

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.

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## 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.

2. *What is the general rule as to the rights and liabilities of the husband?*—129, 130.

That he becomes, upon the marriage, entitled to all the goods and chattels of the wife, and to the rents and profits of her lands, and he becomes liable to pay her debts and perform her contracts.

3. *What common law right in the lands of his wife, does the husband acquire by marriage?*—130, 131.

If the wife, at the time of marriage, be seized of an estate of inheritance in land, her husband, upon the marriage, becomes seized of the freehold, *jure uxoris*, and he takes the rents and profits during their joint lives. If the wife dies before the husband, without having had issue, her heirs immediately succeed to the estate. If there has been a child of the marriage born alive, the husband takes the estate absolutely for life, as tenant by the curtesy, and on his death the estate goes to the wife or her heirs; and in all these cases, the emblements growing upon the lands at the termination of the husband's estate go to him or his representative.

4. *What right does the husband acquire in the life estate of his wife?*—134.

Upon the marriage, he becomes seized of such an estate in right of his wife, and is entitled to the profits during the marriage.

5. *What if she have an estate during the life of another person who survives her?*—134.

The husband becomes a special occupant of the land during the life of such other person.

6. *To whom does the land go after the estate for life is ended?*—134.

To the person entitled in reversion or remainder, and the husband, *quasi* husband, has no more concern with it. This estate the husband can only sell or charge to the extent of his interest in it, and his representatives take as emblements the crops growing at his death.

7. *What rights has the husband in the chattels real of his wife?*—134.

Upon marriage, he becomes possessed of all the chattels real of his wife, as leases for years, and the law gives him power, without her, to assign, mortgage, or otherwise dispose of the same as he pleases, by any act in his lifetime; except it be such an interest as the wife hath, by provision or consent of her husband, by way of settlement. Such chattels real are also subject to be sold under execution for his debts.

8. *What if he makes no disposition of them in his lifetime?*—134.

He can not devise the chattels real by will, and the wife, after his death, will take the same in her own right, without being executrix or administratrix to her husband. If he grant a rent charge out of the same, without altering the estate, the rent charge becomes void at his death.

9. *What property in her chattels real does the law give him, if he survive the wife?*—134.

It gives him her chattels real, absolutely by survivorship; for he was in possession of the chattels real during the coverture, by a kind of joint tenancy with the wife.

10. *What is the rule respecting the wife's choses in action?*—135.

That the husband has power to sue for and recover the same; and when recovered, and reduced to possession, and not otherwise, the money becomes, in most cases, absolutely his own. The rule is the same, if a legacy or distributive share accrues to the wife during coverture. So, he has power to release and discharge the debts, and to change the securities, with the consent of the debtor.

11. *What if he dies before he has recovered the money or reduced the chose in action into possession?*—135.

The wife will be entitled to the property in her own right, without administering on his estate, or holding the same as assets for his debts.

12. *What if the wife dies and he survives her, before he has reduced the chose in action into possession?*—135.

It does not strictly survive to him ; but he is entitled to recover the same to his own use, by acting as her administrator. By the English statutes of distribution, which have been substantially reenacted in New York and the other States of the Union, the husbands of married women who die intestate have a right to administer upon their personal estate, and to recover and enjoy the same. Under the statute it has been held that the husband is entitled, *jure mariti*, to administer, and to take all her chattels real, things in action, and every other species of personal property, whether reduced into possession, or contingent, or recoverable by suit.

13. *What is the rule as to the wife's debts dum sola?*—135, 136.

That if the wife leaves *choses in action* not reduced into possession during her life, the husband will be liable to that extent ; for those *choses in action* will be assets in his hands. It is also settled, that if the husband, who has survived his wife, dies before he has recovered the *choses in action*, his representatives are entitled to that species of property.

14. *What is the rule where the husband has administered in part on his wife's estate, and dies, and administration de bonis non of the wife, by a third person or by the next of kin of the wife, is obtained?*—136.

That such administrator would be deemed as a mere trustee for the representatives of the husband.

15. *What if a suit be brought in the joint name of husband and wife to recover the wife's chose in action, and he die before he has reduced the property to possession?*—138.

The wife as survivor would take the benefit of recovery ; and it is settled that in a suit in chancery, by the husband, to recover a legacy, or distributive share due the wife, she must be made a party with him, and then the court will require the husband to make a suitable provision for the wife out of the property.

16. *How does a general assignment in bankruptcy, or under the insolvent laws, affect the wife's property?*—138.

It passes her property and *choses in action*, but subject to her right of survivorship ; and if the husband dies before the assignees have reduced the property to possession, it will survive to the wife, for the assignees possess the same rights as the husband before the bankruptcy, and none other.

17. *What is the rule in chancery as to the wife's equity to a reasonable provision out of her property, for the support of herself and her children?*—139-141.

That if the husband wants the aid of chancery to enable him to get possession of his wife's property, he must do what is equitable, by making a suitable provision out of it for the maintenance of her and her children. Whether the suit for the wife's debt, legacy, or portion, be by the husband or by his assignees, the result is the same, and a proper settlement on the wife must first be made of a proportion of the property. The provision is to be apportioned, not merely to that part of the equitable portion of the wife's estate which the husband seeks, but to the whole of her personal fortune, including what the husband had previously received. And it is settled that the wife's equity to a suitable provision for the maintenance of herself and her children, out of her separate estate, lying in action, extends not only to property which she owned while unmarried, but to property descended or devised to her while married. But the wife's equity does not attach, except upon that part of her personal property in action which the husband can not acquire without the assistance of a court of equity. And the rule in equity does not controvert the husband's legal title to his wife's personal fortune ; if he once acquired possession of that property *jure mariti*, though it should have been of an equitable nature, chancery will leave him in undisturbed possession of it.

18. *What is the difference as to choses in action belonging to the wife, when the husband sues in his own name exclusively, or jointly with his wife?*—142.

The principle of the distinction is, that if he brings the ac-

tion in his own name alone, it is a disagreement to the wife's interest, and implies it to be his intention that it should not survive her. But if he brings the action in their joint names, the judgment is, that they shall both recover, and the debt survives to the wife. The judgment does not alter the property, nor show it to be his intention that it should be altered.

19. *What is the rule of equity in case the husband has made a marriage settlement on his wife, in consideration of her fortune?—142.*

He is considered in the light of a purchaser of her fortune, and his representatives will be entitled, on his dying in his wife's lifetime, to the whole of her property lying in action, though not reduced to possession in his lifetime, and though there be no special agreement for that purpose.

20. *What is the rule as to the personal property of the wife, which she had in possession at the time of the marriage?—143.*

That which she had in her own right, and not *en autre droit*, such as money, goods and chattels, and movables, vests immediately and absolutely in the husband, and on his death they go to his representatives, as being entirely his property.

21. *What is the rule as to the liability of the husband for the wife's debts?—143, n. 1.*

That he is liable for all her debts before coverture; but if they are not recovered during the coverture, he is discharged. And this is a strict rule of law. In New York, by statute, passed July 18th, 1853, suits to recover debts contracted by the wife before marriage may be brought against husband and wife; but the judgment and execution affect the separate estate of the wife only. A husband, however, who acquires the separate property of his wife, is liable to the extent of such property for her debts contracted before marriage.

22. *How far is the husband liable for the contracts of his wife during coverture?—146, and notes.*

The husband is bound to provide his wife with necessaries suitable to his condition in life: and if she contracts debts due

for them during cohabitation, he is obliged to pay those debts; but for any thing beyond necessaries he is not chargeable. He is bound by her contracts for ordinary purchases, from a presumed assent on his part; but if his dissent be previously made known, the presumption of his assent is rebutted. He may still be liable, though the seller would be obliged to show, at least, the absolute necessity of the purchase for her comfort. If the tradesman furnish goods to the wife, and gives the credit to her, the husband is not liable, though she was at the time living with her husband; though, on this point, there are conflicting decisions. Nor is he liable for money lent to the wife, unless his request be averred and shown. So, if the husband makes a reasonable allowance to the wife for necessaries during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable, unless the tradesman can show that the allowance was not supplied. If the husband abandons his wife, without any provision for her maintenance, or if he sends her away, he is liable for her necessaries, and he sends credit with her to that extent. In Pennsylvania, it has been held that where the husband, after an amicable separation, furnishes necessaries according to agreement, he is not liable for articles furnished by a tradesman, even though he had no notice; for the moral obligation of the husband ceases. But if the wife elope, though it be not with an adulterer, he is not chargeable even for necessaries. The very fact of elopement and separation is sufficient to put persons on inquiry, and whoever gives the wife credit afterwards, gives it at his peril. The husband is not liable unless he receives his wife back again. The duties of the wife, while cohabiting with the husband, form the consideration of his liability. He is, accordingly, bound to provide for her in his family; and while he is not guilty of cruelty, and is willing to provide her a home, and all reasonable necessaries there, he is not bound to furnish them elsewhere.

23. *What is the rule where the wife elopes, and repents and returns again, and her husband refuses to receive her?—147-149.*

That he is bound for her necessaries; but it does not apply where the wife had committed adultery. If a man turns away his wife without justifiable cause, he is bound by her contracts

for necessaries suitable to her degree and estate, but the party furnishing necessaries must, according to a New York decision, prove that the wife left for sufficient cause. If they live together, he is bound only by her contracts made with his assent, which may be presumed. If the wife goes beyond what is reasonable and prudent, the tradesman trusts her at his peril.

24. *How far is the husband liable for the torts and frauds of the wife committed during the coverture?*—149, 150.

If committed in his company, or by his order, he alone is liable. If not, they are jointly liable, and the wife must be joined in the suit with her husband. Where the remedy for the tort is only damages by suit, or fine, the husband is liable with the wife; but if the remedy be sought by imprisonment, on execution, the husband is alone liable to imprisonment. The wife, during coverture, can not be taken on a *ca. sa.*, for her debt *dum sola*, or a tort *dum sola*, without her husband; and if he escapes, or is not taken, the court will not let her lie in prison alone. If the tort or offense be punished criminally, by imprisonment, or other corporal punishment, the wife alone is to be punished, unless there be evidence of coercion, from the fact that the offense was committed in the presence, or by the command of the husband. This indulgence is extended so far as to excuse the wife from punishment for theft committed in the presence, or by the command of her husband. But the coercion which is supposed to exist in that case is only a presumption of law, and, like other presumptions, may be repelled.

25. *What are the exceptions to the general rule of law, that the wife is incompetent to contract?*—150-154.

1. A wife may purchase an estate in fee without her husband's consent, and the conveyance will be good, if the husband does not avoid it by some act declaring his dissent, and the wife, after her husband's death, may waive or disagree to the purchase. And a wife in England, and those States in this country where fines exist, may pass her freehold estate by a fine, and this and a common recovery were the only ways in which she could, at common law, convey her real estate. She may, by a fine, and a declaration of the uses thereof, declare a use for her husband's

benefit. So, if the husband and wife levy a fine, a declaration of the uses by the husband alone will bind the wife and her heirs, unless she disagrees to the uses during the coverture. As a general rule, the wife must be a party with her husband to the conveyance, but if she levy a fine as a *feme sole*, without her husband, though it will be good as against her and her heirs, the husband may avoid it during coverture, for the benefit of the wife, as well as for himself. Now the English law is changed as to the mode of conveyance by the wife, by the abolition of fines and recoveries, and the wife conveys by deed, with her husband's concurrence. The wife may, as an attorney to another, convey an estate in the same manner as her principal could, and she may execute a power simply collateral, and, in some cases, a power coupled with an interest, without the concurrence of her husband. She may also transfer a trust estate, by lease and release, as a *feme sole*. The general rule of our American law is, that the wife may convey by deed; that she must be privately examined; that the husband must show his concurrence to the wife's conveyance by becoming a party; and that the cases in which her deed without such concurrence is valid, are to be exceptions to the general rule.

2. If the husband was banished, or had abjured the realm, it was an ancient and another necessary exception to the general rule of the wife's disability to contract, and if the husband be an alien living abroad, the reason of the exception also applies.

26. *How is the rule of law, that a woman can not hold personal property, independent of her husband, taken in equity?*—162-164.

It is not received in equity, and a married woman may, through the medium of a trustee, enjoy property as freely as a *feme sole*; and it is not unusual to convey or bequeath property to a trustee, in trust to pay the interest or income thereof to the wife to her separate use, free from the debts of her husband, and payable upon her separate order or receipt, and, after her death, in trust for her issue. In such case, the husband has no interest in the property, though after the interest is actually received by the wife, it then might be considered as part of the husband's personal property. It is not necessary that the trustee should be a stranger. The husband himself may be trustee; and if

no trustee be appointed, chancery will protect her interest. Gifts from the husband to the wife may be supported, as her separate property, if they be not prejudicial to creditors, even without the intervention of trustees. She may institute a suit by her next friend, against him, and she may obtain an order to defend separately suits against her; and when compelled to sue her husband in equity, the court may order him to make her a reasonable allowance in money to carry on the suit.

27. *What are the cases in which equity allows a wife to institute a suit against her husband?*—164.

When any thing is given to her for her separate use, or her husband refuses to perform marriage articles, or articles for a separate maintenance; or where the wife, being deserted by her husband, hath acquired by her labor a separate property, of which he hath plundered her. The acquisitions of the wife, in such a case, are her separate property, and she may dispose of them by will or otherwise. It is the settled rule in equity that a *feme covert*, in regard to her separate property, is considered a *feme sole*, and may, by her contracts, bind such separate estate.

28. *Is a married woman bound by her covenants?*—168.

The doctrine that the wife can be held bound to answer in damages after her husband's death, on her covenant of warranty, entered into during coverture, is not considered by the courts of this country to be law; and it is certainly contrary to the settled principles of the common law, that the wife was incapable of binding herself by contract. In the Supreme Court of Massachusetts, it has been repeatedly held that a wife was not liable on the covenants in her deed, further than they might operate by way of estoppel; and though the question in these cases arose while the wife was still married, yet the objection went to destroy altogether the effect of the covenant. The agreement of a *feme covert*, with the assent of her husband, to sell her estate, is absolutely void at law, and the courts of equity never enforce such a contract against her. The chancery jurisdiction is applied to the cases of property settled to the separate use of the wife by deed or will, with a power of appointment, and rendered subject to her disposition.

29. *Can a married woman make a will?*—170, 171.

A wife can not devise her lands by will, for she is excepted out of the statute of wills; nor can she make a testament of chattels, except it be of those which she holds *en autre droit*, or which are settled on her as her separate property without the license of her husband. She may dispose, by deed or will, of her separate personal estate, or of the savings of her real estate settled to her separate use. And where an estate is limited to uses, and a power is given to a *feme sole* before marriage to declare those uses, such limitation of uses may take effect, and she may devise by way of execution of the power, and whoever takes under the will, takes by virtue of the power.

30. *What is the rule with respect to antenuptial agreements?*—172-174.

That equity will grant its aid, and enforce a specific performance of them, provided the agreement be fair and valid, and the intention of the parties consistent with the principles and policy of the law. Equity will execute covenants in marriage articles at the instance of any person who is within the influence of the marriage consideration, and in favor of collateral relations.

Settlements after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, are valid, both against purchasers and creditors. The marriage is, of itself, a valuable consideration for the agreement, and sufficient to give validity to the settlement. And if a person be not indebted at the time, a post-nuptial voluntary settlement upon his wife or children, if made without any fraudulent intent, is valid against subsequent creditors; and such a settlement between husband and wife may be good, provided the settlor has received a fair and reasonable consideration in value for the thing settled, so as to repel the presumption of fraud.

If a wife, previously to marriage, makes a settlement of either her real or personal estate, it is a settlement in derogation of the marital rights, and it will depend upon circumstances whether it will be valid.

31. *What is the rule, as to the right of the husband or wife to be a witness for or against each other?*—178–180.

It is a settled principle of law, founded on public policy, that the husband and wife can not be witnesses either for or against each other. Nor can either of them be permitted to give any testimony either in a civil or criminal case, which goes to criminate the other; and the rule is so inviolable, that no consent will authorize the breach of it. But where the wife acts as her husband's agent, her declarations have been admitted in evidence to charge him. Dying declarations of the wife have been admitted in a civil suit against her husband; and for the security of the peace, *ex necessitate*, the wife may make an affidavit against her husband. These are the only exceptions to the rule.

32. *What authority may the husband exercise over the person of his wife?*—181.

As he is guardian of the wife, and is bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty, if her conduct be such as to require it, unless he renounces that control by articles of separation, or it be taken from him by a qualified divorce. The husband is the best judge of the wants of the family and the means of supplying them, and if he shifts his domicile the wife is bound to follow him wherever he chooses to go.\*

\* The answers in the above (28th) lecture have been framed without reference to the recent legislation of several States in which the relations of husband and wife, as regards the property of the latter, have been essentially changed. In Vermont, Connecticut, New York, Texas, Maine, New Jersey, Georgia, and other States, laws have been enacted enlarging the rights of married women over their property, but these statutes are too numerous to allow of even an abridgment of them being presented here.

## LECTURE XXIX. OF PARENT AND CHILD.

1. *In what do the duties of parents to their children, as their natural guardians, consist?*—189.

In maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life, by a situation suited to their habits, and a competent provision for the exigencies of that situation.

2. *How far is the parent bound by law to provide for the child?*—190–195, and notes.

He is bound to provide reasonably for the maintenance and education of his minor children, and he may be sued for necessities furnished and schooling given to a child, under just and reasonable circumstances. What is necessary for the child is left to the discretion of the parent; and where the minor is *sub potestate parentis*, there must be a clear omission of duty as to necessities, before a third person can furnish them and charge the father. And it will always be a question for a jury, how far, under the circumstances, the father's authority was to be inferred. The obligation of the father to maintain his child ceases as soon as the child comes of age, however wealthy the father may be, and the husband is not liable for the expenses of the maintenance of the child of the wife by a former husband, nor for the expense of the maintenance of the wife's mother. If, however, he takes the wife's child into his own house, he is then considered as standing *in loco parentis*, and is responsible for the maintenance and education of the child so long as it lives with him. The father is, generally, entitled to the custody of the persons of his children and the value of their labor during their minority. He may also maintain trespass for a tort to an infant child, provided he can show a loss of services, for that is the *gist* of the action by the father.

In England, the duties of the parent were regulated by statutes of 43 Elizabeth and 5 George I., which extended to