the United States, be deemed citizens. It is further provided that if any alien shall die after his declaration, and before actual admission as a citizen, his widow and children shall be deemed citizens.

13. *What is the effect of naturalization?*—66.

A person, thus duly naturalized, becomes entitled to all the privileges and immunities of natural-born subjects, except that a residence of seven years is necessary to enable him to hold a seat in Congress, and no person except a natural-born citizen is eligible to the office of Governor in some of the States, or President of the United States.

14. *How will the personal property of an alien, who dies before taking any steps toward naturalization, go?*—67.

According to his will, if he have made any; or if he died intestate, then according to the law of distribution of the place of his domicil at the time of his death.

15. *To whom does the act of Congress confine the description of aliens capable of naturalization?*—72.

To "free white persons."* It is supposed this excludes the inhabitants of Africa, and their descendants, and it may become a question to what extent persons of mixed blood are to be excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of the act of naturalization. Perhaps there might be difficulties also as to the copper-colored natives of America, or the yellow or tawny races of Asiatics, and it may well be doubted whether any of them are "white persons," within the purview of the law. It is the declared law of New York and South Carolina, and probably so understood in other States, that Indians are not citizens, but distinct tribes, living under the protection of government, and, consequently, never can be made citizens under the act of Congress.

* By the Act of July 14, 1870, ch. 254, the privileges of the naturalization laws are extended to aliens of African nativity and to persons of African descent.

The phrase, "free white persons," has been omitted. U. S. Revised Statutes, section 2165.

LECTURE XXVI.

OF THE LAW CONCERNING MARRIAGE.

1. *What is the primary and most important of the domestic relations?*—75.

That of husband and wife.

2. *In what has it its foundation?*—75.

In nature, and it is the only lawful relation by which Providence has permitted the continuance of the human race.

3. *What is its moral influence?*—75.

In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of the institution of marriage a great share of the blessings which flow from refinement of manners, the education of children, the sense of justice, and the cultivation of the liberal arts.

4. *Who are capable of contracting marriage?*—75–79.

1. All persons who have not the regular use of their understanding, sufficient to deal with discretion in the common affairs of life, as idiots and lunatics (except in their lucid intervals), are incapable of agreeing to any contract, and of course to that of marriage. A marriage procured by force or fraud is also void, *ab initio*, and may be treated as null by every court in which its validity may be incidentally drawn in question. The basis of the marriage contract is the consent of the parties, and the ingredient of fraud or duress is fatal in this as in any other contract, for the free assent of the mind is wanting. The common law allowed divorces *à vinculo*, *causa metus*, *causa impotentiæ*, and those were cases of a fraudulent contract. It is proper in all these cases that the objection to the marriage should be judicially investigated in a suit to annul the marriage; and jurisdiction in the case properly belongs to the ecclesiastical courts in England, and to the courts of equity in this country. It is de-

clared by statute in New York that any such marriage shall be void from the time its nullity shall be declared by a court of competent authority. It is said that error will, in some cases, destroy a marriage and render the contract void, as if one person be substituted for another. This, however, would be a case of palpable fraud, going to the ground of the contract; and it would be difficult to state a case, in which error simply, and without any other ingredient, as to the parties, or one of them, in respect to the other, would vacate the contract. It is well understood that error, and even disingenuous representations, in respect to the qualities of one of the contracting parties, as his condition, rank, fortune, manners, and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced.

2. No persons are capable of binding themselves in marriage until they have arrived at the age of consent, which, by the common law of the land, is fixed at fourteen in males, and twelve in females. This rule was derived from the civil law which established the same periods of twelve and fourteen, as the competent age to render the contract binding. The same rule prevailed in France, before their Revolution; but by the code of Napoleon the age of consent was raised to eighteen in males, and fifteen in females, though a dispensation from the rule may be granted for good cause. In some of the States the common law rule has been allowed to remain, while in most of them statutory regulations have altered the age of consent to a more advanced period of life.

3. No person can marry while the former husband or wife is living. Such second marriage is by the common law absolutely null and void; and it is probably an indictable offense in most, if not all, of the States of the Union. In New York, it is declared, by statute, to be an offense punishable by imprisonment in the State prison, in all but the following cases: when the husband or wife, as the case may be, of the party who re-marries, remains continually without the United States for five years together; or when one of the married parties shall have absented himself or herself from the other by the space of five successive years, and the one re-marrying shall not know the other, who was thus absent, to be living within that time; or

when the person re-marrying was, at the time of such marriage, divorced by sentence of a competent court for other cause than the adultery of such person; or if the former husband or wife of the person re-marrying had been sentenced to imprisonment for life; or if the former marriage has been duly declared void, or made within the age of consent.

5. *How does the law regard the intermarriage of relations?*—81–84.

In most countries of Europe in which the canon law has had authority or influence, marriages are prohibited between near relations by blood or marriage. Prohibitions similar to the canonical disabilities in the English ecclesiastical law were contained in the Jewish laws; and they existed also in the laws and usages of the Greeks and Romans, subject to considerable alternations of opinion, and with various modifications and extent. It is very difficult to ascertain exactly the point at which the laws of nature have ceased to discountenance the union. It is very clearly established that marriages between relations by blood in the lineal ascending or descending lines are unnatural and unlawful, and they lead to a confusion of rights and duties. On this point, the civil, canon, and the common law are in perfect harmony. In several of the United States, marriages within the Levitical degrees, under some exceptions, are made void. In New York, since 1830, marriages between relatives of the ascending and descending lines, and between brothers and sisters, of the half as well as of the whole blood, are declared incestuous and void. So, also, in Massachusetts; and in both these States such marriages are criminal offenses, and punishable as such. In Louisiana, marriages are prohibited among collateral relations, not only between brother and sister, but between uncle and niece, and aunt and nephew. It was stated that, in 1843, marriage between a man and his deceased wife's sister was lawful in every State of the Union, except Virginia.

6. *What is the common law rule respecting the consent of parents and guardians?*—85.

That it is not requisite to the validity of marriage.

7. *What are the ceremonies required?*—86, 87.

No peculiar ceremonies are requisite by the common law, to the valid celebration of marriage. The consent of the parties is all that is required; and as marriage is said to be a contract *jure gentium*, that consent is all that is required by natural or public law. If the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and is followed by consummation, it amounts to a valid marriage, and which the parties can not dissolve, and it is equally binding as if made *in facie ecclesiæ*; though this point is not quite free from doubt.

8. *In what light does the law consider marriage?*—87.

In no other light than as a civil contract.

9. *How must the consent of the parties be declared?*—87–91.

It may be declared before a magistrate, or simply before witnesses, or subsequently confessed or acknowledged, or the marriage may even be inferred from continual cohabitation, and reputation as husband and wife, except in cases of civil actions for adultery, or public prosecutions for bigamy. This facility in forming the marriage contract by the common and ecclesiastical law, existed in those American States where the common law has not been altered on this point, or remains in force, as in New York, South Carolina, and Kentucky. In some of the States, publication of bans, consent of parents in certain cases, the presence of a minister or magistrate, and other solemnities are required by statute to constitute a valid marriage; but wherever there are no such statutory provisions, the contract is everywhere in this country (except in Louisiana) under the government of the English common law.

10. *By the laws of what place is the validity of marriage adjudged?*—91–93.

As a general rule, marriage valid by the laws of the place where it is celebrated is valid everywhere. The principle is, that with respect to marriage, the *lex loci contractus* prevails over the *lex domicilii*, as being the safer rule, and one dictated by just and enlightened views of international jurisprudence.

11. *What are the incidents of marriage respecting property, according to the* jus gentium?—94, *n.* (*b*).

They are stated by Mr. Justice Story, as follows: 1. That where there is a marriage in a foreign country, and an express nuptial contract concerning personal property, it will be sustained everywhere, unless it contravenes some positive rule of law or policy. But as to real property, it will be made subservient to the *lex rei sitæ*. 2. Where such a contract applies to personal property, and there is a change afterwards of the matrimonial domicil, the law of the actual domicil will govern as to future acquisitions. 3. If there be no such contract, the matrimonial domicil governs all the personal property everywhere, but not the real property. 4. The matrimonial domicil governs as to all acquisitions present and future, if there be no change of domicil. 5. If there be, then the law of the actual domicil will govern as to future acquisitions, and the law *rei sitæ* as to real property. If the marriage takes place in a foreign country *in transitu*, and where the parties had no intention of fixing their domicil, the law of the actual or intended domicil of the parties governs as to the incidents of the marriage; and it is a general rule that if the husband and wife had different domicils when they married, the domicil of the husband became the true and only matrimonial domicil.

LECTURE XXVII.

OF THE LAW CONCERNING DIVORCE.

1. *How long does marriage continue in force?*—95.

When a marriage is duly made, it becomes of perpetual obligation, and can not be renounced at the pleasure of either or both of the parties. It continues, until dissolved by the death of one of the parties, or by divorce.

2. *What are the provisions made by the Revised Statutes of New York, on the subject of divorce?*—96, 97.

They have authorized the chancellor (now the Supreme

Court), on suit brought, to declare void the marriage contract: 1. If either of the parties, at the time of the marriage, had not attained the age of legal consent. 2. If the former husband or wife was living and the marriage in force. 3. If one of the parties was an idiot or lunatic. 4. If the consent of one of the parties was obtained by force or fraud. 5. If one of the parties was physically incapable of entering into the marriage state. All issues upon the legality of a marriage, except where it is sought to be annulled on the ground of physical incapacity of one of the parties, are to be tried by a jury upon a feigned issue. A marriage shall not be annulled for the first of the above causes on the application of the party of full age at the time of the marriage, or if the parties, after both have attained the age of consent, have voluntarily cohabited. It may be annulled for the second cause on the application of either party during the life of the other; but if contracted in good faith, the issue shall be entitled to inherit as legitimate children. It may be annulled for the third cause on the application of a relative or next friend of the idiot or lunatic. But cohabitation after the lunacy has ceased will bar the divorce; and the children of any marriage annulled on such ground succeed as legitimate children. It may be annulled for the fourth cause, during the life of the parties, on the application of the party whose consent was unduly obtained, provided there was no subsequent voluntary cohabitation. The custody of the children is to be given to the innocent, and provision made for them out of the estate of the guilty, party. A marriage is to be annulled for the last cause above-mentioned only on the application of the innocent party, and the suit must be brought within two years after the marriage.

3. *As the law now stands in New York, in what three cases only, can a bill of divorce for adultery be obtained?*—98.

1. If the married parties are inhabitants of the State at the time of the commission of the adultery. 2. If the marriage took place in the State, and the party injured be an actual resident at the time of the adultery committed, and at the time of filing the bill. 3. If the adultery was committed in the State, and the injured party, at the time of filing the bill, be an actual inhabitant of the State.

4. *What is the punishment, in New York, of a defendant if guilty?*—99.

Disability from re-marrying during the life of the other party.

5. *What are the provisions respecting the legitimacy of children in such cases?*—99, 100.

If the wife be the complainant, the legitimacy of any children of the marriage, born or begotten of her before the filing of the bill, is not to be affected by the decree; and if the husband be the complainant, the legitimacy of the children, born or begotten before the commission of the offense charged, is not to be affected by the decree. The statute further provides, that if the wife be the complainant, the court is to make a suitable allowance, in sound discretion, out of the defendant's property, for the maintenance of her and her children, and compel the defendant to abide the decree. The court is also to give to the wife, being the injured party, the absolute enjoyment of any real estate belonging to her, or of any personal property derived by title through her, or acquired by her industry. If, on the other hand, the husband be the complainant, then he is entitled to retain the same interest in the wife's estate, which he would have if the marriage had continued; and he is also entitled to her personal estate and *choses in action* which she possessed at the time of the divorce, equally as if the marriage had continued; and the wife loses her title to dower, and to a distributive share of her husband's personal estate.

6. *In what cases, in the State of New York, may the court refuse to decree a divorce, though the fact of adultery be established?*—101, 102.

In the four following: 1. If the offense was committed by the procurement or with the connivance of the complainant. 2. If it has been forgiven, and the forgiveness proved by express proof, or by the voluntary cohabitation of the parties with knowledge of the fact. 3. Where the suit has not been brought within five years after the adultery. 4. Or where the complainant has been guilty of the same offense. All these exceptions, except the positive limitation as to time, were settled and acknowledged principles of general jurisprudence applicable to the subject.

The policy of New York has been against divorces from the marriage contract, except for adultery.

7. *How about the law of divorce in some of the other States of the Union?—Notes to page* 96, *et seq.*

The courts in Massachusetts, Delaware, Ohio, North Carolina, Alabama, Illinois, and probably in other States, are authorized by statute to grant divorces *causa impotentiæ*. In Massachusetts, by the Revised Statutes of 1836, marriages prohibited on account of consanguinity or affinity, or when the former husband or wife is alive, or when either party was at the time insane or an idiot, or between a white person and a negro, Indian or mulatto, are absolutely void without any legal process. So of marriages under the age of consent, or when either party is guilty of adultery or sentenced to the State prison. In Vermont, marriages prohibited on account of consanguinity or affinity, or on account of a former husband or wife living, are absolutely void without any legal process. The other provisions of the law of divorce in that State are very similar to those in New York, and in neither of these States can a marriage be annulled for adultery solely on the declarations or confessions of the parties. In most of the States divorces *a vinculo*, or from bed and board, are granted for intolerable ill-usage, or willful desertion, or unheard-of absence, or habitual drunkenness. In some of the States, the Legislatures frequently pass special acts granting divorces, while in others, such legislative divorces are prohibited by the Constitution, and jurisdiction of the matter confined exclusively to the judiciary. And in nearly all the States parties are required to have resided in the State for a greater or less time before they can apply in such State for divorce.

8. *What is the effect of a foreign divorce, or how far is a divorce in one State valid in another?*—107–118.

The question has never been judicially raised and determined in the United States, and it has generally been considered that the State governments have complete control and discretion in the case. In *Harding* v. *Allen*,* it was adjudged by the Supreme Judicial Court in Maine, that a decree of divorce pro-

* 9 Greenleaf's R., 140.

nounced according to the law of one jurisdiction, and the new relations thereupon formed, ought to be recognized, in the absence of all fraud, as operative and binding everywhere, so far as related to the dissolution of marriage, though not as to other parts of the decree, such as an order for the payment of money by the husband. This is deemed a correct and valuable decision in this country, though contrary to the English rule—which is, that a foreign divorce *a vinculo*, from an English marriage, between parties domiciled in England at the time of such marriage, is *null*. The point, however, with us must still be considered unsettled.

9. *What is the effect of a foreign judgment?*—118–121.

In cases not governed by the Constitution and laws of the United States, the doctrine of the English law on that subject is generally the law of this country: and there a distinction is taken between a suit brought to enforce a foreign judgment, and a plea of a foreign judgment in bar of a fresh suit for the same cause. No sovereign is obliged to execute, within his dominion, a sentence rendered out of it; and if execution be sought by suit upon the judgment, or otherwise, he is at liberty, in his courts of justice, to examine into the merits of such judgment; for the effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty. In the case of a suit to enforce a foreign judgment, the rule is, that the foreign judgment is to be received, in the first instance, as *prima facie* evidence of the debt, and it lies on the defendant to impeach the justice of it, or show that it was irregularly and unduly obtained. But if the foreign judgment has been pronounced by a court possessed of competent jurisdiction over the cause and the parties, and carried into effect, and the losing party institutes a new suit upon the same matter, the plea of the former judgment is an absolute bar, provided the subject and the parties, and the grounds of judgment be the same. It is a *res judicata*, which is received as evidence of truth; and the *exceptio rei judicatæ*, as the plea is termed in the civil law, is final. This is a principle of general jurisprudence, founded on public convenience, and sanctioned by the usage and courtesy of nations.

10. *What is the effect of a suit pending before another competent tribunal?*—122–125.

A *lis pendens* before the tribunals of another jurisdiction has, in proceedings *in rem*, been held to be a good plea in abatement of a suit. Thus, where a creditor of A, a bankrupt, had *bonâ fide* and by regular process attached in another State a debt due to A and in the hands of B, it has been held that the assignees of the bankrupt could not, by a subsequent suit, recover the debt of B. The pendency of the foreign attachment is a good plea in abatement of the suit. In such a case the equity of the maxim, *qui prior est tempore potior est jure*, forcibly applies. But, generally, a personal arrest and holding to bail in a foreign country can not be pleaded in abatement; and it is no obstacle to a new arrest and holding to bail for the same cause in the English courts, and they will not take judicial notice of any arrest in a foreign country, or in their own plantations; and the same rule of law has been declared in this country.

11. *When may a divorce* a mensa et thoro *be granted?*—125–128, *notes.*

The statute of New York authorizes the court to grant qualified divorces *a mensa et thoro*, founded on the complaint of the wife, of cruel and inhuman treatment, or such conduct as renders it unsafe and improper for her to cohabit with her husband; or for willful desertion of her, and refusal or neglect to provide for her. The court may grant the decree of separation for ever, or for a limited time, in its discretion, and the same court may revoke the decree at any time, under such regulations as it thinks proper, upon the joint application of the parties, and upon their producing satisfactory evidence of their reconciliation. These qualified divorces are allowed by the laws of almost all countries, and it is assumed that they prevail generally in the United States, in cases of extreme cruelty, though they are unknown in some of them, as, for instance, in New Hampshire, Connecticut, Ohio, Indiana and South Carolina. In Louisiana, the divorce *a mensa* leads to a divorce *a vinculo*, if the parties be not reconciled in two years. In Massachusetts, those divorces are allowed for extreme cruelty in either party, and in favor of the wife when the husband shall utterly desert her, or refuse or neglect to provide (if able) suitable maintenance for her. And by the laws of 1857 of that State, when parties have lived apart for five consecutive years after a divorce *a mensa*, a divorce *a vinculo* may be granted on the petition of the party obtaining the former divorce; and after a separation of ten years, such a divorce may be granted, under certain conditions, on the petition of either party. In Vermont, New Jersey, Kentucky, Mississippi, Tennessee, Alabama, and Michigan, divorces *a mensa et thoro* may be granted for extreme cruelty, and in some of these States for willful desertion for two years.

LECTURE XXVIII.

OF HUSBAND AND WIFE.

1. *What are the legal effects of marriage?*—129.

They are generally deducible from the principle of common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost and suspended, during the continuance of the matrimonial union. From this principle it follows, that at law no contracts can be made between the husband and wife, without the intervention of trustees; for she is considered as being *sub potestate viri*, and incapable of contracting with him; and except in special cases, within the cognizance of equity, the contracts which subsisted between them prior to the marriage are dissolved. The wife can not convey lands to her husband, though she may release her right of dower to his grantee; nor can the husband convey lands by deed to the wife without the intervention of a trustee; but the husband may devise lands to his wife, for the instrument is not to take effect until after his death; and by a conveyance to uses, he may create a trust in favor of his wife, and equity will decree a performance of the contract by the husband with his wife, for her benefit.