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 domicil 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 necessaries 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 necessaries, 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

grand-parents and grand-children reciprocally, and these statutes have been followed or reënacted with modifications in most of the States. The Revised Statutes of New York and Massachusetts speak only of parents and children, and by the laws of New York of 1850, the parent must notify a minor's employer, within thirty days after commencement of service, that he claims the wages, or payment to the minor will be good.

Statutory provision has also been made in New York for the support by parents, when able, of adult children not able to maintain themselves and becoming chargeable to any city or town. Where minor children have property of their own, the courts now look with great liberality to the peculiar circumstances of each case, and to the respective estates of the father and children; and in one case where the father had a large income, he was allowed for the maintenance of his infant children who had a still larger income.

3. *What are the rights of parents in addition to those mentioned in the last answer?*—203–207.

The rights of parents result from their duties, and the law empowers them to exercise such discipline as may be requisite for the discharge of this sacred trust. The father (and, on his death, the mother) is generally entitled to the custody of infant children, but the courts of justice may in their sound discretion, and when the morals, safety or interests of the children strongly require it, withdraw the infants from the custody of the father or mother, and place them elsewhere. The parent, or one *in loco parentis*, may, under certain circumstances, maintain an action for the seduction of his daughter. And generally in this country, the father may by deed or will dispose of the custody and tuition of his infant children; if there be no such disposition, the mother is entitled, after the father's death, to their guardianship.

4. *What are the duties of children to their parents?*—207.

Obedience and assistance during their own minority, and gratitude and reverence during the rest of their lives; but the common law has provided no means of enforcing these natural obligations. The statute law of New York compels children

(being of sufficient ability) of poor, old, lame or impotent persons (not able to maintain themselves), to relieve and maintain them.

5. *How does the law consider an illegitimate child?*—212–216.

A bastard, being in the eye of the law *nullius filius*, or as the civil law, from the difficulty of ascertaining the father, equally concluded, *patrem habere non intelliguntur*, he has no inheritable blood, and is incapable of inheriting as heir, either to his putative father or his mother, or any one else, nor can he have heirs but of his own body. Bastards are incapable of taking in New York under the law of descents or the statute of distributions, and this, the rule of the English law, is followed in many of the other States. But in Vermont, Connecticut, Virginia, Kentucky, Ohio, Indiana, Missouri, Illinois, Tennessee, North Carolina, Alabama, and Georgia, bastards, under certain modifications, inherit and transmit real and personal estate from and to their mothers; and in New York, the estate of an intestate bastard descends to the mother, and the relatives on the mother's side. In Massachusetts, Pennsylvania, and Maine, bastards are rendered legitimate to all intents and purposes by the intermarriage of their parents and recognition by the father; and in North Carolina, the Legislature enabled bastards to be legitimated on the marriage of the parents, or, in some cases, on the petition of the father, so as to enable the child to inherit the estate of the father. The mother or reputed father is generally, in this country, chargeable by law with the maintenance of bastard children, and the mother has a right to their custody as against the putative father, though perhaps he might assert the right as against a stranger.

LECTURE XXX.

OF GUARDIAN AND WARD.

1. *How many kinds of guardianship are there?*—220.

There are two; one by common law and one by statute.

2. *How many kinds of guardianship were there at common law?*—220.

Three; viz., guardian by nature, guardian by nurture, and guardian in socage.

3. *Who is guardian by nature?*—220.

The father.

4. *If the father died, who was the guardian?*—220.

The mother.

5. *How far does this guardianship extend?*—220.

It extends only to the custody of the person of the child, until the age of twenty-one years, and it yielded to guardianship in socage.

6. *When does guardianship by nurture occur?*—221.

Only when the infant is without any other guardian, and it belongs exclusively to the parents, first to the father, and then to the mother. It extends only to the person, and determines when the infant arrives at the age of fourteen, in the case both of males and females. This guardianship is said to apply only to younger children, who are not heirs apparent; and as all the children inherit equally under our laws, it would seem that this species of guardianship has become obsolete. As it was concurrent with guardianship by nature, it is in effect merged in the higher and more durable title of guardian by nature.

7. *What authority has the guardian in socage?*—222.

He has the custody of the infant's lands as well as his person. It applies only to lands which the infant acquires by descent; and the common law gave this guardianship to the next of blood to the child, to whom the inheritance could not possibly descend; and therefore, if the land descended to the heir on the part of the father, the mother, or next relation on the part of the mother, had the wardship; and so if the land descended to the heir on the part of the mother, the father, or his next of blood, had the wardship.

8. *When do guardians in socage cease?*—222.

When the child arrives at the age of fourteen years, for he is then entitled to elect his own guardian, and oust the guardian in socage, who is then accountable to the heir for the rents and profits of the estate.

9. *What if the infant does not elect a guardian?*—222–224.

The guardian in socage continues. But the guardianship may be considered as gone into disuse, and can hardly exist in this country; for the guardian must be some blood relation who can not possibly inherit, and such a case can rarely exist. In New York, where an estate becomes vested in an infant, the guardianship, with the rights of a guardian in socage, belong by law to the father; if there be no father, to the mother; if there be no mother, then to the nearest and eldest relative of full age, not being under any legal incapacity; and as between relatives of the same degree of consanguinity, males are preferred. But the rights of such guardian are superseded when a guardian is appointed by deed or will of the infant's father, or, in default thereof, by the surrogate of the county where the minor resides.

10. *How are testamentary guardians appointed?*—224, 225.

By the deed, or last will of the father, and they supersede the claims of any other guardian, extend to the person and estate of the child, and continue until he arrives at full age. It is a personal trust and is not assignable.

11. *Who are chancery guardians?*—227.

Guardians appointed by the Court of Chancery, or other tribunals, having jurisdiction in testamentary matters. The

chancery guardian continues until the majority of the infant, and is not controlled by the election of the infant when he arrives at the age of fourteen. If there be no testamentary guardian, surrogates and judges of probate have generally power to appoint a guardian in as ample a manner as the chancellor, and on due cause to remove him and appoint another in his stead.

12. *In whom does the general jurisdiction over guardians reside?* —227.

In the Court of Chancery. They may be cited and compelled to appear before the surrogate, but his powers are not exclusive. A guardian appointed by the surrogate or by will is as much under the control of chancery, and of the power of removal by it, as if he were appointed by the court.

13. *What is the practice in chancery on the appointment of a guardian?*—227.

The practice is to require a master's report approving of the person and security offered. The court may, in its discretion, appoint one person guardian of the person, and another guardian of the estate ; in like manner, as in cases of lunatics and idiots, there may be one committee of the person, and another of the estate. The guardian or committee of the estate always is required to give adequate security, but the committee of the person gives none.

14. *What are the legal responsibilities of a guardian to his ward?* —229–231.

His trust is one of obligation and duty, and not of speculation and profit. He can not reap any benefit from the use of his ward's money. He can not act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust. If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage is to accrue entirely to the infant's benefit. He is liable to an action of account at common law, by the infant, after he comes of age ; and the infant, while under age, may, by his next friend, call the guardian to account by a bill in chancery. Every guardian is bound to keep safely the real and personal estate of his ward, and to account for the personal estate,

and for the issues and profits of the real estate ; and if he suffers any waste, sale or destruction of the inheritance, he is liable to be removed, and to answer in treble damages. If the guardian has been guilty of negligence in the keeping or disposition of the infant's funds, whereby the estate has incurred a loss, the guardian will be obliged to sustain that loss. If the guardian puts the ward's money in trade, the ward will be entitled to elect to take the profits of the trade, or the principal, with compound interest, to meet those profits when the guardian will not disclose them. So, if he neglects to put the ward's money at interest, but negligently suffers it to lie idle, or mingles it with his own, the court will charge him with simple interest, and in cases of gross delinquency, with compound interest. These principles apply to trustees of every kind.

LECTURE XXXI.

OF INFANTS.

1. *From what does the necessity of guardians result, and how long does this inability continue in contemplation of law?*—232–234.

It results from the inability of infants to take care of themselves ; and it continues in contemplation of law, until the infant has attained the age of twenty-one years. The age of twenty-one is the period of majority for both sexes, according to the English common law, and that age is completed on the day preceding the anniversary of the person's birth. The age of twenty-one is probably the period of absolute majority throughout the United States, though female infants, in some of them, have enlarged capacity to act at the age of eighteen. In Vermont and Ohio, females are deemed of full age in respect to contracts, at the age of eighteen. Louisiana and France follow in this respect the common law period of limitation, though entire majority by the civil law, as to females as well as males, was not until the age of twenty-five ; and Spain and Holland follow, as to males, the rule of the civil law. Nor can infants do any act

to the injury of their property, which they may not avoid, or rescind, when they arrive at full age. The responsibility of infants for crimes by them committed, depends less on their age, than on the extent of their discretion and capacity to discern right and wrong.

2. *Which of an infant's acts are void, and which voidable?*—234–238.

Most of the acts of infants are voidable only; and it is deemed sufficient if the infant be allowed, when he attains maturity, the privilege to affirm or avoid, in his discretion, his acts done and contracts made in infancy; but the precise line of distinction is difficult to ascertain. If his deed or contract be voidable only, it is nevertheless binding on the adult with whom he dealt, so long as it remains executory, and is not rescinded by the infant; it is also a rule that no one but the infant or his legal representatives can avoid his voidable deed or contract. The books appear to leave the question in some obscurity, when and to what extent a positive act of confirmation on the part of the infant is necessary. The English cases seem to place the infant's exemption on his repudiation of the contract within a reasonable time after his attaining majority, while the American cases seem to decide that his contract is not binding unless there be some act on his part, after arriving at the age of twenty-one years, showing an intention to ratify. The suitable course to be adopted by a person who does not mean to stand by a contract made in infancy, is to disaffirm it by some act equally solemn with that by which the contract was originally made.

3. *What acts are binding on infants?*—239.

Contracts for necessaries are binding upon an infant, and he may be sued and charged in execution on such a contract, provided the articles were necessary for him under the circumstances and condition in which he was placed.

4. *How is the question of necessaries governed?*—239, *and note* 2.

By the real circumstances of the infant, and not by his ostensible situation; and, therefore, the tradesman who trusts him is bound to make due inquiry, and if the infant has been

properly supplied by his friends, the tradesman can not recover. Lord Coke considers the necessaries of the infant to include victuals, clothing, medical aid, and "good teaching or instruction, whereby he may profit himself afterwards." What subjects of expenditure are necessaries, has been declared to be a question for the court; and whether any and how much were required, for the jury.

5. *If the infant lives with his father, or guardian, and their care and protection are duly exercised, can he bind himself even for necessaries?*—239.

He can not.

6. *Is infancy permitted to protect fraudulent acts?*—240, 241.

No, it is not; and therefore, if an infant takes an estate, and agrees to pay rent, he can not protect himself from the rent, by pretense of infancy, after enjoying the estate when of age. If he receives rents, he can not demand them again when of age, according to the doctrine as now understood. If an infant pays money on his contract, and he enjoys the benefit of it, and then avoids it when he comes of age, he can not recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, not as a sword. He can not have the benefit of the contract on one side, without returning the equivalent on the other. But there are many hard cases in which the infant can not be held bound by his contracts, though made in fraud; for infants would lose all protection if they were to be bound by their contracts made by improper artifices, in the heedlessness of youth, before they had learned the value of character, and the just obligation of moral duties. Where an infant had fraudulently represented himself to be of age when he gave a bond, it was held that the bond was void at law. But where he obtained goods upon his false and fraudulent affirmation that he was of age, though he avoided payment of the price of the goods, on the plea of infancy, the vendor was held entitled to reclaim the goods, as having never parted with his property in them; and it has been suggested, in another case

that there might be an instance of such gross and palpable fraud, committed by an infant arrived at the age of discretion, as would render a release of his right to land binding upon him. Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, as trespass or assault; or constructive torts, or frauds. But the fraudulent act, to charge him, must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, can not be changed into a tort in order to charge the infant in trover, or case, by a change in the form of the action. He is liable in trover for tortiously converting goods intrusted to him; and in detinue, for goods delivered upon a special contract for a specific purpose; and in *assumpsit*, for money, which he has fraudulently embezzled.

7. *What other acts has an infant capacity to do?*—242, 243, *and notes.*

He may bind himself as an apprentice. The weight of opinion is that a male infant may devise chattels, at the age of fourteen, and a female, at the age of twelve. By the New York statutes, eighteen in males, and sixteen in females, is the age at which they can make a will of chattels. A general rule is, that whatever an infant is bound to do at law, the same will bind him if he does it without suit at law; and if he does a right act, which he ought to do, and which he was compellable to do, it shall bind him. And in consequence of the capacity of infants to contract marriage at the age of consent, their marriage settlements, when reasonable, have been held valid in chancery, but it has long been an unsettled question whether a female infant could bind her real estate by a settlement upon marriage.

8. *If an infant be made a defendant in equity, at the suit of a creditor, will the answer of the guardian* ad litem *be binding or conclusive?*—245.

No, it will not.

9. *How will such an answer in chancery,* pro forma, *leave the plaintiff?*—245.

It leaves the plaintiff to prove his case, and throws the infant upon the protection of the court.

10. *What was the maxim of the Roman law in this respect?*—245.

It was the maxim of the Roman law, that an infant was never presumed to have done an act to his prejudice, *pupillus pati posse non intelligitur.* In decrees of foreclosure against an infant there is, according to the old and settled rule of practice in chancery, a day given when he comes of age, usually six months, to show cause against the decree, and make a better defense, and he is entitled to be called in for that purpose by process of *subpœna.* The decree in ordinary cases would be bad *on the face of it,* and ground for a bill of review, if it omitted to give the infant a day to show cause after he came of age; though Lord Redesdale held that such an error in the decree would not affect a *bona fide* purchase at a sale under it. But in the case of decrees for the foreclosure and sale of mortgaged premises, or for the sale of lands under a devise to pay debts, the infant has no day, and the sale is absolute. In the case of a strict foreclosure of the mortgagor's right without a sale, the infant has his day after he comes of age, but then he is confined to showing errors in the decree, and can not unravel the accounts, nor redeem.

LECTURE XXXII.

OF MASTER AND SERVANT.

1. *What are the several kinds of persons that come within the description of master and servant?*—246.

1. Slaves. 2. Hired servants. 3. Apprentices.

2. *How, according to the Institutes of Justinian, might a person become a slave?*—246.

In three ways: 1. By birth, when the mother was a slave. 2. By captivity in war. 3. By the voluntary sale of himself as a slave, by a freeman, above the age of twenty, for the purpose of sharing the price.

3. *How is the relation of master and servant of the second class formed?*—258.

By contract. The one is bound to render service, and the other to pay a stipulated consideration. But if the servant, hired for a definite period, leaves the service before the end of it, without reasonable cause, or is dismissed for justifiable cause, he loses his right to wages for the period he has served.

4. *For what cause may a servant be dismissed?*—259.

Either for immoral conduct, willful disobedience, or habitual neglect.

5. *What is the rule with respect to the obligation of the master for the acts and contracts of his servant?*—259, 260, *and notes.*

That the master is bound by the act of his servant, either in respect to contracts or injuries, when the act was done by authority of the master. If the servant does an injury fraudulently, while in the immediate employment of his master, the master, as well as the servant, has been held liable in damages; and he is also said to be liable if the injury proceeds from negligence, or want of skill in the servant, for it is the duty of the master to employ servants who are honest, skillful and careful. The master is only amenable for the fraud of his servant while he is acting in his business, and not for fraudulent or tortious acts, or misconduct in those things which do not concern his duty to his master, and which, when he commits, he steps out of the course of the service to do. Thus, it has been decided that the master is not liable in trespass for the willful act of his servant, in driving his master's carriage against another. In New York and Illinois special statutes have been passed making the master liable for the acts, willful or otherwise, of his servant while driving a carriage.

6. *What is the rule as to liability of the master, if the servant employs another servant to do his business?*—260.

If the servant so employed be guilty of an injury, the master is liable. But to render this rule applicable, the nature of the business must be such as to require the agency of subordinate persons, and then there is an implied authority to employ such persons. A servant may justify a battery in the necessary defense of his master.

7. *What persons come under the description of apprentices?*—261–266.

Persons who are bound to service for a term of years to learn some art or trade. They are the subject of statute regulations in almost, if not quite, every State in the Union, or perhaps in Europe.

It is declared by the statute law of New York, which may be taken for a sample, in most parts, of the law in several of the States, that infants, if males, under twenty-one, and if unmarried females, under eighteen years of age, may be bound by indenture, by their own free act, with the consent of their father, mother, guardian or testamentary executor, or by the overseer of the poor, two justices, or a judge, to a term of service as apprentice in any profession, trade or employment, until the age of twenty-one years, if a male, or eighteen if a female, or for a shorter time. In all indentures by officers, binding poor children, a covenant must be inserted to teach them to read and write, and, if a male, general arithmetic. For refusal to serve and work, infants are liable to be imprisoned until they shall serve as such apprentices; and also to serve double the time they had withdrawn from service, provided the same does not extend beyond three years next after the end of the original term of service. They are also liable to be imprisoned in some house of correction, not exceeding one month, for ill-behavior or any misdemeanor. Infants coming from beyond the sea may bind themselves to service. Grievances of either master or apprentice are to be redressed at the general sessions of the peace, or before two justices of the peace, who have power to annul the contract, discharge the apprentice, or imprison him if in the wrong. And no person shall make any agreement with an apprentice preventing him, on expiration of his term, from setting up his trade, profession or employment in any particular place.*

* See Appendix, note C.