sen. 56; Campbell v. Mackay, 2 M. & C. 34; *contra*, Storke v. Storke, 3 P. Wms. 51.

4. *In re* Lamb's Estate, 139 N. Y. S. 685 (though father had neglected child).

5. Andrews v. Salt, L. R. 8 Ch. 622. See *In re* Newbery, L. R. 1 Ch. 263, where the deceased father's wishes prevailed, as against the mother and the children, so that the minor children might not be taken to worship at a chapel of the "Plymouth Brethren." And see *In re* Agar-Ellis, 27 W. R. 117; *supra*, Part III, ch. X, where the general subject of a child's education and maintenance is discussed.

6. Clarke, *Re*, 21 Ch. D. 817. See also Montagu, *Re*, 28 Ch. D. 82.

7. Violet Nevin, *Re* (1891), 2 Ch. 299; Lacon v. Lacon, 2 Ch. 496; Scanlan, *Re*, 40 Ch. D. 200.

8. Whitledge's Heirs v. Callis, 25 Ky. 403; Baker v. Lane (Ky. 1909), 118 S. W. 963; Collins v. Slaughter, 1 Ky. Law Rep. 261; Griffith's Ex'r v. Bybee, 24 Ky. Law Rep. 666, 69 S.

ciple prevails under the civil law.[9] But to what extent the guardian renders himself personally liable, by exceeding the income without previous sanction of the court, is not quite clear. The English rule is undoubtedly strict. But as to probate guardians, and in modern practice, legal formalities have been considerably relaxed; though the rule is still that the capital should not be encroached upon without judicial leave, to meet expenditures which are beyond the ward's means, however suitable to his social position. In most of the United States the guardian is, doubtless, justified in breaking the principal fund, under strong or sudden circumstances of necessity, for the benefit of his ward, and he may leave his conduct to the subsequent approval of the court when he presents his accounts. In cases of risk and uncertainty, however, the proper course is to obtain a previous order.[10]

It is sometimes provided by statute that a guardian can be allowed for expenditures out of the principal only where there has been previous authority from the court.[11] but otherwise such

W. 767; Fidelity Trust Co. v. Butler, 28 Ky. Law Rep. 1268, 91 S. W. 676; Chubb v. Bradley, 58 Mich. 268, 25 N. W. 186; *In re* Brown, 141 N. Y. S. 193, 80 Misc. 4; Whitfield v. Burrell, 54 Tex. Civ. App. 567, 118 S. W. 153; Rinker v. Streit (Va.), 33 Gratt. 663; Campbell v. O'Neill, 69 W. Va. 459, 72 S. E. 732; *In re* Bostwick, 4 Johns. Ch. 100; Myers v. Wade, 6 Rand. 444; Lawrence v. Speed, 2 J. J. Marsh. 403; Villard v. Chovin, 2 Strobh. Eq. 40; State v. Clark, 16 Ind. 97; Beeler v. Dunn, 3 Head, 87; Oakley v. Oakley, 3 Dem. 140; Dowling v. Feeley, 72 Ga. 557. See Louisiana rule as to the authority of a family meeting. Succession of Melina Webre, 36 La. Ann. 312.

9. Payne v. Scott, 14 La. Ann. 760. See Louisiana rule as to authority of family meeting. Succession of Webre, 36 La. Ann. 312.

10. Story, Eq. Juris., § 1355; Chapline v. Moore, 7 Monr. 150; Davis v. Harkness, 1 Gilm. 173; Davis v. Roberts, 1 Sm. & M. Ch. 543; Royston v. Royston, 29 Ga. 82; Foteaux v. Le Page, 6 Clarke (Ia.), 123; Gilbert v. McEachen, 38 Miss. 469; Phillips v. Davis, 2 Sneed, 520; Cummins v. Cummins, 29 Ill. 452; Cohen v. Shyer, 1 Tenn. Ch. 192. Some State codes lay down a strict rule concerning the previous sanction of the court to exceeding the ward's income. Boyd v. Hawkins, 60 Miss. 277; Eysarte v. George, 63 Miss. 143; Roscoe v. McDonald, 91 Mich. 270; Jones v. Parker, 67 Tex. 76. But in other States ratification by the court is equivalent to a previous authority. Killpatrick's Appeal, 113 Pa. St. 46; Ward, *Re*, 73 Mich. 220; Rhode v. Tuten, 34 S. C. 496.

11. Campbell v. Clark, 63 Ark. 450, 39 S. W. 262; Hudson v. Newton, 83 Ark. 223, 103 S. W. 170; McQueen v. Fisher (Ga. App.), 95 S. E. 1004; Hazelrigg v. Pursley, 69 Ill. App. 467; Hubbell v. Hubbell, 5 La. Ann. 524; Sims v. Billington, 50 La. Ann. 968, 24 So. 637; *In re* Watson, 51 La. Ann. 1641, 26 So. 409; Eastland v. Williams' Estate, 92 Tex. 113, 46 S. W. 32, 45 S. W. 412; Blackwood v. Blackwood's Estate, 92 Tex. 478, 47 S. W. 483, 49 S. W. 1045; Freedman v. Vallie (Tex. Civ. App. 1903), 75 S. W. 322; Logan v. Gay, 99 Tex. 603,

expenditures may be allowed if proper without prior authority,[12] but the court may refuse to authorize such expenditures in advance.[13] In some cases the principal may be used when it becomes both reasonable and necessary[14] to exceed the ward's income, and the judicial sanction is granted accordingly. Thus courts of chancery, or even of probate, authorize the capital to be broken upon, or, if need be, the whole estate to be consumed, where the property is small and the income inadequate for support.[15] As where the ward's education is nearly completed, especially if he will thereby be fitted for a profession. Or where the ward is mentally or physically unfit to be bound out as an apprentice.[16] So, too, in case of extreme sickness, or other emergency, or for the burial of a dead ward, where an unusual and sudden outlay becomes necessary.[17] And the guardian can anticipate the income of one year in supplying the casual deficiency of another.[18] And he may treat an increase of value in his ward's property as income.[19] And he may use the accumulated profits of previous years where necessary. A

90 S. W. 861; Murph v. McCullough, 40 Tex. Civ. App. 403, 90 S. W. 69; Dallas Trust & Savings Bank v. Pitchford (Tex. Civ. App.), 208 S. W. 724; Harkrader v. Bonham, 88 Va. 247, 16 S. E. 159; Gayle v. Hayes' Adm'r, 79 Va. 542.

12. *In re* Boyes' Estate, 151 Cal. 143, 90 P. 454; *In re* Carter, 120 Ia. 215, 94 N. W. 488; Des Moines Sav. Bank v. Krell, 176 Ia. 437, 156 N. W. 858 (to provide home); Hoga's Estate v. Look, 134 Mich. 361, 96 N. W. 439, 10 Det. Leg. N. 473; *In re* Klunck, 68 N. Y. S. 629, 33 Misc. 267; Duffy v. Williams, 133 N. C. 195, 45 S. E. 548; Cutting v. Scherzinger, 40 Ore. 353, 68 P. 393, 69 P. 439; Rinker v. Streit (Va.), 33 Gratt. 663; Bliss v. Spencer (Va.), 99 S. E. 593.

13 *In re* Barry, 61 N. J. Eq. 135, 47 A. 1052. See, however, Watson v. Watson (Ky.), 209 S. W. 524.

14. Williams v. Williams (Ala.), 81 So. 41 (where father is unable to support them); Little v. West, 145 Ga. 563, 89 S. E. 682; Whitledge's Heirs v. Callis, 25 Ky. 403; Commonwealth v. Lee, 120 Ky. 433, 86 S. W. 990, 27 Ky. Law Rep. 806, 120 Ky. 433, 89 S. W. 731, 28 Ky. Law Rep. 596 (when ward so young or of infirm health that he cannot work); Hudson v. Hudson, 160 Ky. 432, 169 S. W. 891 (holding that where the ward is sick and in pressing need payments may be ordered made to him out of principal); Griffith's Ex'r v. Bybee, 24 Ky. Law Rep. 666, 69 S. W. 767 (marriage and illness of ward); Gott v. Culp, 45 Mich. 265, 7 N. W. 767 (where future probable resources justify it); *In re* Ward's Estate, 73 Mich. 220, 41 N. W. 431; Anderson v. Silcox, 82 S. C. 109, 63 S. E. 128.

15. McDowell v. Caldwell, 2 McC. Ch. 43; Farrance v. Viley, 9 E. L. & Eq. 219; Roseborough v. Roseborough, 3 Baxt. 314.

16. Johnston v. Coleman, 3 Jones, Eq. 290; Campbell v. Golden, 79 Ky. 544.

17. Long v. Norcom, 2 Ired. Eq. 354; *In re* Clark, 17 E. L. & Eq. 599; Hobbs v. Harlan, 10 Lea, 268.

18. Carmichael v. Wilson, 3 Moll. 87; Bybee v. Tharp, 4 B. Monr. 313.

19. Long v. Norcom, 2 Ired. Eq. 354; Macphers. Inf. 337, 338.

young lady who is a ward may be allowed small sums by way of spending-money for her personal needs, apart from what may be actually necessary to eat and wear.[20] In short, the guardian is allowed a liberal discretion in expenditures for maintenance and education, so long as he refrains from encroaching upon the ward's capital;[21] and in extreme cases he may intrench upon the capital itself where this is for the ward's welfare. So it is held that he is limited in his disbursements, not to the income of the ward's estate actually in his hands, but to the income of the ward's estate wherever situated.[22] The maintenance of property from which income is derived should be considered in fixing income of the ward's estate.[23]

The order in which the ward's property should be expended for his support and education is as follows: first, the income of the property; next, if that proves insufficient, the principal of personal property; lastly, if both are inadequate, the ward's real estate, or so much of it as may be necessary. A court should protect personal capital while there is income, and realty while there is income or personal capital at all. The ward's real estate can never be sold, except under a previous order of court. Nor can a guardian use, in maintaining his ward, the proceeds of real estate sold for the purpose of reinvestment only, any more than he could have used the real estate itself. He should ask to sell for the purpose of maintenance.[24] In fair instances a court has ordered a sale of the ward's real estate for reimbursement of the guardian's expenses of support, though petition in advance is the safer;[25] but a guardian who has enough personalty of the ward cannot charge the ward's realty by his contracts.[26]

20. Karney v. Vale, 56 Ind. 542.

21. Brown v. Mullins, 24 Miss. 204; Speer v. Tinsley, 55 Ga. 89.

22. Foreman v. Murray, 7 Leigh, 412; Maclin v. Smith, 2 Ired. Eq. 371. And see *In re* Coe's Trust, 4 K. & J. 199. If the guardian pays money from the principal of his ward's estate to a suitable person for the ward's support, and the money is reasonably expended, he cannot recover back the amount from such person. Chubb v. Bradley, 58 Mich. 268.

23. Wegman v. Wegman, 52 La. Ann. 1309, 27 So. 889.

24. Strong v. Moe, 8 Allen, 125; Rinker v. Street, 33 Gratt. 663. See St. Joseph's Academy v. Augustine, 55 Ala. 493.

25. Bellamy v. Thornton (1894), Ala.

26. Roscoe v. McDonald (1894), Mich.

CHAPTER VI.

RIGHTS AND DUTIES OF THE GUARDIAN AS TO THE WARD'S ESTATE.

§ 888. In General; Leading Principles.

We have seen that chancery guardians have only a limited authority over the estates of their wards, inasmuch as the court

makes a fixed allowance, to be consumed in maintenance and education, leaving the bulk of the infant's estate in the hands of executors, trustees, or its own officers. In this country guardians almost invariably assume the full management of their wards' fortunes, unless restrained by the will of the testator; and whenever they do so they are bound by the principles which regulate the general conduct of all trustees and bailees. Ordinary prudence, care, and diligence should be therefore the correct standard as applied wherever the trust is not purely gratuitous.

The leading principle recognized by chancery in supervising the guardian's conduct is, as in the appointment or award of custody, that the ward's interests are of constant consideration. Hence two observations are to be made at the outset of this chapter. The first is, that unauthorized acts of the guardian may be sanctioned if they redound to the ward's benefit; while, on the other hand, for unauthorized acts by which the ward's estate suffers, the guardian must pay the penalty of his imprudence.[27] The second is, that the guardian's trust is one of obligation and duty, and not of speculation and profit.[28] We shall have occasion to apply these observations as we proceed.

§ 889. Guardian's General Powers and Duties as to Ward's Estate.

Among the most obvious powers and duties of the guardian in the management of his ward's property are these: To collect all dues and give receipts for the same. To procure such legacies and distributive shares from testators or others as may have accrued. To take and hold all property settled upon the ward by way of gift or purchase, unless some trustee is interposed. To collect dividends and interest, and the income of personal property in general. To receive and receipt for the rents and profits of real estate. To receive moneys due the ward on bond and mortgage. To pay the necessary expenses of the ward's personal protection, education, and support. To deposit properly and invest and reinvest all balances in his hands. To sell the capital of the ward's property, change the character of investments when needful, convert real into personal and personal into real estate, in a suitable exigency; but not without judicial direction. To account to the

27. Milner v. Lord Harewood, 18 Ves. Jr. 259; Capehart v. Huey, 1 Hill, Ch. 405.

28. 2 Kent, Com. 229.

ward or his legal representatives at the expiration of his trust. And, in general, especially if recompensed, to exercise the same prudence and foresight which a good business man would use in the management of his own fortunes, though under more guarded restraints.[29]

The guardian should, in managing the affairs of his ward, exercise the same prudence which an ordinarily prudent man exercises in his own affairs of like nature,[30] and is not liable for honest errors in judgment,[31] and it is the policy of the courts to sustain if possible irregular acts of a guardian where done in good faith and without detriment to the estate.[32]

A guardian has no right to make a gift out of the estate.[33] Informal advice by a judge cannot be relied on as protection by the guardian.[34]

§ 890. Duty of Loyalty; Not to Make Money from Estate.

The guardian is bound for ordinary diligence if compensated, and for slight diligence at all events, on the usual footing of a bailee of property.

It is to be observed, however, that chancery not only punishes corruption, but treats with suspicion all acts and circumstances evincing a disposition on the guardian's part to derive undue advantage from his position. This rule is applicable to trustees in general. The trust should be managed exclusively in the interest of the *cestui que trust;* or, in case of guardianship, for the

29. Genet v. Talmadge, 1 Johns. Ch. 3; Jackson v. Sears, 10 Johns. 435; Eichelberger's Appeal, 4 Watts, 84; Swan v. Dent, 2 Md. Ch. 111; Crenshaw v. Crenshaw, 4 Rich. Eq. 14; Chapman v. Tibbits, 33 N. Y. 289. One who is liable as a debtor to the ward is not entitled, when sued, to question the validity of the guardian's appointment, not even though he be a co-heir. Johnson v. Blair, 126 Pa. St. 426.

30. *In re* Wood's Estate & Guardianship, 159 Cal. 466, 114 P. 992; Wainright v. Burroughs, 1 Ind. App. 393, 27 N. E. 591; Alcon v. Coons, 82 N. E. 92; Layne v. Clark, 152 Ky. 310, 153 S. W. 437; Gott v. Culp, 45 Mich. 265, 7 N. W. 767 (honesty, kindness and ordinary skill in money matters are all that can be expected); Reynolds' Appeal, 70 Mo. App. 576; Taylor v. Kellogg, 103 Mo. App. 258, 77 S. W. 130; *In re* Bielby's Estate, 155 N. Y. S. 133, 91 Misc. 353 (should inform himself of condition of estate); Scoville v. Brock, 79 Vt. 449, 65 A. 577; Elliott's Adm'r v. Howell, 78 Va. 297. See Perrin v. Lepper, 72 Mich. 454, 40 N. W. 859; Detroit Trust Co. v. Hunrath, 168 Mich. 180, 131 N. W. 147.

31. *In re* Wisner's Estate, 145 Ia. 151, 123 N. W. 978.

32. Duffy v. McHale, 35 R. I. 16, 85 A. 36.

33. Norris v. Norris, 83 N. Y. S. 77, 85 App. Div. 113.

34. *In re* Kimble, 127 Ia. 665, 103 N. W. 1009.

ward's benefit. The guardian cannot reap any benefit from the use of the ward's money. He cannot act for his own benefit in any contract or purchase or sale as to the subject of the trust. If he purchases in his character as guardian, he presumptively uses his ward's funds for that purpose. If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage is to accrue entirely to the ward's estate,[35] and the guardian cannot acquire adverse interests in the ward's property,[36] and where he makes investments which he should have made as guardian he will be charged as trustee of the ward.[37] Where the guardian purchases for himself at sales of his ward's property, his conduct will be closely scrutinized. But where no fraud appears, and the sale

35. White v. Parker, 8 Barb. 48; 2 Kent, Com. 229; Diettrich v. Heft, 5 Barr, 87; Clowes v. Van Antwerp, 4 Barb. 416; Lefevre v. Laraway, 22 Barb. 168; Kennaird v. Adams, 11 B. Monr. 102; Sparhawk v. Allen, 1 Foster (N. H.), 9; Heard v. Daniel, 26 Miss. 451; Jennings v. Kee, 5 Ind. 257.

A guardian is, like other trustees, bound not to reap any personal benefits from use of the ward's funds. Peadro v. Carriker, 168 Ill. 570, 48 N. E. 102; Boyd v. Boyd, 176 Ill. 40, 51 N. E. 782, 68 Am. St. R. 169 (ward is not barred by delay of 18 years to assert his rights); American Surety Co. of New York v. Sperry, 171 Ill. App. 56; Charles v. Witt, 88 Kan. 484, 129 P. 140; Moyer v. Fletcher, 56 Mich. 508, 23 N. W. 198; Brandau v. Greer, 95 Miss. 100, 48 So. 519; Patterson v. Booth, 103 Mo. 402, 15 S. W. 543.

As a guardian must not reap undue benefit, he cannot make a collusive sale or improve the property for his own benefit. Lane v. Taylor, 40 Ind. 495. He must not derive profit by setting fictitious values, but account according to true valuations. Titles adverse to the ward's interest cannot be disposed of for his own benefit and to the ward's detriment. Spelman v. Terry, 15 N. Y. Supr. 205. If the guardian has a life interest in land of which the ward is seized in fee, he cannot apply to the ward the whole cost of removing an encumbrance, principal and interest. Bourne v. Maybin, 3 Woods, C. C. 724.

36. Hawkins v. Reeves, 112 Ark. 389, 166 S. W. 562; Ingram v. Heintz, 112 La. 496, 36 So. 507; Boudreaux v. Lower Terre-Bonne Refining & Mfg. Co., 127 La. 98, 53 So. 456; Johnston v. Loose, 201 Mich. 259, 167 N. W. 1021 (guardian cannot purchase for himself dower interest of widow in ward's land); Town of Thornton v. Gilman, 67 N. H. 392, 39 A. 900 (one who buys from the guardian with notice takes no valid title); Horton v. Maine, 21 R. I. 126, 46 A. 403; Gulf, C. & S. F. Ry. Co. v. Lemons (Tex. Civ. App.), 152 S. W. 1189. See Cahill v. Seitz, 86 N. Y. S. 1009, 93 App. Div. 105. See *In re* Stude's Estate (Iowa), 162 N. W. 10; Mann v. McDonald, 10 Humph. (Tenn.) 275. He cannot contract with himself as a guardian, so as to force his ward into a compromise settlement of claims with his other creditors. Cabell v. Shoe Company, 81 Tex. 104.

37. Haynes v. Montgomery, 96 Ark. 573, 132 S. W. 651; Taylor v. Calvert, 138 Ind. 67, 37 N. E. 531; Donlon v. Maley, 110 N. E. 92; Perry v. Elgin, 15 Ky. Law Rep. 855, 26 S. W. 4; Succession of Hawkins, 139 La. 228, 71 So. 492.

appears beneficial to the ward, the more reasonable doctrine is that the transaction is sustainable in equity, subject to the ward's subsequent election, on reaching majority, to disaffirm the sale. The guardian, meanwhile, takes the legal title; more especially if the sale was conducted through a third party, who afterwards conveyed to him.[38] The ward is entitled to any profits made with his money by the guardian.[39]

Where a guardian speculates with his ward's funds, or employs them in his own business, he must account for the profits. As this is a clear breach of trust, compound interest is properly chargeable. It would seem to be the true rule in equity, where large profits, which ought to have gone to the credit of the *cestui que trust,* are appropriated by his trustee, to require them to be turned in on account; and to impose compound interest instead, with annual or other periodical rests as a penalty only when there are practical difficulties in the way of enforcing such a rule or as a beneficial option to the ward. For it is obvious that in this country a guardian can frequently afford to pay compound interest for the use of his ward's money, if he is suffered to retain the full profits of the speculation for himself.[40] It has been held that where a guardian employs his ward's money in a business which he allows his son to manage, with a portion of the profits as his compensation, and the transaction is free from fraud, he is not chargeable with his son's share of the profits.[41]

38. *Ex parte* Lacey, 6 Ves. 625; Lefevre v. Laraway, 22 Barb. 168; Chorpenning's Appeal, 32 Pa. St. 315; Hoskins v. Wilson, 4 Dev. & Batt. 243; Blackmore v. Shelby, 8 Humph. 439; Crump *et al., Ex parte,* 16 Lea, 732; Brockett v. Richardson, 61 Miss. 766; Hudson v. Helmes, 23 Ala. 585. But see Beal v. Harmon, 38 Mo. 435. In Missouri, under the Spanish laws, the guardian might purchase lands of his ward with the court's permission. McNair v. Hunt, 5 Mo. 300. See Boyer v. East, 161 N. Y. 580, 56 N. E. 114, 76 Am. St. R. 290 (affg. 49 N. Y. S. 1132, 25 App. Div. 625) (guardian who has also a dower interest may purchase at foreclosure sale).

Where a deed of trust taken by a guardian secures the debt of the guardian as well as that of the ward, the guardian may, at a sale under the deed, bid in the property in his own right to protect himself as well as his ward. Bunel v. Nester, 203 Mo. 429, 101 S. W. 69; Same v. Springfield Sav. Bank, 101 S. W. 78.

39. Martinez v. Meyers, 181 Ala. 293, 61 So. 810; Chanslor v. Chanslor's Trustees, 74 Ky. 663; *In re* Allard, 49 Mont. 219, 141 P. 661.

40. Meyers v. Martinez, 172 Ala. 641, 55 So. 498 (where claim made for profits, interest on principal and profits charged); Goff's Guardian v. Goff, 123 Ky. 73, 93 S. W. 625, 29 Ky. Law Rep. 501; Spear v. Spear, 9 Rich. Eq. 184; Lowry v. State, 64 Ind. 421; Reed v. Timmins, 52 Tex. 84.

41. Kyle v. Barnett, 17 Ala. 306.

§ 891. Authority Before or After Termination of Office.

The guardian will not be allowed for expenses incurred previous to his appointment,[42] and he has no authority to take funds of the estate after resignation.[43]

§ 892. Guardian Has No Title in Ward's Estate.

The guardian as a general rule has no legal title to the personal property of the ward,[44] or to his interest in real estate,[45] but takes the proceeds of the sale of trust property.[46] The legal title to stock issued to A. B., Guardian, is in him individually, and on his death descends to his representatives.[47]

§ 893. Character in Which Holds Funds.

One who is executor of a will and also guardian of one of the devisees will, after a settlement of the estate, be regarded as holding funds as guardian,[48] and a guardian who takes funds of the ward will be estopped to deny that he took them as guardian.[49]

§ 894. Right to Possession of Estate.

A guardian has the custody and control of the ward's estate.[50] Nor can he with safety permit the administrator of the estate of his ward's father to control property of which he is the legal custodian. And he must hold an administrator to account in all cases.[51]

42. *In re* Tyndall, 102 N. Y. S. 211, 117 App. Div. 294; *In re* Grant, 166 N. Y. 640, 60 N. E. 1111 (affg. 67 N. Y. S. 654, 56 App. Div. 176), (in obtaining custody, etc.).

43. Hendrix v. Richards, 57 Neb. 794, 78 N. W. 378.

44. Judson v. Walker, 155 Mo. 166, 55 S. W. 1083; Seilert v. McAnally, 223 Mo. 505, 122 S. W. 1064; Title Guaranty & Surety Co. v. Cowen (Okla.), 177 P. 563; *contra*, Hunter v. Lawrence's Adm'r, 11 Grat. (Va.) 111, 62 Am. Dec. 640.

45. Howard v. Pope, 109 Ga. 259, 34 S. E. 301; Louisville Trust Co. v. Kidd, 29 Ky. Law Rep. 382, 93 S. W. 38. See Higginson v. Wathen, 20 Ky. Law Rep. 332, 46 S. W. 21; Louisville Trust Co. v. Kidd, 29 Ky. Law Rep. 382, 93 S. W. 38.

46. Cady v. Lincoln, 100 Miss. 765, 57 So. 213.

47. Williams v. Farmers' State Bank of Sparks (Ga. App.), 97 S. E. 249.

48. State to Use of Jacobs v. Hearst, 12 Mo. 365, 51 Am. Dec. 167.

49. Francis v. Sperry (Okla.), 176 P. 732.

50. Hallinan v. Hearst, 133 Cal. 645, 66 P. 17, 55 L. R. A. 216; Boruff v. Stipp, 126 Ind. 32; *In re* Stude's Estate (Iowa), 162 N. W. 10; Crofoot's Ex'r v. Duvall, 3 Ky. Law Rep. 541; Boaz's Adm'r v. Milliken, 4 Ky. Law Rep. 448; Thompson v. Thompson, 20 Ky. Law Rep. 979, 47 S. W. 1088; Strite v. Furst, 112 Md. 101, 76 A. 498; United States Fidelity & Guaranty Co. v. Citizens' State Bank of Langdon, 36 N. D. 16, 161 N. W. 562 (trust relationship arises); *In re* Bolin's Estate, 22 Okla. 851, 98 P. 934; Tolbert v. Bolin, *Id.*

51. Wills's Appeal, 22 Pa. St. 325;

The will cannot require the testamentary guardian to deliver the infant ward his estate upon his marriage.[52]

§ 895. Collection of Assets.

It is the guardian's first duty to collect the assets of the estate as speedily as possible,[53] which duty is fixed by law and cannot be governed by the wishes of the ward.[54]

Choses in action should be reduced to possession without unnecessary delay;[55] to which we should add, however, that incorporeal personalty of various kinds serves in modern times for a long-continued investment. All claims should be collected as prudence may require, concerning which the guardian has been put upon inquiry,[56] or the court may authorize a judgment to be sold where it appears that it cannot be collected without delay.[57]

In collecting outstanding debts or prosecuting claims a reasonable time is to be allowed the guardian. Ordinary prudence and diligence is the rule; and for culpable negligence subjecting the

Clark v. Tompkins, 1 S. C. (N. S.) 119; Coggins v. Flythe, 113 N. C. 103; Denholm v. McKay, 148 Mass. 434.

52. Hudson's Guardian v. Hudson, 160 Ky. 432, 169 S. W. 891.

53. Independent Order of Mutual Aid v. Stahl, 64 Ill. App. 314; United States Fidelity & Guaranty Co. v. State, 40 Ind. App. 136, 81 N. E. 226 (should pay debt he owes estate); Boaz's Adm'r v. Milliken, 4 Ky. Law Rep. 448; Fairex v. New Orleans City R. Co., 36 La. Ann. 60; Pertuit v. Damare, 50 La. Ann. 893, 24 So. 681; Norris v. Baumgardner, 97 Md. 534, 55 A. 619; Strite v. Furst, 112 Md. 101, 76 A. 498; Daffron v. Modern Woodmen of America, 190 Mo. App. 303, 176 S. W. 498; Mason v. Ackley, 52 Okla. 157, 152 P. 846; Mason v. Evans, 52 Okla. 484, 153 P. 133; Dunleavy v. Mayfield, 56 Okla. 470, 155 P. 1145; Brewer v. Perryman, — Okla. —, 162 P. 791; Hughes v. Green, — S. C. —, 98 S. E. 201 (rent); Hunter v. Lawrence's Adm'r, 11 Grat. (Va.) 111, 62 Am. Dec. 640; Hutson v. Jenson, 110 Wis. 26, 85 N. W. 689; Mann v. Mann, 119 Va. 630, 89 S. E. 897 (money due on condemnation of land). See Benson v. Siemons, 156 N. Y. S. 1, 92 Misc. 509 (fund under control of special term not turned over to guardian).

54. People's Bank v. Wood, 207 Ill. App. 602.

55. See Hill, Trustees, 447, and cases cited; Caffrey v. Darby, 6 Ves. 488; Powell v. Evans, 5 Ves. 839; Lewson v. Copeland, 2 Bro. C. C. 156; Tebbs v. Carpenter, 1 Madd. 298; Caney v. Bond, 6 Beav. 486. So as to infant husband or wife. Ware v. Ware, 28 Gratt. 670; Shanks v. Edmondson, 28 Gratt. 804.

56. The guardian of a soldier's heir should ascertain as to his pension and bounty rights, and pursue claims accordingly. Clodfelter v. Bost, 70 N. C. 733. Where the guardian puts a claim for collection into the hands of an attorney in good standing, who collects and embezzles the money, he is not responsible for the loss, if using common prudence under the circumstances. Landmesser's Appeal, 126 Penn. St. 115.

57. Schmidt v. Shaver, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250.

estate of his ward to loss he may make himself personally liable, even though the demand be against a person residing in another State.[58] He is presumably liable to his ward for the nominal amount of debts due to the ward's estate which he has failed to collect; and if they were not, by the exercise of good business judgment, collectible for their face, he should be able to show this.[59] He is liable not only for what he actually receives, but what he ought to receive.[60] And where the party is insolvent and the guardian loses the chance of gaining some dividend on the claim by his supine negligence, he is also answerable,[61] but he will not be chargeable for honest delay in prosecuting remedies for collection of choses in action if such delay seems advisable.[62] He is not to sue in all cases where ordinary modes of collection fail; for the expenses of litigation are to be weighed against the chances of realizing a benefit.[63] What is a reasonable time will depend upon circumstances. It is his duty to contest all improper claims, though presented by the surviving parent.[64] If a guardian takes notes of third persons in payment of an indebtedness to his ward, and afterwards receives the money upon the notes and appropriates the money as guardian, the payment by the debtor is sufficient.[65]

Where one in paying a debt to the guardian overpays him, the guardian is personally liable for the excess,[66] but money paid to a guardian by mistake cannot be recovered again, if he has paid it out before receiving notice of the mistake,[67] and a guardian has no authority, without order of the court, to refund money collected.[68] Formal acts in beneficial chattel transactions for his ward do not require a judicial order.[69]

A person named in a will as testamentary guardian who has

58. Potter v. Hiscox, 30 Conn. 508.

59. Seigler v. Seigler, 7 S. C. 317.

60. State v. Womack, 72 N. C. 397; Stothoff v. Reed, 32 N. J. Eq. 213.

61. Webber's Estate, 133 Pa. St. 338; Roush v. Griffith, 65 W. Va. 752, 65 S. E. 168 (guardian is liable for money he could have collected, with diligence).

62. *In re* Schandoney's Estate, 133 Cal. 387, 65 P. 877; Nagle v. Robins, 9 Wyo. 211, 62 P. 154 (where it appears that debtor will pay if given time); Stem's Appeal, 5 Whart. 472; Waring v. Darnall, 10 Gill & Johns. 127; Love v. Logan, 69 N. C. 70.

63. §§ 925, 926.

64. *Ex parte* Guernsey, 21 Ill. 443.

65. Jones v. Jones, 20 Ia. 388.

66. Tow v. Elliott, 33 N. C. 51.

67. Massey v. Massey, 2 Hill, Ch. 492.

68. Loyal Americans v. Edwards, 106 Ill. App. 399.

69. Thus he may discharge a tontine life insurance policy upon receiving its actual surrender value when the proper period arrives. Maclay v. Equitable Co., 152 U. S. 499.

never been appointed as such or qualified has no authority to collect assets.[70]

§ 896. What Property is Assets of the Estate.

The guardian's responsibility extends only to such property of his ward as is accessible to him. But having once come into possession, or gained knowledge of his right of possession, it is his duty to account for the property; for the law then imposes upon him a *prima facie* liability.[71] And the fact that money was collected in another State beyond his jurisdiction cannot affect his obligation to account; but where assets never reach his hands from another State or country, the question is whether he used such diligence in attempting to collect as a prudent business man would usually exercise under such circumstances.[72] When one assumes the office of guardian, indebted at the time to his ward, the indebtedness becomes assets to be properly accounted for.[73]

Courts of equity follow the ward's property whenever wrongfully disposed of or appropriated by the guardian; and any person in whose hands it is found will be held as trustee, if it can be shown that it came into his possession with notice of the trust.[74] The guardian himself may follow his ward's property wherever he can find it, whether into the hands of a former guardian or such guardian's transferee.[75] And legacies charged on land and payable to the ward on reaching majority, though paid meanwhile to his guardian, remain a lien on the land until actually received by the ward.[76]

§ 897. Reasonable Time Allowed for Investment.

The guardian is not chargeable for interest from the date of his appointment or receipt of funds, but a reasonable time for investment must be allowed him.[77] A familiar rule charges the guar-

70. Olmstead v. Taylor, 125 Mich. 316, 85 N. W. 740, 8 Det. Leg. N. 10.

71. Bethune v. Green, 27 Ga. 56; Howell v. Williamson, 14 Ala. 419; Martin v. Stevens, 30 Miss. 159.

72. Harris v. Berry, 82 Ky. 137.

73. United States Fidelity & Guaranty Co. v. State, 40 Ind. App. 136, 81 N. E. 226.

Thus, where he becomes guardian upon an express agreement to assume all liabilities of his predecessor, who had converted the ward's estate. Martin v. Davis, 80 Wis. 376.

74. Carpenter v. McBride, 3 Fla. 292. See McCall v. Flippin, 58 Tenn. 161.

75. Fox v. Kerper, 51 Ind. 148.

76. Cato v. Gentry, 28 Ga. 327.

77. Thomas v. Thomas, 126 Ark. 579, 191 S. W. 227; Corcoran v. Renehan, 24 App. D. C. 411; Griffin v. Collins, 125 Ga. 159, 53, S. E. 1004 (one year); Abrams v. United States Fidelity & Guaranty Co., 127 Wis.

dian with interest for neglecting to invest his ward's money after six months; yet deferring interest for that length of time is not invariable, but depends upon the circumstances,[78] and may for good reason leave a proper amount of the funds of the estate uninvested.[79]

Like all other trustees, the guardian is bound to make his ward's funds productive. He should see that the capital which comes to his hands is well secured; procure a change of securities whenever necessary; and invest surplus moneys where they may draw interest. For funds accruing during the continuance of his trust he is allowed a reasonable time for making his investment, usually limited to six months, though in some cases a year is allowed, and in others only three months; and he cannot suffer the ward's money to remain longer idle.[80] But he may keep a suitable surplus on hand for current and contingent expenses; also sums too small to be wisely invested.[81] And family relics and ornaments, household furniture and farm stock, are generally exempted from the rule of investment.

§ 898. Character of Investments.

The investment of the trust funds is one of the most important duties of a guardian, both as respects the interests of his ward and his own security. Testamentary guardians, like trustees under deeds of trust, should follow the direction of the testator in making investments; and for losses arising from such course they are not responsible. But their powers are to be construed strictly; and where the will is silent or the directions are in general terms, or manifestly improper, chancery rules of investment must prevail.[82] We have already observed that conversions are not favored; that

579, 106 N. W. 1091, 5. L. R. A. 575, 115 Am. St. Rep. 1091 (two months).

There are extreme cases in which a guardian would not be charged for delaying to invest, even with simple interest, it appearing on proof that he could not do so advantageously by exercising due diligence. Brand v. bott, 42 Ala. 499; Ashley v. Martin, 50 Ala. 537. At the present day there are banks or trust companies which allow small rates of interest on balances subject to check.

78. Crosby v. Merriam, 31 Minn. 342; Thurston, *Re*, 57 Wis. 104.

79. Gott v. Culp, 45 Mich. 265, 7 N. W. 767. See *In re* Evans' Estate, 7 Pa. Super. Ct. 142 (guardian liable where leaves money uninvested four years in bank which fails).

80. Worrell's Appeal, 23 Pa. St. 44; White v. Parker, 8 Barb. 48; Karr v. Karr, 6 Dana, 3; Pettus v. Sutton, 10 Rich. Eq. 356; Owen v. Peebles, 42 Ala. 338; *infra*, § 902.

81. Baker v. Richards, 8 S. & R. 12; Knowlton v. Bradley, 17 N. H. 458.

82. Macphers. Inf. 266. And see Hill, Trustees, 368-384, and Wharton's notes.

is, the investment of personalty in lands or of lands in personalty.[83] But in many of our States the probate courts are allowed at discretion, like courts of equity, upon a proper showing, to permit the sale of a ward's lands, and the change or conversion from unproductive to productive property, or the improvement of land, all for the ward's intended benefit.[84]

In England the estates of infants and persons of unsound mind under chancery guardianship are usually controlled by the court. The general practice is to get in all the money due the ward and invest it in the public funds. For this purpose a receiver is appointed, if necessary. The court will not allow the ward's money to be left out on personal security, without reference to a master as to the sufficiency of the security; nor upon judgment security; but, where advantageously invested on the security of real estate, in Great Britain, the court will not disturb the investment. The statute of 4 and 5 Will. IV., c. 29, authorizes investments on real security in Ireland, under the direction of the English court of chancery.[85]

Under the English rule a trustee can only protect himself from risk when he invests the trust funds in government securities or has an order of court to invest in any other securities. This is also the law in Pennsylvania, New York and New Jersey, and applies to the committee of a lunatic.[86]

In this country the management of the personal estate of infants and others is usually left to their guardian, subject to recognized principles of law which he is bound to follow, and in the absence of statute a guardian will be protected in using his honest judgment in investments,[87] but not in making partial payments on a

83. See § 921. A guardian who takes title to lands in his own name, paying partly in his ward's money, and giving a mortgage for the unsecured sum, is guilty of waste. Robinson v. Pebworth, 71 Ala. 240. So, too, where the ward's personalty is invested in real estate without an order of the court. West Shields v. Lewis, 20 Ky. Law Rep. 1601, 49 S. W. 803.

84. See Ames v. Ames, 148 Ill. 321. See next chapter after.

85. Macphers. Inf. 266; Hill, Trustees, 395; Norbury v. Norbury, 4 Madd. 191.

86. Comm. v. Riley, 226 Pa. 244, 75 A. 367, 44 L. R. A. (N. S.) 889.

87. Baldy v. Hunter, 171 U. S. 388, 18 S. Ct. 890, 43 L. Ed. 208, 98 Ga. 170, 25 S. E. 416 (Confederate bonds).

Under Laws Neb. 1905, ch. 62, § 3, a guardian may by authority of the court exercise an option to purchase land covenanted to his wards, and may pay in cash, or partly cash. Ankeny v. Richardson, 187 F. 550, 109 C. C. A. 316; Slauter v. Favorite, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106 (where guardian investing in mortgage examined title ten days

contract to purchase property in excess of the estate,[88] and he will not be allowed for speculation or investments not authorized by law,[89] and the guardian will not be allowed for investment in stocks and bonds which he appropriated to his own use.[90] It is the general rule that either public securities or real securities are to be preferred.[91] Investments in bonds of the United States, or of the State having jurisdiction of the ward, are doubtless proper; so mortgage investments on first-class property within the State, and city and town securities, are frequently designated as suitable investments. But the stock of railway, navigation, and other incorporated companies, whose stability is uncertain, is unsuitable;[92] and corporate bonds are a security preferable to their

before loan made and found no incumbrance); Hughes v. White, 117 Ind. 470, 20 N. E. 157 (transaction depends on situation at the time); *In re* Wisner's Estate, 145 Ia. 151, 123 N. W. 978 (real estate); Henderson v. Lightner, 29 Ky. Law Rep. 301, 92 S. W. 945; Gott v. Culp, 45 Mich. 265, 7 N. W. 767; National Surety Co. v. Manhattan Mortgage C ., (N. Y. Sup.), 174 N. Y. S. 9 (not in subordinate interest in mortgage); Mumford v. Rood, 153 N. W. 921; Scoville v. Brock, 81 Vt. 405, 70 A. 1014 (may act on general reputation of the securities); Nagle v. Robins, 9 Wyo. 211, 62 P. 154 (evidence of verbal advice by judge is admissible on question of guardian's good faith). See Sucession of Buddig, 108 La. 406, 32 So. 361 (guardian must clearly show that law complied with). See Smith v. Moore (S. C.), 95 S. E. 351 (purchase of widow's interest in homestead unauthorized).

88. Scott v. Reeves, 131 Ala. 612, 31 So. 453; Harris v. Preston, 153 Ky. 810; 156 S. W. 902.

89. Stubblefield v. Stubblefield, 105 Ark. 594, 151 S. W. 994 (loss on notes); Rogers v. Dickey, 117 Ga. 819, 45 S. E. 71; American Surety Co. of New York v. Sperry, 171 Ill. App. 56; Collins v. Slaughter, 1 Ky. Law Rep. 261; *In re* Moore, 112 Me. 119, 90 A. 1088; Kimball v. Perkins, 130 Mass. 141; Shelton v. Laird, 68 Miss. 175, 8 So. 271; Empire State Surety Co. v. Cohen, 156 N. Y. S. 935, 93 Misc. 299 (incumbered real estate); Woodard v. Bird, 105 Tenn. 671, 59 S. W. 143 Ingenhuett v. Hunt, 15 Tex. Civ. App. 248, 39 S. W. 310.

90. *In re* Dow, 133 Cal. 446, 65 P. 890.

The retention of money in his own hands by the guardian of a ward and the giving of a note therefor cannot be said to amount to an "investment." Fidelity & Deposit Co. of Maryland v. Freud, 115 Md. 29, 80 A. 603.

91. Gray v. Fox, Saxt. 259; Worrell's Appeal, 9 Barr, 508; Nance v. Nance, 1 S. C. (N. S.) 209.

92. Worrell's Appeal, 23 Pa. St. 44; Allen v. Gaillard, 1 S. C. (N. S.) 279; French v. Currier, 47 N. H. 88. There are a number of recent decisions in Virginia, North Carolina, South Carolina, Alabama, and other Southern States, of temporary importance, which relate to investments in what are known as "Confederate securities," and settlements by a guardian in the so-called "Confederate money." Among these see Powell v. Boon, 43 Ala. 459; White v. Nesbit, 21 La. Ann. 600; Brand v. Abbott, 42 Ala. 499; Sudderth v. McCombs, 65 N. C. 186; Coffin v. Bramlitt, 42 Miss. 194; Parsley v. Martin,

stock. United States Bank stock has been considered a proper investment;[93] and so with stock in a solvent bank of good repute.[94] And while, in some States, fiduciary officers are strictly limited in their power of investments, in others, as Massachusetts, there is no favored stock or security, and they are only bound to exercise reasonable prudence and sound faith.[95]

While in many States the guardian's investments of his ward's moneys in stocks is illegal, and it must be his loss if the stock turn out unproductive, the tendency of the decisions is to make him liable, in case the stock prove productive, for the highest market value of the shares which he realized or might have realized, and for all the dividends he received from them.[96] But where the guardian's investment in his own business or speculations is followed by his own insolvency, the ward gains no priority over other creditors if the fund cannot be traced out and identified; and this subjection of a ward's capital to utter loss is a strong reason for discouraging it.[97] Generally, however, as to investments or changes of investment in personal property, the guardian may, in good faith and the exercise of ordinary prudence and discretion, act without a court's order.[98] An unauthorized investment is not void but voidable only,[99] and one participating in an illegal investment knowingly will be liable to the ward for losses.[1]

77 Va. 376; Robertson v. Wall, 85 N. C. 283, 500; Green v. Rountree, 88 N. C. 164; Pannill's Adm'r v. Calloways, 78 Va. 387. Such investment was held unlawful in Lamar v. Micou, 112 U. S. 452, notwithstanding the motive of the guardian was to save property from confiscation.

93. Boggs v. Adger, 4 Rich. Eq. 408; *contra,* Smith v. Smith, 7 J. J. Marsh. 238. And see Watson v. Stone, 40 Ala. 451.

94. Haddock v. Planter's Bank, 66 Ga. 496.

95. Konigmacher's Appeal, 1 Penn. 207; Kimball v. Perkins, 130 Mass. 141; Lovell v. Minot, 20 Pick. 116; Nance v. Nance, 1 S. C. (N. S.) 209; Swartwout v. Oaks, 52 Barb. 622. Where money was lost in a mortgage investment through a defective title, the guardian was relieved of the loss, it appearing that he had used fair prudence in examining the title. Slauter v. Favorite, 107 Ind. 291. See Elliott's Adm'r v. Howellandals, 78 Va. 297. In Jack's Appeal, 94 Pa. St. 367, the guardian was absolved, where the security became worthless through an extraordinary shrinkage of real estate values.

96. French v. Currier, 47 N. H. 88; Lamb's Appeal, 58 Pa. St. 142; Atkinson v. Atkinson, 8 Allen, 15.

97. See Englar v. Offutt, Trustee, 70 Md. 78.

98. Durrett v. Commonwealth, 90 Ky. 312.

99. McCutcheon v. Roush, 139 Ia. 351, 115 N. W. 903; Jordan v. Same, *Id.*

1. Hoyt v. Dollar Savings Bank of the City of New York, 175 N. Y. S. 377.

§ 899. Separation of Funds.

He must not mingle guardianship funds with his own private funds,[2] but he need not keep two separate and distinct accounts for principal and income.[3] Where there are several wards, he must allot to each his due share of expenses and profits. And if he becomes insolvent, and gives the bulk of the property received by him to one, and little or nothing to the others, equity will still treat the property as belonging to the wards in their proper shares.[4] Money temporarily in the guardian's hands should be deposited in some responsible bank of good repute. But wherever placed and however invested, the trust funds should be separated, by distinguishing marks, from his private property; exceptions occurring, however, in some cases of a temporary deposit; as, for instance, where the money is left in one's iron safe with his private valuable papers for no unreasonable length of time and under circumstances imputing to him no want of ordinary prudence and diligence, either in placing and keeping it there in that condition, or in pursuing the thief who took it out. Otherwise, he would be personally liable for loss. Hence, if a guardian deposits money of the ward in the bank to his own account, or takes a certificate of deposit simply to himself, and the bank afterwards fails, he must suffer the consequences;[5] though it is otherwise where he deposits there not imprudently or dishonestly in his trust capacity.[6] So, if he purchases stock or takes a promissory note in his own name, it will be treated as his own; but not, necessarily, to the ward's prejudice, for it might otherwise be clearly identified and traced as the ward's property.[7] And it would appear that he is not permitted in such cases to show by other evidence an intent to charge his ward; for the act itself is conclusive against him.[8]

2. *In re* Stude's Estate (Ia.), 162 N. W. 10; *In re* Allard, 49 Mont. 219, 141 P. 661; Hall v. Turner's Estate, 78 Vt. 62, 61 A. 763.

3. Rountree v. Pursell, 1 Ind. App. 522, 39 N. E. 747.

4. Case of Hampton, 17 S. & R. 144.

5. Wren v. Kirton, 11 Ves. 377; Fletcher v. Walker, 3 Madd. 73; McDonnell v. Harding, 7 Sim. 178; Routh v. Howell, 3 Ves. 565; Matthews v. Brise, 6 Beav. 239; Atkinson v. Whitehead, 66 N. C. 296. As to a certificate of deposit, see Booth v. Wilkinson, 78 Wis. 652.

6. Post's Estate, Myrick's Prob. 230; Law's Estate, 144 Pa. St. 499.

7. Jenkins v. Walter, 8 Gill & Johns. 218; White v. Parker, 8 Barb. 48; Knowlton v. Bradley, 17 N. H. 458; Brown v. Dunham, 11 Gray, 42; Beasley v. Watson, 41 Ala. 234.

8. Brisbane v. Bank, 4 Watts, 92; Stanley's Appeal, 8 Barr. 431.

§ 900. Reinvestment.

Where the trust property is already invested on securities which would not be sanctioned by the court, the question sometimes arises how far it is the guardian's duty to call them in and invest in other securities. In this, and in matters of reinvestment, the same principles would be held to apply as to general trustees. And since such questions have arisen almost always under testamentary trusts, and not as between guardian and ward, the reader is referred to works on that subject for a fuller exposition of the law. We will simply add, that much is to be left to a guardian's discretion, in this and all other respects, where he manages the property of his ward on the footing of a trustee; and that he will not be held to strict account for losses occasioned in the exercise of his authority, where he has acted *bona fide,* and according to the best of his judgment, or with average good judgment, though not with all the promptitude and skill which the exigencies of the ward's situation demanded.[9]

§ 901. Statutes Governing Investments.

There are statutes in many States which authorize the investment by fiduciaries only in particular kinds of securities. In others it is provided that investments may be made in any manner for the interest of all concerned.[10] Guardians are in various States restricted to investments made only under order of court,[11]

9. See Hill, Trustees, and Wharton's notes, 379-384. And see Perry, Trusts, chs. 14, 21.

If the guardian on his appointment finds in the estate investments of a kind not authorized he should sell them within a reasonable time and will be liable for loss if he does not do so. *In re* Yunt's Estate, 170 N. Y. S. 303, 103 Misc. 358.

10. Gary v. Cannon, 3 Ired. Eq. 64. See State v. Harrison, 75 N. C. 432; Stevens v. Meserve, 73 N. H. 293, 61 A. 420, 111 Am. St. R. 612 (mortgages on real estate of double the amount of the loan—guardian may determine value of real estate).

11. Corcoran v. Kostrometinoff, 164 F. 685 (only after notice); *In re* Wood's Estate and Guardianship, 159 Cal. 466, 114 P. 992 (after proper hearing); McIntyre v. The People, Use, Etc., 103 Ill. 142; Easton v. Somerville, 111 Ia. 164, 82 N. W. 475, 82 Am. St. R. 502; McCutchen v. Roush, 139 Ia. 351, 115 N. W. 903; Jordan v. Same, Id.; Berryhill v. Jackson (Okla.), 172 P. 787 (sale under irregular order of court upheld); Francis v. Sperry (Okla.), 176 P. 732; *In re* Wood's Estate, 247 Pa. 478, 93 A. 634; Nagle v. Robins, 9 Wyo. 211, 62 P. 154 (verbal advice by judge to guardian is not an order of court protecting him in making investments). See Davidson v. I. M. Davidson Real Estate & Investment Co., 226 Mo. 1, 125 S. W. 1143 (where is no money in estate order authorizing investment is not binding on widows). See *In re* Jiskra's Estate (Wash.), 182

or that they cannot invest in real estate,[12] or in a non-resident corporation,[13] or in anything other than public securities.[14]

§ 902. When Chargeable with Interest on Investments.

Negligence and unreasonable delay in the investment of trust funds is a breach of official duty for which the trustee is held answerable. And where the guardian carelessly suffers cash balances to remain idle in his hands he is chargeable with interest,[15] and in case of fraud or positive misconduct with compound interest,[16] compounded yearly.[17] It remains a disputed question

P. 961. See Pace v. Pace (Okla.), 172 P. 1075 (order of court based on mistake no protection).

12. *In re* Decker, 76 N. Y. S. 315, 37 Misc. 527; *In re* Bolton, 159 N. Y. 129, 53 N. E. 756, 56 N. Y. S. 1105 (order of surrogate authorizing purchase of residence for ward is void). See Beakley v. Ford, 123 Ark. 383, 185 S. W. 796.

13. *In re* Decker, 76 N. Y. S. 315, 37 Misc. 527.

14. *In re* Decker, 76 N. Y. S. 315, 37 Misc. 527 (not in bank stock).

15. Willis v. Rice, 157 Ala. 252, 48 So. 397 (simple interest after partial settlement); Merritt v. Wallace, 76 Ark. 217, 88 S. W. 876 (ten years' delay); France v. Shockey, 92 Ark. 41, 121 S. W. 1056 (6 per cent.); Parker v. Wilson, 98 Ark. 553, 136 S. W. 981, stay of judgment granted, 99 Ark. 344, 137 S. W. 926; *In re* Boyes' Estate, 151 Cal. 743, 90 P. 454; Robinson v. Smith, 206 Ill. App. 556 (guardian allowing interest to accumulate not chargeable as if he had collected it annually and released it); Kinsey v. State, 71 Ind. 32; Marquess v. La Baw, 82 Ind. 550; *In re* Stude's Estate (Ia.), 162 N. W. 10; Goff's Guardian v. Goff, 123 K. 73, 93 S. W. 625, 29 Ky. Law Rep. 501; *In re* Watson, 51 La. Ann. 1641, 26 So. 409; State *ex rel.* Deckard v. Macom (Mo. App.), 186 S. W. 1157; *In re* Pruyne, 73 N. Y. S. 859, 68 App. Div. 584 (compounded annually); *In re* Ward, 98 N. Y. S. 923, 49 Misc. 181; *In re* Boyle's Estate, 67 Pa. Super. Ct. 381 De Cordova v. Rogers, 97 Tex. 60, 75 S. W. 16 (added to income); Freedman v. Vallie (Tex. Civ. App. 1903), 75 S. W. 322 (10 per cent.); Logan v. Gay, 99 Tex. 603, 90 S. W. 861, 87 S. W. 852; Brockschmidt v. Becker (Tex. Civ. App. 1910), 132 S. W. 111; Yates v. Watson (Tex. Civ. App.), 187 S. W. 548; Elliott's Adm'r v. Howell, 78 Va. 297. See *In re* Wohlers, 164 N. Y. S. 936, 98 Misc. 500 (guardian entitled to interest on legacies to ward).

16. Barney v. Saunders, 16 How. 535; Swindall v. Swindall, 8 Ired. Eq. 285; Knott v. Cottee, 13 E. L. & Eq. 304; Stark v. Gamble, 43 N. H. 465; Mackin v. Morse, 130 Mass. 439; Snavely v. Harkrader, 29 Gratt. 112; Tyson v. Sanderson, 45 Ala. 364; Clay v. Clay, 3 Met. (Ky.) 548; Rawson v. Corbett, 150 Ill. 466. But see Reynolds v. Walker, 29 Miss. 250. Compound interest should not be charged where there is no wilful breach of duty; nor where the ward, on coming of age, voluntarily leaves the money in the late guardian's hands without a demand. Kattelman v. Estate of Guthrie, 142 Ill. 357.

17. *In re* Dow, 133 Cal. 446, 65 P. 890; *In re* Hamilton's Estate, 139 Cal. 671, 73 P. 578 (funds used in guardian's own business); Glassell v. Glassell, 147 Cal. 510, 82 P. 42; Gay v. Whidden, 64 Fla. 295, 59 So. 896; Jones v. Nolan, 120 Ga. 588, 48 S. E.

whether the guardian should be charged with compound interest for mere delinquency; but it seems that he should not. In some cases a trustee has been so charged, because the trusts under which he acted required him to place the fund where more than simple interest would have accumulated. In others, the principle seems to have been to exact it as a penalty for his misconduct in deriving, or seeking to derive, some pecuniary advantage from the trust money, or in squandering it. In all cases courts of chancery have exercised a liberal discretion, according to the circumstances.[18] The rule announced by Chancellor Kent cannot, therefore, be considered quite accurate.[19]

Interest may be compounded only to the time of the termination of guardianship,[20] and the compounding of interest must cease after the wards arrive at maturity.[21] If the guardian takes the funds fraudulently,[22] or improperly invests them, he is liable for the highest legal rate of interest,[23] but where an expenditure is

166; Luke v. Kettenbach (Ida.), 181 P. 705; Blakeney v. Wyland, 115 Ia. 607, 89 N. W. 16; Charles v. Witt, 88 Kan. 484, 129 P. 140 (rents); Commonwealth v. Lee, 120 Ky. 433, 89 S. W. 731, 990, 27 Ky. Law Rep. 806, 28 Ky. Law Rep. 596; *In re* Noble's Estate, 178 Pa. St. 460, 35 A. 859 Smith v. Moore (S. C.), 95 S. E. 351; Scheib v. Thompson, 23 Utah, 564, 65 P. 499 (10 per cent. compounded annually). See *In re* Anderson, 97 Wash. 688, 167 P. 71. See Forbes v. Ware, 172 Mass. 306, 52 N. E. 447 (where no fraud or demand shown).

18. See language of the master of the rolls, in Jones v. Foxall, 13 E. L. & Eq. 140; Roche v. Hart, 11 Ves. 58.

19. 2 Kent, Com. 231, and note *ib.*, with citation of authorities. And see Roche v. Hart, 11 Ves. 58; Robinson v. Robinson, 9 E. L. & Eq. 70; Light's Appeal, 24 Pa. St. 180; Kenan v. Hall, 8 Ga. 417; Greening v. Fox, 12 B. Monr. 187; Bentley v. Shreve, 2 Md. Ch. 215; Pettus v. Clauson, 4 Rich. Eq. 92; Farwell v. Steen, 46 Vt. 678; Finnell v. O'Neal, 13 Bush, 176. And, pending a judicial decree upon his final balance, one is under no obligation to invest and should not be charged interest unless he has made use of the fund or earned interest. *Re* Mott, 26 N. J. Eq. 509. Mere failure of the guardian to file annual accounts does not render him liable for compound interest. Ashley v. Martin, 50 Ala. 537. He should be so charged only in cases of fraud or flagrant breach of trust. Thurston *Re*, 57 Wis. 104. And see Shaw v. Bates, 53 Vt. 360.

20. Stewart v. Sims, 112 Tenn. 296, 79 S. W. 385; Windon v. Stewart, 48 W. Va. 488, 37 S. E. 603.

21. Tanner v. Skinner, 11 Bush (Ky.) 120; Tanner v. Skinner, 74 Ky. 120. See *In re* Noble's Estate, 178 Pa. St. 460, 35 A. 859.

22. Smith v. Smith, 210 F. 947 (notwithstanding order of court authorizing him to borrow ward's money); Waldstein v. Barnett, 112 Ark. 141, 165 S. W. 459; Fisher v. Brown, 135 N. C. 198, 47 S. E. 398 (8 per cent.); Whitfield v. Burrell, 54 Tex. Civ. App. 567, 118 S. W. 153.

23. Francis v. Sperry (Okla.), 176 P. 732; Cross v. Rubey (Mo. App.), 206 S. W. 413; Murph v. McCullough, 40 Tex. Civ. App. 403, 90 S. W. 69.

made in good faith, though not allowed by the court, the guardian will be charged with simple interest only.[24]

One acting as guardian may be charged with compound interest in the same way as a guardian regularly appointed.[25]

If the guardian keeps no accounts, and cannot show what interest he made on the funds of the estate, he must account for interest at the legal rate from the time when they should have been invested.[26] Where he loans his ward's money on usury, and thereby forfeits the whole debt, he is liable for principal and interest.[27] But this need not prevent him from investing at more than the ordinary or "legal" rate, if it be in reality lawful; and in some States he is bound to do so.[28]

The guardian will be allowed interest on disbursements he has made from his own funds for the ward only where they are large in amount and made early in the year.[29] But interest may not be enforced where the guardian was not allowed for sums paid out for the ward which amounted to more than the interest.[30]

The guardian is chargeable with interest actually made on the funds of the estate,[31] compounded annually.[32]

§ 903. Loans by Guardian.

The guardian in the absence of statute is bound to use the prudence of a careful business man in making loans, and is liable for failure to do so,[33] and should take proper security.[34] But for

24. Campbell v. Clark, 63 Ark. 450, 39 S. W. 262; *In re* Smith, 89 N. Y. S. 639, 97 App. Div. 157.

25. Kester v. Hill, 46 W. Va. 744, 34 S. E. 798.

26. Moyer v. Fletcher, 56 Mich. 508, 23 N. W. 198.

27. Draper v. Joiner, 9 Humph. 612.

28. Foteaux v. Lepage, 6 Ia. 123; Frost v. Winston, 32 Mo. 489.

29. Bliss v. Spencer (Va.), 99 S. E. 593.

30. Griffith's Ex'r v. Bybee, 24 Ky. Law Rep. 666, 69 S. W. 767; Sayers v. Cassell (Va. 1873), 23 Grat. 525.

31. Smith v. Smith, 210 F. 947; Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004; Hedges v. Hedges, 24 Ky. Law Rep. 2220, 73 S. W. 1112; Koyl v. Lay, 194 Mo. App. 291, 187 S. W. 279, 196 S. W. 433; Garrett v. Carr, 1 Rob. (Va.) 196 (surplus of interest). See Bell v. Bell's Guardian, 167 Ky. 430, 180 S. W. 803 (not chargeable on income in excess of rental fixed caused by improvements made by guardian); *In re* Allard, 49 Mont. 219, 141 P. 661 (guardian cannot transfer loan from account of one ward to another).

32. Boynton v. Dyer (18 Pick.), 35 Mass. 1; Miller v. Condon (14 Gray), 80 Mass. 118; Anderson v. Silcox, 82 S. C. 109, 63 S. E. 128 (from beginning of year succeeding year of appointment).

33. Des Moines Sav. Bank v. Krell, 176 Ia. 437, 156 N. W. 858; Atkinson v. Wittig, 19 Ky. Law, 513, 40 S. W. 457 (loan to failing corporation secured by notes of failing firm is not prudent); *In re* Allard, 49 Mont. 219, 141 P. 661; Cabell v. McLish (Okla.), 160 P. 592; Nagle v. Robins, 9 Wyo. 211, 62 P. 154.

34. Corcoran v. Kostrometinoff, 164

losses which are without the protection of this rule, the guardian or other trustee is always personally responsible. And loans on the credit of a single individual (even though it be the child's parent)[35] or a single firm, without other security, or with very doubtful security, are not sustained;[36] except perhaps in special instances of transactions with some failing or doubtful debtor already owing the ward's estate, with whom one seeks to make as prudent and advantageous terms as possible. Nor are investments in indorsed notes of parties of bad or doubtful standing to be upheld;[37] though the rule would be otherwise if their credit was good. To lend money deliberately and without special excuse, on what one knows is insufficient security, is a waste of the ward's estate,[38] and where he takes security in his own individual name he will be liable as insurer;[39] and if the guardian uses due diligence he will not be liable though loss ensues.[40]

The guardian is liable if he makes a loan to himself.[41] Statutes often require the approval of the court in loans,[42] and the guardian will be protected if he obeys an order of court.[43] If a loan by the

F. 685; Leach v. Gray (Ala.), 77 So. 341; *In re* Carver's Estate, 118 Cal. 73, 50 P. 22; Line v. Lawder, 122 Ind. 548, 23 N. E. 758; Lovell v. Minot, 20 Pick. 116. See Torry v. Frazer, 2 Redf. 486; Norris v. Norris, 83 N. Y. S. 77, 85 App. Div. 113; Kunz v. Ragsdale (Tex. Civ. App.), 200 S. W. 269; Nagel v. Robins, 9 Wyo. 211, 62 P. 154 (guardian should be given speculative security and charged with the amount of the loan). See Nagle v. Robins, 9 Wyo. 211, 62 P. 154 (holding loan with stock as security is not an investment in stock).

35. Wyckoff v. Hulse, 32 N. J. Eq. 697.

36. Smith v. Smith, 4 Johns. Ch. 281; Line v. Lawder, 122 Ind. 548; Clay v. Clay, 3 Met. (Ky.) 548; Boyett v. Hurst, 1 Jones Eq. 166; Clark v. Garfield, 8 Allen, 427; Gilbert v. Guptil, 34 Ill. 112; Lee v. Lee, 55 Ala. 590. But see State v. Morrison, 68 N. C. 162.

37. Harding v. Larned, 4 Allen, 426; Fletcher v. Fletcher, 29 Vt. 98; Covington v. Leak, 65 N. C. 594; Hurdle v. Leath, 63 N. C. 597.

38. Burwell v. Burvell, 78 Va. 574.

39. *In re* Guardianship of Bane, 120 Cal. 533, 52 P. 852, 65 Am. St. R. 197.

40. Rowe v. Sanford, 74 Mo. App. 191.

41. Fidelity & Deposit Co. of Maryland v. Freud, 115 Md. 29, 80 A. 603; *In re* Bates' Guardianship (Okla.), 174 P. 743 (loan to himself cannot be authorized by court); Hutson v. Jenson, 110 Wis. 26, 85 N. W. 689.

42. Parker v. Wilson, 136 S. W. 981 (stay of judgment granted, 99 Ark. 344, 137 S. W. 926); American Bonding Co. of Baltimore v. People, 46 Colo. 394, 104 P. 81; Charles v. Witt, 88 Kan. 484, 129 P. 140; Woodard v. Bird, 105 Tenn. 671, 59 S. W. 143. See Nagle v. Robins, 9 Wyo. 211, 62 P. 154 (where statute as to approval of court is permissive, only the guardian is not entitled to refuse a proper loan until approval of court is obtained).

43. *In re* Schandoney's Estate, 133

guardian be sanctioned by the court, he is not liable for loss, unless it arises from his subsequent default.[44] But the assent of the court must be in writing and of record; not given by parol.[45]

The ward has no redress where the estate has suffered no financial loss from an unauthorized loan,[46] and the unauthorized loan is good against the borrower.[47]

§ 904. Bank Accounts.

While a guardian has a right to deposit funds temporarily in a bank for safe-keeping, and he will not be liable for loss if he exercises ordinary care in the selection of a bank and so earmarks the deposit as to show its trust character;[48] still, if he deposits the money in his individual name, without any designation or indication of his representative character, he is generally liable for its loss notwithstanding that he has not been guilty of any negligence.[49] Furthermore, he may not make such a deposit as an investment as it is held to be a loan on personal security only and should not be made except by leave of court.[50]

To protect the guardian against loss of funds deposited in a bank from its failure, the guardian must show sufficient reason for not investing the funds elsewhere,[51] and will not be responsible for

Cal. 387, 65 P. 877; *In re* O'Brien's Estate, 80 Neb. 125, 113 N. W. 1001 (personal supervision of county judge is not equivalent to order of court, neither is approval of accounts); Nagle v. Robins, 9 Wyo. 211, 62 P. 154.

44. O'Hara v. Shepherd, 3 Md. Ch. 306; Bryant v. Craig, 12 Ala. 354; Carlysle v. Carlysle, 10 Md. 440.

45. See Newman v. Reed, 50 Ala. 297.

46. Townsend v. Stern (Ia. 1904), 99 N. W. 570.

47. Wright v. Wright (Tex. Civ. App.), 155 S. W. 1015.

48. *Re* Wood, 158 Cal. 466, 114 P. 992, 36 L. R. A. (N. S.) 252; Otto v. Van Riper, 164 N. Y. 536, 58 N. E. 643, 79 Am. St. R. 673 (affg. 52 N. Y. S. 773, 31 App. Div. 278) (deposit in joint names of guardians as an individual and the sureties is improper); O'Connor v. Decker (Wis. 1897), 70 N. W. 286 (letters "Guar." after his name are sufficient).

A bank which has two accounts of the same individual, one as an individual and the other as guardian, has not right to pay the depositor's individual checks out of his guardian's account, and is liable to the estate for doing so. United States Fidelity & Guaranty Co. v. United States Nat. Bank (Ore.), 157 P. 155, L. R. A. 1916E, 610.

49. *Re* Bane, 120 Cal. 533, 52 P. 852.

50. *Re* Wood, 159 Cal. 466, 114 P. 992, 26 L. R. A. (N. S.) 252; Murphy v. McCullough, 40 Tex. Civ. App. 403, 90 S. W. 69, 36 L. R. A. (N. S.) 252; United States Fidelity & Guaranty Co. v. Taggart (Tex. Civ. App.), 194 S. W. 482; *In re* Jiskra's Estate (Wash.), 182 P. 961 (guardian is liable where deposits funds in bank instead of investing as ordered).

51. *In re* Grammel, 120 Mich. 487, 79 N. W. 706, 6 Det. Leg. N. 219.

loss of a fund deposited temporarily in a bank prudently selected,[52] or deposited by order of court.[53] An order of court ordering the guardian to deposit the funds of the ward in a certain institution from which they shall be withdrawn only on order of court may be void as infringing on his right of possession.[54]

A small fund may be properly left in a savings bank at four per cent., where it is so small that no higher rate could have been procured elsewhere.[55]

§ 905. Expenditures Allowed.

The ward's estate is subject to all liabilities properly incurred in the course of the guardian's judicious management of it.[56]

The guardian will be granted considerable latitude in the use of the funds of the estate if he exercises an honest discretion, and expenses incurred in good faith should be allowed although they did not benefit the ward.[57]

Where there is any doubt about the propriety of an expenditure, the prudent guardian will obtain its approval by the court in advance, and statutes frequently provide for such approval before making the expenditure.[58] The guardian may be allowed for ex-

52. Corcoran v. Kostrometinoff, 164 F. 685; *In re* Wood's Estate & Guardianship, 159 Cal. 466, 114 P. 992.

53. *In re* Guardianship of Corcoran, 3 Alaska, 263; Nelson v. Cowling, 89 Ark. 338, 116 S. W. 890; Cohn v. Winslow, 115 Miss. 275, 76 So. 264.

54. De Greyer v. Superior Court of City and County of San Francisco, 117 Cal. 640, 49 P. 983, 59 Am. St. R. 220. See, however, Succession of Wegmann, 110 La. 930, 34 So. 878 (in peculiar cases court may order funds deposited in its registry).

55. *In re* Klunck, 68 N. Y. S. 629, 33 Misc. 267. See Kerr v. Weathers, 153 P. 866.

56. Burton's Adm'r v. Selph (Ky. 1909), 118 S. W. 286 (only sums expended for ward's benefit); McCormick v. Shannon, 111 N. Y. S. 875, 127 App. Div. 745 (buying at foreclosure to protect wards); *In re* Hill's Estate, 250 Pa. 107, 95 A. 426 (not allowed where purpose of payments to wards did not appear); Anderson v. Steddum (Tex. Civ. App.), 194 S. W. 1132; Buskirk v. Sanders, 70 W. Va. 363, 73 S. E. 937 (only necessaries); Owens v. Mitchell, 38 Tex. 588. As to carriage hire, see Ruble v. Cottrell, 57 Ark. 190.

57. Tegart v. McCaleb, 9 La. Ann. 259; State *ex rel.* Tygard v. Elliott, 82 Mo. App. 458 (may be allowed for penalties paid for delay in payment of taxes where was no money to pay taxes on time).

58. State v. Dunbar's Estate, 99 Mich. 99, 57 N. W. 1103; Cross v. Rubey (Mo. App.), 206 S. W. 413; Yates v. Watson (Tex. Civ. App.), 187 S. W. 548; Davis. v. White (Tex. Civ. App.), 207 S. W. 679. See Windleton v. O'Brien, 68 Mo. App. 675. See Barton v. Bowen (Va.), 27 Gratt. 849 (may be allowed after expenditure if would have been authorized before). *Contra, In re* Alexander, 79 N. J. Eq. 226, 81 A. 732.

penses incurred in protecting or obtaining control of the person of the ward.[59]

The guardian will be allowed for costs, attorney's fees and other expenses of litigation properly incurred for the estate,[60] but not for expenses unnecessary in the litigation.[61]

As the guardian is allowed his costs and expenses in suits on the ward's behalf, so he may charge bills of professional counsel properly paid; and this too when the charge was fairly occasioned by a contest over his accounts, which he defended; but he cannot make the estate pay for advice and services rendered on his own account under any colorable pretext.[62] And the primary

59. Bank v. Krell, 176 Ia. 437, 156 N. W. 858 (expenditures need not be confined to food or clothing actually used by wards); *In re* Pruyne, 73 N. Y. S. 859, 68 App. Div. 584. See *In re* Boyle's Estate, 67 Pa. Super. Ct. 381 (guardian adopting ward allowed for her maintenance at his home).

60. *In re* Brady, 10 Ida. 366, 79 P. 75 (will contest in which wards are interested); Luke v. Kettenbach (Ida.) 181 P. 705; *In re* Tolifaro, 113 Ia. 747, 84 N. W. 936; Appeal of Farnum, 107 Me. 488, 78 A. 901; Grove v. Reynolds, 100 Mo. App. 56, 71 S. W. 1103; *In re* Decker, 76 N. Y. S. 315, 37 Misc. 527 (attorney's fee for preparing final account); Order, 102 N. Y. S. 211, 117 App. Div. 294, affirmed, *In re* Tyndall, 190 N. Y. 522, 83 N. E. 1133 (attorney's fees based only on what services are worth); Title Guaranty & Surety Co. v. Slinker, 42 Okla. 811, 143 P. 41 (premiums on guardian's bond); Scheib v. Thompson, 23 Utah, 564, 65 P. 499.

61. *In re* Tolifaro, 113 Ia. 747, 84 N. W. 936 (attendance of guardian at hearing); State *ex rel.* Tygard v. Elliott, 82 Mo. App. 458 (not for expenses of non-resident guardian in coming to State to qualify); *In re* Hill's Estate, 250 Pa. 107, 95 A. 426.

62. McElhenny's Appeal, 46 Pa. St. 347; Alexander v. Alexander, 8 Ala. 796; Neilson v. Cook, 40 Ala. 498; State v. Foy, 65 N. C. 265; Blake v. Pegram, 101 Mass. 592; Voessing v. Voessing, 4 Redf. 360; Moore v. Shields, 69 N. C. 50; Hunt v. Maldonado, 89 Cal. 636. The rule in some States is strict that a guardian who is a counsellor cannot charge for professional services rendered by himself. Morgan v. Hannas, 49 N. Y. 667. But cf. Blake v. Pegram, *supra*. Where the accounts have become complex and intricate through the guardian's own fault, the cost of stating them correctly ought not to be charged to the ward. Rawson v. Corbett *et al.*, 150 Ill. 466.

A retiring guardian should not be compelled to account for money which his successor may collect equally well. Mattox v. Patterson, 60 Ia. 434. A guardian who has received money as such cannot escape accounting therefor by setting up that it belongs to some one else than his wards. Humble v. Mebane, 89 N. C. 410. His failure to disclose that he has received money for his ward amounts to a conversion thereof. Asher v. State, 88 Ind. 215. He cannot avoid liability to account, if acting as guardian, by denying that he was appointed. Gregory v. Field, 63 Miss. 323. And see as to fraudulent concealment of worthless securities, Slauter v. Favorite, 107 Ind. 291. Where one kept his accounts so imperfectly that it was impossible to say whether he should receive certain credits as general or special guardian, they were credited one

liability for such attorneys as he employs is of course his own.[63]

The guardian may be allowed for expenses though he has not actually paid them if there is an arrangement in good faith that he shall do so.[64]

The fact that expenditures otherwise improper were incurred at the request of the wards is no defence.[65] The guardian may be allowed the ward's share of the debts of the estate in which he is an heir.[66] Mother who is guardian of female ward may not be allowed for expenses of ward's wedding,[67] but the burial expenses of the mother of the ward may be properly allowed.[68]

The guardian may make payments on the order of an infant ward to her husband if the latter is of full age,[69] but not if he is under age.[70]

The guardian will not be allowed for sums expended in trying to protect unauthorized investments,[71] and he will not be allowed for expenses in contesting removal proceedings where they force his resignation.[72]

He is to be reimbursed for all reasonable and proper expenses incurred by him in the management of his ward's estate.[73] Also for his proper advances.[74] Interest has been allowed on sums of

half to each fund. Smith v. Gummere, 39 N. J. Eq. 394.

63. §§ 911, 912.

64. *In re* Mason, 68 Neb. 779, 94 N. W. 990 (attorney's fees). *Contra*, *In re* Plumb, 53 N. Y. S. 558, 24 Misc. 249, 2 Gibbons, 447.

65. *In re* Tolifaro, 113 Ia. 747, 84 N. W. 936.

66. Sims v. Billington, 50 La. Ann. 968, 24 So. 637.

67. Keeney v. Henning, 64 N. J. Eq. 65, 53 A. 460.

68. *In re* Connolly's Estate, 150 N. Y. S. 559, 88 Misc. 405.

69. State v. Joest, 46 Ind. 233, 235; State v. Parrish, 1 Ind. App. 441, 27 N. E. 652.

70. State v. Joest, 46 Ind. 233, 235.

71. *In re* Moore, 112 Me. 119, 90 A. 1088.

72. *In re* Cobb's Estate (Okla.), 166 P. 885.

73. Personal services as a mechanic or architect are ruled out strictly in some States, the guardian being restricted to his statutory commission. Morgan v. Hannas, 49 N. Y. 667. Other States rule differently; their rule being that of a fair allowance rather than a fixed commission. § 375. A guardian who keeps a store may in good faith supply the ward's necessaries, and hence charge at customary rates of profit. Moore v. Shields, 69 N. C. 50. But this principle is a dangerous one to admit far. The guardian of a wealthy insane adult ward may fairly claim compensation for luxuries supplied him, and for personal visits and care suitable to the ward's welfare. May v. May, 109 Mass. 252. As to estimating necessaries purchased with depreciated money, see Phillips v. Towles, 73 Ala. 406. The guardian cannot as such sue his ward for necessaries, having no property of the ward in possession to reimburse him for maintenance. McLane v. Curran, 133 Mass. 531.

74. Merkell's Estate, 154 Pa. St. 285.

money necessarily advanced by him to his ward; and this seems reasonable.[75]

Interest may be allowed a guardian on disbursements with annual rests, the amounts expended for the previous year deducted and interest computed on the balance up to the next annual rest.[76]

Where the ward was mentally incapacitated for contracting or appointing an agent, the guardian cannot be credited with sums paid to an agent so appointed by the ward, but only for such sums as were shown to have been used for the ward's benefit.[77] The guardian cannot be allowed for gifts made by him to the ward.[78]

§ 906. Payment of Debts.

It is the guardian's duty to pay all just debts of the ward,[78a] but he is not to apply property exempt from attachment or execution in satisfaction of his ward's debts.[79]

§ 907. Continuance in Business.

The guardian of an insane adult ward cannot lawfully continue the ward's business, so as to charge it with losses thereby incurred,[80] and a ward's property should not be subjected, at the guardian's instance, to the hazards of business, nor should a probate court confer any such authority.[81] But where he does so beneficially, the ward, by acceptance of the benefits after becoming *sui juris*, may be estopped from objecting.[82]

§ 908. Liability for Negligence or Fraud.

So far as the guardian acts within the scope of his powers he is bound only to the observance of fidelity, and such diligence and prudence as men ordinarily display under like circumstances.

75. Hayward v. Ellis, 13 Pick. 272; May v. Skinner, 152 Mass. 328. But see Evarts v. Nason, 11 Vt. 122. And so interest received on a small balance may stand in lieu of compensation. Mattox v. Patterson, 60 Ia. 434.

76. Abrams v. United States Fidelity & Guaranty Co., 127 Wis. 579, 106 N. W. 1091, 5 L. R. A. 575, 115 Am. St. R. 1091. See Nelson v. Cowling, 89 Ark. 334, 116 S. W. 890 (interest not allowed where gross neglect of duty).

77. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004.

78. Harper v. Payne, 24 Ky. Law Rep. 2301, 73 S. W. 1123.

78a. Alcon v. Koons, 42 Ind. App. 537, 82 N. E. 92; Anderson v. Silcox, 82 S. C. 109, 63 S. E. 128 (ward's trousseau); State v. Fidelity & Deposit Co. of Maryland (Md.), 104 A. 278. See Simpson v. Roberts, 205 Ill. App. 35 (not for funeral expenses of ward's mother).

79. Fuller v. Wing, 5 Shep. 222.

80. Corcoran v. Allen, 11 R. I. 567.

81. Michael v. Locke, 80 Mo. 548. And see Bush v. Bush, 33 Kan. 556; Carter v. Lipsey, 70 Ga. 417; Warren v. Union Bank of Rochester, 157 N. Y. 259, 51 N. E. 1036, 43 L. R. A. 256, 68 Am. St. R. 777.

82. Hoyt v. Sprague, 103 U. S. 613.

And in absence of misconduct his acts are liberally regarded like those of any trustee. He is not liable for investments carefully made, which afterwards prove worthless; nor where he deals with failing debtors prudently under all the circumstances, though good security be not available and a loss finally occurs.[83] Nor is he responsible for funds of which he was robbed without his fault.[84] But for any fraudulent transaction to which he lends himself he must suffer the consequences.[85] And if by his negligence the estate has suffered loss, he must make good the deficiency.[86] What acts amount to fraud or culpable negligence will depend upon circumstances. Ignorance of duty is equivalent to misconduct, where the ward's interests suffer by it.[87] And a sale of the ward's rights of property at a grossly inadequate price, upon the guardian's own responsibility, may be afterwards set aside at the instance of the ward.[88] Innocent third parties for value are not affected by the guardian's fraud; and the usual barrier applies as to negotiable securities.[89] But in general, where third parties neglect to make reasonable inquiries as to facts which ought to have raised suspicion in their minds, they may have to suffer for their own imprudence.[90]

§ 909. Effect of Guardian's Unauthorized Acts.

It is a general principle that acts done by a guardian without authority will be protected and will bind the infant, if they turn out eventually beneficial to the latter; but the guardian does such acts at his own peril. The transaction will perhaps avail as between the guardian and third parties; but the infant, on arriving at majority, may usually disaffirm it altogether, if not manifestly beneficial in the court's opinion, and require the guardian to place him *in statu quo*.[91] This risk is restricted, however, to unauthorized as well as prejudicial acts; for no guardian can be an infalli-

83. Barney v. Parsons, 54 Vt. 623; Green v. Rountree, 88 N. C. 164; Lamar v. Micou, 112 U. S. 452; § 353.

84. Furman v. Coe, 1 Caines's Cas. 96; Atkinson v. Whitehead, 66 N. C. 296.

85. McCahan's Appeal, 7 Barr, 56.

86. 2 Kent, Com. 230; Glover v. Glover, 1 McMull. 153; Royer's Appeal, 11 Pa. St. 36; Wynn v. Benbury, 4 Jones Eq. 395; Coggins v. Flythe, 113 N. C. 103.

87. Nicholson's Appeal, 20 Pa. St. 50.

88. Leonard v. Barnum, 34 Wis. 105.

89. See Gum v. Swearingen, 69 Mo. 553; 2 Schouler, Pers. Prop. 23.

90. Gale v. Wells, 12 Barb. 84; Hunter v. Lawrence, 11 Gratt. 111; Bevis v. Heflin, 63 Ind. 129.

91. Maephers. Inf. 339; *infra*, § 987.

ble judge of what is beneficial to his ward; and to make him liable in ordinary cases, beyond the limits of good faith and a sound discretion, would be intolerable. Hence, as judicial control becomes relaxed, the guardian's unauthorized acts may fairly be considered as lessening in number and importance, save so far as local statutes prescribe the rule, as they frequently do. Where the guardian acts under judicial sanction, what he does in good faith receives strong protection,[92] and even without a judicial sanction he may do many acts beneficial to his ward in their scope.[93] Unauthorized acts which turn out ill for the ward are not usually protected.[94]

In States requiring the approval of the court before a guardian can bind his ward's property one doing work under a contract cannot obtain a lien on the property where the contract was executed without the approval of the court.[95]

§ 910. Contracts in General.

A guardian, it is said, cannot by his general contracts bind the person or estate of his ward.[96] Nor can he avoid a beneficial contract made by his infant ward;[97] nor waive a benefit to which the ward is entitled by decree.[98] For anything which he does injurious to the infant is a violation of duty, and the insertion, in a contract, of words importing the title "guardian" will not shield the guardian from personal liability. In the language of Chief Justice Parsons: "As an administrator cannot by his promise bind the estate of the intestate, so neither can the guardian by his contract bind the person or estate of his ward."[99] But the rule is, after all, a technical one; for the insertion of words showing representative capacity imports that the contract was made as a trustee; the form of the remedy is affected, but not the primary source of

92. See McElheny v. Musick, 63 Ill. 329.

93. Maclay v. Equitable Co., 152 U. S. 499; Albert's Appeal, 128 Pa. St. 613; Small's Estate, 144 Pa. St. 293.

94. May v. Duke, 61 Ala. 53; McDuffie v. McIntyre, 11 S. C. 551.

95. Los Angeles County v. Winans, 13 Cal. App. 234, 109 P. 640.

96. *In re* Manning's Estate, 134 Ia. 165, 111 N. W. 409; Jones v. Brewer, 1 Pick. (Mass.) 317; Tenney v. Evans, 14 N. H. 343; Reynolds v. Garber-Buick Co., 149 N. W. 985, L. R. A. 1915C, 362; Aborn v. Janis, 113 N. Y. S. 309, 62 Misc. 95 (order affd., 106 N. Y. S. 1115, 121 App. Div. 923; Lee v. Tonsor (Okla.), 161 P. 804; Jones v. Johnson (Okla.), 178 P. 984.

97. Oliver v. Houdlet, 13 Mass. 237. And see Bac. Abr., Guardian (G).

98. Hite v. Hite, 2 Rand. 409.

99. Forster. v. Fuller, 6 Mass. 58.

liability in the real beneficiary. And on all such contracts, fairly made, the guardian is entitled to reimbursement from his ward's estate. It is simply meant that the person with whom the guardian contracts on behalf of his ward may presume a sufficiency of assets. In other words, the guardian's duty is to bring up the ward suitably; and if in the performance of his duty it becomes necessary for him to enter into contracts, they impose no duty on the ward, but bind the guardian personally and alone. If one acting in a trust capacity could claim exemption from all personal liability, on the ground that there was none of the ward's property left in his hands for payment, he might abuse his privileges. His knowledge of the exact state of the trust fund and his power of management would give him an immense advantage over the other contracting party. Hence the propriety of the rule that guardians are personally bound on their contracts, in dealing with others on the ward's behalf, while in turn they get a recompense from the estate by charging their expenses to the ward's account, to be passed upon by the court; in which sense of a reimbursement alone, whether in law or equity, can it be said that the ward is liable, since the guardian can put no contract obligations upon his ward. The insertion of words implying a trust becomes, therefore, essential in determining whether a contract was intentionally made by the guardian on his own personal account. If the guardian contracts a debt for his ward's benefit, he becomes, in this sense, personally liable; and this, even though the debt be for necessaries.[1] Where, however, the guardian's contract with the creditor shows an express limitation of his liability, by mutual assent, to the assets of the ward in the guardian's hands, it would appear that the guardian incurs no personal liability beyond such

1. Simms v. Norris, 5 Ala. 42; Rollins v. Marsh, 128 Mass. 166. And see *infra*, § 911, as to the ward's necessaries. Sperry v. Fanning, 80 Ill. 371. A guardian should take heed what contract he makes, and provide for terminating it properly. In Mass. General Hospital v. Fairbanks, 132 Mass. 414, A., in anticipation of being appointed guardian of B., an insane person, promised to pay an asylum for B.'s board and supplies. It was held that though A. resigned after his appointment and a new guardian was appointed, A.'s personal liability under the contract had not been terminated. If a guardian promises to pay a debt of his ward, he will become personally bound, though expressly contracting as guardian; and the creditor's discharge of the ward is sufficient consideration. Kingsbury v. Powers, 131 Ill. 182.

assets,[2] though he cannot thereby bind the ward's person or estate absolutely.[3]

The guardian in some States may, when proper to protect assets, make binding agreements for the benefit of the estate of the ward [4] with the approval of the court,[5] and the ward will on coming of age be bound by a contract signed for him by the guardian acting under authority of the court.[6] The guardian cannot bind the estate by any other contract than one expressly allowed by law.[7]

§ 911. Contracts for Necessaries.

For necessaries of his ward, supplied by the guardian's order and on his credit, the guardian then is liable; and this on the principle that the guardian has made a contract.[8] A guardian, it is true, cannot bind his infant ward, or the latter's estate, by a contract, even for necessaries.[9] But he is of course entitled to a proper reimbursement for the necessaries thus supplied by himself from the ward's estate. So, where he advances money for the ward's maintenance and education.[10]

But if the income of the ward's estate is ample for payment of the necessaries supplied him, the creditors may, by a proper course of procedure, have it subjected to the satisfaction of their just claims. And this, too, it would appear, notwithstanding any personal undertaking on the guardian's part.[11] Not even funds derived from a minor's pension, granted under the United States laws, are exempt from liability for the ward's support.[12] On the

2. Sperry v. Fanning, 80 Ill. 371.

3. Rollins v. Marsh, 128 Mass. 116; Reading v. Wilson, 38 N. J. Eq. 446.

4. Hanover Nat. Bank v. Cocke, 127 N. C. 467, 37 S. E. 507 (guardian may make binding agreement to loan credit to borrow money to avoid expense in settlement of insolvent bank in which ward is stockholder); LeRoy v. Jacobosky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977 (contract with trustee of insolvent bank in which ward is stockholder to save expense); Stone v. Ellis (Tex. Civ. App. 1897), 40 S. W. 1077.

5. Smoot v. Richards, 16 Tex. Civ. App. 662, 39 S. W. 133.

6. *In re* Harker's Estate, 113 Ia. 584, 85 N. W. 786.

7. Burke & Williams v. MacKenzie, 124 Ga. 248, 52 S. E. 653; William Comeron & Co. v. Yarby (Okla.), 175 P. 206. See Lenow v. Arrington, 111 Tenn. 720, 69 S. W. 314; Andrus v. Blazzard, 23 Utah, 233, 63 P. 888, 54 L. R. A. 354.

8. State v. Roche, 91 Ind. 406; Turner v. Flagg, 6 Ind. App. 563, 33 N. E. 1104; Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20.

9. Reading v. Wilson, 38 N. J. Eq. 446.

10. Smith's Appeal, 30 Pa. St. 397; Rollins v. Marsh, 128 Mass. 116; *infra*, ch. 6.

11. Barnum v. Frost, 17 Gratt. 398; Walker v. Browne, 3 Bush, 686. Suit on the probate bond by permission of court is the common remedy in many States. Cole v. Eaton, 8 Cush. 587.

12. Welch v. Burris, 29 Ia. 186; Brown's Appeal, 112 Pa. St. 18.

ward's own contract for necessaries, the guardian is not personally liable.[13] And it would appear from some cases that his knowledge of the ward's contract and failure to dissent will not suffice; or, in other words, that an express contract should be shown to charge the guardian personally. Yet such a contract of the ward may be ratified by the words or acts of a guardian; and we presume that he may generally be held bound on a contract shown by strong implication to have existed between him and the party furnishing education or support.[14] Claims for goods furnished to a ward at the request of the guardian should be made and action brought against the guardian personally and not against the ward's estate.[15] As a rule the guardian, if custodian of the ward's person, has the same right to judge as to what are necessaries, according to the estate and social position of his ward, that a parent would have for his own child;[16] and others who supply the minor are bound to take heed acordingly,[17] and the guardian is not liable for necessaries furnished the ward unless expressly authorized by him.[18] The ward is not to be judge of his own necessaries; it is the guardian rather, or the court.[19] It is held that the guardian appointed in one State may sue a foreign guardian for the support and education of wards left with the former by consent of the latter guardian.[20] So, wherever a town is liable for the support of a ward as a pauper, his guardian may claim reimbursement for necessary expenses incurred after the ward's property has been exhausted.[21] A guardian is presumed to furnish all necessaries for his infant ward, and a stranger who furnishes them must in general contract with the guardian himself.[22] But where the guardian makes purchases, the party furnishing the goods is not bound to see that payment is made from the ward's income. This risk must be run by the guardian himself, for the facts are within his

13. Baird v. Steadman, 39 Fla. 40, 21. So. 572.

14. Tucker v. McKee, 1 Bailey, 344; Hargrove v. Webb, 27 Ga. 172; Oliver v. Houdlet, 13 Mass. 237.

15. Fidelity & Deposit Co. of Maryland v. M. Rich & Bros., 122 Ga. 506, 50 S. E. 338; Hall v. Ferguson, 24 Ind. App. 532, 57 N. E. 153; Murphy v. Holmes, 84 N. Y. S. 806, 87 App. Div. 366, 14 N. Y. Ann. Cas. 71.

16. Nicholson v. Spencer, 11 Ga. 607; Kraker v. Byrum, 13 Rich. 163.

17. McKanna v. Merry, 61 Ill. 177.

18. Pinnell v. Hinkle, 54 W. Va. 119, 46 S. E. 171.

19. Matter of Plumb, 52 Hun, 119.

20 Spring v. Woodworth, 2 Allen, 206.

21. Fisk v. Lincoln, 19 Pick. 473. See Preble v. Longfellow, 48 Me. 279.

22. State v. Cook, 12 Ired. 67; Royston v. Royston, 29 Ga. 82.

own peculiar knowledge.[23] And the usual principle is, where the guardian has contracted for his ward's support without express restriction, that the creditor holds the guardian liable individually, relying upon the latter's promise, while the guardian may reimburse himself out of the ward's estate so far as justice permits.[24]

§ 912. Contracts for Services to Ward or Estate.

Under suitable circumstances a guardian may employ attorneys-at-law or other agents, and charge their compensation in his accounts.[25]

A contract by a guardian for services for the estate made without authority of court is invalid as against the estate,[26] although the value of such services may be allowed against the estate in proper proceedings in equity or the probate court;[27] but a contract for services will in any event bind only the estate and not the wards.[28] A personal judgment only against the guardian will be allowed in most States.[29]

The guardian may when necessary employ a physician to care for the ward and pay for his services out of the principal,[30] and

23. Broadus v. Rosson, 3 Leigh, 12; Hutchinson v. Hutchinson, 19 Vt. 437.

24. Rollins v. Marsh, 128 Mass. 116; Rhodes v. Frazier's Estate (Mo. App.), 204 S. W. 547; Gallagher v. McBride, 66 N. J. Law, 49 A. 582.

25. *Re* Flinn, 31 N. J. Eq. 640; *supra*, § 343. A natural tutrix of minors, duly appointed, is bound to prosecute a legal claim on their behalf, and her contract with counsel concerning compensation for service is within her powers. Taylor v. Bemiss, 110 U. S. 42. That an employed attorney must look to the guardian for his compensation, see Kowing v. Moran, 5 Dem. 56.

The guardian may give power of attorney to collect and receipt for debts. Forbes v. Reynard, 98 N. Y. S. 710, 113 App. Div. 306.

26. Morse v. Hinckley, 124 Cal. 154, 56 P. 896; McKee v. Hunt, 142 Cal. 526, 77 P. 1103; Burke & Williams v. MacKenzie, 124 Ga. 248, 52 S. E. 653 (contract for improvement of ward's real estate); *In re* Kitchen (Ind. App. 1909), 89 N. E. 375; Williams v. Bonner, 79 Miss. 664, 31 So. 207; Kersey v. O'Day, 173 Mo. 560, 73 S. W. 481.

27. Morse v. Hinckley, 124 Cal. 154, 56 P. 896; Irvine v. Stevenson (Ky.), 209 S. W. 7 (may employ more than one attorney when necessary); Succession of Hanna, 135 La. 1043, 66 So. 355; Everson v. Hurn, 89 Neb. 716, 131 N. W. 1130; Parnell v. Wadlington, 42 Okla. 363, 139 P. 121. See, however, Payne v. Rech, 6 Ohio App. 327.

An improvident contract of a guardian as to the compensation of attorneys employed to represent their interest will not be enforced; the attorneys being limited to a reasonable fee. Wheeler v. James & James (Ky. 1909), 120 S. W. 350.

28. Wilhelm v. Hendrick, 167 Ky. 219, 180 S. W. 516.

29. Baker v. Groves, 1 Ind. App. 522, 27 N. E. 640; Weber v. Werner, 122 N. Y. S. 943, 138 App. Div. 127.

30. Williams v. Bonner, 79 Miss. 664, 31 So. 207.

payments made for services in caring for the ward's real estate may be credited to the guardian,[31] but not where the services were unnecessary.[32]

Where the guardian delegates his duties to another he is liable for his actions.[33]

The ward will not be allowed to manage his own affairs unless his capacity to do so is shown by a preponderance of the proof.[34]

The guardian of an insane person may, without obtaining authority from the court, hire competent help to take care of the ward's invalid wife. He is thus discharging the personal obligations of his ward, performing an act of no unusual character. It is true as a general rule that the guardian has no authority to bind the estate of his ward by contract, but that rule does not apply to acts in performance of duties and obligations of the ward not of an unusual or extraordinary character, and which do not bind or attempt to bind the ward beyond his legal incompetency to act for himself.[35]

§ 913. Promissory Notes.

Notes payable to guardian.— The title to promissory notes made payable to the guardian is *prima facie* in him. And this is true though the ward come of age pending a suit on such notes, or otherwise the guardian's authority has ceased. Hence he may maintain suit, unless the defendant can show that it has been transferred to the successor, or otherwise disprove title.[36] A guardian may assign a note taken in his own name,[37] but a statute forbidding a sale of property without authority of the court will prevent the guardian from transferring a note without such authority.[38]

31 Sears v. Collie, 148 Ky. 444, 146 S. W. 1117; State *ex rel.* Tygard v. Elliott, 82 Mo. App. 458; McCoy v. Lane, 66 Neb. 847, 92 N. W. 1010; *In re* Mason, 68 Neb. 779, 94 N. W. 990.

32. *In re* Binghamton Trust Co., 83 N. Y. S. 1068, 87 App. Div. 26 (agent for real estate not needed); Vaughn v. Tealey (Tenn. Ch. App. 1900), 63 S. W. 236; Moore v. Bannerman (Tex. Civ. App.), 45 S. W. 825 (attorney not needed).

33. Rittenberry v. Wharton, 176 Ala. 390, 58 So. 293.

34. *In re* Lee, 105 La. 254, 29 So. 703.

35. *Re* Mores (Minn.), 160 N. W. 187, L. R. A. 1917B, 676.

36. Chambles v. Vick, 34 Miss. 109; Fountain v. Anderson, 33 Ga. 372; King v. Seals, 45 Ala. 415; Gard v. Neff, 39 Ohio St. 607.

37. Echols v. Speake, 64 So. 306; Brewster v. Seeger, 173 Mass. 281, 53 N. E. 814; Jenkins v. Sherman, 77 Miss. 884, 28 So. 726.

38. Browne v. Fidelity & Deposit Co. of Maryland, 98 Tex. 55, 80 S. W. 593. See Merchants' & Clerks' Sav.

The guardian may, however, indorse over such note on the cessation of his authority; in which case the person in lawful possession should sue. He may thus assign over a note after the ward's majority for money due the ward, and give the assignee full power to collect, where the ward interposes no valid objection.[39] So, too, he may, after his ward's death, transfer a note for the ward's money, payable to the ward or bearer, to a third person for collection.[40] But a note which evidences a debt due the guardian in his own individual capacity is not properly a part of the ward's assets; and a successor in the trust who accepts such a note from his predecessor is held liable as for a breach of his trust where the note proves uncollectible.[41] If the guardian settled with his ward whatever was due on a note taken by him he may enforce payment for his own benefit.[42] And where a guardian, on surrendering his trust, transfers to his successor a debt due the ward, this is sufficient consideration to support the promise of the latter to pay the former guardian's debt.[43]

Notes payable by guardian.— The ward's estate may be charged with a note issued on authority,[44] or where the transaction benefits the ward.[45] But the ward cannot be made liable after majority on a note given by her guardian without authority where she received no benefit after reaching her majority from the funds realized.[46]

The promise of a guardian to pay his ward's debts is not collateral, within the statute of frauds; and therefore it need not be expressed in writing.[47]

An indebtedness of the guardian of a minor for money borrowed and used for the benefit of his ward is not a good consideration for the execution of a note therefor by his successor.[48]

Bank Co. v. Schirk, 27 Ohio Cir Ct. R. 125 (where guardian has no authority to sell note he can confer none).

39. Hippee v. Pond, 77 Ia. 235; Brewster v. Seeger, 173 Mass. 281, 53 N. E. 814.

40. Fletcher v. Fletcher, 29 Vt. 98.

41. State v. Greensdale, 106 Ind. 364, and cases cited.

42. Wright v. Robinson, 94 Ala. 479.

43. French v. Thompson, 6 Vt. 54; cf. Sharman v. Jackson, 47 Ala. 329.

44. Scottish-American Mortgage Co. v. Ogden, 49 La. Ann. 8, 21 So. 116.

45. Forster v. Fuller, 6 Mass. 58, 4 Am. Dec. 87; Wallis v. Neale, 43 W. Va. 529, 27 S. E. 227.

46. Wright v. Perry, 129 Cal. 613, 62 P. 176. See Moore v. Metz, 24 Ky. Law, 1729, 72 S. W. 294.

47. Roche v. Chaplin, 1 Bailey, 419.

48. Wright v. Perry, 129 Cal. 614, 62 P. 176.

§ 914. Loans to Guardian.

The ward's estate will not be usually liable for money borrowed by the guardian without an order of court,[49] but the guardian is personally liable for moneys advanced to him.[50]

§ 915. Management of Ward's Real Estate in Detail.

The guardian has the management and control of his ward's real estate so long as his general authority lasts. It is his duty to collect the rents for the benefit of his ward, in which connection he may, according to custom, employ a real-estate agent or collector,[51] or he may be allowed an agent's commission.[52]

It is his duty not only to collect the rents but to preserve the property.[53] He may avow for *damage feasant,* sue for non-payment of rent, and bring trespass and ejectment in his own name. This was the common-law rule as to guardians in socage, and it still applies to testamentary, chancery, and perhaps to probate guardians. The recognized principle is that such guardians have an authority coupled with an interest, and not a bare authority,[54] and may prosecute and settle in good faith a claim for trespass on the ward's lands,[55] or collect the purchase price of land sold.[56] A guardian makes himself personally liable where he permits others to negligently collect the rents, or occupies the premises himself.

49. Wood v. Truax, 39 Mich. 628; Buie's Estate v. White, 94 Mo. App. 367, 68 S. W. 101. *Contra, In re* Manning's Estate, 134 Ia. 165, 11 N. W. 409 (estate liable for money used for benefit of estate though money borrowed without authority). See Scottish-American Co. v. Ogden, 49 La. Ann. 8, 21 So. 116 (authority of family meeting is sufficient); State *ex rel.* Tygard v. Elliott, 82 Mo. App. 458; *In re* Bartsch, 113 N. Y. S. 286, 60 Misc. 272.

50. Elson v. Spraker, 100 Ind. 374; Bell v. Dingwell, 91 Neb. 699, 136 N. W. 1128.

51. Haden v. Swepston, 64 Ark. 477, 43 S. W. 393 (guardian is charged with rents only from time property was turned over to him by the administrator); *Re* Flinn, 31 N. J. Eq. 640. See Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004 (liability for rents).

Guardianship of a minor's person does not carry with it the control of his real estate. Atwood v. Frost, 57 Mich. 229, 23 N. W. 790.

52. (1906) Ohlmann v. Wirth, 97 S. W. 760, 30 Ky. Law Rep. 206 (judgment modified on rehearing, Ohlman v. Same (1907), 30 Ky. Law Rep. 1372, 101 S. W. 295 (collecting rents).

53. Walker v. Thompson, 145 Ky. 597, 140 S. W. 1045.

54. Shaw v. Shaw, Vern. & Scriv. 607; Bacon v. Taylor, Kirby, 368; 2 Kent, Com. 228; Torry v. Black, 58 N. Y. 185; Pond v. Curtiss, 7 Wend. 45; Huff v. Walker, 1 Cart. 193. And see O'Hara v. Shepherd, 3 Md. Ch. 306. But such suits cannot in Illinois be bought by a probate or statute guardian, and under local statutes different rules apply. Muller v. Benner, 69 Ill. 108; Wallis v. Bardwell, 126 Mass. 366.

55. Tory v. Black, 58 N. Y. 185, 65 Barb. 414.

56. Davidson v. I. M. Davidson Real

or suffers the premises to remain unoccupied, or wilfully or carelessly permits others to occupy them to the ward's detriment;[57] and in the exercise of ordinary business discretion and subject to the usual rules of agency he is liable for his ward's rents which were or should have been collected.[58] He is therefore liable where he allows a squatter to perfect title to the ward's property not only for the loss of rents but also for the loss of the principal.[59]

The guardian may grant an easement in his ward's lands; but it is of no avail beyond the limit of his guardianship,[60] and he may not encumber it with covenants restricting its use.[61] He may authorize the cutting of standing timber, and allow others to carry it away,[62] though not so as to authorize a waste of the *corpus*.[63] But his license should be given in all cases for his ward's benefit, and so with the receipt of damages for another's trespass.[64] And if trees are cut and carried away by his permission, so that trespass cannot be maintained, he must make compensation to the ward.[65] Guardians may also institute proceedings for partition. Such proceedings, in England, should be by bill in equity.[66]

The guardian may make partition of the lands among the infants which will be sustained if fair.[67]

Estate & Investment Co., 226 Mo. 1, 125 S. W. 1143 (cannot receipt for purchase price when not received).

57. Wills's Appeal, 22 Pa. St. 325; Clark v. Burnside, 15 Ill. 62; Hughes' Appeal, 53 Pa. St. 500; Spelman v. Terry, 74 N. Y. 448.

58. Peale v .Thurman, 77 Va. 753; Coggins v. Flythe, 113 N. C. 103. He cannot give the child's rents or use and occupation without consideration even to the child's parent. Cheney v. Roodhouse, 135 Ill. 257; Matter of Brown, 76 Hun, 186.

59. Short v. Mathis, 107 Ga. 807, 33 S. E. 694.

60. Watkins v. Peek, 13 N. H. 360; Johnson v. Carter, 16 Mass. 443. Under Ohio statutes, a guardian cannot grant a right of way thorugh land owned by his wards without authority from the probate court. State v. Hamilton County, 39 Ohio St. 58. And see Indiana R. v. Brittingham, 98 Ind. 294. As to his authority acting under orders of a competent court to dedicate lands to the public for streets, &c., see Indianapolis v. Kingsbury, 101 Ind. 200. He cannot waive his ward's homestead rights. Ratcliff, Guardian v. Davis *et al.*, 64 Ia. 467.

61. Curry v. Keil, 46 N. Y. S. 495, 19 App. Div. 375; Day v. Forest City Railway, 27 Ohio Cir. Ct. R. 60. See *In re* Kearnes, 1 Pa. 326 (guardian has no authority to build addition); Windon v. Stewart, 43 W. Va. 711, 28 S. E. 776 (after partition).

62. Fonbl. Eq. Tr. 82, *n.*; Thompson v. Boardman, 1 Vt. 367; Bond v. Lockwood, 33 Ill. 212. See Buskirk v. Sanders, 70 W. Va. 363, 73 S. E. 937.

63. Torry v. Black, 58 N. Y. 185.

64. Torry v. Black, 58 N. Y. 556.

65. Truss v. Old, 6 Rand. 556.

66. Macphers. Inf. 340.

67. Hunt v. Rabitoay, 125 Mich. 137, 84 N. W. 59, 7 Det. Leg. N. 447. See Shiner v. Shiner, 14 Tex. Civ. App. 489, 15 Tex. Civ. App. 666, 40 S. W. 439 (guardian cannot represent devisees on partition).

Title by adverse possession may be quieted by suit by the guardian of an insane person.[68]

§ 916. Deeds of Property.

From what has been already said, it appears clear that the guardian may execute all the deeds and other writings necessary to the fulfilment of his trust. But such instruments should be signed in the name of his ward.[69] On the same principle that agents and trustees are personally bound when they exceed their authority, a guardian makes himself personally liable for stipulations which he has no right to insert in a deed, and for authorized covenants, so badly worded that they fail to bind the ward's estate; but not, it would appear, for implied covenants merely.[70] Where a married woman has executed a deed as guardian, it would seem, on principle, that the joinder of her husband is unnecessary.[71]

Guardians may assign dower. And it seems that the guardian's assignment will bind the heir, although Blackstone and Fitzherbert state the law otherwise.[72] The deed of a married woman, guardian of infants, in such capacity, does not convey her right of dower.[73]

§ 917. Repairs and Insurance.

A guardian having the means should with due prudence insure buildings, pay taxes and assessments on his ward's lands, and keep the premises in tenantable condition.[74] But as our next chapter

68. Freeman v. Funk, 85 Kan. 473, 117 P. 1024, 46 L. R. A. (N. S.) 487.

69. Hunter v. Dashwood, 2 Edw. Ch. 415.

70. Whiting v. Dewey, 15 Pick. 428; Webster v. Conly, 46 Ill. 13.

71. Palmer v. Oakley, 2 Doug. 433. An infant's guardian may accept delivery of a deed of conveyance to his ward. Barney v. Seeley, 38 Wis. 381.

72. 2 Bl. Com. 136; Fitzh. N. B. 348; 1 Washb. Real Prop. 226; Jones v. Brewer, 1 Pick. 314; Young v. Tarbell, 37 Me. 509; Curtis v. Hobart, 41 Me. 230; Boyers v. Newbanks, 2 Ind. 388; Clark v. Burnside, 15 Ill. 62.

73. Jones v. Hollopeter, 10 S. & R. 326.

74. For loss imprudently caused by a tax sale the guardian is liable, unless the ward become of age before the sale. Shurtleff v. Rile, 140 Mass. 213. See Strang v. Burris *et al.*, 61 Ia. 375. See Robinson v. Hersey, 60 Me. 225.

The guardian will be allowed for insurance paid on the ward's real estate. Sims v. Billington, 50 La. Ann. 968, 24 So. 637; Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238, 18 N. W. 797; Garvey v. Owens, 12 N. Y. Supp. 349, 58 Hun, 609.

Or taxes. State *ex rel.* Tygard v. Elliott, 82 Mo. App. 458 (though paid to wrong officer); *In re* Bodine, 134 N. Y. S. 406, 74 Misc. 498; Garvey v. Owens, 12 N. Y. Supp. 349; Savage v. City of Buffalo, 59 Hun, 609; Burgert v. Caroline, 31 Wash. 62, 71 P. 724, 96 Am. St. R. 889. See *In re* Pruyne, 73 N. Y. S. 859, 68 App. Div. 584.

will show, his power at common law over the ward's real estate is closely circumscribed, and he cannot build or make expensive permanent improvements without a previous order from a court of equity, which is in the absence of statute to be construed strictly.[75] And where he advances money for such purposes, without first obtaining an order, it would appear that he is without a remedy.[76] But the court will sometimes protect such expenditures, on the ground that the ward has received a benefit thereby;[77] and this seems the more reasonable doctrine, though not clearly recognized in this country aside from express legislation.[78] Authority granted to expend a certain sum for this purpose is held no authority to exceed that sum, though it should prove inadequate;[79] but a liberal decree under a liberal statute is construed otherwise.[80] Nor has the builder any lien upon the ward's real estate for such excess.[81] A guardian's stipulation, in his lease of the ward's lands, to pay for improvements, will not bind the ward.[82] Nor can a guardian's joinder in highway petitions to cover illegal acts.[83]

§ 918. Lease.

A guardian may ordinarily lease the ward's land without special order of the court,[84] unless by statute a special order is required.[85]

Or repairs or improvement of real estate. Buie's Estate v. White, 94 Mo. App. 367, 68 S. W. 101; Garvey v. Owens, 12 N. Y. Supp. 349, 58 Hun. 609; Bramlett v. Mathis, 71 S. C. 123, 50 S. E. 644 (measure of allowance for improvements is not amount expended but increase in value of property); Sutton v. Sutton (Tenn. Ch. App. 1900), 58 S. W. 891; Nagle v. Robins, 9 Wyo. 211, 62 P. 154. See Hickey v. Dixon, 85 N. Y. S. 551, 42 Misc. 4; *In re* Smith, 89 N. Y. S. 639, 97 App. Div. 157 (no allowance for unnecessary improvements); Wallis v. Neale, 43 W. Va. 529, 27 S. E. 227 (not where tenant should have made the repairs).

Or for incumbrances on real estate. Switzer v. Switzer, 57 N. J. Eq. 421, 41 A. 486; American Surety Co. of New York v. Sperry, 171 Ill. App. 56.

75. Payne v. Stone, 7 S. & M. 367; Miller's Estate, 1 Pa. St. 326. And see Powell v. North, 3 Ind. 392; Lane v. Taylor, 40 Ind. 495.

76. Hassard v. Rowe, 11 Barb. 22; Bellinger v. Shafer, 2 Sandf. Ch. 293.

77. See Macphers. Inf. 295; 1 Atk. 489; Hood v. Bridport, 11 E. L. & Eq. 271; Jackson v. Jackson, 1 Gratt. 143; Bent & Co. v. Burnett, 90 Ky. 600.

78. Cheney v. Roodhouse, 135 Ill. 257, recognizes this doctrine.

79. Snodgrass's Appeal, 37 Pa. St. 377.

80. May v. Skinner, 149 Mass. 375.

81. Guy v. Du Uprey, 16 Cal. 195.

82. Barrett v. Cocke, 12 Heisk. 566.

83. Payne v. Stone, 7 S. & M. 367.

84. Indian Land & Trust Co. v. Shoenfelt, 5 Ind. T. 41, 79 S. W. 134; Potter v. Redmon's Guardian, 123 Ky. 400, 96 S. W. 529, 29 Ky. Law Rep. 840; Cumberland Pipe Line Co. v. Howard, 30 Ky. Law Rep. 1179, 100 S. W. 270; Perry v. Perry, 127 N. C. 23, 37 S. E. 71; Rogers v. Harris (Tex. Civ. App.), 171 S. W. 809.

85. Gaines v. Gaines, 116 Ark. 508, 173 S. W. 410 (confirmation by court required); Gridley v. Wood, 206 Ill.

But his demise cannot last for a longer period than the law allows for the continuance of his trust. And it will determine upon the ward's death in any event. A lease made by a guardian, extending beyond the minority of his ward, was once considered void; but the modern rule treats such leases as void only for the excess at the election of the ward;[86] but statutes in some States have authorized mining or oil and gas leases for a period beyond the term of the guardianship on the ground that such extended time may be necessary for the proper development of the property.[87]

A lease by a guardian for oil and gas mining purposes is not a "conveyance of real estate" within the purview of a statute providing machinery for obtaining a license to sell real estate.[88] The same principles apply to guardians of insane persons and spendthrifts. And the rule embraces assignments of the ward's leases.[89]

App. 505; Indian Land & Trust Co. v. Shoenfelt, 5 Ind. T. 41, 79 S. W. 134; Charles v. Witt, 88 Kan. 484, 129 P. 140; Daniels v. Charles, 172 Ky. 238, 189 S. W. 192 (mining lease not an ordinary use); Fisher v. McKeemie, 43 Okla. 577, 143 P. 850; Windon v. Stewart, 43 W. Va. 711, 28 S. E. 776; Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292; Haskell v. Sutton, 53 W. Va. 206, 44 S. E. 533 (oil or gas). See *In re* Berryhill's Estate, 7 Ind. T. 593, 601, 104 S. W. 847, 850. See McCoy v. Ferguson, 172 Ky. 235, 189 S. W. 191. See Globe Soap Co. v. Louisville & N. Ry., 27 Ohio Cir. Ct. R. 759 (agreement to renew held unauthorized).

86. Bac. Abr., Leases, I; 2 Kent, Com. 228; 1 Washb., Real Prop. 307; Rex v. Oakley, 10 East, 494; Putnam v. Ritchie, 6 Paige, 390; Field v. Schieffelin, 7 Johns. Ch. 150; People v. Ingersoll, 20 Hun, 316; Richardson v. Richardson, 49 Mo. 29. See statute restriction in Muller v. Benner, 69 Ill. 108; Bates, Guardian v. Dunham, 58 Ia. 308; Bent & Co. v. Barnett, 90 Ky. 600; Bettes v. Brower, 184 F. 342; Jackson v. O'Rorke, 71 Neb. 418, 98 N. W. 1068; Huston v. Cobleigh, 29 Okla. 793, 119 P. 416 (unless authorized by court); Maxwell v. Urban, 22 Tex. Civ. App. 565, 55 S. W. 1124 (lease expires with death of guardian).

87. Mallen v. Ruth Oil Co., 231 F. 845, 146 C. C. A. 41, 230 F. 497 (by statute lease of oil and gas lands may bind ward on majority); Lawrence E. Tierney Coal Co. v. Smith's Guardian (Ky.), 205 S. W. 951, 203 S. W. 731 (statute authorizing lease beyond majority is unconstitutional; *quaere* as to oil and gas leases); Cabin Valley Mining Co. v. Hall, 155 P. 570 (lease extending beyond minority may be authorized by court); Hoyt v. Fixico (Okla.), 175 P. 517 (oil and gas lease beyond majority of ward approved).

At common law a guardian of a minor had no authority to make a lease beyond the term of the minority, but under proper statutes such a lease may be authorized by the court. In the case of oil and gas leases, where time is necessary for the development of the porperty the minor's estate is not injured but is benefited by such a lease. Cabin Valley Mining Co. v. Hall (Okla.), 155 P. 570, L. R. A. 1916F, 493.

88. Duff v. Keaton, 33 Okla. 92, 124 P. 291, 42 L. R. A. (N. S.) 472.

89. Ross v. Gill, 4 Call, 250.

The guardian must not lease imprudently, nor so as to sacrifice his ward's interests for the benefit of others.[90] The father, as natural guardian, cannot lease the land of his child; nor can the mother; nor can any mere custodian of the person.[91] So, too, guardians may take premises on lease. And though the words "A. and B., guardians" of certain minors, are used in a lease, the guardians are personally bound to the lessor to pay the rent.[92] The guardian's power to lease extends only to usufruct, and not to exhaustion of the *corpus*.[93] In the exercise of due prudence he may let out his ward's lands for raising a crop on shares.[94]

The guardian cannot, however, agree to a lien on the improvements made on the premises on the expiration of the lease,[95] and a natural guardian who has never been appointed by the probate court cannot lease.[96] The burden rests on one attacking a lease.[97]

§ 919. Mortgage or Pledge.

Mortgage or Pledge by Guardian.— The guardian's power to borrow money on a mortgage of his ward's lands, and to create liens upon it generally, is regarded with very little favor. He could hardly make the mortgage operate beyond the minority of his ward, at any rate, if the ward, on reaching majority, elected to disaffirm it; and his only safe course would be to secure the previous permission of the court; which American statutes in these days generally permit to be done on special proceedings.[98]

90. Knothe v. Kalser, 5 Thomp. & C. 4; Thackray's Appeal, 75 Pa. St. 132.

91. Anderson v. Darby, 1 N. & McC. 369; Magruder v. Peter, 4 Gill & Johns. 323; Ross v. Cobb, 9 Yerg. 463. See Drury v. Conner, 1 Har. & G. 220.

92. Hannen v. Ewalt, 18 Pa. St. 9. See Snook v. Sutton, 5 Halst. 133.

93. Thus, a guardian cannot lease oil or mineral lands for the purpose of working out the product. Stoughton's Appeal, 88 Pa. St. 198.

94. Weldon v. Little, 53 Mich. 1.

95. Hughes v. Kershow, 42 Colo. 210, 93 P. 1116.

96. Capps v. Hensley, 23 Okla. 311, 100 P. 515; Pilgrim v. McIntosh, 7 Ind. T. 623, 104 S. W. 858.

97. Norton v. Stroud State Bank, 17 Okla. 295, 87 P. 848.

98. Merritt v. Simpson, 41 Ill. 391; Lovelace v. Smith, 39 Ga. 130; Wood v. Truax, 39 Mich. 628; Edwards v. Taliafero, 34 Mich. 13. And see next chapter. Power to sell and convey, under a trust does not include power to mortgage. Tyson v. Latrobe, 42 Md. 325. As to assigning a mortgage, see next section. Where a statute requires (as in case of a land warrant) a particular authority to be obtained for a transfer of land, one who purchases without ascertaining that it has been pursued, acts at his peril. Mack v. Brammer, 28 Ohio St. 508. The Illinois constitution and statutes confer large powers on the county courts as to granting leave to mortgage, and a mortgage may be authorized to secure a loan obtained in order to make im-

The guardian can mortgage the ward's property only as authorized by statute,[99] and for debts properly contracted,[1] but may pay a mortgage out of the ward's other property.[2] He is bound to apply rents and profits in keeping down the interest on mortgage debts; nor can he, in general, invest personal estate more judiciously than in freeing the land from debt altogether.[3] An order of court is not necessary in such cases, nor for judgment debts, but it would be required for discharging other than direct encumbrances.[4]

Where a guardian purchases, on behalf of his ward, a house and lot expressly subject to a mortgage, he becomes personally liable for the amount of the unpaid debt; even though he had been authorized by the court to make the purchase. But the court will afford him relief from the ward's estate.[5] In an English case, where a guardian borrowed money to pay off encumbrances on the ward's estate and promised to give the lender security, but died before doing so, the court refused to decree specific performance; though the lender's money had been duly applied for that purpose.[6] Here, however, there had been no written contract.[7]

The guardian will be liable for failure to protect the interests of

provements on the ward's land. Mortgage Co. v. Sperry, 138 U. S. 313. Cf. Trutch v. Bunnell, 11 Ore. 58. One who lends money to a guardian who is authorized by the court to borrow for the purpose of removing liens may recover the amount from the ward's estate. Ray v. McGinniss, 81 Ind. 451.

99. Ankeny v. Richardson, 187 F. 550, 109 C. C. A. 316; Howard v. Bryan, 133 Cal. 257, 65 P. 462; Scottish-American Mortgage Co. v. Ogden, 49 La. Ann. 8, 21 So. 116 (only as sanctioned by a family meeting); Capen v. Garrison, 193 Mo. 335, 92 S. W. 368, 5 L. R. A. 838 (statute authorizing mortgage for maintenance of ward does not authorize mortgage to discharge pre-existing incumbrance); Bell v. Dingwell, 91 Neb. 699, 136 N. W. 1128; Battell v. Torrey, 65 N. Y. 294; Noble v. Runyan, 85 Ill. 618; Lee v. Tonsor (Okla.), 161 P. 804; *In re* Hinds' Estate, 183 Pa. St. 260, 38 A. 599.

An order of sale does not authorize a pledge. O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L. R. 498, 60 Am. St. R. 411.

1. Warren v. Union Bank of Rochester, 157 N. Y. 259, 51 N. E. 1036, 43 L. R. A. 256, 68 Am. St. Rep. 777 (act to pay debts contracted in unauthorized business); Yawitz v. Hopkins (Okla.), 174 P. 257 (only for existing debts).

2. Werber v. Cain, 71 S. C. 346, 51 S. E. 123.

3. Macphers. Inf. 285; March v. Bennett, 1 Vern. 428; Jennings v. Looks, 2 P. Wms. 278.

4. Palmes v. Danby, Prec. in Ch. 137; s. c., 1 Eq. Ab. 261; Waters v. Ebral, 2 Vern. 606.

5. Woodward's Appeal, 38 Pa. St. 322; Low v. Purdy, 2 Lans. 422.

6. Hooper v. Eyles, 2 Vern. 480.

7. As to applying money in payment for land, where the title vested prior to the guardianship, see McCall v. Flippin, 58 Tenn. 161.

the ward in foreclosure of a mortgage on property belonging to the ward where the property is sold for less than the amount of the mortgage.[8] So, too, a guardian may redeem his ward's estate from foreclosure.[9]

A guardian of a minor has a right to resort to the principal of the ward's estate, if to the latter's advantage. The legal control of the guardian over the personal estate of the infant is absolute within the bounds of a discretion bounded by an honest judgment of what his best interests require, and he may even sell the personal property of the ward. So the guardian has full authority to pledge an insurance policy in which the ward is named as beneficiary for the purpose of raising money necessary for his education, and when there are no funds to pay the loan may then surrender the policy.[10]

Where a guardian pledges securities for a present loan a pledgee without notice may assume the transaction is proper.[11]

Mortgage or Pledge to Guardian.— The guardian may receive money secured to the ward by mortgage, and discharge the mortgage, before, at, or after maturity, in the exercise of due prudence and foresight;[12] and his discharge of a mortgage is protection to a subsequent mortgagee although the mortgage had not in fact been

8. Kidder v. Houston (N. J. Ch. 1900), 47 A. 336.

9. Botham v. McIntier, 19 Pick. 346; Marvin v. Schilling, 12 Mich. 356. But see Sheahan v. Wayne, 42 Mich. 69.

10. Clare v. Mutual Life Insurance Co., 201 N. Y. 492, 94 N. E. 1075, 35 L. R. A. (N. S.) 1123; *contra*, Easterling v. Horning, 30 App. D. C. 225 (holding that a guardian cannot pledge personal property without order of court).

In New Hampshire it is held that a guardian has no common-law authority to bind his ward or the trust fund by a pledge of the ward's property. A guardian who signs a note as guardian simply binds himself personally; and one who takes in pledge from a guardian a note payable to the order of the guardian, has not even an innocent holder's protection. Hardy v. Bank, 61 N. H. 34, and cases cited. Statutes generally indicate how the guardian may raise money which he needs. In this case the guardian's successor was allowed to recover the notes pledged by a bill in equity. But as to the pledge of negotiable instruments not overdue to one who advances in good faith, and without notice of infirmity, and as to pledge in general, see Schouler, Bailm., Part IV., ch. 4.

11. Bank of Guntersville v. United States Fidelity & Guaranty Co. (Ala.), 75 So. 168.

12. Chapman v. Tibbits, 33 N. Y. 289; Smith v. Dibrell, 31 Tex. 239. The debtor is discharged, though the guardian squander the proceeds. Riddell v. Vizard, 35 La. Ann. 310. Mortgaged land may be redeemed from a tax sale. Witt v. Mewhirter, 57 Ia. 545.

paid;[13] and so, too, he may extend or renew a mortgage note or other note on fair terms;[14] and on a breach may sell[15] or assign a mortgage,[16] but a guardian has no authority to postpone the security of a mortgage held by him as guardian to another junior mortgage.[17]

§ 920. Guardian's Occupation of Land.

Where a guardian cultivates his ward's farm instead of letting it out, he is bound to cultivate as a prudent farmer would his own land; otherwise the loss by depreciation of the property in value must be made good by him.[18] And for losses occurring through his bad management of his ward's real estate he cannot expect to be recompensed.[19] Or he may carry on the farm as guardian when he can do so with fair regard for the ward's benefit, and claim allowance accordingly for his reasonable outlay.[20] If he occupy the premises personally, he should account for rent.[21]

Stock and farming utensils on the ward's farm are *prima facie* the ward's property, as against a guardian who has carried on the farm in person.[22] But this does not exempt from attachment property of the guardian which he purchases and places upon the ward's lands; for the question of title is always open to proof.[23]

§ 921. Changes in Character of Ward's Property; Sales; Exchanges, &c.

Conversions — that is to say, changes made in the character of trust property, from personal into real, or real into personal estate — are never favored, especially where the natural conse-

13. Werber v. Cain, 71 S. C. 346, 51 S. E. 123.

14. Willick v. Taggart, 17 Hun, 511.

15. Stull v. Benedict, 10 Cal. App. 619, 102 P. 961; Taylor v. Hite, 61 Mo. 142.

16. Tonges v. Vanderveer Canarsie Improvement Syndicate, 148 N. Y. S. 748.

17. Covey v. Leslie, 144 Mich. 165, 107 N. W. 900, 13 Det. Leg. N. 218.

18. Willis v. Fox, 25 Wis. 646.

19. Harding v. Larned, 4 Allen, 426. The approval of the probate court is not, in Illinois, essential to the validity of the guardian's lease; unless so disapproved, the lease is good. Field v. Herrick, 101 Ill. 110. Cf. Bates, Guardian v. Dunham, 58 Ia. 308. In some States leases are limited at all events to seven years, or other stated period.

20. Remington v. Field, 16 R. I. 509.

21. Hedges v. Hedges (Ky. 1902), 67 S. W. 835; Hedges v. Hedges, 24 Ky. Law Rep. 2220, 73 S. W. 1112; Sternbach v. Friedman, 34 Hun, 542; Parlin & Orendorff Co. v. Webster, 17 Tex. Civ. App. 631, 43 S. W. 569; Garrett v. Carr (Va.), 1 Rob. 196 (interest allowed on surplus profits).

22. Tenney v. Evans, 11 N. H. 346.

23. *Ib.*; Tinney v. Evans, 14 N. H. 343.

quence would be to vary rights of inheritance. The previous sanction of chancery should always be sought; and this is only given under strong circumstances of propriety. As a rule the guardian may not convert his ward's personal estate into real estate without the previous sanction of chancery, nor may the vendor enforce a lien.[24] The same may be said with less force of exchanges of the ward's property. Courts are reluctant to disturb the property of those who are only temporarily disabled from assuming full control. Sales of real estate are in general only partial, and for necessary purposes. But sales and exchanges of personal estate are very common. And the guardian may sell personal estate for the purposes of the trust without a previous order of court, provided he acts fairly and with good judgment; though his safer course is to obtain permission. But sales of the real estate of the ward would be extremely perilous, if not absolutely void, unless previous authority had been obtained. Undoubtedly, they could not bind the ward under such circumstances. Nor is the guardian permitted to sell first and obtain judicial sanction afterwards, nor to contract to sell at his own instance.[25]

The guardian has as a general rule no authority to sell the ward's property.[26] So the guardian must not buy land with the infant's money without the direction of chancery. And having obtained permission to do so, he is bound to exercise good faith and seek his ward's best interests.[27]

The statutes of most American States have greatly altered the law on the subject of conversions, so as not only to facilitate the sale of real estate belonging to *cestuis que trust,* but to enable their fiduciaries, under judicial authority, to make specific performance of contracts and to release vested and contingent interests.[28] It

24. Boisseau v. Boisseau, 79 Va. 73.

25. Thacker v. Henderson, 69 Barb. 271; next chapter.

26 Los. Angeles County v. Winans, 13 Cal. App. 234, 109 P. 640; Blair v. Dwyer, 110 La. 332, 34 So. 464; Gary v. Landry, 122 La. 29, 47 So. 124; Gremillion v. Roy, 125 La. 524, 51 So. 576; Succession of Drysdale, 130 La. 167, 57 So. 789; LeRoy v. Jacobosky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977. See Bank of Welch v. Cabell, 152 P. 844.

27. Macphers. Inf. 278 *et seq.;* 2 Kent, Com. 228-230, and notes; Story, Eq. Juris., § 1357; Witter v. Witter, 3 P. Wms. 101; *Ex parte* Phillips, 19 Ves. 122; Skelton v. Ordinary, 32 Ga. 266; Ware v. Polhill, 11 Ves. 278; Holbrook v. Brooks, 33 Conn. 347; Royer's Appeal, 11 Pa. St. 36; Woods v. Boots, 60 Mo. 546; *Ex parte* Crutchfield, 3 Yerg. 336; Dorr, Petitioner, Walker, Eq. 145; Kendall v. Miller, 9 Cal. 591. See Harris v. Harris, 6 Gill & Johns. 111; Davis's Appeal, 60 Penn. St. 118.

28. See next chapter. It may be

would appear, too, that, in the absence of any statute limiting his powers, he has, as incidental to his office and duties, the power to sell, in the exercise of sound business discretion, his ward's personal property, except, perhaps, as to peculiar incorporeal kinds,[29] unless authority of the court is required;[30] and the fact that the statute provides for a license to sell does not prevent the guardian from selling without a license.[31]

A purchaser is bound to inquire as to the authority of the guardian to sell, and if he does not do so he cannot claim to be a purchaser without notice.[32]

Where, at the time the court orders the sale or purchase of real estate by the guardian, the conversion was beneficial to the ward, it would appear that the guardian is not made liable if such conversion afterwards turns out injurious.[33] But whether an order of court would protect conduct notoriously imprudent, as

incumbent upon a guardian by virtue of his trust to sell land or foreclose, under a mortgage which he holds as an investment for his ward, in which case the usual rules of trusteeship apply. Taylor v. Hite, 61 Mo. 142.

29. Bank of Guntersville v. United States Fidelity & Guaranty Co. (Ala.), 75 So. 168; Nashville Lumber Co. v. Barefield, 93 Ark. 353, 124 S. W. 758; Schmidt v. McBean, 98 Ill. App. 421; 196 Ill. 108, 63 N. E. 655, 89 Am. St. R. 250; O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. R. 411; Pardoe v. Merritt, 75 Minn. 12, 77 N. W. 552; Cabble v. Cabble, 97 N. Y. S. 773, 111 App. Div. 426.

See Wallace v. Holmes, 9 Blatchf. 67; Humphrey v. Buisson, 19 Minn. 221. A guardian cannot, in South Carolina, sell and assign his ward's bond and mortgage of real estate without judicial sanction. McDuffie v. McIntyre, 11 S. C. 551. *Aliter*, probably, in many States; though the right to assign real estate security is more doubtful than that of assigning a simple note or bond upon personal security or without security. See preceding section; Mack v. Brammer, 28 Ohio St. 508. General guardians do not represent their infant wards in foreclosure proceedings. Sheahan v. Wayne, 42 Mich. 69.

Stock and its transfer follow peculiar rules. Shares of stock standing in the name of "A. B. guardian" cannot be sold so as to compel the company to recognize the transferee, without order of the court. De la Montagnie v. Union Ins. Co., 42 Cal. 290.

A guardian's sale of cotton on credit, taking the purchaser's note without security according to business usage, does not necessarily render the guardian liable if such purchaser turn out insolvent. State v. Morrison, 68 N. C. 162.

30. McCutchen v. Roush, 139 Ia. 351, 115 N. W. 903 (transferee taking with notice); Gentry v. Bearss, 82 Neb. 787, 118 N. W. 1077.

31. Gardner v. Beacon Trust Co., 190 Mass. 27, 76 N. E. 455, 2 L. R. A. 767, 112 Am. St. Rep. 303; *contra*, Hendrix v. Richards, 57 Neb. 794, 78 N. W. 378.

32. Layne v. Clark, 152 Ky. 310, 153 S. W. 437; Hamilton v. People's Nat. Bank of Washington, 259 Pa. 220, 102 A. 877.

33. Bonsall's Case, 1 Rawle, 266.

if there should be a sudden and marked decline in the value of the land from some cause not within the consideration of the court at the time of issuing the order, and such as would have been sufficient for its revocation, and the guardian, nevertheless, goes on and makes the sale at a sacrifice, may well be doubted.[34]

In this country the subject is commonly regulated by statute. A guardian may purchase for his ward, who is one of the heirs, such portion of an estate as the other heirs refused to take on partition, and the court ordered to be sold.[35]

§ 922. Right to Sue and Be Sued as to Ward's Estate.

The right to collect a debt implies the right to sue. Hence the guardian may, in the exercise of good discretion, and acting, if need be, under competent legal advice, institute suits to recover the ward's property.[36] And this right extends to property fraudulently obtained from the ward before the guardian's appointment.[37]

Hence the guardian may, in the exercise of this discretion, institute action against a third person for possession of the ward's land [38] or personal property,[39] or to enjoin injury to the ward's real estate,[40] or for injuries to the ward,[41] or for money due the estate.[42] And if he institutes groundless and speculative suits, and is unsuccessful, or occasions a controversy over his accounts through his own fault, he must bear the loss. So, too, whenever his conduct shows fraud or heedless imprudence.[43] Otherwise, he

34. See Harding v. Larned, 4 Allen, 426.

35. Bowman's Appeal, 3 Watts, 369.

36. Smith v. Bean, 8 N. H. 15; Shepherd v. Evans, 9 Ind. 260; Southwestern R. v. Chapman, 46 Ga. 557.

37. Somes v. Skinner, 16 Mass. 348. See Cook v. Lee, 72 N. H. 569, 58 A. 511 (guardian may not sue to set aside as fraudulent a conveyance by the ancestor).

38. Cole v. Jerman, 77 Conn. 374, 59 A. 425; Duck Island Club v. Bexstead, 174 Ill. 435, 51 N. E. 831; Beaghler v. Messick (Mo. App.), 202 S. W. 409.

39. Mayer v. Columbia Sav. Bank, 86 Mo. App. 108 (replevin); Dold v. Dold, 169 N. Y. S. 209, 103 Misc. 86; Kerr v. McKinney (Okla.), 170 P. 685.

40. Kinsley v. Kinsley, 150 Ind. 67, 49 N. E. 819; Roth v. Conly, 21 Ky. Law Rep. 1623, 55 S. W. 881.

41. Cleveland C. C. & St. L. Ry. Co. v. Moneyhum, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141.

42. Beach v. Peabody, 188 Ill. 75, 58 N. E. 679; Potts v. State, 65 Ind. 273; Bryson v. Collmer, 33 Ind. App. 494, 71 N. E. 229; Poultney's Minors v. Barrett, 6 La. 493; Burke v. Burke, 170 Mass. 499, 49 N. E. 753. See Williams v. Farmers' State Bank of Sparks (Ga. App.), 97 S. E. 249; Webb v. Hayden, 166 Mo. 39, 65 S. W. 760.

43. Brown v. Brown, 5 E. L. & Eq. 567; Savage v. Dickson, 16 Ala. 257;

is entitled to his costs and legal expenses out of the ward's estate.[44] In defending, as in bringing suits, and incurring costs and counsel fees, the rule is that the guardian should not wilfully or recklessly litigate over his ward's interests, but should apply ordinary prudence and discretion in considering the probable benefits of such a course.[45]

Where the guardianship terminates and the wards become of age pending suit by the guardian the suit does not abate, but the wards may be substituted as plaintiffs,[46] or if a new guardian is appointed he may be substituted.[47] Proof that the ward has attained full age or is dead pending suit against the guardian will cause it to abate,[48] but the guardian may recover on a note made to him as guardian although the ward has married or reached majority before action brought,[49] and the general guardian of minors may sue them, a guardian *ad litem* being appointed for them.[50]

§ 923. Guardian's Right of Action for Benefit of Ward.

By the common law, the guardian could maintain an action of trespass and recover damages for his ward; and the statute of Westminster II., c. 32, gave a writ of ravishment, by means of which he could recover the body of the heir as well as damages.[51] The equity of this statute may perhaps extend to testamentary, chancery, and probate guardians, as well as to guardians in socage; on which principle it has been held that the guardian may sue and recover damages for the seduction of his female ward.[52] Local statutes in this country sometimes enlarge the guardian's right of action for the benefit of his ward; and, as a rule, if a minor under guardianship sustains a personal injury from the tort of another his guardian may sue and recover for the ward's benefit just as the latter might have recovered through next friend in case he had no guardian.[53] But the guardian has no personal right of action

Blake v. Pegram, 109 Mass. 541; Spelman v. Terry, 74 N. Y. 448.

44. *Re* Flinn, 31 N. J. Eq. 640.

45. Kingsbury v. Powers, 131 Ill. 182; Coggins v. Flythe, 113 N. C. 103, § 352.

46. Shattuck v. Wolf, 72 Kan. 366, 83 P. 1093; Smith v. Mingey, 172 N. Y. 650, 65 N. E. 1122 (affg. 76 N. Y. S. 194, 72 App. Div. 103).

47. Horning v. Poyer, 18 Ohio Cir. Ct. R. 732, 6 O. C. D. 370.

48. Logan v. Robertson (Tex. Civ. App. 1904), 83 S. W. 395.

49. Kerr v. McKinney (Okla.), 170 P. 685.

50. Kidd v. Prince (Tex. Civ. App.), 182 S. W. 725.

51. Bac. Abr. Guardian (F.).

52. Fernslee v. Moyer, 3 Watts & Serg. 416.

53. §§ 1033-1035; Louisville R. v. Goodykoontz, 119 Ind. 111, where the child died from the injury.

like a parent to recover for loss of services of the child.[54] The guardian may estop himself from recognizing the title of a third party.[55]

§ 924. Parties.

There is much conflict and some confusion concerning the proper parties to suits brought in which the ward is interested. The general rule that the ward is to be made the party in suits which concern his title is clear and well settled, and in most States as the guardian gets not title, but only the care and management of property, it follows that all such suits must be brought in the name of the ward.[56]

There is an anomalous exception to this rule in England and New York when the guardian seeks to set aside an act done by an insane person who has been put under guardianship. This exception is founded in part upon the doctrine that the committee of an insane person acquires some right to the ward's estate and in part on the ancient theory that no man can be heard to stultify himself.[57]

The general guardian has no authority to appear in litigation in which the ward is interested, but a guardian *ad litem* must be appointed.[58]

Where, however, the guardian makes contracts on behalf of the estate suits on such contracts, express or implied, are properly

54. Louisville Railway v. Goodykoontz, 119 Ind. 111; §§ 757-771. Reimbursement of the ward's estate for medical attendance is a proper item of damage.

55. Ingram v. Heintz, 112 La. 496, 36 So. 507.

56. Campbell v. Fichter, 168 Ind. 645, 81 N. E. 661 (no authority to contest will); Harrison v. Western Const. Co., 41 Ind. App. 6, 83 N. E. 256; *In re* Stude's Estate (Ia.), 162 N. W. 10; Boudreaux v. Lower Terre-Bonne Refining & Mfg. Co., 127 La. 98, 53 So. 456 (to annul judgment against ward); Mee v. Fay, 190 Mass. 40, 76 N. E. 229; *In re* Catlin's Estate, 151 N. Y. S. 254, 89 Misc. 93 (construction of will); Empire State Surety Co. v. Cohen, 156 N. Y. S. 935, 93 Misc. 299; Stewart v. Sims, 112 Tenn. 296, 79 S. W. 385; McMullen v. Blecker, 64 W. Va. 88, 60 S. E. 1093 (partition suit); Longstreet v. Tilton, Coxe, 38; Sillings v. Bumgardner, 9 Gratt. 273; Vincent v. Starks, 45 Wis. 458. See The Home v. Selling (Ore.), 179 P. 261 (ward assuming mortgage).

57. Ortley v. Messere, 7 Johns. Ch. (N. Y.) 139; Gorham v. Gorham, 3 Barb. Ch. (N. Y.) 124. The court refused to follow this exception in Lombard v. Morse, 155 Mass. 136, 138; Lang v. Whidden, 2 N. H. 435.

58. Saville v. Saville, 63 Kan. 861, 66 P. 1043; Elder v. Adams, 180 Mass. 303, 62 N. E. 373; Scott v. Royston, 223 Mo. 568, 123 S. W. 454; Schlieder v. Wells, 99 N. Y. S. 1000, 114 App. Div. 417; Buermann v. New York Produce Exchange, 3 How. Prac. (N. Y.) 393.

brought by or against the guardian;[59] so where the guardian

59. Wolfe v. Murphy, 47 App. D. C. 296 (on note); McLean v. Dean, 66 Minn. 369, 69 N. W. 140 (note); Shepard v. Hanson, 10 N. D. 194, 86 N. W. 704 (note); Barnwell v. Marion, 54 S. C. 223, 32 S. E. 313 (on bond); Taylor v. Kilgore, 33 Ala. 214; Merrill v. Sherburne, 1 Foster (N. H.), 204. In Louisiana no suit can be prosecuted by or for an insane person or minor except through a curator or tutor. Succession of Thomas, 35 La. Ann. 23. Among the cases in which the guardian has been allowed to sue in his own name are the following: For non-payment of rent. Pond v. Curtiss, 7 Wend 45. For trespass on his ward's lands. Truss v. Old, 6 Rand. 556; Bacon v. Taylor, Kirby, 368. For intermeddling with the issues and profits thereof. Beecher v. Crounse, 19 Wend. 306. For an injury to any property of the ward in his actual possession. Fuqua v. Hunt, 1 Ala. 197. Or where he has the right of possession. Sutherland v. Goff, 5 Porter, 508; Field v. Lucas, 21 Ga. 447. Or on a note payable to himself as guardian, though given for a debt due to the ward. Jolliffe v. Higgins, 6 Munf. 3; Baker v. Ormsby, 4 Scam. 325; Thacher v. Dinsmore, 5 Mass. 299; Hightower v. Maull, 50 Ala. 495. Or, as it would appear, on his express contract touching the ward's estate. Thomas v. Bennett, 56 Barb. 197. As to statute provisions, see Turner v. Alexander as Guardian, 41 Ark. 254. As to amending the writ, see Weber v. Hannibal, 83 Mo. 262. As to power of the general guardian of an insane person, unlike an infant's guardian *ad litem*, to waive objections to the admission of testimony, see Warren Co. v. Dabney, 81 Mo. 275.

But debts and demands of the ward should in general be prosecuted in the ward's name. And the guardian cannot sue in his own name, after his female ward's marriage, for a debt due her before such marriage. Barnet v. Commonwealth, 4 J. J. Marsh. 389. Nor on a promise to the guardians of the minor children of A. B.; for this is a promise to the wards. Carskadden v. McGhee, 7 Watts & Serg. 140. Nor on an award, although he had submitted to arbitration. Hutchins v. Johnson, 12 Conn. 376. Nor where a statute authorizes guardians to "demand, sue for, and receive all debts due" their wards. Hutchins v. Dresser, 26 Me. 76. And see Hoare v. Harris, 11 Ill. 24; Fox v. Minor, 32 Cal. 111. He cannot act on a petition for partition. Stratton's Case, 1 Johns. 509; Totten's Appeal, 46 Pa. St. 301. Nor subscribe a libel for divorce. Winslow v. Winslow, 7 Mass. 96. Nor bring a bill in equity in his own name touching the ward's transactions. Lombard v. Morse, 155 Mass. 136. He is sometimes authorized by statute, however, to sue in his own name for the use of the ward. Fuqua v. Hunt, 1 Ala. 197; Longmire v. Pilkington, 37 Ala. 296; Mebane v. Mebane, 66 N. C. 354. And see Anderson v. Watson, 3 Met. (Ky.) 509; Hines v. Mullins, 25 Ga. 696. A guardian in Georgia must be party in an action to recover a legacy bequeathed to his deceased ward. Beavers v. Brewster, 62 Ga. 574.

Guardian for minor heirs allowed, in Texas, to sue on a promissory note payable to the ancestor, on showing that they are the only heirs, and that there has been no administration. Roberts v. Saera, 38 Tex. 580. *Sed qu.* For unlawful detainer, and *semble* in all suits by guardian for the benefit of the ward, the action should be entitled in the ward's name *by* guardian. Vincent v. Starks, 45 Wis. 458. A general guardian may sue in his own name to recover an infant's distributive share; and separate suits where there are several infants so entitled. Hauenstein v. Kull, 59 How. Pr. 24. Cf. Jordan v. Donahue, 12

makes a contract in behalf of the ward he is the only necessary party defendant,[60] but he may not be sued for necessaries fur-

R. I. 199, and cases cited. And see Ankeny v. Blackiston, 7 Or. 407. As to procedure in West Virginia, see Burdett v. Cain, 8 W. Va. 282. In Illinois the probate or statuate guardian cannot bring suits in relation to his ward's real estate, such as ejectment. Muller v. Benner, 69 Ill. 108. An action upon an express contract made by a guardian for his ward's benefit may be brought by or against the guardian personally. McKinney v. Jones, 55 Wis. 39.

Payment by the debtor to an unauthorized person cannot avail in defence against the guardian's suit; but as to the defence of payment to the natural guardian, cf. *supra*, § 255; also Southwestern R. v. Chapman, 46 Ga. 557.

The right of action upon a note payable to a guardian for money of the ward passes, upon the guardian's death, to his personal representative. Chitwood v. Cromwell, 12 Heisk. 658. And so in general where he might, if alive, have sued in his own name. *Ib.*

A guardian is to be sued in person upon notes executed by him in his official capacity. See 1 Pars. Bills & Notes, 89, 90; Thacher v. Dinsmore, 5 Mass. 299; § 345.

A guardian is not liable in assumpsit for necessaries. Cole v. Eaton, 8 Cush. 587. Nor for labor performed on the ward's buildings. Robinson v. Hersey, 60 Me. 225. But he may be sued upon his own contract touching his ward's estate. Stevenson v. Bruce, 10 Ind. 397. And judgment should then be against him personally, and not against the ward. Clark v. Casler, 1 Cart. (Ind.) 243. Where the judgment is to bind the ward's property, suit should be against the ward. Otherwise the property of the guardian must be levied upon, who will look to the infant's estate for his own reimbursement. Tobin v. Addison, 2 Strobh. 3; Clark v. Casler, 1 Smith (Ind.), 150. And see Raymond v. Sawyer, 37 Me. 406; Bently v. Torbert, 68 Iowa, 122. As to conclusiveness of judgments, see Morris v. Garrison, 27 Pa. St. 226. Judgment against a person as "guardian" is a judgment against him personally, the additional words being descriptive merely. No action lies against a guardian upon the ward's contracts or debts; but suit should be against the ward, who may defend by guardian. Brown v. Chase, 4 Mass. 439; Willard v. Fairbanks, 8 R. I. 1. In dower and partition proceedings a guardian may appear for the ward, like any guardian *ad litem*, in some States. Rankin v. Kemp, 21 Ohio St. 651; Cowan v. Anderson, 7 Cold. 284; Miller v. Smith, 98 Ind. 226; State v. Cayce, 85 Mo. 456. In Massachusetts a ward's money may be reached by trustee process against him or taken on execution. Simmons v. Almy, 100 Mass. 239. In a suit against A. B. the words "as he is guardian," etc., may be rejected as surplusage. Rollins v. Marsh, 128 Mass. 116.

Guardian and insane ward cannot be sued jointly to recover a debt which the ward incurred previous to the guardian's appointment. Allen v. Hoppin, 9 R. I. 258.

The ward should not sue on the guardian's contracts, but he has a remedy on the guardian's bond or against the guardian personally. Dougherty v. Hughes, 165 Ill. 384, 46 N. E. 229; Martel v. Desjardin, 93 Me. 413, 45 A. 522. See Lynch v. Cogswell, 18 Ohio Cir. Ct. R. 641, 7 O. C. D. 12 (ward bound by decree of probate court approving payment).

60. Howard v. Cassels, 105 Ga. 412, 31 S. E. 562, 70 Am. St. Rep. 44; Shelton v. Laird, 68 Miss. 175, 8 So. 271; King v. Starr, 9 Ky. Law Rep.

nished to the ward without his order.[61] A claimant may proceed in the probate court and obtain an order for payment of his claim,[62] or the claimant may sue on the guardian's bond.[63]

Actions involving injuries to the ward must be brought in the name of the ward.[64] In some States, however, the guardian may sue on the ward's behalf [65] on leave of court.[66] But the ward may proceed in equity to attack a fraudulent settlement of the minor's claim, there being no remedy at law;[67] and where the guardian buys property for his personal use with the knowledge of the seller, the seller becomes a party to the conversion of the funds, and may be sued by the ward.[68]

§ 925. Compromise of Claims.

The guardian may compromise when acting in good faith and with sound discretion for the benefit of his ward.[68a] Local statutes are found in aid of this right. But on general principle the guardian's compromise and allowance of a baseless and unjust claim would not be upheld in equity as against the ward.[69] An infant cannot, in any event, be bound by the fraudulent compromise of his guardian,[70] though he would be commonly by a

536; Lothrop v. Duffield, 134 Mich. 485, 96 N. W. 577, 10 Det. Leg. N. 541 (for services); *contra*, Judson v. Walker, 155 Mo. 166, 55 S. W. 1083; Tow v. Elliot, 33 N. C. 51; Municipal Court of City of Providence v. Le Valley, 25 R. I. 236, 55 A. 640.

61. Pinnell v. Hinkle, 54 W. Va. 119, 46 S. E. 171.

62. Turner v. Flagg, 6 Ind. App. 563, 33 N. E. 1104; Reeves v. Hunter (Iowa), 171 N. W. 567.

63. Conant v. Kendall, 38 Mass. (21 Pick.) 36.

64. Illinois Cent. R. Co. v. Head, 119 Ky. 809, 84 S. W. 751, 27 Ky. Law Rep. 270; Brock v. Rogers, 184 Mass. 545, 69 N. E. 334 (deceit); Pieper v. Shahid, 101 S. C. 364, 85 S. E. 905.

65. Havens v. Ahlering, 123 Ky. 713, 97 S. W. 344, 29 Ky. Law Rep. 1265; Bennett v. Bennett, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994; Martin v. Caldwell, 49 Ind. App. 1, 96 N. E. 660 (right wholly statutory); Wright v. Cosmopolitan Life Ins. Ass'n, 154 Ill. App. 201. See Los Angeles County v. Winans, 13 Cal. App. 234, 109 P. 640; Patterson v. Melchoir, 102 Minn. 363, 113 N. W. 902; Social Benev. Soc. No. 1 v. Holmes, 127 Ga. 586, 56 S. E. 775; Taylor v. Superior Court, 30 R. I. 200, 74 A. 482.

66. Muller v. Naumann, 83 N. Y. S. 488, 85 App. Div. 337; Vinson v. Vinson, 105 La. 30, 29 So. 701 (family meeting must authorize suit).

67. Berdan v. Milwaukee Mut. Life Ins. Co., 136 Mich. 396, 99 N. W. 411, 11 Det. Leg. N. 46.

68. American Surety Co. v. Vann (Ark.), 205 S. W. 646; Empire State Surety Co. v. Nelson, 126 N. Y. S. 453 (ward may sue third person taking money with knowledge).

68a. Simes v. Ward, 78 N. H. 533, 103 A. 310.

69. Underwood v. Brockman, 4 Dana, 309. Nor, as it would seem, against the guardian himself, no blame attaching to him.

70. Lunday v. Thomas, 26 Ga. 537.

compromise made in good faith, apparently in the ward's interest at the time, and with reasonable prudence.[71] On the same general principles, and with like limitations, the guardian may release a debt due his ward, or a cause of action for damages.[72] The same rule as to compounding and releasing debts appears to prevail in England as in this country; and it applies to all trustees alike.[73]

The guardian should not confess judgment against the ward, but should submit the matter to the court for decision,[74] and cannot by consent to a void proceeding render it effectual.[75]

The money received by a guardian on a fraudulent settlement made by the guardian will be credited in the ward's judgment for the same cause of action,[76] and a note given to a guardian under an unlawful agreement not to prosecute for rape may be binding.[77]

A parent has no implied authority to settle a cause of action of his infant child.[78] In the exercise of prudence and good faith or personal, in settlement of the latter's debt or claim,[79] and he a guardian may, to save the ward from loss, accept property, real has no authority to compromise,[80] or release a claim of the

71. Ordinary v. Dean, 44 N. J. 64. Compromise or release under the sanction of the court having jurisdiction of the guardianship is allowed under some codes, and the guardian who obtains it is more amply protected than where he acts on his own responsibility. See Hagy v. Avery, 69 Ia. 434, as to executing a quitclaim deed for land in litigation under the court's direction. And see compromise upheld, under statute, even though the ward's estate be charged thereby with new liabilities. Smith v. Angell, 14 R. I. 192.

72. Torry v. Black, 58 N. Y. 158. An assumption of another's debt on the ward's behalf ought to be shown to be for the ward's apparent interest at the time. Clear Creek Co. v. Comstock Co., 17 Col. 481.

73. Blue v. Marshall, 3 P. Wms. 381.

74. Metcalf v. Alter, 31 La. Ann. 389; Boudreaux v. Lower Terre-Bonne Refining & Mfg. Co., 127 La. 98, 53 So. 456.

75. Fowler v. Lewis' Adm'r, 36 W. Va. 112, 14 S. E. 447.

76. Bunch v. Foreman Blades Lumber Co., 174 N. C. 8, 93 S. E. 374.

77. Griffin v. Chriswisser, 84 Neb. 196, 120 N. W. 909.

78. Missouri Pac. Ry. Co. v. Lasca, 79 Kan. 311, 99 P. 616.

79. Mason v. Buchanan, 62 Ala. 110.

80. Nashville Lumber Co. v. Barefield, 93 Ark. 353, 124 S. W. 758. *Contra,* Grievance Committee v. Ennis, 84 Conn. 594, 80 A. 767. See, however, Malpass v. Graves, 111 Ga. 743, 36 S. E. 955; Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066; Bunnell v. Bunnell, 111 Ky. 566, 64 S. W. 420, 23 Ky. Law Rep. 800; Succession of Emonot, 109 La. 359, 33 So. 368; Berdan v. Milwaukee Mut. Life Ins. Co., 136 Mich. 396, 99 N. W. 411, 11 Det. Leg. N. 46. See Stevens v. Meserve, 73 N. H. 293, 61 A. 420, 111 Am. St. R. 612; Alexan-

ward.[81] Where a note or debt is lawfully due from a solvent party, the guardian may be held accountable for the whole if he settles for less than the full face amount.[82]

§ 926. Arbitration.

A guardian is now generally permitted to submit to a fair arbitration questions and controversies respecting the property and interests of his ward, and the award made in pursuance thereof is binding on all parties.[83] The original doctrine apart from statute seems to be this: that he cannot bind his ward by arbitration unless the court shall previously authorize him to do so, or subsequently approve, on the ground that it was for the ward's benefit.[84] And in considering what is beneficial and binding as to a minor ward, the usual analogies applicable to infants have considerable application.[85]

Although the guardian may enter into an agreement of arbitration in a proper case, still, where such agreement in fact surrendered to one who had no semblance of claim the ward's title to property, it is not binding on the ward,[86] and equity will not uphold any arbitration which does not properly guard the ward's interests.[87]

der v. Alexander, 120 N. C. 472, 27 S. E. 121; Brown v. Fidelity & Deposit Co. of Maryland, 98 Tex. 55, 76 S. W. 944, 80 S. W. 593 (guardian cannot discount notes); Davis v. Beall, 21 Tex. Civ. App. 183, 50 S. W. 1086; Matt v. Matt, 182 Ill. App. 312; Picciano v. Duluth, M. & N. Ry. Co., 102 Minn. 21, 112 N. W. 885. See Goodrich v. Webster, 74 N. H. 474, 69 A. 719; Holliday v. Hammond State Bank, 118 La. 1000, 43 So. 656 (authority of family meeting).

At common law, a testamentary or general guardian has power to settle and compromise claims on behalf of his ward. Dwyer v. Corrugated Paper Products Co., 141 N. Y. S. 240, 80 Misc. 412; Richey v. Harlan, 170 Ky. 461, 186 S. W. 149. *Contra*, McGoodwin v. Shelby, 181 Ky. 230, 204 S. W. 171 (may settle doubtful contested claims of wards); McGoodwin v. Shelby (Ky.), 206 S. W. 625. See O'Reilly v. Reading Trust Co. (Pa.), 105 A. 542 (compromise approved by court).

81. Naeglin v. De Cordoba, 171 U. S. 638, 19 S. Ct. 35, 43 L. Ed. 315 (affg. 7 N. W. 678, 41 P. 526).

82. Darby v. Stribling, 22 S. C. 243.

83. Weed v. Ellis, 3 Caines. 253; Weston v. Stewart, 11 Me. 326; Hutchins v. Johnson, 12 Conn. 376; Goleman v. Turner, 14 S. & M. 118; Strong v. Beroujon, 18 Ala. 168.

84. A guardian cannot release the ward's rights in real estate, irrespective of statutory power. Pond v. Hopkins, 154 Mass. 38; Fowler v. Lewis, 36 W. Va. 112. It is the guardian, and not the ward, who becomes thus liable to counsel for their fees when he engages. Hunt v. Maldonado, 89 Cal. 636.

85. Part V, chs. 2 & 3.

86. Bunnell v. Bunnell, 111 Ky. 566, 64 S. W. 420, 23 Ky. Law Rep. 800, 65 S. W. 607, 23 Ky. Law Rep. 1101.

87. De Vaughn v. McLeroy, 82 Ga. 687.

CHAPTER VII.

SALES OF THE WARD'S REAL ESTATE.

§ 927. In Sales of Ward's Personal Property a Liberal Rule Applies.

The nature of personal property, its convertibility into cash, and the necessity frequently arising for changes of investment in order to make it sufficiently productive, have brought about a flexible rule so far as its purchase and sale is concerned, and no actual conversion takes place. Hence courts of chancery at the present day assume considerable latitude in directing changes from one species of personal estate to another. Especially liberal must be the rule in those States where the trustee is free to invest in any securities deemed proper, provided he observes prudence and good faith. Hence, too, the guardian himself may sell and reinvest his ward's personal estate, and make purchases, without a previous order of court. But this is to be considered rather the American than the English rule; since, as we have seen in the preceding chapter, a guardian's discretion is strictly limited in England, and the practice of the chancery courts in such matters is to control the property.

§ 928. Otherwise as to Real Estate; Whether Chancery Can Sell Infant's Lands.

Courts of chancery, however, have no inherent original jurisdiction to direct the sale of lands belonging to infants. The legislative power of a State may take the property of its citizens in the exercise of the right of eminent domain. But a judicial tribunal properly hesitates to assume such functions. The common law, which recognized fully the right of individuals to the enjoyment of their possessions, and particularly of real estate, without disturbance, appears to have treated lands belonging to infants as property which should be preserved intact until the owner became of sufficient age to dispose of it according to his own pleasure. Timber might be felled, and mineral ore dug out and carried away;[88] but though such acts constituted a technical conversion of real estate, they were in effect but a mode of enjoyment of the rents and profits, and the guardian was obliged to account for these products of the soil to the infant owner. Sales of the ward's lands were authorized in certain cases, as where there were debts to be paid, encumbrances to be discharged, judgments to be satisfied, or necessary repairs to be made upon the premises. But in such cases the court of chancery violated no rights of ownership; since it is the universal doctrine that property can only be held subordinate to the obligation of paying one's debts.[89] Mortgages were in rare instances permitted.[90] Courts of chancery went no further, except when authorized by statutes. They preferred that the infant's property should remain, while guardianship lasted, impressed with its original character. In the settlement of estates, personal property was to be taken to pay what was needful for support and maintenance, rather than lands. Not even purchases of real estate were favorably regarded. And when a sale became necessary, the real

88. See *supra*, ch. VI. But see Stoughton's Appeal, 88 Pa. St. 198.

89. See Shaffner v. Briggs, 36 Ind. 55. On application for maintenance, chancery has jurisdiction to charge expenses of past maintenance and costs on the infant's land. *In re* Howarth, L. R. 8 Ch. 415. And see De Witte v. Palin, L. R. 14 Eq. 251; Nunn v. Hancock, L. R. 6 Ch. 850, as to jurisdiction in sale of reversionary interest of an infant; §§ 340, 351.

90. *Ib.* When an infant was absolutely entitled, subject to certain trusts, to the beneficial interest in real estate, the legal estate being in trustees, chancery directed the raising of money by means of a mortgage to defray the cost of necessary repairs. Jackson, *Re*, 21 Ch. D. 786. See the scanty precedents for such mortgages here cited; prospective charges not seeming to have been sanctioned by such proceedings.

estate was not resorted to until other means of raising money had failed; nor was a general sale of the lands ordered whenever a partial sale would suffice.

On this subject Lord Hardwicke observed as follows, in *Taylor* v. *Philips:*[91] "There is no instance of this court's binding the inheritance of an infant by any discretionary act of the court. As to personal things, as in the composition of debts, it has been done, but never as to the inheritance; for that would be taking on the court a legislative authority, doing that which is properly the subject of a private bill." This language received the subsequent approval of Lord Chancellor Hart.[92] It has also been quoted as the recognized law in this country.[93] In some States, chancery, by virtue of its general jurisdiction over infants and their estates, claims power to decree the sale of an infant's lands, whether held under a deed or will,[94] or to partition, or to give orders to reinvest proceeds. Here the aid of local statute is sometimes invoked for the liberal exercise of such functions; but aside from such aid the claim is made positively in several States that chancery has inherent jurisdiction to order the sale of lands belonging to infants for their proper support and education, or more broadly still for their benefit.[95]

There are, indeed, numerous American decisions, in which the rights of infants in lands are protected in equity, so far as to give the infants opportunity to conform or set aside a sale of real estate and prevent them from being bound by a transaction to

91. 2 Ves. 23.

92. Russell v. Russell, 1 Moll. 525.

93. Rogers v. Dill, 6 Hill, 415. See also the learned and elaborate opinion of the court, with citation of English authorities, in William's Case, 3 Bland, 186; *Ex parte* Jewett, 16 Ala. 409; Thompson v. Brown, 4 Johns. Ch. 619; Faulkner v. Davis, 18 Gratt. 651.

Here real estate owned by tenants in common, of whom an infant was one, was sold under and in pursuance of a judgment in a partition suit instituted by others of the tenants in common, and it was held that the portion of the proceeds belonging to the infant remained impressed with the character of real estate, and as such did not pass under the infant's will. Horton v. McCoy, 47 N. Y. 21. And see Cole v. Gourlay, 79 N. Y. 527. Guardian summarily ordered to refund the excess of purchase-money in case of an error as to the extent of of the infant's lands. Matter of Price, 67 N. Y. 231.

94. Goodman v. Winter, 64 Ala. 410; Redd v. Jones, 30 Gratt. 123.

95. Shumard v. Phillips, 53 Ark. 37; Thaw v. Ritchie, 136 U. S. 519; Hamar v. Cook, 118 Mo. 476. The Illinois rule upholds such jurisdiction quite extensively. Hale v. Hale, 146 Ill. 227. Statutes of a State may affect this whole jurisdiction. Whitehead v. Bradley, 87 Va. 676; Shumard v. Phillips, 53 Ark. 37.

which they could not be parties in their own right. Instances are found in administrators' settlements to which the infant heir was not a privy, sales under decree to persons who had never paid the purchase-money, and fraudulent transactions.[96]

§ 929. English Chancery Doctrine.

Hence, too, whenever the court of chancery has permitted purchases of lands, the infant's right to affirm or disaffirm on reaching majority, or, as chancery sometimes expresses it, to show cause, has been reserved. Lord Eldon lays down with great caution the power of the court in changing the infant's property, so as not to affect the infant's power over it when he comes of age.[97] And whatever may be the rule where there is some claim or debt to be satisfied, it appears that chancery will decline ordering a sale of land belonging to an infant merely upon the ground that the sale would be beneficial to him; while in any case, if there be a material error in substance, and not in form alone, a purchaser may object to the title, and the court will discharge him from his contract.[98]

One objection to conversions of property, namely, that the laws of inheritance are not the same in real and personal estate, became obviated in equity by treating the proceeds throughout as impressed with the character of the original fund; a rule of large application both in England and America.[99] Another objection, upon which English writers have dwelt at length, arose under the law of testamentary dispositions, which allowed infants to give and bequeath personal estate, males at the age of fourteen, and females at twelve, while real estate could not be devised under twenty-one. Here again chancery decreed, whenever a conversion was authorized, that the right of testamentary dis-

96. Williams v. Duncan, 44 Miss. 376; Jones v. Billstein, 28 Wis. 221; Williams v. Wiggand, 53 Ill. 233; Terry v. Tuttle, 24 Mich. 206; Phillips v. Phillips, 50 Mo. 604; Walke v. Moody, 65 N. C. 599.

97. Ware v. Polhill, 11 Ves. 278; *Ex parte* Phillips, 19 Ves. 122.

98. See 1 Dan. Ch. Pract., 3 Am. ed., 159, 160; Calvert v. Godfrey, 6 Beav. 106. Jurisdiction under a recent statute considered in 1893, 1 Ch. 153.

99. Wheedale v. Partridge, 5 Ves. 396; Macphers. Inf. 284; Story, Eq. Juris., §§ 790-793, and authorities cited; 2 Kent, Com. 230, and *n;* Forman v. Marsh, 1 Kern. 544; Horton v. McCoy, 47 N. Y. 21; Fidler v. Higgins, 6 C. E. Green, 138; Holmes's Appeal, 53 Pa. St. 339; March v. Berrier, 6 Ired. Eq. 524; Huger v. Huger, 3 Desaus. 18. But this is not necessarily the case at law. And such proceeds lose their original character and become personalty on

position should not be thereby changed. The wills act of 1 Vict., c. 26, dispenses with this distinction in testamentary dispositions altogether.[1] And this latter objection never could have arisen in the courts of many of the United States.

§ 930. Civil-Law Rule as to Sales of Ward's Lands.

Guardians and tutors of minors at the civil law had power, under the direction of the proper court, as it would appear, to convey the estates of their wards.[2]

§ 931. Sale of Ward's Lands Under Legislative Authority Common in the United States.

Legislative authority may intervene to direct the absolute sale of an infant's lands. And since the ownership of real estate in this country is vested with comparatively little of that sanctity and importance which the ancient laws of primogeniture and feudal tenure threw about it, and inasmuch as purchases and sales of land are fast becoming matters of every-day occurrence, the legislatures of most of the United States have seen fit to enact laws for facilitating the sales of real estate by fiduciary officers. These laws are comparatively recent, and not altogether uniform in their provisions. But in most essential features they are alike. They constitute a permanent system. They may apply, not to guardians alone, but also to trustees, executors, and administrators. As cases are constantly arising under these laws, we shall here briefly notice some of the principles which have a special bearing upon the sales of real estate, so far as guardians are concerned, without deeming it necessary to make a minute analysis, since such statutes are purely local and subject to local variations.

§ 932. American Statutes on This Subject Considered.

Our American statutes relative to the sale of lands belonging to infants have the following points in common: *First,* an application to the court on the infant's behalf upon which the order of sale issues. *Second,* a special bond to be filed by the guardian. *Third,* the formal sale of the land, usually at public auction. *Fourth,* the execution of the deed to the purchaser. *Fifth,* a proper disposition of the proceeds of the sale. And in some

their first transmission, though to an infant. Dyer v. Cornell, 4 Barr, 359.

1. Macphers. Inf. 278, and cases cited. See Hill on Trustees, 396, *n.*

2. Menifee v. Hamilton, 32 Tex. 495.

States a judicial confirmation of the sale is required. The judicial order of sale is frequently termed a license; and the exact method of procedure is indicated in the statutes themselves.

These statutes, we may add, not unfrequently limit the purpose for which such sales may be made: as, for instance, when the ward has no other means for his education and support; or, again, to pay proper debts; or sometimes for the purpose of investing the proceeds so as to derive an income more readily. And again, the guardian to be authorized is the probate, not the natural, guardian, who, besides giving the usual bond of guardianship, is likewise required to give the special bond of which we speak for the purposes of the sale.[3] And the legislative provision sometimes extends to sales of reversionary or equitable interests of minors; or, again, is limited to property in which the minor has the legal title.

It is the universal American rule, both under the statutes and at common law, that a guardian has no power to convey land without an order of court,[4] or to make a contract to convey,[5]

3. See Morris v. Morris, 2 McCart. 239; Shanks v. Seamonds, 24 Ia. 131; People v. Circuit Judge, 19 Mich. 296; Smith v. Biscailuz, 83 Cal. 344. Nor is the husband of an infant a guardian, under such statute, who can be thus authorized to sell. Dengenhart v. Cracraft, 36 Ohio St. 549. A sale will not be authorized after the guardianship has ended. Phelps *et al.* v. Buck *et al.*, 40 Ark. 219. If A., upon his representation that he is B.'s guardian, obtains an order to sell, when he is not B.'s guardian, the order is void and may be impeached collaterally. Grier's Appeal, 101 Pa. St. 412. Sale cannot be made after the ward's death. Robertson v. Coates, 65 Tex. 37. Where the guardian's appointment was absolutely void the sale is likewise void. Dooley v. Bell, 87 Ga. 74. But a merely irregular appointment is not to be assailed. Kramer, Appellant, v. Mugele, 153 Pa. St. 493; § 308.

4. Van Houten v. Black, 67 So. 1008; Funk v. Rentchler, 134 Ind. 68, 33 N. E. 985; Frazier v. Jeakins, 64 Kan. 615, 68 P. 24, 57 L. R. A. 575; Ayer & Lord Tie Co. v. Witherspoon's Adm'r, 30 Ky. Law Rep. 1067, 100 S. W. 259 (timber); Bush v. Coomer, 24 Ky. Law Rep. 702, 69 S. W. 793; Poultney's Heirs v. Ogden, 8 La. 428; Roeques' Heirs v. Leveeque's Heirs, 110 La. 306, 34 So. 454; Touchy v. Gulf Land Co., 45 So. 434; Keel v. Sutherlin, 130 La. 182, 57 So. 794; Crain v. Tremont Lumber Co., 134 La. 276, 63 So. 901 (except to effect partition); Houlihan v. Fogarty, 17 Det. Leg. N. 735, 162 Mich. 492, 127 N. W. 793; Meiggs v. Hoagland, 74 N. Y. S. 234, 68 App. Div. 182; Drennan v. Harris (Okla.), 161 P. 781; Sampson v. Smith (Okla.), 166 P. 422; Sayers v. Pollock, 219 Pa. 274, 68 A. 732; De Armit v. Milnor, 20 Pa. Super. Ct. 369; Ellis v. LeBow, 96 Tex. 532, 74 S. W. 528, 71 S. W. 576, 30 Tex. Civ. App. 449; Merrill v. Bradley, 121 S. W. 561 (certified questions answered, 102 Tex. 481, 119 S. W. 297; Palmer v. Abrahams, 55 Wash. 352, 104 P. 648; Kester v. Hill, 42 W. Va. 611, 26 S. E. 376.

5. Nichols v. Bryden, 86 Kan. 941, 122 P. 1119; Wolf v. Holton, 104

although the guardian acts with the approval of the ward,[6] except for the purpose of collecting a debt.[7]

§ 933. Guardian's Own Sale Not Binding; Public Sale Usually required.

In general, a guardian's sale of real estate belonging to his minor ward, without an order from the court either by virtue of statute or chancery jurisdiction, is not binding upon the minor; and such ward's interest, legal or equitable, can only be divested by a public sale under proper judicial sanction;[8] though discretion is sometimes given the court as to ordering and sanctioning a private sale.[9] But under a deed of gift to minors, empowering the guardian to sell, his discretion is commensurate with the terms of the trust.[10]

§ 934. What Interests in Land May Be Sold.

It is held in New York that the statutes of that State provide for judicial sales only in cases where the legal title is in the infant; and that, independently of such statutes, the court of chancery, having regard to the infant's necessities and interest, may order a sale of the equitable estate. On this principle a chancery sale was sustained, as against infants, where a trust estate of infants in lands had been transferred by a contract made between the guardian and purchaser with the approval of the court.[11] Other sales of this kind have been allowed where the legal estate was in the infant.[12]

The power of sale may extend to the ward's homestead[13] or timber,[14] or to an undivided interest of a minor in land, as tenant

Mich. 107, 62 N. W. 174; LeRoy v. Jacobosky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977; Gault Lumber Co. v. Pyles, 92 P. 175; Storey v. Lonabaugh, 247 Pa. 331, 93 A. 481.

6. Dellinger v. Foltz, 93 Va. 729, 25 S. E. 998.

7. Arrowwood v. McKee, 119 Ga. 623, 46 S. E. 871.

8. *Supra*, § 356; Wells v. Chaffin, 60 Ga. 677, Morrison v. Kinstra, 55 Miss. 71.

9. Maxwell v. Campbell, 5 Ind. 361.

10. Thurmond v. Faith, 69 Ga. 832.

11. Woods v. Mather, 38 Barb. 473; Anderson v. Mather, 44 N. Y. 249.

12. *In re* Hazard, 9 Paige, 365.

13. Merrell v. Harris, 65 Ark. 355, 46 S. W. 538, 41 L. R. A. 714, 67 Am. St. R. 929; *In re* Hamilton's Estate, 120 Cal. 421, 52 P. 708; Ancell v. Southern Illinois & M. Bridge Co., 223 Mo. 209, 122 S. W. 709; Hartsog v. Berry, 45 Okla. 277, 145 P. 328. See *Ex parte* Tipton, 123 Ark. 389, 185 S. W. 798. See Rushing v Horner, 130 Ark. 21, 196 S. W. 468 (only if free from debt).

14. Bettes v. Brower, 184 F. 342 (although timber called personalty still guardian must obtain order to sell it as realty).

Where a guardian severs standing

in common or otherwise,[15] but the part-owner of lands in which an infant is interested ought not to be allowed to make the sale,[16] or to his interest as a remainderman,[17] or an equity subject to an existing mortgage,[18] or to a contingent interest.[19] It is held that chancery cannot interfere with the lands of infants unborn.[20] In all such cases the guardian should keep within the scope of judicial and legislative permission.[21]

§ 935. Parties to Proceedings.

Sales may be ordered on petition of a guardian,[22] or of a special guardian.[23] The infant wards are not necessary parties to proceedings for sale[24] unless by statute when they are over a certain age,[25] and children born after the sale are deemed to have been before the court.[26] A guardian *ad litem* may be required.[27]

Proceedings for sale do not terminate by the termination of the guardianship by the death or resignation of the guardian pending the proceedings, but a new guardian should be appointed to finish the sale.[28]

trees, it is his duty to sell the timber and account for the proceeds. Bushkirk v. Sanders, 70 W. Va. 363, 73 S. E. 937.

15. Price, Matter of, 67 N. Y. 231; Schafer v. Luke, 51 Wis. 669; Brenham v. Davidson, 51 Cal. 352; Fitzpatrick v. Beal, 62 Miss. 244.

16. *In re* Tillotsons, 2 Edw. Ch. 113.

17. Oldaker v. Spiking (Mo.), 210 S. W. 59.

18. As to the effect of such a sale, see Lynch v. Kirby, 36 Mich. 238. And see § 351. Guardian's petition to court for leave to mortgage should be in writing, and in Rhode Island he cannot give a power of sale in such mortgage. Barry v. Clarke, 13 R. I. 65.

19. Palmer v. Garland, 81 Va. 444 (aided by statute); Thaw v. Ritchie, 136 U. S. 519. *Contra*, Graff, v. Rankin, 250 F. 150, 38 S. Ct. 578.

20. Downin v. Sprecher, 35 Md. 474.

21. Kingsbury v. Powers, 131 Ill. 182.

22. Ellis v. Smith's Guardian, 147 Ky. 99, 143 S. W. 776.

23. Hagerman v. Meeks, 13 N. M. 565, 86 P. 801; Baker v. Cureton, 150 P. 1090.

24. Furr v. Burns, 124 Ga. 742, 53 S. E. 201; Dillingham v. Spalding, 7 Ky. Law Rep. 370.

25. Rosenfeld v. Miller, 115 N. Y. S. 692, 131 App. Div. 282 (14 years).

26. Ammons v. Ammons, 50 W. Va. 390, 40 S. E. 490.

27. Siler v. Archer's Guardian, 26 Ky. Law Rep. 557, 82 S. W. 256. See Succession of Coleman, 11 La. Ann. 109; Weil v. Schwartz, 51 La. Ann. 1547, 26 So. 475.

There is no presumption of law that a guardian is so interested personally in a proceeding to sell the ward's real estate that a guardian *ad litem* should be appointed; every presumption being indulged that the guardian will protect the ward's interest until the contrary is shown. Ancell v. Southern Illinois & M. Bridge Co., 223 Mo. 209, 122 S. W. 709.

28. Danahy v. Fagan, 117 N. Y. S. 300, 63 Misc. 658; McVaw v. Shelby, 25 Ky. Law Rep. 309, 75 S. W. 227.

§ 936. Purpose of Sales.

It is commonly provided by statute that the court may authorize sales by the guardian of the estate of the ward for various purposes, as on account of undivided interests therein,[29] or to pay debts of the ward,[30] or for a proper change of investment,[31] or when real estate is unproductive,[32] or may direct an exchange of the ward's lands,[33] or to use the proceeds of sale for the maintenance of the ward,[34] but not for the purpose of erecting permanent improvements.[35]

§ 937. Requisites of Petition.

The petition for sale should set forth its necessity,[36] the purpose for which a sale is asked,[37] showing benefit to the

29. Howard v. Bryan, 133 Cal. 257, 65 P. 462; Skidmore v. Cumberland Valley Land Co., 126 Ky. 576, 104 S. W. 390, 31 Ky. Law Rep. 1002; *In re* Congdon, 41 N. Y. Ch. 1831, 2 Paige, 566. See *In re* Culver (Del. Orph.), 104 A. 784 (not enough that widow wants dower appraised). See *In re* Evans, 143 N. Y. S. 839, 82 Misc. 193 (application to convey ward's interest to a corporation and take stock in payment denied). See Frantz v. Lester (W. Va.), 95 S. E. 945 (statute authorizing sale to be liberally construed).

30. Alcon v. Koons, 42 Ind. App. 537, 82 N. E. 92. See Irvine v. Stevenson (Ky.), 209 S. W. 7 (debts of ward's ancestor); Warren v. Union Bank of Rochester, 157 N. Y. 259, 51 N. E. 1036, 43 L. R. A. 256, 68 Am. St. R. 777 (order void when granted to pay an unauthorized debt).

31. McCreary v. Billing, 176 Ala. 314, 58 So. 311.

32. Crawford v. Broomhead, 97 Ga. 614, 25 S. E. 487.

33. Decker v. Fessler, 146 Ind. 16, 44 N. E. 657. *Contra*, Ford v. May, 157 Ky. 830, 164 S. W. 88.

34. Dixon v. Hosick, 101 Ky. 231, 41 S. W. 282, 19 Ky. Law Rep. 387; Campbell v. Goodin's Guardian, 128 Ky. 278, 108 S. W. 248, 32 Ky. Law Rep. 1137 (only where guardian unable to support her); Hudson's Guardian v. Hudson, 160 Ky. 432, 169 S. W. 891 (out of principal); Nunnely's Guardian v. Nunnelly, 180 Ky. 131, 201 S. W. 976; Eaker v. Harvey (Mo. App.), 179 S. W. 985; Leet v. Gratz, 92 Mo. App. 422 (not to compromise a claim); East Greenwich Inst. for Savings v. Shippee, 20 R. I. 650, 40 A. 872; Gayle v. Hayes' Adm'r, 79 Va. 542.

See Farris v. Bingham, 164 Ky. 444, 175 S. W. 649 (the sale of exempt property of infants, held warranted where retention would only give the use of it to their guardian).

35. Little v. West, 145 Ga. 563, 89 S. E. 682.

36. Van Houten v. Black, 67 So. 1008; *In re* Hamilton's Estate, 120 Cal. 421, 52 P. 708 (petition need not show how much of ward's estate is undisposed of); Howard v. Bryan, 133 Cal. 257, 62 P. 459, 65 P. 462 (items for which money is wanted); McKeever v. Ball, 71 Ind. 398; Alcon v. Koons, 42 Ind. App. 537, 82 N. E. 92; Phillips v. Spalding's Guardian, 31 Ky. Law Rep. 579, 102 S. W. 1193; Sockey v. Winstock, 43 Okla. 758, 144 P. 372; Pyeatt v. Estus (Okla.), 179 P. 42; Bailes v. Anderson (W. Va.), 95 S. E. 1039 (signed and sworn to by guardian).

37. Beezley v. Phillips, 54 C. C. A. 491, 117 F. 105; Campbell v. Goodin's

ward,[38] describing the land to be sold,[39] and the ward's interest in the property,[40] showing the wards as parties.[41]

§ 938. Requisites of Decree.

The order of sale should state its terms.[42]

§ 939. Rights of Purchaser Under Guardian's Deed.

The guardian's deed made under such orders of court has usually only the effect of a quitclaim, except so far as he may have covenanted on his part that he has complied with the statute requisites and that he is the guardian duly authorized; and in general he cannot bind his ward by any covenants of warranty in the deed, though if he choose to warrant he may bind himself. The purchaser in such sales usually takes all risks of title except as concerns the authority and good faith of the guardian in the premises.[43]

The doctrine of *caveat emptor* will not be applied to a sale by a guardian of the ward's property under order of court, as the purchaser has a right to demand a marketable title free from reasonable doubt as to its validity. So the purchaser is not bound to carry out the bargain where there is a right of way over the premises of which neither party knew at the time of the sale.[44]

Guardian, 128 Ky. 278, 108 S. W. 248, 32 Ky. Law Rep. 1137 (inability of father to support ward); Schaale v. Wasey, 70 Mich. 414, 38 N. W. 317.

38. Womble v. Price's Guardian, 112 Ky. 533, 66 S. W. 370, 67 S. W. 9.

39. Theobald v. Deslonde, 93 Miss. 208, 46 So. 712; Maurr v. Parrish, 7 Ohio Dec. 54, 1 Wkly. Law Bul. 85 (wrong lot number renders proceedings void); Jirou v. Jirou (Tex. Civ. App. 1911), 136 S. W. 493.

40. Puckett v. Glendinning (Ark.), 205 S. W. 454; Worthington v. Dunkin, 41 Ind. 515; Campbell v. Goodin's Guardian, 128 Ky. 278, 108 S. W. 248, 32 Ky. Law Rep. 1137 (title papers need not be filed where ward took by descent); Dole v. Shaw, 282 Ill. 642, 118 S. E. 1044; Bailes v. Alderson (W. Va.), 95 S. E. 1039.

41. Revill's Heirs v. Claxton's Heirs, 75 Ky. 558; Eaves v. Mullen, 25 Okla. 679, 107 P. 433 (need not show ward resides in county). See Fowler v. Lewis' Adm'r, 36 W. Va. 11, 14 S. E. 447 (co-owners made parties renders proceeding effective). *Contra*, Ellis v. Smith's Guardian, 143 Ky. 99, 143 S. W. 776.

42. *In re* Hamilton's Estate, 120 Cal. 421, 52 P. 708 ("for cash" is sufficient); Teague v. Swasey, 46 Tex. Civ. App. 151, 102 S. W. 458.

Decree for guardian's sale of real estate, making no reference to a certain lot, held not to authorize guardian in imposing any servitude upon such lot. Silverman v. Betti, 222 Mass. 142, 109 N. E. 947; Roth v. Union Nat. Bank of Bartlesville (Okla.), 160 P. 505.

43. State v. Clark, 28 Ind. 138; Byrd v. Turpin, 62 Ga. 591; Holyoke v. Clark, 54 N. H. 578.

44. Stonebrook v. Wisener (Ia.), 153 N. W. 351, L. R. A. 1915E, 835. See *contra*, Manternach v. Studt, 240

And it is held that *caveat emptor* does not apply to the purchaser so as to require him in equity to take the title where actual representations of the guardian as to the goodness of the title turn out untrue.[45]

§ 940. Sales Void or Voidable.

The most difficult question which arises under the statutes relating to sales of the infant's lands is that of the essentials of the purchaser's title. In what cases may the guardian's sale be set aside? What statute provisions shall be regarded as imperative, and what as merely directory? How far will irregularities avoid the guardian's acts, and who is at liberty to impeach them? One proposition may be laid down at the outset. It is that, inasmuch as the authority of the guardian to make, and of the court to permit, an absolute sale of the infant's lands, is limited to the grant of powers conferred by the legislature, the terms of such grant should be carefully followed. Sales made in utter disregard of the precautions wisely interposed by law are absolutely worthless.[46] And furthermore, there are constitutional constraints in a majority of our States upon corrections of void and irregular sales of this character by a special act of legislation.[47]

On the other hand, it must be admitted that there is always a hardship imposed upon a *bona fide* purchaser, whose rights once apparently vested are afterwards pronounced null. If the purchaser took the child's lands by collusion and fraud, or, being the guardian himself, abused his trust to secure his own profit, equity might justly suffer the transaction to be set aside altogether. But a stranger who pays his purchase-money honestly and fairly ought not to be compelled to suffer for mere irregularities under the law. For such fraudulent acts of the guardian as necessarily follow the consummation of a bargain — as the misapplication of the purchase-money — it is clear that this purchaser is not liable.[48] A sale, too, if valid when made, is not rendered invalid by the guardian's subsequent resignation and the appointment of another person in his place.[49]

Ill. 464, 88 N. E. 1000 (holding that *caveat emptor* does apply to a guardian's sale).

45. Black v. Walton, 32 Ark. 321.

46. *Ex parte* Guernsey, 21 Ill. 443; Barrett v. Churchill, 18 B. Monr. 387; Patton v. Thompson, 2 Jones Eq. 411; Mason v. Wait, 4 Scam. 127.

47. See Roche v. Waters, 72 Md. 264.

48. Fitzgibbon v. Lake, 29 Ill. 165; Kendrick v. Wheeler, 85 Tex. 247; Orman v. Bowles, 18 Col. 463.

49. Herndon v. Lancaster, 6 Bush, 483.

As to those acts which precede the consummation of a bargain the purchaser is put on his guard, unless from the very nature of the case they could not have come to his observation. Irregularities or omissions to comply with statute formalities seem to range themselves in three classes: those which are immaterial; those which will render a sale voidable by certain parties interested; those which go to the foundation of the sale and render it void altogether. And according to the judicial construction of such irregularities and omissions, under the statutes and practice of the particular State, will the purchaser's title be determined.

Where the sole authority of the guardian is derived from the statute, courts will reluctantly declare any part of that statute immaterial, except in the sense that the responsibility for noncompliance is thrown upon the guardian or the court, and not upon the purchaser. Informalities in the recitals of a *bona fide* deed, defective notices, the insertion of irrelevant or superfluous matter in the order of sale, errors of the guardian in his allegations or of the court in issuing process, have been in this sense ruled as immaterial. But such cases are generally not so much of statutory direction as of judicial rule and common-law analogies in supplying the intention of the legislature where the statute was silent. The general principle prevails, that it is wise policy to sustain judicial sales, and that they should not be declared void or voidable for slight defects;[50] and all intendments will be indulged in favor of the decree.[51]

Of mere irregularities advantage may often be taken by direct proceedings concerning the sale, as by appeal, or by a refusal to consummate the sale; while, to attack the completed sale and a purchaser's title collaterally, statute fundamentals should have been disregarded.

As to irregularities or omissions which will render a sale voidable, either the infant heir or some other person in interest has

50. Fitzgibbon v. Lake, 29 Ill. 165; Cooper v. Sunderland, 3 Ia. 114; Thornton v. McGrath, 1 Duv. 349; Ackley v. Dygert, 33 Barb. 176.

51. Howard v. Bryan, 133 Cal. 257, 65 P. 462; Field v. Peeples, 180 Ill. 376, 54 N. E. 304 (though petition destroyed and purpose of sale does not appear in decree); *In re* Turner, 80 N. Y. S. 573, 83 N. Y. S. 1118, 79 App. Div. 495, 86 App. Div. 629; Harris v. Hopkins, 166 Ky. 147, 179 S. W. 14; Wood v. Frickie, 120 La. 180, 45 So. 96; Drennan v. Harris (Okla.), 161 P. 781; Greer v. Ford, 31 Tex. Civ. App. 389, 72 S. W. 73. See Landreth v. Henson, 173 S. W. 427 (presumption of regularity may be overcome by proof); Mullinax v. Barrett (Tex. Civ. App.), 173 S. W.

been unfairly dealt with. Here the privilege is accorded to the party or parties wronged, of having the sale set aside on appeal or by direct proceedings instituted for that purpose; but not in a collateral manner. We need not here speak of the infant's right of election in certain cases on attaining majority.[52] Where in general the guardian obtained his license without duly notifying a person in interest, such person is allowed to have the sale set aside. The purchaser's title is, however, good in the meantime. Nor can anyone take advantage of the defective proceedings but those whose interests were injuriously affected. A special limit is frequently set by law to proceedings of this kind, for the sake of quieting titles; otherwise, the ordinary statute of limitations seems to apply.[53] And length of time and laches on the infant's part after reaching majority, or his election not to avoid, may often render the transaction unimpeachable.[54] After destruction of the records and lapse of time, the sale may be presumed to have conformed to essentials.[55] Presumptions in short are in favor of the regularity of all probate court proceedings within each jurisdiction; and such proceedings should seldom be avoided when collaterally attacked unless it is shown affirmatively that there was no actual jurisdiction.[56]

But as to irregularities or omissions which render the sale void altogether, there is some confusion of authority. The principle itself is a clear one, but in the application commonly made seems much difficulty. The license of a court plainly without com-

1181; Goodman v. Schwind (Tex. Civ. App.), 186 S. W. 282 (sale void where clerk of court is the guardian).

52. *Infra*, ch X; Part V, ch. 5.

53. Kimball v. Fisk, 39 N. H. 110; Bryan v. Manning, 6 Jones, 334; Field v. Goldsby, 28 Ala. 218; Dutcher v. Hill, 29 Mo. 271; Gilmore v. Rodgers, 41 Pa. St. 120; Marvin v. Schilling, 12 Mich. 356; Kenniston v. Leighton, 43 N. H. 309.

54. See *infra*, ch. X; Part V, chs. 5 and 6; Havens v. Patterson, 43 N. Y. 218; Parmele v. McGinty, 52 Miss. 475. Infant's title under statute sale, when actually divested, see Doe v. Jackson, 51 Ala. 514; Shaffner v. Briggs, 36 Ind. 55; MacVey v. MacVey, 51 Mo. 406; Schafer v. Luke, 51 Wis. 669. Land held not taxable to purchaser until conveyance is executed, confirmed, &c., even though by its terms dating back. Ordway v. Smith, 53 Ia. 589.

55. Spring v. Kane, 86 Ill. 580. Where a court of equity acts on general grounds, it must inquire whether the infant will be benefited; if not, decree should be refused. Ames *et al.* v. Ames *et al.*, 48 Ill. 321. General jurisdiction denied in selling land where an adult had a part interest. Roche *et al.* v. Waters, 72 Md. 264. Jurisdiction apart from statute denied. Whitehead v. Bradley, 87 Va. 676.

56. See Howbert v. Heyle, 47 Kan. 58; Meikel *et al.* v. Borders, 129 Ind. 529; Curie v. Franklin, 51 Ark. 338.

petent jurisdiction would be void. But where the court has jurisdiction (and this jurisdiction is usually vested originally in county courts having probate jurisdiction[57]), it is material to inquire what provisions of the statute are positive and what are declaratory. In some cases, a very strict rule seems to have been pursued; in others, the construction has been liberal in favor of the purchaser's rights. The execution of the statute bond would seem to be in general an essential, though some States do not so regard it; so, too, a public sale at the time set; sometimes the filing of an oath; the offer of such land as the license designates and none other; the delivery of a deed to the purchaser and receipt of the purchase-money. And yet the guardian's failure to comply with certain of these formalities does not invariably affect the purchaser's title. The difficulty is set at rest in some States by a statute provision as to the essential particulars which a *bona fide* purchaser is bound to notice.[58] We can only add that, in States where the legislature supplies no such provision, a purchaser cannot feel safe in disregarding any forms of procedure prescribed in so many words; and that, the more explicit the language of the statute, the more careful he should be in insisting on the prescribed course, especially as to the sale and the method of conducting it.[59] There might be defects to urge directly for

57. As to courts of common pleas, for such jurisdiction, see McKeever v. Ball, 71 Ind. 398; Foresman v. Haag, 36 Ohio St. 102.

58. Gen Sts. Mass., ch. 102, §§ 37-48; Mohr v. Tulip, 51 Wis. 487.

59. Williams v. Morton, 38 Me. 47; Owens v. Cowan, 7 B. Monr. 152; Palmer v. Oakley, 2 Doug. 433; Stall v. Macalester, 9 Ham. 19; Blackman v. Baumann, 22 Wis. 611; Strouse v. Drennan, 41 Mo. 289; Brown v. Christie, 27 Tex. 73; Frazier v. Steenrod, 7 Ia. 339.

Due notice to those interested in the sale is essential. Knickerbocker v. Knickerbocker, 58 Ill. 397; Haws v. Clark, 37 Ia. 355; Williamson v. Warren, 55 Miss. 19. But the proceeding is *in rem*, in the ward's interest; and hence notice to heirs is not always insisted upon as necessary. Mulford v. Beveridge, 78 Ill. 455; Gager v. Henry, 5 Sawyer C. C. 237; Mohr v. Mahierre, 101 U. S. 417. Nor the appointment of a guardian *ad litem*. Orman v. Bowles, 18 Col. 463. But notice to the ward is usually requisite. Rankin v. Miller, 43 Ia. 11; Kennedy v. Gaines, 51 Miss. 625; Musgrave v. Conover, 85 Ill. 374. Though the ward need not join in the petition. Cole v. Gourlay, 79 N. Y. 527. Jurisdiction is essential. In some States the probate court has no authority to order a sale. Summer v. Howard, 33 Ark. 490. See Foresman v. Hagg, 36 Ohio St. 102. The statute which prescribes in what county application should be made for leave to sell must be regarded. Spellman v. Dowse, 79 Ill. 66; Mohr v. Tulip, 51 Wis. 487. Advice of a family meeting is an element in Louisiana practice. Wisenor v. Lindsay, 33 La. Ann. 1211. There is no

avoiding such a sale which could not enable the sale to be attacked

jurisdiction to authorize a mortgage under a guardian's petition which asks for a sale. McMannis v. Rice, 48 Ia. 361. The notice of public sale with a wrong time or no time stated is fatally defective. Lyon v. Vanatta, 35 Ia. 521. But cf. Spring v. Kane, 86 Ill. 580. A sale bond is essential in some States, while in others, especially where confirmation is made by the court, its omission does not invalidate the sale. Stewart v. Bailey, 28 Mich. 251; Blauser v. Diehl, 90 Pa. St. 350; Howbert v. Heyle, 47 Kan. 58; McKeever v. Ball, 71 Ind. 398; Railroad Co. v. Steinfeld, 42 Ohio St. 454; Barnett v. Bull, 81 Ky. 127; Goldsmith v. Gilliland, 23 Fed. R. 645. But informality in the bond is not necessarily fatal. McKinney v. Jones and Another, 55 Wis. 39. See Watts v. Cook, 24 Kan. 278; Cuyler v. Wayne, 64 Ga. 78. A special bond covers only a sale under the specific license. Weld and Others v. Johnson Mfg. Co., 84 Wis. 537. Cf. Arrowsmith v. Gleason, 46 Fed. R. 256. As to requisites and sufficiency of a petition for leave to sell, there are many decisions of little more than local consequence. Discretion of a county court in ordering a sale may be controlled usually on appeal. A defective petition does not usually affect the court's jurisdiction. And see Robertson v. Johnson, 57 Tex. 62; Ellsworth v. Hall, 48 Mich. 407.

There has been some conflict of cases as to whether a sale is valid without the statutory notice to persons in interest. But the present inclination upholds the sale where a proper petition was presented to the proper court, thus giving the court jurisdiction *in rem*. The sale may then bind the guardian and his ward, and all having notice and assenting, even though it might not bind parties adversely interested having no notice. For the notice is not to give jurisdiction of the subject-matter, but to get jurisdiction of persons adversely interested. Mohr v. Tulip, 51 Wis. 487, and cases cited; Nott v. Sampson, Man. Co., 142 Mass. 479.

The place of sale need not be designated. Williamson v. Warren, 55 Miss. 199. There may be a merely defective notice, so as not to render the sale void as in case no notice were given. Lyon v. Vanatta, 35 Ia. 521; Bunce v. Bunce, 59 Ia. 533; Richardson v. Farwell, 49 Minn. 210. A limit of sale by appraisement or otherwise is sometimes set. Fraser v. Zylicz, 29 La. Ann. 534. Statute requirement of publication for successive weeks, how fulfilled. Dexter v. Cranston, 41 Mich. 448. As to adjourning the sale, see Gager v. Henry, 5 Sawyer C. C. 237. Defective recitals in a guardian's deed; whether the deed must be cancelled. Bobb v. Barnum, 59 Mo. 394. Succinct statements in such deed are sufficient. Worthington v. Dunkin, 41 Ind. 515. Where the court has jurisdiction, and makes an order for the sale, a *bona fide* but irregular arrangement by the guardian with the purchaser, as to delivery of deed to carry out the terms of the sale, will not readily be regarded as invalidating the sale. Mulford v. Beveridge, 78 Ill. 455. The act of conveyance is rather official than personal, and may be carried out by a successor to the guardian who sold. Lynch v. Kirby, 36 Mich. 238. A ward had a void decree of sale set aside where his guardian misappropriated the proceeds and was not compelled to refund the purchase-money, in Reynolds v. McCurry, 100 Ill. 356. As to limitation of ward's disability to set aside, see White v. Clawson, 79 Ind. 188.

A formal order of court confirming the sale is not needful usually to give it validity; but local statutes differ. Robertson v. Johnson, 57 Tex. 62; Bunce v. Bunce, 59 Ia. 533; Reid *et al.* v. Hart, 45 Ark. 41; Bone v. Tyrrell, 113 Mo. 175; Moore v. Davis,

collaterally. The guardian's tender of a deed with misrecitals of importance need not be accepted by the party purchaser.[60]

The purchaser may sometimes maintain a bill in equity for rescinding the sale on account of illegality. But he must offer to surrender possession and to account for the use and occupation of the premises.[61] Defective proceedings are sometimes cured by the court, so as to compel him to abide by the terms of the purchase. Mere irregularities in a guardian's sale not affecting the jurisdiction and the validity of a title do not justify the purchaser in refusing to complete the purchase.[62] He is presumed to have knowledge of all judicial limits as to price and other essentials on record in the license proceedings.[63] And it seems that he may, by his laches, forfeit his right of objection to the sale.[64] Whatever the favor to be shown to a *bona fide* purchaser without notice of fatal defects in the title or misappropriation of the proceeds, one who connives at a fraud upon the ward may be held accountable for the trust property or its proceeds.[65] But sales made in fraud of an infant are sometimes adopted and confirmed by a court, with the purchaser's assent, as being beneficial to the infant.[66] A guardian in general can only safely accept money in payment of the purchase price.[67]

An order of sale obtained by one who has never qualified as

85 Mo. 464; Scarf v. Aldrich, 97 Cal. 360. What such order adjudicates, see Dawson v. Helmes, 30 Minn. 107. Though confirmation ought to precede the delivery of a deed, a deed previously delivered is good after confirmation. Hammann v. Mink, 99 Ind. 279. Confirmation of a sale where no deed was executed, but the price was paid and possession delivered, gives at least an equitable title. Alexander v. Hardin, 54 Ark. 480.

60. Williams v. Schembri, 44 Minn. 250. The guardian's tender of a deed with proper recitals and covenants should be accepted.

61. Shipp v. Wheeless, 33 Miss. 646; Loyd v. Malone, 23 Ill. 43; Anderson v. Layton, 3 Bush, 87.

62. Beidler v. Friedell, 44 Ark. 411; Kelly and Another v. Morrell, 29 Fed. R. 736.

63. *In re* Petition of Axtele, 95 Mich. 244.

64. Cooper v. Hepburn, 15 Gratt. 551.

65. See Wallace v. Brown, 41 Ind. 436, where a purchaser paid to the guardian the latter's individual notes in settlement of his purchase. So, too, Ambleton v. Dyer, 53 Ark. 224. And see *post*, ch. 9. A collusive sale between administrator and guardian to the detriment of the ward and heir, may be avoided by the latter. Candler v. Clarke, 90 Ga. 550.

Rents and profits under an irregular sale must be accounted for when the sale is set aside. Ambleton v. Dyer, 53 Ark. 224.

66. *Ex parte* Kirkman, 3 Head, 517.

67. Brenham v. Davidson, 51 Cal. 352. See Peabody v. North, 161 Mass. 525, as to other considerations as part of the purchase price.

guardian is a nullity.[68] So, too, the sale of a court, contrary to the provisions of a devise, is utterly void,[69] and may be void unless properly entered in some record book.[70]

§ 941. Disposition of Proceeds.

As to the disposition of the proceeds, the guardian's conduct is to be regulated by the terms of his license. If he was permitted to sell for the purpose of maintenance and support, the moneys obtained must be so appropriated; if for the payment of certain debts, those debts must be paid; if for investment in other securities, he must invest therein; and, unless the court leave sthe investment to his own discretion, he is bound to invest as it orders. Any other course of conduct will subject him to penalties for breach of his special bond. He is not justified in appropriating the proceeds of the sale for the above objects generally, however reasonable it might be to do so on other considerations; but for the particular object contemplated by the court in granting the license.[71] Not even the ward's assent to his disposition of the proceeds can exonerate the guardian from responsibility to other parties immediately interested, for such losses as may occur by reason of his disregard of this rule.[72] Nor is his special bond discharged by the fact that he produced the proceeds of the sale in court, and was then ordered to withdraw them; for the guardian and not the court is the proper custodian of the fund.[73] Any person not the guardian, authorized to sell in such cases, is held to account in like manner.[74]

The ward is bound to account to the purchaser for the purchase price used for his benefit where the guardian makes a void sale,[75] but the succeeding guardian need not do so.[76]

§ 942. Confirmation of Sale.

In various States confirmation of the sale by the court is not a prerequisite to divesting the ward's title, but in others it appears to be.[77] And a court may refuse to confirm or may set aside a

68. Wells v. Steckleberg, 50 Neb. 670, 70 N. W. 242.

69. Rogers v. Dill, 6 Hill, 415. See also Matter of Ellison, 5 Johns. Ch. 261; Sutphen v. Fowler, 9 Paige, 280.

70. Teague v. Swasey, 46 Tex. Civ. App. 151, 102 S. W. 458.

71. Strong v. Moe, 8 Allen, 125.

72. Harding v. Larned, 4 Allen, 426.

73. State v. Steele, 21 Ind. 207.

74. Pope v. Jackson, 11 Pick. 113.

75. Touchy v. Gulf Land Co., 45 So. 434.

76. Gentry v. Bearss, 82 Neb. 787, 118 N. W. 1077 (succeeding guardian need not offer to return purchase price paid for void sale).

77. § 939, notes.

sale because of gross inadequacy of price or other unfairness to the ward's interest.[78] Certain defects in a sale, too, are in some States (but not in others) treated as cured by the court's required confirmation of the sale; and this more particularly where it is shown that the sale was beneficial to the ward.[79]

Where a guardian petitions for the sale of his ward's interest, alleging that a certain cash offer has been received and the sale is confirmed on his return of the receipt of the cash, he is later estopped to deny that he received any cash for the land. To allow such a claim would be trifling with judicial records made up at the instance of the guardian.[80]

§ 943. Sales in Cases of Non-Residents.

Where a non-resident guardian applied for the sale of real estate in Maine belonging to his ward, also a non-resident, the person authorized in that State to make the sale was ordered to transmit the proceeds to such non-resident guardian; but this would not be the rule in some other States.[81] Statutes have been frequently enacted by which non-resident guardians may sell their ward's lands, on petition to the court having jurisdiction, with an authenticated copy of the letters of guardianship, and compliance with the ordinary formalities of such sales; executing, perhaps, to the court having control of the funds, a bond for their proper application.[82]

78. Mitchell v. Jones, 50 Mo. 438.

79. See Emery v. Vroman, 19 Wis. 689; Mahoney v. McGee, 4 Bush, 527; Blackman v. Baumann, 22 Wis. 611; Pursley v. Hayes, 22 Ia. 11; Gager v. Henry, 5 Sawyer C. C. 237; Hurt v. Long, 90 Tenn. 445.

80. *Re* Potter, 249 Pa. 158, 94 Atl. 465, L. R. A. 1916A, 637.

81. Johnson v. Avery, 2 Fairf. 99; *contra*, Gay v. Brittingham, 34 Md. 675.

82. McClelland v. McClelland, 7 Baxt. 210.

CHAPTER VIII.

THE GUARDIAN'S INVENTORY AND ACCOUNTS.

§ 944. The Guardian's Inventory.

One of the probate guardian's first duties after his appointment is to file an inventory of the ward's effects. This is a schedule, prepared by discreet and disinterested persons, and verified by their oath, wherein the amount of the ward's estate, both real and personal, together with the separate items, are duly entered at a just valuation. The inventory serves as the basis of the guardian's accounts, and primarily fixes his liability. Here again the statute relative to infants borrows from the long-established practice of the English ecclesiastical courts, with regard to the administration of estates. But one inventory is in general necessary; and if subsequent effects come to the guardian's hands, he will place them in his accounts to the ward's credit. It is to be observed that though probate inventories are *prima facie* evidence of the existence of assets and their true valuation, they are by no means conclusive. And the guardian may show, in rendering his accounts, that he was not chargeable with certain items which therein appeared, or that the just sale of property realized less than its appraised worth; and he will be credited accordingly.

On the other hand, property omitted from the inventory, which comes within the guardian's reach in any manner, should be accounted for, as well as all gains realized over and above the appraisers' valuation. During the long period for which a guardian's authority frequently lasts, the inventory may become of

little practical consequence, except as furnishing for himself the starting-point in his system of accounts, and determining, for the convenience of others interested, the fact and extent of his original liability. And as the ward's real estate is to be preserved intact unless a sale is ordered, the guardian's account, like that of an administrator, starts usually in this country with the amount of personal estate according to the inventory, taking into his reckoning only the income and expenditures from the real estate until some sale of land is actually made. If two or more persons under guardianship are interested in different property, or have unequal interests in the same property, separate schedules should be rendered for each.[83]

An inventory filed by a guardian may be corrected by amendment allowed by the court.[84]

§ 945. The Guardian's Accounts; English Chancery Practice.

The accounts of guardians are in England subject to the direction of the court of chancery. Guardians and receivers who have entered into recognizance as officers of the court are compelled to present their accounts on application made by any person interested. Such proceedings are by petition, or on motion filed. Receivers are expected to pass their accounts regularly, and a guardian is compelled to account by enforcing his recognizance. The common rules as to executors and trustees apply to guardians. But unless there is misconduct shown, the guardian need not show specifically how he has used the sum allowed as maintenance. A receiver's accounts are sometimes examined on application of strangers. Mr. Macpherson says that there is scarcely a modern instance to be found where an account has been taken from a guardian without suit.[85] In like manner, equity treats

83. Matter of Seaman, 2 Paige, 409; Hooker v. Bancroft, 4 Pick. 50; Mass. Gen. Sts., chs. 100, 109; State v. Stewart, 36 Miss. 652; Clark v. Whitaker, 18 Conn. 543; Fuller v. Wing, 5 Shep. 222; Green v. Johnson, 3 Gill & Johns. 388; Fogler v. Buck, 66 Me. 205. And see, as to inventories generally, 1 Wms. Ex'rs, 878-883; Schouler, Ex'rs, Part III., ch. 2. A guardian's sureties are not precluded by the inventory from showing the true ownership of alleged assets. Sanders v. Forgasson, 3 Baxt. 249. An Indiana statute makes the duty of a guardian to file an inventory imperative. Wood v. Black, 84 Ind. 279. Summary removal is the penalty for disregard of a court's order to file. *Ex parte* Cottingham's Guardian, 124 Ind. 250.

84. *In re* Watson, 51 La. Ann. 1641, 26 So. 409; Martin v. Sheridan, 46 Mich. 93, 8 N. W. 722; United States Fidelity & Guaranty Co. v. Hall (Tex. Civ. App.), 173 S. W. 892.

85. Macphers. Inf. 108; Ib., 259, 348.

as guardians all persons who take possession of an infant's estate, whether duly authorized to act or not, and obliges such persons to account, on application made by the infant himself, or on his behalf.[86]

§ 946. Accounts; Jurisdiction Over.

Courts of equity in this country are doubtless authorized to entertain like proceedings against all *quasi* guardians.[87] But under our statutes probate guardians, duly appointed, are invariably made liable to account, in the first instance, to the local court issuing letters of guardianship, which thus becomes, in fact, the general depository of accounts relative to the estates of deceased persons and wards. The immediate jurisdiction over the settlement of guardians' accounts is usually, therefore, in the probate court.

Rules of equity still prevail to a considerable extent so as to hold guardians accountable on the usual footing of trustees. The citation to render account in the probate court is a summary proceeding, resembling the bill in chancery for discovery.

§ 947. Accounts; Duty to Render Accounts.

It is the duty of every guardian, whose trust as such is revoked, to account honestly to the late wards, or to his successor in the trust if there be one, for their estate. Thus, a guardian cannot discharge himself by simply turning over to his successor the latter's note for an individual debt due the guardian and taking a receipt in full; but he will still be bound in equity to the ward unless he transfers the ward's property, or money in lieu, or good securities, such as are admitted to be proper investments.[88] Permitting a guardian to resign or removing him is, of course, no judgment that a full settlement and accounting has been had.[89] And the collusive appointment of a successor, together with a col-

86. *Ib.*, 259; Story, Eq. Juris., § 1195; Morgan v. Morgan, 1 Atk. 489.

87. Chaney v. Smallwood, 1 Gill, 367; next chapter.

88. Sage v. Hammonds, 27 Gratt. 651; Manning v. Manning, 61 Ga. 137; Coles v. Allen, 64 Ala. 98. Lee State v. Bolte, 72 Mo. 272.

89. King v. Hughes, 52 Ga. 600. No such settlement is practicable, in fact, as many American codes should be construed, until at all events the ward has reached full age, or a new probate guardian is fully clothed with his office, and competent to receive the estate. See as to such decrees, Cheney v. Roodhouse, 135 Ill. 257; Kingsberry *et al.* v. Hutton *et al.*, 140 Ill. 603.

lusive settlement, cannot conclude the rights of the defrauded party in interest.[90]

§ 948. Accounts; When Required.

With probate guardians it is the usual practice to present accounts with vouchers annually, and in some States once in three years if not oftener, or as otherwise directed by the court, the parties in interest other than the ward having been first cited, unless their approval appears upon the face of the account.

The guardian is by law required to render full account of his conduct of the ward's estate usually annually.[91]

Under a statute requiring accounts to be presented annually it is no objection that the first account was filed before the expiration of a year from the appointment,[92] although his failure to render accounts promptly does not of itself render him responsible.[93]

§ 949. Accounts; Form.

The account should be itemized and with regard to chronological sequence. The account is considered by the court and passed after due examination, upon the oath of the guardian. The vouchers are retained by the guardian, but the account is recorded and filed in the court.[94]

All items are not necessarily proved by vouchers; small charges may be allowed on the guardian's oath; and oral proof is frequently admissible as in the settlement of other probate accounts. In the settlement of a guardian's account, the disposition is to adjust items without resort to a circuity of litigation that is practically needless.[95]

90. Ellis v. Scott, 75 N. C. 108; Manning v. Manning, 61 Ga. 137.

91. See Curtis v. Devoe, 121 Cal. 468, 53 P. 936. See Powell v. Powell, 52 Mich. 432, 18 N. W. 203 (undue haste in settling guardian's accounts not favored); Empire State Surety Co. v. Cohen, 156 N. Y. S. 935, 93 Misc. 299; *In re* Troy, 152 P. 103, recall of mandate denied, 158 P. 172; Alcon v. Koons, 42 Ind. App. 537, 82 N. E. 92 (every two years); Driskill v. Quinn (Okla.), 170 P. 495 (even after guardian removed he must settle his accounts).

92. *In re* Hayden's Estate, 146 Cal. 73, 79 P. 588.

93. Curtis v. Devoe, 121 Cal. 468, 53 P. 936.

94. As to the effect of annual settlements where the public records have been destroyed, see Kidd v. Guibar, 63 Mo. 342. The contents may be proved by parol. *Ib.* The guardian's final account should purport on its face to be such. Bennett v. Hanifin, 87 Ill. 31. While in force it is an adjudication of the matters lawfully embraced therein. Briscoe v. Johnson, 73 Ind. 573.

95. Cutts v. Cutts, 58 N. H. 602. As to reopening administration accounts, see Denholm v. McKay, 148 Mass. 434.

The account should show the dates of the items,[96] and bills paid for medical services are sufficiently itemized where the payee, the nature of the services rendered and the dates of payment are given.[97] Valuations should be reduced to the lawful standard of currency,[98] and the court will not be captious over slight irregularities of form where it appears that the guardian honestly discharged his duties and finally accounted fully and satisfactorily.[99] The guardian may correct mistakes, but not dispute his ward's rights at pleasure.[1] The accounts should be accurate in debits and credits, and inaccuracies are corrected.[2]

The accounts of wards having different and unequal interests in property should be kept distinct and rendered separately.[3] But the fact that a guardian of two wards invested on their joint account without distinguishing their several interests is no reason why the investment should be disallowed, if sufficiently for each ward's benefit.[4]

In some States the guardian's final account must embrace all items contained in his prior accounts, and not begin with the balance on the last one; but the practice in this respect is not uniform in the United States, and full prior accounts on file might well be considered in the final connection.[5]

§ 949a. Accounts; Intermediate and Final, Distinguished.

An important distinction is observable in the American practice concerning the accounts of probate guardians, between the final account and those rendered from time to time, as the local practice

96. Succession of Guillebert, 133 La. 603, 63 So. 237.

97. *In re* Hayden's Estate, 146 Cal. 73, 79 P. 588.

98. See McFarlane v. Randle, 41 Miss. 411; Neilson v. Cook, 40 Ala. 498.

99. La Follette v. Higgins, 129 Ind. 412.

1. *Re* Steele, 65 Ill. 322. Costs in a suit not connected with the guardianship cannot be charged. Carrie Allen, 40 N. J. Eq. 181. As to compensation of a special guardian who defends an infant's interest in the probate of a will, see Matter of Will of Bud Long, 100 N. Y. 203. The guardian of a lunatic may include in his account a debt due from the lunatic to himself. Carter v. Edmonds, 80 Va. 58.

2. An honest error which charges the guardian twice for the same fund should be corrected. 85 Ga. 542. Or an honest omission. Purslow v. Brune, 43 Kan. 175. And see Ruble v. Helm, 57 Ark. 304.

3. Armstrong v. Walkup, 9 Gratt. 372; State v. Foy, 65 N. C. 265; Hescht v. Calvert, 32 W. Va. 215; § 370. A consolidated account for several wards having unequal interests should be rejected by the court. Crow v. Reed, 38 Ark. 482; Wood v. Black, 84 Ind. 279.

4. Nance v. Nance, 1 S. C. (N. S.) 209.

5. Foltz's Appeal, 55 Pa. St. 428.

may require, pending the minority of the ward. The rule is that these intermediate accounts, although judicially approved and passed, are by no means conclusive. They serve to show the guardian's liability and to keep the court informed of the general condition of the trust funds, to determine when the guardian's bond should be increased, and to ascertain as to the propriety of sales and investments. Such accounts remain *prima facie* evidence of the sum of the guardian's indebtedness to his ward, and are *prima facie* correct accounts but nothing more.[6] Actual notice to the ward by citation is not indispensable to intermediate accounts.[7]

The decree of the court allowing a partial account, wherein an item is omitted or improperly stated, does not relieve the guardian from liability for the error on his subsequent accounts. He must make the necessary correction as soon as possible. At any time before final settlement and discharge of the guardian *ex parte* orders made by the court may be set aside, corrected, and modified; though they may not be collaterally attacked,[8] and the guardian may correct an erroneous charge he has made against himself.[9] The mere fact that the several current reports filed by the guardian of an insane person were approved by the court *ex parte* does not prevent action by the ward attacking the investments shown on the accounts. Such *ex parte* orders may at any time be set aside, corrected or modified, if the requirements of justice demand it.[10]

But on the final account of the guardian, which is to be rendered at the expiration of his trust, the question comes before the court as to the general fairness of his management, and items allowed in former accounts may then be stricken out as improper. The reason of this is that the *cestui que trust* had no earlier opportunity of judging as to the correctness of the trustee's accounts, and ascertaining that final balance, which is, after all, the estate in controversy. So, too, a guardian in his final account should be allowed to correct errors to his prejudice, satisfactorily proved to

The last of the periodical accounts may suffice. Woodmansie v. Woodmansie, 32 Ohio St. 18.

6. Douglas's Appeal, 82 Pa. St. 169; Bourne v. Maybin, 3 Woods C. C. 724; Ashley v. Martin, 50 Ala. 537; Matlock v. Rice, 6 Heisk. 33; Davis v. Combs, 38 N. J. Eq. 473; State v. Jones, 89 Mo. 470; Jenkins v. Whyte & Horwitz, 62 Md. 427. But even thus, the burden is on the party attacking them after their acceptance by the court. Turner v. Turner, 104 N. C. 566; Bentley v. Dailey, 87 Ala. 406.

7. Davis v. Combs, *supra*.

8. State v. Wheeler, 127 Ind. 451.

9. Ferry v. McGowan, 68 Mo. App. 612.

10. Indiana Trust Co. v. Griffith, 176 Ind. 643, 95 N. E. 573, 44 L. R. A. (N. S.) 896.

exist in his prior accounts, both as to matters of form and substance.[11]

A guardian's final account should cover the entire period of the guardianship where the intermediate reports are incomplete,[12] and should make full disclosure.[13]

The final account must be rendered when the guardianship terminates,[14] or when the ward becomes of age.[15] It would appear that a guardian cannot be cited to render a final account before the ward's majority, unless his trust has been first determined; and that his balances should, in such case, be paid to a successor and not to the court.[16]

The guardian should be prepared to sustain by satisfactory proof the items which indicate his dealings with the estate. But the final account, once examined and approved by the court, and not reversed on appeal, the ward's period of objecting to the same having also expired by limitation, such account, together with all which preceded it, concludes all parties interested, inclusive of the guardian and his own representatives, as to all matters involved in the settlement, and cannot be reopened or annulled in any court; certainly not unless by direct proceedings to obtain a reversal, or setting aside for fraud or manifest error: perhaps in some States not at all.[17] The final account is not allowed by the court, at the

11. Crump v. Gerock, 40 Miss. 765; Burnham v. Dalling, 1 C. E. Green, 144; Willis v. Fox, 25 Wis. 646; Blake v. Pegram, 101 Mass. 592; Brewer v. Ernest, 81 Ala. 435.

12. Ellis v. Soper, 111 Ia. 631, 82 N. W. 1041; Duffy v. McHale, 35 R. I. 16, 85 A. 36 (annual partial account is not a final account).

13. Euler v. Euler, 55 Ind. App. 547, 102 N. E. 856; *In re* Moore, 112 Me. 119, 90 A. 1088; Sroufe v. Sroufe, 74 Wash. 639, 134 P. 471.

14. National Surety Co. v. State, 181 Ind. 54, 103 N. E. 105; Pattison v. Clingan (Miss. 1908), 47 So. 503; Whitfield v. Burrell, 54 Tex. Civ. App. 567, 118 S. W. 153; Buckley v. Herder (Tex. Civ. App. 1911), 133 S. W. 703.

For the purposes of settlement a guardianship is deemed to continue after it has in law ceased. Mitchell v. Penny, 66 W. Va. 660, 66 S. E. 1003.

15. Miller v. Ash, 156 Cal. 544, 105 P. 600; Curran v. Abbott, 141 Ind. 492, 40 N. E. 1091, 50 Am. St. Rep. 337; Succession of Guillebert (La. 1906), 41 So. 654; Probate Judge v. Stevenson, 55 Mich. 320, 21 N. W. 348.

16. Hughes v. Ringstaff, 11 Ala. 564; Lewis v. Allred, 57 Ala. 628.

17. Bonyton v. Dyer, 18 Pick. 1; Diaper v. Anderson, 37 Barb. 168; Manning v. Baker, 8 Md. 44; Allman v. Owen, 31 Ala. 167; Reynolds v. Walker, 29 Miss. 250; State v. Strange, 1 Cart. 538; Stevenson's Appeal, 32 Pa. St. 318; Cummings v. Cummings, 128 Mass. 532; Holland v. State, 48 Ind. 391; Kattlemen v. Estate of Guthrie, 142 Ill. 357; Brent v. Grace, 30 Mo. 253; Seaman v. Duryea, 1 Kern, 324; Yeager's Appeal,

ward's majority, until the ward has had the opportunity of examining it.[18]

But on the termination of a guardian's trust, pending the infancy of the ward, a final account is sometimes allowed after due notice to all parties interested, and examination by a suitable guardian *ad litem* on the ward's behalf; and thus, too, may it be with an intermediate account; not, however, as it would usually appear, so as to absolutely debar the ward from disputing the account afterwards on reaching majority.[19]

§ 950. Accounts; With What Property Guardian Chargeable. The accounting should cover only the dealings of the guardian while in office,[20] and should terminate with the expiration of the trust; since the relation is in other respects as between debtor and

34 Pa. St. 173; Lynch v. Rotan, 39 Ill. 14; Smith v. Davis, 49 Md. 470. Similar rules apply often, as in settlements by executors and administrators. Irregular allowance of a guardian's account upon an alteration, and the discharge thereupon of the guardian, all without notice to the ward, cannot be permitted to deprive the latter of his rights. Buchanan v. Grimes, 52 Miss. 82. The administrator of a deceased ward cannot ignore a final settlement of the guardian's accounts, duly made and recorded, and cause another decree to be entered in the same court. Foust v. Chamblee, 51 Ala. 75.

Nor can the deceased guardian's representative. Kattleman v. Estate of Guthrie, 142 Ill. 357. When the guardian's settlement is surcharged in equity, the particular items objectionable should be specified. Tanner v. Skinner, 11 Bush, 120; Moore v. Askew. See 85 N. C. 199.

Matters only collaterally introduced into the settlement, or which did not properly enter into the accounts, or over which the court had no jurisdiction, are not concluded by the final account. ——— v. ———, 103 Mo. 402. Though even as to possibly omitted or improper items within the fair scope of settlement, such account cannot be reopened. *Ib.* But while the probate settlement is considered final and conclusive, yet where the guardian fraudulently and intentionally concealed the existence of property to which his ward was entitled, the probate settlement will not debar a court of equity from calling the guardian to account for such assets. Lataillade v. Orena, 91 Cal. 565. The final settlement must be a *bona fide* and not a colorable one with false vouchers. State *ex rel.* Hospes v. Branch, 112 Mo. 661.

As to appeals and the costs of appeal, see Kingsbury v. Powers, 131 Ill. 182.

18. Woodbury v. Hammond, 54 Me. 332; Whitney v. Whitney, 7 S. & M. 740.

19. See Smith, Prob. Pract. 182; Racouillat v. Requena, 36 Cal. 651; Blake v. Pegram, 101 Mass. 592; 592; Jones v. Fellows, 58 Ala. 343; Hutton v. Williams, 60 Ala. 133. A final settlement with minor wards should not precede resignation. Glass v. Glass, 80 Ala. 241.

20. Gaspard v. Coco, 116 La. 1096, 41 So. 326; *In re* Wolfe, 136 N. Y. S. 333, 75 Misc. 454 (not money received after ward's death).

creditor.[21] Where no effects have come to the guardian's possession or knowledge, he need not file either inventory or account;[22] but so soon as there is property his liability becomes fixed; and he cannot be exempted from account on the ground that the ward's estate does not more than balance his own outlays and expenses.

The guardian must account for all property he receives as such whether he should have had it or not.[23] Services of the ward rendered to the guardian are assets of the estate which should be accounted for.[24] At common law a father is required to account for the rents and profits of property which he has given his minor children by way of advancement and of which he retains possession during his minority.[25] If notes are inventoried and the guardian's accounts do not charge him therein with the interest thereon, or credit him with their loss as worthless, the presumption is that he has embezzled the property or else neglected to make collections; and in either case he is chargeable for the full amount.[26]

The ward cannot be forced to receive in settlement a building placed by the guardian on the ward's property,[27] but the guardian may be credited with a debt incurred by the ward to him before the guardianship began unless the debt is barred by limitations.[28]

And where he or any other trustee claims credit, upon settling his account, for moneys expended, losses, or charges, the onus of proving the correctness of the credit, by vouchers or otherwise, devolves on him.[29]

The guardian cannot exonerate himself by paying the funds of the estate to the probate judge even after settlement of his accounts, but is bound to pay to the ward.[30]

21. Cunningham v. Cunningham, 4 Gratt. 43; Crowell's Appeal, 2 Watts, 295.

22. McGale v. McGale (1894), R. I.

23. Porter v. Fillebrown, 119 Cal. 235, 51 P. 322; *In re* Camp, 161 N. Y. 651, 57 N. E. 1105. See Gatlin v. Lafon, 95 Ark. 256, 129 S. W. 284 (rent of homestead). See Bliss v. Spencer (Va.), 99 S. E. 593 (guardian not charged with money value of property never converted into money).

24 Ackermann v. Haumueller, 148 Mo App. 400, 427, 128 S. W. 51, 56; Champlin v. Slocum (R. I.), 103 A. 706.

25. Rhea v. Bagley, 63 Ark. 374, 38 S. W. 1039, 36 L. R. A. 86.

26. Starrett v. Jameson, 29 Me. 504.

27. Sims v. Billington, 50 La. Ann. 2083, 24 So. 637.

28. Bondie v. Bourassa, 46 Mich. 321, 9 N. W. 433.

29. Matter of Gill, 5 Thomp. & C. 237; Newman v. Reed, 50 Ala. 297; Hutton v. Williams, 60 Ala. 133; The State *ex rel.* Wiseman *et al.* v. Wheeler *et al.*, 127 Ind. 451.

30. Jacobson v. Anderson, 72 Minn. 426, 75 N. W. 607.

§ 951. Accounts; Effect of Lapse of Time.

Guardians sometimes make settlements out of court, rendering no returns; but this practice is not common where the infant's estate is large; nor is it safe, since the failure to account is a breach of the guardianship bond, and renders the sureties and the guardian himself liable. Any party in interest may compel the guardian to present his accounts years after the guardianship is at an end, notwithstanding he has a receipt in full from the ward; for no mere lapse of time can be set up against a trust, except that the usual limitation to suits on specialties might determine the remedies of parties aggrieved as against the guardian and his sureties.[31] But lapse of time, taken in connection with other circumstances showing a due execution of the trust, will be favorably regarded; and the guardian's account need not then be so strictly made up and proved as would be otherwise necessary, especially when the parties interested are satisfied.[32]

§ 952. Accounts; In Case of Death, etc., of Guardian.

Where the same person is both the executor of the parent's estate and guardian of the infant heir, he should first settle his executor's account, and then transfer the balance by way of distributive share to the account of guardianship.[33] Accounts of joint guardians may generally be rendered on the oath of one of them.[34] Where a guardian dies, resigns, or is removed, his final account must be presented, and it is the successor's duty to see that the former guardian is held to a strict compliance with his bond; since otherwise he may make himself liable to the ward.[35] The final account of a deceased guardian is properly presented by his personal representatives, who may be cited into court for that purpose; but for a deficit beyond the actual assets in their hands the sureties must answer.[36] Hence the administrator of a deceased surety has been

31. Clarke v. Clay, 11 Fost. 393; Bard v. Wood, 3 Met. 74; Crane v. Barnes, 1 Md. Ch. 151; Wade v. Lobdell, 4 Cush. 510; Gilbert v. Guptill, 34 Ill. 112. See next chapter.

32. Gregg v. Gregg, 15 N. H. 190; Pierce v. Irish, 31 Me. 254; Smith v. Davis, 49 Md. 470; Rawson v. Corbett, 150 Ill. 466.

33. Conkey v. Dickinson, 13 Met. 51; Mattoon v. Cowing, 13 Gray, 387; O'Hara v. Shepherd, 3 Md. Ch. 306; Crenshaw v. Crenshaw, 4 Rich. Eq. 14; State v. Tunnell, 5 Harring. 94; Runkle v. Gale, 3 Halst. Ch. 101; Huggins v. Blakely, 9 Rich. Eq. 408. See McIntosh's Estate, 158 Pa. St. 525, where a guardian collected assets of the deceased.

34. See Mass. Revised Laws, ch. 150, § 18. As to blending accounts as guardian and trustee, see Lewis v. Allred, 57 Ala. 628.

35. Sage v. Hammonds, 28 Gratt. 651.

36. Gregg v. Gregg, 15 N. H. 190;

sometimes permitted to supply the missing final account.[37] The administrator of a deceased guardian cannot invest the ward's funds; nor can be discharge the guardian's general indebtedness by setting apart certain effects of the guardian's estate for that purpose.[38] Where a guardian absents himself and has left an attorney in charge of the estate, such attorney may, in Pennsylvania, be summoned by the court.[39]

§ 953. Compensation of Guardians in England.

One rule has always prevailed in England as to the compensation of executors, guardians, and other trustees; namely, that the services rendered should be treated as honorary and gratuitous. Chancery makes no allowance of any sort beyond a reimbursement for the necessary expenses actually incurred. However much the honor of being trusted may be deemed a fair equivalent for the guardian's time, trouble, and responsibility, it is not found to suffice for receivers and other officers of the court of chancery, whose fees may in some measure tend sensibly to diminish the ward's sense of gratitude to the custodians of his fortune. It is found necessary to allow compensation to trustees in some of the British colonies, in order to induce suitable men to accept office; and even in the English courts at the present day there is a strong inclination to multiply exceptions to the general rule. Considerations of policy are alleged in support of the established doctrine of chancery; but the arguments seem not unanswerable.

§ 954. Compensation in This Country.

In this country compensation is allowed the guardian, while the probate court fees are usually trifling in comparison, and it does not appear that the English rule as to the gratuitous services of trust officers was ever adopted in a single State.[40] In this country

Royston v. Royston, 29 Ga. 82; Peck v. Braman, 2 Blackf. 141; Waterman v. Wright, 36 Vt. 164; Farnsworth v. Oliphant, 19 Barb. 30; State v. Grace, 26 Mo. 87; Hemphill v. Lewis, 7 Bush, 214; Tudhope v. Potts, 91 Mich. 490. Nor can such surety allege waste on the part of the guardian's administrator, as against the ward. Huhphrey v. Humphrey, 79 N. C. 396. As to rendering account when guardian died long after his ward's majority, see *In Re* Allgier, 65 Cal. 228. Simple interest is enough to charge a deceased guardian's estate from the date of his death. McKay v. McKay, 33 W. Va. 724; § 354.

37. Curtis v. Bailey, 1 Pick. 198.

38. Moorehead v. Orr, 1 S. C. (N. S.) 304; Clark v. Tompkins, 1 S. C. (N. S.) 119.

39. Petition of Getts, 2 Ashm. 441.

40. 2 Wms. Ex'rs, 1682-1685, and cases cited. In some parts of this country custom or the local law has established a commission as the guar-

the allowance of compensation to guardian for services rendered

dian's compensation. In others the statute allows what the court may deem just and reasonable. The commission allowed the guardian has varied, according to different decisions and under special circumstances, all the way from one to ten per cent., which last may be considered the maximum. Holcombe v. Holcombe, 2 Beasl. 415; *In re* Harland's Accounts, 5 Rawle, 323; Walton v. Erwin, 1 Ired. Eq. 136; Armstrong v. Walkup, 12 Gratt. 608. In New York the rule established for trustees is five per cent. on sums not exceeding one thousand dollars; half that amount upon all sums between that and five thousand dollars; and one per cent. on all sums exceeding that amount. Matter of Roberts, 3 Johns. Ch. 43. And this rule practically obtains in many other States. One half the commission is reckoned for sums received, and one half for sums disbursed. They are to be computed by a guardian at the foot of partial accounts or about the time of actual receipt and disbursement, and not when they are brought forward upon his final account. Huffer's Appeal, 2 Grant, 341; Vanderheyden v. Vanderheyden, 2 Paige, 287. Where commissions at the court's discretion are allowed, special services performed by the guardian may be considered in fixing the rate of commission, but not as an additional charge. Yet it is justly observed in a Pennsylvania case, that since the guardian is a trustee for custody and management, and not, like an executor, merely for distribution, what is allowable to the one may not always suffice for the other. McElhenny's Appeal, 46 Pa. St. 347. Even in New York the unfairness of an inflexible rule, applicable to all who hold trust moneys, led to the assertion of a doctrine in one case, which threatened to disturb the chancery rule; namely, that services of a professional or personal character, rendered the ward, may be allowed to the guardian, besides the usual commission, on the ground that they were rendered not a guardian but as an individual. Morgan v. Morgan, 39 Barb. 20. But see Morgan v. Hannas, 49 N. Y. 667. In Maine, Massachusetts, and other States, where the court allows what is reasonable, the guardian may charge specific sums for special services, instead of or in addition to a commission, provided the whole does not exceed a fair rate of compensation. Longley v. Hall, 11 Pick. 120; Rathbun v. Colton, 15 Pick. 471; Emerson, Appellant, 32 Me. 159; Dixon v. Homer, 2 Met. 420; Roach v. Jelks, 40 Miss. 754; Evarts v. Nason, 11 Vt. 122. The ordinary commission is properly refused for disbursement of the guardian's final balance to the ward, and his receipt of the original fund; nor is it allowable on the principal in mere reinvestments. Commissions may be forfeited by the guardian's misconduct; as where the fund was employed in his own business; or where he was removed from his trust; but not, in some States, for the mere omission to account until cited in. Clerk hire is properly charged as an expense to the estate in cases of magnitude and difficulty, where such assistance is required. Vanderheyden v. Vanderheyden, 2 Paige, 287; Knowlton v. Bradley, 17 N. H. 458; Trimble v. Dodd, 2 Tenn. Ch. 500; Starrett v. Jameson, 29 Me. 504; Royston v. Royston, 29 Ga. 82; Magruder v. Darnall, 6 Gill, 269; Reed v. Ryburn, 23 Ark. 47; Neilson v. Cook, 40 Ala. 498; Bond v. Lockwood, 33 Ill. 212. See § 350 as to a collector. Commissions are properly credited at the time the money was received. Snavely v. Harkrader, 29 Gratt. 112. Cf. May v. May, 109 Mass. 252. A guardian who is also trustee should not be allowed full commissions on both his guardian and

is within the discretion of the court,[41] having in mind that his services are personal and honorary and not undertaken with a view of profit.[42]

Compensation may be refused where the guardian fails to account as ordered,[43] or acts beyond his authority,[44] or where no services were rendered.[45] No compensation will be allowed where the guardian is guilty of negligence or wrongdoing in the man-

trustee accounts, where the performance of double services is merely nominal. Blake v. Pegram, 101 Mass. 592. Only on sums actually collected and paid out should a guardian charge commissions. Reeds v. Timmins, 52 Tex. 84. Vouchers are not needed to sustain items of this character. Newman v. Reed, 50 Ala. 297. See Foster v. Ives, 53 460.

A guardian will not be allowed compensation for taking care of the trust fund while he himself is the borrower of it. Farwell v. Steen, 46 Vt. 678. And see Pierce v. Prescott, 128 Mass. 140. As to compensation for changing investments, repairs, etc., it is not good policy to allow it by way of a commission. May v. May, 109 Mass. 252. Guardian allowed to charge special fees for collecting a pension for his ward. Bickerstaff v. Marlin, 60 Miss. 509; Southwick v. Evans, 17 R. I. 198. Commissions not allowed on a fund of ward employed in guardian's own business, though advantageously employed. Seguin's Appeal, 103 Pa. St. 139; cf. Carr v. Askew, 94 N. C. 194. Compensation for maintenance does not deprive necessarily of commissions. 14 Phil. 3, 9. See, further, Phillips v. Lockwood, 4 Dem. 299. Remissness in duty is an objection to the allowance of commissions. Hume v. Warters, 13 Lea, 554. And where one collects money, uses it, and renders no account until compelled to, he may be charged with interest and otherwise sternly dealt with. *In re* Eschrich, 85 Cal. 98. But making a doubtful investment which turns out beneficially ought not to deprive one of compensation. Small's Estate, 144 Pa. St. 293.

41. France v. Shockey, 92 Ark. 41, 121 S. W. 1056 Luke v. Kettenbach (Ida.), 181 P. 705 (not on commission basis); Trustees of Elizabeth Speers Memorial Hospital v. Makibben's Guardian, 126 Ky. 17, 102 S. W. 820, 31 Ky. Law Rep. 467; Hoga's Estate v. Look, 134 Mich. 34, 96 N. W. 439, 10 Det. Leg. N. 473; *In re* Switzer, 201 Mo. 66, 98 S. W. 461; Switzer v. Switzer, *Id.; In re* Steele's Estate, 97 Mo. App. 9, 70 S. W. 1075; *In re* Cook's Guardians (N. J. Prerog.), 105 A. 792; *In re* Thaw, 169 N. Y. S. 430, 182 App. Div. 368; *In re* Rutherford's Estate, 170 N. Y. S. 1039, 103 Misc. 659; Anderson v. Silcox, 82 S. C. 109, 63 S. E. 128 (extra compensation); Turner v. Turner, (Tenn. Ch. App. 1901), 62 S. W. 607. See *In re* Tilden's Estate, 172 N. Y. S. 811 (compensation for appearance in court limited to costs).

42. Gott v. Culp, 45 Mich. 265, 7 N. W. 767.

43. See Gilligan v. Daly, 79 N. J. Eq. 36, 80 A. 994 (delay which is not unreasonable will not forfeit compensation). See Rogers v. Lindsay, 89 Kan. 417, 131 P. 150 (mere mistakes in accounts not fraudulent will not forfeit compensation).

44. May v. Skinner, 149 Mass. 375, 21 N. E. 870 (charge for superintending building stable for ward disallowed); Maxwell v. Harkleroad, 77 Miss. 456, 27 So. 990 (dealing with lands in another State).

45. *In re* Brigg, 165 N. Y. 673, 59 N. E. 1119 (where no estate vested in wards durings guardianship).

agement of the estate of the ward,[46] as where he mingles the funds with his own and uses them for his own benefit.[47]

§ 955. Commissions.

In some States the guardian is entitled to commissions[48] on interest made[49] on the net amount of sales[50] and on all other sums which pass through his hands.[51] No commissions will be allowed if the guardian has failed in his trust,[52] as where he uses the funds of the estate for his own purposes,[53] and commissions will not be allowed on commissions paid by the guardian to himself.[54] A

46. Donlon v. Maley, 110 N. E. 92; *In re* Moore, 112 Me. 119, 90 A. 1088; Finnel v. Kellogg (Mo. App.), 186 S. W. 1169; State *ex rel.* Short v. Hardy (Mo. App.) 206 S. W. 904; *In re* Allard, 49 Mont. 219, 141 P. 661; Scheib v. Thompson, 23 Utah, 564, 65 P. 499; *In re* Pierce's Estate, 68 Vt. 639, 35 A. 546.

47. Glassell v. Glassell, 147 Cal. 510, 82 P. 42; Robords v. Bryan, 105 Mo. App. 249, 79 S. W. 979; Jennings v. Jennings, 22 Grat. (Va.) 313; *In re* Anderson, 97 Wash. 688, 167 P. 71.

48. *In re* Tutorship of Ratcliffe Minors, 139 La. 996, 72 So. 713; Bass v. Maxwell, 77 Miss. 117, 25 So. 873 (ten per cent. of personal estate); Maxwell v. Harkleroad, 77 Miss. 456, 27 So. 990; State *ex rel.* Tygard v. Elliott, 82 Mo. App. 458 (not on amount paid widow for rent of dower land); Keeney v. Henning, 64 N. J. Eq. 65, 53 A. 460 (though guardian did not keep full accounts); Freedman v. Vallie (Tex. Civ. App. 1903, 75 S. W. 322; Kester v. Hill, 46 W. Va. 744, 34 S. E. 798 (on money included in return to court).

49. Hedges v. Hedges (Ky. 1902), 67 S. W. 835; Sims v. Billington, 50 La. Ann. 968, 24 So. 637; *In re* Cook's Guardianship (N. J. Prerog.), 107 A. 818 (not on interest already accrued on securities at time of purchase); *In re* Chenery's Estate, 152 N. Y. S. 312, 89 Misc. 680.

50. Succession of Hargrove, 9 La. Ann. 505.

51. Beakley v. Cunningham, 181 S. W. 287 (not on amount paid over on final settlement); Commonwealth v. Graves County Banking & Trust Co., 159 Ky. 455, 167 S. W. 411 (five per cent.); Bell v. Bell's Guardian, 167 Ky. 430, 180 S. W. 803 (five per cent.); *In re* Hill's Estate, 250 Pa. 107, 95 A. 426; *In re* Mosley's Estate, 91 S. C. 557, 75 S. E. 179.

52. Rowe v. Sanford, 74 Mo. App. 191; *In re* Marcy, 24 N. J. Eq. 451; Martin v. Porter, 53 N. Y. S. 186, 32 App. Div. 602; *In re* Nowak, 78 N. Y. S. 288, 38 Misc. 713; *In re* Ward, 98 N. Y. S. 923, 49 Misc. 181; *In re* Kashner's Estate, 15 Pa. Super. Ct. 70; Appeal of McMenamin, 4 Walk. 285 (commission forfeited only if acted dishonestly); American Surety Co. of New York v. Hardwick (Tex. Civ. App.), 186 S. W. 804; Bliss v. Spencer (Va.), 99 S. E. 593. See Spies v. Stikes, 112 Ala. 584, 20 So. 959 (guardian entitled to commission though has failed to render account, unless injury to estate resulted). See Fisher v. Brown, 135 N. C. 198, 47 S. E. 398 (where guardian made regular returns, he is entitled to commissions though he wrongfully used money in his own business, charging himself with interest thereon).

53. Blake v. Pegram, 109 Mass. 541.

54. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004.

guardian cannot take annual rests in his accounts so as to allow him commissions at full rates on the balance thus found.[55]

A statute allowing a guardian to charge a commission on "revenues" does not allow a commission on rents that were earned before the property was inherited though collected by the guardian during his administration. Neither does it include dividends on stock of the estate which represented the proceeds of the sale of the property of the corporation. Revenue or income is what is produced by capital without impairing the capital. What is taken from the capital cannot be considered revenue or income.[56]

55. *In re* Decker, 76 N. Y. S. 315, 37 Misc. 527.

56. *Re* Ratcliffe, 139 La. 996, 72 So. 713, L. R. A. 1917C, 188.

CHAPTER IX.

THE GUARDIAN'S BOND.

§ 956. Guardian's Recognizance; Receiver, &c.; English Chancery Rule.

It is the practice of the English court of chancery to require chancery guardians appointed on petition without suit to enter into recognizance to account. When reference is made to a master on the original petition for guardianship, he is directed to make a report approving of the security offered as well as of the person desiring the appointment. On this report the court proceeds to act. A recognizance with sureties is usually taken; but the court uses its discretion; and sometimes the personal recognizance of the guardian is deemed sufficient. This recognizance is vacated when the infant comes of age. No recognizance in modern practice is required from the guardian of the person who is appointed where the infant has been made a ward of chancery during the pendency of a suit. Nor is it given by guardians selected by the court for special purposes; as, for instance, to give formal consent to an

infant's marriage under Lord Hardwicke's act. In a word, the chancery rule appears to be that guardians of the estate give security for the performance of their trust, but guardians of the person none. Special circumstances may, however, arise for requiring recognizance from the latter.[57]

Since the active management of the infant's estate is frequently intrusted to a receiver, selected as an officer of the court, the latter is also bound to account annually and pay his balances into court. For performance of these duties he gives proper security; and he is allowed a salary for his services.[58]

§ 957. American Rule; Bonds of Probate and Other Guardians.

In this country, as we have seen, most guardians of the estate are what may be termed probate guardians, deriving their authority under the appointment of courts which most resemble the old ecclesiastical courts of England. The practice which has grown up in most of the States, as well as our statute law, places guardians, therefore, in many respects, on the same footing as executors and administrators. Like such officers they give bonds, file inventories, and render regular accounts to the court; and the same principles which apply to the one class, in these respects, apply also to the other. But as these three requirements have main reference to the ward's property, little or no practical necessity exists for pursuing a guardian who neglected to qualify or file inventory or account where there were no assets of the infant.

A probate guardian, before receiving from the court his letters of appointment, is obliged to give bond, with good security, for the faithful performance of his trust.[59] As such guardian is intrusted with both the person and estate of his ward, the language of his bond should be framed accordingly. In some States the statute prescribes the terms substantially as follows: To make a true inventory of the ward's estate which shall come to his possession or knowledge; to manage the property according to law and

57. Macphers. Inf. 108, 348, 553; 2 Kent, Com. 227.

58. Macphers. Inf. 266. As to chancery practice in New York, see *In re* Morrell, 4 Paige, 44; Minor v. Betts, 7 Paige, 596.

59. No one should receive letters or be considered actual guardian until he files a statutory bond. Hatch *et al.* v. Ferguson *et al.*, 57 Fed. 966. But where letters issue reciting that bond has been given, it will be presumed that the bond was filed though it cannot be found. McGale v. Mc-

the best interests of the ward, and to discharge his trust faithfully in relation thereto; to render regular accounts to the court; and, finally, to make due settlement with the ward or other person lawfully entitled at the expiration of his trust. The bond, in case of an infant, stipulates for a faithful discharge of duties as to custody, education, and maintenance; but where the ward is an adult insane person or spendthrift, for custody and maintenance only.[60]

The penal amount of the guardian's bond, as in other cases, is usually fixed at double the amount of the estate to be accounted for. The sureties are to be approved by the court. When such sureties are insolvent or the penal sum named in the bond is insufficient, or from any other cause the bond becomes unsatisfactory, a new bond may be ordered with such security as the court deems proper. This bond is made payable to the judge or his successors in office, and is kept on file, to be sued in behalf of the ward or by any other person who may be injured by the misconduct of the guardian while in office.[61] The true principle which distinguishes such cases seems to be that the identity of the parties should sufficiently appear.

Where there are several wards, one probate bond is sufficient for all.[62] But separate bonds for each ward would not be im-

Gale (1894), R. I. Bond not an essential to a valid apointment in Howerton v. Sexton, 104 N. C. 75.

60. Fuller, Mass. Prob. Laws, 359. As to dispensing with sureties where a fidelity company guarantees the bond, see 1 Dem. (N. Y.) 75.

61. See Mass. Rev. Laws, ch. 149; Ib., ch. 109; Bennett v. Byrne, 2 Barb. Ch. 216; Brunson v. Brooks, 68 Ala. 248. A succeeding guardian may of course sue such bond. Voris v. State, 47 Ind. 345. The probate guardian ought to file an approved bond before being considered duly qualified. The court cannot, after appointing him guardian of one child, appoint him guardian of another subsequently, and then order the former bond to stand for both. Vanderburg v. Williamson, 52 Miss. 233. Some statutes hold the judge to careful inquiry into the sufficiency of sureties before accepting them. Colter v. McIntire, 11 Bush, 565. Delivery of a guardian's bond to the proper office cannot readily be shown, after long lapse of time, to be merely in escrow. Ordinary v. Thatcher, 41 N. J. L. 403. A bond filed and executed by two sureties, though calling in its premises for three, may bind the two. Ordinary v. Thatcher, 41 N. J. L. 403. In general, sureties as well as the guardian, are estopped by the delivered bond itself from denying its legal effect on the ground of fraud by the guardian, or arrangements with him as to other signatures, etc., to which the court, the ward, and parties to be protected by the bond were not privy. Vincent v. Starks, 45 Wis. 458; Sasseer v. Walker, 5 Gill & J. 102; State v. Hewitt, 72 Mo. 603; Brown v. Probate Judge, 42 Mich. 501.

62. Cranston v. Sprague, 3 R. I. 205; Ordinary v. Heishon, 42 N. J. L. 15.

proper, and, in some instances, might be even preferable. The names of all the wards should be embraced in the bond, where only one is furnished.

Natural guardians are not required to give bond. Nor were guardians in socage. Nor, in England, are testamentary guardians to furnish security to the court. The reason is that these guardians were not judicially appointed nor answerable in general to the court. The same law prevails in many parts of this country.[63] But in some States testamentary guradians are treated like executors, in respect to their appointment; that is to say, the will which names them must be admitted to probate and letters issued; and the testator's appointment is made subject to judicial approval. In such cases the testamentary guardian, like the executor, is required to give security; but he may be exempted from giving sureties, if the testator requested such exemption and the court deems it safe to grant the request.[64]

A probate bond may be good, though inartificially drawn, if substantially in compliance with the statute.[65] And if it contains more than the law requires, it is nevertheless good for such portion as is lawful.[66] But perhaps not, if it contains less. A bond is not to be avoided for slight defects committed through carelessness or error. In some instances defective bonds have been cured in equity, so as to hold both principal and sureties, and have been

63. See *supra*, chs. 1, 2; Thomas v. Williams, 9 Fla. 289.

64. See Mass. Rev. Laws, ch. 149, § 3. A testamentary guardian will be ordered to furnish security whenever the court's interposition appears proper. Est. of Stanton, 13 Phila. 213. Bond must be given. Hatch v. Ferguson, 57 Fed. 966.

Even if the guardian's appointment was void for want of jurisdiction, the sureties are held liable with him for his *quasi* guardianship under which he obtained the property. Corbitt v. Carroll, 50 Ala. 315. If the appointment was simply voidable the surety is estopped. Doner's Estate, 156 Pa. St. 301. A guardian's bond held good, although there was a blank where the penalty is ordinarily written, and no penalty was stated. State v. Britton, 102 Ind. 214. Nor was it invalid for want of approval. *Ib.*

A guardian's bond is not converted from a statutory to a common-law bond merely because it contains provisions not required in the statutory form, which are in accordance with law. McFadden v. Hewett, 78 Me. 24. But the legality of an appointment may be denied by virtue of recitals in a bond which are senseless and uncertain. Hayden v. Smith, 49 Conn. 83. The surety is estopped when sued to deny the appointment of the guardian as recited in the bond. State v. Mills, 82 Ind. 126; McGale v. McGale (1894), R. I.

65. Probate Court v. Strong, 27 Vt. 202; Alston v. Alston, 34 Ala. 15; Ordinary v. Heishon, 42 N. J. L. 15.

66. Pratt v. Wright, 13 Gratt. 175.

made enforceable even though void at law.[67] Material erasures on the face of the bond may be explained, and the presumption is fair that they were made before delivery.[68] A bond is not vitiated which contains a proper recital of the ward's name, although there be a discrepancy in names between the bond and letters of guardianship; and yet sureties have been relieved from liability on the ground that the ward was not named in the bond at all.[69]

§ 958. Liability of Guardian and Sureties.

The bond of a probate guardian renders him and his sureties liable for all estate of the ward which shall come to his possession or knowledge. This includes chattels due from the guardian to the ward at the time of his appointment or of the execution of the bond, even though the fund be the proceeds of land already sold and paid for, and the rent of real estate occupied by the guardian before that time. It embraces chattels and rents and income from every species of property that the guardian actually receives in his official capacity, or that he might have received if he had faithfully performed his duty.[70] Property received from persons resident in another State is covered by the bond as much as property originally within the jurisdiction.[71] But while the property is beyond his reach, and cannot be obtained without a foreign appointment, the liability of his bondsmen would not seem to extend beyond a general dereliction of duty on his part in neglecting the proper means of obtaining it. The bond of guardians of foreign wards, appointed for recovering estate situated in their own State, binds them to account only for such property, nor can they be held liable for the custody of the wards while the latter remain non-residents. A legacy due from the executor of the ward's father, and other estate lawfully payable to the guardian by the executor, must all be accounted for, and for this the guardian's

67. Wiser v. Blachly, 1 Johns. Ch. 607; Sikes v. Truitt, 4 Jones Eq. 361; Bumpus v. Dotson, 7 Humph. 310.

68. Xander v. Commonwealth, 102 Pa. St. 434. This presumption may be rebutted.

69. Shuster v. Perkins, 1 Jones, 325; Greenly v. Daniels, 6 Bush, 41; State v. Martin, 69 N. C. 175; Shroyer v. Richmond, 16 Ohio St. 455; Richardson v. Boynton, 12 Allen, 138. Bond not invalid where a blank was left for the initials of the wards' names. Turner v. Alexander, 41 Ark. 254.

70. Mattoon v. Cowing, 13 Gray, 387; Neill v. Neill, 31 Miss. 36; Bond v. Lockwood, 33 Ill. 212; Williams v. Morton, 38 Me. 47; McClendon v. Harlan, 2 Heisk. 337; Hunt v. State, 53 Ind. 321.

71. McDonald v. Meadows, 1 Met. (Ky.) 507; Brooks v. Tobin, 135 Mass. 69; State v. Williams, 77 Mo. 463.

sureties are doubtless liable. The bond covers property of the ward obtained by the guardian and disposed of before his appointment and charged in account.[72] But for property unlawfully received by the guardian, and not belonging to his ward, although he may be compelled to account for it on his personal responsibility, his sureties are not liable, since it does not come to his hands as guardian.[73] Where the guardian loans his ward's money improvidently, he and his sureties become and continue liable for it.[74]

The liability of sureties lasts to the full extent of the penal sum named in the bond, while the responsibilities of the guardianship continue, and it does not terminate by the resignation or death of the guardian. For the ward's estate in the guardian's hands or subject to his control at the time of his resignation or death, they continue liable.[75] Their liability, though usually recited in the bond, extends in general to whatever the guardian received after the bond was executed and by culpable negligence or misconduct wasted, misapplied, or did not duly account for.[76] Not even the statutory limitation to suits against executors and administrators operates to relieve such sureties for the default of their deceased principal.[77] The estate of a deceased surety is liable for a default

72. Sargent v. Wallis, 67 Tex. 483.

73. Livermore v. Bemis, 2 Allen, 394; Allen v. Crosland, 2 Rich. Eq. 68; Ballard v. Brummitt, 4 Strobh. Eq. 171. As to liability where court ordered a deposit of money, see Griffith v. Parks, 32 Md. 1. Guardian's bondsmen held liable for the full amount of insurance policy on the life of the father taken for two children, one of whom died soon after the father. Carr v. Askew 94 N. C. 194. For a claim assigned by the widow against the administrator of the estate of the child's father. Todd v. Davenport, 22 S. C. 147. For the guardian's failure to make a reinvestment. Taylor v. Hemingway, etc., 81 Ky. 158. For a loss occurring by reason of a transfer of the estate by the guardian to one erroneously supposed to be a qualified successor. Wilson v. Railroad, 90 N. C. 72. Or. where the guardian removes from the State without accounting. English Ex'r v. The State, 81 Ind. 455. Or where he converts the ward's money before giving a bond and afterwards replaces it, but fails to account for the money so replaced. Parker v. Medsker, 80 Ind. 155.

The guardian's sureties are not liable for money paid over to a guardian by executors contrary to directions of the will. Hindman v. State, 61 Md. 471; Perkins v. Tooley, 74 Mich. 220. Nor for money paid over by mistake, even though the guardian in his accounts charged himself. The State *ex rel.* Howe v. Bond, 121 Ind. 187. And see Riffe v. Proctor, 99 Mo. 609.

74. Richardson v. Boynton, 12 Allen, 138.

75. Moore v. Wallis, 13 Ala. 458; State v. Thorn, 28 Ind. 306; Ashby v. Johnston, 23 Ark. 163.

76. Huson v. Green, 88 Ga. 722.

77. Chapin v. Livermore, 13 Gray, 561; Ordinary v. Smith, 55 Ga. 15.

of the guardian which occurred after such surety's death, and before final settlement of the trust.[78] Under the prevalent rule of American statutes, no action can be maintained on the bond of a probate guardian until after a citation to account and a decree which establishes a default on his part; and this holds, even though the guardian should, meanwhile, die.[79] Sureties are liable so long as the official bond can be sued at all. But a surety may be discharged at any time upon his petition and after due notice to all parties interested; and thereupon the court will order the guardian to furnish new security; and, upon his failure to do so, may remove him. But such surety remains liable until the new bond is approved;[80] and for any previous embezzlement or other misconduct or culpable mismanagement committed by the guardian he must still respond.[81] The personal representative of a deceased surety, it would appear, may compel the guardian to furnish new security in like manner.[82] The approval of a new bond and the discharge of a former surety terminate *ipso facto* the liability of such surety so far as new acts of the guardian are concerned, notwithstanding the security substituted may prove insufficient, or the instrument fatally defective.[83] Release of a surety is not to be readily presumed.[84] One surety cannot be discharged from his liability without the other, unless the latter by words or acts shows his consent to remain solely responsible.[85]

78. Voris v. State, 47 Ind. 345; Cotton v. State, 64 Ind. 573. See Brooks v. Rayner, 127 Mass. 268.

79. Perkins v. Stimmel, 114 N. Y. 359. For in such case his representatives should be summoned to account.

80. Jamison v. Cosby, 11 Humph. 273; Mass. Gen. Sts., ch. 101; Bellune v. Wallace, 2 Rich. 80.

81. Eichelberger v. Gross, 42 Ohio St. 549; Yost v. State, 80 Ind. 350. And see Bell v. Rudolph, 70 Miss. 234, that no artifice of the guardian over such embezzlement will relieve such surety.

82. Moore v. Wallis, 18 Ala. 458. The heirs of a deceased surety are not liable jointly with the principal on the bond. Strickland v. Holmes, 77 Me. 197. Where a guardian, after the death of one surety, gives anotehr bond with other sureties conditioned like the first, though with larger penalty, the sureties on both bonds are so-sureties. Stevens v. Tucker, 87 Ind. 109.

83. Hamner v. Mason, 24 Ala. 480. See Kendrick v. Wilkinson, 18 Ind. 206. A surety may sign an old guardian's bond as well as a new one, in the stead of a retiring surety. Hammond B. Beasley, 15 Lea, 618; McIntyre v. The People (Use, etc.), 103 Ill. 142.

84. Wann v. People, 57 Ill. 202.

85. See Newcomer's Appeal, 43 Pa. St. 43; Sebastian v. Bryan, 21 Ark. 447; Frederick v. Moore, 13 B. Monr. 470; Boyd v. Gault, 3 Bush, 644. Where a guardian has once been discharged with money in his hands not paid over, and is subsequently reappointed, and accounts only for money received since reappointment, the

The sureties on a guardian's bond, though liable, it may be, for money received by the guardian before the bond was made, are not liable for what he receives after having resigned or been removed from office.[86] And where a ward dies and the guardian administers upon his estate, the liability for the assets formerly held by the latter as guardian becomes transferred to him as administrator, and the sureties on his administration bond are made liable in place of those who were his bondsmen in the guardianship.[87] But redress for a guardian's conversion should be sought on the bond or bonds in force at the time; and the question is not when does the guardian charge himself with assets, but when do they come to his possession or knowledge as guardian.[88]

Where the guardian has filed an additional bond, as in case of a large accession to the original estate, both bonds remain valid, the new bond is taken as a cumulative security and the sureties (as such statutes are generally construed), are all deemed co-sureties, and liable as such.[89] And a bond voluntarily offered by the guardian and approved in the ordinary form is as binding as though it had been ordered by the court.[90] Where, however, the sureties of an old bond are discharged and a new bond is substituted, the usual rule is that the old sureties and the new are liable together as co-sureties for the defaults of the guardian, previous to filing the new bond, and that the new sureties alone bear the responsibility of his subsequent misconduct.[91] But the liability of a surety on a new bond given in place of the original one is in

sureties on his first bond are liable. Naugle v. State, 101 Ind. 284. See Bond v. Armstrong, 88 Ind. 65, for the rule where a guardian in default gave a new bond and then committed other defalcations and died, his estate paying a percentage on the entire defalcation. For the California rule see Spencer v. Houghton, 68 Cal. 82.

86. Merrells v. Phelps, 34 Conn. 109. But as to payments made to some person by one not aware that his authority has been revoked, see Sage v. Hammonds, 27 Gratt. 651. See Downing v. Peabody, 56 Ga. 40.

87. Baker v. Wood, 42 Ala. 664.

88. Lowry v. State, 64 Ind. 421; Johnson v. McCullough, 59 Ga. 212. And see Ruffin v. Harrison, 86 N. C. 190, where one is administrator and guardian.

89. Loring v. Bacon, 3 Cush. 465; Commonwealth v. Cox, 36 Pa. St. 442; Alen v. State, 61 Ind. 268; Huson v. Green, 88 Ga. 722. In absence of positive evidence of the time of any misconduct, the sureties are all liable in this case for the entire guardianship. Douglass v. Kessler, 57 Ia. 63. And see Stevens *et al.* v. Tucker *et al.*, 87 Ind. 109.

90. Potter v. State, 23 Ind. 550.

91. Loring v. Bacon, 3 Cush. 465; Bell v. Jasper, 2 Ired. Eq. 597; Hutchcraft v. Shrout, 1 Monr. 206; Jones v. Blanton, 6 Ired. Eq. 115; Ammons v. People, 11 Ill. 6; Sayers v. Cassell, 23 Gratt. 525; McGloshlin v. Wyatt, 1 Lea, 717; State v. Page, 63

some States treated as prospective only, on the equitable principle that, where the statute bond does not plainly express a retrospective operation, such should not be its construction.[92] Contribution is in proportion to the penal sum named in the respective bonds. But in special instances and under the open sanction of the court and of an infant's counsel a new surety has been accepted upon qualified terms of liability sufficiently beneficial to the ward, which he insisted upon.[93]

§ 959. The Same Subject.

Many of the decisions in regard to administration bonds apply on principle to those of guardians. Thus a bond which is not signed by the guardian is not binding even upon his sureties.[94] And if altered, after being signed by two sureties, with the consent of the principal only, and then signed by two other sureties, ignorant of the alteration, it is not binding upon any of the sureties; not upon the first two, because altered without their consent; not upon the other two, because they were not informed of the release of the two former.[95] But fraud practiced in obtaining a surety's signature affords the surety whose confidence was misplaced no defence when sued on the bond, as against those his

Ind. 209. The language of a local code must be resorted to for the rule in such cases as to the discharge of former bondsmen from liability. See Sayers v. Cassell, 23 Gratt. 525. A periodical statutory bond is required in some States, and even such bonds are held to be cumulative, under the statute, as to the wards, though contribution is in inverse order of execution. Tennessee Hospital v. Fuqua, 1 Lea, 608. A surety is not liable for money paid the guardian on account of a ward who at the time of payment was of age. Sheton v. Smith, 59 Tenn. 82. A surety's contingent liability, being provable against him in bankruptcy proceedings, may thus have been avoided. Davis v. McCurdy, 50 Wis. 569. But not a guardian's. *Re* Maybin, 15 Bankr. Reg. 468. Sureties on a bond are not usually liable for past defaults. State v. Jones, 89 Mo. 470; McWilliams v. Norfleet, 60 Miss. 987. But a substituted surety is liable for money received before by the guardian. Tuttle v. Northrop, 44 Ohio St. 178. Or for money already lent to a firm which afterwards turns out insolvent. McWilliams v. Norfleet, 63 Miss. 183. The sureties on a guardian's additional bond may be liable for his failure to account for money on hand when it was given; the presumption being that the misappropriation was afterwards. Clark v. Wilkinson, 59 Wis. 543. See further, Lee v. Lee, 67 Ala. 406; Moody *et al.* v. State *ex rel.* Burton, 84 Ind. 433.

92. Lowry v. State, 64 Ind. 421; State v. Shackleford, 56 Miss. 648.

93. See Spath's Estate, 144 Pa. St. 383, where it was clearly arranged upon the insolvency of the guardian and his original surety, that the new bondsman was not to be held liable beyond the balance shown upon the account then filed.

94. Wood v. Washburn, 2 Pick. 24.

95. Howe v. Peabody, 2 Gray, 556.

conduct led to rely upon it.[96] So joint guardians who wish to limit their respective liabilities must furnish separate bonds; since both are responsible for all the acts of each other during the continuance of the joint guardianship where they execute a joint bond.[97] And the usual rule is that no more than the penal sum named in the bond can be recovered upon it, unless it be by way of interest or cost.[98]

§ 960. Special Bond in Sales of Real Estate.

A special bond is in many States required where a guardian is licensed to make sale of his ward's real estate. Where real estate has been sold by a guardian, and the proceeds remain unaccounted for at the expiration of his trust, it is a question whether the sureties on his general bond shall be held responsible, or those on the special bond given for sale of the real estate. The best authority is in favor of charging the latter and not the former sureties for the guardian's misapplication of such moneys,[99] unless the default be such that the misapplication cannot be identified. The rule in Massachusetts, where a guardian, who has been licensed to sell real estate for the purpose of investment, fails to invest, and charges himself instead, in his accounts, with the proceeds and interest from year to year, has been to hold him responsible for the proceeds of the sale upon his special bond, but for the interest upon his general bond.[1] The omission to give

96. Xander v. Commonwealth, 102 Pa. St. 434; § 366, note.

97. Brazier v. Clark, 5 Pick. 96; Sparhawk v. Buell's Adm'r, 9 Vt. 41; Boyd v. Boyd, 1 Watts, 365. But see Williams v. Harrison, 19 Ala. 277.

98. Tyson v. Sanderson, 45 Ala. 364; Schouler, Pers. Prop. 465-470; Wilson, *Re*, 38 N. J. Eq. 205.

99. Williams v. Morton, 38 Me. 47; Brooks v. Brooks, 11 Cush. 22; Potter v. State, 23 Ind. 607; Fay v. Taylor, 11 Met. 529; Blauser v. Diehl, 90 Pa. St. 350; Madison County v. Johnston, 51 Ia. 152; Bunce v. Bunce *et al.*, 65 Ia. 106; Morris v. Cooper, 35 Kan. 156; Henderson v. Coover, 4 Nev. 429; Withers v. Hickman, 6 B. Monr. 292; Commonwealth v. Pray, 125 Pa. St. 542; Judge of Probate v. Toothaker, 83 Me. 195. See Andrew's Heirs Case, 3 Humph. 592. In some States the requirement of an additional or special bond in such case is matter of judicial discretion. See Vanderburg v. Williamson, 52 Miss. 233. In other States such bond is auxiliary and postponed to the original bond. Hart v. Stribling, 21 Fla. 136. As to releasing sureties and taking a new bond before confirmation of the sale, see State v. Cox, 62 Miss. 786. The court, by altering the terms of sale, &c., does not impair the obligation of such bond. Stevenson v. State, 69 Ind. 257, 71 Ind. 52. See also Colburn v. State, 47 Ind. 310, as to real estate sale on applicaton of another than the guardian.

1. Mattoon v. Cowing, 13 Gray, 387. See Pratt v. McJunkin, 4 Rich. 5. Sureties on the guardian's general bond are liable where the ward's land is sold in partition proceedings.

a special bond for the sale of real estate is, on the foregoing principles, no breach of the guardian's general bond.

§ 961. Suit on the Guardian's Bond for Default and Misconduct.

For the default and misconduct of the guardian the proper remedy is by suit on the probate bond. And such suits are brought in the name of the judge, or the State, according to the requirements of statute, for the benefit of the person or persons injured.[2]

§ 962. Validity of Bond.

Though the appointment of the guardian is void still the bond may be good as a common-law obligation,[3] and the sureties will be liable where the supposed guardian received funds for which he failed to account.[4] A guardian's bond is binding if the court has jurisdiction though the action of the court is erroneous but not void,[5] but a bond given for unknown heirs being a nullity is not valid as a common-law bond.[6] A guardian's bond not signed by a principal is good against the surety as a common-law liability.[7] Where a guardian's bond is valid on its face the sureties cannot escape liability by disputing the truth of its recitals.[8]

The fraud of the guardian in obtaining the sureties to sign by misrepresenting the condition of the estate is no defence for the sureties in an action on the bond.[9]

Action Against Sureties.— As to sureties, it is said that they

Hooks v. Evans, 68 Ia. 52. Where both general and special bond are given, and the guardian's default makes it impossible to ascertain whether the money unaccounted for consisted of proceeds of the land or not, suit may be brought against either set of bondsmen. Yost v. State, 80 Ind. 350. And see State v. Mitchell, 132 Ind. 461. As to moneys derived under a sale of land not perhaps authorized, the bondsmen cannot set up want of authority. Dodge v. St. John, 96 N. Y. 260. Where accounting would not change the facts of liability it is not a prerequisite to suing such a bond. Long v. Long, 142 N. Y. 545. See § 376.

2 Davis v. Dickson, 2 Stew. 370; Potter v. State, 23 Ind. 607; Pearson v. McMillan, 37 Miss. 588.

3. Cotton's Guardian v. Wolf, 77 Ky. 238; United States Fiedlity & Guaranty Co. v. Parker, 20 Wyo. 29, 121 P. 531.

4. Hazelton v. Douglas, 97 Wis. 214, 72 N. W. 637.

5. Moore v. Hanscom, 103 S. W. 665 (judg. mod., Sup. 1908, 101 Tex. 293, 106 S. W. 876) (reduction of bond unauthorized); Findley v. Findley, 42 W. Va. 372, 26 S. E. 433.

6. State v. McLaughlin, 77 Ind. 335.

7. Painter v. Maudlin, 119 Ala. 88, 24 So. 769, 72 Am. St. R. 902.

8. Gray v. State, 78 Ind. 68, 41 Am. Rep. 545.

9. (1906) Rouse v. Whitney, 102 N. Y. S. 899, 53 Misc. 56 (judg. rev., Same v. Payne (1907), 105 N. Y. S. 549).

may be sued without a previous suit against the principal; the common-law rule, that an executor must first be found guilty of *devastavit,* being held inapplicable to guardians.[10] But here, again, in the absence of an accounting or a delinquency fixed in the proper court suit cannot usually be maintained.[11]

Parties.— In a suit against sureties on a guardianship bond, if one of the sureties is dead, his personal representative should be joined.[12]

§ 963. Accounting as Prerequisite.

In most States the guardian's bond cannot be sued until he has been summoned before the proper court to account; nor until leave of that court has been first obtained; except in certain cases of debts which appear of record,[13] unless an accounting is im-

10. State v. Strange, 1 Smith (Ind.), 367; Call v. Ruffin, 1 Call, 333; 1 Met. (Ky.) 22. And see Horton v. Horton, 4 Ired. Eq. 54; Moore v. Baker, 39 Ala. 704; Moore v. Hood, 9 Rich. Eq. 311; Potter v. Hiscox, 30 Conn. 508; Clark v. Montgomery, 23 Barb. 464. In a suit by the ward against his guardian and the sureties on the bond, a decree may be rendered at once against all; the ward need not pursue the guardian first. Barnes v. Trafton, 80 Va. 524. The personal representative of a deceased insolvent guardian is not a necessary party to the ward's suit in equity against a surety. Fulgham v. Herstein, 77 Ala. 496. As to demand, see Buchanan *et al.* v. The State *ex rel.,* 106 Ind. 251; Powers v. The State, 87 Ind. 102. But there should usually be a judgment against the guardian before money can be made out of the sureties. Forest v. Vason *et ux.,* 71 Ga. 49. Cf. Wolfe v. State, 59 Miss. 338.

11. See § 376, notes. But cf. § 369.

12. Lynch v. Rotan, 39 Ill. 14. A release of a surety by payment of an amount less than the principal owed is not a full discharge of the principal. Carroll v. Corbitt, 57 Ala. 579.

As to suits on a guardian's bond, on the relation of one or more wards where there are other wards, see Colburn v. State, 47 Ind. 310; Scheel v. Eidman, 68 Ill. 193. The bond of a guardian of several infants may be sued on for those surviving, where any are dead. Winslow v. People, 117 Ill. 152.

A surety is liable for a debt due from the guardian to his ward when appointed, if the guardian was then solvent. Black, &c. v. Kaiser, 91 Ky. 422.

13. Stillwell v. Miles, 19 Johns. 304; Bailey v. Rogers, 1 Greenl. 186; 78 Me. 24; Salisbury v. Van Hoesen, 3 Hill, 77; Bisbee v. Gleason, 21 Neb. 534; Jarrett v. State, 5 Gill & Johns. 27; Hunt v. White, 1 Cart. 105; Foteaux v. Lepage, 6 Ia. 123; Ammons v. People, 11 Ill. 6; Pratt v. McJunkin, 4 Rich. 5; Justices v. Willis, 3 Yerg. 461; O'Brien v. Strang, 42 Ia. 643; Allen v. Tiffany, 53 Cal. 16; Hailey v. Boyd, 64 Ala. 399; Ordinary v. Heishon, 42 N. J. L. 15. But a guardian cannot prevent an action on his bond by failure to account. Wann v. People, 57 Ill. 202. As for chancery bill of account, in case of *quasi* guardianship, see next chapter. As to abatement of summary proceedings to account by the guardian's death, see Harvey v. Harvey, 87 Ill. 54.

The sureties cannot usually be sued until the guardian's accounts are set-

possible.[14] The reason is that the balances due from the guardian and the extent of his liability cannot be precisely ascertained until the accounts are presented; moreover, the failure to account in obedience to judicial mandate, or to turn over the property according to a balance shown on such accounting, fixes the delinquency. So, too, while the guardian may sue his ward, after the latter attains majority, when it appears that the final indebtedness is in his own favor, he must wait until the court has ascertained and decreed its amount.[15]

tled and he fails to pay what is due. State v. Buck, 63 Ark. 218, 37 S. W. 881; Beakley v. Cunningham, 112 Ark. 71, 165 S. W. 259; Graff v. Mesmer, 52 Cal. 636; Hunt v. White, 1 Ind. 105; United States Fidelity & Guaranty Co. v. Jackson, 111 Miss. 752, 72 So. 150; Wegner v. Wiltsie, 23 Ohio Cir. Ct. R. 302; Fidelity & Deposit Co. of Maryland v. Schelper, 37 Tex. Civ. App. 393, 83 S. W. 871; Pinnell v. Hinkle, 54 W. Va. 119, 46 S. E. 171; *contra*, State *ex rel.* Garesche v. Slevin (Mo. 1887), 6 S. W. 71 (ward who has reached majority may sue sureties without accounting); State *ex rel.* Leutert v. Berger, 92 Mo. App. 631; United States Fidelity & Guaranty Co. v. Nash, 20 Wyo. 65, 121 P. 541 (reh. den., 124 P. 269).

14. Mitchell v. Kelly, 82 Kan. 1, 107 P. 782 (where guardian becomes insolvent and dies) Miller v. Kelsey, 502--5840--Bender—Domestic Relation 100 Me. 103, 60 A. 717 (guardian absconded); Kurz v. Hess, 83 N. Y. S. 773, 86 App. Div. 529 (absconded); Otto v. Van Riper, 164 N. Y. 536, 58 N. E. 643, 79 Am. St. R. 673 (death of guardian in another State); Gilbert v. Gilbert, 13 Ohio Cir. Ct. R. 29, 7 O. C. D. 58.

15. Smith v. Philbrick, 2 N. H. 395; Shollenberger's Appeal, 21 Pa. St. 337. In certain peculiar instances, where the extent of the guardian's liability has been otherwise as definitely determined as it could be by an accounting, it is held that a decree may be entered against the guardian for the amount, though no account has been taken. Sage v. Hammonds, 27 Gratt. 651; and even that an accounting is not a prerequisite to an action against the sureties. Hughes v. City of Auburn, 21 Hun, 316; Long v. Long, 142 N. Y. 545. See McWilliams v. Kalbach, 55 Ia. 110. For the Illinois rule, see McIntyre v. The People Use, 103 Ill. 142. But an accounting is usually a prerequisite to suit on the bond. In an action on a guardian's bond the writ should be indorsed with the name of the person for whose benefit suit is brought. Prob. Court of Hopkinton v. Lamphear, 14 R. I. 291. And see Tudhope v. Potts, 91 Mich. 490.

In an action on a guardian's bond, the burden is on plaintiff to show a breach of its conditions; while in exceptions to the account, the burden is on the guardian to justify his expenditures, deductions, and allowances. The State *ex rel.* Wiseman *et al.* v. Wheeler, 127 Ind. 451. But whatever the *onus* in items of account, the ultimate decision rests with the court on a settlement; and the court will neither exercise a severity which might deter prudent men from accepting such trusts, nor sanction a laxity of diligence which might invite men to accept for gain. Thompson v. Thompson, 92 Ala. 545.

§ 964. Accounting is Conclusive.

Sureties, as well as the guardian, are concluded in the absence of fraud or palpable error, by the amount deliberately adjudged due from the guardian on settlement of his accounts, usually in a probate court, although the sureties were not parties to the proceedings.[16] They cannot become parties to the accounting of their

16. Beakley v. Cunningham, 112 Ark. 71, 165 S. W. 259; Lynch v. Rotan, 39 Ill. 14 (in absence of fraud); Ryan v. People, 165 Ill. 143, 46 N. E. 206 (affg. 62 Ill. App. 355); Chase v. Wright, 116 Ia. 555, 90 N. W. 357; *In re* Caskey (Ia.), 166 N. W. 751;; Rice v. Wilson, 129 Mich. 520, 89 N. W. 336, 8 Det. Leg. N. 1055; Cross v. White, 80 Minn. 413, 83 N. W. 393, 81 Am. St. R. 267; Botkin v. Kleinschmidt, 21 Mont. 1, 52 P. 563, 69 Am. St. R. 641; Deegan v. Deegan, 22 Nev. 185, 37 Pac. 360, 8 Am. St. R. 742; Douglass v. Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. R. 435, 18 N. Y. S. 685; Douglass v. Ferris, 63 Hun, 413; Van Zandt v. Grant, 175 N. Y. 150, 67 N. E. 221, 73 N. Y. S. 600, 67 App. Div. 70; *In re* Ransier, 57 N. Y. S. 650, 26 Misc. 582;; Eberle v. Schilling, 65 N. Y. S. 728, 32 Misc. 195; Southern Surety Co. v. Burney, 34 Okla. 552, 126 Pac. 748, 43 L. R. A. (N. S.) 308; Title Guaranty & Surety Co. v. Slinker, 35 Okla. 128, 153, 128 P. 696, 698; Henry v. Melton, 46 Okla. 278, 148 P. 730; Cabell v. McLish (Okla.), 160 P. 592; Smith v. Garnett (Okla.), 161 P. 1083; Southwestern Surety Ins. Co. v. Richard (Okla.), 162 P. 468; Egan v. Vowell (Okla.), 167 P. 205; Driscoll v. Quinn (Okla.) 170 P. 495; Southern Surety Co. v. Jefferson (Okla.), 174 P. 563; Etna Accident & Liability Co. v. Langley (Okla.), 174 P. 1046; Title Guaranty & Surety Co. v. Cowen (Okla.), 177 P. 563; Neel v. Commonwealth (Pa.), 7 Atl. 74; Hornug v. Schramm, 22 Tex. Civ. App. 327, 54 S. W. 615; Fahey v. Boulmay, 24 Tex. Civ. App. 279, 59 S. W. 300; Minchew v. Case (Tex. Civ. App. 1912), 143 S. W. 366; *contra,* United States Fidelity & Guaranty Co. v. Pittman, 183 Ala. 602, 62 So. 784; Lincoln Trust Co. v. Wolff, 91 Mo. App. 133; State *ex rel.* Leutert v. Berger, 92 Mo. App. 631; see State v. Booth, 9 Mo. App. 583; Judgment Rouse v. Whitney (1906), 102 N. Y. S. 809, reversed; Rouse v. Payne, 105 N. Y. S. 549, 120 App. Div. 667.

Commonwealth v. Rhoads, 37 Pa. St. 60; Braiden v. Mercer, 44 Ohio St. 339; McCleary v. Menke, 109 Ill. 294; Moore & Wife v. Nichols, 39 Ark. 145. In numerous instances, however, a decree rendered against a guardian is held not conclusive against sureties who were not parties to the final accounting. So that the latter may show, in reduction of their liability, that the guardian failed to charge the wards with boarding, tuition, or his own compensation; or made improper charges in their favor against himself. Davenport v. Olmstead, 43 Conn. 67; State v. Hull, 53 Miss. 626; Kinsey v. State, 71 Ind. 32; Kinsey *et al.* v. The State *ex rel.*, 81 Ind. 62; Hauser, Guardian, v. King *et al.*, 76 Va. 731; State v. Hoster, 61 Mo. 544; Sanders v. Forgasson, 3 Baxt. 249. And see Moore v. Alexander, 96 N. C. 34. So may the sureties have the benefit of a debt lawfully chargeable in account with the ward, which the creditor releases *bona fide* to the guardian personally. Kinsey v. State, 71 Ind. 32. Special penalties may be assessed under some local statutes, on a defaulting guardian's bond. Stroup v. State, 70 Ind. 495; Buchanan *et. al.* v. The State

principal, either in the original proceedings or on revision,[17] and a judgment against the guardian is also binding on the sureties,[18] but the surety may plead the statute of limitations,[19] and is not bound by the reports made by the guardian.[20]

Notwithstanding a final settlement showing an amount due from the guardian the surety may show that the loss occurred before the date of his bond.[21]

§ 965. Sureties Held on Breach Occurring While Bond Outstanding.

The sureties are in general liable only for a breach occurring while the bond is outstanding and not for losses occurring before the execution of the bond.[22] However, the sureties on a guardian's bond conditioned on his proper settlement on termination of the guardianship are liable for a conversion prior to the execution of the bond,[23] and are charged with a debt owing by the guardian to the wards at the time of his qualification.[24]

Where a guardian misapplies funds the sureties on his bond are liable although it is subsequently ordered that a new bond be filed

ex rel., 106 Ind. 251. Sureties cannot set up their principal's misappropriation with the ward's connivance while under age. Judge of Probate v. Cook, 57 N. H. 450. See also Scobey v. Gano, 35 Ohio St. 550; Fogarty *et al.* v. Ream *et al.*, 100 Ill. 366.

17. *In re* Scott's Account, 36 Vt. 297. But see Curtis v. Bailey, 1 Pick. 198. In an action on a guardian's bond his accounting and discharge in court cannot be attacked. State v. Slauter, 80 Ind. 597. Sureties cannot set up issues as to the guardian's account in which they have no interest. May and Pasco v. May, 19 Fla. 373. And as to the guardian's neglect to settle accounts, see Judge of Probate v. Grant, 59 N. H. 547.

18. Baldwin v. State of Maryland, 179 U. S. 220, 21 S. Ct. 105, 45 L. Ed. 160; Parr v. State, 71 Md. 220, 17 Atl. 1020; *contra*, Fidelity & Deposit Co. of Maryland v. M. Rich & Bros., 122 Ga. 506, 50 S. E. 338; Rich & Bros. v. Fidelity & Deposit Co. of Maryland, 126 Ga. 466, 55 S. E. 336; National Surety Co. v. Rives' Guardian, 164 Ky. 201, 175 S. W. 351 (default judgment not binding); Commonwealth v. Bracken, 17 Ky. Law. Rep. 785, 32 S. W. 609; Gilbert v. Gilbert, 13 Ohio Cir. Ct. R. 29, 7 Ohio Dec. 58 (judgment without notice to guardian is not binding on surety).

19. Perkins v. Cheney, 114 Mich. 567, 72 N. W. 595, 4 Det. Leg. N. 696, 68 Am. St. R. 495.

20. Lowry v. State, 64 Ind. 421

21. State *ex rel.* and to Use of Short v. Hardy (Mo. App.), 206 S. W. 904.

22. Howe v. White, 162 Ind. 74, 69 N. E. 684; Cotton's Guardian v. Wolf, 77 Ky. 238; Ætna Indemnity Co. v. State, 57 So. 980; American Bonding Co. of Baltimore, Md., v. Fountain (Tex. Civ. App.), 196 S. W. 675.

23. State v. Buck, 63 Ark. 218, 37 S. W. 881. See People's Bank & Trust Co. v. Nelson, 37 Okla. 500, 132 P. 493.

24. Johnson v. Hicks' Guardian, 97 Ky. 116, 30 S. W. 3, 16 Ky. Law Rep. 827.

and that the sureties be relieved from further liability on the bond. The breach having occurred while the first bonds were current those bonds are liable to all damages that accrue to the wards on account of the breach. As the guardian was solvent when the new bonds were given the sureties on the new bonds are also liable when he becomes insolvent after the new bonds are excuted. The amount was lost because the guardian failed and neglected to pay over the amount to the wards as he should have done and it is immaterial that it was a debt due from the guardian himself which he failed to collect. His duty to collect debts rests on him more heavily when he was the debtor by his own wrongful act than it would if he had merely failed to collect a debt from some third party.[25]

The surety will be liable for an unwise loan while the bond was in force though the surety was discharged before maturity of the loan.[26]

§ 966. Sureties on Different Bonds, Special Bonds.

The sureties may be liable to an action by the succeeding guardian,[27] and where the guardian gives a statutory bond and after *devastavit* gives a common-law bond the sureties on both bonds are liable.[28] Where a guardian has filed a general and also a special bond it is error to divide the *devastavit* and find against the sureties on each bond for only a portion of the sum due from the guardian.[29] A breach of the guardian's bond caused by his giving up a note to the maker can only be continued so as to bind the sureties on a second bond by the guardian carrying the note forward to a final settlement.[30] The sureties are not relieved by the

25. Ætna Indemnity Co. v. State (Miss.), 57 So. 980, 39 L. R. A. (N. S.) 961. See Diffie v. Anderson, (Ark.), 208 S. W. 428 (sureties on both bonds liable); Remington v. Hopson, 137 Ga. 95, 72 S. E. 918 (where additional security is ordered the new bond is cumulative). See Union Trust Co. v. Zynda, 129 Mich. 156, 88 N. W. 407, 8 Det. Leg. N. 902 (liability on bond to secure prior defalcation).

26. Des Moines Savings Bank v. Krell, 176 Ia. 437, 156 N. W. 858.

27. Southwestern Surety Ins. Co. v. Taylor (Okla.), 173 P. 831; Etna Accident & Liability Co. v. Langley (Okla.), 174 P. 1046 (validity of appointments of guardians cannot be denied).

28. Matthews v. Mauldin, 142 Ala. 434, 38 So. 849. See Smith v. Moore (S. C.), 95 S. E. 351.

29. Remington v. Hopson, 137 Ga. 95, 72 S. E. 918. See United States Fidelity & Guaranty Co. v. Hansen, 36 Okla. 449, 129 P. 60, 67; *In re* Kress's Estate, 52 Pa. Super. Ct. 29.

30. Lincoln Trust Co. v. Wolff, 91 Mo. App. 133.

mere filing of a subsequent bond,[31] and where a new bond is ordered it is error to discharge the sureties on the old bond until the new is approved.[32] The succeeding sureties' possession of estate funds is the possession of the ward as affecting the liability of the original sureties.[33]

Where a bond runs to three wards jointly the liability of the sureties to each ward is limited to one-third the amount of the penalty,[34] and where separate bonds are given for each ward the sureties are only liable on each bond to the ward's proportion of the penal sum of the bond.[35]

Where a special bond is required for sale of real estate the sureties on the general bond are not liable for the proceeds,[36] but the sureties on the special bonds are liable and cannot deny the validity of the proceedings.[37]

The guardian cannot enlarge his liability on his general bond by taking and charging himself with funds of the ward which he had no legal right to receive and for which a special bond should have been given.[38]

The sureties on a special bond are not liable for the misappropriation of funds not arising from the sale of the property.[39]

31. Kaspar v. People, 230 Ill. 342, 82 N. E. 816 (affg. 132 Ill. App. 1; Rush v. State, 19 Ind. App. 523, 49 N. E. 839; Middleton's Adm'r v. Hensley, 21 Ky. Law. 703, 52 S. W. 974; Miller v. Kelsey, 100 Me. 103, 60 A. 717.

32. Miller v. Miller, 21 Tex. Civ. App. 382, 53 S. W. 362.

33. (Civ. App. 1907) Moore v. Hanscom, 103 S. W. 665 (judg. mod. [Sup. 1908], 101 Tex. 293, 106 S. W. 876).

34. United States Fidelity & Guaranty Co. v. Nash, 20 Wyo. 65, 121 P. 541 (reh. den., 124 P. 269).

35. Parker v. Wilson, 98 Ark. 553, 136 S. W. 981 (stay of judgment granted, 99 Ark. 344, 137 S. W. 926).

36. State v. Peterman, 66 Mo. App. 257; Alen v. Fahy, 63 N. Y. S. 1031, 30 Misc. 377; Commonwealth v. American Bonding Co., 212 Pa. 365, 61 A. 939; Findley v. Findley, 42 W. Va. 372, 26 S. E. 433; Kester v. Hill, 42 W. Va. 611, 26 S. E. 376. See Allen v. Kelly, 171 N. Y. 1, 63 N. E. 528, 67 N. Y. S. 97, 55 App. Div. 454. See Reed v. Hedges, 16 W. Va. 167; *contra*, Southern Surety Co. v. Burney, 34 Okla. 552, 126 P. 748. See Rudy v. Rudy, 145 Ky. 245, 140 S. W. 192 (sale of land void where no special land given).

37. Donnell v. Dansby (Okla.), 159 P. 317.

38. Allen v. Kelly, 171 N. Y. 1, 63 N. E. 528, 67 N. Y. S. 97, 55 App. Div. 454. See Bank of Guntersville v. United States Fidelity & Guaranty Co. (Ala.), 75 So. 168 (surety not liable for funds received by guardian in his individual capacity).

39. Smith v. Garnett (Okla.), 161 P. 1083; National Surety Co. of New York v. Washington (Okla.), 170 P. 1142 Knox v. Cruel (Okla.), 183 P. 427.

§ 967. For What Acts of Guardian is Surety Liable.

The sureties are liable generally for all money which the guardian should pay and does not[40] for defalcation,[41] taxes[42] losses caused by the negligence of the guardian,[43] as for failure of the guardian to collect assets,[44] or to invest funds,[45] or from unauthorized investments,[46] not for losses made in good faith.[47]

Failure of a guardian to file his inventory is a breach of his bond, but the damages assessed will be nominal only unless actual damages are proved.[48]

Failure to comply with an invalid order of the court does not constitute a breach of the bond.[49]

40. Schlee v. Darrow's Estate, 65 Mich. 362, 32 N. W. 717; State *ex rel.* Gregory v. Horton, 101 Mo. App. 701, 74 S. W. 1117; The Ordinary v. Hopler (N. J. Sup. 1896), 36 A. 769 (failure to pay over assets to a new guardian is not a breach, unless on showing new guardian properly appointed); Rouse v. Whitney, 102 N. Y. S. 899, 53 Misc. 56 (judg. revd., Same v. Payne [1907], 105 N. Y. S. 549). See Rick & Bros. v. Fidelity & Deposit Co. of Maryland, 126 Ga. 466, 55 S. E. 336.

41. Steinhart v. Gregory, 176 Ala. 368, 58 So. 266; National Surety Co. v. State, 181 Ind. 54, 103 N. E. 105; Lincoln Trust Co. v. Wolff, 91 Mo. App. 133 (surrender of note to maker); State *ex rel.* Leutert v. Berger, 92 Mo. App. 631; Ordinary v. Wolfson, 65 N. J. Law, 418, 47 A. 457 (failure to turn over money found due as on accounting); Southern Surety Co. v. Jefferson (Okla.), 174 P. 563 (fraud of guardian); Municipal Court of Providence v. United States Fidelity & Guaranty Co. (R. I.), 103 A. 996 (although stock taken be considered as realty); Allen v. Stovall, 94 Tex. 618, 63 S. W. 863 (money received in settlement of litigation, although guardian had no right to make settlement); Mann v. Mann, 119 Va. 630, 89 S. E. 897 (money received for condemnation of land).

42. Baldwin v. State of Maryland, 179 U. S. 220, 21 S. Ct. 105, 45 L. Ed. 160 (affg. 89 Md. 587, 43 A. 857), (taxes assessed after ward became of age, but before guardian stated a final account).

43. Layne v. Clark, 152 Ky. 310, 153 S. W. 437.

44. Ames v. Williams, 74 Miss. 404, 20 So. 877; State *ex rel.* Brebaugh v. Bolte, 72 Mo. 272, 4 Mo. App. 599.

45. United States Fidelity & Guaranty Co. v. Taggart (Tex. Civ. App.), 194 S. W. 482.

46. Leach v. Gray (Ala.), 77 So. 341; American Bonding Co. of Baltimore v. People, 46 Colo. 394, 104 P. 81; Des Moines Savings Bank v. Krell, 176 Ia. 437, 156 N. W. 858 (unwise loan); State *ex rel.* Mount v. Smith, 139 Mo. App. 101, 120 S. W. 614 (taking title to land in his own name); Empire State Surety Co. v. Cohen, 156 N. Y. S. 935, 93 Misc. 299.

47. State *ex rel.* Garesche v. Slevin (Mo. 1887), 6 S. W. 71; United States Fidelity & Guaranty Co. v. Jackson, 111 Miss. 752, 72 So. 150 (mere failure of bank in which funds deposited does not operate *ipso facto* as a breach).

48. Buchanan v. State, 106 Ind. 251, 6 N. E. 614; Miller v. Kelsey, 100 Me. 103, 60 A. 717.

49. Harter v. Miller, 67 Kan. 468, 73 P. 74.

If the guardian uses the funds of his ward in his own business this amounts to a conversion rendering the surety liable.[50]

The refusal of a guardian to pay for the maintenance of the ward out of property under his control constitutes a breach of the bond for which a creditor may bring suit on the bond.[51]

The sureties may be liable to a creditor of the ward if the guardian turns over to the ward assets instead of using them to pay the creditor.[52]

§ 968. Interest, Costs and Penalty.

The sureties are liable for interest from the date of the settlement with the guardian of his accounts,[53] and for interest on annual balances which the guardian has used in private speculations.[54]

In an action on a guardian's bond interest should not be compounded after the marriage of the ward,[55] and the surety is not liable for interest after the death of the guardian until the ward demands a settlement from the surety.[56] Sureties on a guardian's bond are liable for costs awarded against him.[57]

The penalty imposed on a guardian who fails to make an annual report cannot be recovered by the ward against the sureties in an action on the guardian's bond for failure to account for and pay over the ward's money.[58]

§ 969. In What Capacity Guardian Acting.

The sureties on a guardian's bond are liable only for his acts as guardian and not for acts of the guardian while acting in a separate capacity,[59] and are liable for all property held as guardian although received before his appointment.[60]

The liability of the sureties on the guardian's bond can be

50. United States Fidelity & Guaranty Co. v. State, 40 Ind. App. 136, 81 N. E. 226.

51. State v. Fidelity & Deposit Co. of Maryland (Md.), 104 A. 278.

52. Probate Court of Exeter v. Carr, 27 R. I. 184, 61 A. 171.

53. Beakley v. Cunningham, 112 Ark. 71, 165 S. W. 259.

54. Gay v. Whidden, 64 Fla. 295, 59 So. 896.

55. Finnell v. O'Neal, 76 Ky. 176.

56. Freedman v. Vallie (Tex. Civ. App. 1903), 75 S. W. 322; American Bonding Co. of Baltimore, Md., v. Fountain (Tex. Civ. App.), 196 S. W. 675.

57. Phillips v. Liebmann, 41 N. Y. S. 1020, 10 App. Div. 128, 75 N. Y. S. 1386.

58. Townsend v. Stern (Ia. 1904), 99 N. W. 570.

59. *In re* Ransier, 57 N. Y. S. 650, 26 Misc. 582 (as guardian *ad litem*). See Newman v. Flowers' Guardian, 134 Ky. 557, 121 S. W. 652.

60. Tanner v. Skinner, 74 Ky. (11 Bush), 120.

terminated if he ceases to hold securities as guardian but holds them in some other capacity, but this must appear by some unequivocal act.[61]

§ 970. For What Property Sureties Liable.

Sureties are liable only for property which actually came into the guardian's hands during the period of the bond,[62] including personal estate or rents of real estate.[63]

The sureties are liable for all money which came into the possession of the guardian prior to his appointment in the absence of evidence that he had before his appointment converted it to his own use,[64] including losses on property placed in charge of the guardian before the execution of the bond.[65]

The sureties on the guardian's bond are chargeable with funds which the guardian as administrator is directed to deposit to the credit of himself as guardian although he had previously as administrator misappropriated such funds.[66]

Where the wards compensated the guardian for their maintenance by their services to him the sureties on his bond cannot defend an action by showing the guardian was poor and needed the funds for their support.[67]

Where on the guardian's death a portion of his estate was paid to the ward as a dristributee the surety may set off such amount against his liability on a *devastavit*.[68]

61. State *ex rel.* Hospes v. Branch, 112 Mo. 661, 20 S. W. 693.

62. American Bonding Co. of Baltimore v. People, 46 Colo. 394, 104 P. 81; Rudy v. Rudy, 145 Ky. 245, 140 S. W. 192. See Newberry v. Wilkinson, 199 F. 673, 118 C. C. A. 111 (affg. decree [C. C.], 190 F. 62) (sureties estopped by guardian's receipt showing he had received funds); Gillum v. Parker's Guardian, 30 Ky. Law Rep. 1191, 100 S. W. 820 (where guardian removed to another State, where he was appointed again).

63. Reed v. Hedges, 16 W. Va. 167; Jennings v. Parr, 62 S. C. 306, 40 S. E. 683.

64. *In re* Guardianship of Fardette, 83 N. Y. S. 521, 86 App. Div. 50; Loftin v. Cobb, 126 N. C. 58, 35 S. E. 230 (money which came into his hands as administrator).

65. Beakley v. Cunningham, 112 Ark. 71, 165 S. W. 259; State *ex rel.* Johnston v. United States Fidelity & Guaranty Co., 188 Mo. App. 700, 176 S. W. 542; Smith v. Moore (S. C.), 95 S. E. 351 (except in flagrant cases).

66. *In re* Noll, 154 N. Y. 765, 49 N. E. 1101, 41 N. Y. S. 765, 10 App. Div. 356, 75 N. Y. S. 1161. See *In re* Switzer, 201 Mo. 66, 98 S. W. 461; Switzer v. Switzer, *Id.*

67. Bell v. Kinneer, 101 Ky. 271, 40 S. W. 686, 19 Ky. Law Rep. 545, 9 Ky. Law Rep. 172.

68. American Bonding Co. of Baltimore v. Logan (Tex. Civ. App. 1910), 132 S. W. 894.

§ 971. Duty of Sureties as to Estate.

The sureties on the guardian's bond are under no duty after his death to take possession of the property or to manage it,[69] and the surety is not bound to actively concern himself with the settlement of the guardian's accounts and his failure to do this does not render him liable as participating in the guardian's fraud.[70] The surety on a bond which has been discharged cannot, because of *devastavit* prior to his discharge, require the guardian to pay into court funds in his hands.[71]

§ 972. Surety Taking Collateral.

A surety may always take security from his principal for his own indemnity, and, if default occurs, reimburse himself from the principal's own property like any other creditor. But it stands to reason that the surety of a guardian cannot secure himself by any pledge of the ward's property; for this would be permitting fraud in order to prevent fraud, and the infant's pretended security would be to him no security at all.[72]

§ 973. Contribution Among Sureties.

Equity allows sureties to enforce contribution as among themselves. Thus, if co-sureties on one bond pay the whole amount of a deficiency, they may use the other bond to obtain a proportional reimbursement.[73] So where there are three co-sureties, and one proves insolvent, the surety who has responded in damages to the full extent may compel his solvent co-surety to pay him one-half of the amount.[74]

§ 974. Subrogation of Sureties.

Where sureties are compelled to respond in damages for the default of their guardian, they may seek indemnity from his property; they are entitled to be subrogated to the remedies of

69. Garrett v. Reese, 99 Ga. 494, 27 S. E. 750.

70. Newberry v. Wilkinson, 199 F. 673, 118 C. C. A. 111 (affg. decree [C. C.], 190 F. 62).

71. Hooks v. Fidelity & Deposit Co. of Maryland, 135 Ga. 396, 69 S. E. 484.

72. Poultney v. Randall, 9 Bosw. 232; Foster v. Bisland, 23 Miss. 296; Miller v. Carnall, 22 Ark. 274; Howell v. Cobb, 2 Cold. 104. It is not against public policy for the guardian to deposit part of the ward's securities with the surety as indemnity. Rogers v. Hopkins, 70 Ga. 454.

73. Commonwealth v. Cox, 36 Pa. St. 442. See Baugh v. Boles, 35 Ind. 524.

74. Waller v. Campbell, 25 Ala. 544. See State v. Paul's Ex'r, 21 Mo. 51; Jamison v. Crosby, 11 Humph. 273; Hocker v. Woods, 33 Pa. St. 466; Haygood v. McKoon, 49 Mo. 77.

the ward against their principal, subject, however, to equities against the ward.[75]

§ 975. Limitation of Action.

To all suits on guardians' bonds there is a limitation prescribed by law, which is different in the different States.[76] Where no special period is fixed by law, the ordinary limitation to suits on sealed instruments must be held to apply.[77]

An action accrues on a guardian's bond only when an order is entered upon an accounting removing or discharging the guardian, and the statute of limitations does not begin to run until that time.[78]

§ 976. Effect of Fraudulent Settlement with Ward.

No fraudulent and deceptive settlement of the guardian with his ward on the latter's majority, nor even the court's approval thus induced, can shield sureties when the whole transaction is set aside on judgment as void,[79] and the ward on setting aside a settlement with the guardian may recover of the sureties if they have not changed their position relying on the settlement.[80]

§ 977. Ward's Right to Impeach Fraudulent Transfers.

A fraudulent transfer of property by the surety of an insolvent guardian may be impeached on the ward's behalf.[81]

§ 978. Release of Sureties.

A discharge of the guardian will relieve the surety,[82] but the surety is liable for a balance due at the time of the discharge,[83]

75. Adams v. Gleaves, 10 Lea, 367; State v. Atkins, 53 Ark. 303. And see as to proceedings against the lands of a deceased guardian. Richardson v. Day, 20 S. C. 412.

76. State v. Hughes, 15 Ind. 104; Johnson v. Chandler, 15 B. Monr. (Ky.) 584; Loring v. Alline, 9 Cush. (Mass.) 68. And see Favorite v. Booher, 17 Ohio St. 548.

77. Benson v. Benson, 70 Md. 253. As to time of a guardian's "discharge." Orleans Probate Court v. Child, 51 Vt. 82. Cf. Motes v. Madden, 14 S. C. 488.

78. United States Fidelity & Guaranty Co. v. Citizens State Bank, 36 N. D. 16, 161 N. W. 562, L. R. A. 1918E, 326.

79. Douglass v. Ferris, 138 N. Y. 193; Parr v. State, 71 Md. 220; State v. Branch (1894), Mo. See Greenup v. United States Fidelity & Guaranty Co., 159 Ky. 647, 167 S. W. 910 (20 months' delay is bar to attacking settlement).

80. Baum v. Hartmann, 226 Ill. 160, 80 N. E. 711 (revg. 122 Ill. App. 444).

81. Benson v. Benson, 70 Md. 253.

82. Haden v. Swepston, 64 Ark. 477, 43 S. W. 393; Thomas v. Thomas, 126 Ark. 579, 191 S. W. 227; Greenup v. United States Fidelity & Guaranty Co., 159 Ky. 647, 167 S. W. 910 (20 months' delay is bar to attacking settlement).

83. Boyd v. Withers, 103 Ky. 698, 46 S. W. 13, 20 Ky. Law Rep. 511.

and a final receipt in full may not be conclusive where given by the ward.[84] The sureties will be relieved by placing funds in the name of the ward in the hands of the court and by a complete accounting on revocation of the guardian's appointment.[85] A surety will in general be relieved only by the proper payment of the money in the hands of the guardian.[86] Where letters of guardianship are revoked because of the failure of the guardian to file his accounts the court has no power at the succeeding term as against the guardian's sureties to annul such revocation.[87] The surety is not relieved by the mere fact that the court has failed to take proper steps to force the filing of an inventory.[88]

The liability of one surety will not be abated by the abatement of an action against the other.[89]

Statutes in many States authorize the sureties to be released by making direct application to the court,[90] but the release of a surety does not protect him from liability for a *devastavit* already incurred.[91] Such a release will be construed consistently with the statutes providing therefor.[92]

84. Beedle v. State, 62 Ind. 26 (to enable guardian to settle with court); Vick v. Ferrell, 85 S. E. 549 (where ward ignorant).

85. Fidelity & Deposit Co. of Maryland v. Husted, 128 Md. 275, 97 A. 370.

86. State v. Fidelity & Deposit Co. of Maryland (Md.), 104 A. 278; State *ex rel.* Scott v. Greer, 101 Mo. App. 669, 74 S. W. 881.

87. Wallace v. Swepston, 74 Ark. 520, 86 S. W. 398, 109 Am. St. R. 94.

88. Mahan v. Steele, 109 Ky. 31, 58 S. W. 446, 22 Ky. Law Rep. 546.

89. Layne v. Clark, 152 Ky. 310, 153 S. W. 437.

90. National Surety Co. of New York v. Morris, 111 Ga. 307, 36 S. E. 690 (even for reasons other than the misconduct of guardian in conduct of the trust); Means v. American Bonding Co. of Baltimore (Ga. App.), 98 S. E. 399; Kendrick v. Wilkinson, 18 Ind. 206; Rush v. State, 19 Ind. App. 523, 49 N. 839; Clymer v. State (Ind. App.), 109 N. E. 431; *In re* Pope's Estate, 103 Me. 382, 69 A. 616; Rice v. Wilson, 129 Mich. 520, 89 N. W. 336, 8 Det. Leg. N. 1055 (discharge void where without notice to ward); *In re* American Surety Co. of New York, 115 N. Y. S. 860, 61 Misc. 542; United States Fidelity & Guaranty Co. v. Hansen, 36 Okla. 449, 129 P. 60, 67; Etna Accident & Liability Co. v. Langley (Okla.), 174 P. 1046; Reed v. Duncan (Tenn. Ch. App. 1900), 59 S. W. 402 (although no formal petition is presented); Brehm v. United States Fidelity & Guaranty Co., 124 Wis. 339, 102 N. W. 36. See American Bonding Co. of Baltimore v. Logan (Tex. Civ. App. 1910), 132 S. W. 894 (after death of guardian bond cannot be released).

An approved guardian's bond cannot be released even by the court without the consent of all parties in interest. Commonwealth v. American Bonding Co., 245 Pa. 535, 91 A. 938.

91. American Bonding & Trust Co. v. Coons (Okla.), 166 P. 887.

92. Des Moines Savings Bank v. Krell, 176 Ia. 437, 156 N. W. 858.

The amount of the liability on a guardian's bond will not be reduced by the mere granting of an application by the guardian to have it reduced where no such application was made by the surety and the bond was never changed.[93]

93. Commonwealth v. American Bonding Co., 245 Pa. 535, 91 A. 938. See Moore v. Hanscom, 103 S. W. 665 (judg. mod. [Sup. 1908], 101 Tex. 293, 106 S. W. 876).

CHAPTER X.

RIGHTS AND LIABILITIES OF THE WARD.

§ 979. General Rights of the Ward.

Having treated at length of the rights and liabilities of guardians, their appointment and removal, and the settlement of their accounts, it only remains for us to consider the powers and duties of the ward himself. Some of these have been already noticed incidentally; others, so far as minor wards are concerned, fall within the scope of Infancy; but a few legal principles remain for discussion under the present head, to which we shall now direct the reader's attention.

§ 980. Doctrine of Election as to Wards, Insane or Infant.

There is a distinction to be drawn between infant wards, and insane persons or spendthrifts under guardianship. As to the former, the law recognizes a growing responsibility, as it were, on their part; a postponement of many rights and duties to the period of maturity, but not utter and total suspension or loss. Hence sales made and contracts performed while an infant ward's disabilities last are frequently held subjected to his future approval, being treated as neither absolute nor yet void in the meantime. Hence is that principle of election so constantly asserted at law on his behalf; hence, too, the right he exercises, when of age, of passing in review accounts old and almost forgotten, to ascertain the balance justly due him. But as to insane persons

and spendthrifts, their responsibilities are for the time blotted out; the disability may be temporary or it may be permanent; but while it lasts, it is complete; and it may be essential that transactions on their behalf should stand or fall, irrespective of their choice, and beyond the possibility of their future interference. This suggestion we throw out simply by way of caution; for while the same principles are constantly applied by inference to all wards alike, it is unsafe to draw broad conclusions or argue with confidence from mere analogies between these different classes of wards.[94]

§ 981. Insane Persons and Infants Contrasted.

Thus it is asked whether an insane person under guardianship can make a will, if in fact *compos mentis*. Clearly, questions of mental capacity and undue influence may arise whenever a will is presented for probate. And *prima facie* an insane person, if not a spendthrift, under guardianship, is *non compos mentis*, and his testamentary capacity may well be doubted. It is settled, however, in various States that a valid will may be executed by a person under such guardianship, notwithstanding the circumstances of his situation; the fact of testamentary capacity at the date of execution being open to proof.[95] As to the contract of a spendthrift or insane person made before he was placed under guardianship, the law favors the guardian's right of disaffirmance to a certain extent, notwithstanding the ward was an adult when the contract was made; on the ground, apparently, that the person now a ward was not fit to make a contract in his own right which should bind his estate.[96] And yet the rule here must differ greatly

94. Thus, in Vermont, it is held that a spendthrift may be compelled to give security to the town of his settlement against loss by his becoming chargeable afterwards as a pauper, as a condition for his release from guardianship. Williston v. White, 11 Vt. 40.

95. Breed v. Pratt, 18 Pick. 115. The letters of guardianship afford *prima facie* proof of testamentary incapacity, but nothing conclusive, save perhaps where one is adjudged an idiot. Schouler, Wills, §§ 81, 82.

96. Coombs v. Janvier, 2 Vroom, 240; Chandler v. Simmons, 97 Mass. 508. But see, as to the wife's agency to manage his business, Motley v. Head, 43 Vt. 633. The contract of a person not under guardianship but of unsound mind is not necessarily void, but will be held voidable or not, according to circumstances. Copenrath v. Kienby, 83 Ind. 18. And see, as to vesting chattel mortgage rights in the innocent mortgagee, where the mortgage was made by one apparently sane and not declared insane. Fay v. Burditt, 81 Ind. 433. Also, as to an insane person's note, taken by one without notice of his insanity. Shoulters v. Allen, 51 Mich. 529. Cf. Ed-

from that applicable to infants. An insane person having no legal guardian may sue by any competent person as his next friend, and the question of sanity or insanity involved in the transaction may be tried collaterally.[97]

§ 982. Responsibility of Guardian to Ward as Wrongdoer, &c.

For assault and battery, a ward, like all other persons, is entitled to damages. But where his guardian is the offender, there are technical difficulties in the way of maintaining a suit. Many authorities allow an infant to sue his guardian by next friend for a tort; though a spendthrift, it is said, cannot do so. His remedy may be found in getting the guardian removed for misconduct and securing the appointment of a successor, or perhaps obtaining his discharge from guardianship altogether. An action can then be brought by himself or the new guardian, as the case may be. The guardian may in all cases be held criminally responsible for an injury committed.[98]

A guardian may be restrained by injunction from committing waste. So he is responsible for damages thus occasioned; and it has been held that a judgment against sureties on the guardian's bond for waste committed by the guardian will not before satis-

wards v. Davenport, 20 Fed. R. 756, where one was plainly incapable. An insane person's deed of real estate is treated with great disfavor. Rogers v. Blackwell, 49 Mich. 192. The guardian may maintain a bill in equity for a reconveyance. Warfield v. Fisk, 136 Mass. 219. And he should not attempt to ratify a conveyance, or convey without judicial authority. Funk, Guardian, v. Rontchler, 134 Ind. 68. The legal disability of spendthrifts (and *semble* of the insane under local statute) begins when the guardian is appointed and gives bond. Blake v. Potter, 51 Conn. 78; Myer v. Tighe, 151 Mass. 354. An insane person under guardianship usually continues liable to suit and the personal service of summons. Ingersoll v. Harrison, 48 Mich. 234; and cases cited. The guardian should also be summoned and defend. Justice v. Ott, 87 Cal. 530. In a suit against his guardian on a contract made by the ward before he was declared insane, the negligence of the guardian in defending is imputable to the ward. Weems v. Weems, 73 Ala. 462. When a lunatic is supported at an asylum, a valid personal debt is created, and proceedings may be taken to mortgage his estate to secure payment thereof. Agricultural Ins. Co. v. Barnard, 96 N. Y. 525.

A person thus under guardianship may with the guardian's assent establish a domicile sufficient for probate of his will. Culver's Appeal, 48 Conn. 165. And the ward may sometimes change his own domicile, if mentally competent, where the premature death of his guardian precludes an assent. Mowr v. Latham, 17 R. I. 480.

97. Reese v. Reese, 89 Ga. 646.

98. Mason v. Mason, 19 Pick. 506; The State v. Willoughby, 76 Mo. 215. As to an insane ward, see 89 Ga. 656. A guardian has been held liable in

faction bar a suit by the ward against one who participated in the waste.[99] The ward may also sue for use and occupation, although he has a general guardian.[1] Where one assumes to be guardian or agent of a guardian, and enters an infant's lands, the infant may elect to treat him as a wrongdoer, and bring trespass, or charge him as a guardian.[2] So where a guardian wrongfully holds over. But the ward cannot sue his guardian for money had and received. His proper course, at least in this country, is to institute proceedings for the latter's removal, with settlement of accounts, and then to sue for breach of the official bond.[3] For a tort committed upon a third person by the ward, the guardian is not usually liable; at least not directly.[4] And in general it is so desirable to deprive the guardian of all possession and control of his ward's estate, when the ward has a civil grievance against him, that the latter's suit in damages ought to be at least accompanied by proceedings for removal of the guardian from his trust.

§ 983. Ward's Action or Bill for Account.

Whenever guardianship has been terminated, an action of account lies in favor of the ward. And this action is brought by the new guardian, or by next friend; or by the ward himself, if the period of his legal disability has expired. While his guardianship discontinues, chancery permits the ward by next friend to file his bill against the guardian for account. All this seems to apply rather to chancery than probate guardians; since direct proceedings for account in the court which issued letters of guardianship, followed by removal of the guardian, if unfaithful, and suit on his probate bond, afford the infant under such guardianship an ample and expeditious remedy. But for chancery guardians, purely testamentary guardians, and *quasi* guardians, and under peculiar circumstances, the more expensive and complicated

damages for corrupting the virtue of his ward. Brittain v. Cannady, 96 Ind. 266.

99. Powell v. Jones, 1 Ired. Eq. 337. See Bank of Virginia v. Craig, 6 Leigh, 399.

1. Porter v. Bleiler, 17 Barb. 149. See Senseman's Appeal, 21 Pa. St. 331; Sawyer v. Knowles, 33 Me. 208. And see Chilton v. Cabiness, 14 Ala. 447; Wilson *et al.* v. Galey, Guardian, 103 Ind. 257 (statute). Cf. Bonner v. Evans, 89 Ga. 656; Poullaine *et al.* v. Poullain, 76 Ga. 420.

2. Sherman v. Ballou, 8 Cow. 304; Blomfield v. Eyre, 8 Beav. 250.

3. Brooks v. Brooks, 11 Cush. 18; Thorndike v. Hinckley, 155 Mass. 263. The general guardian refusing to collect the purchase price of land, action may be brought in the ward's behalf by a guardian *ad litem*. Peterson v. Baillif, 52 Minn. 386.

4. Garrigus v. Ellis, 95 Ind. 598.

process of a bill in equity becomes the necessary resort. And this in England is still the usual course of procedure, while in most parts of the United States it has gradually gone out of use or has been superseded in great measure altogether.[5] But in some cases of *quasi* guardianship in this country,— the probate court having no jurisdiction at all in the premises,— a *quasi* ward on reaching full age has been allowed to sue in assumpsit for money in the *quasi* guardian's hands; for here, as it would appear, the old action of account was always proper.[6] In considering a ward's action at law on reaching full age, State practice concedes often a choice of remedies to the ward even where probate intervention is proper for compelling an account in court. Thus the guardian's failure to settle and pay over within a reasonable time after the ward's disability ends, has been considered of itself a breach of the condition of the probate bond, entitling the ward to sue at once his late guardian.[7] But if the ward, as he should more prudently do, goes into court and has a balance found by its adjudication against the guardian, he may treat the failure of the guardian to pay the amount as a new breach of the condition of the bond, dating from the time of default in performing the court's order.[8] And the guardian's failure thus to pay over in accordance with the court's decree creates such a debt in the ward's favor that the remedy of the ward is not exclusively confined to a suit on the guardianship bond, but he may instead sue in his own name, at his own choice.[9] In short, the general theory is that on the infant ward's attainment of majority the guardianship over him

5. Monell v. Monell, 5 Johns. Ch. 283; Linton v. Walker, 8 Fla. 144; Swan v. Dent, 2 Md. Ch. 111; Lemon v. Hansbarger, 6 Gratt. 301; Manning v. Manning, 61 Ga. 137; Macphers. Inf. 259, 348; Fanning v. Chadwick, 3 Pick. 424; Jones v. Beverly, 45 Ala. 161. The sureties under a void probate appointment may thus be held responsible together with the principal. Corbitt v. Carroll, 50 Ala. 315. As to appointing a receiver on the ward's bill for account, see Sage v. Hammonds, 27 Gratt. 651. To the ward's action against his guardian to compel a settlement, the surety on the guardian's bond where such bond was given should be made a party. Black v. Kaiser, 91 Ky. 422. Minter v. Clark, 92 Tenn. 459. And equity in peculiar and complicated cases, where the probate jurisdiction appears inadequate, will apply it remedies on the adult ward's application. Camp, *Re*, 126 N. Y. 377. As where the guardian in possession has himself a life tenant's interest in the fund.

6. Pickering v. De Rochemont, 45 N. H. 67; Field v. Torrey, 7 Vt. 372.

7. People v. Seelye, 146 Ill. 189.

8. People v. Seelye, 146 Ill. 189.

9. Cobb v. Kempton, 154 Mass. 266. An analogous rule prevails in the administration of estates. And see Lambert v. Billheimer, 125 Ind. 519.

ipso facto terminates; only that for convenient purposes beneficial to him a judicial supervision and control is exercised for bringing about a business-like adjustment of the late concerns of his wardship.

The ward may on attaining his majority bring action against the guardian for money due,[10] or for services rendered,[11] after the guardian has settled his accounts with the probate court.[12] A ward under age cannot compel an accounting[13] except in equity.[14] Where the ward dies before settlement it must be had with his legal representative.[15] A new guardian appointed may compel an accounting with his predecessor.[16] A guardian *de son tort* is not entitled as of right to an accounting.[17]

§ 984. Limitations, Laches.

The ward's right to call his guardian to account may be barred by limitation, computed from the time he becomes competent to act. In Pennsylvania it is said that the same principle applies as in other legal proceedings; and eighteen years' delay after the ward attains majority has been held fatal to a suit.[18] But in Illinois the rule is differently stated, and the guardian's liability to account is there considerer to last as long as the bond continues in force; the citation to account before the probate court being merely a means to ascertain delinquency as the foundation of a suit, and not of itself a suit at law or in equity.[19] The former may be regarded as the true doctrine for chancery guardianship or

10. Smith v. Smith, 210 F. 947; State v. Joest, 46 Ind. 233, 235; Hays v. Walker, 90 Ind. 105; Hix v. Duncan (Tex. Civ. App. 1907), 99 S. W. 422 (altough defendant retired as guardian before ward reached majority); Scoville v. Brock, 76 Vt. 385, 57 A. 967 (for failure to sell stocks).

11. Ziedeman v. Molasky, 118 Mo. App. 106, 94 S. W. 754; Champlin v. Slocum (R. I.), 103 A. 706 (adult by second guardian may sue first guardian for services).

12. Campbell v. Scott, 3 Ind. T. 462, 58 S. W. 719; Ludowig v. Weber, 35 La. Ann. 579; Cobb v. Kempton, 154 Mass. 266, 28 N. E. 264; Hopkins v. Erskine (Me.), 107 A. 829. See *contra*, Jones v. Jones, 91 Ind. 378 (settlement not necessary).

13. McMurray's Estate, 107 Ia. 648, 78 N. W. 691; Guillebert v. Grenier, 107 La. 614, 32 So. 238 (unwise ward married cannot compel an accounting where not emancipated).

14. Peck v. Braman (Ind. 1828) 2 Blackf. 141.

15. Livermore v. Ratti, 150 Cal. 458, 89 P. 327.

16 Cobleigh v. Matheny, 181 Ill. App. 170.

17. Stull v. Benedict, 10 Cal. App. 619, 102 P. 961.

18. Bones' Appeal, 27 Pa. St. 492. See Magruder v. Goodwin, P. & H. 561; Adams v. Reviere, 59 Ga. 793.

19. Gilbert v. Guptill, 34 Ill. 112. And see last chapter.

proceedings in the nature of a bill for account; the latter for probate guardianship. The guardian's administrator in either case, if the guardian dies, should close up the trust accounts, if not already settled, before he makes distribution; since he may otherwise remain liable for many years.[20] But in most States the general subject of limitation in all trusts is expressly regulated by statute.[21]

Short delays by the ward, after coming of age, to require accounts and institute a suit on the bond, are not to be construed to the prejudice of his rights against either guardian or sureties.[22] But one who has been under guardianship is chargeable with constructive notice of the probate papers on file, and proceedings in the court relative thereto, and should prosecute his rights seasonably.[23] And special circumstances, such as a final settlement with the ward in connection with lapse of time, make the barrier stronger.[24]

A suit for failure of a guardian to reedem from a foreclosure is barred by laches when it is brought twenty years after the plaintiff has come of age and after the guardian had died and thirty-five years after the transaction complained of although the plaintiff claims that he has just learned of his interest in the property. The death of the guardian and the lapse of years renders laches an equitable defence to the suit.[25]

20. Musser v. Oliver, 21 Pa. St. 362. See Felton v. Long, 8 Ired. Eq. 224; Mitchell v. Williams, 27 Mo. 399; Pearson v. McMillan, 37 Miss. 588; Horton *et al.* v. Hastings, 128 Ind. 103. Equitable claim of ward allowed against deceased guardian's estate in Dodson v. McKelvey, 93 Mich. 263.

21. No statute of limitations begins to run before the ward's legal disability actually ends. Minter v. Clark, 92 Tenn. 459. And peculiar circumstances will require equity to extend the period. Matter of Petition of Camp, 126 N. Y. 377.

22. Pfeiffer v. Knapp, 17 Fla. 144.

23. Robert v. Morrin, 27 Mich. 306. The ward reaching age should either compel the guardian to settle his account, or obtain a judgment on the bond, before proving a claim against the estate of his insolvent guardian. Murray v. Wood, 144 Mass. 195. No action by the ward lies at law for moneys in the guardian's hands until his accounts have been settled in court. Kugler v. Prien, imp., 62 Wis. 248. And see Gillespie v. Winn, 65 Cal. 429. But where settlement is delayed, suit lies on the guardian's bond in a fit case before his final settlement. The State to the Use of Koch v. Roeper, 82 Mo. 57.

24. Railsback v. Williamson, 88 Ill. 494. See § 389.

25. Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882, 47 L. R. A. (N. S.) 451.

§ 985. Ward's Right to Recover Embezzled Property, &c.

Courts of chancery will always aid the ward in recovering property embezzled, concealed, or conveyed away in fraud of his rights. The proper mode of procedure is by bill in equity. And while a probate guardian suspected of fraud should be cited to account, it has been held that, his estate being insolvent and his sureties irresponsible, it is not necessary for the ward to sue them before he can file a bill to recover such property as he can trace.[26] A summary process in the nature of an inquisition is provided by statute in some States, for ascertaining the whereabouts of stolen and missing property belonging to wards, by means of which all suspected persons, including the guardian himself, can be summoned before the probate court to answer lawful inquiries under oath.[27] And a writ of *ne exeat* is sometimes issued to protect a minor's interest, where the latter's property has been squandered or embezzled, and the guardian is about to abscond.[28]

Where a guardian squanders the funds of his ward they may be followed into the hands of any person who receives them with knowledge of the trust.[29]

§ 986. Fraudulent Transactions Set Aside on Ward's Behalf.

Fraudulent transactions cannot stand as against the ward. And in cases of this sort, equity will go to the substance rather than the form, in order to ascertain the real motives of one who professes to turn over trust property to third parties, and justice will be done if possible. Where a guardian, for instance, transfers a note with words importing trust to his private creditors as security for his own debt, the ward can follow it into their hands, or against other parties, and stop payment, whether sufficient consideration was paid by the holder or not.[30] But in all cases of this sort, third parties should have some notice, actual or constructive, of the existence of a trust; otherwise they cannot be made to suffer loss further than the usual rules of stolen property apply.[31] Rights of wards to real estate are frequently protected on these principles. Thus, where a mother interested in certain lands with her children obtained partition after being appointed

26. Hill v. McIntire, 39 N. H. 410.

27. Sherman v. Brewer, 11 Gray, 210.

28. People v. Barton, 16 Col. 75.

29. United States Fidelity & Guaranty Co. v. Citizens' State Bank, 36 N. D. 16, 161 N. W. 562, L. R. A. 1918E, 326.

30. Lockhart v. Phillips, 1 Ired. Eq. 342; Lemley v. Atwood, 65 N. C. 46.

31. Hill v. Johnston, 3 Ired. Eq. 432.

their guardian, bought in the premises, and, without paying the full purchase-money, gave a mortgage, taking an assignment to herself as guardian, the claim of the mortgagee with notice was postponed to the children's share.[32] So where a guardian who held a mortgage in his own right agreed with the mortgagor to substitute the ward's money for his own, letting the securities remain as before, this was held to be an equitable investment of the ward's money, and good against any subsequent disposition which the guardian might make, while in failing circumstances, to secure his own creditor.[33] The guardian's collusion with third parties to defeat any equity of the ward in land cannot prevail against the ward who seeks in season to set the conveyance aside.[34] And in any strong case of an illegal sale of the ward's property contrary to statute, and the conversion of the proceeds to the guardian's own use, a ward has not only his remedy upon the guardian's bond, but can repudiate the sale and recover his property.[35]

But fraud is a question of evidence. And the payment of a debt to a guardian before it is due is not sufficient in itself to establish an unfair purpose. Hence it was decided in a North Carolina case, that where one owing a bond to a guardian in failing circumstances, the bond being in behalf of the ward, and not yet due, held also a note against the guardian himself, which he gave to an attorney to collect, with explicit instructions not to make an exchange, but to collect the note given him, and with the proceeds to take up the bond due the guardian, and such attorney received a bank check from the guardian, and believing the money to be in bank, and that the check was as good as money, returned the note to the guardian, and took up the bond in his hands, these acts having been performed in good faith, the ward could not pursue his former debtor.[36]

32. Messervey v. Barelli, 2 Hill Ch. 567.

33. Evertson v. Evertson, 5 Paige, 644. In this case the creditor had not even notice of the ward's rights. And see Gannaway v. Tapley, 1 Cold. 572; Robinson v. Robinson, 22 Ia. 427.

34. Beazley v. Harris, 1 Bush, 533. See McFarland v. Conlee, 44 Ill. 455.

35. State v. Murray, 24 Md. 310. See *infra*, §§ 787, 788.

36. Wynne v. Benbury, 4 Jones, Eq. 395. And see, as to fraud generally, Story, Eq. Juris, §§ 317-320; Harrison v. Bradley, 5 Ired. Eq. 136; Dawson v. Massey, 1 Ball & B. 329; Henry v. Pennington, 11 B. Monr. 55.

§ 987. Ward's Rights to Ratify or Repudiate Transactions of Guardian; Estoppel.

We have seen that the transactions of a guardian on behalf of his infant ward are valid, if within the scope of his general powers, or authorized by the courts of equity; sustainable, though neither within the scope of his powers nor previously authorized, if the court afterwards deems them prudent or beneficial to the ward; in other cases, subject to the ward's own disaffirmance on reaching majority. Herein consists the infant's right of election. Few acts of the guardian can be pronounced valid, except in the sense that they are authorized, either generally or specially, by the court which exercises supervision; and few of his transactions can be so utterly without authority as to be absolutely void *per se*. The general rule of election recognizes, then, two principles: first, the privilege of the infant ward, on attaining full age, to avoid his guardian's doubtful transaction; second, the right of courts of equity to control this privilege by interposing to pronounce the transaction good. The whole doctrine, therefore, seems in strict accordance with that more general rule, that the accounts of the guardian are open to the inspection of the ward at majority, and may be disputed down to the smallest item. And where, as in the case of probate guardians, settlements out of court do not dispense with final returns for preservation and public record, the tendency of the decisions must be in favor of bringing the question of affirmance or disaffirmance of the guardian's transaction before the court, instead of leaving it to acts of the late ward *in pais*. These principles suffice for general application to compromises, submissions to arbitration, investments and reinvestments of personal property, and similar transactions, undertaken by the guardian on the strength of a previous order of court, or at the risk of its subsequent approval.[37] Yet statutes sometimes interpose to render such transactions absolutely perfect on permission of the court. And where the guardian's position in a transaction is that of trustee of an express trust, the transaction will conclude the ward.[38] Infants, as we shall see elsewhere, are incapable of assenting during infancy to anything prejudicial to their property interests; and any consent so procured, if not actually void, can

37. Barnaby v. Barnaby, 1 Pick. 221. See *supra*, chs. 6, 8.

38. Loehr v. Colborn, 92 Ind. 24.

at all events be retracted after the infant reaches majority, except so far as the court rightfully controls his choice.[39]

The ward is not estopped by the unauthorized acts of the guardian,[40] and the ward while under age cannot even by requesting an unauthorized act estop himself from complaining of it.[41]

The ward may ratify the guardian's unauthorized acts after he comes of full age.[42]

But the ward may be barred by the lapse of time alone, or of time in connection with his own acts, from disaffirming in law or equity his own transactions or his guardian's unauthorized acts; though to be barred by his own acts in all such transactions, it should appear that he acted after termination of his disability, with deliberation and on full knowledge of the essential facts.[43] Thus, where a guardian has exceeded his ward's income in purchasing for him a horse and buggy, there will be a ratification presumed from circumstances showing that the ward used them after majority and received the proceeds of their sale.[44]

But mere silent acquiescence in a guardian's unlawful and prejudicial acts is not readily treated as debarring the ward from asserting his rights at majority; and to estop the latter by ratification, that ratification should be clear and founded upon a knowl-

39. Part V., chs. 2, 3.

40. Hobbs v. Nashville, C. & St. L. Ry. Co., 122 Ala. 602, 26 So. 139, 82 Am. St. R. 103; Brandau v. Greer, 95 Miss. 100, 48 So. 519; Draper v. Clayton, 87 Neb. 443, 127 N. W. 369; Wipff v. Heder (Tex. Civ. App. 1897), 41 S. W. 164; Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744.

41. Reynolds v. Garber-Buick Co., 149 N. W. 985, L. R. A. 1915C, 362.

42. Dale v. Dale (Ark.), 203 S. W. 258 (receipt in full); Brandau v. Greer, 95 Miss. 100, 48 So. 519 (on proof of full knowledge only); Hoyt v. Dollar Sav. Bank of the City of New York, 175 N. Y. S. 377. See (Civ. App.) Merrill v. Bradley, 121 S. W. 561 (certified questions answered), 102 Tex. 481, 119 S. W. 297.

43. Fish v. Miller, 1 Hoff. Ch. 267; Binion v. Miller, 27 Ga. 78; Scott v. Freeland, 7 S. & M. 409; Hume v. Hume, 3 Barr, 144; Worrell's Appeal, 23 Pa. St. 44; Sherry v. Sansberry, 3 Ind. 320; Penn v. Heisey, 19 Ill. 295; Trader v. Lowe, 45 Md. 1; Ferguson v. Lowery, 54 Ala. 510; Singleton v. Love, 1 Head, 357; Macphers. Inf. 538-543; Lee v. Brown, 4 Ves. 361; Cory v. Gertcken, 2 Madd. 40; Allfrey v. Allfrey, 11 Jur. 981; Manson v. Simplot, 119 Ia. 94, 93 N. W. 75; Manion v. Conley, 22 Ky. Law Rep. 850, 59 S. W. 11 (two years); Davis v. Richards, 22 Ky. Law Rep. 590, 58 S. W. 477; Jones v. Jones, 51 La. Ann. 636, 25 So. 368; *In re* Klunck, 68 N. Y. S. 629, 33 Misc. Rep. 267; Baylor v. Fulkerson's Ex'rs, 96 Va. 265, 31 S. E. 63. See Young v. Downey, 150 Mo. 317, 51 S. W. 751; Le Roy v. Jacobosky, 136 N. C. 433, 48 S. E. 796, 67 L. R. A. 977.

44. Caffey v. McMichael, 64 N. C. 507. As to lapse of time as a barrier, see *supra*, § 984.

edge of the whole circumstances.[45] And where the ward was not informed of his rights sooner, he is free to assert them.[46] To assert them, however, against the guardian so as to pursue the innocent sureties on the guardian's bond, or a former guardian, is another matter.[47] An unauthorized act may be ratified by the court,[48] or by a final settlement after the ward becomes of age.[49]

The ward or a succeeding guardian may ratify an unauthorized investment if it increases in value and disaffirm it if it depreciates.[50] A demand by the ward on attaining full age of the proceeds of an investment may ratify it,[51] but suit for the proceeds may not be an estoppel to set aside an unauthorized investment where the position of the defendant was in no way affected and the suit was dismissed.[52]

But as to transactions which involve the purchase or sale of real estate on the infant ward's behalf, the rule is very strict, as we have already seen. The ward is not bound even by his guardian's

45. Foley v. Mutual Life Co., 138 N. Y. 333. Cf. Young v. Walker, 70 Miss. 813; Curtis v. Devoe, 121 Cal. 468, 53 P. 936; Gulf, C. & S. F. Ry. Co. v. Lemons (Tex. Civ. App.), 152 S. W. 1139.

46. As where the guardian had carelessly and without right paid over certain proceeds of the ward's property to the ward's mother. Mulholland's Estate v. Meeker's Appeal, 154 Pa. St. 491.

47. See Hart v. Stribling, 25 Fla. 435; Hill v. Lancaster, 88 Ky. 338. Where the guardian is, at the ward's majority, appointed her trustee, or goes on as her attorney, some affirmative and unequivocal act by which he elects to hold the fund in the new capacity may be regarded favorably as to the surety on the guardianship bond. Tittman v. Green, 108 Mo. 22. Cf. § 961.

Settlement of a decedent's estate is not to be reopened after fifty years at the instance of one distributee who was an infant when the decree was entered. Seldner v. McCreery, 75 Md. 287. Nor are heirs of a deceased ward to be favored in reopening what appears to have been fairly affirmed, so as to disturb vested rights. Kingsley v. Jordan, 85 Me. 137.

48. *In re* Dilworth's Estate, 243 Pa. 475, 90 A. 356. See McCutchen v. Roush, 139 Ia. 351, 115 N. W. 903 (order of court authorizing guardian to prosecute a claim for unauthorized transfer is not a ratification).

49. Ellender v. Ellender Bros., 135 La. 45, 64 So. 977; Hoverstock v. Rogers, 177 Mo. App. 446, 163 S. W. 924; Borcher v. McGuire, 85 Neb. 646, 124 N. W. 111; Kulp v. Heimann, 90 Neb. 167, 133 N. W. 206; O'Donnell v. Same, *Id.* 208; Weekes v. Same, *Id.;* Lasoys Oil Co. v. Zulkey, 40 Okla. 690, 140 P. 160. See Crain v. Tremont Lumber Co., 134 La. 276, 63 So. 901 (not where proceeds received without knowledge). See Fahey v. Fahey, 128 La. 503, 54 So. 973. See Howe v. Blomenkamp, 88 Neb. 389, 129 N. W. 539 (not by settlement with another guardian).

50. Rogers v. Dickey, 117 Ga. 819, 45 S. E. 71.

51. Steinhart v. Gregory, 176 Ala. 368, 58 So. 266.

52. Featherstone v. Betlejewski, 75 Ill. App. 59.

exchange of his lands by way of equivalent.[53] A defective sale of real estate under the statute may in some States be set aside on a bill in equity filed by the infant against the guardian and the purchasers.[54] And where the guardian contracts to buy real estate for the ward's benefit, the ward, on reaching majority, may either complete the contract or reject it, and look to the guardian for payment.[55] But he cannot, in absence of fraud, compel the vendor to refund the money paid down as a bonus.[56] Nor can he, having once renounced, seek to be relieved against such renunciation.[57] The right of election goes to the ward's personal representatives if he dies under age.[58]

And it would appear to be a general principle that where the ward, after arriving of age, with full knowledge of all the facts and in the absence of fraud, receives and retains the purchase-money arising from the guardian's sale of his land, he cannot question the validity of the sale afterwards,[59] and the ward cannot keep the property and have it free from the vendor's lien,[60] but acceptance of returns from the property does not amount to a ratification.[61] In other words, the ward may choose whether to repudiate the sale and recover the land, or ratify it and claim the purchase-money. Without some proper judicial sanction, at least, a guardian cannot divest his ward of rights in real estate against the ward's power to assent or dissent, when *sui juris*.[62]

53. Morgan v. Johnson, 68 Ill. 190.

54. 2 Kent, Com. 230; Eckford v. De Kay, 8 Paige, 89; Westbrook v. Comstock, Walker Ch. 314. See *supra*, ch. 7. As to adjustment of rents and improvements in such cases, see Anderson v. Layton, 3 Bush, 87; Holbrook v. Brooks, 33 Conn. 347; Summers v. Howard, 33 Ark. 490. And see Tatum v. Holliday, 59 Mo. 422.

55. Loyd v. Malone, 23 Ill. 43; Hopk. 337; Murrill v. Humphrey, 88 N. C. 138.

56. Yerger v. Jones, 16 How. 30.

57. Floyd v. Johnston, 2 Litt. 109.

58. Singleton v. Love, 1 Head, 357; Dean v. Feeley, 66 Ga. 273. Whether the right of election applies where the guardian took land in discharge of a predecessor's indebtedness, see Beam v. Froneberger, 75 N. C. 540; Clayton v. McKinnon, 54 Tex. 206.

59. Deford v. Mercer, 24 Ia. 118; Parmele v. McGinty, 52 Miss. 476; Shorter v. Frazer, 64 Ala. 74; O'Conner v. Carver, 12 Heisk. 436. See *post*, Part V, ch. 5, as to disaffirmance by infant without restitution; Bevis v. Heflin, 63 Ind. 129.

60. Howard v. Cassels, 105 Ga. 412, 31 S. E. 562, 70 Am. St. R. 44.

61. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066, 110 Ill. App. 648; Manternach v. Studt, 240 Ill. 464, 88 N. E. 1000; Bachelor v. Korb, 58 Neb. 122, 78 N. W. 485, 76 Am. St. R. 70 (proceeds of sale applied to maintenance of ward does not amount to ratification).

62. Rainey v. Chambers, 56 Tex. 17. And see, as to setting aside a void decree of sale, Reynolds v. McCurry *et al.*, 100 Ill. 356; White *et al.* v. Clawson *et al.*, 79 Ind. 188.

The ward's disaffirmance of a sale may appear by his suit to recover the value of the property sold.[63] But a void deed executed by a guardian in the name of the ward cannot be ratified by the ward.[64]

§ 988. Resulting Trusts; Guardian's Misuse of Funds; Purchase of Ward's Property, &c.

All advantageous bargains which a guardian makes with the ward's funds are also considered subject to the ward's election, either to repudiate or to uphold the contract and take the profits. This applies, in general, to improper acts; as where the guardian speculates with the trust funds, or invests them in his own business, or, in a word, converts them to his own use. The ward may either take the investment as he finds it, with all the profits, or demand the original fund, with interest; though he cannot avoid a transaction in part and ratify.[65] The guardian is liable for the ward's estate which he has converted to his own use,[66] and for expenses of recovering such proeprty.[67] One receiving money from the guardian knowing that it belonged to the ward is responsible.[68] And where the ward has declined to elect whether he will take

63. Ayer & Lord Tie Co. v. Witherspoon's Adm'r, 30 Ky. Law Rep. 1067, 100 S. W. 259.

64. Dellinger v. Foltz, 93 Va. 729, 25 S. E. 998. See Clay v. Thomas, 178 Ky. 199, 198 S. W. 762; Slafter v. Savage, 95 A. 790.

65. 2 Kent, Com. 230; Docker v. Somes, 2 M. & K. 664; Kyle v. Barnett, 17 Ala. 306; Singleton v. Love, 1 Head, 357; White v. Parker, 8 Barb. 48; Jones v. Beverley, 45 Ala. 161; *supra*, §§ 352-354. A female ward living with her father on land mortgaged by him to her guardian does not necessarily ratify the guardian's loan on the mortgage. Winslow v. The People, 117 Ill. 152. After repudiation of the transaction, the ward cannot ask to have the deed reformed. Rowley v. Towsley, 53 Mich. 329.

66. Moore v. Smith, 182 F. 540; Covey v. Neff, 63 Ind. 391; *In re* Stude's Estate (Ia.), 162 N. W. 10; Sims v. Billington, 50 La. Ann. 968, 24 So. 637; *In re* Terry's Estate, 65 N. Y. S. 655, 31 Misc. 477; *In re* Klein, 142 N. Y. S. 557, 80 Misc. 377; Tonges v. Vanderveer Canarsie Improvement Syndicate, 148 N. Y. S. 748; Duffy v. Williams, 148 N. C. 530, 62 S. E. 611 (where funds mingled); American Surety Co. of New York v. Hardwick (Tex. Civ. App.), 186 S. W. 804; Hunter v. Lawrence's Adm'r (Va.), 11 Gratt. 111, 62 Am. Dec. 640; Burwell v. Burwell's Guardian, 78 Va. 574. See Buffalo Loan, Trust & Safe-Deposit Co. v. Leonard, 41 N. Y. S. 294, 9 App. Div. 384, 75 N. Y. St. Rep. 705, 154 N. Y. 141, 47 N. E. 966 (liability for negligently allowing executor to waste estate).

67. State *ex rel.* Patterson v. Tittman, 134 Mo. 162, 35 S. W. 579.

68. Steinhart v. Gregory, 176 Ala. 368, 58 So. 266; Montgomery v. Rauer, 125 Cal. 227, 57 P. 894 (although applied to a personal debt to him from the guardian); Empire State Surety Co. v. Cohen, 156 N. Y. S. 935, 93 Misc. 299.

interest or the profits derived by his guardian from an investment which he was not authorized to make (as in the guardian's business), the court may make the election for the ward.[69] And so as to electing to take land which has enhanced in value since the guardian took title to himself.[70] For it is right that the ward should enjoy all the advantages which have accrued from the use of his own money; and it is also right that the guardian should not derive gain from the ward's loss. The old rule of chancery in this respect has been gradually relaxed; so that many acts of a trustee, which might once have been considered fraudulent and void are now deemed voidable only.[71]

Thus it is that the rule may now be considered well settled that the guardian who buys at the sale of his ward's lands or other property is secure in his purchase, and retains all the benefits arising therefrom, unless the ward chooses to set it aside and claims to be reinstated in his own possession. This rule is laid down, however, with great caution in the courts;[72] and it is frequently said that the transaction is treated all the same, whether the guardian bought the property outright or there was a colorable purchase by means of third parties; moreover, that such sales, in order to stand at all, must have been conducted fairly and in good faith.[73] Where the circumstances show fraud and collusion, courts of equity hesitate little in setting the transaction aside.[74] And a material question for consideration in such sales is whether a fair price was paid for the property. Parties affected with notice of the circumstances cannot complain if their title to real estate becomes thereby impaired; but it is hard that purchasers without notice should suffer. On this latter principle, and for the security of title, rests a decision in Massachusetts, to the effect that the guardian's purchase of his ward's real estate is voidable by the

69. Seguin's Appeal, 103 Pa. St. 139.

70. See Tealie v. Hoyte, 3 Tenn. Ch. 651.

71. See Hill on Trustees, 159, 536; Cassedy v. Casey, 58 Ia. 326.

72. See Brockett v. Richardson, 61 Miss. 766, as to a joint purchase; also Barber v. Bowen, 47 Minn. 118, where a purchase by the guardian of minor heirs at a regular administrator's sale was upheld.

73. 2 Kent, Com. 230; Scott v. Freeland, 7 S. & M. 409; Doe v. Hassell, 68 N. C. 213; Elrod v. Lancaster, 2 Head, 571; Patton v. Thompson, 2 Jones Eq. 285; Chorpenning's Appeal, 32 Pa. St. 315; Crump *et al.*, *Ex parte*, 16 Lea, 732. And see *supra*, chs. 6, 7.

74. Hayward v. Ellis, 13 Pick. 272. And see Winter v. Truax, 87 Mich. 324, where a guardian sold and procured an immediate reconveyance to himself by the purchaser at the same price.

ward only as against the guardian, or a purchaser claiming under him with knowledge of the circumstances; and not as against a subsequent grantee or mortgagee without notice.[75]

In general, if with the ward's funds the guardian purchases land and takes title to himself, a subsequent purchaser's rights should depend upon good faith and the question whether he had due notice of the ward's title.[76] The fact that on final settlement a decree is rendered against the guardian and his sureties for such funds, does not estop the ward from enforcing his resulting trust in the land.[77] And a guardian's sale of his own property to the ward may be disavowed by the latter on coming of age.[78]

If the ward does not ratify an unauthorized investment, neither purity of intention nor diligence and good faith in endeavoring to prevent loss thereby will absolve the guardian from liability therefor.[79] But, in general, the guardian may discharge himself by turning over what securities and property he has taken in good faith and in the rightful exercise of his trust, if it remains as the result of prudent management of the estate on his part, whether valuable or worthless at the time of final settlement; his liability extending to property of the ward which has come to his actual or potential control; and securities being turned over at their just valuation, like specific corporeal chattels.[80] But a settlement with the ward by turning over what the guardian knows to be bad securities improperly taken should not be countenanced.[81]

A guardian ought not to hold, as property of his ward, notes or securities which on their face evidence a debt due to the guardian

75. Wyman v. Hooper, 2 Gray, 141. As to the English doctrine, see Morse v. Royal, 12 Ves. 372; Cary v. Cary, 2 Sch. & Lef. 173; Naylor v. Winch, 1 Sim. & Stu. 567. Here that constructive notice which the public records furnish is perhaps to be deemed unavailing on the ward's behalf. And see Taylor v. Brown, 55 Mich. 482.

76. Title running to the guardian as "trustee" should put such third party upon guard. Morrison v. Kinstra, 55 Miss. 71. And see Armitage v. Snowden, 41 Md. 119; Bevis v. Heflin, 63 Md. 129; White v. Izelin, 26 Minn. 487; Webster v. Bebinger, 70 Ind. 9. For a case where A. bought land, his grantor retaining a lien for the purchase-money, and then used the ward's money to pay for the land, see French *et al.* v. Sheplor *et al.*, 83 Ind. 266.

77. Robinson v. Pebworth, 71 Ala. 240.

78. Hendee v. Cleaveland, 54 Vt. 142; Grandstrand, *Re*, 49 Minn. 438.

79. May v. Duke, 61 Ala. 53.

80. *Supra*, ch. 6; State v. Foy, 71 N. C. 527; Goodson v. Goodson, 6 Ired. Eq. 238. Guardian held liable for carelessness in procuring the issue of an erroneous decree of distribution to the ward's injury. Pierce v. Prescott, 128 Mass. 140.

81. Burwell v. Burwell, 78 Va. 574. It is a fraud upon the ward for a guardian to turn over to this succes-

or his predecessor in his individual right, unidentified as the ward's property.[82] In equity the ward may follow not only money belonging to him which has been invested in land by his guardian, but any specific chattel purchased with his funds, into which his funds can be clearly traced, even though the guardian took title to himself. if, however, the ward elects to take the money, such property vests absolutely in the guardian, and those standing upon the guardian's title.[83] And unless the fund can be traced into some specific thing or be clearly identified, the ward, of course, cannot assert his right therein;[84] and the usual rules apply as to *bona fide* third parties who may have meantime acquired title. We may finally observe that a ward who repudiates a transaction to the disadvantage of some *bona fide* third person, ought in justice to offer to restore the consideration as far as he is able,[85] but the ward may recover from one who takes with knowledge of improper use of the ward's funds.[86]

A resulting trust to the ward may be established, on his election, in lands which the guardian has taken in his own or another's name, but upon consideration out of the ward's estate.[87] And a guardian may for convenience have taken real estate or even mortgage notes or other securities in his own name, and yet by his dealings show a plain intent to hold it in trust for his ward, subject to expenses incurred in its management and accounting for its income and proceeds, and giving the ward the right to claim title by proceedings in equity or otherwise.[88]

The guardian is liable for losses caused by his unauthorized use

sor the latter's note to him instead of funds of the estate. State v. Leslie, 83 Mo. 60.

82. State v. Greensdale, 106 Ind. 364. For a guardian to take notes for money belonging to his ward, payable to himself in his own name, is not in law a conversion, though tending perhaps to show a conversion. Richardson v. State, 55 Ind. 381, doubted in State v. Greensdale, *supra*. See § 385.

83. Chanslor v. Chanslor, 11 Bush, 663. As to recovering the thing from third parties after an unproductive suit on the guardian's bond, see Branch v. De Bose, 55 Ga. 21. For the guardian to take a surrender of his own note in payment of the price of his ward's property, is a breach of duty. Heflen v. Bevis *et ux.*, 82 Ind. 388.

84. Vason v. Bell, 53 Ga. 416.

85. See Myrick v. Jacks, 39 Ark. 293; Part V, ch. 5.

86. Williams v. Francis (Okla.), 166 P. 699; *In re* Anderson, 97 Wash. 688, 167 P. 71.

87. Hamnett's Appeal, 72 Pa. St. 337; Pfeiffer v. Knapp, 17 Fla. 144; Summers v. Howard, 33 Ark. 490; Sterling v. Arnold, 54 Ga. 690; Whitehead v. Jones, 56 Ala. 152; Patterson v. Booth, 103 Mo. 422.

88. Fogler v. Buck, 66 Me. 205.

of funds,[89] or by his negligence in handling them,[90] but the guardian is not an insurer and is not liable for losses where he has acted in good faith and without negligence.[91] The guardian must make good the loss whatever it may be.[92]

The fact that the guardian took a note in his own personal name is an indication of fraud.[93] That a guardian should have been charged a greater rate of interest than normal on some transactions does not characterize as fraudulent prior transactions which were honest.[94] A fraudulent settlement of the ward's cause of action may be vacated though it has been approved by the court and the other party to the settlement did not participate in the fraud.[95]

§ 989. Transactions Between Guardian and Ward; Undue Influence.

This brings us to the general subject of transactions between the guardian and ward, from which the former derives a benefit. Here, as in the guardian's purchases, equity is not disposed to favor him. "In this class of cases," says Judge Story, "there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud."[96] Equity will relieve against such transactions,

89. Rogers v. Dickey, 117 Ga. 819, 45 S. E. 71; Selph v. Burton's Adm'r, 24 Ky. Law Rep. 310, 68 S. W. 407 (removal of property from State by taking mortgage on land in another State).

90. Boaz v. Milliken, 83 Ky. 634, 7 Ky. Law Rep. 777 (fraud of another made possible by gross neglect of guardian); Taylor v. Kellogg, 103 Mo. App. 258, 77 S. W. 130; Anderson v. Anderson (Okla.), 165 P. 145 (failure to taking security); Mountcastle v. Mills, 58 Tenn. 267; Abrams v. United States Fidelity & Guaranty Co., 127 Wis. 579, 106 N. W. 1091, 5 L. R. A. 575, 115 Am. St. R. 1091 (leaving funds in hands of attorney for investment). See Easton v. Somerville, 111 Ia. 164, 82 N. W. 475, 82 Am. St. R. 502 (no liability where no damage).

91. Beach v. Moser, 4 Kan. App. 66, 46 P. 202 (default of agent); Owens v. Anderson, 6 K. Law Rep. 446; Hancock v. Cooper, 18 Ky. Law Rep. 966, 38 S. W. 383; Succession of Guillebert, 133 La. 603, 63 So. 237; *In re* Pinchefski, 166 N. Y. S. 204, 179 App. Div. 578; *In re* Clark's Estate, 39 Pa. Super. Ct. 445; *In re* Glassburner's Estate, 40 Pa. Super. Ct. 134; Murph v. McCullough, 40 Tex. Civ. App. 403, 90 S. W. 69 (failure of bank); Windon v. Stewart, 43 W. Va. 711, 28 S. E. 776 (error of judgment).

92. Pearson v. Haydel, 87 Mo. App. 495 (loan less value of security).

93. Slauter v. Favorite, 107 Ind. 291, 4 N. E. 880, 57 Am. R. 106.

94. Smith v. Smith, 45 Mont. 535, 125 P. 987.

95. Dasich v. La Rue Mining Co., 126 Minn. 194, 148 N. W. 45. See Bunch v. Foreman Blades Lumber Co., 174 N. C. 8, 93 S. E. 374.

96. Story, Eq. Juris., § 307.

on the general principle of utility, although there may not have been actual imposition; but if an improper advantage has been taken, the ground for relief is still stronger. And it is noticeable that a more stringent rule has been laid down as to guardians than applies to transactions between parent and child; for a guardian is not supposed to be influenced by that affection for his ward which parents entertain towards their own offspring, and therefore has no such powerful check upon his selfish feelings.[97]

From the confidential nature of the relationship of guardian and ward, it will be presumed that the ward acts under the influence of the guardian, and all transactions and dealings between them, prejudicially affecting the interests of the ward, will be held to be constructively fraudulent, and this presumption continues even after the guardianship is ended, when the affairs of the guardianship have not been fully settled; and transactions between them, during the continuation of the presumed influence, which are injurious to the ward, will be set aside, unless shown to be the deliberate act of the ward after full knowledge of his rights. The mere fact that the ward at the time of the settlement had independent counsel does not of itself release the guardian, but only if it then appears that he made a full disclosure does he discharge his duty.[98]

A guardian may have dealings with the ward provided they are on close scrutiny shown to be fair,[99] but no dealing between them to the advantage of the guardian will be upheld.[1]

§ 990. Situation of Parties at Final Settlement of Accounts.

Such questions generally arise at and about the time the ward attains majority, and pending the final settlement of the guardian's

97. Pierce v. Waring, cited 1 Ves. 380; Hylton v. Hylton, 2 Ves. 547; Hatch v. Hatch, 9 Ves. 296. See Hill on Trustees, 157-160. A ward may, after he becomes of age, disaffirm a contract which he made while an infant with his guardian, without restoring or offering to restore the property which he purchased and received under the contract; but where, after majority and without fraud or undue influence, such ward executes to his guardian a receipt for the value of the porperty received by him, such act is a valid ratification of the contract; and this even though the ward was ignorant that he had a right to disaffirm. Clark v. Van Court, 100 Ind. 113.

98. Harrison v. Harrison (N. M.), 155 P. 356, L. R. A. 1916E, 854.

99. Waldstein v. Barnett, 112 Ark. 141, 165 S. W. 459 (purchase of ward's property); Lamkin v. Robinson, 34 Ohio Cir. Ct. R. 91 (judg. affd., 88 Ohio St. 603, 106 N. E. 1065). See Akin v. Bonfils, 150 P. 194.

1. Beaven v. Stuart (U. S. C. C. A. Ala.), 250 F. 972; Stuart v. Beaven,

accounts. The English rule is very strict, and courts are extremely watchful to prevent all undue advatnage at this critical period. Therefore gifts and conveyances of the ward's property, in consideration of the guardian's services, on a final adjustment, may be set aside afterward in equity, even after the ward's death. "Where the connection is not dissolved, the accounts not settled, everything remaining pressing upon the mind of the party under the care of the guardian," observes Lord Eldon, "it is almost impossible that the transaction should stand." [2] Nor are the circumstances under which the gift was made considered of much account; for the guardian's superior age and knowledge of the world, and the fact that he holds the property in his hands, place him at a decided advantage, whether he chooses to adopt a threatening tone or to impose upon the ward's mind by excessive kindness. These general principles apply, though not always in the same degree, to all others sustaining fiduciary relations; including receivers and agents who manage the property of a *cestui que trust.* And unfair advantages of every sort, which the guardian aims to secure on a final adjustment of his accounts,— whether it be in the shape of compensation or the waiver of indebtedness incurred by his misconduct,— follow one invariable rule: that equity will relieve the ward against the consequences of his one-sided transaction.[3]

In this country the rule is somewhat different; for certain circumstances, such as public recognition that compensation of some sort is justly due a trustee for his services, may fairly contribute to relax the rule in the guardian's favor. Settlements and bargains between the guardian and ward out of court are, however, frequently set aside for corrupt influence. So are gifts and con-

38 S. Ct. 426; Patterson v. Griffith, 23 Ky. Law Rep. 334, 62 S. W. 884; Smith's Ex'r v. May, 24 Ky. Law Rep. 873, 70 S. W. 199; Fidelity Trust Co. v. Butler, 28 Ky. Law Rep. 1268, 91 S. W. 676; Williams v. Davison's Estate, 133 Mich. 344, 94 N. W. 1048, 10 Det. Leg. N. 220; Brandau v. Greer, 95 Miss. 100, 48 So. 519; Decree (Sur. 1905) 96 N. Y. S. 222 modified, *In re* Tyndall, 102 N. Y. S. 211, 117 App. Div. 294 (*Ex parte* order of surrogate approving contract is not binding on ward); Pevehouse v. Adams, 153 P. 65 (utmost good faith required).

2. Hatch v. Hatch, 9 Ves. 296.

3. Hylton v. Hylton, 2 Ves. 547; Wood v. Downes, 18 Ves. 120; Mulhallen v. Marum, 3 Dr. & W. 317; Aylward v. Kearney, 2 Ball & B. 463; Hunter v. Atkins, 3 M. & K. 135; Macphers. Inf. 260-264; Revett v. Harvey, 1 Sim. & Stu. 502; Duke of Hamilton v. Lord Mohun, 1 P. Wms. 118. But see Cray v. Mansfield, 1 Ves. Sen. 379, where gift to an agent was supported.

veyances in consideration of the guardian's services; more especially when undue influence is shown from special circumstances.[4] A guardian cannot recall his own gift to his ward; though such a gift might lead the court to regard the guardian's account for expenditure with favor towards him.[5]

In Pennsylvania it is said that settlements will not stand unless full deliberation and good faith are manifest; but that a settlement made in good faith, especially if wise and prudent, cannot be impeached, after the ward's death, by his representatives.[6] This is doubtless the rule elsewhere. And the mere fact that a settlement has been made between guardian and ward, with allowances in the guardian's favor, is not conclusive of fraud, though every intendment is still to be construed on the ward's behalf.[7]

A private settlement made with the ward on termination of guardianship will stand if fairly made,[8] but the burden rests on the guardian to show that he made full disclosure at the time of settlement and exercised the requisite degree of care in caring for the estate,[9] and if the settlement was unfair in any way it will not be sustained,[10] but a receipt in full signed by the ward before

4. Hall v. Cone, 5 Day, 543; Waller v. Armistead, 2 Leigh, 11; Sullivan v. Blackwell, 28 Miss. 737; Clowes v. Van Antwerp, 4 Barb. 416; Briers v. Hackney, 6 Ga. 419; Fridge v. State, 3 Gill & Johns. 103; Richardson v. Linney, 7 B. Monr. 571.

5. Bond v. Lockwood, 33 Ill. 212; Pratt v. McJunkin, 4 Rich. 5.

6. Hawkins's Appeal, 32 Pa. St. 263.

7. Kirby v. Taylor, 6 Johns. Ch. 242; McClellan v. Kennedy, 8 Md. 230; Spalding v. Brent, 3 Md. Ch. 411; Meek v. Perry, 6 Miss. 190; Myer v. Rives, 11 Ala. 76.

8. Norris v. Norris, 83 N. Y. S. 77, 85 App. Div. 113; Brown v. Adkinson, 22 Ky. Law Rep. 649, 58 S. W. 524; Holcher's Heirs v. Gehrig, 127 Ia. 369, 101 N. W. 759, 94 N. W. 486 (delay of four years before objecting to settlement); Burch v. Swift, 118 Ga. 931, 45 S. E. 698; Hooper v. Hooper, 26 Mich. 435; Epes v. Williams' Adm'r (Va. 1897), 27 S. E. 427 (after eleven years); Kelly v. McQuinn, 42 W. Va. 774, 26 S. E. 517; Lanman v. Lanman, 206 Mass. 488, 92 N. E. 885; Greenup v. United States Fidelity & Guaranty Co., 159 Ky. 647, 167 S. W. 910; Mouser v. Nunn, 142 Ky. 656, 134 S. W. 1148.

9. Harrison v. Harrison, 21 N. M. 372, 155 P. 356; Hall v. Turner's Estate, 78 Vt. 62, 61 A. 763; Line v. Lawder, 122 Ind. 548, 23 N. E. 758; (1906) Rouse v. Whitney, 102 N. Y. S. 899, 53 Misc. 56 (judg. rev., Same v. Payne (1907), 105 N. Y. S. 549).

10. Wilson v. Fidelity Trust Co., 30 Ky. Law Rep. 263, 97 S. W. 753 (when ward in jail); *In re* Lindsay's Guardianship, 132 Ia. 119, 109 N. W. 473; Hall v. Turner's Estate, 78 Vt. 62, 61 A. 763; O'Connor v. O'Connor (R. I., 1897), 37 A. 634 (although release in full is filed in court); Powell v. Powell, 52 Mich. 432, 18 N. W. 203; Succession of Lanphier, 104 La. 384, 29 So. 122; Succession of Vennard, 50 La. Ann. 808, 24 So. 283; Line v. Lawder, 122 Ind. 548, 23 N. E. 758 (when property not turned over to

the termination of the guardianship will not be binding.[11]

When the guardian makes a fair settlement with the ward just before he comes of age the ward cannot later attack the account.[12] Circumstances, such as great inadequacy of price in a guardian's purchase of his ward's property shortly after the latter reaches majority, would doubtless suffice, if not rebutted by ample proof of fairness, for setting aside the transaction as fraudulent.[13] In general, the burden is on the guardian who relies upon an outside informal settlement to show a full disclosure and that the ward understood himself to be making a full and final settlement.[14]

The fact that settlements out of court are not generally regarded in this country as conclusive, inasmuch as the probate guardian must still file his accounts and submit his transactions to the court, is a great safeguard against fraud. A fixed rule is established for the final adjustment of all matters in controversy between guardian and ward.[15] The chancery practice is to allow the ward a reasonable time, after attaining majority, usually one year, to reopen all accounts between himself and his guardian.[16] Hence a receipt in full, or a formal release, has been set aside as inconclusive.[17] And where the ward has made a partial inspection only, without examining the vouchers, or acted without advice, or upon imperfect knowledge of the facts, so much the greater is his equity to relief.[18] But in probate guardianship, settlements out of court usually give way to settlements in court.[19] A settlement made out of court, with no filing of accounts, and shortly after the ward reaches full

ward); Ellis v. Soper, 111 Ia. 631, 82 N. W. 1041 (on mistaken assurance of guardian that nothing is due); Baum v. Hartmann, 226 Ill. 160, 80 N. E. 711 (reversing, 122 Ill. App. 444).

11. Griffin v. Collins, 122 Ga. 102, 49 S. E. 827.

12. Alexander v. Hillebrand, 140 Mich. 490, 103 N. W. 849, 12 Det. Leg. N. 238, 112 Am. St. R. 417.

13. Eberts v. Eberts, 55 Pa. St. 110; Snell v. Elam, 2 Heisk. 82.

14. Gregory v. Orr, 61 Miss. 307.

15. In some States the probate courts and chancery courts have concurrent jurisdiction, and the ward may at his election proceed in either forum to compel a settlement. Hailey v. Bond, 64 Ala. 399.

16. Matter of Van Horne, 7 Paige, 46.

17. But a valid release absolving from all liability to account, and in fact acquitting the guardian of liability for unauthorized acts, is in some cases recognized; the late ward having thus acted when free from undue influence and as one clearly *sui juris*. Satterfield v. John, 53 Ala. 127; Cheever v. Congdon, 34 Mich. 296.

18. Revett v. Harvey, 1 Sim. & Stu. 502; Wych v. Packington, 3 Bro. P. C. 46; Rapalje v. Norsworthy, 1 Sandf. Ch. 399; Johnson v. Johnson, 2 Hill Ch. 277; Womack v. Austin, 1 S. C. (N. S.) 421.

19. Although the guardian has settled with his ward on the latter's ar-

age, is regarded with suspicion, and the guardian should satisfy the court that it was a fair one.[20] A settlement out of court, so-called, without turning over the property, is no settlement.[21] But if the guardian seeks the court of his own choice, and the ward makes no objection to the guardian's final account as presented, or records his approval, and it is thereupon judicially approved and recorded, and appeal is not taken, no necessity for application of the chancery rule, of reopening the account, seems to exist, except upon very strong proof of fraud or error.[22] If the ward be dead,

rival at full age, he may be called afterward to file and settle his account. Marr's Appeal, 78 Pa. St. 66. The guardian must deliver to the proper party entitled. A guardian's deposit of funds with a county clerk, who afterwards defaults, held (such officer not being officially accountable for such funds) to render the guardian and his bondsman accountable and not the defaulting clerk's bondsman. Scott v. State, 46 Ind. 203; State v. Fleming, 46 Ind. 206. And this even though the court directed the guardian upon resigning to deposit thus. *Ib.; sed qu.* Verbal directions of a judge of probate will not protect a guardian. Folger v. Heidel, 60 Mo. 284. A guardian having mortgaged as additional security for indebtedness to his ward, a suit to foreclose is no bar to proceedings for accounting against him and his sureties. Lanier v. Griffin, 11 S. C. 565. As to *ex parte* settlement in court, see Gravett v. Malone, 54 Ala. 19. A guardian's so-called account is inconclusive as such, unless submitted to and approved by the court. Beedle v. State, 62 Ind. 26. Judgment for money found to be due by a guardian to his ward on settlement with the ordinary must be collected by process of execution; attachment for contempt based on the failure of the guardian to pay and return of *nulla bona* does not lie. Burrow v. Gilbert, 58 Ga. 70. And see as to indictment, State v. Henry, 1 Lea, 720. Nor has the ward a lien, equitable or otherwise, upon his guardian's general estate to secure an honest management. Chanslor v. Chanslor, 11 Bush, 663; Vason v. Bell, 53 Ga. 416. As to accepting security from the guardian in lieu of the security of his bond, see Querin v. Carlin, 30 La. Ann. 1131.

Final settlement with infant ward duly represented by a guardian *ad litem* is as binding, as a rule, as a similar one made with an adult. Stabler v. Cook, 57 Ala. 22. But no final settlement of a guardian's account, so as to operate against the ward's rights, can be made by the court while the relation of guardian continues. Lewis v. Allred, 57 Ala. 628. In Brown v. Chadwick, 79 Mo. 587, a guardian paid over a certain amount to his late ward, but on mutual settlement in the probate court, a balance was found due the guardian. For receipts given by the ward after becoming of age, acquiesced in for more than four years and held *prima facie* binding, see Steadham *et al.* v. Sims, 68 Ga. 741; Dunsford v. Brown, 19 S. C. 560.

20. Roth's Estate, 150 Pa. St. 261.

21. Line v. Lawder, 122 Ind. 548.

22. Kittredge v. Betton, 14 N. H. 401; Musser v. Oliver, 21 Pa. St. 362. Pierce v. Irish, 31 Me. 254; Boynton v. Dyer, 8 Pick. 1; Hickman's Appeal, 7 Barr, 464; Southall v. Clark, 3 Stew. & Port. 338; McDow v. Brown, 2 S. C. (N. S.) 95; Bybee v. Tharp, 4 B. Monr. 313; Stoudenmire v. De Bardelaben, 72 Ala. 300. Yet a bill in chancery for correction, etc., may be maintained, notwithstanding the

the guardian's settlement must be with the ward's executor or administrator; but even thus a probate guardian's settlement is usually subject to the court's revision upon his accounts.[23] In

ward's certificate approving the probate account. Monnin v. Beroujon, 51 Ala. 196; Bruce v. Doolittle, 81 Ill. 103; Lindsay v. Lindsay, 28 Ohio St. 157. These are matters of statute regulation. High v. Suedicor, 57 Ala. 403. After long lapse of time following a probate settlement, every intendment is in its favor. Morganstern v. Shuster, 66 Md. 250. Among decisions which apply to transactions between guardian and ward the following may be noticed: Where a guardian advances money on his ward's account, he may have an assignment of the security. Kelchner v. Forney, 29 Pa. St. 47. In extending time for payment of a security the guardian may sometimes arrange fairly with his ward for special compensation. Burnham v. Dalling, 3 C. E. Green, 132. The guardian who does not insist on surrendering good securities, properly taken, as the estate of his ward, but pays out of his own funds instead, in part, may become to a corresponding extent joint owner of the securities. Higgins v. McClure, 7 Bush, 379.

But the guardian's own note or bond for the balance of money adjudged due on a final settlement is no payment to the ward, nor does it discharge the guardian's sureties. It is a mere postponement of final payment, and affords evidence of an admitted liability on his part. Wardlaw v. Gray, 2 Hill Ch. 644; Hamlin v. Atkinson, 6 Rand. 574. See also Douglas v. State, 44 Ind. 67; Coleman v. Davies, 45 Ga. 489. The guardian cannot buy up an equitable encumbrance, and enforce it against the ward who is ready to refund. Taylor v. Taylor, 6 B. Monr. 559. The ward may release to one of joint guardians, and thus hold the sureties, Kirby v. Taylor, 6 Johns. Ch. 242; though this principle may be affected by general rules as to probate bonds. A receipt in full discharges only for the amount actually received by the wards, may be contradicted by parol, and binds only such wards as were authorized to give it; and its validity and effect, though under seal, may be considered in court.

Witman's Appeal, 28 Pa. St. 376; Beedle v. State, 62 Ind. 26; Barnes v. Compton, 8 Gill, 391; Felton v. Long, 8 Ired. Eq. 224; Magruder v. Goodwyn, 2 P. & H. 561; Stark v. Gamble, 43 N. H. 465; Wade v. Lobdell, 4 Cush. 510. Cf. *n.* 7, *supra*, p. 625; 4 Redf. Surr. 310. It may appear that doubtful notes, like the guardian's own note, were accepted not in settlement, but for postponement of payment. Line *et al.* v. Lawder *et al.*, 122 Ind. 548. The settlement of an insolvent guardian with his ward is sometimes protected by a court of equity as against the guardian's assignee in insolvency. Moore v. Hazelton, 9 Allen, 102. Statutes are found which permit the ward at full age to waive his legal right to an account and join his guardian in asking the court for a discharge. Marr's Appeal, 78 Pa. St. 66. A guardian's probate settlement will not be presumed to include damages sustained by the infant's estate through fraud or misconduct of the guardian. Ordinary v. Dean, 44 N. J. L. 64.

23. Kenny v. Udall, 5 Johns. Ch. 464, 473; s. c., 3 Cow. 591; Van Epps v. Van Deusen, 4 Paige, 54; Van Deusen v. Van Deusen, 6 Paige, 366. See also Redfield's *n.* to Story, Eq. Juris., § 1361; Chambers v. Perry, 17 Ala. 726. The guardian of a ward who has imprudently married without his assent has been permitted, in this country, to bring a bill in equity for procuring the settlement of the ward's

short, the proper place to seek for an accounting, according to American practice, is the probate court; and the theory is that every guardian shall settle with the judge, or with a successor, or with the ward at full age, or with the ward's legal representatives, as the case may be, and upon final settlement pay over and deliver all the ward's property and balances which may thus be found due; otherwise action may be had upon his bond as for breach of condition thereof.[24] Accord and satisfaction with the adult husband of a married minor ward, which upon the theory of the old common law might have been admissible, is not to be favored in these days when a wife's separate property is so zealously protected;[25] but joint orders and joint receipts by the married female ward and her husband, if she be still an infant, are favorably regarded.[26] Lapse of time, following an informal settlement made with a ward who had reached majority, will bar a suit for an account in chancery, and raise a presumption that all transactions between them have been properly adjusted.[27] And even in our probate guardianship the late ward's release and receipt in full may under favorable circumstances be shown either in defence to a citation to settle accounts in court or as a voucher upon such settlement.[28]

moderate fortune upon her, against her husband's wishes. Murphy v. Green, 58 Tenn. 403. Trusts for children are sometimes made with a proviso as to the child's marrying with the approbation of the trustee or testamentary guardian. See Tweedale v. Tweedale, 7 Ch. D. 633.

As to a settlement upon a female infant, a ward of chancery, who married without the sanction of the court or the knowledge of the guardian, and was afterwards divorced, see Buckmatser, 33 Ch. D. 482; § 399. And see Sampson and Wall, 25 Ch. D. 482. No jurisdiction lies to compel an infant ward of court to make settlement of his own property because of his marriage without leave. Leigh v. Leigh, 40 Ch. D. 290.

24. But as to the guardian of a person formerly insane, some States hold that he may settle with his ward after the ward has recovered his reason, and need not submit his account to the probate court. Hooper v. Hooper, 26 Mich. 435. An insane person under guardianship cannot sue to impeach sales of his property made by his guardian. Robeson v. Martin, 93 Ind. 420.

25. Married wards stand essentially upon the same footing as others, as to having accounts settled in probate court. Wing v. Rowe, 69 Me. 282; Monnin v. Beroujon, 51 Ala. 196.

26. Dunsford v. Brown, 19 S. C. 560; Steadman *et al.* v. Sims, 68 Ga. 741; Hodges v. Council, 86 N. C. 181.

27. Bickerstaff v. Marlin, 60 Miss. 509. An infant wife cannot pursue the guardian's bond, unless her husband is of full age. Berkam v. The State *ex rel.* Miller *et al.*, 88 Ind. 200; Cox v. Johnson *et al.*, 80 Ala. 22.

28. Alexander's Estate, Lightner's Appeal, 156 Pa. St. 368; Ela v. Ela, 84 Me. 423. Especially when given by the ward two years or more after reaching majority.

Though a settlement with a minor ward of the age of discretion is not binding, still it may be given in evidence.[29]

Ratification of a private settlement between guardian and ward can be shown only by clear evidence.[30]

§ 991. Transactions After Guardianship is Ended.

Transactions after the period of guardianship, between parties lately holding the relation of guardian and ward, especially if the ward still remains under the influence of a former guardian, may be set aside upon the same principle of constructive fraud. It is true that bargains between them are good whenever the influence is fully removed; even to gifts and conveyances in consideration of past services, the accounts having been finally closed, the property duly transferred, and the late parties to the fiduciary relation standing toward one another as man and man. Under these circumstances, the late guardian may purchase property of his late ward,[31] and a contract entered into between a guardian and his former ward after termination of the guardianship may be valid,[32] but dealings between them soon after the ward comes of age will be scrutinized by the court with suspicion.[33] And where the influence still continues, as if the ward be a female, or a person of weak understanding, and the guardian continues to control the property or to furnish a home, the court is strongly disposed to set aside the bargain altogether.[34] Thus, where a guardian procures the late ward's indorsement of his own notes without consideration, the parties who take such notes with knowledge of the fiduciary relationship have been enjoined from enforcing them against the indorser.[35] And if the guardian purchase rights of the late ward in his father's property for a grossly inadequate consideration, it will be set aside.[36] The circumstance that the guardian had better

29. Alexander v. Hillebrand, 140 Mich. 490, 103 N. W. 849, 12 Det. Leg. N. 238, 112 Am. St. R. 417.

30. National Surety Co. v. State, 181 Ind. 54, 103 N. E. 105.

31. Oldin v. Samborn, 2 Atk. 15.

32. Williams v. Canary, 161 C. C. A. 352, 249 F. 344; Ullmer v. Fitzgerald, 102 Ga. 815, 32 S. E. 869.

33. Willis v. Rice, 157 Ala. 252, 58 So. 397; Taylor v. Calvert, 138 Ind. 67, 37 N. E. 531; Garvin's Adm'r v. Williams, 50 Mo. 206; Shiverick v. Bonsall, 173 N. Y. S. 90; Hart v. Cannon, 133 N. C. 10, 45 S. E. 351; Daniel v. Tolon (Okla.), 157 P. 756; Baylor v. Fulkerson's Ex'rs, 96 Va. 265, 31 S. E. 63; *In re* Anderson, 97 Wash. 688, 167 P. 71.

34. See Macphers. Inf. 260; Huguenin v. Baseley, 14 Ves. 273; Dent v. Bennett, 4 M. & C. 269; Mellish v. Mellish, 1 Sim. & Stu. 138; Dawson v. Massey, 1 Ball & B. 219; Harris v. Carstarphen, 69 N. C. 416; Garvin v. Williams, 50 Mo. 206.

35. Gale v. Wells, 12 Barb. 84.

36. Wright v. Arnold, 14 B. Moar.

opportunities of acquaintance with the actual condition and value of the property than the ward himself is properly to be considered on the latter's behalf. Purchases of the guardian's property by the late ward are to be closely scrutinized in like manner.[37] In all such cases and wherever the late guardian has extended the influence of his former relation to procuring some undue advantage, equity may interfere and enjoin or charge him as trustee or compel him to make restitution; not usually, however, in the sense that he is still a guardian.[38]

This principle applies to *quasi* guardians, even to parents. For example, a girl, who had been living for thirteen years with her mother and stepfather, joined the latter within twelve months after she became of age, at his request and under his influence, in a promissory note for which she received no consideration. The payee some years later obtained judgment at common law, and was about to take out execution, when the court of chancery interfered on motion, restrained the payee from enforcing his execution, and ordered the money paid into court.[39] And the composition of a debt on fair terms, made between an insolvent guardian and his ward about eight years after the latter became of age, will not readily be set aside for the purpose of enabling the ward at so late a day to reach the sureties on the guardian's bond.[40] Where the late ward sets aside the transaction for undue influence he ought to refund the money, if any, which he received by way of consideration.[41]

§ 992. Marriage of Ward Against Consent of Chancery or Guardian.

It is the rule of the English courts of chancery that no one can marry a ward of the court without its express sanction. And

638; Williams v. Powell, 1 Ired. Eq. 460; Wickiser v. Cook, 85 Ill. 68.

37. Sherry v. Sansberry, 3 Ind. 320. But as to carrying out, on arriving at age, a reasonable family arrangement, see Cowan's Appeal, 74 Pa. St. 329; *Re* Wood, 71 Mo. 623. Such transactions may be set aside against one recent fiduciary and upheld against another, as the equity of the case may warrant. Berkmeyer v. Kellerman, 32 Ohio St. 239.

38. People v. Seelye, 146 Ill. 189. But should the guardian remain in full control of the fund after the ward's majority, a probate court may treat it as in effect a continuance of the guardianship, and require all such transactions to go into the account. Pyatt v. Pyatt, 46 N. J. Eq. 285.

39. Espey v. Luke, 15 E. L. & Eq. 579. And see Maitland v. Backhouse, 16 Sim. 58.

40. Motley v. Motley, 45 Ala. 555.

41. Wickiser v. Cook, 85 Ill. 68. See a delay favorably regarded in Voltz v. Voltz, 75 Ala. 555.

wherever a guardian is appointed he must give a recognizance that the infant shall not marry without its leave.[42] If a man marry a female ward without the approbation of the court, he, and all others concerned, will be treated as guilty of a contempt of court, and punished accordingly. So where there is reason to suspect an improper marriage of its wards, the court will interfere, by injunction, to prevent the marriage, to forbid all intercourse between the lovers, and even to take the ward from the custody of the guardian or any other person who is supposed guilty of connivance with the match. When an offer of marriage is made, the court refers it to a master to ascertain and report whether the match is suitable, and also what settlement should be made upon the ward. Where a marriage has been celebrated without leave, the court will interfere to protect the female ward against the consequences of her indiscretion, and compel the husband to make a suitable settlement upon her. This whole subject is peculiar to the laws of England, and has no application whatever to courts of chancery in this country; unless it be that orders might issue in some cases of improvident marriage to compel the settlement of a suitable portion upon the female ward. Yet authority is wanting for even the exercise of chancery jurisdiction to this full extent: so repugnant does it appear to the whole tenor of our legislation. But where property of a female ward is under the control of a court of equity, and the husband needs its assistance, a suitable provision might be compelled on her behalf; for this would be in accordance with the general law of husband and wife.[43]

42. Story, Eq. Juris., §§ 1358-1361; Macphers. Inf. 191-209; Eyre v. Countess of Shaftesbury, 2 P. Wms. 111; Smith v. Smith, 3 Atk. 305; Stackpole v. Beaumont, 3 Ves. 98; Stevens v. Savage, 1 Ves. Jr. 154.

43. Ordway v. Phelps, 45 Ia. 279.

PART V.

INFANCY.

CHAPTER I.

THE GENERAL DISABILITIES OF INFANTS.

§ 993. Age of Majority.

All persons are infants, in legal contemplation, until they have arrived at majority. The period of majority differs in different States and countries; but this general principle remains the same.

By the civil law, full majority was not attained until the person had completed his twenty-fourth year; he was then said to be *perfectæ ætatis — ætatis legitimæ*.[44] This period was likewise adopted in France (though it was afterwards changed), and it prevails still in Spain, Holland, and some parts of Germany.[45] By the French civil code, the age of full capacity is twenty-one years, except that twenty-five years is the majority for contracting marriage without paternal consent, by the male, and twenty-one by the female.[46] The law of Scotland adopts the age of twenty-one.[47] Among the Greeks and early Romans women were never

44. 1 Burge, Col. & For. Laws, 113
45. *Ib.*, 114.
46. Code Civil, §§ 145, 488; 2 Kent, Com. 233.
47. Ersk. Inst., b. 1, tit. vii.; 1 Bl. Com. 464.

of age, but subject to perpetual guardianship, except as wives; this gradually changed, and the civil law, as it stood in the time of Justinian, permitted females as well as males to attain their majority at twenty-five.[48]

The common law of England, from the remotest times, has fixed twenty-one as the period of absolute majority for both sexes; or, to be more exact, an infant attains full age on the beginning of the day next preceding the twenty-first anniversary of his birth.[49] The same rule is applied in most parts of the United States, though, in some of the States, females have an enlarged capacity to act at eighteen.[50] Under the statutes of Vermont, Ohio, and Illinois, and various western States, females are deemed of age at eighteen.[51] The Code of Louisiana follows common-law, not civil-law, principles, and adopts twenty-one as the limitation for both sexes.[52] Thus arbitrary is the law which fixes the period of majority; nature assigning no precise and uniform period at which the disability of infancy shall cease, yet clearly indicating that there must be some such period.

A man born the first day of February, 1600, after eleven o'clock at night, was adjudged in England to be of full age after one o'clock on the morning of the last day of January, 1621.[53] This is because the common law makes no allowance for fractions of a day. But the civil law, in order to secure to the person the full protection afforded on account of his minority, did not hold the commencement of the day to be its completion, if injurious to his interests.[54]

48. Inst. 1, 23, 1; 1 Bl. Com. 464.

49. 2 Kent, Com. 233; 1 Bl. Com. 463; 1 Salk. 44; Ld. Raym. 480, 1096; 3 Wils. 274; Hamlin v. Stevenson, 4 Dana, 597; State v. Clarke, 3 Harring. 557; Wells v. Wells, 6 Ind. 447.

50. United States v. Wright, 116 C. C. A. 659, 197 F. 297; Banco De Sonora v. Bankers' etc., Co., 124 Ia. 576, 100 N. W. 532, 104 Am. St. R. 367; Beekman v. Beekman, 53 Fla. 858, 43 So. 923; International Text-Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722; 2 Kent, Com. 233. See Crapster v. Griffith, 2 Bland, Ch. 5.

51. In Alabama by statute a married woman attains full age at eighteen. Bennett v. Bennett, 169 Ala. 618, 53 So. 986; Sparhawk v. Buel, 9 Vt. 41; Stephenson v. Westfall, 18 Ill. 209.

52. Inst. 1, 23, 1; 1 Bl. Com. 464; Texas, Means v. Robinson, 7 Tex. 502. See Ward v. Laverty, 19 Neb. 429.

53. Fitzhue v. Dennington, 6 Mod. 259; 1 Salk. 44, and citations in last section. And see 1 Jarm. Wills, Eng. ed. 1861, 39; Met. Contr. 38. Judge Redfield dissents from this rule. See 1 Redf. Wills, 18-20.

54. J. Voet, lib. 4, tit. 4, n. 1.

§ 994. Enlarging Capacity During Non-Age; Legislative Relief from Non-Age.

The principle of an enlarging capacity in infants has been incidentally noticed. It is reasonable to suppose that they who are constantly growing become naturally competent for certain purposes long before they attain complete majority, and young men and women may well be allowed the exercise of more discretion than babes. Hence we find that infants of suitable age are allowed to contract a valid marriage; that males of the age of fourteen and upwards, and females at the age of twelve, could once dispose of personal estate by will, and at fourteen may still choose or nominate their own guardians; that children of discretion have a voice in determining the right of custody and control. But not until attaining majority could a person at the common law convey, lease, or make contracts in general which would bind him; and the foregoing must then be considered as among the exceptions to the rule that persons are legally incapable so long as they are minors.[55]

Majority must be fully attained before capacity to contract is acquired.[56] Some courts hold that marriage does not affect the

55. Carpenter v. Carpenter (Ala.), 75 So. 472; Johnson v. Wright (Ariz.), 179 P. 958; Kansas City P. & G. R. Co. v. Moon, 66 Ark. 409, 50 S. W. 996; Appeal of Ennis, 84 Conn. 610, 80 A. 772; Gannon v. Manning, 42 App. D. C. 206; Wickham v. Torley, 136 Ga. 594, 71 S. E. 881; *In re* Cummings' Estate, 120 Ia. 421, 94 N. W. 1117; Scantlin v. Allison, 12 Kan. 85; McKibben v. Diltz, 138 Ky. 684, 128 S. W. 1082; Hudson's Guardian v. Hudson, 160 Ky. 432, 169 S. W. 891; Fortier v. Labranche, 13 La. 355; White v. New Bedford, etc., Corp., 178 Mass. 20, 59 N. E. 642.

An infant master of a vessel is not liable for provisions furnished to the ship. A. B. Fogarty, 2 Dane. Abr. (Mass.) 25; Parker v. Gillis, 66 So. 978; Gambrell v. Harper, 113 Miss. 715, 74 So. 623; O'Donohue v. Smith, 114 N. Y. S. 536, 130 App. Div. 214; Kelly v. Same, *Id.;* Aborn v. Janis, 113 N. Y. S. 309, 62 Misc. 95 (order affd., 106 N. Y. S. 115); Kamil v. New York College of Dentistry, 168 N. Y. S. 527; *In re* MacNeil, 151 N. Y. S. 162, 165 App. Div. 842 (trans. from the Third Department, 149 N. Y. S. 1095, 164 App. Div. 917); Jefferson v. Gallagher, 150 P. 1071; Bruner v. Cobb, 37 Okla. 228, 131 P. 165, L. R. A. 1916D, 377.

He may disavow his mortgage held in escrow. Citizens', etc., Ass'n v. Arvin, 207 Pa. 293, 56 A. 870; Chabot v. Paulhus, 32 R. I. 471, 79 A. 1103; Coleman v. Virginia Stave & Heading Co., 112 Va. 61, 70 S. E. 545; *Re* Farley, 213 N. Y. 15, 106 N. E. 756, L. R. A. 1916D, 816; People v. Griesbach, 211 Ill. 35, 71 N. E. 874.

He is not bound by admission made while an infant. Claxton v. Claxton, 56 Mich. 557, 23 N. W. 310. Co. Litt. 78b, 89b, and Harg. note. As to the privilege of wills, see stat. 1 Vict., ch. 26, § 7; *infra*, § 397.

56. *Ex parte* McFerren, 184 Ala. 223, 63 So. 159; Marx v. Clisby, 130 Ala. 502, 30 So. 517.

While a minor may not bind his

disability of infancy,[57] but others hold that it does remove it.[58] In some States the statute so provides.[59] In case of a female infant marriage may suspend the duty to disaffirm till she is discovert, though she may disaffirm without regard to coverture if she chooses.[60] Emancipation does not usually remove the disability.[61] Some statutes provide for the removal of the disability of infancy before majority,[62] while others have somewhat changed the period at which the infant may bind himself by a contract.[63]

estate, yet a well educated person approaching full age may suggest facts and views of policy worthy of the consideration of the courts, which may well be given great weight. *In re* Hickey (Okla.), 182 P. 233; *Ex parte* McFerren (Ala.), 63 So. 159, 47 L. R. A. (N. S.) 543; Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88.

57. Sims v. Gunter (Ala.), 78 So. 62; Shipley v. Smith, 162 Ind. 526, 70 N. E. 803; Hudson v. Hudson, 160 Ky. 432, 169 S. W. 891; Guillebert v. Grenier, 107 La. 614, 32 So. 238.

58. In Indiana it has been held that an infant wife may convey her lands if the husband joins in the deed. Kennedy v. Hudkins, 140 Ind. 570, 40 N. E. 52; Losey v. Bond, 94 Ind. 67; Cochran v. Cochran, 196 N. Y. 86, 89 S. E. 470.

Where it is uncertain whether an infant's contract benefits or prejudices her, and she marries while yet an infant, she should disaffirm the contract within a reasonable time, if she desires to avoid it. Chambers v. Chattanooga, etc., Ry. Co., 130 Tenn. 459, 171 S. W. 84; Town of Northfield v. Town of Brookfield, 50 Vt. 62; *Ex parte* Hollopeter, 52 Wash. 41, 100 P. 159.

59. Hays v. Bowden, 159 Ala. 600, 49 So. 122; Fields v. Mitchell, 112 Me. 368, 92 A. 293.

60. Buchanan v. Hubbard, 96 Ind. 1; Appelgate v. Conner, 93 Ind. 185; Losey v. Bond, 94 Ind. 67; Scranton v. Stewart, 52 Ind. 68; Linville v. Greer, 165 Mo. 380, 65 S. W. 579; Gaskins v. Allen, 137 N. C. 426, 49 S. E. 919; Blake v. Hollandsworth (W. Va.), 76 S. E. 814, 43 L. R. A. (N. S.) 714.

61. Wickham v. Torley, 136 Ga. 594, 71 S. E. 881, 36 L. R. A. (N. S.) 57.

62. Ketchum v. Faircloth-Segrest Co., 155 Ala. 256, 46 So. 476; Ketchum v. Faircloth-Segrest Co., 155 Ala. 256, 46 So. 476; *Ex parte* Singleton (Ala.), 68 So. 253; *Ex parte* Price, 68 So. 866; Wilkinson v. Buster, 124 Ala. 574, 26 So. 940; Boykin v. Collins, 140 Ala. 407, 37 So. 248; Young v. Hiner, 72 Ark. 299, 79 S. W. 1062; Bickle v. Turner (Ark.), 202 S. W. 793; Dalton v. Bradley Lumber Co. (Ark.), 205 S. W. 695.

The enactment of such a statute will not affect the status of an infant who has attained full age under the former. statute. Smith v. Smith (Kan.), 18 P. 231; State v. Lyons (Kan.), 180 P. 802; Gaston v. Rainach, 141 La. 162, 74 So. 890; Jackson v. Jackson, 105 Miss. 868, 63 So. 275; Lake v. Perry, 95 Miss. 550, 49 So. 569; Watson v. Peebles, 102 Miss. 725, 59 So. 881; Cunningham v. Robison, 104 Tex. 227, 136 S. W. 441; Gulf, C. & S. F. Ry. Co. v. Lemons (Tex.), 206 S. W. 75; Durrill v. Robison (Tex.), 138 S. W. 107.

63. In California by statute the deed of an infant under eighteen is void in the absence of a new contract or estoppel. Hakes Inv. Co. v. Lyons, 166 Cal. 557, 137 P. 911. In the same State a minor making a contract while

Legislative or judicial emancipation has existed in Louisiana and some other parts of this country once under the dominion of continental Europe. In the case of an emancipated minor under such statutes, by which he is relieved from the time prescribed by law for attaining the age of majority, he is invested with all the capacities in relation to his property and obligations which he would have had he actually arrived at the age of twenty-one years. And he may be appointed administrator of an estate [64] or surety on a bond.[65] But the right of legislative emancipation seems never to have been distinctly admitted at the common law in any such extensive sense.

§ 995. Conflict of Laws as to True Date of Majority.

Supposing a conflict of laws should arise over the contract of an infant by reason of the period of majority being differently assigned by the law of the domicile of his origin and that of his actual domicile, or of the situation of real property, or of the place where he has entered into a contract. The rules for such cases are these: *First,* that the actual domicile will be preferred to the

over eighteen years old may disaffirm it before majority on certain conditions. Spencer v. Collins, 156 Cal. 298, 104 P. 320.

By statute in Iowa a minor cannot disaffirm a contract where the other party has been misled by the minor's misrepresentations into thinking that he is of full age. First Nat. Bank v. Casey, 158 Ia. 349, 138 N. W. 897.

In North Dakota by statute a minor may contract at eighteen years of age as an adult, except that he may disaffirm, within one year after majority, contracts not for necessaries by refunding the consideration, or paying its equivalent with interest. Luce v. Jestrab, 12 N. D. 548, 97 N. W. 848; Casement v. Callaghan (N. D.), 159 N. W. 77; Hamm v. Prudential Ins. Co. of America, 122 N. Y. S. 35, 137 App. Div. 504 (statute permitting minor to make certain insurance contracts).

Under the Oklahoma statute a minor may disaffirm a conveyance made when under eighteen years of age without returning or tendering the consideration. Rice v. Anderson, 39 Okla. 279, 134 P. 1120.

Under the Pennsylvania statute authorizing minors over eighteen to make needful contracts to become members of beneficial associations, it was held that a minor was bound by a contract made with the beneficial association of a certain railroad making acceptance of its benefits a release of liability against the railroad. Riddell v. Pennsylvania R. Co. (Pa.) 106 A. 80.

64. Succession of Lyne, 12 La. Ann. 155; Gordon v. Gilfoil, 99 U. S. 168. See also State v. Bunce, 65 Mo. 349. A legislative power conferred upon the courts to emancipate is to be exercised in a summary manner and not according to the course of the common law. Hindman v. O'Connor, 54 Ark. 627; State v. Barker, 25 Fla. 598. As to emancipation of a minor in our usual sense, see *supra,* § 807 *et seq.*

65. Cooper v. Rhodes, 30 La. Ann. 533.

domicile of birth. *Second,* that the law of situation of real property must prevail over that of domicile. *Third,* that the law of the place where a contract is made must prevail over that of domicile.[66] *Fourth,* that in matters of practical remedy in the courts, the law of the forum is sometimes conclusive.[67]

The right of action for the recovery of real estate belonging to an infant will be governed, not by the law in force when the right of action accrued, but by the law in force when the infant became of age.[68]

§ 996. Infant's Right of Holding Office and Performing Official Functions.

Next, as to the infant's right of holding office. There are numerous old cases to be found in the books where an infant has been adjudged capable of holding offices that involve no pecuniary or public trust, and require only moderate skill and diligence; such as the office of park-keeper, forester, sheriff, and jailer; though on the ground apparently that such offices formerly were capable of grant, and the grantees had the power to act by deputy.[69] But the modern doctrine seems to be clear that no office of pecuniary and public responsibility can be conferred upon an infant; not so much because of mental incapacity on his part, as for the very good reason that a person who is not legally responsible for the duties of his office cannot be, in point of law, a proper person to execute them. A public office which requires the personal receipt and disbursement of money is not then to be filled by an infant.[70] Nor can an infant act as administrator, executor, or

66. Harding v. Schapiro, 120 Md. 541, 87 A. 951. Where an infant's contract is voidable by the law of the State of his domicile and was made by the infant, and is to be substantially performed in that State, that law will govern the case, though the contract was completed by acceptance in another State, where it might be binding. International Text-Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115. Male v. Roberts, 3 Esp. 163; 1 Burge, Col. & For. Laws, 118 *et seq.;* Story, Confl. Laws, §§ 75, 82, 332; Thompson v. Ketcham, 8 Johns. 189; Hierstand v. Kuns, 8 Blackf. 345; Saul v. His Creditors, 17 Martin, 597; 2 Kent, Com. 233, *n.;* Huey's Appeal, 1 Grant (Pa.), 51; Wharton, Confl., § 112. An order of court of another State, made in conformity to a statute of that State, and purporting to relieve an infant residing in that State from the disability of non-age, can have no operation in Missouri. State v. Bunce, 65 Mo. 349.

67. As in applying the bar of the statute of limitations. Burgett v. Williford, 56 Ark. 187.

68. Gilker v. Brown, 47 Mo. 105.

69. Bac. Abr. Infancy and Age (E.); 3 Mod. 222; Young v. Fowler, Cro. Car. 555; Macphers. Inf. 448.

70. Claridge v. Evelyn, 5 B. & Ald.

trustee, nor by his concurrence (in the absence of fraud on his part) sanction a breach of trust.[71] He cannot be a guardian, an attorney under a power (except to receive seisin), a bailiff, a factor, or a receiver.[72] Nor should he be admitted to the bar as an attorney at law.[73]

The service of a notice of replevy by an infant is, in England, illegal and void; and it would appear that he cannot be a sheriff's officer.[74] But in New Hampshire it is held that an infant may be deputed to serve and return a particular writ; on the ground that while offices where judgment, discretion, and experience are essentially necessary to the proper discharge of the duties they impose, should not be intrusted to infants, offices may be held which are merely ministerial, and require nothing more than skill and diligence.[75] But a distinction is properly taken between the case of officers of justice ordinarily liable for false return, misfeasance, and the like, and those who have no such liability; and for this reason, while, in Vermont, an infant may serve a particular writ, he cannot be specially authorized to serve mesne process by the magistrate.[76]

In ancient times minors appear to have frequently sat in the British Parliament. Thus it is related that a son of the Duke of Albemarle took part in debate when only of the age of fourteen; and history states that about the 10th James I. there were forty members not above twenty years of age, and some not above sixteen.[77] But by statute it is now provided that an infant cannot sit in the House of Lords, or vote at an election for a member of the lower house, or be elected.[78] There are provisions in the Constitution of the United States and of the different States, adopted undoubtedly because it was considered contrary to sound public policy to commit any offices requiring considerable skill and pru-

81. See Crosbie v. Hurley, 1 Alcock & Napier, 431.

71. Macphers. Inf. 449; Wilkinson v. Parry, 4 Russ. 372. But though wrongly appointed, he will be liable to account for money received by him after reaching majority. Carow v. Mowatt, 2 Edw. Ch. 57. And see Knox v. Nobel, 77 Hun, 230.

72. Macphers. Inf. 448, 449; Co. Litt. 3b, 172.

73. Coleman, *ex parte*, 54 Ark. 235. But cf. 25 Fla. 298.

74. Cuckson v. Winter, 2 M. & Ry. 306.

75. Moore v. Graves, 3 N. H. 408. But see Tyler Tyler, 2 Root, 519. And see Railroad v. Fisher, 109 N. C. 1.

76. Barrett v. Seward, 22 Vt. 176; Harvey v. Hall, *ib.* 211; 53 Vt. 109.

77. See Macphers. Inf. 449, *n.*; 1 Parl. Deb. 420, notes.

78. 7 & 8 Will. III., ch. 25.

dence, not to say pecuniary and public responsibility, to the young and immature. By the Constitution of the United States, no person can be President who has not attained the age of thirty-five years; nor a senator, who is under the age of thirty years; nor a representative in Congress who is not twenty-five years of age. Corresponding provisions abound in the different States as to the eligibility of local officers. So is the disqualification to vote universally applied by our laws to minors, and restrictions upon the right of suffrage may extend even further.[79]

The true principle to be extracted from the authorities seems therefore to be that the court will inquire whether an infant, as such, is by law capable of discharging suitably, faithfully, and efficiently the duties of a particular office, and so as to leave open all the usual remedies to others; and this is a proper rule of guidance, the statutes being silent, rather than ancient precedents laid down concerning particular offices in times when they were transmissible in families and mere sinecures.[80]

There are, undoubtedly, certain offices which an infant may properly hold. And the legislature is competent to establish an earlier or later period at which persons shall be deemed of full age for certain purposes. Hence in Massachusetts, under a law fixing eighteen years as the age for military duty, and empowering an infant at that age to enlist of his own accord, and without the parent's asent, in the militia, it is held that he may be elected company clerk, or even, as it would appear, a commissioned officer of the company.[81]

The late cases show a tendency to a more liberal rule, under which a minor has been held to be competent to act as a deputy sheriff,[82] a notary public,[83] and clerk of a court.[84]

79. The officer who usually administers the oath of office cannot refuse to do so on such grounds. People v. Dean, 3 Wend. 438.

80. For some of the old decisions as to what offices an infant might or might not hold, see Bac. Abr. Infancy and Age (E.); also Moore v. Graves, 3 N. H. 408, *passim*.

81. Dewey, Petitioner, 11 Pick. 265. See Hands v. Slaney, 8 T. R. 578. Infant may be a notary. 25 Alb. L. J. 12.

82. Irving v. Edrington, 41 La. Ann. 671, 6 So. 177; Jamesville, etc., R. Co. v. Fisher, 109 N. C. 1, 13 S. E. 698, 13 L. R. A. (N. S.) 721; Gilson v. Kuenert, 15 S. D. 291, 89 N. W. 472; Bell v. Pruit, 51 S. C. 344, 29 S. E. 5; State v. Toland, 36 S. C. 515, 15 S. E. 599.

83. United States v. Bixby, 9 Fed. 78.

84. Talbott's Devisees v. Hooser, 75 Ky. 408.

§ 997. Infant's Responsibility for Crime.

Infants who have arrived at sufficient maturity in years and understanding are capable of committing crimes; and it is said that they cannot plead in justification the restraint of a parent, as married women can that of the husband; although, as we presume, duress or compulsion may be properly set up in defence, wherever a young child is indicted and tried for a crime. The period of life at which a capacity of crime exists is determined by law to a certain extent; for a child under seven is conclusively incapable of crime, one between seven and fourteen only *prima facie* so, and one over fourteen *prima facie* capable like any other.[85]

85. United States *ex rel.* Schornbach v. Behrendsohn, 197 F. 953. The presumption is that an infant under 14 years had not the requisite guilty knowledge of the wrongfulness of an act to authorize a conviction of felony, unless there is proof of knowledge of good and evil. Reynolds v. State, 154 Ala. 14, 45 So. 894; Garner v. State, 97 Ark. 63, 132 S. W. 1010; Gilchrist v. State, 100 Ark. 330, 140 S. W. 260; Harrison v. State, 72 Ark. 117, 78 S. W. 763; Land v. State (Fla.), 71 So. 279, L. R. A. 1916E, 760; Singleton v. State, 124 Ga. 136, 52 S. E. 156; Vinson v. State, 124 Ga. 19, 52 S. E. 79; Carroll v. State (Ga.), 89 S. E. 176; Vinson v. State, 124 Ga. 19, 52 S. E. 79; Anthony v. State, 126 Ga. 632, 55 S. E. 479; Singleton v. State, 124 Ga. 136, 52 S. E. 156; Stephens v. Stephens, 172 Ky. 580, 189 S. W. 1143; Commonwealth v. Smith, 14 Gray (Mass.), 33.

The criminal intent, which is an essential element of every crime, cannot be entertained by an infant until he has developed sufficient intelligence and moral perception to enable him to distinguish between right and wrong and to comprehend the consequences of his acts. Beason v. State, 96 Miss. 105, 50 So. 488; Miles v. State, 99 Miss. 165, 54 So. 946; State *ex rel.* Cave v. Tincher, 258 Mo. 1, 166 S. W. 1028; State v. Fisk, 15 N. D. 589, 108 N. W. 485.

In North Dakota the statute provides that children under seven years of age are legally incompetent to commit crime, and between the ages of seven and fourteen are presumed to be incompetent. State v. Fisk, 15 N. D. 589, 108 N. W. 485.

The presumption is not satisfactorily rebutted by inferences which the judge may make from their appearance and from conversation with them and their parents, satisfying him that they have criminal capacity. A plea of guilty is insufficient to overcome the presumption, which can be done only by affirmative evidence. People v. Domenico, 92 N. Y. S. 390, 45 Misc. 309, 19 N. Y. Cr. R. 8; State v. Nelson, 88 S. C. 125, 70 S. E. 445.

A homicide by an infant seventeen years of age is not excused by his father's coercion. State v. Thrailkill, 73 S. C. 314, 53 S. E. 482; 1 Bish. Crim. Law, § 460; 1 Russ. Crimes, Grea. ed. 2; Marsh v. Loader, 14 C. B. (N. S.) 535. The text-writers have said that an infant can never plead constraint of the parent, but this may be doubted. See Humphrey v. Douglass, 10 Vt. 71; Commonwealth v. Mead, 10 Allen, 398; State v. Learnard, 41 Vt. 585. But see Willet v. Commonwealth, 13 Bush (Ky.), 230 (holding that an infant under twelve years of age may be shown to have criminal capacity). But see *In re* Sanders (Okla.), 168 P. 197 (holding that as an infant under four-

An exception to this rule is usually stated in certain cases of physical impotence; for it is argued that a boy under fourteen years of age is physically undeveloped, and therefore cannot be legally guilty of rape or similar crimes.[86] Nor is carnal consent an admitted palliation to one who commits a crime upon a young person, even though the latter made no resistance.[87] Incapacity for committing a crime might properly be considered in connection with incapacity of criminal intent; and yet the later rule of Ohio and some other States seems the more correct one, which is to reject in such case any doctrine of conclusive presumption of incapacity, and allow evidence of criminal intent to be furnished;[88] though certain investigations on this point might be held *contra bonos mores*. The general rule is that capacity for crimes in persons above the age of seven years is a question of fact; the law assuming *prima facie* incapacity under fourteen, and capacity over fourteen; but subjecting that assumption of guilty intention to the effect of proof concerning the real fact.[89]

Where a statute creates an offence, infants under the age of legal capacity are not presumed to have been included, yet where an act is denounced as a crime, even felony or treason, it extends as well to infants, if above fourteen years, as to others.[90] And a child under fourteen may be within the fair scope of a particular statute misdemeanor.[91]

An infant may be indicted for obtaining goods by false pre-

teen is presumed to be *doli incapax*, and, therefore, cannot be guilty of murder). But see People v. Martin, 13 Cal. App. 96, 108 P. 1034.

86. 1 Bish. Crim. Law, §§ 466, 672, and cases cited; State v. Handy, 4 Harring. 566; Reg. v. Phillips, 8 Car. & P. 736. But see Wagoner v. State, 5 Lea, 352, which holds that this presumption as to a boy nearly fourteen years is not conclusive, but subject to proof.

87. See Eq., 61 Conn. 50

88. Williams v. State, 14 Ohio, 222; People v. Randolph, 2 Parker, 174; Commonwealth v. Green, 2 Pick. 380; Wagoner v. State, *supra*.

89. State v. Learnard, 41 Vt. 585; Willet v. Commonwealth, 13 Bush, 230; Martin v. State, 90 Ala. 602; State v. Toney, 15 S. C. 4096 76 Mo. 355. See Dove v. State, 37 Ark. 261. Where a child is under fourteen the jury, in order to convict, should be satisfied that he knew the distinction between right and wrong as to the particular offence. Willis v. State, 89 Ga. 188; Bell v. The State, 91 Ga. 15. There should be more than the infant's own statement to remove the presumption of guilty intent where he is over fourteen. State v. Kluseman, 53 Minn. 541. See State v. Howard, 88 N. C. 650.

90. 1 Hawk. 1; 4 Bl. Com. 23; 1 Bish. Crim. Law, § 462.

91. Statutes, for instance, which arrest for begging on the streets, gathering garbage from the markets, etc. There are various penal statutes which provide for sending young children who are found offenders, to the house of refuge or some similar institution for youth. People v. N. Y.

tences,[92] or for stealing.[93] He is liable to bastardy process.[94] And, following the general principle already announced, children less than fourteen have been convicted for arson and murder, the *prima facie* presumption of incapacity being overcome;[95] and for perjury.[95a] But a child less than seven cannot be indicted for nuisance, though owner of the land.[96] And it is reasonable to add that the evidence of malice or "mischievous discretion" which is to supply age ought to be strong and clear, beyond all doubt and contradiction.[97]

At fourteen years of age infants are presumed to be capable of malice.[98] And the fact may be shown even though he be of a lesser age.[99] The government has the burden of showing the criminal capacity of a defendant between seven and fourteen years of age.[1] The question of such capacity is for the jury.[2]

Catholic Protectory, 101 N. Y. 195; Hibbard v. Bridges, 76 Me. 324: 66 How. Pr. 178.

92. People v. Kendall, 25 Wend. 399.

93. Dove v. State, 37 Ark. 261. Infant responsible for larceny as bailee. Queen v. McDonald, 15 Q. B. D. 323.

94. Chandler v. Commonwealth, 4 Met. (Ky.) 66.

95. See 4 Bl. Com. 23, 24; 1 Bish. Crim. Law, § 464, and cases cited; State v. Barton, 71 Mo. 288; Martin v. State (1891, Ala.).

95a. Willet v. Commonwealth, 13 Bush, 230.

96. People v. Townsend, 3 Hill, 479.

97. See 4 Bl. Com. 24; Commonwealth v. Mead, 10 Allen, 398; Stephenson v. State, 28 Ind. 272; State v. Tice, 90 Mo. 112. As to recognizance to answer for criminal offence, see State v. Weatherwax, 12 Kan. 463. Where a minor is imprisoned under an illegal sentence, the proper remedy is by *habeas corpus*, and not annulment of the sentence. Cathing v. State, 62 Ga. 243.

98. Birmingham, etc., R. Co. v. Mattison, 166 Ala. 602, 52 S. 49; Young v. Sterling Leather Works (N. J.), 102 A. 395.

99. State v. Jackson, 3 Pennewill (Del.), 15, 50 A. 270.

1. The presumption of law that an infant over seven and under fourteen years of age does not possess sufficient mental capacity to commit a felony is rebuttable only by clear evidence of a mischievous disposition, or of knowledge of good and evil. Key v. State, 58 So. 946, 4 Ala. App. 76; Garner v. State, 97 Ark. 63, 132 S. W. 1010; Kear v. State, 84 Ark. 146, 104 S. W. 1097; Harrison v. State, 72 Ark. 117, 78 S. W. 763; Ledrick v. United States, 42 App. D. C. 384 (an infant cannot be convicted of a crime upon a plea of guilty, unless it is established that he is of criminal capacity and understands the nature and consequences of his plea of guilty); Singleton v. State, 124 Ga. 136, 52 S. E. 156; Ford v. State, 100 Ga. 63, 25 S. E. 845; Carroll v. State (Ga.), 89 S. E. 176; Stephens v. Stephens, 172 Ky. 780, 189 S. W. 1143; Willet v. Commonwealth, 13 Bush (Ky.), 230; Miles v. State, 99 Miss. 165, 54 S. 946; State v. Tice, 90 Mo. 112, 2 S. W. 269; State v. Fisk, 15 N. D. 589, 108 N. W. 485; People v. Squazza, 81 N. Y. S. 254, 40 Misc. 71; State v. Mariano, 37 R. I. 168, 91 A. 21; State v. Nelson, 88 S. C. 125, 70 S. E. 445; State v. Davis, 104 Tenn. 501, 58 S. W. 122; State v. Vineyard, 81 W. Va. 98, 93 S. E. 1034.

2. Key v. State, 4 Ala. App. 76,

§ 998. Infant's Criminal Complaint; Discretion in Case of Peril, &c.

An infant, it is held in Tennessee, may make a criminal complaint, and be what is known as the prosecutor.[3] There are various criminal offences against young children set forth in our codes.[4]

Corresponding to the presumption of criminal capacity in an infant is that of presumed capacity to be diligent for his own personal safety against manifest peril; though such presumptions yield to proof.[5]

§ 999. Power to Make a Will.

The age at which persons may dispose of their property, real or personal, by last will and testament, is now determined by statute in England, and in most parts of the United States. In England the modern statute 1 Vict., c. 26, § 7, provides that no will made by any person under the age of twenty-one years shall be valid. This went into effect in 1838.[6] And the provisions of this statute have been substantially enacted either before or since in most of the American States; so that the policy of the present day may be said to exclude the testamentary capacity of all infants.[7] Nor is this unjust; for the law itself draws up as good a will for children as they are likely to make for themselves.

But the ancient rule was otherwise: namely, to the effect that males at fourteen and females at twelve might make wills of their personal property; thus conforming to the older rule of the civil and canon law.[8] And fourteen, as we have seen, was the age when a guardian by election of the infant might be appointed.[9] But though no objection was admissible to the probate of wills in the ecclesiastical courts, merely for want of age, yet if it could be shown that the testator was not of sufficient discretion, whether of the age of fourteen, or four-and-twenty, that would overthrow the

58 So. 946; State v. Mariano, 37 R. I. 168, 91 A. 21; State v. Nelson, 88 S. C. 125, 70 S. E. 445.

3. State v. Dillon, 1 Head, 389.

4. Such as infanticide, cruelty to children (which certain societies seek to suppress), and corruption of morals). See State v. Hill, 58 N. H. 475; Robinson v. The State, 67 Ga. 29; State v. Woolaver, 77 Mo. 103; Taylor v. The State, 107 Ind. 483; Hickey v. Taaffe, 99 N. Y. 204; Mascolo v. Montesanto, 61 Conn. 50.

5. § 1034.

6. See also 20 & 21 Vict., ch. 77.

7. Schouler, Wills, §§ 39-43; 4 Kent, Com. 506, 507.

8. 1 Wms. Ex'rs, 15; Schouler, Wills, §§ 40, 41. But there are some irreconcilable opinions on the subject to be found in the old books. See Co. Litt. 89b, Hargrave's note.

9. See § 816.

testament.[10] This always operated to discourage such wills from being made. And yet the objection was not insuperable; for there is a clear instance on record where an infant sixteen years of age made a testament in favor of his guardian and schoolmaster, which was established by evidence of the child's capacity and free will.[11]

The English text writers, with reference to the old law, have laid it down that express approval of a former will after the infant had accomplished the years of fourteen or twelve would make it strong and effectual.[12] But as concerns the later statutes, if not as a general principle for modern times, it appears pretty clear that where a will is required to be in writing, and executed before witnesses, in order to be valid, and is thus executed before the testator arrives at the required age, it cannot be rendered valid after the testator arrives at such age, except by republication with all the usual formalities.[13] And even the old books admit that the mere circumstance of an infant having lived some time after the age when he became capable of making a will cannot alone give validity to one made during his incapacity.[14]

The maxims of the older law on this subject adhere somewhat to American jurisprudence; for we find that in a few of our States a distinction is still made between personal and real estate as to the right of an infant to dispose of his property by will.[15]

10. 2 Bl. Com. 497; 1 Wms. Ex'rs, 15.

11. Arnold v. Earle, 2 Cas. temp. Lee, 529.

12. 1 Wms. Ex'rs, 16; Swinb., pt. 2, § 2, pl. 7; Bac. Abr. Wills, B.

13. Schouler, Wills, Part IV., ch. 3.

14. Herbert v. Torball, 1 Sid. 162; Swinb., pt. 2, § 2, pl. 5; 1 Wms. Ex'rs, 16. Formerly, as we have seen, a father, though a minor, might appoint a testamentary guardian of his own child; but this right also is taken from a minor father, under the modern statute of wills. 1 Vict., ch. 26; see § 814.

15. Thus in Rhode Island, Virginia, Arkansas, and Missouri, the age for making wills of real estate is fixed at twenty-one, and for disposing of personalty in the same manner, at eighteen; and in Connecticut at twenty-one for real estate, and seventeen for personalty. Among the States where the right to dispose of estate, both real and personal, is now limited to persons of full age, are Massachusetts, Vermont, New Hampshire, Maine, Ohio, Indiana, New Jersey, Kentucky, Virginia, Pennsylvania, Delaware, and Michigan. For latest changes see Stimson, American, Statute Law. In some States a distinction is made between males and females as to testamentary capacity, and the latter may make wills, as in Vermont and Maryland, at eighteen. In New York and Illinois the principle is to discriminate between real and personal estate, and between males and females; and while as young as sixteen a female in the former State may make a valid will of personalty, but a male only at eighteen. See Schouler, Wills, § 43; 4 Kent, Com. 506, 507; Williams v. Heirs, Busbee,

An infant, even under fourteen years of age, may be a witness to a will, if of sufficient understanding.[16]

§ 1000. Testimony of Infants.

Infants may be admitted to testify in the courts, if of sufficient understanding. There is no precise age at which the law excludes them on the conclusion that they are mentally and morally incompetent; but one's competency in any case will depend upon his actual intelligence, judgment, understanding, and ability to comprehend the nature and effect of a solemn statement under oath as distinguished from falsehood. By the common-law rule, every person over the age of fourteen is presumed to have common discretion and understanding until the contrary appears; but under that age it is not so presumed; and the court will therefore make inquiry as to the degree of understanding which the child offered as a witness may possess. But this preliminary examination, which is made by the judge at discretion, is to be directed to the point whether the witness comprehends the solemn obligation of an oath; and if the child appears to have sufficient natural intelligence to distinguish between good and evil, and to comprehend the nature and effect of an oath, he is an admissible witness.[17] In Indiana a statute provides that all children over the age of ten shall be presumed to be competent. And in various States a child nearly ten years of age has been deemed competent to testify, whose answers when she was examined by the court disclosed that, though she was ignorant of the nature of the punishment for false swearing, yet she comprehended the obligations of an oath and believed that any deviation from the truth, while under oath, would be followed by appropriate punishment.[18] Less expression even than this has been required of children about this age, where the due comprehension appeared, notwithstanding nervous agitation natural to the surroundings.[19] Of the capacity of such witnesses

271; Davis v. Baugh, 1 Sneed, 477; Moore v. Moore, 23 Tex. 637; Posey v. Posey, 3 Strobh. 167; Corrie's Case, 2 Bland. Ch. 488.

16. *Re* Spier, 99 Neb. 853, 157 N. W. 1014, L. R. A. 1916E, 692; Carlton v. Carlton, 40 N. H. 14;

17. Greenl. Evid., § 367; 2 Russ. Crimes, 590; Rex. v. Brazier, 1 East, P. C. 443; State v. Whittier, 21 Me. 341. Nor is a court of appeal disposed to overrule the discretion of the judge at the trial below who makes this examination, unless the discretion was plainly abused. People v. Linzey, 79 Hun, 23.

18. Blackwell v. State, 11 Ind. 196; Draper v. Draper, 68 Ill. 17; Vincent v. State, 3 Heisk. 120.

19. Davidson v. State, 39 Tex. 129; State v. Scanlan, 58 Mo. 204.

for comprehending the matter as to which they testify, of the strength of the memory, and in general as to the weight which may be attached to their testimony in any particular state of facts, a jury should make its estimate carefully.[20]

Children have been admitted to testify at the early age of seven, and even of five;[21] but the dying declarations of a child only four years old were once ruled out,[22] for the reason that, however precocious the child's mind, she could not have had that idea of a future state which is necessary to make such declaration admissible.[23] Different systems of religious education render the judicial test in this respect far from precise; for while there are cases where the court has put off a trial, in order to specially instruct an infant witness as to the nature and solemnity of an oath, this practice is not of late years strongly countenanced; the opinion gaining ground that the effect of the oath upon the conscience should arise from religious feelings of a permanent nature and gradual growth.[24] But in cases where the intellect is sufficiently matured, and the education only has been neglected, it appears that a postponement of the trial might properly be asked.[25] Where a young

20. Competence to testify is not inconsistent with civil immunity at such an age for perjury. Johnson v. State, 61 Ga. 35. See Peterson v. State, 47 Ga. 524.

21. *Ib.* Female child of eight held a competent witness in prosecution for a criminal assault upon her. Wade v. State, 50 Ala. 164.

22. Rex v. Pike, 3 Car. & P. 598; Rex v. Brazier, 1 Lat. P. C. 443.

23. Rex v. Pike, 3 Car. & P. 598. And see Rex v. Brazier, 1 East P. C. 443; 1 Greenl. Evid., § 367; Commonwealth v. Hutchinson, 10 Mass. 225.

24. Rex v. White, 2 Leach C. C. 48, *n.;* 1 Greenl. Evid., § 367; Rex v. Williams, 7 Car. & P. 320; Regina v. Nicholas, 2 Car. & K. 246.

25. Per Pollock, C. B., Regina v. Nicholas, 2 Car. & K. 246. A child is not incompetent to testify because instructed by a minister concerning the nature of an oath between the first day, when offered, and the next, when permitted to testify. Commonwealth v. Lynes, 142 Mass. 577.

With regard to the weight and effect of the testimony of children, Blackstone observes that when the evidence of children is admitted, "it is much to be wished, in order to render the evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that a conviction should not be grounded on the unsupported accusation of an infant under years of discretion." 4 Bl. Com. 214. To this Mr. Phillips replies that in many cases, undoubtedly, the statements of children are to be received with great caution; yet that a prisoner may be convicted upon such testimony alone and unsupported; and that the extent of corroboration necessary is a question exclusively for a jury. It may be observed that the preliminary inquiry as to the competency is not always of the most satisfactory description, and is such that a child might, upon slight practicing of the memory, appear well qualified. The severest test

child's examination shows an utter want of anything like a knowledge of the nature or character and consequences of an oath, or of human relations to God and the Divine penalties denounced against false swearing, the child ought not to be allowed to testify.[26]

§ 1001. Marriage Settlements of Infants.

With respect to the marriage settlement of infants, there was formerly considerable controversy. For, on the one hand, it was urged that infants were in general incapable of entering into valid contracts with respect to their property; on the other, that since infants might make a valid contract of marriage, they ought to be able to arrange the preliminaries. At an early period the opinion prevailed in England that the marriage consideration communicated to the contracts of infants, respecting their estate, an efficacy similar to that which the law stamps upon marriage itself; and Lords Hardwicke and Macclesfield contributed to strengthen it, by maintaining that the real estate of an infant would be bound by a marraige settlement.[27] Lord Northington held later to a different opinion; and Lord Thurlow overturned the doctrine altogether, boldly declaring that the contracts of male and female infants do not bind their estates, and that consequently a female infant cannot be bound by any articles entered into during minority, as to her real estate; but may refuse to be bound, and abide by the interest the law casts upon her, which nothing but her own act after the period of majority can fetter or affect.[28] Other distinguished equity jurists, including Lord Eldon, subsequently expressed their approval of Lord Thurlow's decision.[29] And the rule became set-

appears in the examination which follows; and Mr. Phillips well concludes: "Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; what is wanting in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive." 1 Phil. Evid., 9th ed., 6, 7. See Beason v. State, 72 Ala. 191; State v. Belton, 24 S. C. 185.

26. On the principle that chancery is bound to see that an infant litigant's rights and interests are protected, not only is an unwilling infant not compellable to testify in his suit, but his deposition, though given freely on his part, may be suppressed, at the discretion of the court, as containing admissions unfavorable to his cause. Serle v. St. Eloy, 2 P. Wms. 386; Napier v. Effingham, 2 P. Wms. 403; Moore v. Moore, 4 Sandf. Ch. 37. But see Walker v. Thomas, 2 Dick. 781; Bennett v. Welder, 15 Ind. 332.

27. Harvey v. Ashley, 3 Atk. 607; Cannel v. Buckle, 2 P. Wms. 243; Peachey, Mar. Settl. 25 *et seq.*

28. Drury v. Drury, 2 Eden, 58; Durnford v. Lane, 1 Bro. C. C. 115; Clough v. Clough, 5 Ves. 716.

29. See Peachey, Mar. Settl. 28;

tled within the next fifty years, that the real estate of a female infant was not bound by the settlement on her marriage, because her real estate does not become by the marriage the absolute property of the husband, although by the marriage he takes a limited interest in it.[30] So was it decided that neither the approbation of the parents or guardians, nor even of the court of chancery, independently of positive statute, would make the infant's settlements binding.[31] The inconvenience of such a state of things called for statute remedy; and in 1855 an act was passed which enabled male infants not under twenty, and female infants not under seventeen, with the approbation of the court of chancery, to make valid settlements of all their property, real or personal, and whether in possession, reversion, remainder, or expectancy.[32] The statute has already received some interpretation in the courts; and so much in favor was it, that almost immediately upon its passage it was acted upon in chancery. Under this statute settlements have been upheld even where infant wards married in contempt or defiance of court; and a settlement may be made on the occasion of an infant's marriage after the marriage has actually taken place.[33] But aside from the operation of such a statute, an infant who becomes a party to a marriage settlement may repudiate it within a reasonable time after attaining majority.[34]

Milner v. Lord Harewood, 18 Ves. 275; Caruthers v. Caruthers, 4 Bro. C. C. 509.

30. Simson v. Jones, 2 Russ. & M. 376; Campbell v. Ingilby, 21 Beav. 567; 25 L. J. Eq. 760. For summary of the English chancery doctrine, see Peachey, Mar. Settl. 37.

31. Peachey, Mar. Settl. 53, 54; *Ib.*, 29-43, and cases cited *passim; In re* Waring, 21 L. J. Eq. 784; Simson v. Jones, 2 Russ. & M. 365; Borton v. Borton, 16 Sim. 552; Field v. Moore, 25 L. J. Eq. 69; 25 E. L. & Eq. 498.

32. 18 & 19 Vict., ch. 53. See Peachey, Mar. Settl. 45. For construction of this statute, see *In re* Dalton, 39 E. L. & Eq. 145; s. c. 6, De G. M. & G. 201. But see *Re* Catherine Strong, 2 Jur. (N. S.) 1241; 5 W. R. 107. Such infant may consent to a proposed reinvestment. *In re* Cardress, L. R. 7 Ch. D. 728. Or exercise during minority a power which was apparently so intended in trust settlement. *Ib.;* Andrews v. Andrews, 15 Ch. D. 228.

33. Settlement held valid either under the inherent jurisdiction of chancery over the property of its wards or under the infant's settlement act; and even if invalid in its inception it had been adopted, confirmed, and acquiesced in by the infant, by various acts during and after her coverture. Buckmaster v. Buckmaster, 33 Ch. D. 482. And see Sampson *Re*, 25 Ch. D. 482; § 390.

34. But where the settlement is made by the court, its leave is necessary in order to disaffirm. Brown v. Wadsworth, 168 N. Y. 225, 61 N. E. 250; Smith v. Smith, 107 Va. 112, 57 S. E. 577.

See settlement with a covenant to

This subject has received little attention in the United States; notwithstanding the plenary jurisdiction over the estates and persons of infants which a court of equity is admitted to exercise in many of our States. But in New York some decisions have been made, of a like tenor with those in the English chancery. Thus, in 1831, that a legal jointure settled upon an infant would bar her dower; and, by analogy to the statute, a competent and certain provision settled upon the infant in bar of dower, to which there is no objection but its mere equitable quality.[35] And in 1843, that a female infant was not bound by agreement to settle her real estate upon marriage.[36] So, in Maryland, a female infant cannot bind her real estate by her marriage settlement.[37]

An objection to the validity of a marriage settlement, on the ground that the parties to it were infants, can only be made by the parties themselves. A trustee acting under it has no such power.[38] But since privies in blood can avoid an infant's voidable conveyance, it is held that if the infant dies after making a settlement of real estate, and without having attained majority, her privies in blood may avoid the settlement.[39] There are circumstances under which the infant's confirmation in part of a settlement will be taken as proof of an intention to confirm the whole of it.[40]

Marriage articles are not of themselves binding upon the infant or her privies; but they are binding upon the adult husband.[41] Yet if the infant dies under age, her privies cannot take the benefits of the proposed settlement and of the inheritance likewise; they may have the more beneficial, and that is all.[42]

§ 1002. Infant's Exercise of a Power.

Where a power is given to an infant in general terms to direct a sale of the infant's land, this power cannot be exercised during

settle after-acquired property thus repudiated, Edwards v. Carter (1893), App. C. 360. Same singular effects upon a settlement follow the Married Women's Act (1893), 2 Ch. 307. See also Duncan v. Dixon, 44 Ch. D. 211.

35. McCartee v. Teller, 2 Paige, 511.

36. Temple v. Hawley, 2 Sandf. Ch. 153.

37. Levering v. Levering, 3 Md. Ch. 365. See Burr v. Wilson, 18 Tex. 367.

38. Jones v. Butler, 30 Barb. 641.

39. Levering v. Levering, 3 Md. Ch. 365; Whitingham's Case, 8 Rep. 42; Macphers. Inf. 465; Brown v. Brown, L. R. 2 Eq. 481.

40. Davies v. Davies, L. R. 9 Eq. 468. As to settling a small fund to the separate use of a chancery ward who marries the day after she comes of age, see White v. Herrick, L. R. 4 Ch. 345. As to confirmation, see White v. Cox, 2 Ch. D. 387.

41. Brown v. Brown, L. R. 2 Eq. 481; Whichcote v. Lyle's Ex'rs, 28 Pa. St. 73.

42. Brown v. Brown, *Ib.*

infancy; for a power touching his own estate which is thus intended should be explicitly stated.[43] But an infant may exercise a naked power, unaccompanied with any interest, and requiring no exercise of discretion.[44]

§ 1003. Infant's Commercial Paper.

An infant's commercial paper is voidable,[45] whether negotiable or not.[46] It may be disaffirmed at majority,[47] even though the note is held for value and without notice.[48] The infant's promissory note as surety is void,[49] and he may avoid it or his accommodation note though he misrepresents his age.[50] A note given by the firm, or a contract to purchase, cannot be enforced against the minor partner when he pleads infancy, whether the firm has been already dissolved or not.[51]

We may here add that infancy of the maker of a note does not excuse the want of a demand on him by the holder in order to charge the indorsee.[52] The Negotiable Instruments Act does not change the common law as to the voidability of an infant's com-

43. Hill v. Clark, 4 Lea, 405.

44. *Ib.;* Perry, Trusts, § 52.

45. Wright v. Buchanan (Ill.), 123 N. E. 53; Murray v. Thompson, 136 Tenn. 118, 188 S. W. 578; Heffington v. Jackson, 43 Tex. Civ. 560, 96 S. W. 108; Watson v. Ruderman, 79 Conn. 687, 66 A. 515; Board of Trustees of La Grange Collegiate Institute v. Anderson, 63 Ind. 367, 30 Am. R. 224; Gray v. Grimm, 157 Ky. 603, 163 S. W. 762; Minock v. Shortridge, 21 Mich. 304; Nichols & Shephard Co. v. Snyder, 78 Minn. 502, 81 N. W. 516; Darlington v. Hamilton Bank of New York City, 116 N. Y. S. 678, 63 Misc. 289; Murray v. Thompson (Tenn.), 188 S. W. 578, L. R. A. 1917B, 1172; Grauman, &c., Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50.

46. Wright v. Buchanan (Ill.), 123 N. E. 53.

47. Watson v. Ruderman, 79 Conn. 687, 66 A. 515.

48. Seeley v. Seeley, &c., Co., 128 Ia. 294, 103 N. W. 961.

The paper may not be voidable in the hands of a *bona fide* purchaser where there is evidence of emancipation or that the infant was so engaged in business to warrant a prudent person in believeing that he was competent to contract. Seeley v. Seeley-Howe-Le Van Co., 128 Ia. 294, 103 N. W. 961; Darlington v Hamilton Bank, 63 Misc. 289, 116 N. Y. S. 678. But see Murray v. Thompson, 136 Tenn. 118, 188 S. W. 578 (holding that constructive notice of the infancy of the maker is necessary to enable the infant indorser to disaffirm).

49. Maples v. Wightman, 4 Conn. 376; Curtin v. Patton, 11 S. & R. 305; Nightingale v. Withington, 15 Mass. 272. An assignment by way of equitable mortgage to secure an infant who becomes surety becomes inoperative when the condition of the bond is performed. Trader v. Jarvis, 23 W. Va. 100.

50. Grauman, &c., Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50.

51. Stern v. Meikleham, 56 Hun, 475; Neal v. Berry, 86 Me. 193.

52. Wyman v. Adams, 12 Cush. 210.

mercial paper.[53] It merely prevents the indorsement from being void, but does not affect the right to disaffirm.[54] Therefore his indorsement of a note during minority gives a good title to the indorsee, subject to disaffirmance.[55] The infancy of one joint maker is not a defence to the others.[56]

§ 1004. Trusts.

An infant may be a trustee.[57] If he takes title to land as trustee he can convey or mortgage it as such, but cannot disaffirm such acts on the ground of infancy.[58] He may be liable on a constructive trust.[59] His declaration of trust is voidable, but is good till disaffirmed.[60] He is not bound by the accounts of trustees for him unless he attends their settlement by his guardian,[61] nor is he bound by his consent to the trustee's acts.[62]

§ 1005. Adverse Possession.

The statute of limitations will not run against an infant during minority so as to enable an adverse occupier of his land to obtain a title against him,[63] even though the land is held in trust for

53. Murray v. Thompson, 136 Tenn. 118, 188 S. W. 578.

54. Murray v. Thompson, 136 Tenn. 118, 188 S. W. 578, L. R. A. 1917B, 1172.

The provision of the Negotiable Instruments Act that the note of an infant passes title was enacted merely to dofity existing law, and to enable the subsequent holder to enforce the paper against all parties prior to the infant. Murray v. Thompson, 136 Tenn. 118, 188 S. W. 578, L. R. A. 1917B, 1172.

55. Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101.

56. Gray v. Grimm, 157 Ky. 603, 163 S. W. 762.

57. Sims v. Gunter (Ala.), 78 So. 62; Des Moines Ins. Co. v. McIntire, 99 Ia. 50, 68 N. W. 565; Hlawaty v. Zeock, 253 Pa. 311, 98 A. 557; Clary v. Spain, 119 Va. 58, 89 S. E. 130.

58. Des Moines Ins. Co. v. McIntire, 99 Ia. 50, 68 N. W. 565; Hlawaty v. Zeock, 253 Pa. 311, 98 A. 557.

59. Levin v. Ritz, 41 N. Y. S. 405, 17 Misc. 737.

60. Eldriedge v. Hoefer, 93 P. 246 (judg. mod., 52 Ore. 241, 94 P. 563).

61. Chandler v. Jones, 172 N. C. 569, 90 S. E. 580.

62. Clay v. Thomas, 178 Ky. 199, 198 S. W. 762; Gibney v. Allen, 156 Mich. 301, 120 N. W. 811, 16 Det. Leg. N. 159.

63. Schauble v. Schultz, 137 F. 389, 69 C. C. A. 581; Buford v. Kerr, 33 C. C. A. 166, 90 F. 513, 86 F. 97; Bradford v. Wilson, 140 Ala. 633, 37 So. 295; Taylor v. Leonard, 94 Ark. 122, 126 S. W. 387.

In Georgia the rule is established by statute. Vinton v. Powell, 136 Ga. 687, 71 S. E. 119.

In the same State the reason of the rule is said to be that during minority there is no one charged with the duty to bring ejectment to interrupt the running of the statute. Brown v. Hooks, 133 Ga. 345, 65 S. E. 780; Vinton v. Powell, 136 Ga. 687, 71 S. E. 1119; Harris v. McCrary, 17 Ida. 300, 105 P. 558; Pope v. Brassfield, 110 Ky. 128, 61 S. W. 5, 22 Ky. Law Rep. 1613; Landry v. Landry, 105 La. 362, 29 So. 900; Jenkins v. Salmen Brick & Lumber Co., 120 La. 549, 45

him,[64] but it will run in his favor,[65] and he need not make a new entry on attaining full age.[66] The statute begins to run or resumes running at majority,[67] if not then under other disability, such as coverture.[68] The suspension of the statute as against the infant will not extend to his cotenants,[69] unless the cotenants are also minors, in which case the statute will be suspended till the youngest has reached majority.[70]

So. 435; Parker v. Ricks, 114 La. 942, 38 So. 687; Pennington v. Early (N. J.), 43 A. 707; Bess Mar Realty Co. v. Capell, 164 N. Y. S. 803; Cobb v. Klosterman, 58 Ore. 211, 114 P. 96; Stahl v. Buffalo R. & P. Ry. Co. (Pa.), 106 A. 65; Long v. Cummings, 91 S. C. 521, 75 S. E. 134; Winter v. Hainer, 107 Tenn. 337, 64 S. W. 44; Barnham v. Hanly, &c., Co. (Tex. Civ.), 147 S. W. 330; Hays v. Hinkle (Tex. Civ.), 193 S. W. 153; Babcock Lumber & Land Co. v. Ferguson (U. S. D. C. N. C.), 243 F. 623; Futch v. Parslow, 64 Fla. 279, 60 So. 343; Davis v. Threlkeld, 58 Kan. 763, 51 P. 226; Biedenstein v. Mount Pleasant Inv. Co. (Mo.), 192 S. W. 937.

64. Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728.

65. Killebrew v. Mauldin, 145 Ala. 654, 39 So. 575; Ross v. Richardson, 173 Ky. 255, 190 S. W. 1087; Dunlap v. Robinson, 87 S. C. 577, 70 S. E. 313; Wood v. Bapp (S. D.), 169 N. W. 518; Woodruff v. Roysden, 105 Tenn. 491, 58 S. W. 1066, 80 Am. St. R. 905; Coke v. Ikard, 39 Tex. Civ. 409, 87 S. W. 869; R. W. Wier Lumber Co. v. Conn. (Tex. Civ.), 156 S. W. 276; Griffin v. Houston Oil Co. of Texas (Tex. Civ.), 149 S. W. 567.

66. Dunlap v. Robinson, 87 S. C. 577, 70 S. E. 313.

67. Buford v. Kerr, 86 F. 97, 90 F. 513, 33 C. C. A. 166.

It has been held error to charge that where infants were minors when an adverse possession commenced against them the statute did not run till they conveyed their interest. Carney v. Hennessey, 74 Conn. 107, 49 A. 910, 53 L. R. A. 699, 92 Am. St. R. 199; Brown v. Hooks, 133 Ga. 345, 65 S. E. 780; Hooks v. Brown, *Id.;* Coe v. Sloan, 16 Ida. 49, 100 P. 354; Hamm v. McKenny, 73 Ore. 347, 144 P. 435; Burnham v. Hardy, &c., Co. (Tex. Civ.), 147 S. W. 330.

68. Pope v. Brassfield, 110 Ky. 128, 61 S. W. 5, 22 Ky. L. 1613.

69. Sibley v. Sibley, 88 S. C. 184, 70 S. E. 615.

70. Gilbert v. Hopkins, 204 F. 196, 204; Wenger v. Thompson, 128 Ia. 750, 105 N. W. 333; Garrett v. Weinberg, 48 S. C. 28, 26 S. E. 3.

CHAPTER II.

ACTS VOID AND VOIDABLE.

§ 1006. General Principle of Binding Acts and Contracts, as to Infants.

One leading principle runs through all cases which relate to infants. It is that such persons are favorites of the law, which extends its protection over them so as to preserve their true interests against their own improvidence, if need be, or the sinister designs of others. This principle is found constantly in chancery practice. We have traced it already in cases of custody, control, and guardianship, and particularly in such as come before the American courts. It appears again in matters of legal emancipation and the minor's right to his own wages. It generally determines the result of transactions between an infant and his parent or guardian, where fraud and undue influence are suspected, or in resulting trusts to preserve the child's property. It is applied when a guardian presents his accounts for allowance. We are now to see this same principle at work in the general transactions of infants, controlling and regulating them in great measure, and serving better than any other to explain the shifting and contradictory decisions of the English and American courts on this vexed subject.

Infancy is a personal privilege, allowed for protection against imposition. The general rule of the present day is that an infant shall be bound by no act which is not beneficial to him.[71] And

71. Smith, Contr. 225; Met .Contr. 38, 39; 2 Kent, Com. 234.

most acts and contracts of infants are divided into the two classes of void and voidable; a third class — namely, of binding acts and contracts — still remaining for separate consideration in our next chapter.

§ 1007. Test as to Void or Voidable.

There is much confusion in the older books on the subject of void and voidable acts and contracts.[72] The keenness with which such a distinction must always cut is an objection to its practical use at the present day; yet writers have sought to adapt the weapon to the infant's wants. They have searched for some infallible test between void and voidable. Thus Mr. Bingham, after a review of the English cases, years ago, concluded that the only safe criterion was, that "acts which are capable of being legally ratified are voidable only; and acts which are incapable of being legally ratified are absolutely void."[73] But this was only to shift the uncertainty, and replace one difficulty by another. What acts can be legally ratified and what cannot? As Kent properly observes, such a criterion does not appear to free the question from its embarrassment or afford a clear and definite test.[74] Again, a Massachusetts judge of repute declared, many years ago, that the books agree in one result: that whenever the act done *may be* for the infant's benefit it shall not be considered void, but he shall have his election, when he comes of age, to affirm or avoid it; and this, he adds, is the only clear and definite proposition which can be extracted from the authorities.[75] Even this rule, though much better, is found difficult of application, and has been pronounced unsatisfactory in some of the later cases.[76] Besides, it is lacking in comprehensiveness and scope. A more precise and intelligible test than either was that applied in one of the earlier English cases by Chief Justice Eyre, and cited since with approval by Judge Story and Chancellor Kent:[77] namely, that where the court can pronounce that the contract is for the benefit of the infant, as, for instance, for necessaries, then it shall bind him; where it can

72. See Shep. Touch. 232; Bac. Abr. Infancy and Age (I.), and cases cited in Zouch v. Parsons, 3 Burr. 1794.

73. Bing. Inf. 234.

74. 2 Kent, Com. 234.

75. Per Parker, C. J., Whitney v. Dutch, 14 Mass. 457. See 2 Kent, Com. 234; Met. Contr. 39.

76. Met. Contr. 40; 1 Am. Lead. Cas., 4th ed., 242.

77. See United States v. Bainbridge, 1 Mason, 82; 2 Kent, Com. 236; McGan v. Marshall, 7 Humph. 121.

pronounce it to be to his prejudice, it is void; and that where it is of an uncertain nature, as to benefit or prejudice, it is voidable only, and it is in the election of the infant to affirm it or not.[78] The doctrine seems hardly capable of a closer analysis; yet even this statement of the legal test is by no means clear and conclusive.

The equitable doctrine differs not from the legal as to the contracts of infants. In general, when a contract is not manifestly for the benefit of an infant, he may avoid it, as well in equity as at law; and when it can never be for his benefit, it is utterly void. Infants are favored in all things which are for their benefit, and are saved from being prejudiced by anything to their disadvantage. For infants are by law generally treated as having no capacity to bind themselves, from the want of sufficient reason and discernment of understanding. In regard to their acts, some are voidable and some are void; so in regard to their contracts, some are voidable and some are void.[79] The liberality and freedom exercised in common-law courts at the present day, in shaping general doctrines with reference to infants and their contracts, must be ascribed in a large degree to the influence of the equity tribunals and their decisions. "In short," as Judge Story observes, "the disabilities of an infant are intended by law for his own protection, and not for the protection of the rights of third persons; and his acts may therefore, in many cases, be binding upon him, although the persons, under whose guardianship, natural or positive, he then is, do not assent to them."[80] Where the contract is voidable, not void, the infant has his election to avoid it either during his minority or within a reasonable time after he attains majority; otherwise, it is taken to have been confirmed, and so binds him forever, since he became capable, when an adult, of confirming it.

78. Keane v. Boycott, 2 H. Bl. 511. And see Green v. Wilding, 59 Ia. 679. The rule is that contracts of an infant, caused by his necessities or manifestly for his advantage, are valid and binding, while those manifestly for his hurt are void. Contracts falling between these classes are voidable. Philpot v. Bingham, 55 Ala. 435. Parke, B., in Williams v. Moor, 11 M. & W. 256, 264, alludes to the uncertain sense of the word "void." The word "void" may mean incapable of being enforced; and the plea of infancy is a bar to any demand on one contract as well as the other. But "void" may mean, too, incapable of being ratified.

79. 1 Story, Eq. Juris., §§ 240, 241; 1 Fonbl. Eq., b. 1, ch. 2, § 4. And see Turpin v. Turpin, 16 Ohio St. 270.

80. United States v. Bainbridge, 1 Mason, 83.

§ 1008. Privilege of Avoidance Personal to Infant; Rule as to Third Person, &c.

The privilege of avoiding his acts or contracts, where these are voidable, is a privilege personal to the infant, which no one can exercise for him, except his heirs and legal representatives.[81] Hence the other contracting party remains bound, though the infant be not; for being an indulgence which the law allows infants, to secure them from the fraud and imposition of others, it can only be intended for their benefit, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security.[82] And were it otherwise, this privilege, instead of being an advantage to the infant, would in many cases turn out greatly to his detriment. Being thus personal, the defence of infancy does not go to any stranger.

Thus, where a person of full age promises to marry a minor and afterwards breaks off the match, he may be sued by the minor upon this contract; though he would have had no corresponding remedy against the minor for breach of promise.[83] So a third person, not a party to the contract or transaction, cannot take advantage of the infancy of the parties. Thus, in an action for seducing a servant from his master's service, the defendant cannot justify on the ground that the servant was an infant, and therefore not by law bound to perform his contract for service made with the master.[84] On the same principle (connected with others), the

81. United States v. Bainbridge, 1 Mason, 83; Keane v. Boycott, 2 H. Bl. 511; Met. Contr. 38; Smith, Contr. 231; Harvey v. Briggs, 68 Miss. 60.

82. Riley v. Dillon (Ala.), 41 S. 768; Smoot v. Ryan (Ala.), 65 So. 828; Chapman v. Duffy, 20 Colo. App. 471, 79 P. 746; Wright v. Buchanan (Ill.), 123 N. E. 53; Lafollett v. Kyle, 51 Ind. 446; Johnson v. Rockwell, 12 Ind. 76; Latrobe v. Dietrich, 114 Md. 8, 78 A. 983; Widrig v. Taggart, 51 Mich. 103, 16 N. W. 251.

An infant's right to disaffirm a conveyance of her reality is a legal privilege, of which all persons must take notice. Watson v. Peebles, 102 Miss. 725, 59 So. 881; Griffith v. Schwenderman, 27 Mo. 412; Near v. Williamson, 166 Mo. 358, 66 S. W. 160; Webb v. Harris (Okla.), 121 P. 1082; Bac. Abr. Inf. I. 4; 1 Pars. Contr. 275; Johnson v. Rockwell, 12 Ind. 76; Hartness v. Thompson, 5 Johns. 160; Brown v. Caldwell, 10 S. & R. 114.

A contract of bailment made by the bailee with the agent of an undisclosed principal, who proves a minor, cannot be rescinded by the bailee on the ground of the bailor's minority, without delivering the goods to him. Stiff v. Keith, 143 Miss. 224.

83. Holt v. Ward, 2 Stra. 937; Harvey v. Ashley, 3 Atk. 610; Hunt v. Peake, 5 Cow. 475; Willard v. Stone, 7 Cow. 22; Warwick v. Cooper, 5 Sneed, 659; Cannon v. Alsbury, 1 Marsh. 78; Rush v. Wick, 31 Ohio St. 521.

84. Keane v. Boycott, 8 H. Bl. 511; O'Rourke v. John Hancock Mut. Life Ins. Co., 23 R. I. 457, 50 A. 834, 57

acceptor of a bill of exchange, or the maker of a promissory note, cannot resist payment in a suit by an indorsee, though the indorser be an infant.[85] Nor can the purchaser at a sale under an execution set up infancy to defeat prior transactions of the judgment debtor.[86] Nor can the vendor avoid the infant's purchase on such a ground.[87] Nor can infancy of the mortgagor be set up by one with a junior lien to advance his own security.[88] Nor is a stranger permitted to impeach the conveyance of an infant.[89] Nor can a corporation in which an infant owns stock reject his transfer of it.[90] Nor can an insurance company which insures the property of an infant repudiate its liability on the ground that the infant is not bound.[91] Furthermore, the copartners of an infant cannot use his right of avoidance for their own benefit.[92] In fine, the defence of infancy is for the benefit and protection of the infant; and other persons may not set it up for their own benefit, at all events if the contract be not void.[93] Therefore his creditors cannot compel him to disaffirm,[94] or exercise the power for him to subject his property to their debts.[95] So, too, it is the settled doctrine that infancy does not protect the indorsers or sureties of an infant; or those who have jointly entered into his voidable

L. R. A. 496, 91 Am. St. R. 643 (holding that the beneficiary may reply the insured's infancy to the insurer's defence of false warranties).

85. Met. Contr. 39; Taylor v. Croker, 4 Esp. 187; Nightingale v. Withington, 15 Mass. 273; Hardy v. Waters, 38 Me. 450; Frazier v. Massey, 14 Ind. 382.

86. Alsworth v. Cordtz, 31 Miss. 32.

87. Oliver v. Houdlet, 13 Mass. 237. A sale to an infant is a valid transfer of the property out of the vendor, even though the infant be not bound afterwards to pay the stipulated price. Crymes v. Day, 1 Bail. 320. Where a minor agrees, as the consideration of the conveyance of land, to pay certain debts of the grantor, and afterwards does in fact pay them, it is held that the agreement constitutes a valuable consideration for such conveyance, and will support it against the grantor's creditors. Washband v. Washband, 27 Conn. 424.

88. Baldwin v. Rosier, 48 Fed. 810.

89. Dominick v. Michael, 4 Sandf. 374.

90. Smith v. Railroad, 91 Tenn. 221.

91. Monaghan v. Fire Ins Co., 53 Mich. 238.

92. Brown v. Hartford Ins. Co., 117 Mass. 479; Winchester v. Thayer, 129 Mass. 129.

93. Beardsley v. Hotchkiss, 96 N. Y. 201, a case of marriage settlement.

94. Watson v. Ruderman, 79 Conn. 687, 66 A. 515; Nutt v. Summers, 78 Va. 164.

95. McCarty v. Murray, 3 Gray (Mass.), 578; Kendall v. Lawrence, 22 Pick. (Mass.) 540; Nutt v. Summers, 78 Va. 164; Gayle v. Hayes' Adm'r, 79 Va. 542 (holding that a creditor occupies not higher ground as to the infant or his property than a guardian).

undertakings. They, if of full age, may be held liable, though the infant himself should escape responsibility.[96]

But third persons should be allowed to protect themselves against incurring undue liabilities on an infant's behalf. Thus, an officer selling property at public auction is not bound to accept the bid of an infant.[97] And although infancy is a personal privilege, yet the administrator of the estate of an infant may avail himself of the infancy of his intestate, to avoid or uphold a transaction to which the latter was a party during his life, and which remained voidable at his death.[98] And as a rule the right of avoidance, with due limitations of time and circumstances, passes to privies in blood entitled to the estate;[99] in short, to his heirs or legal representative.

§ 1009. Modern Tendency to Regard Infant's Acts and Contracts as Voidable Rather Than Void.

The strong tendency of the modern cases is to regard all acts and contracts and all transactions of infants as voidable only; and thus almost to obliterate the ancient distinction of void and voidable contracts altogether.[1] And the *dicta* are of frequent occur-

96. Motteaux v. St. Aubin, 2 Black, 1133; Jaffray v. Fretain, 5 Esp. 47; Hartness v. Thompson, 5 Johns. 160; Parker v. Baker, 1 Clarke Ch. (N. Y.) 136; Taylor v. Dansby, 42 Mich. 82.

97. Kinney v. Showdy, 1 Hill, 544.

98. Counts v. Bates, Harp. 464; Parsons v. Hill, 8 Mo. 135; Turpin v. Turpin, 16 Ohio St. 270.

99. Riley v. Dillon (Ala.), 41 So. 768; Hill v. Weil (Ala.), 80 So. 526; Riley v. Dillon & Pennell, 148 Ala. 283, 41 So. 768; Bartlett v. Cowles, 81 Mass. 445; Bartlett v. Drake, 100 Mass. 176, 97 Am. Dec. 92, 1 Am. R. 101; Walsh v. Young, 110 Mass. 399; Lurville v. Greer, 165 Mo. 380, 65 S. W. 579; O'Rourke v. Hall, 56 N. Y. S. 471, 38 App. Div. 534; Blake v. Hollandsworth (W. Va.), 76 S. E. 814, 43 L. R. A. N. S. 714; Blake v. Hollandsworth, 71 W. Va. 387, 76 S. E. 814.

The heirs may disaffirm at any time before they are barred by the statute, or, if the ancestor is a married woman, till after the expiration of the statutory period after the termination of an estate of curtesy, and mere silence or inertness is immaterial unless there are facts amounting to ratification. Blake v. Hollandsworth (W. Va.), 76 S. E. 814, 43 L. R. A. N. S. 714; Dominick v. Michael, 4 Sandf. 374; Beeler v. Bullett, 3 A. K. Marsh. 281; Nelson v. Eaton, 1 Redf. (N. Y. Sur.) 498; Jefford v. Ringgold, 6 Ala. 544; Illinois Land Co. v. Bonner, 75 Ill. 315; Veal v. Fortson, 57 Tex. 482; Sharp v. Robertson, 76 Ala. 343; Harvey v. Briggs, 68 Miss. 60. And see Nolte v. Libbert, 34 Ind. 163. The principle of the text applies to marriage articles. See *supra*, § 399. Devisees under a will, as strangers privy in estate only, cannot avoid the infant's contract. Bozeman v. Browning, 31 Ark. 364. But see Shreeves v. Caldwell, 135 Mich. 323, 97 N. W. 764, 10 Det. Leg. N. 782, 106 Am. St. R. 396.

1. *In re* Huntenberg, 153 F. 768; Carmen v. Fox, &c., Corp., 258 F. 703; Sims v. Gunter (Ala.), 78 S. E. 62;

rence at the present day that acts and contracts of an infant are not absolutely void, but voidable only, unless manifestly to the infant's prejudice; and that beneficial contracts are only voidable at most.[2] This makes all the stronger the position already taken, that an adult party cannot disaffirm such a transaction.

Yet there are cases where a contract may still be pronounced absolutely void. In *Regina* v. *Lord,* an English case, the question arose on the conviction of a servant for unlawfully absenting himself from his master's employment. Denman, C. J., in delivering the judgment of the court, observed: "Among many objections, one appears to us clearly fatal. He was an infant at the time of entering into the agreement which authorizes the master to stop his wages when the steam-engine is stopped working for any cause. An agreement to serve for wages may be for the infant's benefit; but an agreement which compels him to serve at all times during the term, but leaves the master free to stop his work and his wages whenever he chooses to do so, cannot be considered as beneficial to the servant. It is inequitable and wholly void."[3] And conformably to such a principle, a contract which sets a minor child work-

Walker v. Goodlett, 102 Ark. 383, 144 S. W. 189; Grievance Committee v. Ennis, 84 Conn. 594, 80 A. 767; Gannon v. Manning, 42 App. D. C. 206; Putnal v. Walker, 61 Fla. 720, 55 So. 844; Strain v. Hinds, 277 Ill. 598, 115 N. E. 563; Wuller v. Chuse Grocery Co., 241 Ill. 398, 89 N. E. 796; Appell v. Appell, 235 Ill. 27, 85 N. E. 205; Pope v. Lyttle, 157 Ky. 659, 163 S. W. 1121; Henderson v. Clark, 163 Ky. 192, 173 S. W. 367; Halcomb v. Ison, 140 Ky. 189, 130 S. W. 1070; McCarty v. Murray, 3 Gray (Mass.), 578; Holmes v. Rice, 45 Mich. 142, 7 N. W. 772; Missouri, &c., Ass'n v. Eveler, 237 Mo. 679, 141 S. W. 877; Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131; Robinson v. Allison, 192 Mo. 366, 91 S. W. 115; Parrish v. Treadway, 267 Mo. 91, 183 S. W. 580; Bagget v. Jackson, 160 N. C. 26, 76 S. E. 86; Hoan v. Utter, 175 N. C. 332, 95 S. E. 565; Clapp v. Byrnes, 155 N. Y. 535, 50 N. E. 277; New York, &c., Co. v. Fisher, 23 App. Div. 363, 48 N. Y S. 152; McBroom v. Whitfield, 108 Tenn. 422, 67 S. W. 794; Hobbs v. Hinton, &c., Co., 74 W. Va. 443, 82 S. E. 267; Carrigan v. Davis (W. Va.), 100 S. E. 91; Grauman, Marx & Cline Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50; Jones v. Valentine's School of Telegraphy, 122 Wis. 318, 99 N. W. 1043. See Met. Contr. 40; Shaw, C. J., in Reed v. Batchelder, 1 Met. 559.

2. See Ridgely v. Crandall, 4 Md. 435; N. H. M. Fire Ins. Co. v. Noyes, 32 N. H. 345; Jenkins v. Jenkins, 12 Ia. 195; Scott v. Buchanan, 11 Humph. 468; Babcock v. Doe, 8 Ind. 110; Irvine v. Irvine, 9 Wall. 617; Robinson v. Weeks, 56 Me. 102.

3. Clark v. Stanhope, 109 Ky. 521, 59 S. W. 856; Ward v. Sharpe, 139 Tenn. 347, 200 S. W. 974; Regina v. Lord, 12 Q. B. 757. Cf. Leslie v. Fitzpatrick, 3 Q. B. D. 229. In Corn v. Matthews (1893), 1 Q. B. 310, an apprenticeship deed somewhat of this character was refused enforcement against the minor. And see De Francesco v. Bornum, 45 Ch. D. 430.

ing to pay off a creditor of someone else should be pronounced prejudicial to his interest and void, when the wages that ought to be his own are thus appropriated.[4] In general, any transfer of an infant's real or personal property which cannot possibly be for his benefit and is without consideration is void.[5]

§ 1010. Same Subject; Bonds, Notes, &c.

So an infant's bond with penalty and for the payment of interest is held to be void on the ground that it cannot possibly be for his benefit.[6] And a bond executed by a minor as surety is void.[7] So is declared to be a mortgage of a minor's property to secure her husband's debt.[8] And so is said to be a release by a minor to his guardian, which affords the latter more protection than a receipt.[9] But in Vermont it was decided that there is no general rule exempting an infant from paying interest as necessarily injurious to him.[10] An infant's release of his legacy or distributive share is held to be void in Tennessee.[11] In such cases an infant is called upon to become the party to some undertaking substantially for the benefit of another, and not for his own profit. His indorsement or guaranty exposes him to a dangerous liability, and such acts are held void.[12] The construction of a local statute will in

But see (1892) Baring v. Stanton, 3 Ch. 502; Danville v. Amoskeag Co., 62 N. H. 133.

4. Such contracts have been considered where the minor son of a deceased father undertook to pay his father's debt by entering into the creditor's service; an undertaking not wholly without honor, from a family point of view, and yet apt to be oppressive on the other side, and properly disapproved judicially even under mitigating circumstances. In Dubé v. Beaudry, 150 Mass. 448, such a contract was fully executed during minority, but the court allowed the minor to repudiate on reaching full age and recover. In ancient times, as the court remarked, this contract would have been pronounced absolutely void.

5. Bloomingdale v. Chittenden, 74 Mich. 698; Robinson v. Coulter, 90 Tenn. 705; Person v. Chase, 37 Vt. 647; Oxley v. Tryon, 25 Ia. 95.

6. Baylis v. Dineley, 3 M. & S. 477; Fisher v. Mowbray, 8 East, 330.

7. Allen v. Minor, 2 Call, 70; Met. Contr. 40; Carnahan v. Allderdice, 4 Harring. 99. It should naturally follow that an infant's undertaking to become bail for another is void. Yet it is lately held that his indorsement upon a writ to become bail for the defendant is voidable only. Reed v. Lane, 61 Vt. 481.

8. Chandler v. McKinney, 6 Mich. 217; Cronise v. Clark, 4 Md. Ch. 403. See Colcock v. Ferguson, 3 Desaus. 482.

9. Fridge v. State, 3 Gill & Johns. 115.

10. Bradley v. Pratt, 23 Vt. 378.

11. Langford v. Frey, 8 Humph. 443.

12. Helland v. Colton State Bank, 20 S. D. 325, 106 N. W. 60; Margrett, *Ex parte* (1891), 1 Q. B. 413; and this however valuable be the consideration. *Ib.*

some cases determine that an instrument is void, not voidable.[13] An infant's stock speculations on margin have been declared in the nature of a wager contract and void.[14] And an assignment by the infant in trust for the benefit of creditors is held in New York void and not voidable.[15]

Now it is admitted that the decisions are frequently contradictory and uncertain; yet these cases of void contracts almost invariably proceed upon the doctrine that the infant's act was positively prejudicial to his interest; and certainly, if any contract can be so pronounced on mere inspection, it is a contract whereby an infant becomes bound upon another's debt or disability. The technical form of the transaction is of less importance. There are many cases where an infant's bonds, mortgages, and promissory notes have been held not void, but under the circumstances of the case voidable only; as where given in ordinary transactions which may possibly prove beneficial with relation to the minor's property.[16] And reference to the latter cases will show that the modern rule is broadly announced in many States, that an infant's promissory note, his statutory recognizance, and his mortgage, whether of real estate or chattels, are all voidable, rather than void in general.[17] Even an infant's contract as surety or indorser has lately been pronounced voidable and not void in numerous

13. Hoyt v. Swar, 53 Ill. 134.

14. Ruchizky v. De Haven, 97 Pa. St. 202.

15. Yates v. Lyon, 61 Barb. 205.

16. State v. Plaisted, 43 N. H. 413; Richardson v. Boright, 9 Vt. 368; Palmer v. Miller, 25 Barb. 399; Reed v. Batchelder, 1 Met. 559; Patchkin v. Cromack, 13 Vt. 330; Conroe v. Birdsall, 1 Johns. Cas. 127; Everson v. Carpenter, 17 Wend. 419; Monumental, etc., Association v. Herman, 33 Md. 128; Dubose v. Whedon, 4 McCord, 221; Little v. Duncan, 9 Rich. 55. See Adams v. Ross, 1 Vroom (N. J.), 505; Kempson v. Ashall, L. R. 10 Ch. 15; Garin v. Burton, 8 Ind. 69. But see McMinn v. Richmond, 6 Yerg. 9; Beeler v. Young, 1 Bibb, 519.

17. See *e. g.* Goodsell v. Myers, 3 Wend. 479; Reed v. Batchelder, 1 Met. 559; Patchkin v. Cromack, 13 Vt. 330; State v. Plaisted, 43 N. H. 413, and cases cited; Palmer v. Miller, 25 Barb. 399; Mustard v. Wohlford, 15 Gratt. 329. Whether an infant's own statutory recognizance in a criminal proceeding may not be more than voidable, *i. e.*, binding, see next chapter; State v. Weatherwax, 12 Kan. 463; Losey v. Bond, 94 Ind. 67; Uecker v. Koehn, 21 Neb. 559; Catlin v. Haddox, 49 Conn. 492; Hoyt v. Wilkinson, 57 Vt. 404. No recovery can be had on a note given by an infant for what he does not need,—*e. g.*, a buggy or horse,—even by a *bona fide* holder; the usual protection of a negotiable instrument taken when not overdue will not avail. Howard v. Simpkins, 70 Ga. 322. See, as to assignee of an infant's mortgage, Bridges & White v. Bidwell, 20 Neb. 185.

instances.[18] This we conceive to be the reasonable view of the subject; the rule of voidable, rather than void, applying wherever the transaction was not from its very nature such as could be pronounced prejudicial to the infant's interest, but might under some conditions be in a sense for his personal benefit.[19]

§ 1011. Rule of Zouch v. Parsons.

It is true, however, that the decisions are not invariably placed by the court upon such a ground. The rule of Perkins, which was adopted by the Court of King's Bench in the celebrated case of *Zouch* v. *Parsons,* is that all deeds of an infant which do not take effect by delivery of his hand are merely void, and all such as do take effect by delivery of his hand are voidable. For in the one case an interest is conveyed, in another a mere power.[20] This case has come down as authority for all future times; and the rule has frequently been cited with approval, in support of mortgages, bonds, and deeds being as voidable only, in contrast with deeds delegating a mere power to sell or encumber, which are void. But we question the propriety of its modern application as a principle, however useful in describing an incident. So manual delivery, it was said, must accompany the sale of an infant's personal property in order to render it valid.[21] The real reason of such a rule might have been that solemn instruments and transactions of grave importance ought not to be lightly entered upon, or be made

18. Owen v. Long, 112 Mass. 403; Hardy v. Waters, 38 Me. 450; Harner v. Dipple, 31 Ohio St. 72; Fetrow v. Wiseman, 40 Ind. 148; Williams v. Harrison, 11 S. C. 412. And see Reed v. Lane, 61 Vt. 481.

19. Where the grantees in a deed of gift are minors, the law will presume an acceptance on account of the beneficial character of the conveyance. Petre v. Petre (Ind. App.), 121 N. E. 285. Thus, infants are not bound by conditions in a deed to them. Strothers v. Woodcox, 142 Ia. 648, 121 N. W. 51. Stock transactions resulting in a loss are within the rule. Benson v. Tucker, 212 Mass. 60, 98 N. E. 589, 41 L. R. A. (N. S.) 1219; Young v. Sterling, etc., Works (N. J.), 102 A. 395.

A statute giving a garage keeper a lien for storage and repairs does not bind an infant's automobile, where the obligation is predicated on the infant's obligation to pay. La. Rose v. Nichols (N. J.), 103 A. 390; Aborn v. Janis, 113 N. Y. S. 309; 62 Misc. 95 (aff. 106 N. Y. S. 1115). Nor is he bound by warranties in an application for a policy of insurance. O'Rourke v. John Hancock, etc., Ins. Co., 23 R. I. 457, 50 A. 834, 57 L. R. A. 496, 91 Am. St. R. 643.

20. Perkins, § 12; Zouch v. Parsons, 3 Burr. 1804; Bool v. Mix, 17 Wend. 131; 2 Kent, Com. 236, 237, *n.;* State v. Plaisted, 43 N. H. 413; Conroe v. Birdsall, 1 Johns. Cas. 127; Seavey v. Hunter, 81 Tex. 644; Dexter v. Lathrop, 136 Pa. St. 568.

21. Fonda v. Van Horne, 15 Wend. 631.

effective in future; but it is clear that ere the present day much of the ancient veneration for parchment deeds under seal has disappeared, while the tendency is to place real and personal estate transactions on much the same footing, distinguishing rather by the value than the nature of the property and by the consideration involved. We admit, however, that the common law draws a strong line of demarcation between real and personal property; so that title transfer of the former kind requires far more positive formality than that of the latter.

Now to continue. It is held that an infant may make a voidable purchase and take a voidable conveyance of land, for, says Lord Coke, striking the legal principle with wonderful clearness for that day, "*it is intended for his benefit,* and at his full age he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase."[22] For this reason, rather than the technical one just referred to, it may be said in general that the conveyance of land by a minor is also voidable and not void;[23] though here again the courts have been prone to cite the rule of Perkins. But the decided cases usually presume that a valuable consideration has passed to the infant, or at least that there is nothing *prima facie* prejudicial to him. Lord Chancellor Sugden, in 1842, in *Allen* v. *Allen,* took occasion to review Lord Mansfield's decision in *Zouch* v. *Parsons,* and commended it as sound law in respect that a deed which takes effect by delivery, and is executed by an infant, is voidable only; though he intimated that his own decision might equally well be referred

22. Co. Litt. 2b; Met. Contr. 40; Bac. Abr. Inf. 6; Ferguson v. Bell, 17 Mo. 347. And see Spencer v. Carr, 45 N. Y. 406; also Hook v. Donaldson, 9 Lea, 56. Where a deed to an infant was destroyed by the father before it was recorded, and a new deed was executed by the same grantor to the father, it was held that the destruction of the deed did not, even with the assent of the infant, divest his title, and that equity would restore him to his former position. Brendle v. Herron, 88 N. C. 383.

23. Kendall v. Lawrence, 22 Pick. 540; Gillet v. Stanley, 1 Hill, 121; Bool v. Mix, 17 Wend. 119; Wheaton v. East, 5 Yerg. 41; Phillips v. Green, 5 Monr. 344; Eagle Fire Ins. Co. v. Lent, 6 Paige, 635; Allen v. Poole, 54 Miss. 323; Illinois Land Co. v. Bonner, 75 Ill. 315; Dixon v. Merritt, 21 Minn. 196; Davis v. Dudley, 70 Me. 236; Weaver v. Carpenter, 42 Ia. 343; Schaffer v. Lavretta, 57 Ala. 14; Nathans v. Arkwright, 66 Ga. 179; Welch v. Bunce, 83 Ind. 382; Brantley v. Wolf, 60 Miss. 420; Ellis v. Alford, 64 Miss. 8; Dawson v. Helmes, 30 Minn. 107; Bingham v. Barley, 55 Tex. 281; Bagley v. Fletcher, 44 Ark. 153; Birch v. Linton, 78 Va. 584; Haynes v. Bennett, 53 Mich. 15. And so as to infant wife. Scranton v. Stewart, 52 Ind. 68; Richardson v. Pate, 93 Ind. 423.

to the benefit arising to the infant from the deed; which, indeed, was one of the grounds on which Lord Mansfield had decided that celebrated case.[24] And to confirm our former distinction as the crucial one, it is held that an infant's conveyance of land by way of gift or without consideration or upon mere nominal consideration is absolutely void, because obviously prejudicial to his interests.[25]

So leases to infants are not absolutely void, but voidable only.[26] And an exchange of property made by an infant is voidable.[27] And it is held that the infant's bond for title to real estate or his parol contract to convey is voidable and not void.[28] Also that his contract for the purchase of land is voidable.[29] A minor's tenancy by lease or otherwise is usually voidable by him.[30]

§ 1012. Letters of Attorney; Cognovits, &c.

So a power of attorney to authorize another to receive seisin of land for an infant, in order to complete his title to an estate conveyed to him by feoffment, is voidable only; it being an authority to do an act for his probable benefit.[31]

But letters of attorney from an infant conveying no present interest are held to be absolutely null. This point was discussed in *Zouch* v. *Parsons,* and on the distinction of Perkins' rule, it was maintained that writings "which take effect" cannot include letters of attorney, or deeds which delegate a mere power and convey no interest. Whatever might be thought of this explanation, the conclusion follows: "that powers of attorney are an exception to the general rule, that the deeds of infants are only voidable; and a power to receive seisin is an exception to that. The end of the privilege is to protect infants; and to that object all the rules and their exceptions must be directed."[32] And the English courts have uniformly held the infant's warrant of attor-

Or infant husband. Barker v. Wilson, 4 Heisk. 268; Yourse v. Norcross, 12 Mo. 549.

24. Allen v. Allen, 3 Dru. & War. 340. See Co. Litt. 51b, *n.* by Hargrave.

25. Swafford v. Ferguson, 3 Lea, 292; Robinson v. Coulter, 90 Tenn. 705. Cf. Slaughter v. Cunningham, 24 Ala. 260. As to an infant's deed for necessaries, see ch. 3.

26. Zouch v. Parsons, 3 Burr. 1806; Hudson v. Jones, 3 Mod. 310; Taylor, Landlord & Tenant, and cases cited; Griffith v. Schwenderman, 27 Mo. 412.

27. Co. Litt. 51b; Williams v. Brown, 34 Me. 594.

28. Weaver v. Jones, 24 Ala. 420; Yeager v. Knight, 60 Miss. 730.

29. McCarty v. Woodstock Co., 92 Ala. 463.

30. Valentine v. Canali, 24 Q. B. D. 166.

31. Met. Contr. 41; 1 Roll. Abr. 730; Zouch v. Parsons, *supra.*

32. Per Lord Mansfield, in Zouch

ney void, even though executed jointly with others.[33] In this country there are decisions in some States to the same effect;[34] in others, again, the rule is deemed somewhat doubtful.[35]

An infant's power of attorney to another to sell his lands is deemed so manifestly unbeneficial on the face of it as to be void, and a sale made under such a power does not confer even an inchoate title.[36] But a power of attorney from an infant to sell a note is lately held voidable, not void, in California.[37] In Massachusetts an instrument of assignment, not under seal, which appoints the assignee attorney to receive the fund to his own use, is not void.[38] And in Maine the act of an infant in transferring a negotiable note, though his name be written by another under parol authority, is voidable only.[39] The good sense of the rule seems to be, as an American writer observes, that an authority delegated by an infant for a purpose which may be beneficial to him, or which the court cannot pronounce to be to his prejudice, should be considered as rendering the contract made, or act done by virtue of it, as voidable only, in the same manner as his personal acts and contracts are considered.[40] And, we may add, the English and most of the American decisions do not seem to carry the rule beyond cases of the technical "warrant of attorney," to appear in court and bind the infant, as in confessing judgment, except it be with reference to an infant's land, which power stands also upon a strong footing of objection. What we call "powers of attorney" are less likely than the warrant of attorney to be to the infant's prejudice; though we may well assume that whatever an infant cannot do he cannot authorize another to do for him, so as to make the transaction more binding.

v. Parsons, 3 Burr. 1804. And see Cummings v. Powell, 8 Tex. 88.

33. Saunderson v. Marr, 1 H. Bl. 75; Ashlin v. Langton, 4 Moore & S. 719, and cases cited.

34. Lawrence v. McArter, 10 Ohio, 37; Waples v. Hastings, 3 Harring. 403; Bennett v. Davis, 6 Cow. 393; Semple v. Morrison, 7 Monr. 298; Pyle v. Cravens, 4 Litt. 17; Knox v. Flack, 22 Pa. St. 337; Wainwright v. Wilkinson, 62 Md. 146.

35. Pickler v. State, 18 Ind. 266. But see Trueblood v. Trueblood, 8 Ind. 195. See Whitney v. Dutch, 14 Mass. 457; Met. Contr. 41; Cummings v. Powell, 8 Tex. 88; 1 Am. Lead. Cas., 4th ed., 142 *et seq.*

36. Philpot v. Bingham, 55 Ala. 435. Cf. Weaver v. Carpenter, 42 Ia. 343; Armitage v. Widoe, 36 Mich. 124.

37. Hastings v. Dollarhide, 24 Cal. 195.

38. McCarty v. Murray, 3 Gray, 578. And see Kingman v. Perkins, 105 Mass. 111.

39. Hardy v. Waters, 38 Me. 450.

40. Met. Contr. 42. And see Powell v. Gott, 13 Mo. 458.

An infant cannot bind himself by cognovit. "We come to this conclusion," said Lord Abinger, "on three grounds, each of which is fatal to the validity of the cognovit. First, it is bad because it falls within the principle which prevents an infant from appointing and appearing in court by attorney; he can appear by guardian only. Secondly, by this means the minor is made to state an account, which the law will not allow him to do, so as to bind himself; if an action be brought against him, the jury are to determine the reasonableness of the demand made. Thirdly, the general principle of law is, that a minor is not to be allowed to do anything to prejudice himself or his rights."[41] Nor can he bind himself by the appointment of an agent.[42] The cases are not harmonious as to whether the act is void or only voidable.[43] Where such a contract is voidable merely, the appointment and the acts of the agent thereunder may be ratified or disaffirmed after majority.[44]

§ 1013. Illustrations.

An infant may in some States avoid his usurious contracts, and recover the money so lent under the count for money had and received.[45] But the policy of usury is becoming abandoned in many parts of the country.

An infant may avoid his release of damages for an injury or an award upon a submission entered into by him. But if, upon trial, the jury shall find such damages to have been satisfied by an adequate compensation, the infant shall recover nominal damages only.[46] The rule is general that an infant is not bound by his

41. Oliver v. Woodroffe, 4 M. & W. 653 (1839). But the second of these grounds is not now tenable. See Williams v. Moor, 11 M. & W. 256.

42. Smoot v. Ryan, 65 So. 828; Benson v. Tucker, 212 Mass. 60, 98 N. E. 589. So where a power of sale mortgage of real estate appointed the mortgagee the attorney of an infant mortgagor to sell the property on foreclosure, a sale thereunder was not binding on the infant. Rocks v. Cornell, 21 R. I. 532, 45 A. 552.

43. Sims v. Gunter (Ala.), 78 So. 62 (void); Simpson v. Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560 (voidable); Coursolle v. Weyerhaeuser, 69 Minn. 328, 72 N. W. 697 (voidable); Smoot v. Ryan (Ala.), 65 So. 828 (void); Penson v. Tucker, 212 Mass. 60, 98 N. E. 589 (voidable).

44. In Louisiana it is held that a minor cannot disaffirm the act of an agent as far as not beneficial, and affirm it to the extent to which it is beneficial. State *ex rel.* Stempel v. New Orleans, 105 La. 768, 30 So. 97; Courselle v. Weyerhaeuser, 69 Minn. 328, 72 N. W. 697.

45. Millard v. Hewlett, 19 Wend. 301.

46. Baker v. Lovett, 6 Mass. 78. A mechanic's lien, where incident only under the local statute, to a legal

agreement to refer a dispute to arbitration; nor by an award, even in his own favor; though this is usually voidable only.[47]

Among the acts of the infants which are in the later cases regarded as voidable and not void (nor of course binding) are the following: His appeal from a justice's decision.[48] Judgments against him.[49] His covenant to carry and deliver money.[50] His chattel mortgage.[51] His agreement to convey.[52] His written obligation for the rent of land.[53] His agreement with others for the compensation of counsel retained in a lawsuit for their common benefit.[54] His executory contracts generally.[55] And, in short, his deeds and instruments under seal, with perhaps the exception of powers of attorney; though it is otherwise, perhaps, if the instrument should manifestly appear on the face of it to be fraudulent or otherwise to the prejudice of the infant; "and this," says Judge Story, "upon the nature and solemnity, as well as the operation of the instrument."[56] In Massachusetts a contract of charter to an infant, though by parol, is voidable and not void.[57] So, too, an infant's promise to pay money borrowed on joint account with another.[58] And in various instances a family arrangement as to

liability to pay, cannot attach against an infant's land, Davis v. State, 47 N. J. L. 340.

47. Watson on Awards, ch. 3, § 1; Smith, Contr. 280; Britton v. Williams, 6 Munf. 453; Barnaby v. Barnaby, 1 Pick. 221. See Guardian and Ward, *supra*.

48. Robbins v. Cutler, 6 Fost. 173.

49. Trapnall v. State Bank, 18 Ark. 53; Kemp. v. Cook, 18 Md. 130; Bickel v. Erskine, 43 Ia. 213; Wheeler v. Ahrenbeak, 54 Tex. 535; Walkenhorst v. Lewis, 24 Kan. 420; England v. Garner, 90 N. C. 197; Parker v. Starr, 21 Neb. 680; Cates v. Pickett, 97 N. C. 21. Thus a judgment of partition is voidable as against minors who were not duly represented. Williams v. Williams, 94 N. C. 732; Montgomery v. Carlton, 56 Tex. 361. But the judgment is not to be impeached in a collateral suit. *Ib.* See ch. 6, *post*.

50. West v. Penny, 16 Ala. 186.

51. Miller v. Smith, 26 Minn. 248; Corey v. Burton, 32 Mich. 30; Hongan v. Hochmeister, 49 N. Y. Super. 34; Sporr & Duvol v. Fla. Southern Ry. Co., 25 Fla. 185. But *semble* void under some circumstances, and at all events unenforceable against him during his minority. Barney v. Rutledge (1895), Mich.

52. Carrell v. Potter, 23 Mich. 377.

53. Flexner v. Dickerson, 72 Ala. 318.

54. Dillon v. Bowles, 77 Mo. 603. So as to an infant's contract creating an easement in his land. McCarthy v. Nicrosi, 72 Ala. 332. So as to infant's agreement to accept a consideration in lieu of dower. Drew v. Drew, 40 N. J. Eq. 458. And as to his assignment of wages, where no parental right intervened, see O'Neil v. Chicago R., 33 Minn. 489.

55. But see next chapter.

56. Per Story, J., Tucker v. Moreland, 10 Pet. 71; 2 Kent, Com. 236, 11th ed., *n.*, and cases cited. And see Regina v. Lord, 12 Q. B. 757.

57. Thompson v. Hamilton, 12 Pick. 425.

58. Kennedy v. Doyle, 10 Allen, 161. So, too, a purported gift to an

settlement of an estate in which the minor is interested.[59] So is an infant's marriage settlement voidable in general.[60] In so many cases of the character discussed in this chapter is the infant before or at majority presented as seeking and being permitted to set aside the transaction, that the voidable rather than void nature of the transaction is assumed, rather than asserted, and the decision is more to the point that, void or voidable, it does not under the circumstances bind him.[61]

It has been repeatedly decided in England that where an infant becomes the holder of shares by his own contract and subscription he is *prima facie* liable to pay calls or assessments; but he may repudiate that contract and subscription; and if he does so while an infant, although he may on arriving at full age affirm his repudiation, or receive the profits, it is for those who insist on this liability to make out the facts.[62] A minor's contract for stock is doubtless voidable at least in this country,[63] or if purely speculative and prejudicial to him may be even void,[64] but in general his assignment of stock which he holds is voidable only.[65]

An absolute gift of articles of personal property made by an infant can be revoked or avoided by him.[66] So may his sale of personal property.[67] So may his assignment.[68] And the executed contract of an infant follows the same rule as an executory one; he may rescind the one as well as the other; the more so, where the other party can be put substantially *in statu quo*.[69] But if before rescission the adult make a *bona fide* sale of property pur-

infant of a contract of purchase involving pecuniary obligation. Armitage v. Widoe, 36 Mich. 124.

59. Turpin v. Turpin, 16 Ohio St. 270; Jones v. Jones, 46 Ia. 466.

60. § 1001.

61. See *e. g.*, Dubé v. Beaudry, 150 Mass. 448; Queen v. Lord, 12 Q. B. 759.

62. Smith, Contr. 285; Newry & Enniskillen R. R. Co. v. Coombe, 3 Exch. 565; London & Northwestern R. R. Co. v. McMichael, 5 Exch. 114. See, as to the liability of a stockjobber in such cases, Brown v. Black, L. R. 8 Ch. 939; Merry v. Nickalls, L. R. 7 Ch. 733. And see (1894), Mayd v. Field, 3 Ch. 589.

63. Indianapolis Chair Co. v. Wilcox, 59 Ind. 429.

64. Ruchizky v. De Haven, 97 Pa. St. 202. Cf. Crummey v. Mills, 40 Hun, 370.

65. Smith v. Railroad, 91 Tenn. 221.

66. Person v. Chase, 37 Vt. 647; Oxley v. Tryon, 25 Ia. 95. So, too, his deed of gift to a trustee. Slaughter v. Cunningham, 24 Ala. 260. *Qu.*, whether not rather void. § 403.

67. Towle v. Dresser, 73 Me. 252.

68. City Savings Bank v. Whittle, 63 N. H. 587.

69. Hill v. Anderson, 5 S. & M. 216; Robinson v. Weeks, 56 Me. 102. See Petty v. Rousseau, 94 N. C. 355.

chased of the minor, trover will not lie against him.[70] And it is held, on the ground of an executed agency, the money belonging to an infant soldier and received from him by his brother, with authority to use it for the support of their needy parents, and so used by the brother, cannot be recovered by the infant upon reaching majority.[71] But, in general, an infant soldier's gift of his bounty and pay, even to his own father, is treated as voidable and revocable.[72]

§ 1014. Trading and Partnership Contracts.

The rule is a general one that an infant cannot trade, and consequently cannot bind himself by any contract having relation to trade. "We know, by constant experience," says Mr. Smith, "that infants do, in fact, trade, and trade sometimes very extensively. However, there exists a conclusive presumption of law that no infant under the age of twenty-one has discretion enough for that purpose."[73] In *Dilk* v. *Keighley,* the infant was a glazier, and the person who sued him sought to make out that the goods furnished were in the nature of necessaries, to enable the infant to earn a livelihood; but this plea did not avail.[74] And an infant, rescinding a trading contract with another, was allowed to recover back, in an action for money had and received, a sum which he had paid towards the purchase of a share in the defendant's trade, if without consideration and he had actually derived no benefit or profit from the business.[75] So, too, as an infant cannot trade, he cannot become a bankrupt, and a fiat against him is void.[76]

Yet, even in trading contracts, it must not be forgotten that the current of modern decisions is to make the transaction of an infant voidable and not void. The English case of *Goode* v. *Harrison* is exactly in point; where a person was held liable for

70. Carr v. Clough, 6 Fost. 280; Riley v. Mallory, 33 Conn. 201.

71. Welch v. Welch, 103 Mass. 562.

72. Holt v. Holt, 59 Me. 464; *supra,* § 252.

73. In Georgia it is held that where an infant, with the permission of ihs parent, engages in business, his contracts in relation thereto are binding. Jemmerson v. Lawrence, 112 Ga. 340, 37 S. E. 371; Wuller v. Chuse Grocery Co., 241 Ill. 398, 89 N. E. 796; M. M. Sanders & Son v. Schilling, 123 La. 1009, 49 So. 689; Crew-Levick Co. v. Hull, 125 Md. 6, 93 A. 208; Smith, Contr. 278. See Whywall v. Champion, 2 Stra. 1083; Dilk v. Keighley, 2 Esp. 480.

74. Dilk v. Keighley, 2 Esp. 480.

75. Corpe v. Overton, 10 Bing. 252; Holmes v. Blogg, 8 Taunt. 508. See next chapter.

76. Smith, Contr. 282, and cases cited; Belton v. Hodges, 9 Bing. 365;

goods supplied him as one of a partnership, on the ground that the contract was voidable, not void, and that the infant on becoming of age had substantially ratified his former act. "It is clear," says Justice Bayley, "that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy; but still he may be a partner. If he is, in point of fact, a partner during his infancy, he may, when he comes of age, elect whether he will continue that partnership or not. If he continue the partnership, he will then be liable as a partner.[77] Nor is another principle to be lost sight of in trading contracts; namely, that fraudulent representations and acts, though made by an infant, may sometimes make his contract binding upon him, or at least afford a means of holding him answerable for the transaction; but of this hereafter.

In this country, it is likewise admitted that, in point of fact, infants do sometimes trade;[78] but that, nevertheless, their trading contracts do not absolutely bind them, being voidable at their option and not absolutely void;[79] and statutes sometimes permit such trading.[80] Aside from his affirmation on reaching majority, however, an infant partner is not liable individually for the firm debts beyond what he put into the business.[81] An infant's partnership agreement, too, is not void, but voidable.[82] He is not liable

Rex v. Wilson, 5 Q. B. D. 28; Jones v. Jones, 18 Ch. D. 109. And see Winchester v. Thayer, 129 Mass. 129.

77. 5 B. & Ald. 147. See Smith, Contr. 283.

78. Whitney v. Dutch, 15 Mass. 457; Houston v. Cooper, Penning. 865; Kitchen v. Lee, 11 Paige, 107; Beller v. Marchant, 30 Ia. 350. An infant partner sued for goods sold the firm may plead infancy. Folds v. Allardt, 35 Minn. 488.

79. Mason v. Wright, 13 Met. 306; Kinnen v. Maxwell, 66 N. C. 45.

80. Beickler v. Guenther, 121 Ia. 419, 96 N. W. 895. Under the Iowa statute providing that a minor who "engages in business" as an adult in such fashion that the other party has reason to believe him capable of contracting he cannot disaffirm, the quoted expression should be construed as signifying an employment of occupation occupying the minor's time for livelihood or profit, and hence the purchase of land, while engaged as a farm laborer, was not within the statute. Beickler v. Guenther, 121 Ia. 419, 96 N. W. 985; White v. Sikes, 129 Ga. 508, 59 S. E. 228.

Under a similar Georgia statute a single transaction in the sale of land is not engaging in business within its meaning. White v. Sikes, 129 Ga. 508, 59 S. E. 228.

81. Bush v. Linthicum, 59 Md. 344. But the firm may be dissolved by proceedings in equity, and in such bill the infant is not liable for costs. *Ib.*

82. Latrobe v. Dietrich, 114 Md. 8, 78 A. 983; Osburn v. Farr, 42 Mich. 134, 3 N. W. 299; Jaques v. Sax, 39 Ia. 367; Dunton v. Brown, 31 Mich. 182. That the minor had an interest in profits, but had not put in capital, does not operate to discharge him

for the debts of a partnership of which he is a member.[83] An infant may become a general partner in a limited partnership; and in such a case an adult special partner cannot set up the plea of such infancy in disclaimer of his own liability.[84] Nor, as it would appear, can any adult partner with an infant shield himself by any such plea from the firm's engagements; but the true situation is rather that the minor may set up his own infancy, to release himself from liability on contracts of purchase whereby assets have been obtained, and thus throw the whole liability upon the adult members of the firm; at the same time that the law presumes his liability in the concern and treats him as responsible until his plea of infancy is asserted.[85] In such arrangements, however, while the infant is protected, on the one hand, he is not on the other permitted to derive undue advantages from his disability. Thus, it is held that one engaged in trade cannot by his own act make children of tender years his partners in business; though he may, if indebted to them, prefer them in assigning for the benefit of his creditors, wherever the law permits a preference.[86] Again, an infant partner is not bound by an assignment of partnership assets executed by his adult co-partner.[87] He may by his assertion break up the partnership. But as to firm assets obtained by any such firm contract, these should in justice be devoted to satisfying the liabilities incurred in procuring them, and the infant is not allowed to retain the partnership property nor to assert title to any

from liability. Jaques v. Sax, 39 Ia. 367. See, as to pleadings, Kine v. Barbour, 70 Ind. 35.

83. The fact that a partner was a minor at the time a contract with the partnership was made cannot be asserted as a defence to an action of replevin, based on such contract, where no personal liability is claimed and there is no showing that the minor has ever elected to disaffirm. Richards v. Hellen, 153 Ia. 66, 133 N. W. 393; Crew-Levick Co. v. Hull, 125 Md. 6, 93 A. 208.

It has been held that an infant's right to disaffirm his partnership contract is limited to a right to avoid its debts, and that he cannot prevent the subjection of its property to such debts. Hill v. Bell, 111 Mo. 35, 19 S. W. 959.

An infant cannot, as against his co-partners, insist that in taking the partnership's accounts he shall be credited with profits and not debited with losses, and as against the creditors of the firm he has no higher rights to the firm property than the adult partner. His only right is immunity from personal liability. Elm City, etc., Co. v. Haupt, 50 Pa. Super. 489.

84. Continental Bank v. Strauss, 137 N. Y. 148.

85. Continental Bank v. Strauss, 137 N. Y. 148; Pelletier v. Couture, 148 Mass. 269.

86. Baer v. Rooks, 50 Fed. 898.

87. Foot v. Graham, 68 Miss. 529.

portion of it, until the firm creditors are satisfied.[88] He is thus likely to lose what he has put into the concern, if the firm prove insolvent, at the same time that he is not individually liable. On reaching majority an infant may by his acts keep an undissolved partnership continuing and by his own acts and conduct commit himself fully to outstanding obligations.[89] In South Carolina it was once expressly decided that a person's express or implied ratification of the partnership upon reaching majority made him liable for a debt of the firm contracted during his infancy, although he was ignorant of the existence of the debt at the time of such ratification, and had, on being informed of it, refused to pay for it.[90] For the principle thus indicated is, that to affirm a partnership contract on reaching majority, and continuing to receive its benefits, and to induce the confidence of others, is to affirm it with its usual inseparable incidents. Certainly, the infant member of a firm should not be permitted to derive undue advantage over his partner.[91]

§ 1015. Void and Voidable Acts Contrasted; When May Voidable Acts Be Affirmed or Disaffirmed.

What, then, is the difference between the void and the voidable contracts of an infant? Simply this: that the void contract is a mere nullity, of which any one can take advantage, and which is, in legal estimation, incapable of being ratified; while a voidable contract becomes at the option of the infant, though not otherwise, binding upon himself and all concerned with him.[92] Acts or circumstances, then, which amount to a legal ratification, serve to make the voidable contract of an infant completely binding and perpetually effectual; and this period of ratification is usually to be referred to the date when the disability of infancy ceases, and he becomes of full age, — though not always. What amounts to a legal ratification, under such circumstances, we shall show in a subsequent chapter. On the other hand, acts or circumstances

88. Pelletier v. Couture, 148 Mass. 209; Bush v. Linthicum, *supra*.

89. Salinas v. Bennett, 33 S. C. 285.

90. Miller v. Sims, 2 Hill (S. C.), 479.

91. See Kitchen v. Lee, 11 Paige, 107; Dunton v. Brown, 31 Mich. 182. But see Minock v. Shortridge, 21 Mich. 304, where an infant refused, on majority, after the goods had been disposed of and the partnership closed, to pay the partnership note, though recognizing the late partnership in some other respects.

92. See Met. Contr. 41; Story, Eq. Juris., § 241.

which at the proper time amount to disaffirmance will render the infant's voidable contract of no effect.

An infant's voidable conveyance of land, which is a solemn instrument, and perhaps his deeds generally, cannot be avoided or confirmed during his minority.[93] But as to many other transactions it is different, particularly where the contract relates to personal property, or is an unexecuted one, to perform services, for instance, and relates to the minor's person; so one may at any time during minority put an end to a continuing lease.[94] And the American cases seem to establish clearly the doctrine that an infant's sale or exchange or purchase of personal property, or contract for such sale or exchange or purchase, may be rescinded by him at any time during minority; and when the transaction is thus avoided, the title to the property revests in the infant.[95] This distinction appears to be recognized out of regard to the infant's benefit; since land might be recovered after long lapse of time upon disturbing the possessor's title, while personal property would often be utterly lost if one could not trace out and recover it until he became of age. Furthermore it is easier thus to make restitution to the other party and place things *in statu quo*. To repudiate one's executed contract while yet an infant, so as to gain an unfair advantage, is not usually permitted;[96] but the court requires his decision to be postponed to mature age, or otherwise attempts justice by requiring such restitution as he is able to make.[97] An infant's void conveyance he may have set aside at any time during infancy.[98]

93. Zouch v. Parsons, 3 Burr. 1794; McCormie v. Leggett, 8 Jones, 425; Bool v. Mix, 17 Wend. 119; Emmons v. Murray, 16 N. H. 385; Cummings v. Powell, 8 Tex. 80; Sims v. Everhardt, 102 U. S. Supr. 300; Phillips v. Green, 3 A. K. Marsh. 7; Tillinghast v. Holbrook, 7 R. I. 230; Welch v. Bunce, 83 Ind. 382. So his chattel mortgage cannot be made binding to his prejudice by any act of affirmance during minority. Corey v. Burton, 32 Mich. 30.

94. Gregory v. Lee (1895, Conn).

95. Grace v. Hale, 2 Humph. 27; Shipman v. Horton, 17 Conn. 481; Kitchen v. Lee, 11 Paige, 107; Willis v. Twombly, 13 Mass. 204; Carr. v. Clough, 6 Fost. 280; Monumental Building Association v. Herman, 33 Md. 128; Riley v. Mallory, 33 Conn. 201; Briggs v. McCabe, 27 Ind. 327; Hoyt v. Wilkinson, 57 Vt. 404; McCarthy v. Henderson, 138 Mass. 310. An infant's contract for purchasing stock may be avoided or go unfulfilled during minority. Indianapolis Chair Co. v. Wilcox, 59 Ind. 429. So his contract to marry, or to perform labor for a specified time, as seen in chapters 3, 5, *post*.

96. Dunton v. Brown, 31 Mich. 182. And see § 408.

97. See ch. 5.

98. Swafford v. Ferguson, 3 Lea, 292. A statute provision is sometimes found as to disaffirmance during minority. Murphy v. Johnson, 45 Ia. 57.

CHAPTER III.

ACTS BINDING UPON THE INFANT.

§ 1016. General Principle of Binding Acts and Contracts.

We have seen that the general acts and contracts of infants are either void or voidable, and that the tendency at this day is to treat them as voidable only. But keeping in view the principle that an infant's beneficial interests are to be judicially protected, we shall find that there are some acts and contracts which he ought to be able for his own good to perform and make; some acts and contracts of which it may be said that the privilege of standing upon a clear footing is worth more to him than the privilege of repudiation. Some such acts and contracts there are, recognized as exceptions to the general rule; these are neither void nor voidable, but are obligatory from the outset, and thus neither require nor admit of ratification on the infant's part.[99] Again, there are acts and contracts which public policy makes obligatory.

§ 1017. Contracts for Necessaries; What Are Such for Infants.

The most important of these binding contracts are those for necessaries; which in fact are so important that they are often mentioned as the only exception to the rule of void and voidable contracts. The general signification of the word "necessaries" has already been discussed with reference to married women:

99. See Met. Contr. 64; Smith, Contr. *et seq.* 268.

but it is readily perceived that what are necessaries for a wife may not be equally necessaries for a child, and what are necessaries for young children may not be equally necessaries for those who have nearly reached majority. The leading principles of the doctrine of necessaries being made clear, and a rule of legal classification judicially announced, any man of ordinary intelligence knows how to apply it; and yet juries will not and cannot always agree in their conclusions on this point, every one having some preconceived notions of his own on topics so constantly occurring in our every-day life, and to so great an extent involving individual tastes and preferences. Plainly, it is wrong to prevent an infant from attaining objects not only not detrimental, but of the utmost advantage, to him; "since," as it has been observed, "otherwise he might be unable to obtain food, clothes, or education, though certain to possess at no very distant period the means of amply paying for them all."[1]

Food, lodging, clothes, medical attendance, and education, to use concise words, constitute the five leading elements in the doctrine of the infant's necessaries. But, to apply a practical legal test, we must construe these five words in a very liberal sense, and somewhat according to the social position, fortune, prospects, age, circumstances, and general situation of the infant himself. "It is well established by the decisions," says one writer, "that under the denomination *necessaries* fall not only the food, clothes, and lodging necessary to the actual support of life, but likewise means of education suitable to the infant's degree; and all those accommodations, conveniences, and even matters of taste, which the usages of society for the time being render proper and conformable to a person in the rank in which the infant moves."[2] Says another: "The word *necessaries* is a rela-

1, Smith, Contr. 269. An infant father may be liable for the necessaries of his children. McConnell v. McConnell, 75 N. H. 385, 74 A. 875.

2. Smoot v. Ryan (Ala.), 65 So. 828; Gannon v. Manning, 42 App. D. C. 206; International Text-Book Co. v. Doran, 80 Conn. 307, 68 A. 255; Slusher v. Weller, 151 Ky. 203, 151 S. W. 684; Cain v. Garner, 169 Ky. 633, 185 S. W. 122; Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118; Stanhope v. Shambow, 54 Mont. 360, 170 P. 752; McConnell v. McConnell, 75 N. H. 385, 74 A. 875.

The word "necessaries" is a relative term, except when applied to such things as are obviously requisite for the maintenance of existence, and depends on the social position and situation in life of the infant, as well as on his own fortune, and that of his parents. International Text-Book Co. v. Connelly, 206 N. Y. 188 99 N. E. 722; Frank Spangler Co. v. Haupt, 53 Pa. Super. Ct. 545.

tive term, and not confined to such things as are positively required for mere personal support."[3] The language of an American judge is this: "It would be difficult to lay down any general rule upon this subject, and to say what would or would not be necessaries. It is a flexible, and not an absolute term."[4] Dental services are usually necessaries.[5]

Articles of mere ornament are not necessaries. The true rule is taken to be that all such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters therefore an infant cannot be made responsible. But if they were not of this description, then the question arises whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved; if they were, for such articles the infant may be made responsible.[6] The result of the cases on both sides of the Atlantic seems to be that unless the articles are, both as to quality and quantity, such as must be necessaries to any one, the burden of proof lies on the plaintiff to show such a condition of life of the defendant as might raise to the rank of necessaries things which would otherwise be considered luxuries and superfluous.[7]

A pair of solitaires (or shirt-fasteners), worth £25, are not, it would appear, necessaries for any infant.[8] But it seems that presents to a bride, when she becomes the defendant's wife, may be

A telegram by an infant to his parents for money when he was destitute has been held to be necessaries, obliging the infant, in order to sue for statutory penalties for negligent transmission of the message, to comply with the conditions of the concontract. Western Union Telegraph Co. v. Greer, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525; Gayle v. Hayes' Adm'r, 79 Va. 542; Wallace v. Leroy, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. R. 777.

Articles purchased by an infant in carrying on a business, and services rendered in connection therewith are not necessaries, though the infant derives his living from the business. Walace v. Leroy, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777; Smith, Contr. 269.

3. Met. Contr. 69. And see Peters v. Fleming, 6 M. & W. 42.

4. Breed v. Judd, 1 Gray, 458, per Thomas, J.

5. McLean v. Jackson, 12 Ga. App. 51, 76 S. E. 792

6. Per Parke, B., Peters v. Fleming, 6 M. & W. 42.

7. Smith, Contr. 272, 5th Am. ed., Rawle's *n.*, and cases cited; Harrison v. Fane, 1 Man. & Gr. 550; Wharton v. Mackenzie, 5 Q. B. 606; Rundel v. Keeler, 7 Watts, 239; Bent v. Manning, 10 Vt. 225; Merriam v. Cunningham, 11 Cush. 40.

8. Ryder v. Wombwell, L. R. 4 Exch. 32. As to a watch and chain, see Welch v. Olmstead, 90 Mich. 492.

necessaries.[9] Betting-books are not an infant's necessaries.[10] Nor tobacco, though for a minor soldier.[11] Nor money paid to relieve an infant from draft for military duty.[12] Horses, saddles, harness, and carriages may be necessaries under some circumstances, but not ordinarily; and this is the better doctrine, English and American.[13] Wedding garments for an infant who marries are, within reasonable limits, necessaries.[14] But not the treats of an undergraduate at college.[15] Nor, in Arkansas, as it appears, kid gloves, cologne, silk cravats, and walking-canes.[16] The uniform of an officer's servant is adjudged a necessary; but not cockades for his company.[17] An insurance contract is not a necessary.[18] But a solicitor's bill for preparing a marriage settlement may be.[19] The following have been held not necessaries: motorcycle,[20] bicycle,[21] buggy,[22] janitor's services for building owned by the infant,[23] articles furnished to an infant for use in business as a common carrier by means of automobiles.[24] Those who incline to pursue the subject still further will find some interesting decisions as to balls, seranades, suits of satin and velvet, and doubtless of fustian, among the ancient cases which have survived the fashions they describe.[25]

9. Genner v. Walker, 19 Law Times (N. S.), 398; 3 Am. Law Rev. 590.

10. *Ib.*

11. Bryant v. Richardson, L. R. 3 Ex. 93, *n.*

12. Dorrell v. Hastings, 28 Ind. 478.

13. Harrison v. Fane, 1 Man. & Gr. 550; Grace v. Hale, 2 Humph. 67; Aaron v. Harley, 6 Rich. 26; Merriam v. Cunningham, 11 Cush. 40; Beeler v. Young, 1 Bibb, 519; Owens v. Walker, 2 Strobh. Eq. 289.

14. Sams v. Stockton, 14 B. Monr. 232.

15. Wharton v. Mackenzie, 5 Q. B. 606; Brooker v. Scott, 11 M. & W. 67.

16. Lefils v. Sugg, 15 Ark. 137.

17. Hands v. Slaney, 8 T. R. 578; Coates v. Wilson, 5 Esp. 52.

18. Simpson v. Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. R. 560; New Hampshire Ins. Co. v. Noyes, 32 N. H. 345. See Harrison v. Fane, 1 Man. & Gr. 550; Davis v. Caldwell, 12 Cush. 512; Bent v. Manning, 10 Vt. 225; Stanton v. Wilson, 3 Day, 37; Glover v. Ott, 1 McCord, 572; Rundel v. Keeler, 7 Watts, 239.

19. Helps v. Clayton, 17 C. B. (N. S.) 553.

20. Raymond v. General Motorcycle Co., 230 Mass. 54, 119 N. E. 359.

21. Rice v. Butler, 49 N. Y. S. 494, 25 App. Div. 388 (for a domestic residing in the house of her employer).

22. Heffington v. Jackson, 43 Tex. Civ. 560, 96 S. W. 108 (for one not needing it to ride to and from school or business).

23. Covault v. Nevitt, 157 Wis. 113. 146 N. W. 1115 (contract for janitor's services).

24. La Rose v. Nichols (N. J.), 103 A. 390.

25. See cases cited Met. Contr. 69, 70; Cro. Eliz. 583.

§ 1018. Illustrations.

It is usual to leave the question of necessaries in each case to the jury, without very positive directions. But the dividing line between court and jury is not in this respect clearly marked, as the latest cases teach us. *Ryder* v. *Wombwell* lays it down that the question whether articles are necessaries is one of fact, but, like other questions of fact, should not be left to the jury unless there is evidence on which they could reasonably find that they were.[26] The immediate object of this decision was to set aside a verdict deemed improper; as to the fitness of such a rule in its broader application there is considerable doubt.[27] But it has frequently been said, that in a very clear case a judge would be warranted in directing a jury authoritatively that some articles, like diamonds and race-horses, would not be necessaries for any minor.[28]

The propriety of classing education as among the necessaries of an infant rests rather upon respectable *dicta* than precedents. Lord Coke includes among the necessaries for which an infant may bind himself by contract, "good teaching and instruction, whereby he may profit himself afterwards;" and the doctrine within strict limits is undoubtedly correct.[29] In Vermont and New York it is decided that a collegiate education is not to be ranked among those necessaries for which an infant can render himself absolutely liable.[30] But the court seems to make it but a *prima facie* rule, and to admit that extraneous circumstances might be shown to make even this a necessary; while a good common-school education is strongly pronounced to be such. And the judge adds: "I would not be understood as making any allusion to professional studies, or to the education and training which is requisite

26. Ryder v. Wombwell, L. R. 4 Exch. 32.

27. Of this rule, says Cockburn, C. J., of the Queen's Bench, still later: "I really cannot understand it, unless it means that it is to be a question of law for the judge to determine whether the articles disputed are, or are not, necessaries. If that is to be taken to be law, of course I must act upon it; but I should certainly have preferred the law as it was previously understood to be, that it was for the jury to say what articles were reasonably necessary with reference to the position of the defendant, the infant." Genner v. Walker, 19 Law Times (N. S.) 398. And see Johnstone v. Marks, 19 Q. B. D. 509.

28. See Harrison v. Fane, Davis v. Caldwell, and other cases, *supra;* Mohney v. Evans, 51 Pa. St. 80.

29. Co. Litt. 172; 1 Sid. 112; Met. Contr. 69, *n.;* Smith, Contr. 269, 273.

30. Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574; International Text-Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115; Middlebury College v. Chandler, 16 Vt. 683.

to the knowledge and practice of mechanic arts. These partake of the nature of apprenticeships, and stand on peculiar grounds of reason and policy. I speak only of the regular and full course of collegiate study."[31]

An infant is not liable, at common law, for the expense of repairing a dwelling-house on a contract made by him or his guardian or parent for that purpose; although such repairs were necessary for the prevention of immediate and serious injury to the house.[32] Thus a course in pharmacy;[33] a course in stenography,[34] and a course in steam engineering[35] have all been held not necessaries unless special circumstances make them so.[36] So materials or services furnished to an infant for building on his own land are not necessaries.[37] Nor is a dwelling-house built for him a necessary.[38] A mechanic's lien is not to be thus acquired.[39] The law is extremely reluctant to permit an infant's real estate to be encumbered by others in any possible way so as to exclude his disaffirmance.

So it is ruled that the services and expenses of counsel in a suit brought to protect the infant's title to his real estate cannot for similar reasons be charged against the infant on his own contract.[40] But the doctrine that legal expenses cannot be charged as necessaries for an infant appears not to prevail in Connecticut; and the more liberal rule is asserted, that in cases where, under peculiar circumstances, a civil suit is the only means by which an infant can procure the absolute necessaries which he requires,

31. Per Royce, J., *Ib.* A board bill contracted to enable attendance at school is a necessary. Kilgore v. Rich, 83 Me. 305. To the same effect see International, etc., Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115.

32. Tupper v. Caldwell, 12 Met. 559; West v. Gregg, 1 Grant, 53; Wallis v. Bardwell, 126 Mass. 366; Price v. Sanders, 60 Ind. 310; Phillips v. Lloyd (1895), R. I.

33. Wallin v. Highland, etc., Co., 127 Ia. 131, 102 N. W. 839.

34. In order to determine whether a contract of an infant for a course in stenography was a contract for "necessaries," the evidence must show the condition in life of the infant, and that the parents or guardian of such infant refused to furnish such alleged necessary. Mauldin v. Southern Shorthand Business University, 126 Ga. 681, 55 S. E. 922.

35. International Text-Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722 (affg. judg., 125 N. Y. S. 1125, 140 App. Div. 939).

36. International, etc., Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722. 42 L. R. A. (N. S.) 1115.

37. Freeman v. Bridger, 4 Jones Law, 1.

38. Allen v. Lardner, 78 Hun, 603.

39. Bloomer v. Nolan, 36 Neb. 51.

40. Phelps v. Worcester, 11 N. H. 51.

power cannot be denied him to make the necessary contracts for its commencement and prosecution; for it would be a reproach to the law to hold otherwise.[41] In this particular case the circumstances justifying relief were very strong. Moreover, the English cases long ago established that money advanced to an infant to procure him liberation from arrest, where he was in execution or taken in custody on a debt for necessaries, could be recovered as necessaries.[42] Services of an attorney in defending the infant against a criminal complaint may likewise be recovered.[43] And we have already seen that legal expenses may sometimes be classed as necessaries for married women.[44] On the whole, it may be said that legal expenses on behalf of a minor may or may not be regarded as a necessary for him, according to circumstances and the reasonableness of incurring them. If a liability exists to pay for legal services whenever necessary for the infant's personal protection or that of his estate, the liability is limited, at all events to the actual value of those services, and not extended to whatever the infant may have agreed to pay.[45] In Oklahoma it is held that attorney's services are necessaries when rendered in proceedings relating to the liberty or person of the minor are necessaries,[46] while those rendered in litigation over property are not,[47] while others hold the contrary, if the services are beneficial.[48] Still others hold that such services are unqualifiedly necessaries, whether rendered in behalf of the infant's personal or property rights.[49] If the contract was for a contingent fee, the infant is liable for the amount of the fee in case of success, and not merely for the reasonable value of the services rendered.[50] In Massachusetts, under peculiar statutory provisions, such services are held

41. Munson v. Washband, 31 Conn. 303.

42. Clarke v. Leslie, 5 Esp. 28; 2 Eden, 72.

43. Barker v. Hibbard, 54 N. H. 539; Askey v. Williams, 74 Tex. 294.

44. Supra, p. 100.

45. 68 Hun, 589; Searcy v. Hunter, 81 Tex. 644.

46. Grissom v. Beidleman (Okla.), 129 Pac. 853, 44 L. R. A. (N. S.) 411.

47. Watts v. Houston (Okla.), 165 P. 128; Marx v. Hefner (Okla.), 149 P. 207; Grissom v. Beidleman, 35 Okla. 343, 129 P. 853 (attorneys services).

48. Sutton v. Heinzle, 84 Kan. 756, 115 P. 560, 34 L. R. A. (N. S.) 238 (reh. den., 116 P. 614, 85 Kan. 332, 34 L. R. A. [N. S.] 239).

49. Hickman v. McDonald, 164 Ia. 50, 145 N. W. 322; Slusher v. Weller, 151 Ky. 203, 151 S. W. 684; Crafts v. Carr, 24 R. I. 397, 53 A. 275, 60 L. R. A. 128, 96 Am. St. R. 721; Vance v. Calhoun (Ark.), 90 S. W. 619.

50. Hickman v. McDonald, 164 Ia. 50, 145 N. W. 322.

not necessaries unless the attorney is employed by the minor's guardian.[51] And it would appear that the burden of proof is upon an attorney to show that the suit could be viewed in such a light as to entitle him to recover for his fees and disbursements.[52] Generally, a guardian or next friend would assume the responsibility of employing counsel for advice or suits on an infant's behalf. A court of equity will enforce against an infant an agreement settling a suit made by his guardian, when it appears to have been made for the infant's benefit.[53]

The doctrine of necessaries is manifestly not to be extended to an infant's trading contracts, as we have already intimated. Thus the board of four horses for six months, the principal use of which was in the business of a hackman, is not within the class of necessaries for which an infant is liable, although the horses are occasionally used to carry his family out to ride.[54] The board of an infant, again, is included among the necessaries for which he may pledge his credit.[55] But here, too, we must keep within our principle. Thus, where an infant took a house to carry on the business of a barber,— the house containing five rooms, two on the ground floor, one of which he occupied as a shop, the other to reside in, and three above, which he underlet,— he was held not to be liable for the rent.[56] An infant may contract for his necessary lodgings, but he cannot bind himself for more. Nor are farm implements, live stock, wagons,[57] and the like, to be deemed necessaries when purchased to carry on a farm; inasmuch as articles for business or trade, whether agricultural, commercial, or mercantile, cannot be brought within the present rule.

§ 1019. Contracts for Necessaries; Same Subject.

But the question in all such cases is one of mixed law and fact. And articles *prima facie* to be classed as luxuries, such as wines, fruits, and the use of a horse and carriage, might, under some circumstances, become necessaries; as if, for instance, medically prescribed, for an infant's health; though this salutary rule is

51. McIsaac v. Adams, 190 Mass. 117, 76 N. E. 654 (where the attorney volunteered his services at the suggestion of the infant's relatives).

52. Thrall v. Wright, 38 Vt. 494.

53. *In re* Livingston, 34 N. Y. 555. And so where there is no guardian, and the counsel's services contributed to secure the estate to the infant. Epperson v. Nugent, 57 Miss. 45.

54. Merriam v. Cunningham, 11 Cush. 40; *supra*, § 1014. But see Hall v. Butterfield, 59 N. H. 354.

55. Bradley v. Pratt, 23 Vt. 378.

56. Lowe v. Griffith, 1 Scott, 458.

57. Paul v. Smith, 41 Mo. App. 275.

not designed to support a quibble.[58] The infant's clothes may be fine or coarse, according to his rank; his education may vary according to the station he is to fill, and the extent of his probable means when of age; and as to servants, attendance, and the like, this will depend on his social position.[59] Stock purchased for a farm, too, may under some special circumstances, though not usually, be treated as necessaries.[60] And so with plantation supplies, where a married infant is intrusted by law with the estate.[61] And upon such issues, quantity may be as much for the consideration of the jury as quality.[62] Primarily, the parent or guardian who supplies the necessaires is the judge of what quantity and quality are suitable for the infant.[63] And if the natural protector with whom the child lives does his legal duty as best he may according to his means, the fact that he is poor and unable to pay for what was furnished to the child, will not render the child's estate liable.[64]

If one furnish an infant with necessaries, and also other articles not necessary under his circumstances and condition, he is not on that account precluded from recovering for the necessaries; though, as to the balance of his claim, he may be without a remedy.[65]

An infant is not liable for necessaries when he lives under the roof of his father, who provides everything which seems proper. Not only is there here no implied agreement on the infant's part to pay for such support, but if one were expressly made by him it would be in derogation of parental duty. And so when he is supplied by a guardian or widowed mother, or anyone assuming the place of parent. The parent or the legal protector having the means and being willing to furnish all that is actually necessary, the infant can make no binding contract for

58. See Wharton v. Mackenzie, 5 Q. B. 606.

59. See Alderson, B., Chapple v. Cooper, 13 M. & W. 258. Gold filling and dentist's work upon his teeth should be classed among the necessaries of a minor of good means and social position. Strong v. Foote, 42 Conn. 203.

60. Mohney v. Evans, 51 Pa. St. 80.

61. Chapman v. Hughes, 61 Miss. 339.

62. Burghart v. Angerstein, 6 Car. & P. 690.

63. Thus, a journey for the child's recreation, without the parent's or guardian's approval, cannot generally be deemed a necessary. McKanna v. Merry, 61 Ill. 177.

64. Hoyt v. Casey, 114 Mass. 397.

65. Turberville v. Whitehouse, 12 Price, 692; Bent v. Manning, 10 Vt. 225. And see Johnson v. Lines, 6 W. & S. 80; Wilhelm v. Hardman, 13 Md. 140.

any article without such protector's consent. Nor can the infant be charged for what such protector ordered on his own credit. *Prima facie*, where the child resides at home, proper maintenance is furnished him: and the tradesman who furnishes goods to an infant or the professional person rendering services does so at his peril; it is incumbent upon him to show the necessity of his supply or service.[66] But an infant, when absent from home, and not under the care of his parent or guardian, is usually liable for his own necessaries.[67] An emancipated infant may agree with his employer in such matters.[68] And the law will imply a promise, on the part of an infant having no legal protector, to make payment;[69] though not for any fixed amount, but only a reasonable price,[70] and certainly not for what were not necessaries at all.[71]

There is no inflexible rule of law, however, which makes it incumbent on the tradesman who supplies an infant to inquire as to his situation and resources before giving him credit for necessaries; though it would be prudent always for him to do so.[72] And the parent or guardian may sanction by words or conduct the child's purchase, so as to make it obligatory. As in a case where the infant daughter, living with her mother at a hotel, drove to the plaintiff's store in a carriage, accompanied by her mother, who

66. Mauldin v. Southern, etc., University, 126 Ga. 681, 55 S. E. 922. It is otherwise where the child has been emancipated. Robinson v. Hathaway, 150 Ind. 679, 50 N. E. 883; Angel v. McLellan, 16 Mass. 28, 8 Am. D. 118; Harris v. Crawley, 17 Det. Leg. N. 303, 126 N. W. 421; International Text-Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115; Coler v. Cllahan, 174 N. Y. S. 504; Potter v. Thomas, 164 N. Y. S. 923; International, etc., Co. v. Connelly, 206 N. Y. 88, 99 N. E. 722; Bainbridge v. Pickering, 2 Blacks. 1325; Story v. Pery, 4 Car. & P. 526; Angel v. McLellan, 16 Mass. 28; Wailing v. Toll, 9 Johns. 146; Johnson v. Lines, 6 W. & S. 80; Kline v. L'Amoreux, 2 Paige, 419; Perrin v. Wilson, 10 Mo. 451; Freeman v. Bridger, 4 Jones Law, 1; Smith v. Young, 2 Dev. & Bat. 26; Connolly v. Hull, 3 McCord, 6; Elrod v. Myers, 2 Head, 33; Kraker v. Byrum, 13 Rich. 163; Tilton v. Russell, 11 Ala. 497; Hussey v. Roundtree, Busbee Law, 110. Perhaps for a return of such necessaries as the minor has not consumed the tradesman may sue. Nichol v. Steger, 2 Tenn. 328.

67. Angel v. McLellan, 16 Mass. 28; Hunt v. Thompson, 3 Scam. 179.

68. Genereux v. Sibley (1895, R. I.).

69. Hyman v. Cain, 3 Jones Law, 111; Epperson v. Nugent, 57 Miss. 45.

70. Parson v. Keys, 43 Tex. 557.

71. Genereux v. Sibley, *supra;* Morse v. Ely, 154 Mass. 458. An infant thrown upon his own support, and without a legal protector, ought, in case of medical expenses incurred, through another's wrongful act, recover such damages for himself by way of reimbursement. See Railroad Company v. Maddux, 134 Ind. 571; §§ 262, 427-430.

72. Brayshaw v. Eaton, 7 Scott, 183.

waited in the carriage while her daughter purchased the goods, some of which she took home in the carriage, while others were delivered at the hotel; here it might be reasonably inferred, as the court decided, that the whole had come under the mother's inspection, so as to make the infant liable for the purchase.[73]

The English cases seem to lay especial stress upon the question whether articles are or are not of themselves necessaries. And it is held, not only that an infant may enter into a contract for necessaries for ready money, but that he may be bound by any reasonable contract for necessaries on a credit, though he has an income of his own, and an allowance amply sufficient for his support.[74]

In South Carolina a contrary doctrine is maintained; namely, that an infant who is regularly furnished with necessaries, or the means in cash of procuring them, by his parent or guardian, or from any other source, is *prima facie* not liable for necessaries furnished him on credit.[75]

This is likewise the rule in some other States.[76] Claims against an infant for necessaries being perfectly valid at law, the creditor cannot sue in equity;[77] but it is held that where a minor cannot legally contract a debt on the ground that his parent or guardian has properly supplied him, equity will compel him to return the furnished articles if he has them.[78] And while it is true that an infant cannot bind himself when he has a parent or guardian who supplies his wants, he may be bound by the purchase of necessaries under the express or implied authority of his guardian.[79] But not for anything absurd or improper in quantity or quality.[80] And where credit is given to a parent or guardian, the infant's estate is not answerable.[81]

The rule as to necessaries in general is, that it is the province of the court to determine whether the articles sued for are within the class of necessaries, and, if so, it is the proper duty of the jury

73. Dalton v. Gibb, 5 Bing. (N. C.) 198; Atchison v. Bruff, 50 Barb. 381. And see Strong v. Foote, 42 Conn. 203.

74. Burghart v. Hall, 4 M. & W. 727; Smith, Contr. 273.

75. Rivers v. Gregg, 5 Rich. Eq. 274. And see Mortara v. Hall, 6 Sim. 465.

76. Nicholson v. Wilborn, 13 Ga. 467; Nichol v. Steger, 6 Lea, 393. In a suit to recover the price of necessaries sold to the defendant during minority, the burden is on the latter to show, by way of defence, that during minority his parent or guardian supplied him. Parsons v. Keys, 43 Tex. 557.

77. Oliver v. McDuffie, 28 Ga. 522.

78. Nichol v. Steger, 6 Lea, 393.

79. Watson v. Hensel, 7 Watts, 344.

80. Johnson v. Lines, 6 W. & S. 80.

81. Sinklear v. Emert, 18 Ill. 63; 148 N. Y. Super. 152.

to pass upon the questions of quantity, quality, and their adaptation to the condition and wants of the infant.[82] But, as the reader is already apprised, this rule is neither stated nor applied with invariable precision in all cases. Generally, the question is one of fact for the jury; and the two principal circumstances are, whether the articles are suitable to the minor's estate and condition, and whether he is, or is not, without other means of supply.[83] An infant will be held to pay for necessaries what they are reasonably worth, but not what he may foolishly have agreed to pay for them.[84] Nor can the court be precluded, by the form of the contract, from inquiring into their real value.[85] By the better opinion it may be shown, when the infant is sued, not only that the articles were not of the kind called necessaries, but that the infant at the time they were furnished was sufficiently provided with articles of that kind.[86] The creditor must plead and show the reasonableness of the price,[87] the fact that the articles are necessaries,[88] and that they are really needed, and that the articles, or the money therefor, were not supplied by others.[89] The infant is not bound by an

82. Peters v. Fleming, 6 M. & W. 42; Harrison v. Fane, 1 Man. & Gr. 550; Phelps v. Worcester, 11 N. H. 51; Merriam v. Cunningham, 11 Cush. 40; Beeler v. Young, 1 Bibb, 519.

83. Per Shaw, C. J., Davis v. Caldwell, 12 Cush. 512.

84. Sims v. Gunter (Ala.), 78 So. 62; Appeal of Ennis (Conn.), 80 A. 772; Hickman v. McDonald, 164 Ia. 50, 145 N. W. 322; McConnell v. McConnell, 75 N. H. 385, 74 A. 875; Locke v. Smith, 41 N. H. 346; Plummer v. Northern Pac. Ry. Co., 98 Wash. 67, 167 P. 73.

85. See 10 Mod. 85; Met. Contr. 73; 2 Kent, Com. 240; Parsons v. Keys, 43 Tex. 557. An infant sued for the price of goods has not the burden of showing that they were not necessaries, but the plaintiff must show that they were. Wood v. Losey, 50 Mich. 475

86. Johnstone v. Marks, 19 Q. B. D. 509; Barnes v. Toye, 13 Q. B. D. 410. It is immaterial whether the plaintiff did or did not know of the existing supply. *Ib.*

87. In order that an infant's contract may be "fair" and "reasonable," it must not waste his estate, and must be provident and advantageous to him. Berglund v. American Multigraph Sales Co. (Minn.), 160 N. W. 191; Gray v. Sands, 73 N. Y. S. 322, 66 App. Div. 572; International, etc., v. Alberton, 30 Ohio Cir. Ct. R. 352.

88. Thus, where the defendant pleads infancy, he states a good defence, and the plaintiff must set up the fact of necessaries by replication where that is required. Medders v. Baxley, etc., Co., 17 Ga. App. 730, 88 S. E. 407; International Text-Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722 (affg. judg., 125 N. Y. S. 1125, 140 App. Div. 939); Marx v. Hefner (Okla.), 149 P. 207.

89. Brent v. Williams, 79 Miss. 355, 30 So. 713. But see Lynch v. Johnson, 109 Mich. 640, 67 N. W. 908.

executory contract for necessaries.[90] But usually the question as to whether the contract is for necessaries is for the jury.[91]

§ 1020. Money Advanced for Necessaries; Infant's Deed, Note, &c.; Equity Rules.

An infant is liable to an action at the suit of a person advancing money to a third party to pay for necessaries furnished to the infant.[92] But it is thought to be otherwise as to money supplied directly to the infant, to be by him thus expended, notwithstanding the money be actually laid out for necessaries.[93] The reason for this distinction is said to be that in the latter case the contract arises upon the lending, and that the law will not support contracts which are to depend for their validity upon a subsequent contingency.[94] The same is true of a loan to enable the infant to pay a debt incurred for necessaries.[95] The purpose for which the minor uses the money must be in fact necessaries.[96] One writer admits that, according to some reports of a leading case, the court held that if the money were actually expended for necessaries the infant would be chargeable;[97] but adds that the weight of authority is, that the infant is not liable at law for money thus lent and appropriated.[98] What this weight of authority may be is not apparent, but the analogies elsewhere noticed as to a wife are to be considered as in point. The equity rule is, that if money is lent to an infant to pay for necessaries, and it is so applied, the infant becomes liable in equity; for the lender stands in place of the

90. Valentines' School of Telegraphy, 122 Wis. 318, 99 N. W. 1043.

91. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A. 255; Nielson v. International Textbook Co., 106 Mo. 104, 75 A. 330.

92. Price v. Sanders, 60 Ind. 310; Equitable Trust Co. of New York v. Moss, 134 N. Y. S. 533, 149 App. Div. 615; Swift v. Bennett, 10 Cush. 436; Randall v. Sweet, 1 Den. 460.

93. Macphers. Inf. 505, 506; Ellis v. Ellis, 5 Mod. 368; 12 Mod. 197; Earle v. Peele, 1 Salk. 386; Clarke v. Leslie, 5 Esp. 28.

94. See Swift v. Bennett, 10 Cush. 436.

95. Price v. Sanders, 60 Ind. 310.

96. Burton v. Anthony, 46 Ore. 47, 79 P. 185, 114 Am. St. R. 847 (holding that a loan for the purpose of enabling a minor to redeem where he was not bound to do so, and where redemption was not necessary, was not necessaries).

97. Ellis v. Ellis, 12 Mod. 197.

98. Met. Contr. 72. The learned writer quotes a *dictum* from 10 Mod. 67, to controvert that of 12 Mod. 197, which last held that money might be sometimes properly charged upon the infant. But the context only contemplates the "great difference between lending an infant money to buy necessaries, *and actually seeing the money so laid out.*" Besides, it is not clear which of the two is the better *dictum*.

payee.[99] This is the New York doctrine, whether legal or equitable.[1] And other States assert the same rule.[2] An innkeeper's lien on the baggage of his infant guest has been protected in our courts, notwithstanding the infant acted improperly and contrary to his guardian's wishes, so long as the innkeeper acted in good faith; and this, even to the extent of protecting the innkeeper for money furnished the infant, which was expended for necessaries.[3] Circuity of action should not be favored at this late day, especially when the object is, after all, to enforce a moral obligation in small transactions.

The old books say that an infant may bind himself by his deed to pay for necessaries.[4] Yet it has been considered clearly settled that he cannot do so by a bond in a penal sum; since it cannot be to his advantage to become subject to a penalty.[5] But on the question whether an infant is bound by a note not negotiable given for necessaries, there is an irreconcilable difference of opinion in the authorities; though Story considers the weight of modern English and American authorities greatly in favor of holding promissory notes given or indorsed by an infant to be voidable only, and not void, and therefore capable of being ratified after the party comes of age.[6] The mischief of holding an infant's promissory note for necessaries to be worthless or even voidable is the same as in loans of money for the same purpose; namely, that an infant is thereby allowed to get his supplies without paying for them. Equity influence the later cases; that somewhat novel and yet manifestly just principle gaining ground that one who receives advantages is liable on an implied contract to furnish a suitable recompense. Reeve and others state the law thus: that an infant is not bound by any express contract for necessaries to the extent of such contract, but is bound only on an implied contract to pay the amount of their value to him; that when the instrument given by him as security for payment is such that, by the rules of law, the consideration cannot be inquired into, it is void and not merely voidable; that whenever the instrument is such that the consideration may be inquired into, he is liable thereon for the true value of the articles

99. Marlow v. Pitfeild, 1 P. Wms. 558.

1. Smith v. Oliphant, 2 Sandf. 306. And see Randall v. Sweet, 1 Den. 460, per Bronson, C. J.

2. Kilgore v. Rich, 83 Me. 305.

3. Watson v. Cross, 2 Duv. 147.

4. Com. Dig. Infant. But see next page.

5. Ayliff v. Archdale, Cro. Eliz. 920; Corpe v. Overton, 10 Bing. 252; Smith, Contr. 281; Met. Contr. 75.

6. Story, Prom. Notes, 6th ed., § 78, and cases cited. And see 2 Kent,

for which it was given.[7] This excellent statement could hardly be improved upon, except so far as equitable doctrine may properly enlarge the expression; and, for a topic so much unsettled, is as well entitled to be called good law as anything else; and, what is more, it has justice in it. The doctrine has received substantial encouragement in Massachusetts.[8] Even a bond for necessaries has been deemed binding in a State where the statute allows its consideration to be impeached and a judgment *pro tanto* rendered for the amount actually due.[9] The same practical result seems to be reached in New Hampshire, and other States, so as further to give the infant's indorser or surety a remedy against him;[10] and the broad doctrine conforms to equitable procedure in other analogous cases.[11] A deed of land or mortgage given by a

Com., 11th ed., 257; Bayley, Bills, ch. 2, pp. 45, 46, 5th ed. Askey v. Williams, 74 Tex. 294.

7. Reeve, Dom. Rel. 229, 230; 2 Dane, Abr. 364, 365; Met. Contr. 75.

8. Stone v. Dennis, 13 Pick. 6, 7, per Shaw, C. J.; Earle v. Reed, 10 Met. 387.

9. Guthrie v. Morris, 22 Ark. 411.

10. McCrillis v. How, 3 N. H. 348; Conn v. Coburn, 7 N. H. 368; Dubose v. Wheddon, 4 McCord, 221; Haine v. Tarrant, 2 Hill (S. C.), 400; McMinn v. Richmonds, 6 Yerg. 9. See, *contra,* Swasey v. Vanderheyden, 10 Johns. 33.

A late Indiana case tends in the same direction. Here it is said an infant is not liable at law on his note or other contract whereby he obtains money to build a barn or work his farm, although the money be actually expended for necessaries; since the indebtedness for necessary for which he is liable must be created directly therefor. But, in equity, the infant is liable for the money so obtained, where the creditor can show that it was actually expended for necessaries. Price v. Sanders, 60 Ind. 310. But a surety on an infant's note, given for necessaries, who has been compelled to pay it, cannot sue the infant during his infancy for reimbursement. Ayers v. Burns, 87 Ind. 245.

11. We have seen a similar rule applied of inquiry into consideration in the case of a married woman's contract under equity and modern statutes. *Supra,* Part II,, ch. 11. An account for necessaries was allowed in equity, with a lien on the infant's reversionary interest, in a recent English case, although the minor's deed of sale of his reversionary interest, given during minority, as security, was declared not binding upon him. Martin v. Gale, 4 Ch. D. 628. A similar rule is observed in charging a married woman's separate estate. In a Vermont case this later rule received a striking illustration. An infant boarded in a country town for some twenty weeks at a reasonable price. The person to whom he was indebted owed his own adult son money, and for the convenience of the parties drew an order upon the infant, authorizing him to pay the amount of the board to his son; which order was duly received, and the infant agreed to pay it. Soon after, by consent of the parties, this order was surrendered, and the infant substituted in its place his promissory note. The note was negotiable, but never was negotiated; and the holder, the adult son of the person furnishing board, brought a suit thereon. The evidence showed that

minor in consideration of necessaries furnished receives late favor.[12]

§ 1021. Illustrations.

While stress was formerly laid upon the infant's contract for his necessaries, infants appear liable in various modern instances on the ground rather of an implied liability based upon the necessity of the situation, and because the infant derives a substantial benefit at another's cost. Thus, where the infant seeks to recover what his services are reasonably worth, the adult is permitted to set off the reasonable value of what the infant may have received from him in support or otherwise.[13] And it is held that one may recover for necessaries furnished to a minor, taken from an almshouse, and supported on the credit of property which was to become his on his father's death.[14] But necessaries purely *in futuro,* or upon some executory contract of the infant, cannot charge him, for his liability only arises when the necessaries are furnished.[15]

§ 1022. Binding Contracts as to Marriage Relation; Promise to Marry Contrasted.

There are other contracts besides necessaries which are excepted from the general rule, and are made obligatory upon the infant; being neither void nor voidable.

the defendant's board constituted the sole consideration of the note. It was held that the consideration of the note was open to inquiry, and that, upon the facts found, the defendant was liable to the plaintiff for the full amount of the note; and, as the court also decided, with interest. Bradley v. Pratt, 23 Vt. 378. Says the learned judge who gave the opinion in this case, after a full examination of the conflicting authorities as to the infant's liability on his promissory note for necessaries: "We may then, we think, regard the question as still *in dubio,* and justifying the court in treating it as still an open question. And being so, we should desire to put it upon safe and consistent ground. We are led, then, to inquire what is the true principle lying at the foundation of all these inquiries. We think it is, that the infant should be enabled to pledge his credit for necessaries to any extent consistent with his perfect safety. All the cases and all the elementary writers expressly hold that it is for the benefit of the infant that he should be able to contract for necessaries; and we see no reason why he may not be allowed to contract in the ordinary modes of contracting, so far as his perfect safety is maintained always." See Thing v. Libbey, 16 Me. 55; Ray v. Tubbs, 50 Vt. 688.

12. Searey v. Hunter, 81 Tex. 644. But not beyond what may be truly classed as necessaries. Deeds and mortgages are generally voidable at least. See last chapter.

13. Hall v. Butterfield, 59 N. H. 354, 358. But there is no set-off of what the minor was not bound to pay for. Wright v. McLarinan, 92 Ind. 103; § 236.

14. Trainer v. Trumbell, 141 Mass. 527.

15. Gregory v. Lee (1895), Conn.

Thus contracts of marriage are binding, if executed: they cannot be avoided on the ground of infancy, as we have shown in another connection,[16] except for the non-age barrier;[17] while on the other hand no such considerations of policy attach to an infant's promise to marry, and such promise is not binding.[18] So, too, the general rights and liabilities of a husband as to custody, maintenance, and the like, which are incidental to the marriage relation, apply, from reasons of policy, to infants as to adults.[19] So is a contract for the burial of a spouse held beneficial and binding upon an infant.[20]

§ 1023. Acts Which Do Not Touch Infant's Interest; Where Trustee, Officer, &c.

The acts of an infant that do not touch his interest, but which take effect from an authority which he is by law trusted to exercise, are binding; as if an infant executor receives and acquits debts to the testator, or an infant officer of a corporation joins in corporate acts, or any other infant does the duties of an office which he may legally hold.[21] And his conveyance of land which he held in trust for another, in accordance with the trust, is not to be disaffirmed by him on the ground of infancy; a principle which may extend sometimes to conveyances from a parent made to defraud creditors.[22] This seems to arise from the consideration which the law pays to the rights of others besides the infant; or, to put it differently, the doctrine may rest upon this fact, that the infant in such cases does not act as an infant. So the acts of the

16. Birmingham, etc., R. Co. v. Mattison, 166 Ala. 602, 52 So. 49.

A minor husband may be liable criminally for non-support. Land v. State, 71 Fla. 270, 71 So. 279; Cochran v. Cochran, 196 N. Y. 86, 89 N. E. 470. See § 20; Bonney v. Reardin, 6 Bush, 34.

17. Such marriages are only inchoate even though the statute declares them void. Smith v. Smith, 84 Ga. 440; § 20; Land v. State (Fla), 71 So. 279, L. R. A. 1916E, 760; Com. v. Graham, 167 Mass. 73, 31 N. E. 706, 16 L. R. A. 578. *Contra*, People v. Todd, 61 Mich. 234, 28 N. W. 79.

18. Schouler, Hus. & Wife, §§ 24, 42; Rush v. Wick, 31 Ohio St. 521; McConkey v. Barnes, 42 Ill. App. 511.

19. Bac. Abr., Infancy and Age (B); 3 Burr. 1802; Met. Contr. 66. Even though such marriage failed of the parent's consent. Commonwealth v. Graham, 157 Mass. 73.

20. Chapple v. Cooper, 13 M. & W. 259; Shouler, Hus. & Wife, §§ 412, 413.

21. Met. Contr. 66. See Butler v. Breck, 7 Met. 164; Roach v. Quick, 9 Wend. 238. As to *devastavit* by an infant administrator, see Saumm v. Coffelt, 79 Va. 510.

22. Prouty v. Edgar, 6 Clarke (Ia.), 353; Starr v. Wright, 20 Ohio St. 97; Elliott v. Horn, 10 Ala. 348; Nordholt v. Nordholt, 87 Cal. 552.

king cannot be avoided on the ground of infancy; partly for the same reasons, partly as one of the attributes of his sovereignty.[23] This attribute of sovereignty may perhaps enter as an element into the public acts of infants in this country who are improperly chosen to civil offices, yet whose official acts should be sustained.

§ 1024. Infant Members of Corporations.

It is held that infants and married women, owning proprietary rights in townships, are not by reason of legal incapacity prevented from being bound by the acts of proprietors at legal meetings.[24] And the same is doubtless true of infant shareholders in corporations generally.[25] Their incapacity would, otherwise, block the wheels of business altogether in matters where it is really property, and not persons, that are usually represented.[26]

§ 1025. Acts Which the Law Would Have Compelled.

It is an old and well-settled doctrine that an infant will be bound by any act which the law would have compelled him to perform; as if the infant make equal partition of lands, or assign dower, or release a mortgaged estate on satisfaction of the debt.[27] But it is held that this rule does not apply to the case of a voluntary distribution; for the law, though it would have coerced a distribution, might not have made just such a one as was made by the

23. Met. Contr. 66.

24. But where a corporation was dissolved and a new one formed, it was held that an infant stockholder was not bound by a contract to take shares in the new corporation in lieu of his stock in the old one. White v. New Bedford, etc., Corp., 178 Mass. 20, 59 N. E. 642; Wuller v. Chuse Grocery Co., 241 Ill. 398, 89 N. E. 796; Townsend v. Downer, 32 Vt. 183.

25. An infant may be a member of a mutual benefit association on a voluntary basis, with the usual consequences. Chicago Mutual Association v. Hunt, 127 Ill. 257. Cf. Matter of Globe Mutual Assn., 63 Hun, 263.

26. As to the binding force of a decree in equity upon the infant's property, see *post*, ch. 6.

27. Sims v. Gunter (Ala.), 78 So. 62.

So infancy is no defence in an action on an instrument of settlement between the father and mother of a bastard. Gavin v. Burton, 8 Ind. 69.

An infant may be restrained by an injunction from making such a use of his real estate as to do irreparable injury to the property of another. Cole v. Manners, 76 Neb. 454, 107 N. W. 777; Young v. Sterling Leather Works (N. J.), 102 A. 395.

An infant has been restrained from violating a contract not to solicit certain business. Mutual Milk & Cream Co. v. Prigge, 98 N. Y. S. 458, 112 App. Div. 652; Co. Litt. 38 *a*, 172 *a*; 3 Burr. 1801; Met. Contr. 67; Jones v. Brewer, 1 Pick. 314; Bavington v. Clarke, 2 Pa. 115; Prouty v. Edgar, 6 Clarke (Ia.), 353.

parties.[28] The rights of a minor in land may be condemned under the power of eminent domain.[29]

§ 1026. Contracts Binding Because of Statute; Enlistment; Indenture.

Enlistments are binding contracts under appropriate public statutes.[30] Whenever a statute authorizes a contract which from its nature or objects is manifestly intended to be performed by infants, such a contract must, in point of law, be deemed for their benefit and for the public benefit; so that when *bona fide* made it is neither void nor voidable, but is strictly obligatory upon them. Yet if there be fraud, circumvention, or undue advantage taken of the infant's age or situation by the public agents, the contract could not, in reason or justice, be enforced.[31] And contracts of enlistment are not by our statutes usually made binding upon any infants under a prescribed age, without, at all events, the consent of parent or guardian.[32] But such requirement of consent imports no privilege to the minor; for he on his own part becomes bound by his enlistment contract.[33]

On like principles, a minor may be bound by his indentures of apprenticeship, executed in strict conformity to statute; these being likewise deemed for his benefit. By the custom of London, and under the laws of some States, the covenants of the minor apprentice are obligatory upon him. But it is otherwise by the common law of England, and also under the statutes of Elizabeth, and in New York, Massachusetts, and other States. Still, although the infant may not be liable for breach of his covenants, he cannot dissolve the indenture.[34] The English doctrine is that indentures are so far binding that the master may enforce his rights under them; and the legal incidents of service as apprentice attach to this relation; unless the master by his own misconduct

28. Kilcrease v. Shelby, 23 Miss. 161.

29. Brown v. Rome & Decatur Railroad Co., 86 Ala. 206; Hutchinson v. McLaughlin, 15 Col. 492.

30. Acker v. Bell (Fla.), 57 S. 356, 39 L. R. A. (N. S.) 454; King v. Rotherfield Greys, 1 B. & C. 345; Commonwealth v. Gamble 11 S. & R. 93; United States v. Bainbridge, 1 Mason, 83, before Story, J.

31. United States v. Bainbridge, 1 Mason, 83. And see Franklin v. Mooney, 2 Tex. 452.

32. Matter of Tarble, 25 Wis. 390; *In re* McDonald, 1 Low. 100; Seavey v. Seymour, 3 Cliff. 439.

33. Morrissey, *Re*, 137 U. S. 157. Here the infant falsely represented himself as older than he was.

34. Met. Contr. 66. But in some States he can. See Woodruff v. Logan, 1 Eng. 276; Stokes v. Hatcher, 1 So. 84; McDowle's Case, 8 Johns.

deprives the infant of the benents of the contract, in which case the law will release the latter from his bargain.[35] A provision not for the benefit of the infant under such an indenture may render such an instrument inoperative.[36] In short, the age at which an infant shall be competent to perform certain acts, civil or military, is subject to legislative provision.[37]

§ 1027. Infant's Recognizance for Appearance on Criminal Charge.

Partly out of respect to statute requirements, and partly, no doubt, because it is beneficial to one charged with crime to be allowed to enter into recognizance for his personal appearance in court, instead of suffering close confinement meantime, it is held that a minor defendant in criminal proceedings may bind himself personally by such recognizance, entered into after the usual form by himself and his sureties.[38]

§ 1028. Whether Infant's Contract for Service Binds Him.

Apart from statutes prescribing differently, and minor apprentice acts in particular,[39] the executory contract of a minor, made without the consent of his parent or guardian, for employment for a certain or uncertain time, by means of which he may obtain necessaries or a livelihood, may be treated perhaps as void if positively disadvantageous in terms;[40] it is not by the better authorities to be considered as absolutely binding upon him, however fair and advantageous its provisions, to the extent of compelling him to fulfil stipulations, like an adult; but so far as he himself is concerned it is usually voidable.[41] If the contract were made by parent or guardian, or conformed to apprentice legislation, the employer's relation as to such a party would of course be different.

331; Blunt v. Melcher, 2 Mass. 228; Rex v. Inhabitants of Wigston, 3 B. & C. 484; Owens v. Frager, 119 Ind. 532; Clark v. Goddard, 39 Ala. 164; *infra*, Part VI., ch. 1.

35. 5 Dowl. & Ry. 339; 6 T. R. 558; Cro. Jac. 494; Cro. Car. 179; Met. Contr. 66; Rex v. Mountsorrel, 3 M. & S. 497. Infant's covenant to pay a reasonable premium for being taught the business enforced. (1891) Myatt v. St. Helene's R. R. Co., 2 Q. B. 369.

36. Such, *e. g.*, as a provision for not paying wages regularly. Meakin v. Morris, 12 Q. B. D. 352. § 403.

37. A minor's contract to support his bastard child held binding, because statute would have compelled it. Stowers v. Hollis, 83 Ky. 544.

38. State v. Weatherwax, 12 Kan. 463; 404 *n.* and citations.

39. § 1026.

40. Regina v. Lord, 12 Q. B. 755; *supra*, § 1009.

41. See Person v. Chase, 37 Vt. 647, and other cases referred to in ch 5, *post*.

In this country the cases are very common where a minor is said to be emancipated and entitled to contract for and receive his own wages. But the significance of the word "emancipation" is not exact; and, certainly, the legal obligation of the infant's contract for work as to others is by no means commensurate with his right to the fruits of his own toil.[42] His legal capacity to do acts necessarily binding does not seem to be enlarged by the circumstance that his father has given him his time.[43] or that he serves out with neither parent nor guardian to assume liabilities to others for him. But the right of an infant nearly of age and an orphan without a guardian, to recover the wages due him under a contract for his services, should in the courts be favorably regarded.[44]

42. As to the more general effect of a child's emancipation, see *supra*, Part 3, ch. 5.

43. *Post*, ch. 5.

44. Waugh v. Emerson, 79 Ala. 295.

CHAPTER IV.

THE INJURIES AND FRAUDS OF INFANTS.

§ 1029. Division of This Chapter.

In this chapter we shall treat, *first,* of injuries and frauds committed by an infant; *second,* of injuries and frauds suffered by an infant.

§ 1030. Injuries Committed by Infant; Infant Civilly Responsible.

First, as to injuries and frauds committed by an infant. It is a general principle that infancy shall not be permitted to protect wrongful acts. To use the forcible expression of Lord Mansfield, the privilege of infancy is given as a shield and not a sword.[45] And minors are liable, not only for their criminal acts, but for their torts; and must respond in damages in all cases arising *ex delicto* to the extent of their pecuniary means, irrespective of the form of action which the law prescribes for redress of the wrong.[46]

45. Zouch v. Parsons, 3 Burr. 1802.

46 Watson v. Wrightsman, 26 Ind. App. 437, 56 N. E. 1864; Daggy v. Miller (Ia.), 162 N. W. 854.

In Kentucky the rule is limited to cases where malice is not a necessary element, since infants are not presumed to be capable of malice. Stephens v. Stephens, 172 Ky. 780, 189 S. W. 1143; Guidry v. Davis, 6 La. Ann. 90; McGreevey v. Boston Elevated Ry. Co. (Mass.), 122 N. E. 278.

An infant is liable for a penalty for violation of a militia statute. Winslow v. Anderson, 4 Mass. 376; Caswell v. Parker, 96 Me. 39, 51 A. 238; Brunhoelzl v. Brandes, 90 N. J. Law, 31, 100 A. 163; Hewitt v. Warren, 10 Hun (N. Y.), 560; People v. Kendall, 25 Wend. (N. Y.) 399, 37 Am. D. 240; Collins v. Gifford, 203 N. Y. 465, 96 N. E. 721; Saum v. Coffelt, 79 Va. 510; Briese v. Maechtle, 146 Wis. 89, 130 N. W. 893; Paradies v. Woodard, 156 Wis. 243, 145 N. W. 657; Covault v. Nevutt, 157

An infant is then as fully liable as an adult in an action for damages occasioned by injury to the person or property of another by his wrongful act.[47] True, as it has been observed where infants are the actors, that might probably be considered an unavoidable accident, which would not be so where the actors are adults.[48] But, says a writer, where the minor commits a tort with force, he is liable at any age; for in case of civil injuries with force, the intention is not regarded.[49]

It follows from what we have said, that for an injury occasioned by an infant's negligence, he may be held civilly answerable. As where, in sport, he discharges an arrow in a school-room where there are a number of boys assembled, and thereby disables another;[50] or aims a missile at an older boy and accidentally hits another and younger one.[51] And even though under seven years of age, a child has been held liable in trespass for breaking down the shrubbery and flowers of a neighbor's garden.[52] But not for turning horses which were trespassing on his father's land into the highway, for this does not constitute a tort.[53] All the cases agree that trespass lies against an infant. And minors are chargeable in trespass for having procured others to commit assault and battery.[54] While, furthermore, an infant, as we have seen, cannot be sued for mere breach of promise to marry, one old enough to commit such an offence is liable in civil damages for seduction, whether accompanied or not by such a promise.[55]

But, supposing a tort to have been committed by the express command of the father; is the infant then liable? So it was

Wis. 113, 146 N. W. 115; Met. Contr. 49; 1 Addis. Torts, 731; 8 T. R. 335; 2 Kent, Com. 240, 241; School District v. Bragdon, 3 Fost. 507; Bullock v. Babcock, 3 Wend. 391; Oliver v. McClellan, 21 Ala. 675.

47. Conklin v. Thompson, 29 Barb. 218.

48. Bullock v. Babcock, 3 Wend. 391.

49. Reeve, Dom. Rel. 258. See Neal v. Gillett, 23 Conn. 437.

An infant is not liable to arrest on civil process. If, however, the writ was valid, on its face, the infant has no right of action against one aiding the officer in making the arrest. Cassier, *Re*, 139 Mass. 458, 461.

50. Bullock v. Babcock, 3 Wend. 391.

51. Peterson v. Haffner, 59 Ind. 130; Conway v. Reed, 66 Mo. 346.

52. Huchting v. Engel, 17 Wis. 231; Huggett v. Erb, 148 N. W. 805; O'Leary v. Brooks Elevator Co., 7 N. D. 554, 41 L. R. A. 677 (holding that a child may be a trespasser).

53. Humphrey v. Douglass, 10 Vt. 71.

54. Sikes v. Johnson, 16 Mass. 389; Tifft v. Tifft, 4 Denio, 177; Scott v. Watson, 46 Me. 362.

55. Becker v. Mason, 93 Mich. 336; § 415; Fry v. Leslie, 87 Va. 269.

thought in a Vermont case, where the decision nevertheless rested on a different ground.[56] "An infant, acting under the command of his father, as a wife in the presence of her husband, might be excused from a prosecution for crime, if it should appear that the intent was wanting, or that he was acting under constraint; yet he is answerable *civiliter* for injuries he does to another." [57] And more recently this question is plainly decided in Maine, in the affirmative.[58] In North Carolina, too, it is held that the infant cannot defend by alleging that the tort was committed by the direction of one having authority over him.[59] On the other hand, it would appear that an infant cannot be held responsible for torts committed by persons assuming to act under his implied authority; in other words, that his liability is not to be extended in any case beyond acts committed by himself or under his immediate and express direction.[60]

An infant in the actual occupation of land is responsible for nuisances and injuries to his neighbor, arising from the negligent use and management of the property.[61] Or for wrongful detention of premises.[62] Nor was he liable for breaking a borrowed carriage.[63] And ejectment may be maintained against an infant for disseisin, that being a tort.

He may be liable for libel.[64] It seems that he may be liable for negligence, if he fails to exercise that degree of care which one of his age would ordinarily exercise.[65]

56. Humphrey v. Douglass, 10 Vt. 71.

57. Per Williams, C. J., *ib.*

58. Scott v. Watson, 46 Me. 362.

59. Smith v. Kron, 96 N. C. 392. Here the offence was trespass upon another's premises.

60. Robbins v. Mount, 4 Rob. (N. Y.) 553; Burnham v. Seaverns, 101 Mass. 360.

61. 1 Addis. Torts, 731; McCoon v. Smith, 3 Hill, 147.

62. McClure v. McClure, 74 Ind. 108.

63. Schenck v. Strong, 1 So. 87.

64. Fears v. Riley, 148 Mo. 49, 49 S. W. 836.

65. House v. Fry, 30 Cal. App. 157, 157 P. 500; Hartnett v. Boston Store of Chicago, 265 Ill. 331, 106 N. E. 837, L. R. A. 1915C, 460; Churchill v. White, 58 Neb. 22, 78 N. W. 369, 76 Am. St. R. 64.

The owner of an automobile loaning it to an infant cannot recover for negligence in its operation. Brunhoelzl v. Brandes, 90 N. J. Law, 31, 100 A. 163.

A minor who buys an automobile and later disaffirms is not liable for his unskilfulness in the use of it, but is liable for tortious acts resulting in damage to the car. Woolridge v. Lavoie (N. H.), 104 A. 346; Young v. Muhling, 63 N. Y. S. 181, 48 App. Div. 617 (holding that an infant is not liable for negligence where the act was not wilful and intentional); Briese v. Maechtle, 184 Wis. 89, 130 N. W. 893.

A child is only required to exercise that degree of care which the

An infant is not, however, liable for the torts of an agent.[66]

§ 1031. Immunity for Violation of Contract Distinguished.

The cases on the subject of an infant's torts do not seem quite consistent, so far as decisions upon the facts are concerned; but the principle which runs through them all serves to harmonize the apparent contradictions. This is the principle: that the courts will hold an infant liable for what are substantially his torts, but not for mere violations of a contract, though attended with tortious results, and though the party ordinarily has the right to declare in tort or contract at his election. It must be remembered that, for his contracts, the infant is not ordinarily liable: for his torts he is. And this distinction is at the root of the legal difficulty. The plaintiff cannot convert anything that arises out of a contract into a tort, and then seek to enforce the contract through an action of tort. Therefore was it held that where a boy hired a horse and injured it by immoderate driving, this was only a breach of contract for which he was not liable.[67] And where in an exchange of horses the infant had falsely and fraudulently warranted his mare to be sound, he was protected from the consequences on the same principle.[68]

The English cases, decided many years ago, exhibit a strong disposition to apply this rule in favor of an infant's exemption. And the language of the court in *Manby* v. *Scott,* with reference to the delivery of goods to an infant, and suit afterwards for trover and conversion, was that the latter shall not be chargeable: "for by that means all infants in England would be ruined."[69] Says a judge, deciding a case on the same general principle, "the judgment will stay forever, else the whole foundation of the common

great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and undertsanding of the child. Briese v. Maechtle, 146 Wis. 89, 130 N. W. 893. But see Lowery v. Cate, 108 Tenn. 54, 64 S. W. 1068, 57 L. R. A. 673, 91 Am. St. R. 744 (holding that where plaintiff's grain was destroyed by a spark from an infant's threshing machine engine, which was without a spark arrester, the infant was not liable, where it appeared that the infant was threshing the grain under a contract with plaintiff, and that the negligence was not wilful, since the act took place under a voidable contract).

66. Covault v. Nevitt, 157 Wis. 113, 146 N. W. 1115.

67. Jennings v. Rundall, 8 T. R. 335.

68. Green v. Greenblank, 2 Marsh. 485; Howlett v. Haswell, 4 Campb. 118; Morrill v. Aden, 19 Vt. 505.

69. 1 Sid. 129, quoted with approbation in Jennings v Rundall, *supra.*

law will be shaken." [70] But a more equitable principle pervades the later cases. Thus in an English case, where one twenty years old hired a horse for a ride, and was told plainly that it was not let for jumping, and notwithstanding caused the horse to jump a fence and killed the animal, he was held liable for the wrong.[71] And in Vermont an infant was held answerable, not many years ago, where he hired a horse to go to a certain place and return the same day, then doubled the distance by a circuitous route, stopped at a house on the way, left the horse all night without food or shelter, and by such over-driving and exposure caused the death of the horse.[72] This is the Massachusetts doctrine likewise,[73] and that of other States.[74] The New Hampshire rule is that the infant bailee of a horse is liable for positive tortious acts wilfully committed, whereby the horse is injured or killed; though not for mere breach of contract, as a failure to drive skilfully.[75] The distinction to be relied upon is, that when property is bailed to an infant, his infancy protects him so long as he keeps within the terms of the bailment; but when he goes beyond it, there is a conversion of the property, and he is liable just as much as though the original taking were tortious.[76]

Chief Justice Marshall pronounces infancy to be no complete bar to an action of trover, although the goods converted be in the infant's possession in virtue of a previous contract. "The conversion is still in its nature a tort; it is not an act of omission but of commission, and is within that class of offences for which infancy cannot afford protection." [77] This doctrine is approved in New York [78] and in Maine.[79] So, in England, detinue will lie against an infant where goods were delivered for a special purpose not accomplished.[80] And the general rule seems to be now well established that an infant is liable for goods intrusted to his care, and unlawfully converted by him; though as to what would con-

70. Johnson v. Pye, 1 Keb. 905. See *n.* to Howlett v. Haswell, *supra.*

71. Burnard v. Haggis, 14 C. B. (N. S.) 45.

72. Towne v. Wiley, 23 Vt. 355. And see Ray v. Tubbs, 50 Vt. 688.

73. Homer v. Thwing, 3 Pick. 492.

74. Freeman v. Boland, 14 R. I. 39.

75. Eaton v. Hill, 50 N. H. 235.

76. Towne v. Wiley, *supra*, per Redfield, J. The rule is otherwise in Pennsylvania. Penrose v. Curren, 3 Rawle, 351. An infant of apparent discretion was not allowed to defraud upon the settlement of a suit, where his promise had been relied on, in Cadwallader v. McClay, 37 Neb. 359.

77. Vasse v. Smith, 6 Cranch, 226.

78. Campbell v. Stakes, 2 Wend. 137.

79. Lewis v. Littlefield, 15 Me. 233.

80. Mills v. Graham, 4 B. & P. 140.

stitute such conversion, the authorities are not agreed.[81] Thus it is held that while a ship-owner cannot sue his infant supercargo for breach of instructions he may bring trover for the goods.[82] And an infant, prevailing on the plea of infancy in an action on a promissory note given by him for a chattel which he had obtained by fraud and refused to deliver on demand, has still been rendered liable to an action of tort for the conversion of the chattel; the original tort not having been superseded by a completed contract.[83] Replevin would lie for the goods even where a suit for damages might fail.[84] For stolen money and stolen goods converted into money, an infant is held liable in assumpsit.[85] Yet his conversion of specific goods should be carefully distinguished from what is in substance a breach of his contract to sell and account for profits.[86]

Where an action for money had and received was brought against an infant to recover money which he had embezzled, Lord Kenyon said that infancy was no defence to the action; that infants were liable to actions *ex delicto,* though not *ex contractu,* and though the action was in form an action of the latter description, yet it was in point of substance *ex delicto.*[87] For embezzlement of funds, therefore, an infant may be considered liable.[88] And in New York, and some other States, an infant is held responsible in tort for obtaining goods on credit, intending not to pay;[89] or for drawing a check fraudulently against a bank where he has no funds, in payment of his purchase.[90] In New Hampshire, the general rule is stated to be, that if false representations are made by an infant at the time of his contract, he may set up infancy in defence; but that if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable.[91]

The test is always whether an action of tort can be made out

81. See Story, Bailments, § 50; 2 Kent, Com. 241; Baxter v. Bush, 29 Vt. 465; Schouler, Bailments.

82. Vassee v. Smith, 6 Cranch, 226.

83. Walker v. Davis, 1 Gray, 506. And see Fitts v. Hall, 9 N. H. 441.

84. Badger v. Phinney, 15 Mass. 359.

85. Shaw v. Coffin, 58 Me. 254; Elwell v. Martin, 32 Vt. 217.

86. See Munger v. Hess, 28 Barb. 75. And see Burns v. Hill, 19 Ga. 22.

87. Bristow v. Eastman, 1 Esp. 172.

88. Elwell v. Martin, 32 Vt. 217.

89. Wallace v. Morse, 5 Hill, 391, and cases cited. But the rule appears otherwise in Indiana. Root v. Stevenson's Adm'r, 24 Ind. 115.

90. Mathews v. Cowan, 59 Ill. 341.

91. Fitts v. Hall, 9 N. H. 441; Prescott v. Norris, 32 N. H. 101.

without regard to the contract.[92] To maintain an action of tort against an infant, the act complained of must be wholly tortious.[93] For example, an action for false warranty or other breach of contract cannot be made over into deceit so as to hold the infant.[94] Conversely, the infant cannot escape liability for deceit on the theory of a false warranty.[95] An infant is liable generally for fraud,[96] but mere silence of a minor as to his age is not fraud for which deceit can be maintained.[97]

§ 1031a. Same Subject; Infant's Fraudulent Representations as to Age, &c.

The plea of infancy has long been considered, both in England and this country, a good defence to an action for fraudulent representation and deceit. Thus, the rule is, that an infant who falsely affirms goods to be his own, and that he had a right to sell them, and thereby induces the plaintiff to purchase them, is not responsible.[98] For the plea of infancy, as it is sometimes said, will prevail when the gravamen of the fraud consists in a transaction which really originated in contract.[99] The result is circumlocution and uncertainty, oftentimes in trivial matters. And it is sometimes held that such an action, as for tort, will not lie.[1]

92. Churchill v. White, 58 Neb. 22, 78 N. W. 369, 76 Am. St. R. 64; Lowery v. Cate, 108 Tenn. 54, 64 S. W. 1068, 57 L. R. A. 673.

93. (1911) Collins v. Gifford, 203 N. Y. 465, 96 N. E. 721; Frank Spangler Co. v. Haupt, 53 Pa. Super. Ct. 545; Covault v. Nevitt, 157 Wis. 113, 146 N. W. 1115; Campbell v. Perkins, 8 N. Y. 430; Wilt v. Welsh, 6 Watts (Pa.) 430; Gilson v. Spear, 38 Vt. 311, 88 Am. D. 659.

94. Brooks v. Sawyer, 191 Mass. 151, 76 N. E. 953, 114 Am. St. R. 594; Hewitt v. Warren, 10 Hun (N. Y.), 560; Collins v. Gifford, 203 N. Y. 465, 96 N. E. 721, 38 L. R. A. (N. S.) 202.

95. Pritchett v. Fife, 8 Ala. App. 462, 62 S. 1001; Patterson v. Kasper, 148 N. W. 690.

96. Guidry v. Davis, 6 La. Ann. 90; Saum v. Coffelt, 79 Va. 719; Patterson v. Kasper (Mich.), 148 N. W. 690, L. R. A. 1915A, 1221; Elwell v. Martin, 32 Vt. 217.

97. Frank Spangler Co. v. Haupt, 53 Pa. Super. 545; Grauman, etc., Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50.

98. Minority does not prevent the adult from rescinding where the infant makes false representations. Pritchett v. Fife, 8 Ala. App. 462, 62 S. 1001; Brooks v. Sawyer, 191 Mass. 151, 76 N. E. 953; Raymond v. General, etc., Co., 230 Mass. 54, 119 N. E. 359.

An infant securing goods by false representations is not liable in trover. Slayton v. Barry, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560; 78 Am. St. Rep. 510. But see Shenkein v. Fuhrman, 141 N. Y. S. 909, 80 Misc. 179; Grove v. Nevill, 1 Keb. 778; 1 Addis. Torts, 661; Prescott v. Norris, 32 N. H. 101; Morrill v. Aden, 29 Vt. 465. But see Word v. Vance, 1 Nott & McCord, 197.

99. Gilson v. Spear, 38 Vt. 311.

1. Nash v. Jewett, 61 Vt. 501, and cases cited.

§ 1032. Estoppel by Misrepresentation of Age.

It has been held that for a false and fraudulent representation that he was of full age there is no remedy against the infant; whether money were advanced or goods intrusted to him on the strength of such representation.[2] The reader must reconcile the sense of these rules with some of the foregoing cases as best he may. If anything be needed to show the inadequacy of common-law remedies for frauds and wilful misrepresentations, it is just such maxims as these which have been perpetuated from the old books.

Upon common-law principle it may well be said that while an infant's false representation of full age or other material fraud may perhaps constitute a separate cause of action, as for a tort, it will not render his contract valid so as to estop him from avoiding it,[3] even though the facts relied on as an estoppel would support an action in tort,[4] unless he has attained years of discretion, and unless the act be intentionally fraudulent.[5] Some courts hold that the doctrine of estoppel has no application to infants.[6] Other

2. Johnson v. Pye, 1 Sid. 258; Price v. Hewett, 8 Exch. 146; s. c. 18 E. L. & Eq. 522; Burley v. Russell, 10 N. H. 184; Conroe v. Birdsall, 1 Johns. Cas. 127; Merriam v. Cunningham, 11 Cush. 40; Brown v. McCune, 5 Sandf. 224; Carpenter v. Carpenter, 45 Ind. 142. As to an infant's false representation of age when marrying, see § 20.

3. Carpenter v. Carpenter, 45 Ind. 142; Conrad v. Lane, 26 Minn. 389; Heath v. Mahoney, 14 N. Y. Supr. 100; Studwell v. Shapter, 54 N. Y. 249. And see Whitcomb v. Joslyn, 51 Vt. 79; Hughes v. Gallans, 10 Phila. 618; Alvey v. Reed, 115 Ind. 148, 17 N. E. 265, 7 Am. St. R. 418; Lacy v. Pixler, 120 Mo. 383, 25 S. W. 206; Ridgeway v. Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. R. 464; Carolina Interstate Bldg. & Loan Ass'n v. Black, 119 N. C. 323, 25 S. E. 975; LaRose v. Nichols (N. J. Sup.), 103 A. 390; International, etc., Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722; Johnson v. Clark, 51 N. Y. S. 238, 23 Misc. 346; New York Bldg. Loan Banking Co. v. Fisher, 45 N. Y. S. 795, 20 Misc. R. 242.

The absurdity of the old rule is well illustrated by a recent Massachusetts decision holding that where an infant leases a motorcycle and takes it out and smashes it up he can bring back the wreck and then recover all instalments he has paid thereon, although the contract was in the first place made in reliance on his written statement under oath that he was of age. This decision is an encouragement to young crooks and seems in defiance of common sense and common justice. Knudson v. General Motorcycle Co., 230 Mass. 54.

4. New York, etc., Co. v. Fisher, 45 N. Y. S. 795, 20 Misc. 242.

5. Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694 64 Am. St. R. 891; Headley v. Hoopengarter, 60 W. Va. 626, 55 S. E. 744.

6. Lyons v. First Nat. Bank, 101 Ark. 368, 142 S. W. 856; Tobin v. Spann, 85 Ark. 556, 109 S. W. 534; Rowe v. Allison, 87 Ark. 206, 112 S. W. 395; Beauchamp v. Bertig, 90

courts assert the doctrine broadly that an infant may be estopped from disaffirming his contract in any case where the evidence plainly and convincingly shows the presence of actual, active and wilful fraud and misrepresentation deceiving the other party to his damage.[7]

Chancery, handling its weapons with more freedom, is accomplishing results in this respect more widely useful. The doctrine of the English equity courts appears to have been, for years, that where payment is made to one falsely representing himself as an infant, this is a discharge for the sum paid; but that where there was no such misrepresentation the trustee still remains liable; the mere belief that one was of age, of course, affording no ground of justification.[8] An English bankruptcy case of modern date carries the principle still farther; far enough to startle those who have reposed upon the assurance that the ancient judgments "will stay forever." A young man, who from his appearance might well have been taken to be more than twenty-one years of age, engaged in trade, and wished to borrow or to obtain credit, and for the purpose of doing so represented himself to the petitioner, expressly and distinctly, as of the age of twenty-one. It was held that, whatever the liability or non-liability of the infant at law, he had made himself liable in equity to pay that debt.[9] But in a somewhat later case, not inconsistent with these others, it was held

Ark. 351, 119 S. W. 75; Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 81 P. 869.

7. Bunel v. O'Day, 125 F. 303.

Where plaintiff was indebted to defendants for goods sold to him while conducting a grocery and meat market, and while indebted to them left the State for the purpose, as he alleged, of buying some hay to be shipped to the town in which he resided, and a third party sold all the property in the store to defendants, they believing at the time that plaintiff had absconded, and also believing that the third party was a partner of plaintiff, where there was no evidence that plaintiff had induced such third party to make the representations that he had absconded or abandoned his property, he was not estopped by the circumstances from asserting his minority. Barbieri v. Messner, 106 Minn. 102, 118 N. W. 258; Lake v. Perry, 95 Miss. 550, 49 So. 569.

Where an infant 19 years of age, in consideration of employment by a milk company, contracts not to solicit business from the customers of the employer within three years after leaving its employ, an injunction will lie to restrain him from violating the agreement. Mutual Milk & Cream Co. v. Prigge, 98 N. Y. S. 458, 112 App. Div. 652.

8. Overton v. Bannister, 3 Hare, 503; Stikeman v. Dawson, 1 De G. & S. 90.

9. *In re* Unity and Banking Association, 3 De G. & J. 63 (1858). Lords Justices Bruce and Turner concurred in this opinion, both expressing some reluctance in giving the judgment.

that an infant's settlement upon his wife might be avoided by him on arriving at majority, notwithstanding there was some evidence that he fraudulently misstated his age to her solicitor; the fact being, however, that she, a widow of thirty-two, knew perfectly well that he was under age, and was not misled by his representations.[10]

The result of these late English decisions is to reopen in that country the whole subject of an infant's liability on his fraudulent misrepresentations; and considerable uncertainty appears to pervade the latest common-law decisions in that country, which incidentally bear upon the subject.[11] Whether the new or the old doctrine is in the end to prevail, it is too early yet to say; but a collision has come, towards which equity and the common law were fast tending. Much, however, depends upon the position in which the infant's liabilities are presented in court.[12]

The civil-law doctrine is clearly that if a minor represents himself of age, and from his person he appears to be so, any contract made with him will be valid; and the law protects those who are defrauded, not those who commit fraud.[13] And such was the Spanish law as formerly prevalent in our Southwestern States.[14] In a Maryland case, too, we find the suggestion that if an infant forms a partnership with an adult he holds himself out fraudu-

10. Nelson v. Stocker, 4 De G. & J. 458 (1859). Lord Justice Turner, commenting upon the case, said: "There can be no doubt that it is morally wrong in an infant of competent age, as it is in any other person, to make any false representation whatever; but the observance of obligations or duties which rest only upon moral grounds cannot be enforced in chancery. Some wrong or injury to the party complaining must be shown." He further observes: "The privilege of infancy is a legal privilege. On the one hand, it cannot be used by infants for the purposes of fraud. On the other hand, it cannot, I think, be allowed to be infringed upon by persons who, knowing of the infancy, must be taken also to know of the legal consequences which attach to it." *Ib.*, p. 465. See Inman v. Inman, L. R. 15 Eq. 260.

11. See DeRoo v. Foster, 12 C. B. (N. S.) 272 (1862); Wright v. Leonard, 11 C. B. (N. S.) 258.

12. Thus, recently, where an infant, had obtained a lease on a false representation that he was of full age, it was held in chancery that the lease must be declared void and possession given up, and the infant enjoined from parting with the furniture; but that the infant could not be made liable for use and occupation. Lemprière v. Lange, L. R. 12 Ch. D. 675.

13. 1 Dom., pt. 1, b. 4, tit 6, § 2.

14. See able discussion of this subject by Hemphill, C. J., Kilgore v. Jordan, 17 Tex. 341. There is not another American case to be found where this subject is so fully discussed, in its civil-law, common-law, and English equity bearings (1870).

lently to the world.[15] In Texas, the fraudulent representations of an infant are binding upon him.[16] Intimations are sometimes found in the courts as to gross frauds which might bind an infant.[17] And in Kentucky, not long since, the court refused to allow a deed made by a wife and her husband to be avoided on the ground of the wife's infancy, when, to induce the innocent purchaser to take the land, she and her husband had made oath before a magistrate that to the best of their knowledge and information she was more than twenty-one years old. This was a righteous decision.[18] In some other States an infant nearly of age who entraps another into a purchase or mortgage loan by direct participation in a fraud as to his or her age, has been estopped in chancery from attacking the title to the land afterwards on that ground, and thereby perpetrating a fraud.[19] Beyond this there seems increased authority for asserting that the American doctrine on this subject is unsettled, and that it responds to the change now going on in the English courts.[20] But an equity court in North Carolina refused, not many years since, to compel specific performance of an infant's contract on the alleged ground of fraudulent misrepresentation of his father and himself, that he was of full age; following the old common-law rule instead of opposing it.[21] And in many States

15. Kemp v. Cook, 18 Md. 130. The remark is quoted as that of Lord Mansfield, in Gibbs v. Merrill, 3 Taunt. 307, but this must be an error, as no such language appears in the case referred to, while the decision went upon totally different ground. As to a partnership where the infant deceived the adult concerning his age, see Bush, etc. v. Linthicum, 59 Md. 344.

16. Kilgore v. Jordan, 17 Tex. 341; Carpenter v. Pridgen, 40 Tex. 32.

17. Stoolfos v. Jenkins, 12 S. & R. 399; 2 Kent, Com. 241. And see Sterling v. Adams, 3 Day, 411; Davies, J., in Henry v. Root, 23 N. Y. 544.

18. Schmitheimer v. Eiseman, 7 Bush, 298.

19. Ferguson v. Bobo, 54 Miss. 121. Here the fraud appears to have been perpetrated without any positive misstatement as to age. A clearer and later case is Pemberton Building Association v. Adams (1895), N. J. Eq. In Lacy v. Pixler, 120 Mo. 383, such an issue is not clearly presented.

20. In several of the latest American cases the disposition is strong to hold an infant apparently of age and in fact nearly so, liable for the consequences of his fraudulent misrepresentation on that point. In Indiana an infant who by falsely stating himself to be of age obtained property for which he gave his worthless note and mortgage, is held liable to an action for deceit. Rice v. Boyer, 108 Ind. 472; cf. Baker v. Stone, 136 Mass. 405, where the infant did not misrepresent, but merely knew that the adult supposed him to be of age. In New Jersey an infant ward who fraudulently procured a settlement from his guardian by a similar falsehood was not allowed to repudiate that settlement on attaining majority. Hayes v. Parker, 41 N. J. Eq. 630.

21. Dibble v. Jones, 5 Jones Eq. 389.

still an infant will not thus be debarred from disaffirming his conveyance at majority.[22]

But our American statutes sometimes quicken the infant's sense of honor. Thus, in Iowa, it is enacted that one who, in selling real estate, represents himself to be of full age, and induces the grantee to buy on the strength of that representation, cannot afterwards disaffirm his contract on the ground of infancy.[23] It would be well if similar statutes were enacted in every State. We assume, of course, in general, that the infant thus misrepresenting has reached years of discretion and in appearance might be taken for an adult.

It may now, however, be said generally that where a minor represents himself to be of full age, the doctrine of estoppel will apply under certain conditions,[24] but not where he falsely represents that his disability has been removed under a statute.[25] To raise an estoppel the misrepresentation must be express.[26] Mere silence is not enough,[27] even though the infant ought to speak.[28] The same may be true where the information is given unwill-

22. Sims v. Everhardt, 102 U. S. Supr. 300.

23. Prouty v. Edgar, 6 Ia. 353.

24. Goff v. Murphy, 153 Ky. 634, 156 S. W. 95; Turner v. Stewart, 149 Ky. 15, 147 S. W. 772; Asher v. Bennett, 143 Ky. 361, 136 S. W. 879; County Board of Education v. Hensley, 147 Ky. 441, 144 S. W. 63; Edgar v. Gertison (Ky.), 112 S. W. 831; Adkins v. Adkins (Ky.), 210 S. W. 462.

It has been held to be otherwise where in a conveyance to a father to enable him to become surety the infant recites that he is of age, and where the court accepted the father as such surety on the faith of the recital, as well as on the infant's own testimony in open court to the same effect. Damron v. Com., 110 Ky. 268, 61 S. W. 459, 96 Am. St. R. 453; Lake v. Perry, 95 Miss. 550, 49 S. 569; Commander v. Brazil, 88 Miss. 668, 41 S. 497; Ostrander v. Quin, 84 Miss. 230, 36 So. 257, 105 Am. St. R. 426; La Rosa v. Nichols (N. J.), 105 A. 201; Grauman, etc., Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50.

25. Wilkinson v. Buster, 124 Ala. 574, 26 So. 940.

26. Grauman, etc., Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50.

27. Frank Spangler Co. v. Haupt, 53 Pa. Super. Ct. 545; Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744; Grauman, etc., Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50.

If a minor merely fails to impart information as to his age and uses no artifice to induce the other party to enter into the contract, the doctrine of estoppel does not apply. Grauman, etc., Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50.

28. Grauman, etc., Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50.

The rule that an infant may bind himself by his actual fraud, but not by mere conduct or silence when he ought to speak, is an exception to the rule that an infant cannot bind himself by estoppel, and is confined to cases where the infant is in fact developed to the condition of actual discretion, and to cases of actual fraud, and where the contract or transaction is beneficial. Grauman, etc., Co.

ingly.[29] To raise an estoppel, the contract must be fairly made, and the consideration adequate.[30] There must be a fraudulent intent on the part of the infant,[31] and the misrepresentation must be relied on and must induce the contract.[32] The act relied on as an estoppel must be that of the infant himself.[33] Where the other party knew, or as a reasonable and prudent man should have known of the infant's non-age, the latter's misrepresentation will not estop him,[34] but he is allowed to rely somewhat on the fact that the minor is well grown, so that his appearance indicates full age to a person of ordinary prudence.[35] Where the contract is wholly void, it cannot be validated by an estoppel.[36]

v. Krienitz, 142 Wis. 556, 126 N. W. 50.

29. International, etc., Co. v. Doran, 80 Conn. 307, 68 A. 255. But see County Board of Education v. Hensley, 147 Ky. 447, 144 S. W. 63 (holding that a false answer to a question as to a minor's age was ground for estoppel).

30. Edgar v. Gertison (Ky. 1908), 112 S. W. 831; Asher v. Bennett, 143 Ky. 361, 136 S. W. 879; Goff v. Murphy, 153 Ky. 634, 156 S. W. 95.

31. Putnal v. Walker, 61 Fla. 720, 55 So. 844.

32. Putnal v. Walker, 61 Fla. 720, 55 So. 844; County Board of Education v. Hensley, 147 Ky. 441, 144 S. W. 63; Commander v. Brazil, 88 Miss. 668, 41 S. 497; Lake v. Perry, 95 Miss. 550, 49 S. 569; Ostrander v. Quinn, 84 Miss. 230, 36 S. 257, 105 Am. St. R. 426; La Rosa v. Nichols (N. J.), 105 A. 201; Headley v. Hoopengarter, 60 W. Va. 626, 55 S. E. 744; Grauman, etc., Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50.

33. A conveyance by the heirs of a decedent at the instance of the widow will not estop the minor children from having assigned to them a year's support from the estate of their deceased father. Jones v. Cooner, 137 Ga. 681, 74 S. E. 51; Goff v. Murphy, 153 Ky. 634, 156 S. W. 95; Howard v. Sebastian, 143 Ky. 237, 136 S. W. 226.

A minor may be barred by his father's misrepresentation of his age, if in his presence and without objection by him. United States Inv. Co. v. Ulrickson, 84 Minn. 14, 86 N. W. 613, 87 Am. St. R. 326; Wallace v. Wallace (N. J.), 75 A. 770.

34. Putnal v. Walker, 61 Fla. 720, 55 So. 844, 36 L. R. A. (N. S.) 33; Asher v. Bennett, 143 Ky. 361, 136 S. W. 879; Lake v. Perry, 95 Miss. 550, 49 So. 569.

35. In Arkansas a different conclusion is drawn from the appearance of full age. Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75.

Where a married infant having a beard and every appearance of being of age joined in a conveyance of his interest of trees and took an active part in the negotiations and assisted in counting and branding the trees and received his part of the purchase price, he was estopped from relying on his infancy to defeat the grantee's title without returning the consideration. Smith v. Cole, 148 Ky. 138, 146 S. W. 30; Commander v. Brazil, 88 Miss. 668, 41 So. 497; Lake v. Perry, 95 Miss. 550, 49 So. 569; La Rosa v. Nichols (N. J.), 105 A. 201. But see Frank Spangler Co. v. Haupt, 53 Pa. Super 545 (holding that the fact that the minor appears to be of age does not estop him if he makes no representation.

36. Hakes, etc., Co. v. Lyons, 166 Cal. 557, 137 P. 911.

§ 1033. Injuries, &c., Suffered by Infants.

Second. As to injuries and frauds suffered by infants. Infants have a right to sue, by guardian or next friend, to recover damages for injuries done to person or property by the tortious acts of another; and the ordinary principles of law, in this respect, as to contributory negligence, apply to them as to adults.[37] But by reason of their tender years, their rights and remedies receive a somewhat peculiar treatment in the courts, as we proceed to show. In actions for negligence he must show due care.[38]

§ 1034. Child's Contributory Negligence.

Thus it is held that a child eight years old may sue one who sells and delivers to him a dangerously explosive substance, such as gunpowder, though upon his own request.[39] Such actions are grounded upon the ignorance of the child and the negligence of those who fail to regard it.

The principle involved is precisely that of the case where a man delivers a cup of poison to an idiot or puts a razor into the hand of an infant. The child uses that ordinary care of which he is presumed capable at his age; and though this may amount, logically, to actual carelessness as applied among adults to the ordinary transactions of life, his right of action is not thereby forfeited.[40]

37. Wilmot v. McPadden, 78 Conn. 276, 61 A. 1069; Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. R. 176; McGreevey v. Boston Elevated Ry. Co. (Mass.), 122 N. E. 278.

An infant injured by negligence while *en ventre sa mere* cannot recover if at the time of the accident she was a foetus too young to have been born vivable. Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N. W. 916. To the same effect see Nugent v. Brooklyn Heights R. Co., 139 N. Y. S. 367, 154 App. Div. 667; 1 Addis. Torts, 712.

The youth of a person injured does not extend the liability of the person causing the injury, for the tortious acts of his servants. Sherman v. Hannibal R., 72 Mo. 62. And see *post*, Part VI, ch. 4, As to prosecuting such suits by next friend, &c., see § 450.

As to action for malpractice in treating an infant, see Force v. Gregory, 63 Conn. 167. The fact that the plaintiff is a minor and incapable of contracting for the service, or that the father called the physician, constitutes no defence. *Ib.;* Harris v. McNamara, 97 Ala. 181. Injury to a young child by leaving team unhitched. Westerfield v. Levi Bros., 43 La. Ann. 63. Instigating a young child to do an injurious thing. Rosenberg v. Durfee, 87 Cal. 545.

Where a suit is prosecuted on an infant's behalf to recover for fraud practised upon him, it is no defence that he has not rescinded the contract or returned the property received. Shuford v. Alexander, 74 Ga. 293.

38. Campany v. Brayton, 171 App. D. 63, 156 N. Y. S. 1010.

39. Carter v. Towne, 98 Mass. 567.

40. Byrne v. New York Central R., 83 N. Y. 620.

A child between seven and fourteen years of age is presumed incapable of contributory negligence, and those seeking to apply the doctrine to him have the burden of showing his maturity and capacity.[41] Whoever, then, would avoid a suit like this must regulate his own discretion to suit the party with whom he deals, and act at all times with befitting prudence. Due average care, according to age, sex, and capacity, is all that the law exacts of any child of tender years, and not the average standard for adults, in judging of the child's contributory negligence; and wherever there is danger to which the infant exposes himself, it is material to consider whether his judgment and reflection were sufficiently matured to make that danger obvious.[42] Children under four can hardly be capable of prudence or rashness at all as to themselves.

But there are cases where the child himself may have no right of action for injuries received,— as if he be technically a trespasser, and meddling with property which does not belong to him. Of this rule an English case affords an example, where a boy, four years old, coming from school, saw a machine exposed for sale in a public place, and by direction of his brother, seven years old, placed his fingers within the machine whilst another turned the crank and thereby crushed his fingers;[43] the court held that no action would lie. But if the trespass of the infant does not substantially contribute to produce the injury, it would appear that no defence can be legally interposed on this ground.[44] Thus the mere fact that a youth gets upon a railroad car intending to ride without paying fare is held not to bring the case within the rule of trespass or contributory negligence.[45] And late American cases go so far as to assert that a young child, even though a technical trespasser, may recover for injuries where an adult might not;

41. Richmond Traction Co. v. Wilkinson, 101 Va. 394, 43 S. E. 622.

42. Railroad Co. v. Young, 83 Ga. 12; 120 N. Y. 526; Illinois Central R. v. Slater, 129 Ill. 91; Greenway v. Conroy, 160 Pa. St. 185; Reed v. City of Madison, 83 Wis. 171; Brazil Bl. Coal Co. v. Gaffney, 119 Ind. 455; G. C. & S. F. Ry. Co. v. McWhister, 77 Tex. 356; De Cordova v. Powter, 123 N. Y. 645 In setting a child to perform a dangerous service the above principle applies, and due warning is at least incumbent upon the employer in such case. Brazil Bl. Coal Co. v. Gaffney, 119 Ind. 455; Rhodes v. Railroad Company, 84 Ga. 320; Emma Cotton Seed Oil Co. v. Hale, 56 Ark. 232; Texas & Pacific Ry. Co. v. Brick, 83 Tex. 598.

43. Mangan v. Atterton, L. R. 1 Ex. 239. And see Hughes v. McFie, 2 H. & C. 744; 33 L. J. (Ex.) 177.

44. See Daley v. Norwich & Worcester R. R. Co., 26 Conn. 591.

45. Kline v. Central Pacific R. R. Co., 37 Cal. 400. See Townley v. Chicago R., 53 Wis. 626.

and this upon the ground that the defendant had placed something dangerous or in a dangerous condition to which children were readily attracted.[46]

§ 1035. Contributory Negligence of Parent, Protector, &c.

Another and the more common class of exceptions consists of cases where the parents or other persons having charge of the child have been guilty of negligence. The rule of New York, Massachusetts, Illinois, and some other States, is that a child too young to have discretion for himself cannot recover if his protector fails to exercise ordinary care, but that he may if he uses such care as is usual with children of the same age, and the protector exercises ordinary care besides.[47] The English rule, as formerly understood, does not take into consideration the circumstance of the protector's negligence at all.[48] And in various American States the child's exercise of ordinary care appears alone to be regarded.[49] The latest English cases, however, lean toward the doctrine first above stated. Thus, when the child, at the time of injury, was in the care of his grandmother, at a railroad station, where she had purchased tickets for both, it was held that the plaintiff was so identified with his grandmother that, by reason of her negligence, no suit was maintainable against the company.[50]

46. Haesley v. Winona R., 46 Minn. 233; City of Pekin v. McMahon (1894) Ill.; Penso v. McCormick, 125 Ind. 116. See rule stated in McCarragher v. Rogers, 120 N. Y. 526. But cf. cases where the child was debarred as a trespasser. Rogers v. Lees, 140 Pa. St. 475; McGuiness v. Butler, 159 Mass. 233, and cases cited; McEachern v. Boston & Maine Co., 150 Mass. 515. It is sometimes hard to draw the line between a child's wrongdoing and contributory negligence in such cases; but the rule of trespass should avail as a defence, within fair limits, for unintentional injury. These tort suits are constantly on the increase. Presumptions under the principle of a growing discretion during infancy have been already considered. § 392. Yet these are presumptions only; and in these civil actions the law fixes no arbitrary rule. See Stone v. Dry Dock R. R. Co., 115 N. Y. 104.

47. Wright v. Malden & Melrose R. Co., 4 Allen, 283; Hartfield v. Roper, 21 Wend. 617; Downs v. New York Central R. R. Co., 47 N. Y. 83; Kerl v. Forgue, 54 Ill. 482; Schmidt v. Milwaukie, etc., R. R. Co., 23 Wis. 186; O'Flaherty v. Union R. R. Co., 45 Mo. 70; Baltimore, etc., R. R. Co. v. State, 30 Md. 47; Munn v. Reed, 4 Allen, 431; Lehman v. Brooklyn, 29 Barb. 236; City of Chicago v. Starr, 42 Ill. 174.

48. Lynch v. Nurdin, 1 Q. B. 29. Doubted, however, in Lygo v. Newbold, 9 Exch. 302.

49. Robinson v. Cone, 22 Vt. 213; North Pa. R. R. Co. v. Mahoney, 57 Pa. St. 187; Bellefontaine, etc., R. R. Co. v. Snyder, 18 Ohio St. 399; Daley v. Norwich & Worcester R. R. Co., 26 Conn. 591. But see Bronson v. Southbury, 37 Conn. 199.

50. Waite v. North-Eastern R. R. Co., 5 Jur. (N. S.) 936.

Where carelessness of a mother or other protector is alleged, in authorizing an exposure of the child, it may sometimes be said that the father or proper parent or guardian had conferred no authority.[51] To take common illustrations of this doctrinee: Allowing a child seventeen months or even two or three years old to be in the public street of a city without a suitable attendant is held to be a want of ordinary care on the parents' part, and if the child be run over there is no remedy.[52] But there are circumstances under which it would be found that the parent or protector of such a child was exercising ordinary care; while the child himself would be treated, doubtless, as incapable of personal negligence at so early an age, so as to defeat his right of action.[53] Suffering a boy eight or ten years old to play on the street after dark is not necessarily negligence on the protector's part.[54] And even as to children four years of age or thereabouts, or perhaps younger, it is not expected that parents who have to labor for themselves and cannot hire nurses are to be without remedy for themselves or their children every time the child steps into the street unattended. What would be expected of the custodians of these tender beings is a degree of care or diligence suitable to the capacity of the child; in other words, ordinary care and prudence in watching and controlling the child's movements.[55] This care and prudence should be proportionate to known dangers or to dangers which ordinary diligence might have made known to the custodian.[56] As to a child some twelve years of age traveling with his mother, and injured in stepping between cars, the right to sue is not necessarily defeated for the reason that she permitted him to go into another car from that where she was sitting, and he did so.[57] In fact, the circumstances of each case are fairly to be weighed by

51. Pieree v. Millay, 62 Ill. 133.

52. Kreig v. Wells, 1 E. D. Smith, 74; Casey v. Smith, 152. Mass. 294; Johnson v. Railway, 160 Pa. St. 647. Otherwise as to leaving a child three years of age to play inside the gate, when, unknown to the parent, a large hole had been dug just outside into which the child fell. Creed v. Kendall, 156 Mass. 291.

53. See Mangam v. Brooklyn R. R. Co., 38 N. Y. 455; Schmidt v. Milwaukie, etc., R. R. Co., 23 Wis. 186.

54. Lovett v. Salem, etc., R. R. Co., 9 Allen, 557.

55. City of Chicago v. Major, 18 Ill. 360; O'Flaherty v. Union R. R. Co., 45 Mo. 70; Baltimore, etc., R. R. Co. v. State, 30 Md. 47; I. C. R. R. Co. v. Slater, 129 Ill. 91.

56. Louisville R. v. Shanks, 132 Ind. 395. As to the unforeseen use of a toy air-gun bought by the parent, see Harris v. Cameron, 81 Wis. 239; Chaddock v. Plummer, 88 Mich. 225.

57. Downs v. N. Y. Central R. Co., 47 N. Y. 83.

the jury. No child capable of running about can be kept tied up in the house and subjected to constant watch. The rule is to be reasonably and beneficially applied; and the circumstances are in general for the jury.[58]

And wherever the child himself exercised due care and prudence in fact, the care and diligence of a protector might well become immaterial in a suit for the child's own injury.[59]

Causa proxima non remota spectatur is the maxim usually applied in cases of torts, whether the plaintiff be infant or adult. But where the tort is occasioned by the negligence of one person,

58. The principle may be further illustrated by an Illinois case. A heavy counter, some eighteen feet long and three feet high, which had been placed across the sidewalk in one of the principal thoroughfares of Chicago, remained so for two or three weeks, when some children were climbing upon it and thereby caused it to fall over. One of the children, six years old, was injured and died, and the parents sued the city, under statute, for damages. The court held, upon the state of facts before them, that the action would not lie because there was negligence shown on both sides,— on the part of the city in allowing the counter to remain in that situation, and on the part of the parents in permitting the child, at his age, to roam the crowded thoroughfares of the city at a great distance from his home. The negligence on the part of the city was less than that attributable to the child's parents, and therefore there could be no recovery. City of Chicago v. Starr, 42 Ill. 174. In this case it was further suggested that the degree of carelessness is not to be judged from a single fatal accident; but that the question is rather what would have been the course of a prudent person prior to the accident. And the habitual carelessness of the parents in allowing the child to go about unattended was considered material. But see Kerr v. Forgue, 54 Ill. 482, limiting the rule. Perhaps the course most consistent with the latest authorities is to leave the question of negligence, so far as possible, with the jury, upon the state of facts presented. See further, Weeks v. Pacific R., 56 Cal. 513; Murley v. Roche, 130 Mass. 330; Wynne v. Conklin, 86 Ga. 40; § 428; McCarragher v. Rogers, 120 N. Y. 526; Sprague v. Atlee, 81 Ia. 1; Higgins v. Deeney, 78 Cal. 578.

59. Chicago R. v. Robinson, 127 Ill. 9. A statute suit by the administrator of a child who was killed is not debarred by the consideration that a negligent parent will inherit. Wymore v. Mahasha County, 78 Ia. 396. In Newman v. Phillipsburg R., 52 N. J. L. 446, the above doctrine of imputing the misfeasance of a child's custodian to the child itself so as to defeat the latter's right of action is deemed to be an interpolation into the law; with chief pertinence, perhaps, where the child himself was actually careful. See also Chicago City Ry. Co. v. Robinson, 127 Ill. 9; Westbrook v. M. & O. R. R. Co., 66 Miss. 560; Railway Co. v. Harsch, 69 Miss. 126. Such parental misfeasance ought to bar the parent's own suit, at all events; even though it should not that of the child. Chicago City Ry. Co. v. Wilcox, 138 Ill. 370. The doctrine of imputed negligence has been repudiated in various States. Trumbo's Adm'r v. City St. Car Company, 89 Va. 780; cases *supra*.

the infant is not debarred of his right to sue the other party who shared in it. As where a child too young to take care of himself — there being, we shall suppose, no negligence on the part of the parent — is in danger of being run over by a steam-engine, and some stranger catches him up, meaning to save his life, and imprudently rushes over the track and falls with the child. An accident so occasioned might, under some such circumstances, give a right of action against either the stranger or the railroad company, or against them jointly.[60]

But for damage to the person involving a permanent injury reaching beyond one's minority, the minor is entitled in his own right to recompense for such prospective loss.[61] He may also recover for physical suffering as the result of injury.[62] A double recovery for loss of the child's services during minority is not permitted.[63]

60. See North Pa. R. R. v. Mahoney, 57 Pa. 187. The views expressed in this case may not meet, in all respects, the concurrence of other courts; but the principle extracted in the text seems to the writer a correct one. See further, as to slander of an infant, Hopkins v. Virgin, 11 Bush, 677. As to injury done to a minor servant, see De Graff v. N. Y. Central R., 76 N. Y. 125; Cooper v. State, 8 Baxt. 324; *post*, Part VI.

A parent who knowingly allows his young child to remain in a dangerous employment without objection debars himself of suit by his own negligence. Kilgove v. Smith, 122 Pa. St. 57. But where on employs a minor knowingly in a dangerous business without his father's consent or knowledge, he becomes liable to the father's suit in case of injury. Texas R. v. Brick, 83 Tex. 526. Concerning the child's knowledge of danger as affecting his own suit for damages, see § 428.

The act of the parent entitled to his services in bringing an action for him as his next friend and in her petition asking recovery for him for loss of time, has been held such a waiver of the right of his services as to enable him to recover for them. Abeles v. Bransfield, 19 Kan. 16.

The infant may recover for loss of time where he has no legal or natural guardian. Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 S. E. 908; Manufacturers, etc., Co., 228 Ill. 187, 81 N. E. 841.

61. Camp v. Hall, 39 Fla. 535, 22 So. 792; Central R. R. v. Brimson, 64 Ga. 475, and cases cited; Manufacturer's, etc., Co. v. White, 228 Ill. 187, 81 N. E. 841; Helm v. Phelps, 157 Ky. 795, 164 S. W. 92; Cincinnati, N. O. & T. P. Ry. Co. v. Troxell, 143 Ky. 765, 137 S. W. 543; Lamkin & Foster v. Ledoux, 101 Me. 581, 64 A. 1048; Cameron Mill & Elevator Co. v. Anderson, 98 Tex. 156, 81 S. W. 282, 78 S. W. 8; Cameron Mill & Elevator Co. v. Anderson, 34 Tex. Civ. App. 105, 1 L. R. A. 198; Dublin Cotton Oil Co. v. Jarrard, 91 Tex. 289, 42 S. W. 959, 40 S. W. 531; Kruck v. Wilbur, etc., Co., 148 Wis. 76, 133 N. W. 1117; Sharon v. Winnebago Furniture Mfg. Co., 141 Wis. 185, 124 N. W. 299; Part III, ch. 4, *supra*.

62 Cincinatti, etc., R. Co. v. Troxell, 143 Ky. 765, 137 S. W. 543.

63. Baker v. Railroad Co., 91 Mich. 298. See Judd v. Ballard (1894), Vt.

§ 1035a. Arbitration, Compromise and Settlement of Injuries Committed or Suffered by Infants.

While an infant is liable for torts, it does not follow that his contracts in compensation for torts are binding. In fact, his submission to an award, and notes given or money paid in pursuance thereof, would follow the principle of void and voidable and binding contracts;[64] and, as we may presume, a note or other security given to settle damages may not be sued upon without inquiry into its consideration, but it shall be good to the same extent as the tort which constituted its basis.[65] And on the other hand, where he releases or compromises for any injury himself has sustained, the same rule applies.[66] The parent cannot sue, as such, for the child's injuries; neither can he make a binding compromise or release, except as to his own demand upon the defendant.[67]

Emancipation will enable the minor to recover for loss of time or wages during minority.[68]

64. Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. R. 496; Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88 (holding that at common-law such a submission voidable); Halks v. Deal, 3 McCord, 257; Pitcher v. Turin Plank Road Co., 10 Barb. 436; Ware v. Cartledge, 24 Ala. 622.

65. See Ray v. Tubbs, 50 Vt. 688; *supra*, § 1019. The withdrawal of a suit against a minor child, without further costs, is sufficient consideration for the father's note in settlement. Mascolo v. Montesanto, 61 Conn. 50.

66. Baker v. Lovett, 6 Mass. 78. Cf. Cadwallader v. McClay, 37 Neb. 359, as to attempting fraud in settling a suit. Infant's right to sue for wrong is barred by limitations. Ela v. Ela, 158 Mass. 54.

67. See Loomis v. Cline, 4 Barb. 453; Passenger R. R. Co. v. Stutler, 54 Pa. St. 375; 82 Tex. 623. But see Merritt v. Williams, 1 Harp. Ch. 306. Such is the general rule as to next friend. § 1055; Tripp v. Gifford, 155 Mass. 108; O'Donnell v. Broad, 149 Pa. St. 24. There should be judicial sanction to such compromise.

68. Farrar v. Wheeler, 145 F. 482; Harris v. Crawley, 17 Det. Leg. N. 303, 126 N. W. 421; Nemorofskie v. Interurban St. Ry. Co., 87 N. Y. S. 463; Lieberman v. Third Ave. R. Co., 54 N. Y. S. 574, 25 Misc. 296 (mod., 55 N. Y. S. 677, 25 Misc. 704); Harris Irby Cotton Co. v. Duncan (Okla.), 157 P. 746.

CHAPTER V.

RATIFICATION AND AVOIDANCE OF INFANT'S ACTS AND CONTRACTS.

§ 1036. Nature of Defence of Infancy.

That indulgence which the law allows infants, to secure them from the fraud and imposition of others, can only be intended for their benefit, and therefore persons of riper years cannot take advantage of such transactions. The infant may rescind or disaffirm his own deed or contract; but the adult with whom he deals is held bound meantime, unless the transaction be void, and not voidable,[69] or one of those contracts which bind an infant from the outset.[70] And since, as we have observed, his conveyance is not to be decisively repudiated or ratified till his minority ends, while his personal property transactions or personal transactions may be avoided any time though not ratified,[71] the act of ratifying or affirming bears differently in its application.

69. Smith v. Bowen, 1 Mod. 25; 2 Kent, Com. 236; Warwick v. Bruce, 2 M. & S. 205; Brown v. Caldwell, 10 S. & R. 114; *supra*, ch. 2; Dentler v. O'Brien, 56 Ark. 49.

70. *Supra*, ch. 3.

71. *Supra*, § 1015.

But the infant may confirm his voidable contract on arriving at full age; and if he does so by such writings, words, or acts as amount to a legal ratification or affirmance, he will become liable then and thereafter.[72] Infancy is an affirmative defence,[73] the presumption being that the parties are of full age.[74] It cannot be availed of by objection to the complaint.[75] It must be specially pleaded.[76] The rule is the same whether set up in direct defence or interposed collaterally.[77]

Infancy may be specially pleaded in bar.[78] The plaintiff replies either that the defendant was of age, or that the goods were necessaries, or that he confirmed the contract when he came of age.[79] If there be several defendants, the party who is a minor should plead his infancy separately. Infancy is an issuable plea; and it may be pleaded with other pleas without leave of court.[80] Where there are several issues, one of which is upon the plea of infancy, that being found for the infant, the whole case is disposed of.[81] The burden is on the infant to show the fact of infancy affirmatively,[82] and, according to some courts, by clear and con-

72. Winchester v. Thayer, 129 Mass. 129.

73. Friorson v. Irwin, 5 La. Ann. 525; Garbarisky v. Simkin, 36 Misc. 195, 73 N. Y. S. 199; Reynolds v. Alderman, 103 N. Y. S. 863, 54 Misc. 73.

74. Moore v. Sawyer, 167 F. 826; Pitcher v. Laycock, 7 Ind. 398.

75. Reynolds v. Alderman, 54 Misc. 73, 103 N. Y. S. 863.

76. Sanders v. Williams, 163 Ala. 451, 50 So. 893; Board of Trustees of La Grange Collegiate Institute v. Anderson, 63 Ind. 367, 30 Am. Rep. 224; Pitcher v. Laycock, 7 Ind. 398; Daugherty v. Reveal, 54 Ind. App. 71, 102 N. E. 381; Mullins v. Watkins, 146 Ky. 773, 143 S. W. 370; Chicago Bldg. & Mfg. Co. v. Higginbotham (Miss.), 29 So. 79; Bill v. Wolinsky, 123 N. Y. S. 290. But see Thrall v. Wright, 38 Vt. 494 (holding that evidence of infancy is competent under the general issue).

77. Board of Trustees v. Anderson, 63 Ind. 367, 30 Am. R. 224.

78. Daugherty v. Reveal, 54 Ind. App. 71, 102 N. E. 381; Clemson v. Bush, 2 Binn. 413 Hillegass v. Hillegass, 5 Barr, 97.

79. See as to proof, Freeman v. Nichols, 138 Mass. 313.

80. 15 & 16 Vict., ch. 76, § 84. See Delafield v. Tanner, 5 Taunt. 856; Dublin & Wicklow R. R. Co. v. Black, 8 Exch. 181.

81. Rohrer v. Morningstar, 18 Ohio, 579. In New York infancy may be given in evidence under the general issue. Wailing v. Toll, 9 Johns. 141.

82. Moore v. Sawyer, 167 F. 826; Barker v. Fuestal, 103 Ark. 312, 147 S. W. 45; Pitcher v. Laycock, 7 Ind. 398; Stringer v. Northwestern, etc., Ins. Co., 82 Ind. 100; County Board of Education v. Hensley, 147 Ky. 441, 144 S. W. 63; Edgar v. Gertison (Ky.), 112 S. W. 831; Friorson v. Irwin, 5 La. Ann. 525; Schweltzer v. Bird (Mich.), 170 N. W. 57; Garbarisky v. Simkin, 36 Misc. 195, 73 N. Y. S. 199; Bill v. Wolinsky, 123 N. Y. S. 290; Rice v. Ruble, 39 Okla. 51, 134 P. 49; Sharshontay v. Hicks (Okla.), 166 P. 881; Gillam v. Richart

vincing evidence,[83] which must relate to the time of the transaction to be avoided.[84] The question of the defendant's age, in such case, is for the jury.[85]

§ 1037. Rule Affected by Statute; Lord Tenterden's Act; Other Statutes.

Much of the discussion on this point is now dispensed with, or rather diverted, in England, by a short statute to the effect that "no action shall 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 shall be made by some writing, signed by the party to be charged therewith."[86] This statute is known as Lord Tenterden's Act. Here is a clear, precise, and definite rule; and any apparent want of equity is compensated by the certainty with which a very troublesome subject is managed, one which has so constantly led to unprofitable litigation. The same or similar provisions are to be found in the laws of some of our States.[87]

But even statutes will raise legal difficulties. And the difficulty which arises under this particular act is to distinguish ratification from a new promise. What is meant by a "ratification" in the words of this statute? The Court of Exchequer, some years since, admitting, in the course of argument, that the statute made a distinction between ratification and new promises, gave it as their opinion that any act or declaration which recognizes the existence

(Okla.), 150 P. 1037; Jordan v. Jordan (Okla.), 162 P. 758; McKeever v. Carter (Okla.), 157 P. 56; McGauley v. Grimm, 115 Va. 610, 79 S. E. 1041; Lambrecht v. Holsaple, 164 Wis. 465, 160 N. W. 168.

83. Moore v. Sawyer, 167 F. 826; McCauley v. Grim, 115 Va. 610, 79 S. E. 1041.

84. Stringer v. Northwestern, etc., Ins. Co., 82 Ind. 100; Board of Education v. Hensley, 147 Ky. 441, 144 S. W. 63; Moore v. Moore, 74 N. J. Eq. 733, 70 A. 684.

85. Where, under a plea of infancy, there is no independent evidence of the fact, the jury may consider the physical appearance of the defendant, in order to determine whether the defence is made out. Garbarisky v. Simkin, 36 Misc. 195, 73 N. Y. S. 199; Waterman v. Waterman, 42 Misc. 85, N. Y. S. 377.

In an action where the defendant pleaded infancy at the time of the transaction, evidence that at such time he had a beard of several weeks' growth on his face and appeared to be a man of 22 or 23 years of age, was held sufficient to warrant the jury in finding that he was then of age. Johnson v. Brown (Tex. Civ.), 65 S. W. 485; Lambrecht v. Holsaple, 164 Wis. 465, 160 N. W. 168.

86. Stat. 9 Geo. IV., ch. 14, § 5 (1828).

87. See Thurlow v. Gilmore, 40 Me. 378.

of a promise as binding is a ratification of it; and that the statute "ratification" goes so far as to comprehend such a ratification as would make a person liable as principal for an act done by another in his name.[88] And hence certain letters written by the defendant in reference to payment of his debt out of his money in the hands of a third party were held binding. More lately this definition of ratification was reconsidered by the same court in another case, where the correspondence was over a dishonored bill of exchange, and another person, not the infant, was to be primarily liable; and the judges were divided in opinion. But the disposition seemed to be to define ratification anew, as a willing admission that the party is liable and bound to pay the debt arising from a contract which he made when an infant.[89] Still later a man, being of age, signed the following statement at the foot of an account of the items and prices of goods furnished to him while an infant by the plaintiff: "Particulars of account to the end of 1867, amounting to £162 11*s.* 6*d.* I certify to be correct and satisfactory." It was held that this was not a sufficient ratification under the statute, because these words did not really admit the debt to be a debt existing and binding upon the defendant.[90]

Some statutes regard the allowance of only a reasonable time after attaining majority for disaffirmance of a contract or conveyance made in infancy, requiring the infant both to disaffirm and to make restitution.[91] Others seek to prevent sales of the minor's property for some time after he reaches majority.[92]

88. Harris v. Wall, 1 Exch. 122.

89. Mawson v. Blane, 10 Exch. 206; 26 E. L. & Eq. 560. See, further, Smith, Contr. 287. Lord Ellenborough considered it more correct to say, in general, that the infant makes a new promise after he comes of age. Cohen v. Armstrong, 1 M. & S. 724. As to what is a sufficient compliance with the statute, see Hartley v. Wharton, 11 Ad. & El. 934; Hyde v. Johnson, 2 Bing. N. C. 778; Hunt v. Massey, 5 B. & Ad. 902.

See also Infants' Relief Act of 1874 (37 & 38 Vict., ch. 62); Smith v. King (1892), 2 Q. B. 543. As to what constitutes ratification or a fresh promise upon majority, under English statutes, of an infant's promise to marry, see Ditcham v. Worrall, 5 C. P. D. 410; Northcote v. Doughty, L. R. 4 C. P. D. 385. As to ratifying as "a debt of honor," see Maccord v. Osborne, 1 C. P. D. 569. And see *In re* Onslow, L. R. 10 Ch. 373. The inclination of these late cases is to insist upon something like a fresh promise in order to bind.

90. Rowe v. Hopwood, L. R. 4 Q. B. 1.

91. Wright v. Germain, 21 Ia. 585; Jones v. Jones, 46 Ia. 466; Hawes v. Burlington Ry. Co., 64 Ia. 315. Disaffirmance under the code should be within a reasonable time. Childs v. Dobbins, 55 Ia. 205; Green v. Wilding, 59 Ia. 679.

92. Soullier v. Kern, 69 Pa. St. 16.

§ 1038. Rule Independent of Statute; American Doctrine.

Independently of all statutes, however, the question has been asked again and again, what language and what conduct on the part of the infant attaining to majority will suffice to give binding force to his acts originally voidable. The American cases on this point are very numerous. And it must be confessed that the more this subject has been discussed, the less it appears to be understood. Two principles are evidently in conflict: the one, that an infant should be protected against his own imprudence while under a disability; the other, that *bona fide* creditors ought not to be cheated Some cases have given more prominence to the first principle, others to the second.

There cannot be much doubt that at the time Lord Tenterden's Act was passed, the English rule was, that an infant might, by his general conduct, independently of a precise promise or new contract, on his part, render himself liable for his contracts made while an infant.[93] The statute was passed to change this rule. On that point we need not dwell. This does not bind American courts, it is true, for they had adopted, in many instances, another rule of the common law, to which they were at liberty to adhere, in spite of the later English decisions; since it was the rule our ancestors brought over with them.

Now, what is the American doctrine? We take a case decided some years ago in Massachusetts, where an infant had made a promissory note, and after majority admitted several times that he owed the debt, and said he would pay it when he could. Says the court: "It has long been settled that a direct promise, when of age, is necessary to establish a contract made during minority, and that a mere acknowledgment will not have that effect."[94] We take still another, decided in New York only a little later. Says a judge of the Court of Appeals, after a most exhaustive review of the cases: "I think that the course of decision in this State authorizes us to assume that the narrow and stringent rule, formerly enunciated, that to establish the contract, when made in infancy, there must be a precise and positive promise to pay the particular debt, after attaining majority, is not sustained by the more modern decisions."[95] Courts taking this view hold that an

93. See Goode v. Harrison, 5 B. & Ald. 147; Smith, Contr. 283, 284.

94. Proctor v. Sears, 4 Allen, 95 (1862), per Metcalf, J.

95. Per Davies, J., Henry v. Root, 3 N. Y. 545 (1865).

act from which a ratification is sought to be inferred must be positive,[96] and inconsistent with any other intention.[97] An express adoption made after majority is sufficient,[98] even though no words of express promise are used.[99] Time has not with us lessened the force of Chancellor Kent's observation, many years ago, that "the books appear to leave the question in some obscurity, when and to what extent a positive act on the part of the infant is requisite." [1]

It may be remarked that a great change was gradually developed in the law of infancy, by making various contracts and transactions voidable which before were deemed void.[2] This might reasonably be thought to have introduced a new element into the consideration of such cases; the result tending towards freedom in the courts, and enabling them to repudiate artificial refinements and do substantial justice. It certainly throws upon the modern courts a greater responsibility than formerly in ruling between complete and incomplete ratification; or (if legal precision requires another expression) in determining whether a new promise has passed

96. Coe v. Moon, 260 Ill. 76, 102 N. E. 1074. Payments after majority on a voidable contract have been held evidence of an intention to ratify. Rubin v. Strandberg (Ill.), 122 N. E. 808; Healy v. Kellogg, 145 N. Y. S. 943; Syck v. Hellier, 140 Ky. 388, 131 S. W. 30; International, etc., Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722.

Payments made to a person out of the payor's bounty after she has attained majority have been held not a ratification, though according to the terms of a voidable contract, have been held not a ratification. Parsons v. Teller, 188 N. Y. 218, 80 N. E. 930. See also International Text-Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115 (holding that payment after majority of a sum stipulated in a contract made during infancy is not necessarily a ratification).

97. An infant does not ratify merely by releasing from attachment goods purchased while a minor. Lamkin & Foster v. Ledoux, 101 Me. 581, 64 A. 1048 Lacy v. Pixler, 120 Mo. 383, 35 S. W. 206.

Where an infant executed a written contract of guaranty, and after he became of age wrote asking that an itemized bill be sent to him, there was no such "ratification" as to make him liable upon the guaranty. H. C. Miner Lithographing Co. v. Santley, 150 N. Y. S. 71; Hobbs v. Hinton, etc., Co., 74 W. Va. 443, 82 S. E. 267.

98. Walker v. Arkansas Nat. Bank of Hot Springs, 256 F. 1; Bell v. Swainsboro, etc., Co., 12 Ga. App. 81, 76 S. E. 756; Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; Lynch v. Johnson, 109 Mich. 640, 67 N. W. 908; McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997; Pedro v. Pedro, 127 N. Y. S. 997, 71 Misc. 296; *In re* Kane's Estate (Wis.), 168 N. W. 402.

99. Thompson v. Lay, 21 Mass. 48, 16 Am. Dec. 325; Thompson v. Lay, 4 Pick (Mass.) 48, 16 Am. D. 325 (where the words relied on were, "I do ratify and confirm the debt").

1. 2 Kent, Com. 237.

2. See ch. 2, *supra.*

from the person after attaining full age. But this change has not always been kept in view. In New York the modern doctrine is that ratification or confirmation of the contract made in infancy will bind the party if it take place after his coming of age; that a new promise, positive and precise, equivalent to a new contract, is not now essential; but that a ratification or confirmation of what was done during the minority is sufficient to make the contract obligatory.[3] And it is well observed that the words "ratify and confirm" necessarily import that there was something in existence to which the ratification or confirmation could attach, entirely ignoring therefore the notion that an infant's obligations or contracts were nullified by the state of infancy.[4] But it must be borne in mind that in some other States the rule is quite different. So that we have nothing which may safely be pronounced the American doctrine upon this subject.

§ 1039. What Constitutes Disaffirmance.

No particular form of disaffirmance is required by the cases.[5] There must be an intention to repudiate the contract,[6] but notice of such intention is not usually required,[7] but if required, should be given to the person contracting with the infant, and not to an assignee of the contract.[8] The act of disaffirmance must be unequivocally and unmistakably such.[9] It may be said generally that any act showing unequivocally a renunciation of, or a disposition not to abide by, a voidable contract, is sufficient to disaffirm it.[10]

A conveyance, in due season after majority, to a third person has been taken to be sufficient disaffirmance of the minor's deed, especially when coupled with express notice of disaffirmance, and followed by the grantee's entry.[11] And another means of disaffirm-

3. Henry v. Root, 33 N. Y. 526.

4. *Ib.*

5. Stanhope v. Shambow, 54 Mont. 360, 170 P. 752; Groesbeck v. Bell, 1 Utah, 338.

6. Smoot v. Ryan (Ala.), 65 S. 828; Strain v. Hinds, 277 Ill. 598, 115 N. E. 563.

7. Highland v. Tollisen, 75 Ore. 578, 147 P. 558.

8 Spencer v. Collins, 156 Cal. 298, 104 P. 320.

9. Smoot v. Ryan (Ala.), 65 So. 828; Spencer v. Collins, 156 Cal. 298, 104 P. 320; Putnal v. Walker, 61 Fla. 720, 55 So. 844; Shroyer v. Pittenger, 31 Ind. App. 158, 67 N. E. 475.

10. Strain v. Hinds, 277 Ill. 598, 115 N. E. 563. The refusal of a minor to sign a note and mortgage a second time has been held not a disaffirmance. Brown v. Staab (Kan.), 176 P. 113; Stanhope v. Shambow, 54 Mont. 360, 170 P. 752; Casement v. Calaghan (N. D.), 159 N. W. 77; Grissom v. Beidleman, 35 Okla. 343, 129 P. 853, 44 L. R. A. (N. S.) 411.

11. Blake v. Holandsworth (W.

ing the conveyance of one's lands during infancy consists in bringing an ejectment suit.[12]

Whether it is necessary that an entry upon the land to regain seisin be made to perfect the title of the person intending to disaffirm his conveyance as infant, does not clearly appear from the authorities. The old rule was that in order to avoid a feoffment this was necessary. But conveyance by feoffment has been superseded by other methods of transferring real property in England, and it is not in use here. In some of the earlier New York cases, where an infant had sold wild lands to other persons, and had, after coming of age, conveyed by similar deed the same lands to another, it was held that the first conveyance had been legally avoided, and the last purchaser was entitled to the property.[13] A case before the Supreme Court in the United States is supposed to sustain the same view; only *arguendo,* however, for in point of fact the person making the second conveyance remained in possession all the time; and, as the court observed, "could not enter upon himself."[14] Following the indication of these three important cases, several of the State courts have since held that a conveyance by an infant of the same land to another person, after he comes of age, effectually avoids a deed of bargain and sale made in infancy; and this without entry on his part.[15] But the New York courts have latterly been disposed to retrace their steps; reluctance to do injury to others, doubtless, contributing to increase the strictness of requirements on the infant's part. Their present rule appears to be that, unless the lands were wholly vacant, or the infant remained in possession, he must make an entry or do some other act of equal notoriety before he can pass title by a

Va.), 76 S. E. 814, 43 L. R. A. (N. S.) 714. See Prout v. Wiley, 28 Mich. 164; Riggs v. Fisk, 64 Md. 100; Haynes v. Bennett, 53 Mich. 15; Dawson v. Helmes, 30 Minn. 107. If, after coming of age, an infant quitclaims land conveyed by him during his minority to another, he effectually disaffirms. Bagley v. Fletcher, 44 Ark. 153 (one judge dis.). But as to a mortgage see Buchanan v. Griggs, 18 Neb. 121. Wherever the later deed may be reconciled with that made in infancy, so that the two may stand together, disaffirmance should not be predicated of the transaction.

12. Craig v. Van Bebber, 100 Mo. 584.

13. Jackson v. Carpenter, 11 Johns. 639; Jackson v. Burchin, 14 Johns. 124. See Met. Contr. 44, 45, where this subject is discussed.

14. Tucker v. Moreland, 10 Pet. 58, per Story, J.

15. Hoyle v. Stowe, 2 Dev. & Bat. 320; Pitcher v. Laycock, 7 Ind. 398; McGan v. Marshall, 7 Humph. 121; Hughes v. Watson, 10 Ohio, 127; Peterson v. Laik, 24 Mo. 541; Haynes v. Bennett, 53 Mich. 15.

second conveyance.[16] There is no authority in the New England States to oppose this later doctrine; nor do we find any in the Middle States.[17] But doubt is removed by statutes, in Maine, Massachusetts, and some other States, which permit parties to recover land by writ of entry without making actual entry. And it is held in Maine that such a writ dispenses with entry and amounts to disaffirmance.[18]

To render a subsequent conveyance an act of dissent to the prior conveyance of an infant, it must be inconsistent therewith, so that the two cannot stand together.[19] There may be other acts of the late infant equivalent to dissent; such as giving notice of disaffirmance, followed by a suit, if need be, for repossession or restitution of rights.[20]

Express acts of disaffirmance or repudiation leave no doubt of intention on this point; and they, of course, suffice to avoid the contract made during infancy. As in a sale of his land, where one gives notice that he considers the bargain void, and offers to return the consideration.[21] And so generally where the transaction is such that the late infant must take the initiative or else forfeit his right, being out of possession. There are many other ways in which one may clearly disavow his intention of carrying into effect

16. Dominick v. Michael, 4 Sandf. 421; Bool v. Mix, 17 Wend. 133; Voorhies v. Voorhies, 24 Barb. 150.

17. See Roberts v. Wiggin, 1 N. H. 75; Worcester v. Eaton, 13 Mass. 375. See also Harrison v. Adcock, 8 Ga. 68; Moore v. Abernethy, 7 Blackf. 442.

18. Chadbourne v. Rackliff, 30 Me. 354. And see Cole v. Pennoyer, 14 Ill. 158. Judge Metcalf appears to doubt the correctness of the rule in Jackson v. Carpenter, even as to cases of wild lands. See Met. Contr. 45, 46, and cases cited. A bill to enforce specific performance of an infant's contract to sell real estate should not be brought before a reasonable time has elapsed, after the infant attains majority, for him to affirm or disaffirm. Walker v. Ellis, 12 Ill. 470; Petty v. Roberts, 7 Bush, 410; Griffis v. Younger, 6 Ired. Eq. 520; Carrel v. Potter, 23 Mich. 377. As to the ratification necessary to allow of enforcing a lien on real estate for work and materials furnished during infancy, see McCarty v. Carter, 49 Ill. 53. But acquiescing in the settlement of boundaries after coming of age binds the infant. George v. Thomas, 16 Tex. 74.

19. Leitensdorfer v. Hempstead, 18 Mo. 269; McGan v. Marshall, 7 Humph. 121. And see § 438.

20. Richardson v. Pote, 93 Ind. 423. A minor remainder-man will not be excused from disaffirming his deed within a reasonable time after majority, merely because his right to bring ejectment for the land has not accrued. Nathans v. Arkwright, 66 Ga. 179.

21. See Willis v. Twombly, 13 Mass. 204; Aldrich v. Grimes, 10 N. H. 194; Williams v. Norris, 2 Litt. 157; Hill v. Anderson, 5 S. & M. 216; McGill v. Woodward, 3 Brev. 401; Scranton v. Stewart, 52 Ind. 69, 92.

the contract made during infancy; and if the transaction appears to have been made shortly before reaching majority, and not to be disadvantageous to the infant, his disavowal ought not to be inferred from his silence.[22]

But an infant who leases or hires premises may leave them at any time during infancy and free himself from all further liability for rent.[23] But an act of the late infant, clearly showing his intention not to be bound by his mortgage, is a sufficient avoidance of it.[24] A prompt declaration of his intention to disaffirm, and a conveyance to another, will answer.[25] The execution of a warranty deed to another without reservation of the mortgage incumbrance imports a disaffirmance of the mortgage;[26] but the execution of a quitclaim deed does not.[27]

As to the infant's mortgage, it may be further remarked that a minor cannot avoid a mortgage given to secure either real or personal property purchased by him without avoiding the sale also.[28] In short, there is, according to the best authorities, a well-recognized distinction between the nature of those acts which are necessary to avoid an infant's deed, and those which are sufficient to confirm it. The deed cannot be avoided except by some solemn act, or, as some assert, an act equally solemn with the deed itself;

22. Davis v. Dudley, 70 Me. 266. Non-assertion of rights in a court of justice, where the courts are closed during war, cannot be construed into confirmation. Thompson v. Strickland, 52 Miss. 574. Nor can statements of record evidently referring to personal property be taken as confirmation of a conveyance of real estate. Illinois Land Co. v. Bonner, 75 Ill. 315. Equivocal acts very shortly after attaining majority should not be construed readily into a binding ratification or election not to avoid. Tobey v. Wood, 123 Mass. 88. Nor a transaction only remotely connected with the transaction to which he was a party in infancy. Todd v. Clapp, 118 Mass. 495. Notice of disaffirmance, given in writing, will suffice. Scranton v. Stewart, 52 Ind. 69, 92. Especially if this be consistenly followed up by acts of ownership or such as indicate a claim of title adverse to the transaction of infancy. Tunison v. Chambly, 88 Ill. 378. Suing to set aside the transaction is a disaffirmance. Gillespie v. Bailey, 12 W. Va. 70. And see §§ 1046, 1047, *post;* Baker v. Kennett, 54 Mo. 82.

23. Gregory v. Lee (1895, Conn.).

24. State v. Plaisted, 43 N. H. 413.

25. White v. Flora, 2 Overton, 426; Hoyle v. Stowe, 2 Dev. & Bat. 320.

26. Dixon v. Merritt, 21 Minn. 196; Allen v. Poole, 54 Miss. 323.

27. Singer Man. Co. v. Lamb, 81 Mo. 221. The warranty deed of a minor does not disaffirm his mortgage because he cannot disaffirm while an infant. *Ib.*

28. Heath v. West, 8 Fost. 101; Dana v. Coombs, 6 Greenl. 89. And see § 1046.

but acts of a character which would be insufficient, to avoid such a deed may amount to an affirmance of it.[29]

Such acts as notice of disaffirmance, and then bringing an appropriate suit, amount fairly to avoidance of an infant's contract, in various instances.[30]

Bringing an action to recover back what the infant has parted with is usually a sufficient disaffirmance.[31] In some cases, however, a preliminary act of disaffirmance is required before bringing suit.[32] The disaffirmance may be made by defending an action on the contract sought to be disaffirmed,[33] and, in some cases, by replication.[34] Denial of the execution of a

29. Wise v. Loeb, 15 Pa. Super. Ct. 601; Irvine v. Irvine, 9 Wall. 617. Here taking a lease of part of the premises from the person to whom he had conveyed when an infant was held proper evidence of affirmance. And see Phillips v. Green, 5 Monr. 344; Scott v. Buchanan, 11 Humph. 468; Allen v. Poole, 54 Miss. 323; Johnston v. Furnier, 69 Pa. St. 449; *Re* Wood, 71 Mo. 623; Houser v. Reynolds, 1 Hayw. 143.

30. The bringing of an action is a disaffirmance by the infant of his release of a claim for personal injuries. St. Louis R. v. Higgins, 44 Ark. 293; § 1015. And see Burdett v. Williams, 30 Fed. R. 697; § 1044, as to ejectment to recover his land.

On an issue whether an infant's contract has been ratified, it may be shown that the consideration was used with his knowledge for his advantage. Owens v. Phelps, 95 N. C. 286.

31. Smoot v. Ryan (Ala.), 65 So. 828; Arizona Eastern R. Co. v. Carillo, 17 Ariz. 115, 149 P. 313; Carmody v. Patchell, 42 App. D. C. 426; O'Donohue v. Smith, 130 App. D. 215, 114 N. Y. S. 536.

Where a proceeding was brought in favor of an infant during his minority to avoid his contract, it was held that he effectively disaffirmed after majority by obtaining leave to prosecute the action in his own name. Carmody v. Patchell, 42 App. D. C. 426; Conn v. Boutwell, 101 Miss. 353, 58 So. 105. The infant need not go into equity to obtain possession of property conveyed during infancy. Conn v. Boutwell, 101 Mass. 353, 58 So. 105; Parrish v. Treadway, 267 Mo. 91, 183 S. W. 580; Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 606, 73 Am. St. R. 464. He may maintain ejectment. Conn v. Boutwell, 101 Miss. 353, 58 So. 105; Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402; Lanning v. Brown, 95 N. E. 921, 84 Ohio St. 385. Where, after conveying away his undivided interest in property during minority, a bill for partition is a good disaffirmance. Lanning v. Brown, 84 Ohio, 385, 95 N. E. 921. An action by a minor to recover for his wages on a *quantum meruit* is a good disaffirmance of a contract under which the services were rendered. Fisher v. Kissinger, 27 Ohio Cir. Ct. R. 13. To the same effect see Dearden v. Adams, 19 R. I. 217, 36 A. 3; Ryan v. Morrison, 40 Okla. 49, 135 P. 1049; Bedinger v. Wharton, 27 Grat. (Va.) 857.

32. McClanahan v. Williams, 136 Ind. 30, 35 N. E. 897; Tomczek v. Wieser, 108 N. Y. S. 784, 58 Misc. 46 (holding that an infant must disaffirm before bringing ejectment).

33. First, etc., Bank v. Casey, 158 Ia. 349, 138 N. W. 897; Wallace v. Leroy, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. R. 777.

34. Alabama, etc., R. Co. v. Bonner

deed[35] and a conveyance of land to a person other than the grantee in a deed made during minority have both been held good disaffirmances.[36] Sometimes mere notice to the other party of intention to disaffirm is enough.[37]

§ 1040. Time, Nature and Effect of Ratification and Disaffirmance.

The general rule is that contracts cannot be avoided till majority,[38] or within a reasonable time thereafter.[39] But some cases

(Ala.), 39 S. 619 (where, in an action by a minor servant for personal injuries, the employer pleaded a contract whereby the infant, at the time of employment, agreed to abide by certain rules, and where the infant was allowed to set up his infancy by replication).

Where in an action defendant pleaded accord and satisfaction, a reply setting up the infancy of plaintiff, with the fact of bringing the action, was an effective disaffirmance. Indiana Union Traction Co. v. Maher, 176 Ind. 289, 95 N. E. 1012.

35. Ricks v. Wilson, 154 N. C. 282, 70 S. E. 476.

36. Losey v. Bond, 94 Ind. 1; Pitcher v. Laycock, 7 Ind. 398; Ison v. Cornett, 116 Ky. 92, 75 S. W. 204, 25 Ky. 366.

A mortgage made after majority to a person other than the one to whom the property has been conveyed during infancy has been held a sufficient disaffirmance. Phillips v. Hoskins, 128 Ky. 371, 108 S. W. 283, 33 Ky. Law Rep. 378; Ridgeway v. Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. R. 464; Craig v. Van Bebber, 150 Mo. 606, 51 S. W. 1040, 18 Am. St. R. 569. The question whether a second conveyance is a disaffirmance or not is one of law. Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441; Hetterick v. Porter, 20 Ohio Cir. Ct. R. 110, 11 O. C. D. 145; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Blake v. Hollandsworth (W. Va.), 76 S. E. 814, 43 L. R. A. (N. S.) 814.

37. Benson v. Tucker, 212 Mass. 60, 98 N. E. 589; Danziger v. Iron Clad Realty & Trading Co., 141 N. Y. S. 593, 80 Misc. 510.

38. Carmen v. Fox Film Corporation, 258 F. 703; Sims v. Gunter (Ala.), 78 So. 62; Bell v. Burkhalter, 176 Ala. 62, 57 So. 460.

The object of the general rule deferring the act of avoidance by an infant of a contract made by him until his coming of age is his protection; and, when it is apparent to the court that delay will work injury to the infant, the power of repudiation may be exercised by the court immediately. Adriaans v. Dill, 37 App. D. C. 59; Wright v. Buchanan (Ill.), 123 N. E. 53; McCullough v. Finley, 69 Kan. 705, 77 P. 696; Barr v. Packard, etc., Co., 172 Mich. 299, 137 N. W. 697; Reynolds v. Garber-Buick Co. (Mich.), 149 N. W. 985, L. R. A. 1915C, 362; Pedro v. Pedro, 127 N. Y. S. 997, 71 Misc. 296; Allen v. Ruddell, 51 S. C. 366, 29 S. E. 198; Clary v. Spain, 119 Va. 58, 89 S. E. 130; Hobbs v. Hinton, etc., Co., 74 W. Va. 443, 82 S. E. 267; *In re* Kane's Estate (Wis.), 168 N. W. 402.

39. Bentley v. Greer, 100 Ga. 35, 27 S. E. 974; Law v. Long, 41 Ind. 586; Wiley v. Wilson, 77 Ind. 596. In Indiana it is held that disaffirmance must be made within a reasonable time after majority even though the statute of limitations has not run against the right of rescission. Wiley v. Wilson, 77 Ind. 596. In Iowa this rule is established by stat-

hold that contracts may be disaffirmed either before or after majority.[40] Obviously an infant cannot ratify till he attains full age.[41] A new consideration is not essential to a valid ratification.[42] His election, after majority, to ratify is final, and he cannot thereafter disaffirm.[43] But a contract may be ratified even after an un-

ute. Seeley v. Seeley-Howe-Le Van Co., 128 Ia. 294, 103 N. W. 961. In Kansas the infant must act within two years after attaining majority. Crapster v. Taylor, 74 Kan. 771, 87 P. 1138; Justice v. Justice, 170 Ky. 423, 186 S. W. 148; Robinson v. Allison, 192 Mo. 366, 91 S. W. 115; Robinson v. Allison, 192 Mo. 366, 91 S. W. 115; Krbel v. Krbel, 84 Neb. 160, 120 N. W. 935; Chandler v. Jones, 172 N. C. 569, 90 S. E. 580; Hogan v. Utter, 175 N. C. 332, 95 S. E. 565. In North Carolina it is held that three years is a reasonable time. Hogan v. Utter, 175 N. C. 332, 95 S. E. 565; Chandler v. Jones, 172 N. C. 569, 90 S. E. 580; Baggett v. Jackson, 160 N. C. 26, 76 S. E. 86; Weeks v. Wilkins, 134 N. C. 516, 47 S. E. 24; Woolridge v. Lavoie (N. H.), 104 A. 346. It depends largely on the facts of each case. Darlington v. Hamilton Bank, 63 Misc. 289, 116 N. Y. S. 678; O'Donohue v. Smith, 114 N. Y. S. 536, 130 App. Div. 214; Kelly v. Same, Id. What is a reasonable time is a question of fact. Clemmer v. Price (Tex. Civ. 1910), 125 S. W. 604. A "reasonable time," within the meaning of the rule, is such a time as a person of ordinary diligence would require under the circumstances. Havard v. Carter-Kelley, etc., Co. (Tex. Civ.), 181 S. W. 756. In determining it, the jury may consider the nature of the contract and the situation of the parties. Groesbeck v. Bell, 1 Utah, 338; Johnston v. Gerry, 34 Wash. 524, 76 P. 258, 77 P. 503.

40. *In re* Huntenberg, 153 F. 768; *Ex parte* McFerren, 184 Ala. 223, 63 So. 159; *Ex parte* McFarren (Ala.), 63 So. 159, 47 L. R. A. (N. S.) 543.

A disaffirmance before majority, coupled with a return eight months after majority, but before action brought, of certain books loaned to the infant as part of the contract, has been sustained as a good disaffirmance. International, etc., Co. v. Doran, 80 Conn. 307, 68 A. 255; Steger & Sons Piano Mfg. Co. (Ga.), 95 S. E. 734; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. R. 53; Shipley v. Smith, 162 Ind. 526, 70 N. E. 803; Vanatter v. Marquardt, 134 Mich. 99, 95 N. W. 977, 10 Det. Leg. N. 349; Darlington v. Hamilton Bank of New York City, 116 N. Y. S. 678, 63 Misc. 289; Covault v. Nevitt, 157 Wis. 113, 146 N. W. 1115.

41. Sanger v. Hibbard, 43 C. C. A. 635, 104 F. 455; Sims v. Gunter (Ala.), 78 So. 62; *Ex parte* McFerren, 184 Ala. 223, 63 So. 159; Lee v. Hibernia Savings & Loan Soc. (Cal.), 171 P. 677; Bates v. Burden (Ga.), 96 S. E. 178; Perkins v. Middleton (Okla.), 166 P. 1104; Tolar v. Marion, etc., Co., 93 S. C. 274, 75 S. E. 545; North American, etc., Co. v. O'Neal (W. Va.), 95 S. E. 822.

42. Bell v. Swansboro, etc., Co., 12 Ga. App. 81, 76 S. E. 756; Sims v. Gunter (Ala.), 78 So. 62; Bell v. Burkhalter, 176 Ala. 62, 57 So. 460; Calhoun v. Anderson, 78 Kan. 749, 98 P. 275.

43. A voluntary cancellation of an insurance policy by the infant during minority puts an end to the contract so that it cannot be ratified by his administrator. Pippen v. Mutual Ben. Life Ins. Co., 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505; Luce v. Jestrab,

effectual attempt has been made, after majority, to disaffirm.[44] The burden of proving a ratification is on the person relying upon it.[45] If the contract was void in its inception, no ratification can validate it.[46]

Both ratification and disaffirmance relate back to the time of making the contract and either validate[47] or avoid it[48] *ab initio.* Therefore, since an infant's deed is not void, it passes a good title to the grantee, subject to disaffirmance,[49] upon which title revests in the grantor.[50] The right to disaffirm exists independently of the infant's motive,[51] or of the good faith of the person contracting

12 N. D. 548, 97 N. W. 848; North American Coal & Coke Co. v. O'Neal (W. Va.), 95 S. E. 822.

44. Hilton v. Shepherd, 92 Me. 160, 42 A. 387; Minock v. Shortridge, 21 Mich. 304 (holding that a ratification cannot be inferred from circumstances where the minor has made an explicit declaration of intention to disaffirm).

45. Southern, etc., Co. v. Dukes, 121 Ga. 787, 49 S. E. 788; Tyler v. Gallop, 68 Mich. 185, 35 N. W. 902, 13 Am. St. R. 336; Kane v. Kane, 13 App. D. 544, 43 N. Y. S. 662; Healy v. Kellogg, 145 N. Y. S. 943; Barnes v. American, etc., Co., 32 Okla. 81, 121 P. 250; Carroll v. Durant, etc., Bank, 38 Okla. 267, 133 P. 179.

46. Maier v. Harbor Center Land Co. (Cal.), 182 P. 345 (where the contract was void under a statute).

47. Minock v. Shortridge, 21 Mich. 304; *In re* Farley, 213 N. Y. 15, 106 N. E. 756.

48. Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; Shrock v. Crowl, 83 Ind. 243; Pippen v. Mutual Ben. Life Ins. Co., 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505; Yancey v. Boyce, 28 N. D. 187, 148 N. W. 539; Oneida County Savings Bank of Rome v. Saunders, 166 N. Y. S. 280, 179 App. Div. 282; Plummer v. Northern Pac. Ry. Co., 98 Wash. 67, 167 P. 73.

Thus, where an infant has purchased goods and sold them and has placed their proceeds in the hands of a third person, where they are attached in an action to recover the price, a plea of infancy annuls the contract, defeats the action, dissolves the attachment and releases the funds. Wallace v. Leroy, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777; Hobbs v. Hinton Foundry, Machine & Plumbing Co., 74 W. Va. 443, 82 S. E. 267 (the disaffirmance after full age of a contract made while an infant, and the offer to return, or return, of the property purchased, will discharge a trust lien securing payment of the consideration and acquit both principal and surety therefrom).

49. Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75; Parker v. Fuestal, 103 Ark. 312, 147 S. W. 45; Putnal v. Walker, 61 Fla. 720, 55 So. 844. The release of dower of a minor wife makes a good title subject to her disaffirmance at full age. Law v. Long, 41 Ind. 586; Robinson v. Allison, 192 Mo. 366, 91 S. W. 115; Parrish v. Treadway, 267 Mo. 91, 183 S. W. 580; Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131; Bohwer v. District Court of First Judicial Dist., 41 Utah, 279, 125 P. 671.

50. Mustard v. Wohlford's Heirs, 15 Grat. 329, 76 Am. Dec. 209; Seed v. Jennings (Ore.), 83 Pac. 872.

51. An infant need not show fraud in order to disaffirm release. Arizona, etc., R. Co. v. Carillo, 17 Ariz. 115, 149 P. 313; Forsee v. Forsee, 144 Ky. 169, 137 S. W. 863.

with him,[52] or of whether there was a consideration or not,[53] or whether the contract price was fair,[54] or whether the contract was reasonable and prudent,[55] or by the fact that the property has been conveyed by the infant's grantee to one without notice of the original grantor's infancy.[56] The right to disaffirm exists independently of fraud,[57] or that the grantee has made improvements,[58] or that during minority proceedings were had respecting the transaction, wherein a decree was rendered after majority.[59] It does depend, however, on the *lex rei sitæ*.[60]

§ 1041. Instances.

It seems settled that silence for an unreasonable time, taken in connection with other facts, such as using the property purchased, retaining possession of it, selling or mortgaging it, or in any way converting it to the infant purchaser's own use, would be sufficient ratification to bind the infant after reaching manhood.[61] And hence the ready disposition in so many modern cases to treat the transaction of minority as affirmed, wherever one, after attaining majority, retains deliberately and enjoys the fruits of the transaction or disposes of the consideration.[62] As where a minor bought a yoke of oxen, for which he gave his note, and after arriv-

52. Lake v. Perry, 95 Miss. 550, 49 So. 569.

53. Bilskie v. Bilskie (Ind. App.), 122 N. E. 436.

54. Braucht v. Graves-May Co., 92 Minn. 116, 99 N. W. 417.

55. Simpson v. Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. R. 560; Klaus v. A. C. Thomson Auto & Buggy Co., 131 Minn. 10, 154 N. W. 508 (holding that evidence that the contract was reasonable and prudent in view of the infant's situation was material).

56. Miles v. Lingerman, 24 Ind. 385; Cole v. Boutwell, 101 Miss. 353, 58 So. 105; Jackson v. Beard, 162 N. C. 105, 78 S. E. 6; Oneida County, etc., Bank v. Saunders, 179 App. Div. 282, 166 N. Y. S. 280; Allen v. Anderson (Tex. Civ.), 96 S. W. 54.

57. Arizona, etc., R. Co. v. Carillo, 17 Ariz. 115, 149 P. 313.

58. Buchanan v. Hubbard, 96 Ind. 1; Eagan v. Scully, 173 N. Y. 581, 65 N. E. 1116.

59. Thain v. Randal, 126 Ind. 272, 26 N. E. 46. The right to disaffirm has been held not affected by the fact that in a suit commenced against him in his minority to reform his deed a decree was rendered after majority. Thain v. Randal, 126 Ind. 272, 26 N. E. 46.

60. Beauchamp v. Baty, 90 Ark. 351, 119 S. W. 75.

61. See note Am. editor in 16 E. L. & Eq. 558; aLwson v. Jovejoy, 8 Me. 405; Boyden v. Boyden, 9 Met. 519; Cheshire v. Barrett, 4 McCord, 241; Boody v. McKenney, 23 Me. 517; Robinson v. Hoskins, 14 Bush, 393. Against third parties averment of possession may be sufficient averment of ratification. Duvic v. J. B. Henry, 33 La. Ann. 102.

62. Brantley v. Wolf, 60 Miss. 420; §§ 436, 437.

ing at full age converted the oxen to his own use and received the avails.[63] Mere lapse of time, it is true, will not usually amount to confirmation, unless the complete bar of limitations is fulfilled.[64]

Likewise where, after attaining full age, a minor permits an unreasonable time to elapse without disaffirmance, he may be held to have ratified, if knowledge of invalidity appears.[65] But a brief lapse of time, in connection with other circumstances making the infant's position inequitable if he means later to disaffirm, may amount to confirmation.[66] It may be generally said that mere silence without disaffirmance for less than the statutory period will not of itself work a ratification, unless there is a duty to speak.[67] And cases are not wanting to establish the position that ratification will be inferred from tacit assent and delay under circumstances where silence is not excusable, where there was full knowledge and opportunity to assert one's rights, and the party whose title might have been disputed was permitted to go on incurring expense on the faith of it.[68]

Yet that the cases are somewhat conflicting and difficult in this respect to be reconciled will appear from the citation of a few.

63. Lawson v. Lovejoy, 8 Me. 405. And see Alexander v. Heriot, 1 Bail. Ch. 223; Deason v. Boyd, 1 Dana, 45; Vandevort's Appeal, 43 Pa. St. 462; Stern v. Freeman, 4 Met. (Ky.) 309; Belton v. Briggs, 4 Desaus. 465.

64. Walace v. Latham, 52 Miss. 291; Prout v. Wiley, 28 Mich. 164; cases cited in 31 Minn. 468.

65. Walker v. Arkansas, etc., Bank, 256 F. 1; Walker v. Pope, 101 Ga. 665, 29 S. E. 8; Bentley v. Greer, 100 Ga. 35, 27 S. E. 974; Miles v. Lingerman, 24 Ind. 385; Brown v. Staab (Kan.), 176 P. 113; Justice v. Justice, 170 Ky. 423, 186 S. W. 148; King v. Merritt, 67 Mich. 194, 34 N W. 689; Parrish v. Treadway, 257 Mo. 91, 183 S. W. 580; Criswell v. Criswell (Neb.), 163 N. W. 302. Acquiescence for fourteen months has been held to be a ratification under special facts. O'Rourke v. Hall, 56 N. Y. S. 471, 38 App. Div. 534; Wise v. Loeb, 15 Pa. Super. 601. The rule has been limited to contracts which are beneficial to the infant. Groesbeck v. Bell, 1 Utah, 338. What is a reasonable time, within the meaning of the rule, is a question of fact. Hobbs v. Hinton Foundry, Machine & Plumbing Co., 74 W. Va. 443, 82 S. E. 267.

66. Cresinger v. Welch, 15 Ohio, 156; Strong, J., in Irvine v. Irvine, 9 Wall. 617; Goodnow v. Empire Lumber Co., 31 Minn. 468.

67. Syck v. Hellier, 140 Ky. 388, 131 S. W. 30; Britt v. Caldwell-Norton Lumber Co., 126 La. 155, 52 So. 251. See Becker v. Stone, 136 Mass. 405; Lynch v. Johnson, 109 Mich. 640, 109 N. W. 640; Shipp v. McKee, 80 Miss. 741, 32 So. 281, 92 Am. St. R. 616; Watson v. Peebles, 102 Miss. 725, 59 So. 881; Lacy v. Pixler, 120 Mo. 383, 25 S. W. 206; Gapp Mayer v. Wilkenson (Utah), 177 P. 763; Birch v. Linton, 78 Va. 584, 49 Am. R. 381; Wilson v. Branch, 77 Va. 65, 46 Am. R. 709.

68. See *post*, 1044; Allen v. Poole, 54 Miss. 323.

In Alabama, an infant, ten days before majority, purchased a note and drew an order upon a third person in payment, and received notice of non-payment. It was held, in a suit several years after, that his failure to renew the note and disaffirm warranted the conclusion that he intended to abide by it.[69] Still more rigidly was the same doctrine enforced in an earlier New York case.[70] Part-payment, or even promise of part-payment, may operate as confirmation.[71] So may authority given to an agent to pay, though the agent does nothing.[72] But declarations of affirmance by one purporting to act as the attorney or solicitor of the late infant do not amount to ratification if his authority be not proved.[73] Submitting the question of liability, after coming of age, to arbitration or offering to compromise does not amount to ratification.[74] But letters indicating intent to abide by a former award may; as well as the enjoyment of its benefits.[75] So may permitting an action growing out of the transaction to go by default, or a bill in equity to be taken as confessed,[76] as well as bringing an action after majority to enforce a voidable contract either individually[77] or jointly with others.[78-79] A promise to settle by note against a third party is held sufficient.[80] So is a promise to settle by work. Nor do the recent cases seem to require that a promise to settle should be very precisely expressed. The mere retention of consideration-money received during infancy appears to amount to ratification in California;[81] though this is not the general rule elsewhere,[82] but

69. Thomasson v. Boyd, 13 Ala. 419.

70. Delano v. Blake, 11 Wend. 85.

71. Little v. Duncan, 9 Rich. Law, 55; Stokes v. Brown, 4 Chand. (Wis.) 39.

72. Orvis v. Kimball, 3 N. H. 314.

73. Carrell v. Potter, 23 Mich. 377.

74. Benham v. Bishop, 9 Conn. 330; Bennett v. Collins, 52 Conn. 1.

75. Barnaby v. Barnaby, 1 Pick. 221; Jones v. Phœnix Bank, 4 Seld. 228.

76. Terry v. McClintock, 41 Mich. 492.

77. Carrell v. Potter, 23 Mich. 377; Pecararo v. Pecararo, 84 N. Y. S. 581; Wise v. Loeb, 15 Pa. Super. Ct. 601.

78-79. Ward v. The Little Red, 8 Mo. 358.

80. Taft v. Sergeant, 18 Barb. 320.

81. Hastings v. Dollarhide, 24 Cal. 195.

82. It has been held that there was no ratification of the illegal sale of an infant's land by an executor where the infant accepted a pair of shoes from the executor after majority, even though he expended part of the proceeds of the sale for her board and clothing during her infancy. Hamilton v. Rathbone, 175 U. S. 414, 20 S. Ct. 155, 44 L. ed. 219; Hobbs v. Nashville C. & St. L. R. A. Co., 122 Ala. 602, 26 So. 139, 82 Am. St. Rep. 103; White v. Sikes, 129 Ga. 508, 59 S. E. 228. A wife cannot be held to have ratified where her husband receives and retains the consideration. Buchanan v. Hubard, 96 Ind. 1; Richardson v. Pate, 93 Ind. 423, 47

it may have that effect, especially where the consideration is received after majority.[83] Keeping and using an article purchased during infancy, with equivocal expressions of intention, may bind the infant so that he cannot return it afterwards to the vendor. So may a sale of the article with full knowledge of the fact of

Am. R. 374 (where an infant joined with her husband in the sale of his lands, with the proceeds of which other lands were bought, of which she at his death, received one-third as dower); Syck v. Hellier, 140 Ky. 388, 131 S. W. 30; Baker v. Stone, 136 Mass. 405.

An infant does not ratify merely by retaining, after majority, a note which he had accepted during minority from an executor in settlement of a legacy. Durfee v. Abbott, 50 Mich. 479, 15 N. W. 559; Carrell v. Potter, 23 Mich. 377; Orchard v. Wright-Dalton-Bell-Anchor Store Co. (Mo.), 197 S. W. 42; Pedro v. Pedro, 127 N. Y. S. 97, 71 Misc. 296.

83. Goin v. Cincinnati Realty Co., 118 C. C. A. 438, 200 F. 252; Hobbs v. Nashville C. & St. L. Ry. Co., 122 Ala. 602, 26 So. 139, 82 Am. St. R. 103; La Cotts v. Quertermous, 84 Ark. 610, 107 S. W. 167. In Georgia by statute the retention of the benefits a voidable contract after majority operates as a ratification. Wickham v. Torley, 136 Ga. 594, 71 S. E. 881; Bell v. Swainsboro Fertilizer Co., 12 Ga. App. 81, 76 S. E. 756. It has been held that where after majority a minor demands the consideration of a valuable contract he ratifies it. Barlow v. Robinson, 174 Ill. 317, 51 N. E. 1045.

One indorsing a note, given as a part consideration for a conveyance made by him while an infant, thereby ratifies the conveyance. Turner v Stewart, 149 Ky. 15, 147 S. W. 772.

Where, after an infant became of age, he collected his part of the purchase money arising from a void sale by order of court of his interest in land, and allowed a deed to be made therefor, and the grantee to hold it for many years without asserting claim thereto till it had passed into the hands of an innocent purchaser, he was estopped thereby to claim an interest in the land. Williamson v. Mann, 134 Ky. 63, 119 S. W. 232; Damron v. Ratliff, 123 Ky. 758, 97 S. W. 401, 30 Ky. Law Rep. 67; Clark v. Kidd, 148 Ky. 479, 146 S. W. 1097.

Continuing after majority to receive wages under a voidable contract of service has been held a good ratification. Spicer v. Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152; McDonald v. Sargent, 171 Mass. 492, 51 N. E. 17; Ferguson v. Bell's Adm'r, 17 Mo. 347.

Where an infant after majority takes title to property, knowing that his funds have wrongfully been used to purchase it, he was held to have ratified the transaction. Comey v. Harris, 118 N. Y. S. 244, 133 App. Div. 686 (affd., 200 N. Y. 534, 93 N. E. 1118).

Where a woman during infancy accepted an annuity in settlement of a claim for services, her continuance to accept the payments after majority was held a ratification. Parsons v. Teller, 97 N. Y. S. 808, 111 App. Div. 637; Kinard v. Proctor, 68 S. C. 279, 47 S. E. 390; Dudley v. Browning, 79 W. Va. 331, 90 S. E. 878. To the same effect see Burkhard v. Crouch, 169 N. Y. 399, 62 N. E. 431 (where the amount received had been invested for the infant during minority, and where, after majority, she applied for and received it, acquiescing in the transaction for nine years).

purchase.[84] So may the reception and substantial enjoyment of the benefits of the transaction after reaching majority, such as collecting dividends or interest,[85] asserting ownership and control after majority of land or other property acquired under a voidable contract,[86] or receiving the principal, or other act totally inconsistent with an honest intention to disaffirm. A verbal promise is sufficient to bind;[87] while a contract to work is ratified by continuance in the employer's service for a month after attaining full age.[88] Plea of the execution of a note, in defence of a suit in assumpsit, is held to be confirmation of the note itself.[89] Slight words, importing recognition and confirmation of the promise, have been treated as sufficient; or, at least, as sufficient for a jury to consider.[90] And, according to a recent decision of the Supreme Court of the United States, it is a question for the jury and not for the court to decide, whether the evidence submitted in any case shows an affirmance or not, if there be any evidence tending to show it.[91]

On the other hand are numerous decisions which seem to bear against the creditor. Says a Massachusetts judge in an early case: "By the authorities a mere acknowledgment of the debt, such as would take a case out of the statute of limitations, is not a ratification of a contract made during minority."[92] Yet the much-quoted distinction there taken between "acknowledgment" that a debt is due, and verbal "ratification and confirmation" is

84. Shropshire v. Burns, 46 Ala. 108.

85. Huth v. Carondolet R., 56 Mo. 202; Price v. Winter, 15 Fla. 66; Corwin v. Shoup, 76 Ill. 246.

86. Gannon v. Manning, 42 App. D. C. 206; Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538. Selling after majority personal property purchased while an infant, has been held a good ratification. Robinson v. Hoskins, 77 Ky. 393; Hilton v. Shepherd, 92 Me. 160, 42 A. 387; Gulf, etc., R. Co. v. Lemons (Tex.), 206 S. W. 75.

Where a minor purchases land, giving a mortgage to one who pays the price, the two acts being one transaction, he affirms the mortgage where, after majority, he conveys the land, which had been conveyed to him. Ready v. Pinkham, 181 Mass. 351, 63 N. E. 887; Kincaid v. Kincaid, 157 N. Y. 715, 53 N. E. 1126, 32 N. Y. S. 476, 85 Hun, 141. To the same effect see Perkins v. Middleton (Okla.), 166 P. 1104 (mortgaging land acquired under voidable contract); Mission Ridge Land Co. v. Nixon (Tenn.), 48 S. W. 405.

87. West v. Penny, 16 Ala. 186; Martin v. Mayo, 10 Mass. 137.

88. Forsyth v. Hastings, 27 Vt. 646.

89. Best v. Givens, 3 B. Monr. 72.

90. Hoit v. Underhill, 9 N. H. 436; Bay v. Gunn, 1 Den. 108; Whitney v. Dutch, 14 Mass. 457.

91. Irvine v. Irvine, 9 Wall. 617, 628.

92. Whitney v. Dutch, 14 Mass. 460, per Parker, C. J.

either exceedingly subtile, or at the present day frequently misapplied. The distinction further developed leads, as we find, to the conclusion that where one says he owes the debt and has not the means of payment, but will pay as soon as able, or words to this effect, this is only an acknowledgment, and not binding.[93] Such decisions do not always support the explanation sometimes given, that the American cases proceed upon the ground of intention to ratify; though there are doubtless cases which support so reasonable a view.[94] In a well-considered Connecticut case the distinction is thus drawn: that the infant's contract to pay money not for necessaries, cannot as a rule be ratified by any mere acknowledgment of indebtedness after he becomes of age, since there should be an express promise to pay; but that an exception arises where the infant received the consideration for which his promise was given, and after he becomes of age still has it in his possession or under his control; and in such a case it will be inferred from his mere acknowledgment of indebtedness that he meant to make himself liable.[95]

Where the statute provides a period within which the infant may disaffirm, the expiration of the statutory period without such action operates as a ratification.[96]

§ 1042. Conflicting Dicta.

What is it that suffices to take a case out of the statute of limitations? "Either an express promise to pay, or an unqualified acknowledgment of *present* indebtedness; in which latter case *the law will imply a promise to pay.*" [97] What is ratification of a con-

93. See Proctor v. Sears, 4 Allen, 95; Thompson v. Lay, 4 Pick. 48; Ford v. Phillips, 1 Pick. 203; Hall v. Gerrish, 8 N. H. 374; Goodsell v. Myers, 3 Wend. 479; Wilcox v. Roath, 12 Conn. 550; Chandler v. Glover, 32 Pa. St. 509.

94. See Thing v. Dibbey, 16 Me. 55; Dana v. Stearns, 3 Cush. 372; Smith v. Kelly, 13 Met. 309. And see note to 16 E. L. & Eq. 558. The mere indorsement on a minor's note of a receipt of money of date after the maker had attained majority, is not a sufficient ratification. Catlin v. Haddox, 49 Conn. 492. In a suit on such note, brought after the maker's majority, it will not be presumed that the note was given for necessaries, nor that the consideration remains under the maker's control; this must be proved by the party who seeks to enforce it. *Ib.*

95. Catlin v. Haddox, 49 Conn. 492. This statement assumes that the consideration which the infant retains is a *bona fide* and ample one, making it inequitable to delay his decision to affirm or disaffirm while he holds the benefits.

96. Luce v. Jestrab, 12 N. D. 548, 97 N. W. 848.

97. See Gailey v. Crane, 21 Pick. 523; Wakeman v. Sherman, 5 Seld.

tract? So far as a definition may be hazarded, it is a voluntary admission that one is liable and bound by the terms of an existing though inchoate or imperfect contract. A debt is, of course, created by contract, express or implied. But some say that there must always be a new contract made by the minor on reaching majority. To hold that a new contract for payment is essential, differs certainly from ruling that ratification and confirmation of an existing contract binds one who was lately an infant. But once again such contracts of an infant are called voidable. Does not the term "voidable" imply something still different, something which binds until expressly repudiated? And if so, how doubly inconsistent to exact a specific promise to pay, over and above an admission of present indebtedness. In truth, the law is here overburdened with its own definition; judicial terms, inconsistent and varied, bewilder the judicial mind; and thankless, indeed, must be the task of refining upon distinctions which rest upon no rational basis of difference.[98]

§ 1043. Summary of Doctrine.

This writer makes no attempt to reconcile the numerous *dicta* of the courts on this important subject. They are irreconcilable. If American decisions themselves may be regarded as pointing out a general rule, it seems to be this: that the mere acknowledgment that a certain transaction constitutes a debt is insufficient to bind him lately an infant; but that an acknowledgment to the extent that he justly owes that debt, with equivocal expressions as to some future payment, may or may not be considered sufficient, though the better opinion is in favor of their sufficiency; that acts or omissions on his part, which are prejudicial to the adult party's interests, or evince his own intention to retain the consideration and advantages of a contract made during infancy, may be, especially when reasonable time has elapsed, construed into a ratification, without an express promise, the presumption of honorable motives being fair and reasonable under such circumstances; and finally, that a distinct, unequivocal promise, verbal or written, made after attaining majority, is always sufficient, this apparently

91; Marshall, C. J., in Clemenstine v. Williamson, 8 Cranch. 72; Story, J., in Bell v. Morrison, 1 Pet. 351.

98. Lord Kenyon seems responsible for the doctrine that the case of infancy differs in essence from that under the statute of limitations. He says: "In the case of an infant, I shall hold an acknowledgment not to be sufficient, and require proof of an *express promise* to pay, made by the infant, after he had attained that age

superseding the former promise altogether.[99] In cases of doubt, moreover, it would seem to be better to treat the evidence presented as constituting facts for the consideration of the jury, rather than a question of law for the court to pass upon.

Some cases go even farther, and require an express repudiation on the infant's part. But this is appropriate only to certain transactions, and we are not justified in deducing therefrom a general principle that express repudiation is necessary in all voidable contracts of an infant; for the decisions certainly do not go to this length, whatever the *dicta*.[1]

A conditional promise, when of age, to perform a contract made during minority will not sustain an action thereon without proof that the condition has been fulfilled.[2] And any conditional ratification is subject accordingly.[3]

Reasonable time for an infant, on coming of age, to elect to confirm or avoid the acts and contracts of his minority, must depend in each case upon the particular circumstances; and in all cases the mental operation of election at majority, whether outwardly manifested more or less plainly, and whether actually proved or to be conclusively assumed from long lapse of time and silence, is the fact to be legally established or inferred.[4] And such election once made is irrevocable.[5] An obligation may be silently

when the law presumes that he has discretion.'' Trupp v. Fielder, 2 Esp. 628.

99. See American cases collected in Am. editor's note to 16 E. L. & Eq. 558; Bobo v. Hansell, 2 Bail. 114; Ackerman v. Bunyon, 1 Hilt. (N. Y.) 58; Vaughan v. Parr, 20 Ark. 600; Richardson v. Boright, 9 Vt. 368; Hodges v. Hunt, 22 Barb. 150; State v. Plaisted, 43 N. H. 413; Wright v. Steele, 2 N. H. 51; Conklin v. Ogborn, 7 Ind. 553; Merriam v. Wilkins, 6 N. H. 413; Jones v. Butler, 30 Barb. 641; Curtin v. Patton, 11 S. & R. 305; Norris v. Vance, 3 Rich. 164; Oswald v. Broderick, 1 Clarke (Ia.), 380.

1. See Holmes v. Blogg, 8 Taunt. 39; Richardson v. Boright, 9 Vt. 368; Kline v. Beebe, 6 Conn. 494; Hoit v. Underhill, 9 N. H. 439.

2. Bresee v. Stanly, 119 N. C. 278, 25 S. E. 870; Proctor v. Sears, 4 Allen, 95; Everson v. Carpenter, 17 Wend. 419; Chandler v. Glover, 32 Pa. St. 509; Huth v. Carondolet R., 56 Mo. 202.

3. *Ib.*; State v. Binder (1895), N. J.

4. Stringer v. Life Ins. Co., 82 Ind. 100. Parke, B., says in Williams v. Moor, 11 M. & W. 256, 265, that the principle on which the law allows a party who has reached twenty-one to give validity to contracts entered into during his infancy, is, that he is supposed to have acquired the power of deciding for himself whether the transaction in question is of a meritorious character by which in good conscience he ought to be bound.

5. If evidence of express disaffirmance is shown, acts tending to prove a prior full affirmance may be shown

outstanding or maturing when the infant reaches full age or it may by that time reach the stage of performance or enforcement; and lapse of time before disaffirmance ought to bind the late infant more readily in the latter case than the former because active regard on his part is called for in such connection.[6] In other words, reasonable time should be determined by the facts and circumstances in each case.

§ 1044. Rule as to Conveyance of Infant's Lands, Lease, Mortgage, &c.

Let us apply the rule of ratification or avoidance to the infant's lands, where, as we have stated, affirmance or disaffirmance is postponed to his majority.[7] If an infant makes a lease of his land (which is voidable if for his benefit, but not otherwise), and accepts rent after attaining full age, and by other slight acts affirms the transaction, this is a ratification of the lease and he cannot afterwards disaffirm.[8] And where a minor mortgaged his

likewise. Scranton v. Stewart, 52 Ind. 69, 92.

6. Where an infant went surety for another, a year and a half has been considered not unreasonably long after his majority to disaffirm. Johnson v. Storie, 32 Neb. 610.

7. Smoot v. Ryan (Ala.), 65 S. 828; Webb v. Reagin, 160 Ala. 537, 49 So. 580; Tobin v. Spann, 85 Ark. 556, 109 S. W. 534; Watson v. Ruderman, 79 Conn. 687, 66 A. 515. One seeking to foreclose an infant's mortgage must show that it is not subject to disaffirmance. Watson v. Ruderman, 79 Conn. 687, 66 A. 515; Slater v. Rudderforth, 25 App. D. C. 97; White v. Sikes, 129 Ga. 508, 59 S. E 228; McReynolds v. Stoats (Ill.), 122 N. E. 860; Losey v. Bond, 94 Ind. 1; Pitcher v. Laycock, 7 Ind. 398; Law v. Long, 41 Ind. 586; Forsee v. Forsee, 144 Ky. 169, 137 S. W. 836; Syck v. Hellier, 140 Ky. 388, 131 S. W. 30; Damron v. Ratliff, 123 Ky. 758, 97 S. W. 401, 30 Ky. Law Rep. 67; Ward v. Ward, 143 Ky. 91, 136 S. W. 137; Lansing v. Michigan, etc., R. Co., 126 Mich. 663, 86 N. W. 147, 88 Am. St. R. 567, 8 Det. Leg. N. 183; Weeks v. Wilkins, 139 N. C. 215, 51 S. E. 909; Jackson v. Beard, 162 N. C. 105, 78 S. E. 6; Evants v. Taylor, 18 N. M. 371, 137 P. 583; Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402; Foy v. Salzano, 136 N. Y. S. 699, 152 App. Div. 47; Union, etc., Ins. Co. v. Hilliard, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. R. 644; Hetterick v. Porter, 20 Ohio Cir. Ct. R. 110, 11 O. C. D. 145; Seed v. Jennings (Ore.), 83 P. 872; Birch v. Linton, 78 Va. 584, 49 Am. R. 381; Gillespie v. Bailey, 12 W. Va. 70, 29 Am. R. 445.

While a minor's affirmance or disaffirmance by election is postponed until his majority, he may, during his minority, enter upon premises which he has conveyed to another, and receive rents and profits until arriving at full age; or he may by his guardian or next friend procure the appointment of a receiver for collecting rents and profits. Hutchinson v. McLaughlin, 15 Colo. 492.

But an infant cannot, during minority, disaffirm his conveyance nor recover possession. Shipley v. Bunn (1894), 125 Mo. 445; § 409.

8. Ashfield v. Ashfield, W. Jones,

land, and on coming of age conveys it to another person in fee, subject to the mortgage, which he recognizes in the second deed, it is held to be a ratification of the mortgage;[9] and making a new mortgage after majority has naturally the effect of creating a junior incumbrance.[10]

A deed given after majority to carry out or confirm a previous voidable transaction is a good ratification.[11] Such a deed must be regular in form.[12] So slight acts of assent on the infant's part are held sufficient to confirm leases made by a guardian beyond the term of his authority.[13] The subsequent ratification of a mortgage, as of other deeds, relates back to the first delivery, so as to affect all intermediate persons, except purchasers for a valuable consideration.[14] And where a loan of money was made to an infant for which he executed a bond and mortgage, and in a will made after he became of age directed the payment of "all his just debts" and died, it was held that the will sufficiently confirmed the mortgage.[15] Even notes given for the purchase-money of land, not secured by mortgage, have been equitably enforced; and the court has refused to permit the notes to be disaffirmed and the land reclaimed.[16] And yet the retention, after reaching majority, of the proceeds of land purchased and afterwards sold by the person while an infant, is not of itself sufficient to render him liable upon his covenant to pay an outstanding mortgage upon the land which he had assumed as part of the consideration of his purchase.[17] But allowing the mortgage to be foreclosed after majority, and a bill of foreclosure to be taken as confessed, may defeat the infant's equity.[18] A mortgage given by the infant is affirmed if he

157; Wimberley v. Jones, 1 Ga. Dec. 91.

9. Boston Bank v. Chamberlin, 15 Mass. 220; Story v. Johnson, 2 You. & Coll. Exch. 607; Phillips v. Green, 5 Monr. 355; Lynde v. Budd, 2 Paige, 191; Losey v. Bond, 94 Ind. 67.

10. McGan v. Marshall, 7 Humph. 121.

11. Hill v. Weil (Ala.), 80 S. 526; Green v. Holzer (Ark.), 177 S. W. 903; Wall v. Mines, 130 Cal. 27, 62 P. 386; Calhoun v. Anderson, 78 Kan. 749, 98 P. 275.

A promise to make a confirmatory deed, and acquiescence for many years thereafter in the grantee's title has been held a sufficient ratification. Henson v. Culp, 157 Ky. 442, 163 S. W. 455; Haldeman v. Weeks (Ore.), 175 P. 445.

12. Gaskins v. Allen, 137 N. C. 426, 49 S. E. 919 (where the deed of a married woman lacked proper probate and privy examination before acknowledgment).

13. See Smith v. Low, 1 Atk. 489.

14. Palmer v. Miller, 25 Barb. 399.

15. Merchants' Fire Ins. Co. v. Grant, 2 Edw. Ch. 544.

16. Weed v. Beebe, 21 Vt. 495.

17. Walsh v. Powers, 43 N. Y. 23.

18. Terry v. McClintock, 41 Mich. 492.

pays interest on the mortgage note after attaining majority.[19]

§ 1045. Infant's Conveyance, Lapse of Time, &c.

It would seem that the infant is not precluded from disaffirming his conveyance of real estate by the mere lapse of time, provided there has been no word or act on his part indicating affirmance. Laches is not imputable to an infant during the continuance of minority.[20] Where land has been sold by an infant, it was said in a Connecticut case, years ago, the period of acquiescence being thirty-five years, that the infant ought to declare his disaffirmance within a reasonable time; and similar *dicta* may be found in other courts; but there seems to be no doubt upon the decided cases, that mere acquiescence is no confirmation of a sale of lands unless it has been prolonged for the statutory period of limitation; and that an avoidance may be made any time before the statute has barred an entry.[21] But disaffirmance is here required; and any solemn revocation, or a conveyance to someone else of that land, repudiates the infant's conveyance; while any new conveyance by way of affirmance makes the infant's deed wholly valid.[22]

Whatever might be the effect of an infant's own fraud, as against himself, it would appear that a subsequent purchaser or mortgagee in good faith and for a valuable consideration will hold his title as against a deed made by the owner during his minority, of which he has received neither actual nor constructive notice; and

19. American Mortgage Co. v. Wright (1894), 101 Ala. 658.

20. Conditions in Virginia during the Civil War have been held to save an infant from being barred by laches. Bedinger v. Wharton, 27 Gratt. (Va.) 857; Smith v. Sackett, 5 Gilm. 534; Hill v. Nelms, 86 Ala. 442. But time which has commenced running against the ancestor continues to run against the infant heir. Gibson v. Herriott, 55 Ark. 85; Hayes v. Nourse, 114 N. Y. 595. But see Nobles v. Poe (Ark.), 182 S. W. 270 (delay of 43 years in bringing suit).

21. 1 Am. Lead. Cas., 4th ed., 256; Met. Contr. 60, 61, and cases cited; Tucker v. Moreland, 10 Pet. 58; Boody v. McKenney, 23 Me. 517; Drake v. Ramsay, 5 Ohio, 251 Jackson v. Burchin, 14 Johns. 124; Urban v. Grimes, 2 Grant, 96; Vaughan v. Parr, 20 Ark. 600; Voorhies v. Voorhies, 24 Barb. 150; Ware v. Brush, 1 McLean, 533; Moore v. Abernethy, 7 Blackf. 442; Cole v. Pennoyer, 14 Ill. 158; Gillespie v. Bailey, 12 W. Va. 70 (the case of an infant tenant in common); Wallace v. Latham, 52 Wis. 291; Prout v. Wiley, 28 Mich. 164; Wells v. Seixas, 24 Fed. R. 82; Lacy v. Pixlar, 120 Mo. 383.

22. Mette v. Feltgen, 148 Ill. 357; Moore v. Baker, 92 Ky. 518; Cox v. McGowan (1895), N. C. Where the infant, with knowledge of the facts, accepts upon majority the residue of the purchase price of the land, he ratifies the transaction. Smith v. Gray (1895), N. C.

this, too, notwithstanding ratification or fraud of the minor might have rendered that deed valid.[23]

Yet lapse of time, together with slight circumstances, have in many instances sufficed to sustain an infant's deed. A Missouri case, indeed, holds that mere declarations or a promise upon contingency will not ratify and confirm.[24] But the authorities generally manifest extreme repugnance at setting aside a solemn conveyance of land and reopening beneficial transactions, merely to suit the caprice or dishonorable intent of infants.[25] This may explain another *dictum* to the effect that an infant's deed will be confirmed by any deliberate act after he becomes of age, by which he takes benefit under it or recognizes its validity;[26] which is not without precedents for support. Thus in some instances where the infant, after coming of age, saw the purchaser make valuable improvements and incur considerable expense, and said nothing for years, he was held bound.[27] So, too, it would seem, where one, knowing his title, permits another to purchase without giving notice of his claim.[28] Or omits a fair opportunity for asserting his privilege.[29] While mere lapse of time less than the statute period will not suffice, yet the lapse of a less period in connection with such circumstances may. A tribunal of justice can properly decline to become the instrument of a knave; and the late infant's dishonorable intention to take advantage bears against him. So, in Illinois, and some other States, the statute makes conveyances of a minor binding, unless disaffirmed and repudiated within a certain reasonable period, say three years after reaching majority,[30] which is just legislation. Where the infant was nearly of age

23. Black v. Hills, 36 Ill. 376; Inman v. Inman, L. R. Eq. 260; Weaver v. Carpenter, 42 Ia. 343.

24. Clamorgan v. Lane, 9 Mo. 446. And see Davidson v. Young, 38 Ill. 145.

25. See cases cited in preceding paragraph.

26. McCormic v. Leggett, 8 Jones, 425.

27. Wheaton v. East, 5 Yerg. 41; Wallace v. Lewis, 4 Harring. 75; Jones v. Phenix Bank, 4 Seld. 235; Davis v. Dudley, 70 Me. 236. *Aliter* where improvements are made while the late infant is absent and silent. Birch v. Linton and Wife, 78 Va. 584. And cf. Brantley v. Wolf, 60 Miss. 420.

If there is doubt whether the deed was made during infancy or not, the burden of proof is on the disaffirming party. Amey v. Cockey & Bargar, 73 Md. 297.

28. Hall v. Simmons, 2 Rich. Eq. 120; Alsworth v. Cordtz, 31 Miss. 32; Belton v. Briggs, 4 Desaus. 465; Cresinger v. Welch, 15 Ohio, 156; Emmons v. Murray, 16 N. H. 385. But see Brantley v. Wolf, 60 Miss. 420.

29. Dolph v. Hand, 156 Pa. St. 91.

30. The infant may have the full benefit of the statute though he commences an action in infancy and dis-

when he conveyed, and had made a fair sale, receiving the purchase-money, delay on his part to disaffirm is not favored.[31] And there ought to be no disaffirmance favored which comes unreasonably late after the legal disability is removed.[32]

The purchaser of an infant's lands succeeds to all the infant's rights in relation to it, although those rights grow out of the latter's infancy.[33] And a party in possession under the infant's deed cannot be regarded as a trespasser before the deed is avoided.[34]

And it is held that where land was conveyed by a person under age in exchange for other lands, and he, after coming of age, sells and conveys the lands so received, the last deed amounts to a confirmation of the first.[35]

§ 1046. Ratification, as to an Infant's Purchase, &c.

The same reasoning which applies to property transferred by the infant applies to his purchases. If an infant, for instance, takes a conveyance of land during minority and retains possession

continued it. Snare & Triest Co. v. Friedman, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367; Putnal v. Walker, 61 Fla. 720, 55 So. 844; Watson v. Peebles, 102 Miss. 725, 59 So. 881; O'Donohue v. Smith, 130 App. D. 214, 114 N. Y. S. 536; Birch v. Linton, 78 Va. 584, 49 Am. R. 381; Wilson v. Branch, 77 Va. 65, 46 Am. R. 709; Blake v. Hollandsworth, 71 W. Va. 387, 76 S. E. 814.

Where in the case of a female the disabilities of infancy and coverture concur, the right to disaffirm continues till both disabilities are removed and for the statutory period thereafter, without regard to the interval between the conveyance and the avoidance. Blake v. Hollandsworth (W. Va.), 76 S. E. 814, 43 L. R. A. (N. S.) 714; Blankenship v. Stout, 25 Ill. 132; Wright v. Germain, 21 Ia. 585; *supra*, § 433. And see Ferguson v. Bell, 17 Mo. 347; Bostwick v. Atkins, 3 Comst. 53; Pursley v. Hays, 17 Ia. 311; Sheldon v. Newton, 3 Ohio (N. S.), 494; Rainsford v. Rainsford, Spears Ch. 385. Forgetfulness of the deed made in infancy is no sufficient excuse for delay to disaffirm. Tunison v. Chamblin, 88 Ill. 378. See Amey v. Cockey & Bargar, 73 Md. 297.

Infant remaindermen assenting to a sale of land must disaffirm within a reasonable time after majority or they will be barred as against the purchaser. Criswell v. Criswell (Neb.), 163 N. W. 302, L. R. A. 1917E, 1103. But see Steele v. Poe, 79 S. C. 407, 60 S. E. 951 (holding that infant contingent remaindermen who have conveyed their estate need not disaffirm till the termination of the life estate. To the same effect see McCauley v. Grimm, 115 Va. 610, 79 S. E. 1041.

31. Ferguson v. H. E. & W. T. Ry. Co., 73 Tex. 344.

32. Where there was an arrangement during minority that the grantee would reconvey upon the grantor's majority, such a transaction will be favorably regarded for enforcement. Butler v. Hyland, 89 Cal. 575.

33. Thompson v. Gaillard, 3 Rich. 418. See Jackson v. Todd, 6 Johns. 257; Hall v. Jones, 21 Md. 439.

34. Wallace v. Lewis, 4 Harring. 75.

35. Williams v. Mabee, 3 Halst. Ch. 500.

after coming to majority, circumstances may make that a binding transaction. So, if an infant lessee remains in possession of the house or land demised, and pays rent after majority, he cannot repudiate the lease afterwards.[36] Ratification of a purchase of land involves ratification of a mortgage back to secure the purchase-money; one cannot repudiate the former and not the latter, for this would be inequitable.[37] An infant may duly avoid or ratify his purchase of personal property also, either during minority or within a reasonable time after reaching majority.[38]

When an infant purchases property, and continues to enjoy the use of the same, and then sells it or any part of it, and receives the money for it, he must be considered as having elected to affirm the contract, and he cannot afterwards avoid payment of the consideration.[39] Some authorities would confine the affirmation of a purchase of land to an actual subsequent sale, but this is quite unreasonable, and contrary to the general doctrine; for there may be many other acts which constitute just as full and undoubted evidence of a design on the infant's part to affirm such contract as an actual sale of the land. Thus continuous occupation of premises, improvements, and offers to sell, have sometimes been deemed sufficient.[40] And Chief Justice Shaw observes that if an infant, after coming of age, retains landed property purchased by him during minority for his own use, or sells or otherwise disposes of it, such acts being only conscientiously done with intent to ratify or affirm, affirmation or ratification may be inferred.[41] The same principle has been declared in other cases, even to the extent of holding that mere continuance in possession is an affirmance; the more so, if the late infant has put it out of his power to restore the title.[42] It will be observed that such latter conduct involves

36. Holmes v. Blogg, 8 Taunt. 35; Smith, Contr. 284; Bac. Abr., tit. Infant, K. 612; Baxter v. Bush, 29 Vt. 465; Armfield v. Tate, 7 Ired. 258; Beickler v. Guenther, 121 Ia. 419, 96 N. W. 895.

37. § 1044; Langdon v. Clayson, 75 Mich. 204; Kennedy v. Baker, 159 Pa. St. 146; Peers v. McLaughlin, 88 Cal. 294. Provision in an absolute conveyance to an infant confering upon him the power to sell, implies only the power to sell when the disability of infancy is removed. Sewell v. Sewell, 92 Ky. 500.

38. § 1015.

39. Boody v. McKenney, 10 Shep. 517; Hubbard v. Cummings, 1 Me. 11; Boyden v. Boyden, 9 Met. 519; Robbins v. Eaton, 10 N. H. 561.

40. See Robbins v. Eaton, 10 N. H. 561.

41. See Boyden v. Boyden, 9 Met. 519.

42. Dana v. Coombs, 6 Greenl. 89; Cheshire v. Barrett, 4 McCord, 241;

two elements: lapse of time and the exercise of acts of ownership.[43] But the infant on coming of age has of course the right to disaffirm as well as to affirm the purchase by appropriate acts.[44]

Where a deed made to an infant is beneficial to him, equity will infer an acceptance on his part, whether he knew of the conveyance or not; but he may reject the grant upon reaching majority if he so elects.[45]

§ 1047. Executory Contracts, &c., Voidable During Infancy; How Affirmed or Disaffirmed.

As to deeds passing a voidable title to land out of the infant we have seen that he cannot elect to disaffirm or ratify until he attains majority. But with regard to an infant's executory contracts, or transactions importing on his part the fulfilment of duties, during the period of infancy, which might be prejudicial or irksome, he is allowed to disaffirm and avoid during infancy wherever the contract was not of that beneficial or positive kind which the law pronounces binding. This is strictly in accordance with the general doctrine that one shall not be prejudiced by his own acts committed while an infant. Thus, if the infant promises during infancy to marry, he need not fulfil that promise; if he make a stock contract, he can repudiate it at any time and thereby avoid the onerous responsibility of continuing to pay assessments;[46] if he has become a partner, he may rid himself, before majority, of the injudicious compact;[47] if he has taken a lease, he may put an end to it;[48] if he executes a promissory note, he

Lynde v. Budd, 2 Paige, 191; Middleton v. Hoge, 5 Bush, 478.

43. This rule was applied in a recent well-considered New York case, upon a full examination of the authorities. An infant had given his note for certain real estate; and, very foolishly, or very dishonorably, endeavored to avoid payment upon majority, while holding to the benefits of his purchase. It was held that by his acts he had ratified the contract of purchase. Henry v. Root, 33 N. Y. 526.

44. Williams v. Williams, 85 N. C. 313. In Houlton v. Manteuffel, 51 Minn. 185, an arrangement on majority to keep the purchase was held an affirmance though the arrangement itself failed.

45. Owings v. Tucker, 90 Ky. 297; Sneathen v. Sneathen, 104 Mo. 201. Land conveyed to an infant upon his trust to reconvey cannot be retained by him. Nordholt v. Nordholt, 87 Cal. 552; § 416.

46. Wuller v. Chuse, etc., Co., 241 Ill. 398, 89 N. E. 796; Cain v. Garner, 169 Ky. 633, 185 S. W. 122; Dublin & Wicklow R. v. Black, 3 Ex. 181; Indianapolis Chair Co. v. Wilcox, 59 Ind. 429; Robinson v. Weeks, 56 Me. 102.

47. Goode v. Harrison, 5 B. & Ald. 147; Dunton v. Brown, 31 Mich. 82.

48. Gregory v. Lee (1895), Conn.

need not pay when it falls due.[49] A disaffirmance during infancy, where thus permitted, may require something different from disaffirmance at majority, something more explicit perhaps, and nearer to an express repudiation; though each case, as in the case of election at majority, should be governed by its own circumstances. The executory contract of an infant to convey or transfer his real or personal property cannot be specifically enforced against him, nor made the basis of an action of damages;[50] nor, on the other hand, can his executory contract to buy real or personal property, or to mortgage or give security, be compelled;[51] but in either case the right of affirmance or disaffirmance is left open. To bind him he must confirm such a contract after attaining majority.

§ 1048. Rule Applied to Infant's Contract of Service.

Thus, too, although it may be said that one's fully executed contract for service cannot be re-opened, if beneficial to him, to the adult party's detriment, the general rule, independently of the apprentice acts, is that an infant who contracts to perform labor for a fixed time at a definite rate may put an end to it whenever he chooses during minority, and claim compensation *pro rata* for his services.[52] It has also been applied to a contract relating to

49. Cummings v. Everett, 82 Me. 260.

50. Walker v. Ellis, 12 Ill. 470; Petty v. Roberts, 7 Bush, 410; Griffis v. Younger, 6 Ired. Eq. 520. And see Mustard v. Wohlford, 15 Gratt. 329.

51. See Riley v. Mallory, 33 Conn. 201; McCarty v. Woodstock Co., 92 Ala. 463. An infant who bids for property at an auction is not obliged to execute the purchase. Shurtleff v. Millard, 12 R. I. 272.

52. The infant may enforce the contract and recover wages upon it, where it does not appear that he has a parent, guardian or master entitled to his services. The Melissa Fed. Cas. No. 9,400 (U. S. D. C., Mich. 1874), 1 Brown Adm. 476; Belyea v. Cook, 162 F. 180; The Cubadist, 252 F. 658 (affd., 256 F. 203); Ping Min & Mill Co. v. Grant, 68 Kan. 732, 75 P. 1044; Cain v. Garner, 169 Ky. 633, 185 S. W. 122; Spicer v. Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152.

If the contract disaffirmed be entire and partially performed by the infant when disaffirmed, he cannot recover on a *quantum meruit* for the services actually performed. Yancey v. Boyce, 28 N. D. 187, 148 N. W. 539; Ramsdell v. Coombs, etc., Co., 161 N. Y. S. 360; Aborn v. Janis, 113 N. Y. S. 309, 62 Misc. 95 (order affd., 106 N. Y. S. 1115); Dearden v. Adams, 19 R. I. 217, 36 A. 3.

A contract by a minor to work for his board and clothes has been upheld on the ground that the latter were necessaries. Starke v. Storm, 115 Va. 651. To the same effect see Stone v. Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; Person v. Chase, 37 Vt. 647; Van Pelt v. Corwine, 6 Ind. 363; Ray v. Haines, 52 Ill. 485; Davies v. Turton, 13 Wis. 185; Moses v. Stevens, 2 Pick. 332; Mason v. Wright, 13 Met.

damages which might be suffered in the course of the employment.[53] Infants, acting upon bad advice, have sometimes the effrontery, however, after rescinding a contract of service beneficial to themselves, to demand wages from their employers, without the allowance of reasonable offsets; but the courts are not so foolish as to indulge them often in this respect; hence, in numerous instances, it is decided that where an infant puts an end to his contract of service, his demand for proportional wages is subject to the reasonable deduction of his employer for part-payments, board, and necessaries furnished him during the same period, even to the entire extinction of his own claim.[54] And the injury sustained by his employer will not be unfrequently taken into account.[55] But the infant cannot be sued for breach of his agreement of service.[56] Of course, he may set off his own labor against the employer's demand for necessaries, and recover any balance accordingly.[57] The mutual understanding of the parties as to whether the infant's services should be paid for, or counterbalanced completely by his board and education, should be regarded in every case, upon examination of the circumstances.[58] And if the infant

306; Gaffney v. Hayden, 110 Mass. 137; Spicer v. Earl, 41 Mich. 191; Lufkin v. Mayall, 5 Fost. 82; Francis v. Felmet, 4 Dev. & Bat. 498; Judkins v. Walker, 17 Me. 38; Nashville, etc., R. Co. v. Elliott, 1 Cold. 611. But see Weeks v. Leighton, 5 N. H. 343; Harney v. Owen, 4 Blackf. 336; Wilhelm v. Hardman, 13 Md. 140; McCoy v. Huffman, 8 Cow. 84; Medbury v. Watrous, 7 Hill, 110. As to the more general effect of emancipation, see *supra*, Part III, ch. XII.

Two cases hold that an executed contract for services cannot be disaffirmed, in the absence of evidence of fraud or undue advantage taken of the infant. Robinson v. Van Vleet, 91 Ark. 262, 121 S. W. 288; Spicer v. Earl, 41 Mich. 19, 1 N. W. 923, 32 Am. R. 152.

53. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788.

54. Thomas v. Dike, 11 Vt. 273; Hoxie v. Lincoln, 25 Vt. 206; Lowe v. Sinklear, 27 Mo. 308; Stone v. Dennison, 13 Pick. 1; Squier v. Hydliff, 9 Mich. 274; Wilhelm v. Hardman, 13 Md. 140; Roundy v. Thatcher, 49 N. H. 526.

55. Thomas v. Dike, 11 Vt. 273; Hoxie v. Lincoln, 25 Vt. 206; Lowe v. Sinklear, 27 Mo. 308; Moses v. Stevens, 2 Pick. 336. *Contra*, Meeker v. Hurd, 31 Vt. 639; Derocher v. Continental Mills, 58 Me. 217.

56. Frazier v. Rowan, 2 Brev. 47.

57. Francis v. Felmet, 4 Dev. & Bat. 598; Lockwood v. Robbins, 125 Ind. 398.

58. Mountain v. Fisher, 22 Wis. 93; Garner v. Board, 27 Ind. 323. A case occurred in Massachusetts some years ago, where an infant, in consideration of an outfit to enable him to go to California, agreed, with his father's assent, to give the party furnishing the outfit one third of all the avails of his labor during his absence, which he afterwards sent accordingly. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was held that he

continues in service after he becomes of age, without demanding increase of wages or other modification of the contract, this is good evidence of his affirmance of the contract.[59] As matter of law one is not precluded from avoiding at majority a contract of service if something be due him, although it has been fully executed.[60]

It is a well-known principle that when a contract is dissolved by mutual consent, *pro rata* wages may be recovered without express agreement. This applies to infants as well as adults. But a father is so far bound by his son's contract that his own claim for compensation depends upon his son's proper performance.[61] The employer, on the other hand, cannot make a new contract with the minor, so as to supersede the first one, without the assent of the father, or other person with whom the original contract was made.[62] But it is held that a contract of hiring between an infant and a third person is not rendered inoperative on the infant's part merely for want of the parent's previous consent; the infant not having avoided the contract, and the parent making no effort to assert his paramount rights.[63]

§ 1049. Parents, Guardians, &c., Cannot Render Transaction Obligatory upon the Infant, &c.

A contract made by a parent, or guardian, or a stranger, in an infant's name, acquires no obligatory force against the infant himself, apart from the latter's knowledge or consent; and if it be the infant's own contract, then the usual right of ratification or

could not rescind the agreement and recover the amount sent, deducting the cost of the outfit and any other money expended for him under the agreement. Breed v. Judd, 1 Gray, 455. This offer, the court observed, would not place the parties *in statu quo*, for the defendants took the risk of the life, health, and good fortune of the plaintiff. Under all the circumstances of the case, the sum advanced was held to be a reasonable consideration for a third part of the proceeds of the plaintiff's labor.

59. Spicer v. Earl, 411 Mich. 91. Says Cooley, J., of repudiation in such cases: "Where only the infant's services are in question, the rule should not be extended beyond what is absolutely necessary to proper protection; it should not be allowed to become a trap for others, by means of which the infant may perpetrate frauds." See also Forsyth v. Hastings, 27 Vt. 646, where ratification was inferred from remaining in the employer's service a month after attaining majority.

60. Dube v. Beaudry, 150 Mass. 448.

61. Rogers v. Steele, 24 Vt. 513. See Thomas v. Williams, 1 Ad. & E. 685; Roundy v. Thatcher, 49 N. H. 526.

62. McDonald v. Montague, 30 Vt. 357. And see Gates v. Davenport, 29 Barb. 160. See also Parent and Child, *supra*.

63. Nashville, etc., R. R. Co. v. Elliott, 1 Cold. 64.

avoidance remains open to him.[64] One who assumes for an infant a mortgage debt, or a deficiency upon foreclosure of the infant's land, or makes any undertaking for the infant upon a voidable obligation, cannot render the infant personally liable.[65] A father, though acting as guardian, cannot estop the child from denying an invalid sale of land.[66] Nor can a father sue on his child's voidable contract as the child's substitute.[67]

On the other hand, a third person not in privity with the infant has no right to say that the infant shall not on majority make or assume any contract he pleases.[68] Minors whose property has been sold without legal authority by parents, guardian, or anyone else, can recover it again upon the principles already discussed; and thus may be avoided an illegal sale of land, without first tendering the price to the purchaser, leaving him, however, to recover such consideration as may remain.[69] So, too, will purchasers or mortgagees from the infant be protected against acts of the parents which disregard the child's rights.[70]

§ 1050. Miscellaneous Points; as to New Promise; Whether Infant Affirming Must Know His Legal Rights.

Where a new promise is requisite on reaching majority, it must be made to the party with whom the infant contracted, or to his agent or attorney; not to a stranger.[71] But a promise to an agent authorized to present the claim and receive payment and give discharge binds him lately an infant.[72] And where a writing addressed to another than the plaintiff is relied on, not as constituting a ratification or containing a promise, but as evidence of a ratifica-

64. Armitage v. Widoe, 36 Mich. 124.

65. Bicknell v. Bicknell, 111 Mass. 265; Wood v. Truax, 39 Mich. 628.

66. Harmon v. Smith, 38 Fed. 482.

67. Osburn v. Farr, 42 Mich. 134. Infant may redeem his land from a tax sale. Carroll v. Johnson, 41 Ark. 59.

68. Douglas v. Watson, 34 E. L. & Eq. 447.

69. Graves v. Hickman, 59 Tex. 381, 401; Self v. Taylor, 33 La. Ann. 769; Part IV, ch. 7. Equity will charge purchase-money applied for the benefit of infants by way of equitable subrogation in the purchaser's favor. Hill v. Clark, 4 Lea, 405. Where minors on arriving at age are induced by their trustee to execute a deed of confirmation without their rights being explained to them, equity will relieve them from the consequences of their mistake. Wilson v. Life Ins. Co., 60 Md. 150. Delay in disaffirming may bar relief, if unreasonable. Williams v. Williams, 94 N. C. 732. And equitable considerations are not lost sight of. Peers v. McLaughlin, 88 Cal. 294.

70. Hooper v. Payne, 94 Ala. 223.

71. Bigelow v. Grannis, 2 Hill, 120; Goodsell v. Myers, 3 Wend. 479.

72. Mayer v. McLure, 36 Miss. 389.

tion previously made by the defendant, it is held admissible in the plaintiff's favor.[73] Nor is it necessary that the agent should have disclosed his authority before the defendant made his admission.[74]

It is not essential to a valid ratification that the person lately an infant should know that he was not legally liable on his contract made during infancy.[75] Ignorance of the law excuses no one. But there is a *dictum* of Lord Alvanley to the contrary, which has been frequently repeated in American courts, and once constituted the basis of a decision in Pennsylvania.[76] Nearly all the later cases hold that the intention must be to ratify a contract known to be invalid but for the ratification.[77] Some American statutes require a new promise in writing.[78]

§ 1051. Whether Infant Who Disaffirms Must Restore Consideration.

It is a rule that money voluntarily paid by a minor under a contract from which he has derived no benefit may be recovered

73. Stern v. Freeman, 4 Met. (Ky.) 309.

74. Hoit v. Underhill, 10 N. H. 220. And see Tate v. Tate, 1 Dev. & Bat. 22.

75. Bestor v. Hickey, 71 Conn. 181, 41 A. 555; Robin v. Shandberry (Ill.), 122 N. E. 808; Healy v. Kellogg, 145 N. Y. S. 943; Hobbs v. Hinton, etc., Co., 74 W. Va. 443, 82 S. E. 267; Morse v. Wheeler, 4 Allen, 570; Met. Contr. 59; Ring v. Jamison, 66 Mo. 124; Anderson v. Soward, 40 Ohio St. 325; Clark v. Van Court, 100 Ind. 113.

76. Harmer v. Killing, 5 Esp. 103; Hinely v. Margaritz, 3 Barr, 428. See Curtin v. Patton, 11 S. & R. 305; Reed v. Boshears, 4 Sneed, 118; Norris v. Vance, 3 Rich. 164.

77. Manning v. Gannon, 44 App. D. C. 98.

Ratification by an adult of a contract made by him when a minor is a question of intention, and the act, to have such effect, must have been performed with full knowledge of its consequences and express intention to ratify what is known to be voidable. Coe v. Moon, 260 Ill. 76, 102 N. E. 1074; George v. Delaney, 111 La. 760, 35 So. 894; Durfee v. Abbott, 61 Mich. 471, 28 N. W. 521; Ridgeway v. Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. R. 464; International Text-Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722; Grolier Soc. of London v. Forshay, 157 N. Y. S. 776.

The fact of knowledge of his right to disaffirm may be shown by circumstantial evidence. Fletcher v. A. W. Koch Co. (Tex. Civ.), 189 S. W. 501.

78. Syck v. Hellier, 140 Ky. 388, 131 S. W. 30; Hilton v. Shepherd, 92 Me. 160, 42 A. 387; Lamkin & Foster v. Ledoux, 101 Me. 581, 64 A. 1048; Pedro v. Pedro, 71 Misc. 296, 127 N. Y. S. 997; Grolier Soc. v. Foshay, 157 N. Y. S. 776; Carroll v. Durant Nat. Bank, 38 Okla. 267, 133 P. 179; Barnes v. American Soda Fountain Co., 32 Okla. 81, 121 P. 250; Steele v. Poe, 79 S. C. 407, 60 S. E. 951; Same v. Friedham, 79 S. C. 398, 60 S. E. 953; Ward v. Scherer, 96 Va. 318, 31 S. E. 518.

The new promise in writing required by the Virginia Code must recognize the debt as binding, and, either

back upon his disaffirmance of the contract,[79] but nearly all the late cases permit a recovery without regard to the benefit of the contract to the infant, especially if not of a sort to be returned.[80]

in terms or by a fair construction, refer to the contract to be ratified and treat it as a subsisting contract. Ward v. Scherer, 96 Va. 318, 31 S. E. 518.

79. By defending against an action on the ground of infancy and making counterclaim to recover what he has paid on a contract for a correspondence course an infant must show that he has not received equal value for what he has paid. International, etc., Co. v. Doran, 80 Conn. 307, 68 A. 255.

Where an infant and an adult as partners pay money and give notes for stock, neither can recover back the money paid. Latrobe v. Dietrich, 114 Md. 8, 78 A. 983.

It has been held that where plaintiff sued to recover several life insurance premiums paid by him when an infant, and the contract was fair and free from fraud, and the infant had enjoyed the benefits thereof in part and they were of such a nature that he could not restore them, he could not recover the premiums paid. Link v. New York Life Ins. Co., 107 Minn. 33, 119 N. W. 488; Bergluud v. American Multigraph Sales Co. (Minn.), 160 N. W. 191; Thornton v. Holland (Miss.), 40 So. 19.

Where an infant disaffirms his contract he cannot recover the unpaid contract price. Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. R. 569.

It has been held that a minor buying an automobile and afterwards disaffirming may be charged with the benefits of its use, including the pleasure experienced. Wooldridge v. Lavoie (N. H.), 104 A. 346.

An infant may not be entitled to recover back the sum paid under a chattel mortgage to secure the price of a piano, where the reasonable value of the use of the piano during the time she used it exceeded the amount paid. Wanisch v. Wuertz, 140 N. Y. S. 573, 79 Misc. 610; Lown v. Spoon, 143 N. Y. S. 275, 158 App. Div. 900; Rice v. Butler, 49 N. Y. S. 494, 25 App. Div. 388; Pierce v. Lee, 74 N. Y. S. 926, 36 Misc. 870.

Shurtleff v. Millard, 12 R. I. 272, applies this doctrine (and without restriction as to auctioneer's loss) to the deposit-money paid by an infant at an auction purchase, where he repudiated before completing the purchase.

80. *Ex parte* McFerren, 184 Ala. 223, 63 So. 159; Evelyn v. Chichester, 3 Burr. 1719; *Ex parte* McFerren (Ala.), 63 So. 159, 47 L. R. A. (N. S.) 543; Carmody v. Fairchild, 42 App. D. C. 426; Wuller v. Chuse, etc., Co., 241 Ill. 398, 89 N. E. 796; Wuller v. Chuse, etc., Co., 147 Ill. App. 224 (aff., 241 Ill. 398, 89 N. E. 796; Wallin v. Highland, etc., Co., 127 Ia. 131, 102 N. W. 839; Nielson v. International, etc., Co., 106 Me. 104, 75 A. 330; Caswell v. Parker, 96 Me. 39, 51 A. 238; White v. New Bedford, etc., Corp., 178 Mass. 20, 59 N. E. 643; Gillis v. Goodwin, 180 Mass. 140, 61 N. E. 813, 91 Am. St. R. 265.

The rule seems to cut both ways, so that it has been held that where an infant buys from another infant and pays a price, the vendor may, on disaffirmance by the vendee, in turn disaffirm the implied contract to repay the price. Drude v. Curtis, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.

On the disaffirmance of an insurance policy and action for the recovery of the premium, the insurer cannot retain the cost of keeping the policy in force before disaffirmance. Simpson v. Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. R. 560; Vanatter v. Marquardt, 134 Mich. 99, 95 N. W. 977,

If an infant purchaser of goods claims the right to rescind and restores the property, he can of course recover back the purchase-money he paid.[81] An infant upon reaching majority, who chooses to disaffirm a sale of his real estate not made in accordance with law, may do so effectually without first refunding, or offering to refund, the purchase-money.[82] Purchase-money in such cases might come fairly into an account for adjusting rents and profits. But the principle is firmly established by the courts that he cannot on attaining full age hold to an exchange or purchase, made by him in infancy, with its advantages, and thus affirm the transaction, while pleading his infancy to avoid the payment of the purchase-money.[83] There is some conflict in this class of cases, however, at the present day; the effort being on the one hand to hold the infant to common honesty, and on the other not to deprive him of the legal right of election which the policy of the law accords to all who have been under a legal disability, because of possible improvidence on his part while irresponsible. According to the better opinion now current, it is only when an infant, on disaffirming his contract at majority, still has the consideration, that he can be compelled to return it as the condition of disaffirmance; restitution in full not being a prerequisite, but restitution

10 Det. Leg. N. 349; Reynolds v. Garber-Buick Co. (Mich.), 149 N. W. 985, L. R. A. 1915C, 382; Braucht v. Graves-May Co., 92 Minn. 116, 99 N. W. 417; Thornton v. Holland, 87 Miss. 470, 40 So. 19.

Where an action is brought to recover property sold to an infant in infancy, and partial payment is pleaded, the right to recover the property and the right of the infant to be repaid money paid on the price may both be tried in the same action. Ross P. Curtice Co. v. Kent, 89 Neb. 496, 131 N. W. 944, 52 L. R. A. (N. S.) 723; Rice v. Butler, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. R. 703; Healy v. Kellogg, 145 N. Y. S. 943; Danziger v. Iron Clad, etc., Co., 80 Misc. 510, 141 N. Y. S. 593; Lipschitz v. Korndahl, 136 N. Y. S. 2; Prudential Life Ins. Co. of America v. Fuller, 29 Ohio Cir. Ct. R. 415.

81. Cooper v. Bowe, 10 Daly, 352; St. Louis, etc., Ry. v. Higgins, 44 Ark. 293.

82. Pitcher v. Laycock, 7 Ind. 398; Cresinger v. Welch, 15 Ohio, 156; Miles v. Lingerman, 24 Ind. 385; Bedinger v. Wharton, 27 Gratt. 857; Green v. Green, 69 N. Y. 553; Moore v. Baker, 92 Ky. 518. But cf. Stuart v. Baker, 17 Tex. 417; Bingham v. Barley, 55 Tex. 281.

83. Kline v. Beall, 6 Conn. 494; Bailey v. Barnberger, 11 B. Monr. 113; Strain v. Wright, 7 Ga. 568; Hillyer v. Bennett, 3 Edw. Ch. 222; Lowry v. Drake, 1 Dana, 46; Kitchen v. Lee, 11 Paige, 107; Tipton v. Tipton, 3 Jones, 552; Womack v. Womack, 8 Tex. 397; Smith v. Evans, 5 Humph. 70; Manning v. Johnson, 26 Ala. 446; Wilie v. Brooks, 45 Miss. 542; Kerr v. Bell, 44 Mo. 120.

of the advantages as they still remain to him and capable of being restored.[84] In other words, if the infant has wasted or squandered the consideration he may repudiate without any tender of restitution.[85] Where an infant has the privilege of repudiating during

84. *In re* Huntenberg, 153 F. 768; Sanger v. Hibbard, 104 F. 455, 43 C. C. A. 455; Barker v. Fuestal, 103 Ark. 312, 147 S. W. 45.

A commission paid to a broker for negotiating a sale of land to a minor need not be returned on disaffirmance. Maier v. Harbor, etc., Co. (Cal.), 182 P. 345; Clyde v. Steger & Sons Piano Mfg. Co. (Ga. App.), 95 S. E. 734; Wuller v. Chuse, etc., Co., 241 Ill. 398, 89 N. E. 796; Wright v. Buchanan (Ill.), 123 N. E. 53; Sanger v. Hibbard, 2 Ind T. 547, 53 S. W. 330; Wilson v. Unselt's Adm'r, 12 Bush (Ky.), 215; Ison v. Cornett, 116 Ky. 92, 75 S. W. 204, 25 Ky. Law Rep. 366; Succession of Sallier, 115 La. 97, 38 So. 929; United States Inv. Co. v. Ulrickson, 84 Minn. 14, 86 N. W. 613, 87 Am. St. R. 326; Lacy v. Pixler, 120 Mo. 383, 25 S. W. 206; Orchard v. Wright-Dalton-Bell-Anchor Store Co. (Mo.), 197 S. W. 42; Price v. Blankenship, 144 Mo. 203, 45 S. W. 1123; Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. R. 569; Starr v. Watkins, 78 Neb. 610, 111 N. W. 363.

It has been held that an engagement ring cannot be recovered from an infant female on her breach of the engagement. Stromberg v. Rubenstein, 19 Misc. 647, 44 N. Y. S. 405; McCarthy v. Bowling Green Storage & Van Co., 169 N. Y. S. 463, 182 App. Div. 18; Lane v. Dayton Coal & Iron Co., 101 Tenn. 581, 48 S. W. 1094; Abernathy v. Phillips, 82 Va. 769, 1 S. E. 113.

The claim for return of the consideration on disaffirmance is personal and against the infant, so that it cannot be enforced against those to whom he has granted the property sold. Mustard v. Wohlford, 15 Grat. (Va.), 329, 76 Am. Dec. 209.

Where a party seeks to prevent an infant from avoiding his release, by setting up that the infant has not returned the consideration, the burden is on him to prove that the consideration remains in the infant's hands unspent. Britton v. South Penn Oil Co., 73 W. Va. 792, 81 S. E. 525; Wallace v. Leroy, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. R. 777; Jones v. Valentine's School of Telegraphy, 122 Wis. 318, 99 N. W. 1043; Grauman, Marx & Cline Co. v. Krienitz, 142 Wis. 556, 126 N. Vt. 50.

The rule does not apply where the only thing received is a paper, called a "scholarship," entitling the infant to a course of study in the other party's school. Jones v. Valentine's School of Telegraphy, 122 Wis. 318, 99 N. W. 1043.

If the property has been sold and reinvested in other property, that property must be surrendered. Roberts v. Roberts, 61 Ohio St. 96, 55 N. E. 411; Millsops v. Estes, 137 N. C. 535, 50 S. E. 227, 107 Am. St. R. 496, 70 L. R. A. 170; Chandler v. Simmons, 97 Mass. 508; Green v. Green, 69 N. Y. 553, and cases cited; Dill v. Bowen, 54 Ind. 204; Shurtleff v. Millard, 12 R. I. 272. Cf. Badger v. Phinney, 15 Mass. 359; Bartholemew v. Finnemore, 17 Barb. 428.

85. Alfrey v. Colbert, 168 F. 231; Colbert v. Alfrey, *Id.;* Bell v. Burkhalter, 176 Ala. 62, 57 S. 460; Bickle v. Turner (Ark.), 202 S. W. 703; Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75; Lee v. Hibernia Sav. & Loan Soc. (Cal.), 171 P. 677; Putnal v. Walker, 61 Fla. 720, 55 So. 844, 36 L. R. A. (N. S.) 33; White v. Sikes, 129 Ga. 508, 59 S. E. 228; Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788; Mustard v. Wohlford, 15 Grat. 329, 76 Am. Dec. 209; Ship-

infancy, a similar rule applies as to restoring consideration.[86] All that is usually asserted is that the repudiating infant shold be made to place the adult *in statu quo* as far as possible.[87]

ley v. Smith, 162 Ind. 526, 70 N. E. 803; Story & Clark Piano Co. v. Davy (Ind. App.), 119 N. E. 177; First Nat. Bank v. Casey, 158 Ia. 349, 138 N. W. 897; Burgett v. Barrick, 25 Kan. 526; Gray v. Grimm, 157 Ky. 603, 163 S. W. 762; White v. New Bedford Cotton-Waste Corp., 178 Mass. 20, 59 N. E. 642; Barr v. Packard Motor Car Co., 172 Mich. 299, 137 N. W. 697; Lake v. Perry, 95 Miss. 550, 49 So. 569; Ridgeway v. Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. R. 464; Rowe v. Griffiths, 57 Neb. 488 78 N. W. 20; Evants v. Taylor (N. M.), 137 Pac. 583, 50 L. R. A. (N. S.) 1113; Oneonta Grocery Co. v. Preston, 167 N. Y. S. 641; Kane v. Kane, 43 N. Y. S. 662, 13 App. Div. 544; Coody v. Coody, 39 Okla. 719, 136 P. 754, L. R. A. 1915E, 465; F. B. Collins Inv. Co. of Clinton v. Beard, 148 P. 846; Worthy v. Jonesville Oil Mill, 77 S. C. 69, 57 S. E. 634; Turney v. Mobile & O. R. Co., 127 Tenn. 673, 156 S. W. 1085.

An infant's wife, joining with her husband in a mortgage on their homestead, of which he receives the proceeds, need not refund in order to disaffirm. Bradshaw v. Van Valkenburg, 97 Tenn. 316, 37 S. W. 88; McBroom v. Whitefield, 108 Tenn. 422, 67 S. W. 794; Bullock v. Sprowles, 93 Tex. 188, 54 S. W. 657, 47 L. R. A. 326, 77 Am. St. R. 849; MacGreal v. Taylor, 167 U. S. 688, 17 S. Ct. 961, 42 L. Ed. 326; Blake v. Harding (Utah), 180 P. 172; Bedinger v. Wharton, 27 Grat. (Va.) 857; Britton v. South Penn Oil Co., 73 W. Va. 792, 81 S. E. 525.

Where infants borrow money, and give a mortgage to secure the loan, for the purpose of discharging a prior mortgage on their land, thep cannot disaffirm the contract and mortgage without returning the money so acquired. Berry v. Stigall, 253 Mo. 690, 162 S. W. 126. See, to the same effect, MacGreal v. Taylor, 167 U. S. 688, 17 S. Ct. 961, 42 L. Ed. 326. But see New York, etc., Co. v. Taylor, 23 App. D. 363, 48 N. Y. S. 152 (seemingly holding the contrary); Morse v. Ely, 154 Mass. 458; Craig v. Van Bebber, 100 Mo. 584; Smith v. Equitable Co-operative Bank, 219 Mass. 382, 106 N. E. 1020.

86. Corey v. Burton, 32 Mich. 30, the case of a chattel mortgage; where the infant was allowed to replevy the chattels without restoring the consideration. But an infant purchasing chattels and giving a purchase-money mortgage for the price cannot disaffirm the mortgage and at the same time keep the chattels as if by clear title. Curtiss v. McDougal, 26 Ohio St. 66; Knaggs v. Green, 48 Wis. 601; Carpenter v. Carpenter, 45 Ind. 142; White v. Branch, 51 Ind. 210,— seem to absolve an infant from restoring property received in exchange. But, *semble*, if he still holds the exchanged property he ought, on correct principle, to restore or offer to restore it, when disaffirming the transaction. In many cases to maintain an action based upon his avoidance of his contract, an infant should first give notice of his election to avoid or make a demand. Betts v. Carroll, 6 App. 518. See Stout v. Merrill, 35 Ia. 47; Henry v. Root, 33 N. Y. 526. See, further, Dawson v. Holmes, 30 Minn. 107; Brantley v. Wolf, 60 Miss. 420; Brandon v. Brown, 106 Ill. 519. A purchaser from the infant, after majority, on a bill to have the deed cancelled which was made in minority, need not tender back the purchase-money received by the infant, which the latter has squandered. Eureka Co. v. Edwards, 71 Ala. 248.

87. Marx v. Clisby, 130 Ala. 502, 30 S. 517.

Where an infant disaffirmed a re-

Hence an infant cannot damage property he has received, and then demand the full price on offering to restore it.[88] Nor recover partnership property after rescinding the partnership agreement, so as to prejudice liabilities of the firm which are outstanding;[89] nor rescind the partnership agreement and then demand benefits inconsistent with it.[90] If the former vendee be sued for use and occupation of land, it is held that he may recoup for valuable improvements; and equity favors a fair adjustment of rents, damages and improvements.[91] It is held also in some instances, that where the infant disaffirms his conveyance of land, he ought to be prepared to account for the purchase-money with interest.[92] But again it is said that the infant on disaffirming may not recover unpaid purchase-money.[93] The plea of false warranty may sometimes be set up against the infant's attempt by affirmance to enforce a hard bargain.[94] To multiply these illustrations is unnecessary; the cardinal principle which runs through them all is that, with due reservation of the infant's privilege, substantial justice should be done, if possible, between the two parties to a

lease and brought suit to recover damages on the right of action released, the jury was properly instructed to deduct from the damages recovered the amount paid by the defendant to secure the release. Arizona, etc., R. Co. v. Carillo, 17 Ariz. 115, 149 P. 313.

In an action by an infant after disaffirming a contract to recover the price paid for a theatre, the amount recovered cannot be reduced by an allowance for rental during the infant's occupancy. Gannon v. Manning, 42 App. D. C. 206; Coe v. Moon, 260 Ill. 76, 102 N. E. 1074; Shirk v. Shultz, 113 Ind. 571, 15 N. E. 12; Bowen v. Marston, 134 La. 298, 64 So. 118; Nielson v. International Text-Book Co., 106 Me. 104, 75 A. 330; International Text-Book Co. v. McKone, 133 Wis. 200, 113 N. W. 438.

The courts will aid the adult to get his property restored, where they can, aside from the infant's assent. Evans v. Morgan, 69 Miss. 328; Whyte v. Rosenerantz, 123 Cal. 634, 56 P. 436, 69 Am. St. R. 90.

88. Carr v. Clough, 6 Fost. 280; Bartholemew v. Finnemore, 17 Barb. 428.

89. Furlong v. Bartlett, 21 Pick. 401; Sadler v. Robinson, 2 Stew. 520; Kinnen v. Maxwell, 66 N. C. 45.

90. Page v. Morse, 128 Mass. 99; § 408; Dunton v. Brown, 31 Mich. 82. So, too, as to his contract to perform service, *supra*, § 443.

91. Weaver v. Jones, 24 Ala. 420; Petty v. Roberts, 7 Bush, 410. If one receives rents when an infant, he cannot demand them over again on attaining majority. Parker v. Elder, 11 Humph. 546. Where the grantee has made valuable improvements they may be set off against the rental value of the land, but the grantor is not liable for any excess. Sewell v. Sewell, 92 Ky. 500.

92. Sewell v. Sewell, 92 Ky. 500.

93. Craig v. Van Bebber, 100 Mo. 584.

94. Morrill v. Aden, 19 Vt. 505. And see Heath v. West, 8 Fost. 101; Shipman v. Horton, 17 Conn. 481; Edgarton v. Wolf, 6 Gray, 453.

contract, and things placed *in statu quo* when the contract is rescinded; for courts are very reluctant to allow the infant to use his privilege as a means of defrauding others, at the same time that they resent all efforts of adults to impose fraudulently upon him.[95] The rule is based on the principle that the infant is possessed of property which, in equity and good conscience, he may not retain after he disaffirms.[96] He must do equity if he seeks equitable relief.[97] It follows that a grantor of real estate cannot defeat the right of the infant to disaffirm the transaction by refusing to accept a reconveyance.[98] No action can usually be maintained against him if after majority he sells goods which he bough while a minor but does not pay for,[99] but a creditor may replevin the goods sold under a disaffirmed contract.[1]

§ 1052. Avoidance Through Agents, &c.

It has been said that all acts done by an infant through an agent's intervention are void; but they are (in many instances at

95. Whether a minor who deals with an adult whom he fraudulently induces to think him of full age is estopped from avoiding the transaction for infancy, see Baker v. Stone, 136 Mass. 405; § 1032. If an infant retains the property, the adult cannot recoup its use during minority against the price demanded. McCarthy v. Henderson, 138 Mass. 310. Some of the latest cases lay much stress upon the inherent fairness or unfairness of a transaction, where one party or the other tries to recover his consideration. See Johnson v. Mutual Life Co. (1894), Minn. If an infant advanced money on his voidable contract, it is lost to him when he rescinds, unless fraudulently obtained from him. Chicago Life Association v. Hunt, 127 Ill. 259. He cannot at all events rescind without returning what he received, so far as it remains. Bloomer v. Nolan, 36 Neb. 51; Nanny v. Allen, 77 Tex. 240, 301; Harvey v. Briggs, 68 Miss. 60; Evans v. Morgan, 69 Miss. 328. But if the property was injured while in his keeping, he is not liable by the adult standard of bailment. Stack v. Cavanaugh (1894), N. H.

96. Gannon v. Manning, 42 App. D. C. 206.

97. Gruba v. Chapman (S. D.), 153 N. W. 929.

98. Evants v. Taylor, 18 N. M. 371, 137 P. 583, 50 L. R. A. (N. S.) 1113.

99. Where an infant vendee of personal property has sold to a third person, the vendor, who retains possession against such vendee, cannot defend an action of trover brought by such second vendee on the ground of the original grantee's infancy. Elder v. Woodruff, etc., Co., 9 Ga. App. 484, 71 S. E. 806; Lamkin & Foster v. Ledoux, 101 Me. 581, 64 A. 1048.

The infant is not liable for conversion where he spends the amount received and afterwards disaffirms. Drude v. Curtis, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755. See also, to the same effect, Stone v. Rabinowitz, 45 Misc. 405, 90 N. Y. S. 301.

1. Robinson v. Berry, 93 Me. 320, 45 A. 34.

But he cannot bring replevin and recover a money verdict where the infant no longer has the goods. Kay v. Haupt, 63 Pa. Super. Ct. 16.

least) rather to be regarded as voidable.[2] The rescission of a minor's contract as to personal property or his person, then, by means of an agent whom he employs, should not be pronounced void, if not plainly to the infant's prejudice, nor set up in defence by the adult with whom he contracted. And where an infant, with his father's assent, sent an attorney at law to repudiate his purchase for him, instead of repudiating personally, the adult, in a recent case, was not permitted to dispute this disaffirmance as illegally made.[3] His voidable act may be also disaffirmed for him by his guardian in some cases.[4]

§ 1053. Ratification, &c., as to Infant Married Spouse.

Since a married woman conveys her lands by force of statute provisions, perplexing questions may arise as to the effect of a conveyance executed in conformity with late acts, yet ineffectual because of her infancy.[5] It would appear from some late American cases, that the wife still continuing covert after becoming of age, acts which might constitute ratification in ordinary cases may not always be set up against her.[6] That her husband prevented her from disaffirming upon her majority is a good excuse for her delay while he lived.[7] On the other hand it has been held that when a deed is disaffirmed because of the wife's minority it is avoided as

2. *Supra*, § 1012. See Sawyer v. Northan, 112 N. C. 261.

3. Towle v. Dresser, 73 Me. 252. Especially, as the authority of the agent was not especially objected to when the notice was given and the demand made upon the adult. *Ib.*

4. Benson v. Tucker, 212 Mass. 60, 98 N. E. 589, 41 L. R. A. (N. S.) 1219.

5. Harbman v. Kendall, 4 Ind. 403.

6. Matherson v. Davis, 2 Cold. 443; Miles v. Lingerman, 24 Ind. 385. The equity doctrine, to argue from the case of marriage settlements, appears to be that the wife may by acts give validity to such deeds, after attaining full age and notwithstanding her coverture. See *supra*, § 1001. Disaffirmance soon after attaining majority is permitted. Scranton v. Stewart, 52 Ind. 69, 92; Thormachlen v. Koeppel, 86 Wis. 378. But a reasonable time after discoverture is allowed an infant wife, as cases now decide the point, though length of time may have intervened. See Schouler, Hus. & Wife, § 178; Sims v. Everhardt, 102 U. S. 300; Wilson v. Branch, 77 Va. 65; Ryman v. Crawford, 86 Ind. 263, 577; Richardson v. Pate, 93 Ind. 423; Stull v. Harris, 51 Ark. 294; *supra*, Part II, ch. XI. Infant husband's conveyance voidable. Barker v. Wilson, 4 Heisk. 268.

Where one is under two disabilities — infancy and coverture — when a cause of action accrues, the statute of limitations will not begin to run until both are removed. North v. James, 61 Miss. 761. But see *contra*, as to suspending the running of the statute, Farish v. Cook, 78 Mo. 212; Ortiz v. De Senavides, 61 Tex. 60.

7. Sims v. Bardoner, 86 Ind. 87.

to the husband who joined her in making it.[8] But a married woman is sometimes estopped by her own acts; as in a case where her equitable interest in land was sold while she was a minor, together with the interests of adult parties, and she received her share of the proceeds some years after attaining majority.[9] It would appear that any affirmance which a wife in a just transaction may make with her husband's acquiescence and her own free consent after reaching majority, will bind her.[10] And her disaffirmance is subject to the usual qualifications applicable to infants in general. Coverture is fast becoming unpopular in these days, and the disabilities of infancy and coverture are at any rate separate and independent; and the mere fact that both occur in connection with the same act does not give to either disability greater force than it would have had separately.[11] Modern legislation may in a sense remove the disability of coverture; but this does not remove the disability of infancy, with its incidental protection.[12]

§ 1054. Rules; How Far Chancery May Elect for the Infant.

By a well-known rule of equity, the proceeds of lands sold during minority retain the character of real estate, and where the personal estate becomes land its original character is likewise retained. And such property remains real or personal still, even after the infant attains majority, so long as there is no act or intent on his part to change its character;[13] but the character ceases when he attains majority, and obtains possession of the proceeds.[14]

A court of chancery, however, as the protector of the young

8. Craig v. Van Bebber, 100 Mo. 584.

9. Anderson v. Mather, 44 N. Y. 249. And see Schmitheimer v. Eiseman, 7 Bush, 298.

10. Sims v. Smith, 99 Ind. 469. And see Ellis v. Alford, 64 Miss. 8; Logan v. Gardner, 136 Pa. St. 588.

11. Logan v. Gardner, 136 Pa. St. 588. Hence, when a woman becomes both discovert and of full age, she may be estopped like any other person, *sui juris*. Logan v. Gardner, 136 Pa. St. 588. Clear disaffirmance of a deed executed during minority should be seasonably made by her, or she may be estopped by her own conduct and laches. Logan v. Gardner, 136 Pa. St. 588. Nor should she retain benefits and yet claim the right to avoid. Bull v. Sevier, 88 Ky. 515. Still less should she, after reaching age, use the consideration in a manner which indicates affirmance and then seek to disaffirm. Buchanan v. Hubbard, 119 Ind. 187.

12. See Cummings v. Everett, 82 Me. 260.

13. Foreman v. Foreman, 7 Barb. 215.

14. Forman v. Marsh, 1 Kern, 544. Upon the death of the infant after such conversion the inheritance or distribution is according to the original character of the property. See Paul v. York, 1 Tenn. Ch. 547.

has an extensive jurisdiction of matters affecting an infant's property rights, and may, upon a full hearing, the infant himself being duly summoned and his rights duly represented, enter a decree which, if procured without fraud or undue injury, will be binding. Of this jurisdiction we have already treated,[15] as also of statutes authorizing sales of an infant's real estate.[16] Infants must be parties to bills in equity, as, for instance, in affecting their title to real estate; and making their guardians parties is not sufficient, as it is generally ruled, without service of process upon the infant himself as the usual publication of notice.[17]

But the practical result must be, wherever chancery jurisdiction is broadly upheld, that the court in many instances, the infant being duly a party to the proceedings, elects for him.[18] The infant's own affirmance of the decree in chancery or under statute, as by accepting and retaining the benefits, delaying procedure to reopen the matter for alleged fraud or other infirmity, is of course a double confirmation.[19]

15. Part IV., chs. 6, 7. But as to "allowing the infant his day" on reaching majority, see next chapter. Jurisdiction of the court over an infant ward is not taken away because the infant is insane. *In re* Edwards, L. R. 10 Ch. D. 605.

16. *Ib.;* Chappell v. Doe, 49 Ala. 153.

17. Tucker v. Bean, 65 Me. 352; Rowland v. Jones, 62 Ala. 322; Cook v. Rogers, 64 Ala. 406; Bonnell v. Holt, 89 Ill. 71; Carver v. Carver, 64 Ind. 195. But see Burrus v. Burrus, 56 Miss. 92; Scott v. Porter, 2 Lea, 224. And as to cancelling a purely personal contract this rule is all the more imperative. Insurance Co. v. Bangs, 103 U. S. Supr. 435. Concerning joinder of guardian, see next chapter.

18. Abney v. Abney, 182 Ala. 213, 62 So. 64.

Chancery may authorize leases for the enhancement of the real estate of infants if manifestly for their interests. Talbot v. Provine, 7 Baxt. 502. As to partition sale held binding, see Cocks v. Simmons, 57 Miss. 183; Scott v. Porter, 2 Lea, 224. As to decree enforcing a vendor's lien, see Cocks v. Simmons, 57 Miss. 183. As to sale for maintenance or better investment, see Sharp v. Findley, 59 Ga. 722; *supra,* Part IV, chs. 6, 7. Chancery may compromise a claim in which infants are interested, even against next friend or guardian *ad litem. In re* Birchall, 16 Ch. D. 41. Or exercise discretion as to selling either realty or personalty, or both. Jones v. Sharp, 9 Heisk. 660. And see Knotts v. Stearns, 91 U. S. 638; Carr v. Branch, 85 Va. 597. Decree sustained, notwithstanding the birth of a posthumous child not considered when the sale was ordered. *Ib.* See also Goodman v. Winter, 64 Ala. 410.

19. Walker v. Mulvean, 76 Ill. 18; Corwin v. Shoup, 76 Ill. 246. See further, as to the binding effect of decrees and judgments, next chapter.

CHAPTER VI.

ACTIONS BY AND AGAINST INFANTS.

§ 1055. Actions at Law by Infants; Suit or Defence by Next Friend or Guardian.

It is a fundamental principle that the rights of property shall vest in infants, notwithstanding their tender years; and incidentally thereto they have the right of action. Yet it is clear that if the infant be unfit to make a contract he is unfit to sue on his own behalf. Hence is the rule that while process is sued out in the infant's own name, it is in his name by another; that is to say, some person of full age must conduct the suit for him. The same principle applies to all civil actions, whether founded on a contract or not.

At common law, infants could neither sue nor defend, except by guardian. They were authorized, by Stat. Westm. 1, to sue by *prochein ami* (or next friend) against the guardian in chivalry who had aliened any portion of the infant's inheritance.[20] Stat. Westm. 2, ch. 15, extended this privilege to all other cases where they could not sue formerly. Lord Coke lays down that, since these statutes, the infant shall sue by *prochein ami* and defend by guardian.[21] And Fitzherbert is to the same effect.[22] But Mr. Hargrave thinks it probable that Fitzherbert and Lord Coke did not mean to exclude the election of suing either by *procheim ami* or by guardian.[23] And whether they did or not, guardianship at the present day, so unlike guardianship as they understood it, justifies the modern practice; which is to appoint a special person as *prochein ami* only in case of necessity, where an infant is to sue his guardian, or the guardian will not sue for him, or it is im-

20. Macphers. Inf. 13, 352.
21. 2 Inst. 261, 390; Co. Litt. 135b; 3 Robinson's Pract. 229.
22. F. N. B. (27) H.
23. Harg. *n.* Co. Litt. 135b.

proper that the guardian should be the *prochein ami.* In other cases, the rule is to sue by guardian or *prochein ami,*[24] or, under

24. Sandeen v. Tschider, 205 F. 252, 123 C. C. A. 456. Though not technically a party, the next friend is really such in the view of the statutes and in practice. Swoope v. Swoope, 173 Ala. 157, 55 So. 418. But see Slafter v. Savage (Vt.), 95 A. 790; Truman Cooperage Co. v. Shelton (Ark.) 207 S. W. 42; Nashville, etc., Co. v. Barefield, 93 Ark. 353, 24 S. W. 758; Parker v. Wilson, 98 Ark. 553, 136 S. W. 981 (stay of judgment granted, 99 Ark. 344, 137 S. W. 926); Watts v. Hicks, 178 S. W. 924; Bukley v. Collins, 177 S. W. 920; Toomer v. Fourth Nat. Bank of Jacksonville, 67 So. 225; Linder v. Brown, 137 Ga. 352, 73 S. E. 734; Hurst v. Goodwin, 114 Ga. 585, 40 S. E. 764, 88 Am. St. R. 43; Perkins v. Wright, 37 Ind. 27; Winer v. Mast, 146 Ind. 177, 45 N. E. 66; Teeple v. State, 171 Ind. 268, 86 N. E. 49.

Where, after the removal of a minor's next friend, she could not obtain another to act as such, she was permitted to prosecute without a next friend, as a poor person. Wright v. McLarinan, 92 Ind. 103.

A statute providing for the bringing of an action within a certain time after the removal of disabilities does not prevent bringing action by next friend before that time. Edwards v. Beall, 75 Ind. 401; Harrison v. Miller, 87 Kan. 48, 123 P. 854; Guy v. Hansow, 86 Kan. 933, 122 P. 879; Wilson v. Unselt, 12 Bush (Ky.), 215; Hopkins v. Virgin, 11 Bush (Ky.), 677; Eaton v. Eaton, 112 Me. 106, 90 A. 977, 52 L. R. A. (N. S.) 799.

A statute providing that no action shall be maintained on a minor's contract unless ratified after majority does not prevent an action during minority to recover back the consideration of a disaffirmed contract. Hilton v. Shepherd, 92 Me. 160, 42 A. 367; Sick v. Michigan Aid Ass'n, 49 Mich. 50, 12 N. W. 905.

One reason given for the rule is that the appointment is necessary so that the defendant may look to some one who is responsible for costs. Sick v. Michigan, etc., Ass'n, 49 Mich. 50, 12 N. W. 905; Memphis, etc., Co. v. Archer (Miss.), 82 So. 315; Scott v. Royston, 223 Mo. 568, 123 S. W. 454; Jones v. Kansas City, Ft. S. & M. R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. R. 434; Melzner v. Northern Pac. Ry. Co., 46 Mont. 162, 127 P. 146; Clasen v. Pruhs, 69 Feb. 278, 95 N. W. 640; Settle v. Settle, 141 N. C. 553, 54 S. E. 445; Willard v. Mohn, 24 N. D. 390, 139 N. W. 979; Gillette v. Delaware, L. & W. R. Co. (N. J.), 102 A. 673; Heath v. Madock, 81 N. J. Eq. 469, 86 A. 945; Fox v. Interurban St. Ry. Co., 86 N. Y. S. 64, 42 Misc. 538; Gruner v. Ruffner, 110 N. Y. S. 873, 59 Misc. 266; Gruner v. Ruffner, 119 N. Y. S. 942, 134 App. Div. 837 (reh. den., 121 N. Y. S. 1133, 136 App. Div. 945); *In re* Rousos, 119 N. Y. S. 34; First State Bank of Vinita v. Fay (Okla.), 159 P. 505; Hill v. Reed, 23 Okla. 616, 103 P. 855; Everart v. Fischer, 75 Ore. 316, 147 P. 189; Everart v. Fischer, 145 P. 33 (judg. rev. or reh., 75 Ore. 316, 147 P. 189); Ferencz v. Greek Catholic Union, 54 Pa. Super. Ct. 642.

In Rhode Island he may recover during infancy without a guardian or next friend. Vaughn v. Carr (R. I.), 95 A. 569.

Where, after a proceeding in which a guardian *ad litem* acted for an infant defendant, a question arose as to the guaridan's fees, it was held that another guardian should be appointed to act for the infant in that particular matter. Loftis v. Butler (Tenn.), 58 S. W. 886; Race v. Decker (Tex. Civ. App.), 214 S. W. 709; Owen v. Appalachian Power Co., 78 W. Va. 596, 89 S. E. 262 (holding that except in a justice's court a

the civil law, by a tutor *ad hoc*[25] as provided under that law.

An infant cannot prosecute an action either in person or by attorney. This is well settled.[26] But an infant may sue by his next friend though he have a guardian, if the guardian does not dissent.[27] And in some States the choice allowed the infant is still more liberal.[28] Where the disability has been removed under a statute, he may sue as though of age.[29] The rule applies even though the plaintiff is a married woman, if a minor.[30] An infant may contest a will by next friend.[31] Statutes have sometimes provided for the appointment of guardians *ad litem* for infant plaintiffs.[32]

§ 1056. General Rules as to Actions by Next Friend.

If the action is commenced without a next friend, one may be admitted to prosecute on behalf of the infant.[33] Not unfrequently, too, the next friend who brought the suit is removed and another

next friend need not be appointed to prosecute an action for an infant); Claridge v. Crawford, 1 Dowl. & Ry. 13; 3 Robinson's Pract. 230; Younge v. Younge, Cro. Car. 86; Goodwin v. Moore, Cro. Car. 161; Apthorp v. Backus, Kirby, 407; McGiffin v. Stout, Coxe, 92; Blackman v. Davis, 42 Ala. 184; Succession of Becnel, 117 La. 744, 42 So. 256; Becnel v. Stewart, *Id.*

25. Lamkin v. Succession of Filhiol, 123 La. 181, 48 So. 881. But see Lamkin v. Succession of Filhiol, 123 La. 181, 48 So. 88.

26. Cro. Eliz. 424; Cro. Jac. 5; 1 Co. Litt. 135 *b*, Harg. *n.*, 220; Miles v. Boyden, 3 Pick. 213; Clark v. Turner, 1 Root, 200; Mockey v. Gray, 2 Johns. 192; Timmons v. Timmons, 6 Ind. 8; Nicholson v. Wilborn, 13 Ga. 467.

27. Thomas v. Dike, 11 Vt. 273; Robson v. Osborn, 13 Tex. 298.

28. Hooks v. Smith, 18 Ala. 338.

29. Merriman v. Sarlo, 63 Ark. 151, 37 S. W. 879.

30. Hays v. Bowden, 159 Ala. 600, 49 So. 122.

31. Schnee v. Schnee, 61 Kan. 643, 60 P. 738; Campbell v. Fichter, 168 Ind. 645, 81 N. E. 661; Dixon v. Cozine, 118 N. Y. S. 1103 (holding that this cannot be done under the New York statute).

32. The omission to comply with the Arizona statute requiring that the guardian consent to the appointment in writing is not reversible error where the guardian brought and prosecuted the action. Arizona Eastern R. Co. v. Carillo, 17 Ariz. 115, 149 P. 313; Johnston v. Southern Pac. Co., 150 Cal. 535, 89 P. 348; Grosovsky v. Goldenberg, 86 Minn. 378, 90 N. W. 782; Flaherty v. Butte Electric Ry. Co., 40 Mont. 454, 107 P. 416; Muller v. Manhattan Ry. Co., 108 N. Y. S. 852, 124 App. Div. 295; Hill v. Reed, 23 Okla. 616, 103 P. 855; Mitchell v. Cleveland, 76 S. C. 432, 57 S. E. 33; Hiers v. Atlantic Coast Line R. Co., 75 S. C. 311, 55 S. E. 457; Schuyler v. Southern Pac. Co., 109 P. 458 (reh. den. [1910], 37 Utah, 612, 109 P. 1025).

In West Virginia the statute requires the appointment of a guardian *ad litem* before bringing suit, who must accept the appointment and agree to be responsible for costs. Blair v. Henderson, 49 W. Va. 282, 38 S. E. 552; Green v. Appleton Woolen Mills, 155 N. W. 958.

33. A father who sues in his own

appointed, on the ground that it is for the infant's benefit.[34] If the infant attains majority pending the action, the authority of the next friend ceases *ipso facto,* but the action does not abate, and the infant may thereafter prosecute it as an adult.[35] Where an infant has, after bringing suit (not by guardian or next friend), become of age, no amendment, nor appearance of a guardian or next friend is necessary.[36] No infant plaintiff is concluded by a settlement of the case which his next friend makes out of court without a formal judicial sanction.[37] Nor will a settlement in court on a judgment by agreement be permitted to stand which

name for his child's injury cannot be substituted on motion as next friend, because that would be a new action. Orby v. Dowdy (Ark.), 213 S. W. 739; Howell v. American Bridge Co. (Del.), 53 A. 53.

The want of a next friend is cured by verdict. Vale Royal Mfg. Co. v. Bradley, 8 Ga. App. 483, 70 S. E. 36; Royal v. Grant, 5 Ga. App. 643, 63 S. E. 708; Blood v. Harrington, 8 Pick. (Mass.) 552; Smith v. Carney, 127 Mass. 179; Haines v. Oatman, 2 Doug. (Mich.) 430; Eubanks v. McLeod (Miss.), 69 So. 289; Raming v. Metropolitan St. Ry. Co. (Mo.), 50 S. W. 791; Chrisman v. Divinia, 141 Mo. 122, 41 S. W. 920; Power v. Lenoir, 22 Mont. 169, 56 P. 106; Manfull v. Graham, 55 Neb. 645, 76 N. W. 19, 70 Am. St. R. 412; Moore v. Moore, 74 N. J. Eq. 733, 70 A. 684 (holding that a motion to dismiss was not available); Conroy v. Bigg, 109 N. Y. S. 914; Goodfriend v. Robins, 92 N. Y. S. 240; Rook v. Dickinson, 78 N. Y. S. 287, 38 Misc. 690, 11 N. Y. Ann. Cas. 454; Robertson v. Blair, 56 S. C. 96, 34 S. E. 11, 76 Am. St. R. 543.

34. Barwick v. Rackley, 45 Ala. 215; Martin v. Weyman, 26 Tex. 460; Mills v. Humes, 22 Md. 346. As where the next friend refuses to appeal. Dupuy v. Welsford, 28 W. R. 762.

35. Therefore an infant may satisfy a judgment recovered after majority in an action originally by next friend. City, etc., Co. (Cal.), 183 P. 267; Missouri Pac. Ry. Co. v. Leib, 23 Colo. App. 364, 129 P. 569; Flint v. Flint, 3 Boyce (Del.), 155, 82 A. 538; Ohio Valley Tie Co. v. Hayes, 180 Ky. 469, 203 S. W. 193; Bernard v. Pittsburg Coal Co., 137 Mich. 279, 100 N. W. 396, 11 Det. Leg. N. 246; Corbett v. Metropolitan Life Ins. Co., 55 N. Y. S. 775, 37 App. Div. 152; McGarity v. New York City Ry. Co., 101 N. Y. S. 191, 51 Misc. 666; Webb v. Harris, 32 Okla. 491, 121 P. 1082; Johnson v. Alexander (Okla.), 167 P. 989.

Where the trial is after attainment of majority, the want of a next friend when the action was commenced, is not ground for a new trial. Webb v. Harris, 32 Okla. 491, 121 P. 1082; Mahoney v. Park Steel Co., 217 Pa. 20, 66 A. 90; Seigler v. Southern Ry. Co., 85 S. C. 345, 67 S. E. 296; Connor v. Ashley, 57 S. C. 305, 35 S. E. 546; Spell v. William Cameron & Co. (Tex. Civ.), 131 S. W. 637; Slafter v. Savage (Vt.), 95 A. 790.

36. Bell v. Burkhalter, 183 Ala. 527, 62 So. 786; Moore v. Moore, 74 N. J. Eq. 733, 70 A. 684; Bills v. Birkenhalter, 183 Ala. 527, 62 S. 786; Woodman v. Rowe, 59 N. H. 453. See Bryant v. Hilton, 66 Ga. 477, as to amendment of husband's action as next friend after his infant wife becomes of age.

37. Tripp v. Gifford, 155 Mass. 108; O'Donnel v. Broad, 149 Pa. St. 24. Though the next friend be the child's father, it is the same. *Ib.;* § 1035A.

appears collusive to the child's prejudice.[38] The next friend usually has power to receive payment of and satisfy the judgment.[39] But not to compromise it,[40] or to submit it to arbitration.[41] The infant cannot bind himself by a satisfaction, compromise or release.[42] But advantage must be taken by plea in abatement of the infant's suing by attorney, or by application to a judge, or the court, for it is not error after judgment either on verdict or by default.[43] The same rules are frequently applied to a parent who

38. Merchants' Despatch Trans. Co. v. Furthmann, 149 Ill. 73; Tennessee Coal & Iron R. R. Co. v. Hayes, 97 Ala. 201.

39. Where a statute authorizes only the general guardian to receive the property of an infant, the next friend cannot effectively satisfy the judgment. Paskewie v. East St. Louis & Suburban R. Co., 281 Ill. 385, 117 N. E. 1035, L. R. A. 1918C, 52.

The minor will not be bound by the settlement where the judgment is by consent and where the merits of the claim was not considered and no evidence heard. Leslie v. Proctor, etc., Co., 102 Kan. 159, 169 P. 193, L. R. A. 1918C, 55.

It is otherwise where the settlement was made under the direction of the court under a statute authorizing a next friend to settle such claims. Clark v. Southern Can Co., 116 Md. 85, 81 A. 271, 36 L. R. A. (N. S.) 980; Baker v. Pere Marquette R. Co., 142 Mich. 497, 105 N. W. 1116, 12 Det. Leg. N. 780.

The next friend is sometimes required to give bond before receiving payment of the judgment. Parriss v. Jewell, 57 Tex. Civ. App. 199, 122 S. W. 399; State v. Ballinger, 41 Wash. 23, 82 P. 1018. But see Collins v. Gillespey, 148 Ala. 558, 41 So. 930 (holding that only the general guardian has such authority).

40. A court of chancery has power to authorize the settlement of a proceeding by a minor to contest a will, upon terms which, in the opinion of the court, are advantageous to the minor. Williams v. Williams, 204 Ill. 44, 68 N. E. 449; McGillvray v. Employers' Liability Assurance Co., 214 Mass. 484, 102 N. E. 77, 46 L. R. A. (N. S.) 110; Beliveau v. Amoskeag Mfg. Co., 68 N. H. 225, 40 A. 734, 44 L. R. A. 167, 73 Am. St. R. 577; State v. Ballinger, 41 Wash. 23, 82 P. 1018.

41. Millsaps v. Estes, 134 N. C. 486, 46 S. E. 988.

42. Arizona Eastern R. Co. v. Carillo, 17 Ariz. 115, 149 P. 313; Pittsburg C. C. & St. L. Ry. Co. v. Healey, 170 Ill. 610, 48 N. E. 920; Interstate Coal Co. v. Trivett, 155 Ky. 825, 160 S. W. 728; Interstate Coal Co. v. Love, 153 Ky. 323, 155 S. W. 746.

But where it appears that the sum received is adequate, he may only recover nominal damages on an action to disaffirm the settlement. Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88.

In Michigan it is held that where the infant makes such a settlement it is voidable only, and that he cannot disaffirm it during minority and sue for his injuries. Lansing v. Michigan Cent. R. Co., 126 Mich. 663, 86 N. W. 147, 8 Det. Leg. N. 183, 86 Am. St. R. 567; Theriualt v. Breton, 114 Me. 137, 95 A. 699; Hollinger v. York Rys. Co., 225 Pa. 419, 74 A. 344; Turney v. Mobile & O. R. Co., 127 Tenn. 673, 156 S. W. 1085.

43. 2 Saund. Pleading, 207; Bird v. Pegg, 5 B. & Ald. 418; Finley v. Jowle, 13 East, 6; Apthorp v. Backus, Kirby, 407. But as to the infant himself, see Bird v. Pegg; Jones v. Steele, 36 Mo. 324. He may repudiate the judgment if entered against him. Hicks v. Beam, 112 N. C. 642.

sues on behalf of minor children, but not as guardian or next friend. Where infancy of the plaintiff is pleaded in abatement to a suit brought by a minor in his own name without any guardian or next friend, the court may allow the infant to amend by inserting in his writ that he sues by A., his next friend.[44] Nor does this rule deprive the infant of the professional services of an attorney; it relates to the parties to the suit.[45] The judgment becomes upon him if entered after his majority.[46] If the action is properly brought and prosecuted the infant is bound by the judgment as an adult would be,[47] but he is not bound by an adverse judgment in an action commenced without a guardian or next friend.[48]

§ 1057. Powers, Qualifications and Duties of Next Friend.

Generally speaking, when an action is brought by an infant, he sues in his own name by a certain person as next friend. A *prochein ami,* commencing his authority with the writ and declaration, can only maintain the suit for such causes of action as may be prosecuted without special demand; as for personal injuries done to the infant, or for sums of money where the writ itself is considered as the demand.[49] In England, it was considered that the special admission of a guardian for an infant to appear in one case would serve for others.[50] But the modern rule is that the special admission of *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.[51] Sometimes there will be an advantage in suing by guardian if this can legally be done.[52] In any event, the interests of the person who sues as guardian or next friend must not be hostile to that of the infant.[53]

The guardian, like the *prochein ami,* is, in English practice, appointed by the court before the plaintiff can proceed in the action, and no legal right of parentage or of guardianship will enable any one to act for the infant without such appointment.[54] But where

44. Blood v. Harrington, 8 Pick. 552.

45. People v. New York, 11 Wend. 164.

46. Hicks v. Bean, 112 N. C. 642.

47. McCreary v. Creighton, 76 Neb. 179, 107 N. W. 240.

48. Di Meglio v. Baltimore & O. R. Co. (Del.), 74 A. 558.

49. Miles v. Boyden, 3 Pick. 219.

50. Archer v. Frowde, 1 Stra. 304.

51. 2 Saund. Plead. 207; Macphers. Inf. 353.

52. 3 Robinson's Pract. 229.

53. George v. High, 85 N. C. 113; Patterson v. Pullman, 104 Ill. 80.

54. Macphers. Inf. 353.

the infant's father, being a necessary witness, could not properly be *prochein ami* in a certain suit, the court, on motion, appointed a friend of the family with the father's concurrence.[55] And the father's natural right to represent his child as next friend is to be respected,[56] though he does not describe himself as next friend.[57] No authority from the infant to the guardian or *prochein ami* to sue is necessary, though the infant be on the very eve of majority; but it is intimated that the court might interfere if fraud were shown.[58] An action to recover money or personal property belonging to an infant may be brought in the infant's name by his next friend, though he has a general guardian.[59] As the *prochein ami* is an officer of the court, if the infant wishes him removed he must apply to the court for that purpose, and an entry of the change should be made of record.[60] But on the plaintiff coming of age, he may, it seems, remove the *prochein ami* of his own authority, and appear thereafter by his own attorney.[61]

While, in theory, however, the *prochein ami* is still legally appointed by the court, such formalities are now, in practice, very generally waived. In Connecticut, Rhode Island, Massachu-

55. Claridge v. Crawford, 1 Dowl. & Ry. 13.

56. Woolf v. Pemberton, 6 Ch. D. 19. See Strong v. Marcy, 33 Kan. 109.

57. *In re* Brackey's Estate, 147 N. W. 188.

By statute in Louisana a father may sue on behalf of his infant child without joining the mother. Scarborough v. Louisana Ry. & Nav Co. (La.), 82 So. 286; Williams v. Pope Mfg. Co., 52 La. Ann. 1417, 27 So. 851, 50 L. R. A. 816.

The same has been permitted where the person acting for the infant styles himself guardian *ad litem*, if it appears that he is really acting as next friend. Ætna Indemnity Co. v. State (Miss.), 57 So. 980; Donald v. City of Ballard, 34 Wash. 576, 76 P. 80 (holding that the father of an infant might sue as guardian *ad litem*).

58. Morgan v. Thorne, 9 Dowl. 228. And see Barwick v. Rackley, 45 Ala. 215.

59. Segelken v. Meyer, 94 N. C. 473.

60. Davies v. Locket, 4 Taunt. 765; Morgan v. Thorne, *supra*.

61. See Bac. Abr., Infant, K. 2; Patton v. Furthmier, 16 Kan. 29.

Dismissal of action by next friend for infant, because not for the infant's interest. Bull v. Miller, 59 Ia. 634 (code). And see dismissal of suit brought without leave of court where the next friend's interest is adverse to the infant. Patterson v. Pullman, 104 Ill. 80. Local codes furnish their respective rules of practice; and statute formalities should be carefully observed. But special averments of infancy, etc., are not commonly required. Dodd v. Moore, 91 Ind. 522. And see as to form G. C. & S. F. Ry. Co. v. Styron, 66 Tex. 421.

Whether an infant or his next friend can sue *in forma pauperis*, see Cargle v. Railroad Co., 7 Lea, 717; Wright v. McLarinan, 92 Ind. 103; 13 Abb. (N. Y.) N. Cas. 182. A bond under some codes is required of the next friend. Pace v. Pace, 19 Fla. 438. As to actions brought in the

setts, Virginia, and other States, no entry of record is required admitting a person to sue as guardian or next friend, the recital in the writ and count being deemed sufficient evidence of admission unless seasonably challenged by the opposite party, when the order may be supplied, or the court on its discretion may remove the party.[62] In New York, on the other hand, a *prochein ami* must be appointed for the infant plaintiff before process is sued out; and such is the practice in some other parts of this country.[63] In some States it is deemed proper to prove infancy in advance, and hence the right to sue by next friend.[64]

So, too, in this country, more deference seems to be shown to the infant's wishes than in England. Thus, in Massachusetts, the court, on the personal petition of a minor twenty years of age, withdrew the authority of the *prochein ami,* and ordered all further proceedings in the suit postponed until the minor should attain full years.[65] In the choice of a guardian and *prochein ami,* a minor above fourteen has much latitude of discretion; and when he attains full age he may enter the fact upon record, and without further formality proceed to conduct the suit for himself.[66]

name of the State, see Albert v. State, 66 Md. 325.

62. Gillespie v. Collier, 224 F. 298, 139 C. C. A. 534.

A recital in the judgment for an infant plaintiff that the action of the next friend in suing was ratified cures the omission of an order appointing the next friend. Gillespie v. Collier, 224 F. 298, 139 C. C. A. 534; Swoope v. Swoope, 173 Ala. 157, S. W. 418.

In Arkansas by statute the next friend is under the control of the court, which may dismiss him and substitute another. Nashville, etc., Co. v. Barefield, 93 Ark. 353, 124 S. W. 758. The same rules obtains in Alabama. Swoope v. Swoope, 173 Ala. 157, 55 S. 418.

It is otherwise where a foreign guardian, not qualified to sue in the forum, brings a suit for the minor, when an amendment appointing a next friend may be allowed by the court. St. Louis I. M. & S. Ry. Co. v. Haist, 71 Ark. 258, 72 S. W. 893, 100 Am. St. R. 65; Butler v. Winchester Home for Aged Women, 216 Mass. 567, 104 N. E. 45. And seemingly it may be necessary where the infants appoint none of their own. Sick v. Michigan, etc., Ass'n, 49 Mich. 50, 12 N. W. 905. See Guild v. Cranston, 8 Cush. 506: Boynton v. Clay, 58 Me. 236; Burwell v. Corbin, 1 Rand. 151; 3 Robinson's Pract. 230; Trask v. Stone, 7 Mass. 241; Judson v. Blanchard, 3 Conn. 579; Klaus v. State, 54 Miss. 644. And see Stumps v. Kelley, 22 Ill. 140; Gray v. Parke, 155 Mass. 443; Murray v. Barber, 16 R. I. 512. The authority of next friend continues, though without appointment, until the court removes him. Commonwealth v. Vieth, 155 Mass. 443.

63. Wilder v. Ember, 12 Wend. 191; Haines v. Oatman, 2 Doug. 430; Grantman v. Thrall, 44 Barb. 173.

64. Byers v. Des Moines, etc., R. R. Co., 21 Ia. 54.

65. Guild v. Cranston, 8 Cush. 506.

66. Clark v. Watson, 2 Ind. 399; Shuttlesworth v. Hughey, 6 Rich. 329.

Where an infant has brought an action by his next friend, and has recovered damages which have been received by the attorney, the money is the money of the infant, and he may sue the attorney for it.[67] The codes of some States require payment of the amount recovered into court, until a guardian is appointed to hold the fund. Upon a writ of error the court may in its discretion select another next friend for the minor.[68]

A *prochein ami* is liable for costs, and the remedy is against his for attachment, which should be absolute in the first instance.[69] This is the English practice. It would appear that execution cannot issue against the infant himself; and this from the very circumstance that the next friend is, in theory, one who comes forward to assume all such liabilities.[70] But in conformity with statutes in Massachusetts, it is held that a *prochein ami*, as such, is not liable for costs;[71] nor does he seem to be always stirctly considered in our courts a party to the suit;[72] and the infant plaintiff is made liable for his own costs.[73]

§ 1058. Action at Law Against Infant; the Guardian ad Litem.

An infant can appear and defend in civil suits by guardian only, and not by attorney, or in person.[74] An appearance by attorney merely does not bind him.[75] He cannot answer by next

67. Collins v. Brook, 4 Hurl. & Nor. 276. And see Smith v. Redus, 9 Ala. 99.

68. Ames v. Ames, 148 Ill. 321.

69. Newton v. London, Brighton, etc., R. R. Co., 7 Dow. & L. 328 (1849); Dow v. Clark, 2 Dowl. 302. See Price v. Duggan, 4 Man. & Gr. 225.

70. *Ib.;* Stephenson v. Stephenson, 3 Hey. 123; Perryman v. Burgster, 6 Port. (Ala.), 199; Sproule v. Botts, 5 J. J. Marsh. 162. But see Proudfoot v. Poile, 3 Dow. & L. 524; Macphers. Inf. 356, 357, and cases cited. As to practice under New York Code, see Linner v. Crouse, 61 Barb. 289. As to the infant's own testimony of age in such suits, see Hill v. Eldridge, 126 Mass. 234.

71. Crandall v. Slaid, 11 Met. 288.

72. Brown v. Hull, 16 Vt. 673.

73. Howett v. Alexander, 1 Dev. 431; Smith v. Floyd, 1 Pick. 275. Cf. statutes of other States. Kleffel v. Bullock, 8 Neb. 336.

74. Edwards v. Edwards, 142 Ala. 267, 39 S. 82; Williamson v. Grider, 97 Ark. 588, 135 S. W. 361; Dudley v. Dudley, 126 Ark. 182, 189 S. W. 838; Nunn v. Robertson, 80 Ark. 350, 97 S. W. 293; Blanton v. Davis, 107 Ark. 1, 154 S. W. 947; Wheelock v. Lake, 117 Mich. 11, 75 N. W. 140, 5 Det. Leg. N. 119; Mitchell v. Spaulding, 206 Pa. 220, 55 A. 968; Manning v. Baylinson, 68 Pa. Super. Ct. 512; Co. Litt. 88 *b*, *n.* 16, 135 *b;* 2 Stra. 784; Macphers. Inf. 358; Alderman v. Tirrell, 8 Johns. 418; Knapp v. Crosby, 1 Mass. 479; Miles v. Boyden, 3 Pick. 213; Bedell v. Lewis, 4 J. J. Marsh. 562; Starbird v. Moore, 21 Vt. 529.

75. Tubbs v. Tubbs, 250 Ill. 540, 95 N. E. 479; Thurston v. Tubbs, 250

friend.[76] The process is the same against an infant as in ordinary cases; but he needs some one to conduct his defence, and hence every court, wherein an infant is sued, has power to appoint a guardian *ad litem* for the special purposes of the suit, since otherwise he might be without assistance.[77] Under the civil law, the

Ill. 540, 95 N. E. 479; Spahr v. Dickson, 67 Ind. 394; Copeland v. Yoakum's Adm'r, 38 Mo. 349.

Under a Missouri statute providing that no judgment shall be impaired by reason of the appearance of any party by attorney, if the judgment was for him, it was held that an original appearance of minors by attorney was cured after judgment for them. Chrisman v. Divinia, 141 Mo. 122, 41 S. W. 920; (1909) Hope v. Seaman, 119 N. Y. S. 713 (judg. mod., Same v. Shevill [1910], 122 N. Y. S. 127, 137 App. Div. 86). But see Gamache v. Provost, 71 Mo. 84.

76. Bush v. Linthicum, 59 Md. 344.

77. Shehane v. Caraway, 154 Ala. 391, 45 So. 469; Sibeck v. McTiernan, 94 Ark. 1, 125 S. W. 136; *In re* Snowball's Estate, 156 Cal. 235, 104 P. 446; Bancroft v. Bancroft (Del.), 85 A. 561; Parrish v. Haas (Fla.), 67 So. 868; Burnett v. Summerlin, 110 Ga. 349, 35 S. E. 655; Douglas v. Johnson, 130 Ga. 472, 60 S. E. 1041; (1911) Thomas v. Thomas, 250 Ill. 354, 95 N. E. 345 (reversing judg., 155 Ill. App. 619); Flynn v. Flynn, 283 Ill. 206, 119 N. E. 304; White v. Kilmartin, 205 Ill. 525, 68 N. E. 1086; Thurston v. Tubbs, 250 Ill. 540, 95 N. E. 479; Mechling v. Meyers (Ill.), 120 N. E. 542; Phillips v. Phillips, 185 Ill. 629, 57 N. E. 796; Simpson v. Simpson, 273 Ill. 90, 112 N. E. 276; Gibbs v. Potter, 166 Ind. 471, 77 N. E. 942; Rice v. Bolton, 126 Ia. 654, 100 N. W. 634, 102 N. W. 509; Wise v. Schloesser, 111 Ia. 16, 82 N. W. 439; Earl v. Cotton, 78 Kan. 405, 96 P. 348; Tichenor v. Yankee, 89 Ky. 508, 12 S. W. 947, 11 Ky. Law Rep. 712; Adams v. De Dominguez, 129 Ky. 599, 112 S. W. 663; Whalen v. Hopper's Guardian, 152 Ky. 727, 154 S. W. 40.

In the absence of express legislative requirement, it is not necessary to have a guardian *ad litem* appointed for infants interested in a trust estate prior to the determination of an application by the trustees to borrow money on mortgage of the trust property for the benefit of the estate, as authorized by Rev. Laws 1902, ch. 147, § 18. Warren v. Pazolt, 203 Mass. 328, 89 N. E. 381; Easton v. Eaton, 112 Me. 106, 90 A. 977, 52 L. R. A. (N. S.) 799.

The rule has been applied to a bastardy proceeding against an infant. Easton v. Eaton, 112 Me. 106, 90 A. 977, 52 L. R. A. (N. S.) 799; Chapman v. Barnes, 1 Bland. (Md.) 552; Haines v. Oatman, 2 Doug. (Mich.) 430; Calhoun v. Cracknell (Mich.), 168 N. W. 547.

Who shall represent a minor in an action is a matter wholly of procedure, and the laws of the place of action, not the laws of domicile of the minor or his parent, control. Brunette v. Minneapolis, St. P. & S. S. M. Ry. Co., 118 Minn. 444, 137 N. W. 172; Northern Scruggs (Miss.), 79 So. 227; Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968; Bunting v. Bunting, 87 N. J. Eq. 20, 99 A. 840; *In re* Cooper's Estate, 2 How. Prac. (N. Y.) 38; Kindgen v. Craig, 147 N. Y. S. 571, 162 App. Div. 508; Fishbein v. Fishbein, 165 N. Y. S. 936; (1909) Hope v. Seaman, 119 N. Y. S. 713 (judg. mod., Same v. Shevill [1910], 122 N. Y. S. 127, 137 App. Div. 86), *In re* Rousos, 119 N. Y. S. 34.

Where no such guardian is appointed, the infant cannot be in contempt for failure to obey an order.

court appoints a tutor *ad hoc.*[78] The court should do this *ex mero motu* wherever necessary.[79] The appointment should be by formal order.[80] The infant cannot nominate an attorney, nor by accepting service make himself a party to the action.[81] It is not sufficient for a proper defence and a binding judgment against the infant that his parents in fact represented him and employed counsel.[82] A guardian *ad litem* is one appointed for the infant to defend in the particular action brought against him, and is therefore to be distinguished from guardians of the person and estate.[83] If there be a general chancery, probate, or testamentary guardian

Gross v. Gross, 112 N. Y. S. 790, 128 App. Div. 429.

A guardian *ad litem* is an arm of the court extended to protect the minor who is incapacitated to look after his own interests. American Inv. Co. v. Brewer (Okla.), 181 P. 294; Mitchell v. Spaulding, 206 Pa. 220, 55 A. 968; Chapman v. Turberville, 4 Hen. & M. (Va.) 482; Turner v. Barraud, 102 Va. 324, 46 S. E. 318; Sears v. Duling, 77 Vt. 496, 61 A. 518; Burke v. Northern Pac. Ry. Co., 86 Wash. 37, 149 P. 335; Stewart v. Parr, 74 W. Va. 327, 82 S. E. 259; Alexander v. Davis, 42 W. Va. 465, 26 S. E. 291.

The infant and not the guardian is the defendant. Stewart v. Parr, 74 W. Va. 327, 82 S. E. 259.

The rule stated in the text has been applied even where the infant had a general guardian who was a party to the action. Ponti v. Hoffman, 87 Wash. 137, 151 P. 249; (1908) *In re* McNaughton's Will, 118 N. W. 997; Frame v. Plumb, *Id.* (affd. reh., 138 Wis. 179, 120 N. W. 288; Grauman, Marx & Cline Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50; Hubbard v. Chicago, etc., R. Co., 104 Wis. 160, 80 N. W. 454, 76 Am. St. R. 855; Bac. Abr., Guardian, B. 4

78. Gates v. Bank of Patterson, 116 La. 539, 40 So. 891; *In re* Interstate Land Co., 118 La. 587, 43 So. 173; Interstate Land Co. v. Doyle, *Id.*; Gilbert v. Mazeratt, 121 La. 35, 46 S. 47; *In re* Bank of Patterson, *Id.*

An infant wife, being emancipated from the disability of infancy by marriage, does not need a tutor to defend a proceeding for annulment of the marriage where the ground of dissolution is relative and not absolute. Delpit v. Young, 51 La. Ann. 923, 25 So. 547.

79. Mason v. Truitt, 257 Ill. 18, 100 N. E. 202; Sheahan v. Wayne Circuit Judge, 42 Mich. 69, 3 N. W. 259; Jones v. Hudson (Neb.), 141 N. W. 141, 44 L. R. A. (N. S.) 1182, 93 Neb. 561; Bunting v. Bunting, 87 N. J. Eq. 20, 99 A. 840.

The duty extends to cases where a guardian *ad litem* is appointed, but fails to perform his duty. Bolling v. Campbell, 36 Okla. 671, 128 P. 1091; Same v. Gibson, *Id.* 1093.

80. Where a guardian *ad litem* had been formally appointed for certain infant contestants of an allowance to trustees, the action of the court in recognizing him as guardian *ad litem* for other contestants was held a sufficient appointment for that matter. Johnston v. Moeller (Conn.), 107 A. 566.

The absence of an order is not fatal, where the fact is otherwise shown by the record. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424; Alexander v. Davis, 42 W. Va. 465, 26 S. E. 291.

81. Finley v. Robertson, 17 S. C. 435; McClosky v. Sweeney, 66 Cal. 53.

82. Johnson v. Waterhouse, 152 Mass. 585.

83. Larkin v. Mann, 2 Paige, 27;

already appointed, it is his place, generally speaking, to defend the infant from all suits, so long as his authority over the infant's property continues and his interest is not adverse in the suit; this being, however, a matter usually regulated in this country by statute.[84] This guardian ought to be a person with no interests to regard except those of the infant defendant;[85] he should have no interest adverse to the party he appears for.

What has been observed of the appointment of *prochein ami* may be said, in general, of that of the guardian *ad litem*. The two correspond, and the principles of law applicable to the one are in general to be applied to the other.[86] In a criminal case no guardian *ad litem* is appointed. But in a civil case proceedings against an infant are liable to be reversed and set aside for irregularity, where no guardian *ad litem* has been appointed for him, unless, perhaps, his regular guardian having no adverse interest has appeared in his defence; and process must, besides, have been first regularly served upon the infant; though in this latter respect the rule of the several States is not uniform.[87] Ir-

Roberts v. Stanton, 2 Munf. 129; Bac. Abr., Guardian, *supra*, cases cited by Bouvier.

84. See Hughes v. Seller, 34 Ind. 337; Emeric v. Alvarado, 64 Cal. 529; Manx v. Rowlands, 59 Wis. 110. See McMakin v. Stratton, 82 Ky. 226. Under various practice codes, infants should be specially defended by a guardian *ad litem*, and not by the general guardian. Bearinger v. Pelton, 78 Mid. 109; Vaughan v. Lewellyn, 94 N. C. 473.

85. Hence the plaintiff's husband should not be appointed. Bicknell v. Bicknell, 72 N. C. 127.

86. See Macphers. Inf. 358.

87. See Abdil v. Abdil, 26 Ind. 287; Jarman v. Lucas, 15 C. B. (N. S.) 474; Frierson v. Travis, 39 Ala. 150; Larkins v. Bullard, 88 N. C. 35. In some States it is required by statute that process shall be served upon the infant defendant personally, also upon his father, mother, or guardian. Ingersoll v. Ingersoll, 42 Miss. 155; Irwin v. Irwin, 57 Ala. 614; Helms v. Chadbourne, 45 Wis. 60. Service on the guardian *ad litem* (as well as the infant), is indispensable to his appearance in New York practice. Ingersoll v. Mangam, 84 N. Y. 622. See also Johnston v. S. F. Sav. Union, 63 Cal. 554; Gibbons v. McDermott, 19 Fla. 852; Brown v. Downing, 137 Pa. St. 569. Only personal service gives jurisdiction of a suit against an infant; and acceptance of service is no equivalent. Genobles v. West, 23 S. C. 154, 187; Young v. Young, 91 N. C. 359. A judgment rendered against a minor without the appointment of a guardian *ad litem* is not void, but rather voidable. Walkenhorst v. Lewis, 24 Kan. 420; Charley v. Kelley, 120 Mo. 135; Eisenmenger v. Murphy, 42 Minn. 84; Clark v. Hillis, 134 Ind. 421. Some local statutes provide for the infant's modification of a judgment against him within a year after arriving at age. Richards v. Richards, 10 Bush, 617. But the judgment is *prima facie* correct, and errors must be prejudicial to the infant's interest in order to be thus availed of. Richards v. Richards, 10 Bush, 617. An infant may appeal from a judgment against him, or have

regularities of procedure or delay in the appointment are often cured by the judgment; and even though the judgment be voidable, lapse of time and laches on the part of an infant after reaching majority may leave him altogether without an opportunity to set the judgment aside, especially if no prejudice has resulted, as in the usual case of his voidable transactions.[88] Some courts hold that the appointment of a guardian *ad litem* for an infant defendant is a jurisdictional fact, the want of which will render the judgment void and open to collateral attack,[89] but the weight of authority favors the view that the omission is mere reversible error, not rendering the judgment void.[90] In this view of the

is reversed for error, at any time during minority without waiting for his majority. Moss v. Hall, 79 Ky. 40. Judgments at law are voidable, not void. § 1015; England v. Garner, 90 N. C. 197. Even where it does not appear that a guardian *ad litem* appeared. Emeric v. Alvarado, 64 Cal. 529. Some courts pronounce judgments void, under local practice, where clearly prejudicial to the infant, if the formalities of service and defence by guardian are omitted. See Brown v. Downing, 137 Pa. St. 569. But the mere omission to appoint before bringing suit is not a jurisdictional defect, but an irregularity merely. Rima v. R. I. Works, 120 N. Y. 433.

The court's jurisdiction to appoint is not impaired by the guardian's erroneous acts after appointment. Maloney v. Dewey, 127 Ill. 395. And see Batchelder v. Baker, 79 Cal. 266. The guardian may appeal on the infant's behalf. Thomas v. Levering, 73 Md. 451.

Statutes sometimes provide that proceedings against non-resident defendants (infants included) may be by publication. Bryan v. Kennett, 113 U. S. 179.

88. See Townsend v. Cox, 45 Mo. 401; Barnard v. Heydrick, 49 Barb. 62; McMurray v. McMurray, 60 Barb. 117; Wickersham v. Timmons, 49 Ia. 267; Maples v. Maples, 3 Houst. 458.

89. Burnett v. Summerlin, 110 Ga. 349, 35 S. E. 655; Hulsewede v. Churchman's Ex'x, 111 Ky. 51, 63 S. W. 1, 23 Ky. Law Rep. 487; M. M. Sanders & Son v. Schilling, 123 La. 1009, 49 So. 689; Prince v. Clark, 81 Mich. 167, 45 N. W. 663; Wells v. Wells, 144 Mo. 198, 45 S. W. 1095; Weaver v. Glenn, 104 Va. 443, 51 S. E 835; Horton v. Barto, 57 Wash. 477, 107 P. 191; Hays v. Camden's Heirs, 38 W. Va. 109, 18 S. E. 461; O'Dell v. Rogers, 44 Wis. 136; Hubbard v. Chicago & N. W. Ry. Co., 104 Wis. 160, 80 N. W. 454, 76 Am. St. R. 855.

90. Conway v. Clark, 177 Ala. 99, 58 So. 441; Edwards v. Edwards, 142 Ala. 267, 39 So. 82; Dudley v. Dudley, 126 Ark. 182, 189 S. W. 838; Foley v. California Horseshoe Co., 115 Cal. 184, 47 P. 42, 56 Am. St. R. 87; Blake v. Douglass, 27 Ind. 416; Cook v. Edson Keith & Co., 5 Ind. T. 595, 82 S. W. 918; Nels v. Rider (Ia.), 171 N. W. 150; Reints v. Engle, 130 Ia. 726, 107 N. W. 947; Fudge v. Fudge, 23 Kan. 416; Holloway v. McIntosh, 7 Kan. App. 34, 51 P. 963; Carney v. Yocum's Heirs, 176 Ky. 173, 195 S. W. 482; Reynolds v. Steel, 170 Ky. 163, 185 S. W. 820; Harrod v. Harrod, 167 Ky. 308, 180 S. W. 797; Schimpf v. Rohnert, 129 Mich. 103, 88 N. W. 384, 8 Det. Leg. N. 886.

The guardian may be appointed during the trial. Muenkel v. Muenkel (Minn.), 173 N. W. 184; Eubanks v. McLeod, 105 Miss. 826, 63 So. 226; Reineman v. Larkin, 222 Mo. 156, 121

matter the want of an appointment of a guardian *ad litem* is not jurisdictional,[91] so that the judgment will not be open to collateral attack,[92] but it seems agreed that it is reasonable error, if seasonably objected to[93] and that the trial court may set it aside on motion.[94]

The writ and declaration in actions at law against infants are to be made out as in ordinary cases. In English practice, where the defandant neglects to appear, or appears otherwise than by guardian, the plaintiff may apply for and obtain a summons, calling on him to appear by guardian within a given time; otherwise the plaintiff may be at liberty to proceed as in other cases, having

S. W. 307; *In re* Cooper's Estate, 2 How. Prac. (N. Y.) 38; *In re* Jones' Estate, 105 N. Y. S. 932, 54 Misc. 202; *In re* Weed's Estate, 177 N. Y. S. 93; Winterroth v. Cox, 75 Misc. 467, 133 N. Y. S. 445; Anderson v. Anderson, 150 N. Y. S. 359, 164 App. Div. 812; Fox v. Fee, 49 N. Y. S. 292, 24 App. Div. 314; Manning v. Baylinson, 68 Pa. Super. Ct. 512; Murchison Nat Bank v. Reynolds (S. C.), 96 S. E. 521; Wallis v. Stuart, 92 Tex. 568, 50 S. W. 567; Catron v. Bostic (Va.), 96 S. E. 845; Kongsbach v. Casey, 66 Wash. 643, 120 P. 108; Alexander v. Davis, 42 W. Va. 465, 26 S. E. 291; Linn v. Collins, 87 S. E. 934; Curtis v. Deepwater Ry. Co., 68 W. Va. 762, 70 S. E. 776; Grauman v. Marx, etc., Co., 142 Wis. 556, 126 N. W. 50.

91. Conway v. Clark, 177 Ala. 99, 58 S. 441; Trask v. Boise King Placers Co., 26 Ida. 290, 142 P. 1073; Eubanks v. McLeod, 105 Miss. 826, 63 S. 226; Winterroth v. Cox, 75 Misc. 467, 133 N. Y. S. 445; *In re* Jones' Estate, 54 Misc. 202, 105 N. Y. S. 932.

92. Conway v. Clark, 177 Ala. 99, 58 S. 441; Harrod v. Harrod, 167 Ky. 308, 180 S. W. 797; Eubanks v. McLeod, 105 Miss. 826, 63 S. 226; Reineman v. Larkin, 222 Mo. 156, 121 S. W. 307; Grauman, etc., Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50.

93. Edwards v. Edwards, 142 Ala. 267, 39 S. 82; Conway v. Clark, 177 Ala. 99, 58 So. 441; Cowling v. Hill, 69 Ark. 350, 63 S. W. 800, 86 Am. St. R. 200; Linebaugh v. Atwater, 173 Ill. 613, 50 N. E. 1004; White v. Kilmartin, 205 Ill. 525, 68 N. E. 1086; Wise v. Schlosser, 111 Ia. 16, 82 N. W. 439; Daggy v. Miller (Ia.), 162 N. W. 854; State v. Stark (Ia., 1911), 129 N. W. 331; Eaton v. Eaton, 112 Me. 106, 90 A. 977, 52 L. R. A.) N S.) 799; Conto v. Silvia, 170 Mass. 152, 49 N. E. 86; Winteroth v. Cox, 133 N. Y. S. 445, 75 Misc. 467; Cowen v. Ganung, 110 N. Y. S. 470, 58 Misc. 141; Wallis v. Stewart, 92 Tex. 568, 50 S. W. 567; Curtis v. Deepwater Ry. Co., 68 W. Va. 762, 70 S. E. 776; Grauman, etc., Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50; Shelby v. St. James' Orphan Asylum, 66 Neb. 40, 92 N. W. 155.

94. Maryland Casualty Co. v. Lanham, 124 Ga. 859, 53 S. E. 395; *In re* Finck's Estate, 171 N. Y. S. 988; Byrnes v. Byrnes, 96 N. Y. S. 306, 109 App. Div. 535.

In New York by statute the time for making such a motion is limited to two years. Byrnes v. Byrnes, 109 App. Div. 535, 96 N. Y. S. 306; Curtis v. Deepwater Ry. Co., 68 W. Va. 762, 70 S. E. 776; Grauman, etc., Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50.

had a nominal guardian assigned to the infant.[95] A like rule prevails in New York and other States.[96] Courts will go so far for protecting an infant as to see that process is properly served, a guardian *ad litem* appointed for him, and the formal answer filed.[97] An infant defendant is liable to costs in the same manner as any other defendant, notwithstanding he has a guardian.[98]

If an infant comes of age pending the suit, he can assert his rights at once for himself; and unless he does so he cannot generally complain of the acts of his guardian *ad litem*. Where a person is of age and *sui juris*, it is error to appoint a guardian *ad litem*.[99]

§ 1059. Chancery Proceedings by or against Infants; Corresponding Rule.

The same leading principles noticeable in suits at law are to be recognized in equity proceedings by or against infants; and the doctrines of next friend and guardian *ad litem* receive ample discussion in the chancery courts.[1]

Among the miscellaneous matters of chancery practice relating to infants may be mentioned proceedings in partition, orders for maintenance and education, the management of trust funds[2] by

95. The defence of statute of frauds must be regarded as having been pleaded with reference to infant defendants as to whom it might be available, though not in fact pleaded. Willis v. Zorger, 258 Ill. 574, 101 N. E. 963. See Macphers. Inf. 359.

96. Van Deusen v. Brower, 6 Cow. 50; Judson v. Storer, 2 South. 544; Clarke v. Gilmanton, 12 N. H. 515.

97. Alexander v. Frary, 9 Ind. 481.

98. Anderson v. Warde, Dyer, 104; Gardiner v. Holt, Stra. 1217. Macpherson says that the guardian of an infant defendant is subject to the same liability for costs as the *prochein ami*, or the guardian of an infant plaintiff. Macphers. Inf. 361. No authority is given for this statement, and it seems that the guardian of an infant defendant is not liable. See Perryman v. Burgster, 6 Port. (Ala.) 199. Such guardian should at all events be reimbursed all reasonable charges incurred in the case. Smith v. Smith, 69 Ill. 308. A guardian *ad litem* cannot absolutely bind those whom he represents by a contract with an attorney in the suit fixing his compensation. Cole v. Superior Court, 63 Cal. 86. See § 344.

99. Mitchell v. Berry, 1 Met. (Ky.) 602. And see Marshall v. Wing, 50 Me. 62; Stupp v. Holmes, 48 Mo. 89; Bursen v. Goodspeed, 60 Ill. 277; Patton v. Furthmier, 16 Kan. 29.

1. See 1 Daniell, Ch. Pl., 3d Am. ed., 65 *et seq.; Ib.* 150 *et seq.*, where the English and American authorities are very fully cited. As to an allowance to a guardian *ad litem* for fees and services, see Mason v. Pomeroy, 151 Mass. 164; Wilbur v. Wilbur, 138 Ill. 446.

2. Infant owners of land, whether by legal or equitable title, may sue in chancery to charge as trustee one who has received the rents or profits of their land. Johns v. Williams, 66 Miss. 350.

guardians and other trustees, and the award of custody. These subjects have already been incidentally considered in the course of this treatise. And we need only add that, in the appointment of guardians *ad litem*, courts of chancery will exercise a liberal discretion; that in all proceedings of this character the appointment of a guardian *ad litem* to appear in behalf of infants interested in the proceedings is regarded as proper and even necessary, when they have no general guardian or the general guardian has an adverse interest; that personal service upon the infants, besides, is usually requisite; and that a decree rendered without observance of such formalities may be reserved for error.[3] It is the rule in many States, as it was the old practice in chancery, to allow an infant his day, after he attains majority, to set aside a decree against him; thus, in effect, rendering such decrees in chancery voidable rather than binding, so far as he is concerned, and treating him more than ever upon the footing of a privileged person;[4] for it is not too much to say that at all times and under all circumstances infants are especial favorites of our law.

A guardian with hostile interest should not represent the ward in such cases.

3. 1 Daniell, 65, 150; Rhett v. Martin, 43 Ala. 86; Girty v. Logan, 6 Bush, 8; Rhoads v. Rhoads, 43 Ill. 239; Swain v. Fidelity Ins. Co., 54 Pa. St. 455; Ivey v. Ingram, 4 Cold. 129; 39 Ark. 61, 235. Personal service on the infant dispensed with in Georgia. Harvey v. Cubbedge, 75 Ga. 792.

4. Simpson v. Alexander, 6 Cold. 619; Kuchenbeiser v. Beckert, 41 Ill. 173; 1 Daniell, Ch. Pl., 3d Am. ed., 71, 167. Rule now abrogated in some States. Phillips v. Dusenberry, 15 N. Y. Supr. 348. It does not apply to an infant trustee. Walsh v. Walsh, 116 Mass. 377. And see O'Rorke v. Bolinbroke, 2 App. Cas. 814.

Concerning the appointment, the court's discretion is favored as in other interlocutory proceedings. Walker v. Hull, 35 Mich. 488. Giving security for costs will not obviate the necessity of suing in the name of next friend or guardian. Sutton v. Nichols, 20 Kan. 43. A fund in chancery should not be given up without securing the legal costs, &c., of the guardian *ad litem* or his solicitor. Sheahan v. Circuit Judge, 42 Mich. 69. As to infant married woman's guardian *ad litem* or next friend, see *Ex parte* Post, 47 Ind. 142. General guardians do not represent their wards in foreclosure proceedings, but a guardian *ad litem* is proper. Sheahan v. Circuit Judge, 42 Mich. 69. Where the infant's probate guardian has an adverse interest in the suit, there should be a guardian *ad litem* appointed. Stinson v. Pickering, 70 Me. 273. Though service on the infant is the regular rule (*supra*, § 448), it is held in some States that a regular guardian may defend, and may waive the service of process, even where the minor's realty is involved. Scott v. Porter, 2 Lea, 224; Walker v. Veno, 6 Rich. 459. As to infant's acceptance of service, see Wheeler v. Ahenbeak, 54 Tex. 535.

A guardian *ad litem* cannot admit away the substantial rights of infants; his passiveness will not be construed into a waiver; nor will a

An infant defendant is as much bound by a decree in equity, rendered upon due jurisdiction and fairly,— as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, and who has regularly appeared by a guardian *ad litem* and has been served with process, he will not be permitted to dispute it unless upon the same grounds as an adult might have disputed it; such as fraud, collusion, or fundamental error.[5] As to the binding force of judgment at law, the rule does not seem to be equally strong.[6] But the rule may be stated that in the main an infant plaintiff suing by guardian or next friend is as much bound by a judgment or decree as a person of full age.[7] But where a defendant in a suit is a minor at the time of service of summons, and the record shows that he becomes of full age before the judgment is taken, a court is dis-

bill in equity be taken as confessed against an infant. Lane v. Hardwicke, 9 Beav. 148; Tucker v. Bean, 65 Me. 352; Mills v. Dennis, 3 Johns. Ch. 367; Turner v. Jenkins, 79 Ill. 228; Jones v. Jones, 56 Ala. 612; Ashford v. Patton, 70 Ala. 479; Daily's Adm'r v. Reid, 74 Ala. 415. Of course no general guardian has such a right. Bearinger v. Pelton, 78 Mich. 109.

An infant may by original bill impeach a decree in favor of his guardian and prejudicial to his own interests; nor, on general chancery rules, need he wait until attaining full age. Sledge v. Boone, 57 Miss. 222. A decree not appealed from is held binding upon an infant in the absence of fraud, whoever may have been his guardian *ad litem*, process having been duly served on the infant. McCrosky v. Parks, 13 S. C. 90; Cuyler v. Wayne, 64 Ga. 78. What has been decreed will be presumed rightly done. Whether guardian *ad litem* or *prochein ami* can submit an infant's interests to arbitration, see Tucker v. Dabbs, 12 Heisk. 18. It seems he cannot, except upon the court's sanction. § 1055; Savage v. McCorkle, 17 Ore. 42.

5. 1 Dan. Ch. Practice, 205; Rivers v. Durr, 46 Ala. 418; Ralston v. Lahee, 8 Clarke (Ia.), 17; Watkins v. Lawton, 69 Ga. 671; *In re* Livingston, 34 N. Y. 555; *supra*, § 1054. And see, as to allowing the infant his day, § 542. But see Tibbs v. Allen, 27 Ill. 119; Driver v. Driver, 6 Ind. 286; Ashton v. Ashton, 35 Md. 496.

As to the method of impeaching a decree for reasons stated in text, see Haines v. Hewitt, 129 Ill. 347; Stunz v. Stunz, 131 Ill. 309; Kingsbury v. Buckner, 134 U. S. 650. The infant need not proceed by bill of review, but may, while a minor, file his original bill to impeach the decree. *Ib.* He has longer time than an adult by reason of disability to institute suits for relief. Hurt v. Long, 90 Tenn. 445. But the decree cannot be set aside as against an intervening *bona fide* purchaser without notice. Allison v. Drake, 145 Ill. 500.

An infant, duly represented by guardian, is concluded by a probate decree. Simmons v. Goodell, 63 N. H. 458. And see Sites v. Eldredge, 45 N. J. Eq. 632. But not if the probate court undertook to sell or partition land without jurisdiction. Cole v. Railway Co., 81 Mich. 167.

6. *Supra*, §§ 1015, 1055, 1058.

7. Woodall v. Moore, 55 Ark. 22.

posed to uphold the judgment unless it can be impeached for fraud.[8] In some States, doubtless both judgments at law and decrees of equity now stand on the same conclusive footing, and the infant has not his opportunity to show cause as to either class on reaching majority, except on the grounds above stated.[9] Wherever the substantial interests of infants are involved, nothing can be established by admissions or stipulations; but proof is necessary.[10] But while a next friend or guardian *ad litem* cannot thus surrender substantial rights of the infant, he may bind the latter by arrangements which simply facilitate the trial and the pursuit of justice.[11] All this may be likewise said of counsel; for the authority of counsel cannot be greater than that of the next friend or guardian employing him.[12]

8. Stupp v. Holmes, 48 Mo. 89. And see Blake v. Douglass, 27 Ind. 416; Hicks v. Beam, 112 N. C. 642.

9. Phillips v. Dusenberry, 15 N. Y. Supr. 348; Bickel v. Erskine, 43 Ia. 213. As to either guardian *ad litem* or *prochein ami*, he is not a party to an action in such sense that his relationship to the judge disqualifies the latter from sitting in the case. Sinclair v. Sinclair, 13 M. & W. 646; Bryant v. Livermore, 20 Minn. 313, 342, and cases cited.

10. Claxton v. Claxton, 56 Mich. 557; Crotty v. Eagle, 35 W. Va. 143; Jeffers v. Jeffers, 139 Ill. 368; Hale v. Hale, 146 Ill. 227.

11. Kingsbury v. Buckner, 134 U. S. 650.

12. Eidam v. Finnegan, 48 Minn. 53; Crotty v. Eagle's Adm'r, 35 W. Va. 143.

PART VI.

SEPARATION AND DIVORCE.

CHAPTER I.

SEPARATION AND DIVORCE.

§ 1060. Deed of Separation; General Doctrine.

Separation is that anomalous condition of a married pair which involves a cessation of domestic intercourse, while the impediments of marriage continue. Either from choice or necessity, as the case may be, they throw aside the strong safeguards of a home and mutual companionship; they forfeit their most solemn obligations to protect, love, and cherish through life; they continue united in form and divided in fact. The spirit of the contract, all that dignifies and ennobles it, is gone; but the letter remains. Both parties submit, in some degree, at least, to the degradation of public scandal; they are cast loose upon the world without the right to love and be loved again; the thought of kindling fresh flames at the altar of domestic happiness is criminal; and deprived of the comfort and support of one another, finding in society at best but timid sympathy and consolation, the moral character must be strong, and doubly so must be that of the wife, that each may buffet with success the tide which bears onward to destruction. Such a state of things no public policy can safely favor; but the law sometimes permits it, if for no other reason than that an adequate remedy is wanting to check or to prevent the evil; and

hence it may be thought more expedient for the courts to enforce such mutual contracts of the unhappy pair as mitigate their troubles, than to dabble in a domestic quarrel and try to compel unwilling companionships.[13]

This we conceive to be the rightful position of the English and American equity courts whenever they see fit to enforce separation agreements. Some, to be sure, are disposed to carry the argument further. Thus, recent English writers of much repute refer to the fact that divorces from bed and board are often granted in that country, and hence conclude that it is reasonable for the married parties themselves to compromise litigation, save court fees, and avoid public notoriety, and therefore to agree to live apart, just as though the court had entered a decree for that purpose.[14] But this argument proves too much; for if marriage and divorce are matters for private compromise, like ordinary contracts, why should not the discontented pair, upon just cause, agree to unloose the yoke altogether? Why should they not sometimes obtain divorce from the bonds of matrimony by collusion and default, and thus take the readiest means of avoiding scandalous and expensive suits? One shrinks from such conclusions. In fact, divorce laws do not belong to the parties themselves, but to the public; government guards the sanctity of marriage, just as it demands the duty of alliegiance; only that perhaps its policy cannot be enforced in the one case as well as the other. It is because marriage is not on the footing of ordinary contracts, that husband and wife cannot, on principle, compromise, arbitrate, or modify their relationship at pleasure. Furthermore, the above argument would seem to suggest that where a complete divorce, instead of divorce from bed and board, is attainable, deeds of separatoin would not hold good; nor, again, where parties separate for causes which do not even justify divorce from bed and board; neither of which positions is sustained by the actual decisions.

§ 1061. English Rule.

Lord Eldon was of the opinion that a settlement by way of separate maintenance, on a voluntary separation of husband and wife, was against the policy of the law and void. The ground of his opinion was that such settlements, creating a separate mainte-

13. Bergen v. Van Liew, 36 N. J. Eq. 637.

14. Macq. Hus. & Wife, 324 *et seq.* See also Jacob, *n.* to Roper, Hus & Wife, 277; Peachey, Mar. Settl. 647.

nance by voluntary agreement between husband and wife, were in their consequences destructive to the indissoluble nature and the sanctity of the marriage contract; and he considered the question to be the gravest and most momentous to the public interest that could fall under discussion in a court of justice.[15] But in England final and complete dissolution of marriage was, until quite recently, attainable only by act of Parliament. And this method of procedure was found so difficult, expensive, and uncertain, that parties who could not live peaceably together were led to consider some lesser means of mitigating their misfortune. To be sure the ecclesiastical courts awarded sentences of divorce from bed and board; but these merely discharged the parties from the duty of cohabitation, permitting them to come together afterwards if they should so choose; and therefore, as a writer observes, these sentences "did not often, it must be owned, repay the pains bestowed in obtaining them."[16] The English ecclesiastical courts steadily refused, moreover, to recognize separation deeds.[17] Such a policy seems, however, to have turned husband and wife to their own devices for effecting the same result, with less delay and annoyance, and in order to adjust more completely those property arrangements which never could be forgotten in their misery. Deeds of settlement, trusts, and the intervention of the equity courts readily furnished a plan of operations; and the ubiquitous conveyancer appeared once more upon the stage to open the way, through subtle refinements, to freedom for discontented couples, and emolument for himself.

After a prolonged struggle, and in spite of public policy, it is therefore fully established at length in England, as a doctrine of equity, that deeds of separation may and must, if properly framed, be carried into execution by the courts.[18] They may be enforced in the common-law courts indirectly through the medium of covenants which are entered into between the husband and trustees; and in equity specific performance will be decreed where the

15. St. John v. St. John, 11 Ves. 530. See Mortimer v. Mortimer, 2 Hag. Consist. Rep. 318; Legard v. Johnson, 3 Ves. 352; Mercein v. People, 25 Wend. 77.

16. Macq. Hus. & Wife, 326. See Hope v. Hope, 3 Jur. (N. S.) 456; s. c. 26 L. J. Eq. 425; Peachey, Mar. Settl. 620; H. v. W., 3 Kay & Johns. 386, 387.

17. 1 Bish. Mar & Div., 5th ed., § 634; Mortimer v. Mortimer, 2 Hag. Con. 310; Smith v. Smith, 4 Hag. Ec. 609.

18. Wilson v. Wilson, 1 Ho. Lords Cas. 538; 5 Ho. Lords Cas. 59;

stipulations are not contrary to law nor in contravention of public policy.[19] An agreement between husband and wife to live apart is, perhaps, void as against public policy; but the husband's covenant with a third party may be valid and binding, although it originates in this unauthorized state of separation and relates directly to it.[20]

It may seem strange that such an auxialary agreement should be enforced, while the principal agreement is held contrary to the spirit and policy of the law. Lord Eldon, who strongly opposed the whole doctrine on principle, said that if the question were *res integra,* untouched by *dictum* or decision, he would not have permitted such a covenant to be the foundation of a suit in equity.[21] Sir William Grant appears to have been the first to call attention to the inconsistency of the courts in this respect; and his remark has come down through the later judges.[22] Lord Rosslyn, however, hit upon the explanation that an agreement for a separate provision between the husband and wife alone is void, merely from the general incapacity of the wife to contract;[23] an explanation which, we submit, is quite unsatisfactory. The true reason for the anomalous distinction appears to be simply this: that contracts for separation are in general void as against public policy, but that the courts saw fit to let in exceptions so far as to enforce fair covenants.[24]

§ 1062. American Rule.

Deeds of separation were never very common in the United States. And there are at least three very good reasons why they should be at this day less encouraged than in England. The first is that our legislation strongly favors the separate control of married women as to their own acquisitions, without the intervention of trustees and formal deeds of settlement, thus dispensing with the necessity of intricate property arrangements. The second is that equity, ecclesiastical, and common-law functions are usually

Peachey, Mar. Settl. 620, and cases cited; Macq. Hus. & Wife, 329.

19. Vansittart v. Vansittart, 2 De Gex & Jones, 249.

20. Worrall v. Jacob, 3 Mer. 255; Peachey, Mar. Settl. 621; Sanders v. Rodney, 16 Beav. 211; Warrender v. Warrender, 2 Cl. & Fin. 488.

21. Westmeath v. Westmeath, Jac. 126; 2 Kent, Com. 176.

22. See Jones v. Waite, 5 Bing. 361; Frampton v. Frampton, 4 Beav. 293.

23. Legard v. Johnson, 3 Ves. Jr. 352. See 2 Bright, Hus. & Wife, 306, *n.* by Jacob.

24. Under English legislation, not only are covenants in a separation deed enforced, but the court has power to vary them after a dissolution of the marriage. Clifford v. Clifford, 9

blended in the same courts of final appeal, so that a State is at liberty to adopt the precedents of the ecclesiastical rather than the modern equity tribunals of England for its guidance; while an American court, on the other hand, could not admit clearly the right of parties to declare terms of private separation, without bringing confusion and uncertainty upon its own divorce and matrimonial jurisdiction. The third is that sentences of divorce have been procured in most of the United States with great ease, moderate expense, and little publicity.

Early in this century, Chancellor Kent summed up authorities which showed that a private separation was an illegal contract, in these emphatic words: "Nothing can be clearer or more sound than this conjugal doctrine."[25] Contrary to what until quite lately was the rule in England, many of our States have never directly sanctioned separation deeds at all. And a recent North Carolina case distinctly maintains what ought to and may yet become the pronounced American doctrine,— that separation deeds are void as against law and public policy.[26]

Nevertheless there are individual American cases, and numerous ones, where separation deeds have been recognized so far as to permit, and sometimes to require, parties to perform such marital duties as were incumbent upon them, notwithstanding the fact of separation.[27] And the text-writer must still further concede, however reluctantly, that out of a regard for permitting married parties, who are resolved upon separation without a divorce, to arrange decently for the maintenance of wife and offspring and for a just mutual disposition of property rights, our courts are in the latest cases following the English lead so as to sustain the enforcement of whatever covenants might be pronounced fair in themselves on behalf of parties separated or about to separate. Some of these cases sustain such covenants upon a suggestion that,

P. D. 76; Fearon v. Aylesford, 12 Q. B. D. 539.

25. 2 Kent, Com. 177 *n*.

26. Collins v. Collins, 1 Phill. N. C. Eq. 153. An agreement between husband and wife, having for its object a dissolution of the marriage, is contrary to sound policy, and a note and mortgage executed in pursuance thereof is void. Cross v. Cross, 58 N. H. 373.

27. 1 Bishop, Mar. & Div., § 639 *et seq.*; Schouler, Hus. & Wife, § 473; Goodrich v. Bryant, 4 Sneed, 325; McCubin v. Patterson, 16 Md. 179; Griffin v. Banks, 37 N. Y. 621; Joyce v. McAvoy, 31 Cal. 273; Walker v. Stringfellow, 30 Tex. 570; Hitner's Appeal, 54 Pa. St. 110; Loud v. Loud, 4 Bush, 453; Dutton v. Dutton, 30 Ind. 452; McKee v. Reynolds, 26 Ia. 578; Walker v. Beal, 3 Cliff. 155;

separation being inevitable, they are prepared to make the best of it, not conceding the support of contracts calculated to favor a separation which has not yet taken place or been fully decided upon.[28] An unsatisfactory distinction truly, nor likely to afford a resting-place; as though this half countenance were not calculated of itself to favor future separation; and yet a legal distinction, since it leaves the bickering parties where they have placed themselves. It seems to stop short of enforcing specific performance of a written agreement for a separation deed, and to refuse direct countenance to a stipulation that husband and wife shall live apart in time to come.[29]

§ 1063. What Covenants are Upheld.

An indenture with the intervention of a trustee or trustees is in this country held the safer sort of instrument where separation is contemplated, and such are the deeds usually drawn and construed by our courts. It is desirable that the husband and trustee mutually covenant together. But so considerably are husband and wife now emancipated from the need of intermediate parties, that a fair transaction of the present nature has been sometimes sustained in certain States, where no trustee at all was interposed.[30] This cannot be affirmed of all, nor of most of the United States;[31] nor can such a contract ever prevail against the wife's interests where she, in such negotiation and arrangements, does not appear to have acted with perfect freedom and a perfect understanding of her individual rights.[32] Sometimes an agreement or bond to separate is executed by husband and wife, accompanied by the conveyance of property to a trustee for the use of the wife;

Dupre v. Rein, 56 How. (N. Y.) Prac. 228; Deming v. William, 26 Conn. 226; Chapman v. Gray, 8 Ga. 341.

28. Fox v. Davis, 113 Mass. 255, per Endicott, J., and cases cited; Hutton v. Hutton, 3 Barr, 100; Randall v. Randall, 37 Mich. 563, per Cooley, C. J.; Garver v. Miller, 16 Ohio St. 527; Robertson v. Robertson, 25 Ia. 350; Dutton v. Dutton, 30 Ind. 452; Carpenter v. Osborn, 102 N. Y. 552.

29. See this distinction asserted in the latest cases. Aspinwall v. Aspinwall, 49 N. J. Eq. 302; Galusha v. Galusha, 116 N. Y. 635. *Contra*, Scott's Estate, 147 Pa. St. 102, where, however, the application accords with the text.

30. In Randall v. Randall, 37 Mich. 563, a deed passed from husband to wife, whose actual consideration was relinquishment of the right to a support on her part. And see Commonwealth v. Richards, 131 Pa. St. 209; Zimmer v. Settle, 124 N. Y. 37.

31. Simpson v. Simpson, 4 Dana, 140; Carter v. Carter, 14 Sm. & M. 59; Stephenson v. Osborne, 41 Miss. 119; McKennan v. Phillips, 6 Whart. 571.

32. Switzer v. Switzer, 26 Gratt. 574.

which later, however, is the instrument the court construes and upholds.[33]

Inasmuch, then, as separation deeds are not enforced either in England or the United States, at the present day, without regard to the policy of stipulations or covenants in question, the limit of judicial support may be drawn at the support of provisions which, supposing separation inevitable, carry the fulfilment of conjugal duties and rights after a reasonable and becoming manner into that relation. For equity can only sanction what is fair and beneficial; and here cognizance is taken, not of the separation, but of circumstances and a settlement attending that state. The covenant or stipulation itself, the whole settlement, must be free from exception and such as equity might, under other instances of its jurisdiction, have sustained.[34] Where, therefore, the provision is for the wife, as in providing suitable maintenance during the separation, such a covenant or stipulation is to be highly favored.[35] Where an equitable and suitable division is made of the property whose benefits have been enjoyed during the coverture, this, too, may well be upheld.[36] It is reasonable and binding for the separating wife to release all claims upon the husband's estate as surviving spouse, in consideration of other fair provisions for her benefit and support.[37] The spouse who covenants to deliver up certain property to the other should make that covenant as advantageous to the latter as was reasonably intended.[38] It is fair that a husband's covenant or stipulation of proper allowance for the wife's support should be accompanied by the trustee's covenant or stipulation of indemnity against his wife's debts.[39] In respect of directly compelling the married parties to live apart under their agreement, separation deeds cannot be pro-

33. Keys v. Keys, 11 Heisk. 425; Dixon v. Dixon, 23 N. J. Eq. 316.

34. Switzer v. Switzer, 26 Gratt. 574.

35. Fox v. Davis, 113 Mass. 255; Randall v. Randall, 37 Mich. 562; Walker v. Walker, 9 Wall. 743; Aspinwall v. Aspinwall, 49 N. J. Eq. 302; Galusha v. Galusha; 116 N. Y. 635; Roll v. Roll, 51 Minn. 353; Clark v. Fosdick, 118 N. Y. 7.

36. Cooley, C. J., in Randall v. Randall, 37 Mich. 563.

37. Scott's Estate, 147 Pa. St. 102 (especially if she has means of her own); Carpenter v. Osborn, 102 N. Y. 552.

38. Thus it is held that a husband has no right to retain copies of his wife's journals and diaries, which he, under a separation deed, has covenanted to deliver up. Hamilton v. Hector, L. R. 13 Eq. 511. And see McAllister v. McAllister, 10 Heisk. 345; § 160, *note*.

39. Dupre v. Rein, 56 How. (N. Y.) Prac. 228; Harshberger v. Alger, 31 Gratt. 52; Reed v. Beazley, 1 Blackf.

nounced good upon any just conception of public policy and the divorce laws;[40] and especially must this rule hold true where the compulsion sought is under circumstances of separation not justifying a divorce. No relief will be afforded by equitable interference against the executed provisions.[41]

The potential mingling of legal and illegal conditions in these agreements, with the view of entering upon a status which of itself is inconsistent with a due fulfilment of the moral and legal duties of matrimony, occasions judicial confusion, which is more likely to increase than decrease while separation deeds are judicially recognized. But it is recently held in England that if some covenants in such a deed are legal and proper, while others are not, the former are enforceable by themselves.[42] At all events,

97. Such a provision of indemnity, though usual, is not essential. Smith v. Knowles, 2 Grant, 413.

40. Warrender v. Warrender, 2 Cl. & F. 488, 527, per Lord Brougham; Brown v. Peck, 1 Eden, 140; McCrocklin v. McCrocklin, 2 B. Monr. 370; McKennan v. Phillips, 6 Whart. 571, per Gibson, C. J.

Whether articles of separation can debar one from procuring a divorce for cause, see *post* Vol. II; Moore v. Moore, 12 P. D. 193. If separation never took place, the deed is void. Hamilton v. Hector, L. R. 13 Eq. 511.

41. Tallinger v. Mandeville, 113 N. Y. 427.

42. Hamilton v. Hector, L. R. 13 Eq. 511. There is no implied covenant that the wife shall remain chaste; such covenants should be stated. Sweet v. Sweet (1894), W. N. 181. And see Chase v. Phillips, 153 Mass. 17, as to husband.

While in many parts of the United States is seen an increasing tendency to adopt the English theory concerning separation covenants, with, however, more looseness as to the form such transactions shall take, the latest English cases quite transcend the distinctions behind which our courts take refuge, and the earlier *dicta* of their own Eldon and Brougham. Divorce being there regarded with less favor than in the United States, notwithstanding the late statutes on the subject, trust deeds, and voluntary separation, are, upon mature experience, treated as, on the whole, the more decent and respectable method for unhappy couples to adopt, than that somewhat novel recourse to courts, which brings a scandalous cause into public controversy. See Peachey, Mar. Settl. 647, 648. English policy, indeed, in its inception is quite different from American in this regard, a fact which American jurists should bear well in mind.

And under legislation of date much later than the divorce acts which were copied from the United States, separation deeds are plainly legalized. Stats. 36 & 37 Vict., cited in *Re* Besant, L. R. 11 Ch. D. 508. Thus, the custody of the offspring may now be distinctly provided for, as it would appear, in an English deed of separation. But at the same time, chancery, where the child is made a ward of the court, will protect the child's welfare. *Re* Besant, L. R. 11 Ch. D. 508; Besant v. Wood, L. R. 12 Ch. D. 605. See, further, *post*, Vol. II.

reconciliation and a renewal of cohabitation will put an end to all provisions of a separation deed whose scope relates to a state of continuous saparation merely, and the rights and interests of each in the other's property will be resumed by inference as of the usual marital status.[43] Courts have shown a recent disposition to aid the reconciliation contracts of spouses who have been living apart.[44] But a postnuptial contract, made in consideration of the settlement of differences which had caused a temporary separation, appears to be founded on a valid consideration, and its transfers will not be disturbed.[45] And a decree of divorce without alimony

Upon still another point, namely, the restitution of conjugal rights, the English chancery has, of late, departed widely from its earlier precedents. In Great Britain, where this suit for restitution of conjugal rights has always been permitted, it was formerly ruled in the matrimonial courts, and seemed to be the well-settled doctrine, that a deed of separation afforded no bar to such a suit whenever either party chose to enforce the remedy; and, this, even though the deed in terms forbade such proceedings. 1 Bishop, Mar. & Div., § 634, and numerous cases cited. This was in accordance with the first idea that separation deeds might indirectly be tolerated for their beneficial covenants as concerned parties bent upon separation, but not directly upheld. That rule has changed; for, as the English statute now provides, a deed of separation which contains a covenant forbidding the suit for restitution of conjugal rights to be brought, will bar such a suit. Marshall v. Marshall, 39 L. T. 640.

And to one separated spouse chancery will now grant an injunction, by virtue of such a covenant, to restrain the other spouse from suing for restitution of conjugal rights. Besant v. Wood, L. R. 12 Ch. D. 605, and cases cited. Under the English divorce act of 20 & 21 Vict., ch. 85, suits for restitution of conjugal rights are still permitted. 1 Bishop, Mar. & Div., § 771. Compromise, too, of the suit for restitution of conjugal rights is permitted in England. Stanes v. Stanes, L. R. 3 P. D. 42. There is this fundamental distinction between the English suit for divorce or judicial separation, and the suit for restitution of conjugal rights: that in the former instance the chief object is to free the petitioner in whole or in part from the marriage obligations; but in the latter, to control the other spouse so as to compel once more an unwilling cohabitation. See language of court in Firebrace v. Firebrace, 39 L. T. 94. Restitution of conjugal rights is a remedy unknown in the United States, where courts may finally part, but cannot forcibly reunite, the separated spouses. See *post*, Vol. II; 1 Bishop, Mar. & Div., 5th ed., § 771. And see as to specific performance of an agreement to separate, Gibbs v. Harding, L. R. 5 Ch. 336.

43. Nicol v. Nicol, 31 Ch. D. 524; Knapp v. Knapp, 95 Mich. 474. Even where the matrimonial resumption is not on the full footing of cohabitancy, a substantial resumption is enough. Zimmer v. Settle, 124 N. Y. 37.

44. Barbour v. Barbour, 49 N. J. Eq. 429. But cf. Miller v. Miller, 78 Ia. 177.

45. Phillips v. Culliton, 153 Mass. 17; Burkholder's Appeal, 105 Pa. St. 31. See as to the offer by one party to return, Farber v. Farber, 64 Ia. 362. A written agreement of spouses, where there had been no separation,

may rely upon the continuance of provisions for just support under a previous separation deed.[46]

§ 1064. Abandonment; Rights of Deserted Wife.

Abandonment by either spouse consists in leaving the other wilfully and with the intention of causing their perpetual separation. As to the right of the wife, when abandoned by her husband, to earn, contract, sue, and be sued, to much the same effect as a *feme sole,* while such abandonment actually lasts, the current of American authority, legislative and judicial alike, decidedly favors so just a doctrine.[47] Modern Married Women's Acts often permit the wife to do quite or nearly as much when not abandoned at all. And in England, recent statutes secure to a married woman privileges to a similar extent under like circumstances of abandonment.[48] The test is, observes a recent American case, whether the husband may be deemed to have renounced his marital rights and relations.[49]

The great contrariety of current legislation is a great obstruction, however, to formulating a decided rule of English and American jurisprudence on this point. We have seen that, under the old common-law doctrine of coverture, the wife could not sue or be sued, or otherwise act as a single woman, unless the husband was under the disability of a civil death, which meant

to do certain things in consideration of ignoring their former quarrels was held unenforceable in Miller v. Miller, 78 Ia. 177.

46. Galusha v. Galusha, 116 N. Y. 635. A separation deed affords no bar to a legal divorce for causes subsequently arising; nor for damages against the offending spouse, where the separation agreement was because of the intimacy of the wife with a third person, with whom she committed adultery afterwards. Izard v. Izard, 14 P. D. 45.

47. See Shaw, C. J., in Abbott v. Bayley, 6 Pick. 89; Benadum v. Pratt, 1 Ohio St. 403; Spier's Appeal, 2 Casey, 233; Mead v. Hughes, 15 Ala. 141; Rhea v. Rhenner, 1 Pet. 105; Moore v. Stevenson, 27 Conn. 14; see *post,* Vol. II. And see the various statutes in almost every State in the Union, enlarging the rights of married women in such cases; Peck v. Marling, 22 W. Va. 708; Phelps v. Walther, 78 Mo. 320; Peru v. Poland, 78 Me. 215; Johnson v. Barnes, 69 Ia. 641. A wife thus abandoned is favored in applying the crops of the husband's land for the family support. Loy v. Loy, 128 Ind. 150.

48. See Stat. 20 & 21 Vict., ch. 85; Midland R. R. Co. v. Pye, 10 C. B. (N. S.) 179. Chancery has long moulded its proceedings to secure a like privilege. *In re* Lancaster, 23 E. L. & Eq. 127; Johnson v. Kirkwood, 4 Dru. & War. 379. A right of action is conferred, too, under 32 & 34 Vict., ch. 93. Moore v. Robinson, 27 W. R. 312.

49. Ayer v. Warren, 47 Me. 217.

originally banishment and abjuration of the realm. The wife's rights being enlarged by statute under such circumstances, we have therefore to inquire into the scope of any statute in point. Some of our local acts are construed as affording a substitute for the common-rule law, and not as merely cumulative, and hence require a literal interpretation. In general, such legislation is to be considered as grafted upon the common law of coverture which prevailed when this country was settled, and at the Revolution. It contemplates abandonment, and not what might be designed as a merely temporary withdrawal from cohabitation; and it regards the husband in general as completely out of the jurisdiction of the State, never having entered it, or else having forsaken it.[50] Abandonment is now universally a cause for divorce.[51]

§ 1065. Divorce Legislation in General.

Divorce laws have constantly given rise to most interesting and earnest discussions; and men differ very widely in their conclusions, while all admit the subject to be of the most vital importance to the peace of families and the welfare of nations. Some favor a rigid divorce system as most conducive to the moral health of the people; others urge a lax system on the same grounds. On two points only do English and American jurists seem to agree: first, that the government has the right to dissolve a marriage during the lifetime of both parties, provided the reasons are weighty; second, that, unless those reasons are weighty, husband and wife should be divorced only by the hand of death.[52]

The ancient nations, all recognizing the necessity of some divorce legislation, differed in their method of treatment. Among the Greeks, despite their intellectual refienment, the marriage institution was degraded, even in the palmiest days of Athens. The husband could send away his wife, and the wife could leave her husband; the procedure in either case being quite simple.[53] In Rome more of the moral and religious element prevailed; and

50. See, at length, *post*, Vol. II. And as to separate maintenance to a wife, see further, *post*, Vol. II. It is humane and just to construe the common law as permitting the wife, when permanently abandoned by her husband, to sue in her own name for personal injuries. Wolf v. Banereis, 72 Md. 481. Various modern codes now give the right still more broadly.

51. Drummond v. Drummond, 171 N. Y. S. 477.

52. Upon divorce causes and divorce procedure, see *post*, Vol. II; also Bishop, Mar. & Div., 2 vols., *passim*.

53. Woolsey, Divorce Legislation, 31.

so strictly was marriage respected in the days of the Republic, that no divorce is supposed to have occurred for more than five hundred years from the foundation of the city; and the earliest recorded instance may possibly have been under the rightful head of void and voidable marriage.[54] But ancient Rome was built on family discipline, rather than domestic love; the husband exercised full sway, and the stately and severe Roman matron disappeared entirely in the later dissolute and corrupt years of the Roman Empire, and before an empire succeeded it.[55] The ideal of marriage among the Hebrews was high: that husband and wife should cleave together and be one flesh; nevertheless, the usage of this nation, founded upon the Mosaic code, seems to have permitted the husband to dismiss his wife at pleasure. The Christian influence and teaching has been to condemn all arbitrary exercise of power in this respect, to place man and woman on more nearly an equal footing, to discourage all lax and temporary unions, and to warn the legislator that those whom God hath joined man may not with inpunity put asunder.[56]

The influence of Christianity has been felt in modern Europe, spreading to England, whence, too, it was brought to the wilds of America; the Christian rule ever shaping the policy of government. But this rule has received different methods of interpretation The Church of Rome treats marriage as a sacrament, and indissoluble without a special dispensation, even for adultery. Protestants are divided: all regarding adultery as a sufficient source of divorce; many considering desertion equally so, others cruelty; while a strong current of local authority in this country tends to multiply the legal occasions for divorce even down to such pretext as incompatibility of temper. So loose, indeed, and so confusing, is our State marriage and divorce legislation becoming, that it might be well to ask whether the cause of morality would not be promoted, if, by constitutional amendment, the whole subject were placed in the control of the general government; so that, at least, one uniform system could be applied, and the experiments of well-meaning reformers be subject to an unerring and crucial test.[57]

54. Spurius Carvilius Ruga, B. C. 231, put away his wife for barrenness 1 Bishop, Mar. & Div., § 23; Woolsey, Div. 41.

55. See the cause of Rome's decay, which Horace divines, in Carm. Lib. iii. 6.

56. *Post*, Vol. II.

57. There is a growing and dangerous laxity in the United States as

There has been a movement in recent years supported by our Bar Associations towards a uniform divorce law. The uniform negotiable instruments act and the uniform bill of sale law have been of wide benefit and a uniform divorce act would undoubtedly have most beneficial results.

§ 1066. Legislation upon Divorce; Divorce from Bed and Board; Divorce from Bond of Matrimony, &c.

Private agreement for divorce is repugnant to the good sense of England and the United States; government must interpose to pronounce the sentence; and collusion between the parties to dissolve their own relation is so little favored — however much the courts may have reluctantly yielded to uphold deeds of mere separation [58] — that the divorce tribunal shields the public conscience, and requires that even in a default the complainant's case be made out properly.[59] The English Divorce Act (Stat. 20 & 21, Vict. ch., 85, § 7) places the whole subject since 1858, more than formerly, upon the recognized American plane, by investing judicial tribunals with power competent to pronounce sentence in each case conformably to general directions of the statute. Divorce may, therefore, be granted from bed and board (*a mensa et thoro*) or from the bonds of matrimony (*a vinculo*) by the prevailing English and American practice. The former, which is a sort of judicial separation, applies to the less heinous offences, wherever a legislature recognizes any distinction; while the latter, which alone is complete, is the remedy for the greater offences, or, according to the most conservative policy, for adultery only. The one is partial divorce or a legalized separation; the other is final and full divorce.[60] Divorces *nisi* are sometimes decreed, being in the nature of a partial and not final divorce, so as to afford delay for remedying error or allowing a last chance for reconciliation. The old ecclesiastical remedy for restitution of conjugal rights, still available in England, had never a foothold in the United States,

to the permanency of the marriage relation. One difficulty is our universal tendency to greater social freedom, freedom as between the sexes, woman herself pressing for it; another the existence of some forty independent jurisdictions, which enable our citizens traveling from one State to another to find facilities for divorce and remarriage always at hand.

58. Stewart v. Stewart (Ida.), 180 P. 165.

59. *Post*, Vol. II; 2 Bishop, §§ 235, 236; Milster v. Milster (Mo. App.), 209 S. W. 620.

60. *Post*, Vol. II. Local codes should be carefully studied on this point, as they differ in policy. Many causes for annulling a marriage are in these days

the prejudice being too strong against it; specific performance of marriage is consequently unenforceable even by way of penalty.[61] And it is generally held in this country that the old English ecclesiastical law was never adopted here as a part of the common law[62] although its forms and practices are often used when necessary by our courts.[63]

§ 1067. Causes of Divorce: Adultery; Cruelty; Desertion; Miscellaneous Causes.

We shall only briefly advert to the chief cause of divorce recognized by our modern legislation. *Adultery* is the cause of divorce most universally commended: a plain offence, and one which involves conjugal unfaithfulness at the most vital part of the marital relation. By adultery we mean the voluntary sexual intercourse of either married party with some one, married or single, of the opposite sex, other than the offender's own spouse. Adultery justifies divorce from bond of matrimony under most codes; and while the English statute has been somewhat partial to a husband who sins without otherwise offending his wife or without atrocious accompaniments of the crime, American policy treats both sexes alike, and visits the guilt of husband or wife alike.[64] As for *cruelty,* legal cruelty is more readily expounded by negative than affirmative language. This cause of divorce is designed regularly for the vindication of the weaker party, usually (but not necessarily) a wife, whose wrong from her husband's cruelty may be found greater, in the average of cases, than from his silent infidelities. In general, it should be stated that wherever the conduct of one spouse to the other is such that the latter cannot continue cohabitation without reasonable ground for fearing such bodily harm from the former as seriously to obstruct the exercise of marital duties, or render the conjugal state unendurable, there legal cruelty exists, and cause for divorce; and from this point of view violence actually committed and violence threatened, if with

specified in local codes as causes of divorce.

61. *Post,* Vol. II.

62. Hodges v. Hodges (N. Mex.), 159 P. 1007; Erkenbrach v. Erkenbrach, 96 N. Y. 456.

63. Le Barron v. Le Barron, 35 Vt. 365 (medical examination to determine impotency); Robbins v. Robbins, 140 Mass. 328 (connivance).

64. Mordaunt v. Moncrieffe, L. R. 2 H. L. Sc. 374; Pattison v. Pattison (Md.), 103 A. 977; Slattery v. Slattery, 87 N. J. Eq. 673, 102 A. 873; Luderitz v. Luderitz, 88 N. J. Eq. 103, 102 A. 661; Steele v. Steele, 170 N. Y. S. 454; Evenden v. Evenden, 170 N. Y. S. 458; Smith v. Smith, 181 Ky. 55, 203 S. W. 884; Freeman v. Freeman (Ark.), 206 S. W. 439;

sinister intention, are treated as alike reprehensible,[65] but it is commonly held that legal cruelty cannot be shown by anything less than physical violence,[66] although many States hold the view that physical violence is not necessary to show cruelty,[67] and a false charge of infidelity made in bad faith may be held to be cruelty.[68]

Desertion, or the wilful abandonment of one spouse by the other, was not a recognized cause of divorce under England's ecclesiastical law, as promulgated at the settlement of this country; but the English divorce statute made it, when without cause and extending over the space of two years, a third cause for judicial separation; while meantime, in the United States, where remedies for restitution of conjugal rights were discarded, desertion for a specified period has long been a permitted cause for divorce; perhaps for a limited divorce in the first instance, and yet, quite commonly, as in the case of adultery or cruelty, for a divorce

Ross v. Ross (N. J.), 104 A. 199, 105 A. 894; Bowers v. Bowers (N. J.), 104 A. 831.

65. England v. England (Ga.), 96 S. E. 174; Smith v. Smith (Tex. Civ. App.), 200 S. W. 1129; Unzicker v. Unzicker, 101 Neb. 837, 166 N. W. 241. See Thomas v. Thomas, 87 N. J. Eq. 668, 103 A. 675, 101 A. 1055; Evans v. Evans, 1 Hag. Con. 35; 1 Bishop, Mar. & Div., §§ 715-717; Latham v. Latham, 30 Gratt. 307; 25 N. J. Eq. 526; Beckley v. Beckley, 23 Ore. 226.

Legislative enactments use various expressions, some of which stop short of the extremity of cruelty; *e. g.,* "excesses," "outrages," "intolerable indignities," etc. And see such phrases as "cruel and inhuman," "cruelty of treatment," "extreme and repeated cruelty," etc.

In some States a husband who unjustly charges his wife with unchastity is guilty of such cruelty as entitles her to a divorce. Bahn v. Bahn, 62 Tex. 518; Avery v. Avery, 33 Kan. 1. And as to the wife's unjust charge, see Carpenter v. Carpenter, 30 Kan. 712; Kelly v. Kelly, 18 Nev. 49. Especially if these accusations are publicly and harshly made and repeated. 67 Tex. 198. Chastisement of the wife is cruelty, and certainly when repeated; but not such acts as laying his hand on her shoulder. Hawkins v. Hawkins, 65 Md. 104; Donald v. Donald, 21 Fla. 571; *supra,* § 44.

As to masturbation, see W—— v. W——, 141 Mass. 495. For cruelty by neglecting the wife wantonly when she was critically ill, see Hoyt v. Hoyt, 56 Mich. 50.

66. Cowden v. Cowden, 5 Alaska, 311; Armstrong v. Armstrong, 229 Mass. 592, 118 N. E. 916, L. R. A. 1918D, 426; Moir v. Moir (Ia.), 165 N. W. 1001; Umbach v. Umbach, 171 N. Y. S. 138, 183 App. Div. 495; Claunch v. Claunch (Tex. Civ. App.), 203 S. W. 930 (drunkenness alone is not cruelty). See Germaine v. Germaine (Mich.), 171 N. W. 377.

67. Lefevre v. Lefevre (Tex. Civ. App.), 205 S. W. 842; Carson v. Carson (Ia.), 171 N. W. 584; Johnson v. Johnson (Ky.), 209 S. W. 385; Robertson v. Robertson (Okla.), 176 P. 387; McNabb v. McNabb (Tex. Civ. App.), 207 S. W. 129; Koehler v. Koehler (Ark.), 209 S. W. 283.

68. Johnson v. Johnson (Ky.), 209 S. W. 385; Milster v. Milster (Mo.

ultimately if not immediately from the bonds of matrimony.[69] Three things are usually imported in this legal desertion: an actual cessation of cohabitation for the period specified; the wilful intent of the absent spouse to desert; desertion by that spouse against the will of the other;[70] but a wife may be justified in leaving the husband where he has been guilty of matrimonial misconduct.[71]

As to the various other causes of divorce which are specified from time to time by local statute, with much variety of verbal expression, these are for the most part modifications of the three chief ones we have just enumerated. For with few exceptions, all causes of divorce have one or more of the three leading elements present: there is adultery or cruelty or desertion; or, to speak less literally, sexual infidelity, maltreatment, or the wrongful cessation of marital intercourse. Thus, among offences akin to adultery which are specified, are sodomy and bestial crimes against nature, concubinage, and habitual loose intercourse with persons of the opposite sex.[72] Offering indignities to the person of a spouse,[73] conviction of felonious crime[74] (which, besides separation, visits disgrace upon the innocent), gross and confirmed habits of intox-

App.), 209 S. W. 620; Pearson v. Pearson, 173 N. Y. S. 563; Olsen v. Olsen, 5 Alaska, 459; Wesley v. Wesley, 181 Ky. 135, 204 S. W. 165.

69. *Post*, Vol. II; Pape v. Pape, 20 Q. B. D. 76; Act. 20 & 21 Vict., ch. 85, § 16; 1 Bishop, Mar. & Div., §§ 771-775; Schanck v. Schanck, 33 N. J. Eq. 363. Note the varying language of local codes on this subject: "wilful desertion," "abandonment," "wilful absence," etc. The time specified varies from one to five years; three years being, perhaps, the fair average. See Harding v. Harding, 11 P. D. 111, as to neglect to comply with a decree of restitution.

70. Sergent v. Sergent, 33 N. J. Eq. 204; Latham v. Latham, 31 Gratt. 307; Morrison v. Morrison, 20 Cal. 431. There is no cause of divorce in which the collusion of a discontented pair is more likely to prevail, unless the court is quite circumspect, than this alleged desertion. McCauley v. McCauley, 88 N. J. Eq. 392, 103 A. 20; Gordon v. Gordon, 88 N. J. Eq. 436, 103 A. 31 (confinement in insane asylum a defence to charge of desertion only if involuntary); Streicher v. Streicher (Mich.), 168 N. W. 409; Gollehon v. Gollehon (Va.), 96 S. E. 769; Axton v. Axton (Ky.) 206 S. W. 480; Nunn v. Nunn (Ore.), 178 P. 986; Wilhelm v. Wilhelm (Ore), 177 P. 57.

71. Pattison v. Pattison (Md.), 103 A. 977; McCauley v. McCauley, 88 N. J. Eq. 392, 103 A. 20.

72. Stevens v. Stevens, 8 R. I. 557; Hansley v. Hansley, 10 Ire. 506.

73. Simpkins v. Simpkins (Ark.), 207 S. W. 28; Cunningham v. Cunningham (Mo. App.), 202 S. W. 420 (forcing wife to take drugs to cause miscarriage); Cunningham v. Cunningham (Mo. App.), 206 S. W. 240, 202 S. W. 420.

74. Klasner v. Klasner (N. M.), 170 P. 745 (conviction followed by pardon as cause for divorce).

ication or habitual intemperance,[75] gross neglect of duty, abusive treatment,— all these are of the nature of cruelty.[76] Joining the Shakers (among whom the relation of husband and wife is held unlawful), absenting one's self unreasonably long,— causes like these are in the nature of desertion; and insanity, withholding sexual intercourse, and various other causes not clearly recognized as justifying divorce, are of a like nature.[77] But other miscellaneous causes of divorce may be found specified in American codes: some mingling fraud and other nullifying causes as grounds for a divorce; some again permitting divorce to be granted at judicial discretion for any other cause or upon general considerations of the peace and morality of society,— a dangerous latitude should any court choose to abuse its functions.[78]

§ 1068. Defences.

There are four common defences to libels for divorce. *First,* provocation, that the defendant by his conduct so provoked the plaintiff as to be the real cause of the treatment complained of;[79] *second,* collusion, a defence often resorted to in cases of adultery, where the libellant is privy to or aids and abets the libellee in the

75. Koehler v. Koehler (Ark.), 209 S. W. 283 (use of drugs producing stupor is not drunkenness).

76. Pending an appeal from a conviction of a felony, the conviction cannot be urged as ground for divorce. Rivers v. Rivers, 60 Ia. 378. But actual imprisonment for the statute period is a cause of divorce, notwithstanding a bill of exceptions be filed. Cone v. Cone, 58 N. H. 152.

77. *Post,* Vol. II. In some instances it might be hard to say whether cruelty or desertion is the stronger element.

78. 1 Bishop, Mar. & Div., § 827; 31 Me. 590. It matters not that from some perverted religious belief and conscientiously, and not with criminal intent, one spouse transgresses; the usual divorce remedy lies open to the other spouse nevertheless. 74 Tex. 414.

For divorce precedure, see 2 Bishop, Mar. & Div., *passim.* Among the permitted defences, besides that of assailing the libellant's proof, is recrimination (since the party alleging a wrong must come into court with clean hands), condonation (or conditional forgiveness), connivance (or aiding and abetting the offence, usually from corrupt and sinister motives, so as to make out a case for divorce). Cross-bills are often filed, each party seeking divorce for the other's fault. The husband's condonation of his wife's adultery does not debar her from divorce from him if he afterwards commits adultery. Cumming v. Cumming, 135 Mass. 386. For the Scotch law of condonation, see Collins v. Collins, 9 App. Cas. 205.

As to connivance at a wife's adultery which debarred a divorce, see Morrison v. Morrison, 136 Mass. 310.

79. Thomas v. Thomas, 87 N. J. Eq. 668, 101 A. 1055, 103 A. 675; Smith v. Smith (Tex. Civ. App.), 200 S. W. 1129. See Closz v. Closz (Ia.), 169 N. W. 183.

adultery;[80] *third,* codonation, where the libellant forgives or condones the acts complained of by continuing to cohabit with the libellee after knowledge of the acts complained of;[81] *fourth,* recrimination, that the libellant has himself been guilty of crimes against the marriage relation similar or equal in degree to those complained of.[82] Condonation is, however, supposed to be conditional on the future good behavior of the erring spouse, so where the conduct complained of is repeated after forgiveness this revives the original offence.[83]

§ 1069. Effect of Absolute Divorce upon Property Rights.

The effect of divorce from bonds of matrimony upon the property rights of married parties is substantially that of death, or rather annihilation. We speak here of *bona fide* and valid and complete decree of dissolution.[84] And, save so far as a statute may divide the property or restore to each what he or she had before, or a decree for alimony may fasten directly upon the property in question, the guilt or innocence of either spouse does not affect the case.[85] This is a topic upon which the common law, from the infrequency of divorce, furnishes no light, except by analogies. The settled usage of Parliament in granting divorce has been to introduce property clauses to the above effect into the sentence of dissolution regulating the rights and liabilities of the respective parties,[86] but even in these cases the rights of divorced

80. Shilman v. Shilman, 174 N. Y. S. 385, 175 N. Y. S. 681; Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625. See McCauley v. McCauley, 88 N. J. Eq. 392, 103 A. 20.

81. Parker v. Parker (Tex. Civ. App.), 204 S. W. 493; Merriam v. Merriam, 207 Ill. App. 474; Bush v. Bush (Ark.), 205 S. W. 895; Sayles v. Sayles (R. I.), 103 A. 225; Wesley v. Wesley, 181 Ky. 135, 204 S. W. 165; Satterwhite v. Satterwhite (La.), 80 So. 547; Millet v. Millet (La.), 81 So. 400; Mahurin v. Mahurin (Tex. Civ. App.), 208 S. W. 558; Davis v. Davis (Mo. App.), 206 S. W. 580.

82. Smith v. Smith, 181 Ky. 55 203 S. W. 884; Wesley v. Wesley, 181 Ky. 135, 204 S. W. 165; Walker v. Walker (Vt.), 104 A. 828; McCarty v. McCarty (Ia.), 169 N. W. 135; Mosier v. Mosier (Ore.), 174 P. 732; Wehrenbrecht v. Wehrenbrecht (Mo. App.), 207 S. W. 290; McNabb v. McNabb (Tex. Civ. App.), 207 S. W. 129; Nolker v. Nolker (Mo. App.), 208 S. W. 128; Tanton v. Tanton (Tex. Civ. App.), 209 S. W. 429; Wolf v. Wolf (N. D.), 169 N. W. 577.

83. Deusenberry v. Deusenberry (W. Va.), 95 S. E. 665; Neeley v. Neeley (Cal.), 176 P. 163; Abbott v. Abbott (Mich.), 168 N. W. 950; Parker v. Parker (Tex. Civ. App.), 204 S. W. 493; James v. James (Neb.), 171 N. W. 904; Quient v. Quient (Wash.), 177 P. 779.

84. See invalid decree disregarded in Cheely v. Clayton, 110 U. S. 701.

85. See Harvard College v. Head, 111 Mass. 209.

86. Macq. Hus. & Wife, 210, 214.

parties as to tenancy by the curtesy, chattels real, and rents of the wife's lands, are still unsettled; and in general, the consequence by act of Parliament "does not very clearly appear."[87] But under the new English Divorce Act,[88] it is held that where the wife, at the date of the decree of divorce *a vinculo,* was entitled to a reversionary interest in a sum of stock which was not settled before her marriage, and had been the subject of a postnuptial settlement, and after the decree the fund fell into possession, her divorced husband had no right to claim it.[89] The English doctrine, as thus indicated, is that the same consequences as to property must follow the decree of dissolution by the divorce court as if the marriage contract had been annihilated and the marriage tie severed on that date. Such, too, has been the spirit of later decisions.[90]

In settlements and trusts involving intricate family arrangements, however, the English rule is not yet uniform and positive.[91]

In this country the effect of divorce *a vinculo* is frequently regulated by statute. And in general, and independently of statute, all transfers of property actually executed before divorce, whether in law or in fact, remain unaffected by the decree. For

87. 2 Bright, Hus. & Wife, 366.

88. Stats. 20 & 21 Viet., ch. 85; 21 & 22 Vict., ch. 108; 23 & 24 Vict., ch. 144.

89. Says Vice-Chancellor Wood: "Here the contract has been determined by a mode unknown to the old law, namely, by a decree of dissolution; and as the husband was unable, during the existence of the contract, to reduce this chattel into possession, I must hold that the property remained the property of the wife." Wilkinson v. Gibson, L. R. 4 Eq. 162.

90. Pratt v. Jenner, L. R. 1 Ch. 493; Fussell v. Dowding, L. R. 14 Eq. 421; Swift v. Wenman, L. R. 10 Eq. 15; Prole v. Soady, L. R. 3 Ch. 220. And one who obtained a sentence of dissolution of marriage was held, moreover, not liable to be joined in an action for tort committed by his wife during the coverture. Capel v. Powell, 17 C. B. (N. S.) 743.

91. The most recent cases show a decided indisposition to forfeit a husband's rights to a trust fund, where, at all events, the effect of annihilation would be to disturb the remote right of some innocent party, or without consideration as to which spouse offended. Fitzgerald v. Chapman, L. R. 1 Ch. D. 563. Jessel, M. R., here discredits Fussell v. Dowding, and other cases cited *supra.* And see Burton v. Sturgeon, L. R. 2 Ch. D. 318; Codrington v. Codrington, L. R. 7 H. L. 854. And in certain causes the Divorce Act confers the power to modify the marriage settlement upon final sentence. 20 & 21 Viet., ch. 85, § 45. Where application is made for that purpose, the judicial object of thus proceeding is, apparently, to prevent the innocent party from being injuriously affected in property by the decree. Maudslay v. Maudslay, L. R. 2 P. D. 256. On the decree for dissolution of marriage becoming absolute, it takes effect from the date of the decree *nisi.* Prole v. Soady, L. R. 3 Ch. 220.

instance, personal *choses* of the wife already reduced to possession by the husband remain his.[92] A voluntary settlement which is completely executed will not be arbitrarily revoked by a court.[93] But as to rights dependent on marriage and not actually and fully vested, a full divorce, or the legal annihilation, ends them. This applies to curtesy, dower, the right to reduce *choses* prospectively into possession, rights of administration, and property rights under the statutes of distribution.[94] These doctrines are set forth in local codes, which frequently save certain rights, such as the wife's dower where divorce is occasioned by her husband's misconduct. And a provision under an antenuptial contract, which is plainly intended as a substitute or equivalent for dower in case the wife survives the husband, is barred by their divorce.[95]

As to torts a similar rule would probably apply.[96] Separate

92. Lawson v. Shotwell, 27 Miss. 630.

93. Thurston, *Re*, 154 Mass. 596.

94. Dobson v. Butler, 17 Mo. 87; 4 Kent, Com. 53; *n.*, 54; Given v. Marr, 27 Me. 112; Wheeler v. Hotchkiss, 10 Conn. 225; Calane v. Calane, 24 N. J. Eq. 440; Hunt v. Thompson, 61 Mo. 148; Schouler, Hus. & Wife, § 559; Rice v. Lumley, 10 Ohio St. 596. But see Wait v. Wait, 4 Comst. 95; Ensign, *Re*, 103 N. Y. 284. As to property of the husband in the divorced wife's possession, see Lane v. Lane, 76 Me. 521. As to community property, see Moore v. Moore, 59 Tex. 54; Brown v. Brown, 60 Cal. 579. Divorce severs the estate of husband and wife by the entirety, 92 Tenn. 695, § 193.

95. Jordan v. Clark, 81 Ill. 465. Here divorce was granted to A. for the fault or misconduct of A.'s wife, but the principle of the case was that the wife could only be entitled to receive the provision as A.'s widow. A divorce *a vinculo* obtained by the wife, though for the husband's misconduct, bars dower. Calame v. Calame, 24 N. J. Eq. 440. And see Gleason v. Emerson, 51 N. H. 405; Hunt v. Thompson, 61 Mo. 148. Cf. New York statute construed in Schiffer v. Pruden, 64 N. Y. 47; also Ohio statute, in 44 Ohio St. 645. Some State codes provide how the homestead shall be disposed of. Stahl v. Stahl, 114 Ill. 375.

96. Chase v. Chase, 6 Gray, 157; 2 2 Bishop, Mar. & Div., § 724; Schouler, Hus. & Wife, § 559. And see Capel v. Powell, 17 C. B. (N. S.) 743.

If the husband receives any property of the wife after divorce, she may recover it in a suit for money had and received. 2 Bishop, Mar. & Div. § 714; Legg v. Legg, 8 Mass. 99. See Kintzinger's Estate, 2 Ashm. 455. How far, on the divorce of the husband, his assignee may claim against the wife does clearly appear; but where the divorce was obtained through his fault, the wife's equitable provision, it seems, will be favorably regarded as against him. 2 Bishop, § 715, and conflicting cases compared; Woods v. Simmons, 20 Mo. 363; 2 Kent, Com. 136 *et seq.* Divorce takes away the husband's right of administration upon the estate of his divorced wife. 2 Bishop, Mar. & Div., 5th ed., § 725; Altemus's Case, 1 Ashm. 49. See, further, as to the effect of divorce, Schouler, Hus. & Wife, § 561, and cases cited. For implied revocation of a will by divorce, see Lansing v. Haynes, 95 Mich. 16.

property of a wife settled, or otherwise vested in her, is not to be disturbed by a divorce,[97] nor property vested already in the husband by gift from his wife;[98] and where the husband and wife own property jointly a divorce restores to each the whole of the land formerly held separately.[99]

§ 1070. Effect of Partial Divorce upon Property Rights.

Divorce from bed and board, or *nisi*, produces, however, no such sweeping results; the cardinal doctrine here being that the marriage remains in full force, although the parties are allowed to live separate. Here we must consult the phraseology of local statutes with especial care, in order to determine the respective rights and duties of the divorced parties. Thus the consequence of judicial separation, under the present divorce acts of England, is to give to the wife, so long as separation lasts, all property of every description which she may acquire, or which may come to or devolve upon her, including estates in remainder or reversion; and such property may be disposed of by her in all respects as if she were a *feme sole;* and if she dies intestate it goes as if her husband had then been dead.[1]

In this country, independently of statutory aid, the property rights of the parties divorced from bed and board remain in general unchanged. For this divorce is only a legal separation, term-

97. Barclay v. Waring, 58 Ga. 86; Harvard College v. Head, 111 Mass. 209; Schouler, Hus. & Wife, § 560; Jackson v. Jackson, 91 U. S. 122; Stultz v. Stultz, 107 Ind. 400.

It is held, and upon that principle of sound policy which maintains inviolate the sanctity of the marriage union, while further discouraging stale and doubtful litigation to which their final and angry rupture might incite one of the married parties, that a divorced wife cannot maintain an action against her divorced husband upon an implied contract arising during coverture (Pittman v. Pittman, 4 Ore. 298); nor for an alleged assault committed upon her while they were husband and wife. Abbott v. Abbott, 67 Me. 304; Morrison v. Brown, 84 Me. 82. Such remedies, so far as available at all, ought to be sufficiently available at the time the right accrued and during marriage. As to a note from the divorced husband, see Chapin v. Chapin, 135 Mass. 393. A debt of the wife to her husband legally extinguished by the marriage is not revived as a cause of action on their subsequent divorce. Farley v. Farley, 91 Ky. 497. But *semble* the wife may sue the husband in contract upon mutual transactions of legal force during the marriage state. Morrison v. Brown, 84 Me. 82.

98. Tyson v. Tyson, 54 Md. 35.

99. Bowling v. Little (Ky.), 206 S. W. 1. See Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67, L. R. A. 1919C, 1009 (divorce dissolves tenancy by entirety).

1. Stats. 20 & 21 Vict., ch. 85, § 25; 21 & 22 Vict., ch. 108, § 8. See Romilly, M. R. in *Re* Insole, L. R. 1 Eq. 470.

inable at the will of the parties; the marriage continuing in regard to everything not necessarily withdrawn from its operation by the divorce.[2] Thus, the husband still inherits from the wife, and the wife from the husband; the one takes his curtesy, the other her dower; and even the right of reducing the wife's *choses in action* into possession still remains to the guilty husband.[3] But chancery, by virtue of its jurisdiction in awarding the wife her equity to a settlement, may, and doubtless will, keep the property from his grasp, and do to both what justice demands.[4] On principle, the right to administer would seem not to be forfeited by one's divorce from bed and board.[5]

2. Dean v. Richmond, 5 Pick. 461; 2 Bishop, Mar. & Div., 5th ed., § 726 *et seq.;* Castlebury v. Maynard, 95 N. C. 281.

3. Clark v. Clark, 6 Watts & S. 85; Kriger v. Day, 2 Pick. 316; Smodt v. Lecatt, 1 Stew. 590; Ames v. Chew, 5 Met. 320.

4. Holmes v. Holmes, 4 Barb. 295; *post*, Vol. II.

5. But see limitations suggested in *post*, Vol. II.

The recent English statutes give the wife, upon sentence of judicial separation, the capacity to sue and be sued on somewhat the same footing as a *feme sole*. The rule in the United States is not uniform; but the tendency is clearly in the same direction. See 2 Bishop, Mar. & Div., 5th ed., § 737, and cases cited; Lefevres v. Murdock, Wright, 205; Clark v. Clark, 6 Watts & S. 85. And see, further, as to statutory provisions, including a division of property, *post*, Vol. II; 2 Bishop, Mar. & Div., §§ 509-519.

Concerning the conflict of laws, with respect of (1) marriage, (2) marital rights and duties, and (3) divorce, see Schouler, Hus. & Wife, §§ 566-575. As affecting the rights and duties of the marriage relation, Story, in his Conflict of Laws, after an extended discussion of the great diversity of laws existing in different countries, as to the incidents of marriage, lays down the following primary rules, which are of general application. (1) Where parties are married in a foreign country, and there is an express contract respecting their rights and property, present and future, it will be held equally valid everywhere, unless, under the circumstances, it stands prohibited by the laws of the country where it is sought to be enforced. It will act directly on movable property everywhere. But as to immovable property in a foreign territory, it will, at most, confer only a right of action, to be enforced according to the jurisdiction *rei sitæ*. (2) Where such an express contract applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to all future acquisitions. (3) Where there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, upon the principle that movables have no *situs*, or, rather, that they accompany the person everywhere. As to immovable property, the law *rei sitæ* will prevail. (4) Where there is no change of domicile, the same rule will apply to future acquisitions as to

§ 1071. Validity of Foreign Divorces.

There has been much controversy during the last few years over the validity of foreign divorce decrees, especially those obtained without service or actual notice. The tendency of certain Western States to cater to Eastern divorce business by giving their courts jurisdiction to grant divorces to persons who have been but a short time resident in the State, and without personal service, has had the result of attracting many from other States bent upon a quick and quiet separation from domestic troubles. The question has arisen whether a decree in divorce so obtained is entitled to the full faith and credit granted by the United States Constitution to the judgments of other States.

We have here, on the one hand, the principle that a divorce valid where made is valid everywhere,[6] while on the other hand is the consideration that the courts of a State may and should protect its citizens against foreign judgments made without notic to them and in fraud of their rights.[7] Two recent cases in the Supreme Court have clarified the situation considerably. In the first case the Court held that the court of the matrimonial domicile has jurisdiction of divorce even though the wife has left her husband at the matrimonial domicile for just cause and established a

present property. (5) But where there is a change of domicile, the law of the actual domicile, and not of the matrimonial domicile, will govern as to all future acquisitions of movable property; and as to all immovable property, the law *rei sitæ*. Story, Confl. Laws, §§ 184-187. And see Besse v. Pellochoux, 73 Ill. 285.

He further adds that although in a general sense the law of the matrimonial domicile is to govern in relation to the incidents and effects of marriage, yet this doctrine must be received with many qualifications and exceptions, inasmuch as no nation will will recognize such incidents and effects when incompatible with its own policy, or injurious to its own interests. So, too, perplexing questions will sometimes arise in determining upon the real matrimonial domicile of parties who marry *in transitu*, during a temporary residence abroad, or on a journey made for that purpose with the intention of returning. But the true principle in such case is to consider as the real matrimonial domicile, the place where, at the time of marriage, the parties intended to fix their abode, and not the place where the ceremony was in fact performed. Story, Confl. Laws, §§ 189-199, and cases cited. See also 1 Burge, Col. & For. Laws, 244-639; Wharton, Confl. Laws, §§ 118-121, 166, 187-202; and *post*, Vol. II.

6. McLaughlin v. McLaughlin (Ala.), 79 So. 354; *In re* Pusey's Estate (Cal.), 170 P. 846.

7. Thompson v. Thompson (N. J. Ch.), 103 A. 856; State v. Duncan (S. C.), 96 S. E. 294; Deyette v. Deyette (Vt.), 104 A. 232.

different domicile elsewhere.[8] But in the second and last case on the subject a somewhat different rule was laid down that the mere domicile of one spouse within a State is not sufficient to give jurisdiction in divorce where there was neither appearance by the libelee or personal service within the State.[9] This decision does not hold, however, that a State court cannot recognize the validity of a foreign divorce obtained without service of process, but only that it does not need to do so, and therefore the principle has been laid down that State courts will recognize foreign divorces obtained under statutes similar to their own although obtained on publication without personal service.[10]

8. Atherton v. Atherton, 181 U. S. 155. See Searles v. Searles (Minn.), 168 N. W. 133.

9. Haddock v. Haddock, 201 U. S. 562. See *In re* Caltabellotta's Will, 171 N. Y. S. 82, 183 App. Div. 753. See Thompson v. Thompson (N. J. Ch.), 103 A. 856; Pearson v. Pearson, 173 N. Y. S. 563. See Ball v. Cross, 174 N. Y. S. 259; *In re* Grossman's Estate (Pa.), 106 A. 86, 88.

10. Thompson v. Thompson (N. J. Ch.), 103 A. 856 (where matrimonial domicile is in State); Kenner v. Kenner, 139 Tenn. 211, 700, 201 S. W. 779, 202 S. W. 723 (where no fraud appears).

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