THE LAW OF

HUSBAND AND WIFE.

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The Law

OF

HUSBAND AND WIFE

WITH SEPARATE CHAPTERS UPON

MARRIAGE SETTLEMENTS,

AND THE

MARRIED WOMEN'S PROPERTY ACT 1882.

BY

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THE PREFACE.

THE absence of any modern Treatise on the Law relating to Husband and Wife induced the Authors to commence this work some two years ago, but as their aim was not merely to bring together an incoherent mass of decisions on the subject, but to elucidate and classify the principles underlying them, their progress has been slower than was anticipated.

When, therefore, the Married Women's Property Act, 1882, was passed, they had been engaged some time on the preparation of the work; but they have not thought it needful to alter its arrangement, except to the extent of treating Statutory Separate Estate distinct from Equitable Separate Estate. They have, accordingly, dealt with the Act of 1882 in a separate chapter, and have added to it as an Appendix the Married Women's Property Acts of 1870 and 1874, by which means special attention is drawn to the alterations effected by these Acts.

The classification adopted in this work follows what appears to be the best division of the subject. The first Chapter deals with the various points affecting the relation of Husband

and Wife, other than those relating to Property: and treats of Promises to Marry; of Marriage, its Requisites and Disabilities, and the Personal Rights and Liabilities arising from Marriage; and of Separation Deeds, Judicial Separation, and Divorce. Chapters II. to V. deal with the proprietary rights and liabilities of Husband and Wife: treating, first, of the Husband's rights in his Wife's property, and his liabilities for her contracts and torts; and, secondly, of the Wife's rights in her Husband's property, including Dower; and of her rights and liabilities with respect to her own property, including Equitable Separate Estate and Equity to a Settlement. Chapter VI. treats of the various forms of Joint Ownership existing between Husband and Wife; Chapter VII. of the Law relating to Marriage Settlements; and Chapter VIII. of Statutory Separate Estate, with special reference to the alterations effected by the Married Women's Property Act, 1882.

The large type is employed for the purpose of stating the principles of the law; and in the smaller type will be found the cases from which those principles have been deduced, and often the reasoning and judgments of the eminent judges by whom they were decided; and from the frequent references made to the judgments

of the late Sir George Jessel, it will be seen how great is the obligation under which the profession and the public generally are to him for his lucid exposition of many of the branches of law treated of in this work. The student and unprofessional reader will find in the large print a succinct and clear exposition of the law relating to Husband and Wife; and the practitioner will see at a glance where he can find the law bearing upon any particular subject, and the cases which have been decided upon it. This work is intended to be practical only, and it, therefore, contains no dissertations upon the history of the subjection of the wife and her property to the control of the husband, and of the steps by which the subjection of her property has been terminated. The Authors, however, claim for their book that its classification and arrangement have enabled them to clearly set forth the whole law affecting husband and wife within reasonable limits of space.

A considerable portion of the book has been devoted to the law affecting Marriage Settlements. These will be more than ever necessary, for a firm reliance on the words of the Act that a married woman "shall be entitled to have and to hold as her separate property and to dispose of . . . . . all real and personal

property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage," may induce testators to disregard the advisability of annexing a restraint upon alienation to property given by them to women.

The full effect of the Act of 1882, upon the legal relations of husband and wife will probably not be discovered for some time. The alterations made by it are of the first importance; and in the notes to the Act the probable results of such alterations are discussed at considerable length, and where there are difficulties attending the construction of the different sections, the Authors have not shrunk from considering them and offering an opinion.

The Table of Cases has been arranged with references to all the reports where the several cases are to be found. This will be of service to those who can refer to certain reports only, and prevents the text being overcharged with references. The full Index appended will, it is hoped, add to the value of the work.

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The Law of Husband and Wife.

INTRODUCTORY CHAPTER.

The word "marriage" is ambiguous. It sometimes signifies the ceremony by which a man and woman are made husband and wife, and sometimes the relation subsisting between them. There have been ingenious and learned disquisitions upon the class of juridical acts in which marriage ought to be included. We consider that such inquiries are profitless, and that nothing is gained by calling marriage a real contract, a consensual contract, or a conveyance. We regard marriage as a legal disposition, *sui generis*, the exact import of which can only be understood by an enumeration and classification of the rights and duties arising therefrom. It follows, therefore, that the meaning of the term marriage varies with the alteration and development of the law relating to husband and wife.

There has been no system of law in which the personal and proprietary privileges of married women have been so restricted as they have been by the common law of England, except in systems like the early Roman law, where the woman, by passing into the *manus* of the husband, lost all her rights. Even then it must be remembered that *manus* was not an incident inseparable from marriage, and that, in fact, before the Republic was replaced by the Empire, it had practically ceased to exist. Unless the wife entered into the *manus* of the husband he acquired no rights whatever in her property, except those which she gave him by way of *dos*. The *dos* was the property contributed by the wife, or by anyone else on her behalf, towards the expenses of the marriage, and the husband's rights over it were regulated by the general law, which might be modified to a certain extent by agreement between the parties. The laws of continental countries have, in the main, followed the later Roman law in regulating the effect of marriage upon the property of the husband and wife. Our common law is derived from feudal rules, and the reciprocal rights in feudal times of the husband and wife in each other's property

were not on the whole unfairly apportioned. The only property of any value in feudal times was land, and although it is true that the husband took the rents and profits of his wife's land during the coverture, yet upon him fell the burden of maintaining his wife and children in a style suitable to their degree, and he was also liable for feudal services. The wife's right to dower out of her husband's lands may be regarded as approximately equivalent to his right of curtesy out of her lands. It was the springing into existence of new kinds of personal property arising out of the growth of commerce and of wealth, that made the proprietary position of the wife unprotected by settlement so much inferior to that of her husband. By the marriage husband and wife became one person, and that person the husband. Her legal *persona* merged in his, and only emerged at the termination of the coverture in her lifetime. In Bacon's Abridgment it is said: "From the time of the intermarriage the law looks upon the husband and wife but as one person, and therefore allows of but one will between them, which is placed in the husband as the fittest and ablest to provide for and govern the family." *Bar. and Fem.* (*C.*)

The wife was incapable of making any legal disposition. She could not make a contract or execute a deed, and could not sue or be sued, nor could she make a will, except of personalty, and that only with her husband's consent. Her husband, as we shall see hereafter, acquired the greater part of her property, and became responsible for her antenuptial debts and torts, and for her torts committed during the marriage. His powers over her person were also considerable. The rigid rules of the common law could not be adapted by our judges to the constantly changing condition of society. Equity—always a potent factor in legal changes—secured to married women their equity to a settlement; by means of the doctrine of trusts created separate estate; and, by the invention of the restraint upon anticipation, placed the latter out of the power of the husband. But just as in Rome the Praetor could only bestow *possessio* (equitable ownership), not *dominium* (legal ownership), upon persons unable to acquire property by the civil law, so in England equity could only give to married women the equitable not the legal ownership of their separate estate. The legislation of Justinian abolished the distinction between

dominium and *possessio*, and the Married Women's Property Act, 1882, has completed the equitable modification of the common law, by giving every married woman the capacity of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate estate as if she were a feme sole, without the intervention of any trustee. The history of the law affecting husband and wife consists chiefly of a narration of the various steps by which, starting originally from a platform of personal and proprietary subjection to her husband, she has at length attained complete proprietary independence.

I.

MARRIAGE AND DIVORCE.

FONBLANQUE has well said that "the institution of marriage, whether it be considered as a religious institution or as a merely positive and social institution, involves consequences more extensively and seriously interesting to society than any other institution. To ensure to society all the advantages which such an institution is calculated to produce and confer, it seems to be peculiarly important that the law should secure to individuals that freedom of choice which is necessary to reconcile the happiness of individuals with the welfare of the state." It was a maxim of the Roman civil law that marriage should be free, and it was the policy of that law to encourage marriage. The principles of the civil law have been followed in construing conditions in restraint of marriage annexed to gifts of personalty, while the rules of the common law obtain with regard to similar conditions attached to gifts of realty. Agree-

ments to promote marriage were valid in Roman law, but such agreements, known as marriage brocage contracts, are void in England, and so are all agreements which are in fraud of the marriage contract. Agreements limiting freedom of choice in marriage are also void, but an agreement between two persons to marry each other is valid, and, although specific performance will not be decreed, an action for damages for breach of promise to marry is maintainable.

PROMISES TO MARRY.

Parol promise sufficient.—An agreement between two persons to marry is not an agreement in consideration of marriage within the Statute of Frauds, and therefore is enforceable if by parol only: *Cork* v. *Baker*, 1 Str. 34.

See also *Harrison* v. *Cage*, 1 Ld. Raym. 386, where the action was brought by the man, and one defence, *inter alia*, was that, although a promise to marry was binding on the man, yet that the loss to him from the woman not carrying out her promise was not such as could be remedied in a court of law. This defence, however, was unavailing.

Mutuality.—A promise of marriage in order to be binding must have been given

by both parties: *Harrison* v. *Cage*, 1 Ld. Raym. 386.

In the last edition (8th) of Addison's Contracts, p. 835, it is stated "If a man of full age bind himself by deed to marry a woman by a day named, he is responsible for the non-performance of his bond or covenant, although the woman may not be bound by a reciprocal contract to marry him." The authority cited is *Atkins* v. *Farr* (1 Atk. 287), but upon examination it will be found that the woman had accepted the man's offer of marriage and had agreed to marry him. In *Vincall* v. *Veness* (4 F. & F. 344), Bramwell, B., says, "To constitute a contract of marriage it must be mutual, and bind both parties, it was not enough that the defendant was willing and desirous to marry the lady unless she had bound herself to marry him . . . and if the jury thought there had been no such final assent until so long after the defendant's offer, that he might fairly be deemed to have retracted, and if she had held back, in fact, until then, she was too late. The assent on her part ought to have been as binding on her as upon him, and within a reasonable time. A man was not to be bound for ever, and the lady to have him or not at any future time. It was not necessary that the mutual assent should be concurrent, but it must at all events be within a reasonable time." "A promise to marry may be without words. Conduct, demeanour, the behaviour of the parties towards each other, might constitute proof from which the contract might be inferred, but stronger evidence of the promise is required on the part of the man than on the part of the woman": per Pigot, C. B. (Ir.), in *Hickey* v. *Campion* (20 W. R. 752). And Holt, C. J., in *Hutton* v. *Mansell* (3 Salk. 16, 64) said, "there is no necessity to prove an *actual* promise on the woman's part; it is sufficient to show that she

countenanced the promise and carried herself as one who approved and consented to it." And in *Daniel* v. *Bowles* (2 C. & P. 552), where the defendant, although already a married man, had been received from February to April as an accepted suitor of the plaintiff and had eloped with her to England, Best, C. J., said, that "no doubt the jury must be satisfied that there were mutual promises, but I think there is evidence from which they may be inferred." So in *Harvey* v. *Johnstone* (6 C. B. 295), where the defendant had promised to marry the plaintiff if she would go to L., and she, trusting in his promise, went, and was held entitled to bring an action for the breach of his promise. An expression to third persons of an intention to marry another, not uttered in that other person's hearing, nor communicated to such person by the authority of the party expressing the intention, does not amount to a promise: *Cole* v. *Cottingham*, 8 C. & P. 75.

Infancy.—An infant, though not bound by a promise to marry, may bring an action for breach of promise to marry: *Holt* v. *Ward-Clarencieux*, 2 Str. 937.

"The contract," said C. J. Raymond, "is not void, but only voidable at the election of the infant; and as to the person of full age, it absolutely binds." The Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2, providing that "no action shall be brought whereby to charge any person upon . . . any ratification made after full age of any promise or contract made during infancy, . . ." applies to promises of marriage: *Coxhead* v. *Mullis* (3 C. P. D. 439), in which it was admitted that there had been no fresh contract or promise after the defendant came of age, or at all events there was no evidence of any such fresh promise.

Whether there is a fresh promise to marry after attaining twenty-one or merely a ratification of a previous promise made before that age, is a question for the jury: *Northcote* v. *Doughty*, 4 C. P. D. 385; see also *Ditcham* v. *Worrall* (5 C. P. D. 410), where it was agreed that the damages should be assessed, subject to the opinion of the Court as to whether the fixing of the wedding day after coming of age was evidence of a fresh promise, and where Denman and Lindley, JJ., held that it was, but Lord Coleridge, C. J., held that it was a mere ratification. Judgment, therefore, for the plaintiff.

Conditional promise.—If a promise to marry is not to be performed immediately, but to depend upon the happening of another event, it does not operate till after that event has happened: per Lord Kenyon in *Atchinson* v. *Baker*, 2 Peake's N. P. 104.

See also *Cole* v. *Cottingham* (8 C. & P. 75), where a man in the presence of a woman declared his intention of marrying her as soon as his business was settled, and it was held that it must be shown that the condition had been performed. But where one of the parties repudiates the contract before the time for carrying it into effect has arrived, an action for the breach can be brought: *Frost* v. *Knight*, L. R., 7 Ex. 111, *S. C.* In this case the defendant promised to marry the plaintiff as soon as his (the defendant's) father should die, but during his father's life refused absolutely to marry the plaintiff. And in *Donoghue* v. *Marshall* (32 L. T. 310), the marriage was fixed to take place in May, 1875, but in February of the same year the defendant told the plaintiff that the engagement must be

considered at an end, and the plaintiff was held justified in bringing the action at once.

Unconditional promise.—If a promise to marry is indefinite, the party to whom it is made may call upon the maker to perform it at any convenient time; per Lord Kenyon in *Atchinson* v. *Baker*, 2 Peake's N. P. 104.

See also *Potter* v. *Deboos* (1 Stark. 82), where Lord Ellenborough left it to the jury whether they would not presume a general promise to marry (*i. e.*, a promise to marry within a reasonable time) from a promise of the defendant's to marry the plaintiff within six months, or in a month after Christmas; also *Short* v. *Stone* (8 Q. B. 369), where Patteson, J., said: "I do not see any rational distinction between the averments of a promise to marry on request and a promise to marry in reasonable time after request." In *Phillips* v. *Crutchley* (3 C. & P. 178), where the defendant said to the plaintiff that he would marry her in July, and that he would marry her sooner were it not that he had arrangements to make which would be completed by July, if not before, and also said to her in the month of May, on taking leave of her, "I hope in a few weeks to take you home;" this was held sufficient evidence of a general promise: see also *Dennis* v. *McKenzie* (24 L. T. 363), where, after an action for a breach of promise had been commenced, the defendant wrote saying that he was ready to marry the plaintiff, and it was held that the breach had already taken place.

Breach of promise.—If one of the parties has repudiated the contract, or by marrying

some one else has put it out of his or her power to carry out the promise, an action for breach of the promise can be brought at once, although a time has been agreed upon and it has not arrived: *Short* v. *Stone*, 8 Q. B. 358.

In the above case, Patteson, J., said, "There was a breach of contract at once when the defendant married:" see also *Caines* v. *Smith* (15 M. & W. 189), where the defence was, that although the defendant had married, he had not put it out of his power to carry out his promise, for his wife might die before the lapse of the reasonable time, and he might thus be enabled to perform his contract with the plaintiff; and Alderson, B., said: "Why should we presume that the wife will die before the lapse of a reasonable time, or in the lifetime of her husband? We ought rather to presume the continuance of the present state of things, and while that continues it is clear that the defendant is disabled from performing his contract." Where defendant has not married another, there ought to be a proof of tender and refusal; yet when plaintiff's father asked defendant if he intended to carry out his promise, and he replied "Certainly not," that was considered sufficient: *Gough* v. *Farr*, 2 C. & P. 631. Where the contract is made abroad and the breach occurs there, no action can be brought in England: see *Cherry* v. *Thompson* (20 W. R. 1029), where one of the parties came to England, and whilst here received a letter breaking off the match; but where the contract is made abroad and the breach takes place in England, an action can be brought: *Durham* v. *Spence*, L. R., 6 Ex. 46.

Justification for breach of promise.—The subsequent discovery on the part of the man of the unchastity of the woman; or the subsequent discovery on the part of the woman of the bad character or brutal conduct of the man; is a justification for a breach of a promise to marry.

CONDUCT OF THE WOMAN.—"If any man has been paying his addresses to one whom he supposes to be a modest person, and *afterwards* discovers her to be a loose and immodest woman, he is justified in breaking any promise of marriage that he may have made to her; but to entitle a defendant to a verdict on that ground, the jury must be satisfied that the plaintiff was a loose and immodest woman, and that the defendant broke his promise on that account; and they must also be satisfied that the defendant had not known her character at the time of making of the promise; for if a man knowingly promise to marry such a person, he is bound to do so": per Abbott, C. J., in *Irving* v. *Greenwood*, 1 C. & P. 350. Evidence as to the character which a woman bears in the neighbourhood where she lived is considered admissible: *Foulkes* v. *Sellway*, 3 Esp. 236. See also *Young* v. *Murphy* (3 Scott, 379), where the defendant, after the promise, discovered that the plaintiff had had carnal intercourse with a third person, and was also pregnant with a child; and *Bench* v. *Merrick* (1 C. & K. 463), where it was held that, if a man enter into a promise of marriage in ignorance of the fact that the woman had had an illegitimate child, and discovers that before the marriage, and on that ground declines entering into the marriage, he has a right to do so, although the transaction as to the child may have taken place ten or more years ago,

and the conduct of the woman may have been since perfectly correct; but if the man knew, or had reason to know, at the time of the promise, that the woman had had such a child, and gave that afterwards as his reason for refusing to marry, that would be no defence. The defendant promised marriage on condition that the plaintiff would go to bed with him, which she did: but there was evidence of subsequent promises. *Semble*, that this was not such a *turpis contractus* as to prevent the plaintiff from recovering: *Morton* v. *Fenn*, 3 Doug. 211.

Conduct of the man. — "If the plaintiff had conducted himself in a brutal or violent manner, and threatened to use her ill, a woman, under such circumstances, had a right to say she would not commit her happiness to such keeping; and she might set up such defence, and it would be legal. . . . . If the plaintiff appeared to be of gross manners and destitute of feeling . . . . the jury should take it into consideration in the verdict they were to pronounce": per Lord Ellenborough in *Leeds* v. *Cook*, 4 Esp. 258. So also in *Baddeley* v. *Mortlock* (1 Holt, N. P. C. 151), it was held to be a sufficient reply if the man had been, upon inquiry, found to be a man of bad character, but that mere accusation and suspicion were not sufficient.

Ill-health.—That the defendant since the promise, but before the breach, became afflicted with disease, occasionally bleeding from the lungs, and by reason of such disease was incapable of marriage, was held not a good answer as against the party bringing the action: *Hall* v. *Wright*, E. B. & E. 746; although *semble* a good answer as against the plaintiff, if she, instead of the defendant, had been so afflicted: *ibid.*; see also *Atchinson* v. *Baker* (2 Peake, N. P. 103), where it was held that bodily infirmity

arising after the contract was a good reason for the other party breaking off the match. We agree with Mr. Pollock in thinking that the case of *Hall* v. *Wright* is of little authority beyond the point actually decided: *Pollock's Principles of Contracts*, 392.

UNSOUND MIND.—It is no answer that the plaintiff had, before the making of the promise, been of unsound mind, and had been confined in a lunatic asylum, provided she was sane at the time of the promise: *Baker* v. *Cartwright*, 10 C. B., N. S. 124.

PREVIOUS ENGAGEMENT.—That the plaintiff was engaged to a third person at the time of the engagement is, in the absence of fraud, no answer: *Beachey* v. *Brown*, E. B. & E. 796.

PREVIOUS MARRIAGE.—That the defendant at the time of the promise was already married to a third person is no defence: *Wild* v. *Harris*, 7 C. B. 999; *Millward* v. *Littlewood*, 5 Exch. 775.

RESCISSION OF PROMISE.—If one of the parties had "absolved, exonerated, and discharged" the other from the promise, it is a good answer to an action for the breach thereof: *King* v. *Gillett*, 7 M. & W. 55; also, if there has been a tacit agreement to rescind the contract, as where no communication between the parties has taken place for two years: see *Davis* v. *Bomford* (6 H. & N. 245), where the question had been left to the jury, who had found that it was a good defence; and on a motion for a new trial, the judges unanimously decided that it was a question for the jury, and Pollock, C. B., said, "I think that the question was properly left to the jury, and that they came to a right conclusion."

FRAUD.—If the defendant was induced to continue the connection (after having broken it off from

rumours of the real state of affairs), by wilful suppressions of the real state of the circumstances of the family and previous life of the plaintiff, it is a good defence: per Abbott, C. J., in *Wharton* v. *Lewis*, 1 C. & P. 529.

DEATH OF ONE OF THE PARTIES.—The executor or administrator cannot have an action for a breach of promise to the deceased where no special damage is alleged: *Chamberlain* v. *Williamson*, 2 Mau. & S. 408.

Evidence.—The parties to any action for breach of promise of marriage shall be competent to give evidence in such action: provided that no plaintiff in any such action shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise: 32 & 33 *Vict. c.* 68, *s.* 2.

These words differ from those used in the Bastardy Act (7 & 8 Vict. c. 101, s. 3), which says that the evidence of the party bringing the action shall be "corroborated in some material particular by other testimony." In *Bessela* v. *Stern* (L. R., 2 C. P. D. 265), therefore, where the defendant had seduced the plaintiff, her sister gave evidence that the defendant told her (the sister) that he would marry the plaintiff, and also that she overheard a conversation in the course of which the plaintiff said to the defendant "you always promised to marry me, and you don't keep your word," when the defendant said he would give the plaintiff money if she went away. This evidence was held admissible under the 32 & 33 Vict. c. 68, s. 2; see also *Wilcox* v. *Gotfrey* (26 L. T. 328), where it was held that the jury could judge as to whether the

testimony was corroborated; also that the fact, that the plaintiff had sworn that the defendant had promised to marry her, whereas the defendant had declined to go into the box and swear that he had not, must be taken into consideration. In this same case it was held that acts done before the promise could not be produced as evidence: see also *Hickey* v. *Campion*, 20 W. R. 752 (Ir. Ex.). A defendant is entitled to inspect documents in the plaintiff's possession bearing upon the amount of damages, though there is no issue to be tried: *Pape* v. *Lister*, L. R., 6 Q. B. 242.

Bonds.—Where one of the parties to the agreement to marry binds himself or herself by a unilateral bond or covenant to pay a sum of money if he or she refuses to marry, an action may be brought thereon in case of such refusal.

Atkins v. *Farr* (1 Atk. 287), a covenant by the man, and *Box* v. *Day* (1 Wils. 59), a covenant by the lady. Where, however, such a bond has been obtained by fraud it is voidable: see *post*, p. 18.

Promises in consideration of marriage.—If a person make a representation, upon the faith of which a marriage is contracted, that representation must be made good by him or his executors or administrators. If made by parol, there must be a part performance other than the marriage.

Thus if the parent or his agent deliberately holds

out inducements to the suitor to celebrate the marriage, and he consents and celebrates it, believing it was intended that he should have the benefits so held out to him, the court will give effect to the proposals. In *Hammersley* v. *De Biel* (12 Cl. & F. 45), the lady's brothers, acting for her father, stated that 10,000*l.* would be left by his will to be settled on wife and children. The suitor then married and provided a jointure, relying upon the statement. The 10,000*l.* was not left by the father's will; and it was held that his estate was liable to the payment thereof, with interest from the end of the year after his death: see also *Luders* v. *Anstey*, 4 Ves. 501; *Prole* v. *Soady*, 2 Giff. 1; *Coverdale* v. *Eastwood*, L. R., 15 Eq. 121. The marriage must take place in reliance upon the representation: *Dashwood* v. *Jermyn*, 12 Ch. D. 776.

Marriage brocage contracts.—Agreements made for the purpose of promoting marriage are void *ab initio*.

Examples.—Any agreement for reward to bring about a marriage: *Hall* v. *Potter*, 3 Lev. 411. A bond given to obtain a father's consent to the marriage of his daughter: *Keat* v. *Allen*, 2 Vern. 588. A release given to obtain the mother's consent: *Hamilton* v. *Mohun*, 1 P. Wms. 118. As such agreements are not merely voidable, but void, they cannot be confirmed: *Cole* v. *Gibson*, 1 Ves. senr. 503; see also *Stribblehill* v. *Brett*, 2 Vern. 446, and the important case of *Hall* v. *Potter*, 3 Lev. 411. Money paid in consideration of marriage brocage contracts may be recovered: *Smith* v. *Bruning*, 2 Vern. 392.

Agreements in fraud of marriage.—Contracts made in fraud of parents or persons

standing *in loco parentis* are voidable, and may be set aside in equity: *Woodhouse* v. *Shepley*, 2 Atk. 535.

So also contracts in fraud of one of the parties to the marriage: *Turton* v. *Benson*, 1 P. Wms. 496; *Peyton* v. *Bladwell*, 1 Vern. 240; *Palmer* v. *Neave*, 11 Ves. 165. Such contracts, being only voidable, will not be set aside if doing so would injure third persons: *Roberts* v. *Roberts*, 3 P. Wms. 66. Where one of the parties to the marriage has prior thereto been furnished with money or property to deceive the other party, and he or she has made an agreement to restore the whole or part of it, or has given a bond to do so, such agreement or bond is voidable: *Gale* v. *Lindo*, 1 Vern. 475; *Lamlee* v. *Hanman*, 2 Vern. 466; *Redman* v. *Redman*, 1 Vern. 348.

CONDITIONS AND AGREEMENTS IN RESTRAINT OF MARRIAGE.

Testamentary conditions.—The distinctions which are recognised in our courts respecting testamentary conditions with reference to marriage are founded, says Fonblanque (Treatise on Equity, p. 258), upon the following considerations: "Though it be true that freedom from restraint, as it encourages this species of contract, is of importance to the state, it must not be considered as a principle to be pursued to its whole extent and at every hazard, for if it were it would be found that this principle, the well

regulated and bounded influence of which i capable of inducing real benefit to society, i in its excess or abuse, like other good principles, destructive of the very interests which it professes to consult . . . . The only restrictions which the law of England imposes are such as are dictated by the soundest policy and approved by the purest morality: that a person professing to be affectionate shall not be unjust, that professing not to assert his own claim, he shall not disappoint or control the claims of nature, nor obstruct the interests of the community, that what purports to be an act of generosity shall not be allowed to operate as a temptation to do that which militates against nature, morality or sound policy, or to refrain from doing that which would serve and promote the essential interests of society; are principles which cannot reasonably be reprobated as harsh infringements of private liberty, or even reproached as unnecessary restraints on its free exercise."

In considering the validity of conditions in restraint of marriage, it is necessary to distinguish between conditions precedent and conditions subsequent, whether the property to the gift of which they are attached is real or personal, and whether the restraint upon marriage is general or particular. Conditions

precedent are such as must be punctually performed before the estate can vest, and as the estate is only to arise upon the performance of the condition, it cannot vest till it is performed. Upon a condition subsequent the estate is immediately vested, but is liable to be divested upon the breach or performance of the condition. As a condition subsequent operates in defeasance of a vested interest, it is construed strictly and is not favoured at law. No precise technical words are necessary to make a condition precedent or subsequent, it will depend upon the intention of the donor, as collected from the fair construction of the instrument. We have already mentioned that the rules of the common law are followed in determining the validity of conditions in restraint of marriage annexed to gifts of real property, while the civil law governs as to similar conditions annexed to gifts of personalty.

Conditions precedent.—If the condition in restraint of marriage is a condition precedent it is valid, whether it is general or particular, and whether it relates to real or personal property.

REALTY.—*Bertie* v. *Lord Falkland*, 3 Ch. Ca. 129; *Reynish* v. *Martin*, 3 Atk. 330.

v. *Tyler*, 2 Bro. C. C. 431, the leading case; *Stackpole* v. *Beaumont*, 3 Ves. 89; *Garbut* v. *Hilton*, 1 Atk. 381; *Atkins* v. *Hiccocks*, ibid. 500.

In *Davis* v. *Angel* (4 De G. F. & J. 524), a testator by his will gave a share of his residuary estate in case A. should marry B. in trust for A. for life, subject to the proviso thereinafter contained, with remainder over; but if A. should not marry B., the testator directed that the bequest to A. should fail and become part of his residuary estate, for the benefit of the other legatees. A. married C. in testator's lifetime with his consent. Held, that the condition being precedent, could not be removed by the assent. When, however, by unavoidable circumstances, the consent required cannot be obtained, the doctrine of *cy près* will be applied, and it will be sufficient if the condition is complied with as far as possible. Thus, if a condition precedent requires the consent of three trustees to the marriage, and one of them die, the approbation of the survivors will be a sufficient compliance with the condition: *Roper's Legacies*, 4th ed., p. 802, approved by James, L. J., in *Dawson* v. *Oliver-Massey*, 2 Ch. D. 753. In this case the condition precedent was the consent of parents: one died, and held that consent of survivor was sufficient. The same rule would hold good whenever the consent of several persons is required, and the consent of the survivors is duly obtained. Where also the person whose consent is required dies, the condition will be dispensed with: see *Booth* v. *Meyer*, 38 L. T. 125.

Conditions subsequent.—If the condition in restraint of marriage is a condition subsequent, it is good as to real estate if the restraint is partial, and apparently also if

general, whether there is or is not a devise over.

The restraint, if general, will be held good if the object of the donor seems to be to make a provision until marriage rather than to restrain marriage: *Jones* v. *Jones*, 1 Q. B. D. 279. As to partial restraints, see *Fry* v. *Porter*, 1 Ch. Cas. 138. Real estate for this purpose includes such portions charged upon, or interest arising out of, land, as are not in their nature testamentary: *Harvey* v. *Aston*, 1 Atk. 361; *Mansell* v. *Mansell*, 2 Bro. C. C. 473. Lord Thurlow says, in *Scott* v. *Tyler* (2 Bro. C. C. 431), "land devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in lands (though I do not find this yet resolved) follow the rule of the common law."

A condition subsequent in general restraint of marriage, annexed to a gift of personal property, or a mixed fund, is bad, whether there is or is not a gift over.

See *Lloyd* v. *Lloyd*, 2 Sim. (N. S.) 255; *Morley* v. *Rennoldson*, 2 Hare, 570; *Bellairs* v. *Bellairs*, L. R., 18 Eq. 510, where Sir George Jessel seemed to be of opinion also that the condition would be void if the gift were of the income of a fund arising from the proceeds of a sale of realty only.

A condition subsequent in partial restraint of marriage annexed to a bequest of personal property is valid if there is a gift over, but

not otherwise. If there is no bequest over, the condition restraining marriage is regarded as being *in terrorem* only, and is of no effect.

The following are examples of partial restraint:—A condition not to marry without consent; or to marry or not to marry a certain person; or a condition prescribing due ceremonies and place of marriage, or which prohibits marriage before a reasonable age; a condition not to marry a widow: *Scott* v. *Tyler*, 2 Bro. C. C. 431.

As to gifts over, see *Sutton* v. *Jewke*, 2 Cha. Rep. 95; *Wrottesley* v. *Wrottesley*, 2 Atk. 584; and *Chauncy* v. *Graydon*, ibid. 616.

Where it is a condition subsequent that consent to the marriage shall be obtained, such consent may be dispensed with in the following cases:—

(1) Where the legatee or devisee marries with the testator's consent, or he subsequently approves of the marriage: *Clarke* v. *Berkeley*, 2 Vern. 720; a devise, *Parnell* v. *Lyon*, 1 V. & B. 479; a bequest, *Wheeler* v. *Warner*, 1 S. & S. 304; subsequent approval, *Smith* v. *Cordery*, 2 S. & S. 358. The case of *Lowry* v. *Patterson* (8 Ir. Rep., Eq. 372), though apparently in conflict with these decisions, will be found to be in agreement: see also *Crommelin* v. *Crommelin*, 3 Ves. 227.

(2) Where it becomes impossible to obtain such consent. In *Booth* v. *Meyer* (38 L. T. 125), a testator declared that if L. should marry M. without his consent in writing first obtained, the legacies to L.

should be void, and should go to certain other persons. After testator's death L. married M. without such consent. Held, that the condition was only intended to apply to marriage during testator's life, and that the condition having become impossible of fulfilment, the gift over did not take effect: see also *Grant* v. *Dyer*, 2 Dow, 73; *Collett* v. *Collett*, 35 Beav. 312.

As to what is a sufficient manifestation of consent see *Mesgrett* v. *Mesgrett*, 2 Vern. 580; *Clarke* v. *Parker*, 19 Ves. 1; *Lord Strange* v. *Smith*, Amb. 263; *Worthington* v. *Evans*, 1 S. & S. 165; *Daley* v. *Desbouverie*, 2 Atk. 261; *Pollock* v. *Croft*, 1 Mer. 181. It appears that the consent must not be unreasonably or improperly withheld: *Dashwood* v. *Bulkeley*, 10 Ves. 230.

Conditions annexed to gifts of personalty, that husband and wife should separate, are void, but the gifts are valid. In *Brown* v. *Peck* (1 Eden, 140), there was a bequest of an allowance to a *feme covert*, on condition that she lived apart from her husband. Held, that the condition being *contra bonos mores*, the legacy was unconditional. In *Wren* v. *Bradley* (2 De G. & S. 49), an annuity and share in residue were bequeathed to testator's daughter on condition she lived apart from her husband. Held, that the bequests were valid, although they were living together at time of testator's death.

Second marriages.—A condition, whether subsequent or precedent, in restraint of a man or woman marrying a second time is valid.

The cases deciding that a condition restraining the second marriage of a widow is valid are *Newton* v. *Marsden* (2 J. & H. 356), *Evans* v. *Rosser* (2 H. & M. 190), and this is so, whether imposed

by a husband or a stranger. A recent case in the Court of Appeal has, in analogy to these decisions, held that such a condition as to a widower marrying again is also valid: *Allen* v. *Jackson*, 1 Ch. D. 399.

Conditional limitations.—Either real or personal property may be given to a person until marriage and then over, and such a limitation will be valid.

Examples.—An annuity or an estate given to a person during widowhood: *Jordan* v. *Holkham*, Amb. 209; *Barton* v. *Barton*, 2 Vern. 308. College fellowships are a familiar illustration of the validity of limitation during celibacy: see *Lowe* v. *Peers*, Wilmot's Cases, 369. An annuity to a person while she keeps single: *Gibson* v. *Dickie*, 3 Mau. & S. 463; *Heath* v. *Lewis*, 3 De G. M. & G. 954.

Agreements.—Agreements made in restraint of marriage are void, as being contrary to public policy.

In *Hartley* v. *Rice* (10 East, 22) Lord Ellenborough held a wagering contract, that defendant would not marry within a specified time, to be void, as it tended to discourage marriage: see also *Baker* v. *White*, 2 Vern. 215. Any agreement, whether by parol or specialty, which restrains a person from marrying any one other than a particular person is void: *Lowe* v. *Peers*, 4 Burr. 2230—2234. But a covenant to pay a woman a sum of money so long as she continues unmarried is good: *Gibson* v. *Dickie*, 3 Mau. & S. 463.

MARRIAGE AND ITS REQUISITES.

Marriage, as understood in Christendom, is the voluntary union for life of one man and one woman, to the exclusion of all others. A marriage contracted in a country where polygamy is lawful between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and though it is a valid marriage by the *lex loci*, and at the time when it was contracted both the man and the woman were single and competent to contract marriage, an English court will not recognize it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or of obtaining relief for a breach of matrimonial obligations: *Hyde* v. *Hyde*, L. R., 1 P. & D. 130. The requisites for a valid marriage are, that it should be celebrated in a form valid by the *lex loci celebrationis*, and between persons capable of contracting a marriage by the law of their domicile, consenting thereto, and able to perform the duties of marriage.

Formal requisites.—The forms of entering into the contract of marriage are regu-

lated by the *lex loci celebrationis*: *Brook* v. *Brook*, 9 H. L. C. 193; *Simonin* v. *Mallac*, 2 Sw. & Tr. 67. The formal requisites of a marriage in England, and the capacity for contracting it, are prescribed by several statutes.

The 4 Geo. 4, c. 76, rendered it necessary that all persons, except Jews and Quakers, should be married according to the rites of the Established Church, and directed that all the rules prescribed by the Rubrics prefixed to the Book of Common Prayer should be duly observed. By this act marriages shall take place in the parish church or public chapel of the parish or chapelry in which the parties to be married, or one of them, shall reside, after publication of banns for three Sundays preceding the solemnization of the marriage; or if it is a marriage by common licence, at the church or chapel in the parish of which one of the parties has resided for fifteen days preceding the obtaining of the licence, which church must be named on the licence. If it is a marriage by special licence, it can take place at any hour of the day or night, in any place, whether consecrated or not. People may also be married in an Established Church, after obtaining a certificate from the superintendent registrar, the certificate naming the church where the parties are to be married (6 & 7 *Will.* 4, *c.* 85), but not without the consent of the minister of the church: 19 & 20 *Vict. c.* 119, *s.* 11. All marriages, except those where a special licence has been obtained, must take place between the hours of eight a.m. and twelve noon. If the marriage is celebrated in a church, it must be performed by a duly ordained clergyman, who, with two other witnesses, must attest the marriage, and in this case the civil registrar need not be present. If the bride-

groom be a priest, he cannot perform the ceremony; if he do, the marriage is null and void: *Beamish* v. *Beamish*, 9 H. L. C. 274.

The 6 & 7 Will. 4, c. 85, appointed, instead of a marriage in accordance with the rites of the Church of England, a marriage at a duly licensed place of worship, or a purely civil ceremony. Under this act persons may be married upon a certificate or upon a licence of the superintendent registrar of the district or districts (if more than one) in which they reside, after notice given. In the case of a marriage upon a certificate, the notice must state a previous residence of at least seven days in the district or districts, and a copy of the notice must be hung up in the registrar's office for twenty-one days after it has been received. In the case of a marriage upon a licence, if the parties declare that they have resided for at least the fifteen days next before the notice in the district or districts, the licence may be issued the second day after the notice is received. The licence or certificate must state where the marriage is to take place. The parties may then be married either in a place of religious worship registered as a building for the solemnization of marriages, or in the superintendent registrar's office; in the latter case the superintendent registrar must himself be present, and in the former, he or one of the registrars under his superintendence. The marriage must take place between the hours of eight a.m. and twelve noon, and there must be two witnesses to attest to its having taken place.

Fraudulent alteration of name.—If both parties were cognizant of it, and the marriage was by banns, a suit for nullity can be established: *Mather* v. *Ney*, 3 Mau. & S. 265; but "in order to invalidate a marriage . . . it must be contracted by *both* parties, with a knowledge that no due publication of the

banns had taken place:" per Denman, C. J., in *R.* v. *Inhabitants of Wroxton*, 4 B. & Ad. 640. If the marriage is by licence the suit for nullity cannot be established: see *Bevan* v. *M'Mahon*, 2 Sw. & Tr. 230, where Sir C. Cresswell said, "Is the marriage to be vitiated by reason of mis-statement in the affidavit? We find no authority for that proposition, but, on the contrary, many *dicta* in a long series of cases directly the other way, and pointing out the difference in that respect between banns and licences:" see also Hannen, J., in *Haswell* v. *Haswell and Gilbert* (30 W. R. 231), where he says, "as the marriage was by licence and not by banns, I do not think the misdescription invalidates it." There is no analogy between a marriage by banns and a marriage before the registrar: *Holmes* v. *Simmons*, L. R., 1 P. & D. 523.

Consent of guardians, &c.—The consent of parents or guardians shall be obtained to the marriage of minors (except where they are widowers or widows). The marriage is not invalidated by the want of such consent, but the property that shall accrue to the offending party by reason of marriage may be settled for the benefit of the innocent party, or for the issue of the marriage: 4 *Geo.* 4, *c.* 76, *s.* 23. Where the husband incurs a penalty under this section, the Court of Chancery has no discretion, but is bound to settle and secure all the property present and future of the wife for the benefit of herself or the issue of the marriage: *Att.-Gen.* v. *Mullay*, 4 Russ. 329. The father is the proper guardian of his children, and he has power by deed or will to appoint a guardian, who at his death shall stand in his place. After the father's death, and in default of his having appointed a guardian for his children, the mother will act as guardian until she marries again. If there is no mother, or on her marrying again, the Court of Chancery will either appoint or act as guardian. In

case the father or fathers of the parties to be married, one of them, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them whose consent is made necessary to the marriage, shall be *non compos mentis*, or beyond seas, or shall unreasonably, or from undue motive, withhold consent, the Court of Chancery will render assistance: 4 *Geo.* 4, *c.* 76, *ss.* 16 and 17.

QUAKERS.—The 6 & 7 Will. 4, c. 85, s. 2, provides that where both parties belong to the Society of Friends, commonly called Quakers, they "may continue to contract and solemnize marriage according to the usages of the said society," provided that notice to the registrar shall have been given, and that the superintendent registrar's certificate shall have been issued. The 23 Vict. c. 18, extends this provision to the cases where "one only, or where neither of the parties to the marriage shall be a member of the said society; provided always, that the party or parties who shall not be a member or members of the said society shall profess with or be of the persuasion of the said society," and be authorized by the rules of the said society. See also 35 *Vict. c.* 10.

JEWS.—The 6 & 7 Will. 4, c. 85, s. 2, provides that Jews may continue to contract and solemnize marriage according to their own usages, provided that the superintendent registrar's certificate shall have been issued in due form.

ROYAL MARRIAGES.—By 12 Geo. 3, c. 11, no descendant of George II. (other than the issue of princesses who may validly marry into foreign families) can marry without the consent first obtained of his Majesty's heirs or successors, signified under the great seal and declared in council. A marriage

without such is void wherever celebrated (*The Sussex Peerage*, 11 C. & F. 85); but if any descendant over twenty-five shall persist in his intention to contract a marriage, although such consent is withheld, he or she may do so after giving twelve months' notice to the Privy Council.

COLONIAL MARRIAGES.—The 28 & 29 Vict. c. 64 provides that every law made or to be made by the legislature of any of her Majesty's possessions abroad for the purpose of establishing the validity of any marriage contracted in such possession shall have from the date of such law the effect of making any such marriage valid within all parts of her Majesty's dominions, provided that at the time of such marriage both of the parties thereto were according to the law of England competent to contract the same.

MARRIAGES IN FOREIGN COUNTRIES.—Marriages of British subjects in foreign countries are valid if made according to the forms prescribed by the laws of those countries (*Lacon* v. *Higgins*, 3 Stark. 178; *Lautour* v. *Teesdale*, 8 Taunt. 830), or if solemnized in the manner provided by 12 & 13 Vict. c. 68.

CONSULAR MARRIAGES.—The 12 & 13 Vict. c. 68, and 31 & 32 Vict. c. 61, provide for marriages between British subjects resident in foreign countries, by or in the presence of the British consul, or the person acting temporarily as British consul.

HER MAJESTY'S SHIPS.—The Act 42 & 43 Vict. c. 29, makes valid all marriages between British subjects which before the passing of the act have been solemnized on board one of her Majesty's vessels on a foreign station, in the presence of the officers commanding such vessel.

Essentials of marriage.—It is essential to the validity of a marriage that the parties should not be within the prohibited degrees of consanguinity or affinity, and should be unmarried; that each of them should be of the required age, and should consent to the marriage; and that they should be of sound mind, and able to perform the duties of marriage.

PROHIBITED DEGREES.—The essentials of the marriage contract depend upon the *lex domicilii*, and therefore, if the marriage is absolutely prohibited by the law of the domicile, the marriage is there void, though duly solemnized elsewhere. Thus, where a marriage between relatives is forbidden by our law, such a marriage contracted by British subjects temporarily resident abroad, but really domiciled in this country, though valid in the foreign country, is void here: *Brook* v. *Brook*, 9 H. L. C. 193. In England all marriages before the 31st August, 1835, within prohibited degrees of affinity (*i. e.*, the relation between the wife or husband, and the relatives of the other of them) are valid; but within prohibited degrees of consanguinity are void. Since that date all marriages between parties related to each other, either by consanguinity or affinity within the third degree inclusive, are absolutely void (5 & 6 *Will.* 4, *c.* 54, *ss.* 1 *and* 2), wherever contracted, if the parties are domiciled in England. In the case of *Brook* v. *Brook* (*supra*), a man married, in Denmark, his deceased wife's sister, where such marriages are valid: held, that the marriage was void, as at the time of the marriage they were domiciled in England.

lucid interval is good, unless a commission of lunacy has been taken out and remains unrevoked at the time of marriage, when it is void under 15 Geo. 2, c. 30: *Turner* v. *Meyers*, 1 Hagg. Cons. R. 414; *Hancock* v. *Peaty*, L. R., 1 P. & D. 335.

Impotency.—A marriage is voidable on account of the impotency of either party, but is valid until annulled. The latest case bearing on impotency is *L.* v. *L.* (otherwise *W.*), 7 P. D. 16.

Proprietary rights.—Where a person domiciled in one country marries a person domiciled in another country, the question arises what law is to govern the operation of the marriage upon the proprietary rights of the parties. The following rules are extracted from Westlake's Private International Law (p. 61):—First. In the absence of express contract, the effect of marriage on English land is governed by the law of England, while the law of the domicile (husband's) regulates the rights of the husband and wife in the moveable property belonging to either of them at the time of the marriage, or acquired by either of them during the marriage. Secondly. The formal requisites of a marriage settlement or contract will generally depend on the law of the place where it is made; but if it relates to English land it cannot operate as a conveyance unless it satisfies the forms required by English law. Its legality, operation, and generally its interpretation, will be governed by the law of the matrimonial domicile, except where the marriage has taken place on the faith of an agreement that the husband shall transfer his domicile to another country, when law will govern.

Nullity of marriage.—The Probate, Admiralty and Divorce Division of the High

Court has power to declare a marriage null and void upon a suit for nullity of marriage. The legal presumption is in favour of the validity of any marriage; and although grounds may exist for declaring it void, yet if the petitioner has been aware of them and has refrained for some time from seeking relief, the remedy will be barred.

We have already stated that to constitute a valid marriage it is requisite (1) that it should be celebrated in a form valid by the *lex loci celebrationis;* (2) that the parties should be capable of inter-marrying by the law of their domicile; and (3) that they should consent thereto, being of sound mind and able to perform the duties of marriage. The first is merely formal, and the court will not, in the absence of some of the required formalities, declare the marriage void unless *both* the parties were at the time of the marriage aware of the non-compliance with such forms, and knowingly and wilfully concurred in the omission or irregularity. Thus a marriage is valid although celebrated without banns and licence first had and obtained, unless both parties were aware, at the time of the ceremony, of the absence of such banns and licence: *Greaves* v. *Greaves*, L. R., 2 P. & D. 423; see also *Gompertz* v. *Kensit*, L. R., 13 Eq. 369; *Templeton* v. *Tyree*, L. R., 2 P. & D. 420; and *Fendall* v. *Goldsmid*, 2 P. D. 263. With regard to (2) and (3), if either is lacking, *i. e.*, if the parties are not single or are within the prohibited degrees of consanguinity or affinity, or if one of them is impotent, the marriage is void, whether the parties were or were not aware of it: see the cases of *Brook* v. *Brook* and *Sottomayor* v. *De Barros*, *ante*, pp. 33, 34.

Jactitation of marriage.—A jactitation of marriage is where a person "boasts that he or she is married to the other, whereby a common reputation of their matrimony may ensue." Suits for jactitation of marriage rarely occur now. If the petitioner's case is proved, the court will decree perpetual silence against the jactitator.

The defences to a jactitation charge are either a denial of the boasting, or a setting-up of the marriage, or an allegation that the jactitator was allowed by the petitioner to assume the character of husband or wife, as the case may be: see *Browne's Divorce Practice*, 4th edit. 90, 149.

PERSONAL RIGHTS AND LIABILITIES RESULTING FROM MARRIAGE.

The rights of a husband acquired by marriage are either rights *in rem*, that is, rights against the world generally, or rights *in personam*, that is, rights against individuals. As will be seen hereafter, many of the wife's rights *in rem* and rights *in personam* were formerly transferred to the husband by the marriage; but it still creates a new class of rights *in rem*, viz., those rights which he has to the society and person of his wife as against all other persons; and such rights may be violated by any act which deprives him, even though

temporarily, of her society (*per quod consortium amisit*), or which wrongs her reputation.

Husband's rights and powers.—A husband may recover damages for the wrongful imprisonment or detaining of his wife, for injuries to her, for assault and battery of her (even where the assault is with consent of wife, as she has not *potestatem corporis sui*), and for slander of her where special damage results to him.

If the cause of action is one that will survive to the wife after the husband's death, she shall be joined, but in every other case the husband will sue alone: see *Viner's Abr. Bar. and Fem.* (*J.*)

Where a person who has assaulted a married woman has been summarily convicted and fined, and the fine has been paid, the husband's right of action is barred: *Masper* v. *Brown*, 1 C. P. D. 97.

A husband may maintain an action against any person who entices away his wife from him, or who, having received her into his house, allows her to continue there after the husband has given him notice not to harbour her, unless the husband has been guilty of cruelty: see *Winsmore* v. *Greenbank*, Willes, 577; *Philip* v. *Squire*, 1 Peake, 114; *Berthon* v. *Cartwright*, 2 Esp. 480.

If the death of the wife is caused by neglect, default, or any wrongful act, the husband is entitled to compensation: 9 & 10 *Vict. c.* 93; see also *Chapman* v. *Rothwell*, 4 Jur. (N. S.) 1180. So, also, for injuries to her caused by negligence: *George* v. *Skivington*, L. R., 5 Ex. 1.

ADULTERY.—The Divorce Act, 1857, s. 59, abolished the action given to a husband against a person for criminal conversation with his wife; but sect. 33 permits a husband to claim damages from any person who has committed adultery with his wife; such damages may be claimed, either in a petition for dissolution of marriage, or for judicial separation, or in a petition limited to such object alone, *i.e.*, to the claiming of damages. In assessing damages the jury are to take into consideration the same circumstances as would have been considered in an action for criminal conversation: *Comyn* v. *Comyn*, 32 L. J., Prob. 210; *Cowing* v. *Cowing*, 33 L. J., Prob. 149. The court has power to direct in what manner the damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife: *sect.* 33.

Besides the proprietary rights which the husband may have acquired by the marriage, he has certain personal rights against his wife. Thus, he has a right to sue for restitution of conjugal rights if she has left him. It used to be held that a husband had power to administer correction to his wife: *Sir Thomas Seymour's case*, Godb. 215, but even then Coke, L. J., dissented from the majority of the court.*

*In Bac. Abr. Baron and Feme (B.), it is said, "The husband hath by law power and dominion over the person of his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a

violent or cruel manner;" and although by our ancient law she was entitled in case of threatened violence to sue out her writ of *supplicavit*, yet the writ expressly saved the husband's lawful power. There is little doubt, however, that at the present day a husband would be criminally liable for assaulting his wife, and that in a matrimonial suit such treatment of her would be regarded as cruelty. In 1718, in the case of *Atwood* v. *Atwood* (Prec. Cha. 492), it was held, that the husband has by law a right to the custody of his wife, and may, if he think fit, confine her, but that he must not imprison her, and that a wife cannot either by herself or her next friend maintain a writ *de homine replegiando* against her husband. This subject is fully discussed and authorities cited in the remarkable case of *In re Cochrane* (8 Dowl. P. C. 630), which decided that where there is a restraint upon the personal liberty of a *feme covert*, the court *in favorem libertatis* will grant a *habeas corpus* directed to the husband to bring up the body of his wife. From the return made to the writ, it appeared that the restraint on the wife's person arose from her own breach of duty, and that the object and declared purpose of the wife was to escape from her husband, and to live apart from him as she had previously done for four years. The court restored her to her husband, though there was no reason to apprehend that she would avail herself of her absence to injure his honour or his property, and held that (1) the husband has by the common law of England a right to the custody and control of his wife, she is under his guardianship, and he is entitled to prevent her from indiscriminate intercourse with the world by enforcing cohabitation and a common residence; therefore, where a wife appears at masked balls without the permission or knowledge of her husband, he has a right to restrain her from frequenting such

husband as may seem right. The Married Women's Property Acts, 1870 and 1882, have made this section applicable to the wife having separate property, whose husband becomes chargeable to any union or parish. A husband, whose wife has left him and committed adultery, is not answerable to the parish for maintaining her, although he himself has been guilty of adultery since her departure: *R.* v. *Flintan*, 1 B. & Ad. 227; see also *Wife's Equity to a Settlement, post.*

Maintenance of children.—The husband is bound to support and educate his children: see 43 *Eliz. c.* 2, *s.* 7; 31 & 32 *Vict. c.* 122, *s.* 37; and 39 & 40 *Vict. c.* 79, *s.* 4. Should he be unable to do so, and the wife has separate property, she will be liable for their maintenance: see *Married Women's Property Act*, 1882, *s.* 21, *and notes thereon, post.*

The 4 & 5 Will. 4, c. 76, s. 56, enacts that "any relief given to or on account of any child or children under the age of sixteen of any widow, shall be considered as given to such widow, provided always, that nothing herein contained shall discharge the father and grandfather, mother and grandmother of any poor child from their liability to relieve and maintain such child," in pursuance of 43 Eliz. c. 2, s. 7. She is not liable if she has no separate property, and cannot be convicted under the Vagrancy Act (5 Geo. 4, c. 83, s. 4), for running away and leaving her children chargeable to the parish: *Peters* v. *Cowie*, 2 Q. B. D. 131. A man marrying a woman who has children at the time of such marriage, whether legitimate or illegitimate, is bound to support them until they reach the age of sixteen or until the mother dies: 4 & 5 *Will.* 4, *c.* 76, *s.* 57.

Guardianship of children.—It hardly falls within the scope of this work to treat of the guardianship of children, we shall therefore content ourselves with stating the principles which apply, and refer readers, wishing for detailed information, to the valuable notes appended to the case of *Eyre* v. *Countess of Shaftesbury*, 1 W. & T. L. C. in Equity.

The father is the natural guardian of his children, and is entitled to their custody during their infancy, and even as against their mother he may place them with another person.

Prior to the Infants' Custody Act, 1873, any contracts made by the father giving up his rights to their custody were void. That act legalizes an agreement in a separation deed made between the father and mother of an infant, by which the father agrees to give the custody thereof to the mother, unless the court is of opinion that such agreement is not for the benefit of the infant. At the death of the father, the mother is the natural guardian of their children, if he has appointed no testamentary guardian. The Act, 12 Car. 2, c. 24, gives the father the power of appointing a testamentary guardian to his infant children, but this does not extend to his illegitimate children. A mother has not the power of appointing a testamentary guardian, but the court in appointing a guardian will have regard to her wishes. A mere stranger has no legal right to appoint guardians for an infant during his father's life, but the father may so act as to render such appointment effectual. The court has also jurisdiction to appoint a guardian and

to interfere between the children and any kind of guardian. Thus, the court may take away the children even from their father on account of his misconduct or insolvency, and give them to a person *to act as guardian.*

Torts.—As a consequence of the unity of the person of the husband and wife, neither can commit a tort against the other while living together, except in regard to property, and that exception was first introduced in 1870, in respect of a wife's separate estate: see the *M. W. P. Act*, 1882, *s.* 12, *and notes thereon, post.*

As to a wife separated from her husband, or living apart from him under a protection order, see 20 & 21 *Vict. c.* 85, *s.* 26, *post* (p. 67), *and s.* 21, *post* (p. 77).

Crimes.—With regard to crimes committed by husband or wife against the other, a distinction must be drawn between offences against the person and offences against property. As to the former the ordinary rules of law apply, but prior to 1870, neither could commit a crime against the other in respect of his or her property. The Act of 1870, s. 11, gave a married woman, in her own name, in regard to certain separate property therein mentioned, the same criminal remedies against all persons (including her hus-

band, therefore), as if she were a *femé sole*, and the Act of 1882 extends the remedies to all her separate property, and expressly includes the husband, with a proviso, however, preventing such proceedings being brought in reference to acts committed while they are living together, unless on the eve of his deserting her: see *Notes to Act*, *s.* 12, *post.* This act also gives criminal remedies to the husband against the wife in respect of his property. The law prior to 1883 was as stated below:—

"A married woman cannot, therefore, commit theft upon things belonging to her husband. If any other person assists a married woman in dealing with things belonging to her husband in a manner which would amount to theft in the case of other persons, such dealing is not theft unless the person so assisting commits or intends to commit adultery with the woman, in which case he, not she, commits theft. But this exception does not apply to the case of an adulterer or person intending to commit adultery who assists a married woman to carry away her own wearing apparel only from her husband. It is doubtful whether the mere presence and consent of a married woman on an occasion when some person deals with her husband's goods in a way which would otherwise amount to theft, excuses such person if he acts as a principal in the matter and not as her assistant": *Stephen's Digest of Criminal Law*, p. 213.

If a wife commit a crime in the presence of the husband, the law presumes that she

acted under his coercion, and excludes her from punishment: 1 *Hale*, 45, 516.

If she commit a crime in the absence of her husband, though it be by his order or procurement, the coverture will be no excuse: 2 *Leach, C. C.* 1102. The presumption that the wife is acting under the coercion of her husband may be rebutted; and it is not allowed in cases of treason, murder, or offences of the like description: 1 *Hale*, 45, 47, 48; 1 *Hawk. c.* 1, *s.* 11. She may be joined in an indictment with her husband in certain cases, as, *e. g.*, for keeping a brothel or gaming-house (*R.* v. *Williams*, 10 Mod. 63; 1 Salk. 384; *R.* v. *Dixon*, 10 Mod. 335); also for committing an assault (*R.* v. *Cruse*, 8 Car. & P. 541). Husband and wife cannot be found guilty of a conspiracy, for they are considered in law as one person, and are presumed to have but one will: 1 *Hawk. c.* 72, *s.* 8; nor can either as a rule give evidence against the other in criminal cases; nor does the wife become an accessory after the fact by receiving and assisting her husband who has committed a crime.

DISABILITIES OF COVERTURE.

If an unmarried woman is of age and of sound mind, she has the normal rights and liabilities of an ordinary citizen, so far as the sphere of private law is concerned, and it is not within the scope of this treatise to discuss her political disabilities. She may acquire, hold, and dispose of any kind of property; she is capable of entering into contracts and incurring thereby valid obligations; she is liable for her torts, and for the performance of duties imposed upon her by law

apart from duties arising *ex contractu* or *ex delicto*, and may sue and be sued in every respect as if she were a man. The effect of marriage by the common law was to take away nearly all her rights and liabilities; the law gave the husband an absolute power of disposing of her personal property, and he was so far master of her real property as to receive the profits of it during her life. He had the same power over property coming to her during the coverture, even although it might have been acquired by her own labour. Thus where the wife had actually received the price of her labour, the husband recovered the price again, because it had been paid after he had given notice not to pay the wife. She could not make a will of realty except by means of a power, nor of personalty unless by a power or with her husband's consent, nor could she alienate her real property during the coverture except with his consent and by deed acknowledged.

The husband was liable for the wife's debts contracted before marriage, whether he had any portion with her or not, but only during the coverture, and if he died before the debt was recovered, the wife surviving was liable. A wife could not make a valid contract, nor

was she responsible for any wrongs founded upon or connected with a contract. The husband was answerable for all actions for which his wife was answerable at the time of the marriage, and also for all her torts and trespasses during coverture. The wife could not sue or be sued alone; but in those cases where the debt or cause of action would survive to the wife, as in recovering ante-nuptial debts, in actions relating to her lands, or injuries done to her person, both the husband and wife had to be parties. In consequence of her inability to sue, the times prescribed by the Statutes of Limitations did not run against her while the coverture lasted. We refer to the sections on Separate Estate and the Married Women's Property Acts, *post*, for a detailed account of her present legal position and the changes which led to it. It may briefly be summarized in this statement that the proprietary disabilities of a married woman have been almost entirely removed. She may acquire and hold any real or personal property as her separate property, and may dispose of it by will or otherwise, in the same manner as if she were a *feme sole*. She can contract and can sue and be sued as if unmarried; hence she will no longer be able

to claim the privilege given by the Statutes of Limitations to persons under disability, among whom she was formerly included when unable to bring actions alone.

SEPARATION DEEDS.

While a bare agreement between husband and wife to live apart from each other has been held to be not binding, the court will decree specific performance of an agreement to execute a deed of separation, founded upon valuable consideration, where the stipulations are not contrary to law or public policy: *Wilson* v. *Wilson*, 1 H. of L. Cases, 538.

The whole question as to the validity and policy of separation deeds is exhaustively discussed and considered in the arguments and judgment in *Wilson* v. *Wilson*, *supra*, and in the case of *Hunt* v. *Hunt*, 4 De G. F. & J. 221. In the latter case Lord Westbury says (p. 239): "The theory of a deed of separation is that it is a contract between husband and wife through the intervention of a third party, viz., the trustees, and the husband's contract for the benefit of the wife is supported by the contract of the trustees on her behalf." In the same judgment he says: "Before the Reformation . . . marriage was regarded by the church, and therefore regarded by the law, as a sacrament. . . Voluntary separations were forbidden by the law, and contracts made for giving effect to voluntary separations were, therefore,

invalid. But then came the Reformation, and the Statute of Henry VIII. . . . enacted that the rules of the ecclesiastical law should prevail as far as they were not contrary to the common law. By the common law voluntary separations were not forbidden, and therefore after the Reformation voluntary separations were not contrary to the policy of the law."

The agreement may be between the husband and a third party only : *Augier* v. *Augier*, Prec. Ch. 496.

In *Gibbs* v. *Harding* (17 W. R. 1093) a husband and his wife's father, on behalf of the wife, agreed that wife should live apart, and that husband should execute a separation deed with usual clauses. Specific performance decreed, although wife merely signed agreement and was not a party thereto.

An agreement for separation between husband and wife alone without the intervention of a third person may be enforced.

Before the M. W. P. Act of 1882, it was held that in certain exceptional cases where a married woman had an interest adverse to the husband she was not incapable of contracting with him. Thus she could agree with him to refer matters in dispute to arbitration : *Bateman* v. *Countess of Ross*, 1 Dow, H. of L. 235; see also *Vansittart* v. *Vansittart*, 4 K. & J. 62. In *Guth* v. *Guth* (3 Bro. C. C. 614), the provisions of a separation deed made between husband and wife alone were enforced. In *Durand* v. *Durand* (2 Cox, 207) the court refused to interfere in an agreement between husband and wife, whereby the

wife was to give up part of her separate property on condition of living separate from him.

It is submitted that as a married woman is now capable of contracting, she may validly contract with her husband for separation without the necessity of any other person being made a party to the contract.

Essentials.—It is essential to the validity of a separation deed—(1) that there is a justifiable cause for separation: see *Jones* v. *Waite*, 5 Bing. N. C. 341, (2) that there be a sufficient consideration; (3) that the stipulation in the deed must not be contrary to public policy; and (4) that it must be for immediate, not for future, separation.

1. JUSTIFIABLE CAUSES.—There must be a proper cause for the separation. While it is the policy of the law not to prevent husband and wife separating from each other when they cannot live amicably together, yet if they can live it would be contrary to public policy to enforce their separation. The following are examples of justifiable causes:—Discords or quarrels: *Seeling* v. *Crawley*, 2 Vern. 386; *Guth* v. *Guth*, 3 Bro. C. C. 614; *Sanky* v. *Golding*, Cary, 124; *Jee* v. *Thurlow*, 2 B. & C. 547; *Frampton* v. *Frampton*, 4 Bea. 287. Wife's infirmities: *Head* v. *Head*, 3 Atk. 547. Wife's expensiveness: *Fletcher* v. *Fletcher*, 2 Cox, 99. Impotency: *Wilson* v. *Wilson*, 1 H. L. C. 538. Cruelty: *Augier* v. *Augier*, Prec. Ch. 496; *Nunn* v. *Wilsmore*, 8 T. R. 521. The cause need not necessarily appear in the separation deed: *Jones* v. *Waite*, 5 Bing. N. C. 341; *Guth* v. *Guth*, 3 Bro. C. C. 614.

2. SUFFICIENT CONSIDERATION. — The following are examples of consideration which have been held sufficient:—A covenant by trustees to indemnify husband against the debts of his wife: *Jee* v. *Thurlow*, 2 B. & C. 547; *Wellesley* v. *Wellesley*, 10 Sim. 256. Forbearance of suit for a divorce: *Augier* v. *Augier*, Prec. Ch. 496; *Turner* v. *Boteler*, Finch's Ch. Ca. 73; *Hobbs* v. *Hull*, 1 Cox's Rep. 445; *Nunn* v. *Wilsmore*, 8 T. R. 521; *Jodrell* v. *Jodrell*, 9 Beav. 45. Compromise of a misdemeanour, viz. an assault by husband on the wife: *Elworthy* v. *Bird*, 2 S. & S. 372. Forbearance of a suit for nullity of marriage on account of impotency: *Wilson* v. *Wilson*, 1 H. L. C. 538. A covenant by trustees to pay husband's existing debts, or to pay him an annuity: *Ibid.* The execution of a deed of separation (already drawn up and agreed to) by the husband is a sufficient consideration for an agreement by a third person to pay a sum of money to the husband towards the discharge of certain debts and expenses for which the husband was alone liable: *Jones* v. *Waite*, 9 Cl. & F. 101. *Semble*, a covenant by trustees that wife shall support the children of the marriage, and shall not sue the husband for alimony or otherwise: *Nixon* v. *Hamilton*, 1 Ir. Eq. 46. A release by husband of his marital rights in respect of his wife's future-acquired property is a sufficient consideration for grant of annuity to husband by wife out of her separate property: *Logan* v. *Birkett*, 1 M. & K. 220. A covenant by a married woman to indemnify her husband against her debts, where all her separate property is settled without power of alienation, is *not* a sufficient consideration: *Walrond* v. *Walrond*, Johns. 18.

A separation deed founded upon valuable consideration is valid as against creditors in the absence of fraud (*Worrall* v. *Jacob*, 3 Mer. 269), where the

consideration was a covenant to indemnify the husband against the wife's debts: see also *Stephens* v. *Olive*, 2 Bro. C. C. 90; *Compton* v. *Collinson*, ibid. 377.

Although articles of agreement for separation require a valuable consideration for their validity, a deed of separation between husband and wife not founded on valuable consideration is not on that account void. In *Frampton* v. *Frampton* (4 Beav. 287), by a separation deed made between the husband, his wife, and trustees, he assigned the dividends of some funds standing in the names of trustees to other trustees for the benefit of wife, and covenanted that she might live apart from him, &c.; and the wife agreed to accept the provision in lieu of alimony, dower, &c., and to exonerate her husband from all her debts, and to forfeit her rights under the deed if she violated the agreement. The deed contained no covenant on the part of the trustees and no other consideration. Held, that the trusts created by it in favour of the wife were valid. Lord Langdale regarded the deed as a voluntary deed, not invalidated by the agreement for separation, creating a valid trust in favour of the wife as against her husband, but would not discuss its validity as against the husband's creditors: see also *Fitzer* v. *Fitzer*, 2 Atk. 511; *Cooke* v. *Wiggins*, 10 Ves. 191. In these cases the question whether it was a valid agreement to live apart was not raised, but in an earlier case (*Guth* v. *Guth*, 3 Bro. C. C. 614) the decision seems to go to that length. These deeds, being voluntary, would be void as against creditors: *Fitzer* v. *Fitzer*, *supra*; *Clough* v. *Lambert*, 10 Sim. 174. In all these cases it is stated or assumed that the wife was incapable of binding herself by contract. It is submitted that deeds containing similar provisions will in future be no longer voluntary, as the contract of the wife to release her rights

will be a binding contract, and therefore a valuable consideration for the release by the husband of his marital rights.

3. ILLEGAL PROVISIONS.—The provisions and stipulations must not be contrary to public policy. A distinction must be drawn here between an agreement for separation and a deed of separation. If the agreement contains stipulations or provisions, some of which are, and some are not, contrary to public policy, the court will not separate one class from the other, but will refuse to decree specific performance of part, even although the agreement is founded on sufficient consideration: *Vansittart* v. *Vansittart*, 2 De G. & J. 249. But if a deed has been actually executed, the court will distinguish between the legal and illegal provisions, and will hold the former to be binding: *Rodney* v. *Chambers*, 2 East, 283; *Nicholls* v. *Danvers*, 2 Vern. 671, where there were provisions contemplating future separation; *Wilson* v. *Mushett*, 3 B. & Ad. 743, where there was a provision that a reconciliation should not alter the trusts created by the deed; *Byrne* v. *Carew*, 13 Ir. Eq. Rep. 1, where it was held that a provision for the wife's future use, notwithstanding future reconciliation or separation, is good; see also *Hamilton* v. *Hector*, L. R., 13 Eq. 511. It was formerly held that a covenant taking away the custody of the children from the father and giving it to the mother was contrary to public policy (see *Vansittart* v. *Vansittart*, 2 De G. & J. 249), but the act of 36 Vict. c. 12, provides that such a covenant is not invalid. It is not lawful for a husband to separate from his wife in consideration of a sum of money: *Jones* v. *Waite*, 5 Bing. N. C. 346.

4. THE SEPARATION MUST BE IMMEDIATE NOT FUTURE.—Any agreement or covenant, made either before or after marriage, which contemplates a future

voluntary separation of husband and wife, is void as contrary to the policy of the law.

For example, see *H.* v. *W.* 3 K. & J. 382, and *Cocksedge* v. *Cocksedge*, 14 Sim. 244, ante-nuptial agreement; *Westmeath* v. *Westmeath*, Jacob, 126, and *Westmeath* v. *Salisbury*, 5 Bligh, N. S. 339, post-nuptial agreement; *Durant* v. *Titley*, 7 Price, 577, a deed providing for future separation at will of wife; *Cartwright* v. *Cartwright*, 3 De G. M. & G. 982, where, by an ante-nuptial settlement, the father of the husband conveyed lands to the use of trustees during the life of the wife, in trust for her separate use, with a proviso as to the payment of rents in case of voluntary separation of husband and wife, and proviso held void; *Hindley* v. *Westmeath*, 6 B. & C. 200, where a deed was made between husband, wife, and a trustee, providing a separate maintenance for the wife, and purporting to be made in contemplation of an immediate separation, but no separation then took place, and no immediate separation was intended. Such a deed cannot be supported as a voluntary settlement: *Bindley* v. *Mulloney*, L. R., 7 Eq. 343. A separation deed being put an end to by reconciliation, a clause to revive the provision on a second separation is void: *Byrne* v. *Carew*, 13 Ir. Eq. Rep. 1; see also, *Procter* v. *Robinson*, 14 W. R. 381. But in *Rodney* v. *Chambers* (2 East, 283), it was held that a covenant by a husband to pay an annuity to trustees for his wife in case of their future separation, *with the approval of such trustees*, is valid, on the ground of their approval being required. Pollock, in his Principles of Contract (3rd ed. p. 286), says the reason of the distinction between deeds providing for immediate separation, and those providing for future separation, is, that "an agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable. Still, that state of things is

abnormal, and not to be contemplated beforehand. It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate; or, in other words, to allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves."

Effect of a separation deed.—The effect of a deed of separation is not to make a woman a *feme sole*.

Thus, formerly, she could not execute a deed or make a contract, or sue or be sued, and at the present time there is a presumption she is not guilty of certain crimes committed in her husband's presence: see *St. John* v. *St. John*, 11 Ves. 530. Unless the wife has an adequate allowance the husband may still be liable upon her contracts for necessaries: *Hodkinson* v. *Fletcher*, 4 Camp. 70; *Mizen* v. *Pick*, 3 M. & W. 481; *Reeve* v. *Conyngham*, 2 C. & K. 444. He will also continue to be liable for her torts. Formerly a separation deed could not be pleaded as a bar to suits for restitution of conjugal rights: *Mortimer* v. *Mortimer*, 2 Hagg. Con. Rep. 318. But where the deed contained an agreement not to sue, therefore equity restrained the party from suing: *Wilson* v. *Wilson*, 1 H. L. Ca. 538; 5 H. L. Ca. 40; *Hunt* v. *Hunt*, 4 De G. F. & J. 221; *Williams* v. *Baily*, L. R., 2 Eq. 731; *Kitchin* v. *Kitchin*, 19 L. T. 674. A covenant not to sue for restitution of conjugal rights cannot be implied: *Jee* v. *Thurlow*, 2 B. & C. 547. Since the Judicature Acts the separation deed can be pleaded in the Probate, Divorce, and Admiralty Division, and will be a bar to the suit: *Marshall* v. *Marshall*, 27 W. R. 399. A wife

will be restrained from molesting her husband: *Flower* v. *Flower*, 20 W. R. 231; and a husband from molesting his wife: *Sanders* v. *Rodway*, 16 Beav. 207, contrary to covenants contained in the deed. A covenant by husband to deliver up to wife all her diaries held to preclude his taking copies of them: *Hamilton* v. *Hector*, L. R., 13 Eq. 511.

It has been held, in *Williams* v. *Baily* (L. R., 2 Eq. 731), that while the trustees of a separation deed are, immediately upon its execution, liable for any breach of the contract by the wife or themselves, she will not be liable until she has compromised herself by some acceptance of the deed. It is submitted that such a doctrine will not obtain as to deeds executed after the 31st December, 1882.

A separation deed recited adultery of wife and contained a covenant by husband to pay her an annuity for life so long as she continued chaste; he subsequently obtained a divorce on account of her former adultery. Held that the divorce was no answer to her action on the covenant: *Goslin* v. *Clark*, 9 Jur., N. S. 520; *Charlesworth* v. *Holt*, L. R., 9 Ex. 38; *Jee* v. *Thurlow*, 2 B. & C. 547. The wife's adultery after separation is no answer: *Baynon* v. *Batley*, 8 Bing. 256; neither is a divorce: *Grant* v. *Budd*, 30 L. T. 319. It is no answer to an action by a trustee of a separation deed against the husband for the non-payment of the covenanted allowance, that it was by the trustee's contrivance and concealment of facts that the husband had consented to the separation, and that he was ready to cohabit with his wife again: *Kendall* v. *Webster*, 1 Hurl. & Colt. 440. A deed of separation will prevent the husband obtaining the person of his wife by means of a writ of *habeas corpus*: *R.* v. *Mead*, 1 Burr. 542; *R.* v. *Winton*, 5 T. R. 89. Where a wife in a deed of separation covenanted not to take any proceedings against him in respect of that cruelty, his subsequent

adultery does not revive the wife's right to complain of the cruelty: see *Rose* v. *Rose*, 7 P. D. 225; *Gandy* v. *Gandy*, 7 P. D. 168. The case of *Besant* v. *Wood* (12 Ch. D. 605) decides that a married woman can contract to live apart from her husband, and that he is entitled to specific performance of the contract; that he is not debarred by trifling breaches of his covenants from enforcing a deed of separation, and from obtaining an order restraining his wife from commencing an action for restitution of conjugal rights; and that where he has covenanted to allow an infant child to reside with the wife, and has subsequently concurred as next friend of the infant in a petition under the Infants' Custody Act (36 Vict. c. 12), for the removal of the infant from the wife's custody, which had been ordered by the court, he did not thereby break his covenant. Although since the Judicature Acts, one Division of the High Court cannot restrain proceedings in another Division, it can restrain a person from instituting proceedings.

Fraud.—A separation deed procured by the concealment of some material fact by one of the parties is void.

EXAMPLE.—Where wife induced her husband to execute the deed so that she might renew an illicit intercourse: *Evans* v. *Carrington*, 2 De G. F. & J. 481; or where she has falsely represented that she has not committed adultery: *Brown* v. *Brown*, L. R., 7 Eq. 185.

Subsequent cohabitation.—If the husband and wife cohabit again after the execution of the separation articles or deed, there is a

complete end of them: *Fletcher* v. *Fletcher*, 2 Cox, 99; *St. John* v. *St. John*, 11 Ves. 526; *Bateman* v. *Olivia Countess of Ross*, 1 Dow, H. of L. 235; *Westmeath* v. *Salisbury*, 5 Bligh, N. S. 339.

A mere reconciliation without cohabitation is insufficient: *Slatter* v. *Slatter*, 1 Y. & C. Ex. 28; *Frampton* v. *Frampton*, 4 Beav. 287; see also *Bateman* v. *Ross*, 1 Dow, H. L. 235. If the deed contains provisions beyond the purview of a mere separation deed, it can be supported as a voluntary settlement, although the parties, after the separation, returned to cohabitation: *Ruffles* v. *Alston*, L. R., 19 Eq. 539. And where, in a separation deed, the husband covenanted with a trustee to pay his wife an annuity for life, and then offered by parol to continue the annuity if she would live with him again, and she did so, it was held that she was entitled to recover arrears of annuity after his death against his estate: *Webster* v. *Webster*, 3 Jur. (N. S.) 655.

LEGAL SEPARATION.

"The law has said that married persons shall not be *legally* separated from the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves. To vindicate the policy of the law is no necessary part of the office of a judge; but if it were, it would not be difficult to show that the law in this respect has acted with its usual wisdom

and humanity—with that true wisdom, and that real humanity, that regards the general interests of mankind. For though, in particular cases, the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives, for necessity is a powerful master in teaching the duties which it imposes. If it were once understood, that upon mutual disgust married persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their common offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality.

In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good": per Lord Stowell in *Evans* v. *Evans*, 1 Hag. Con. Rep. 36.

Judicial separation.—A divorce *à mensâ et thoro* is abolished by the Divorce Act, 1857 (20 & 21 Vict. c. 85), and for it is substituted a "judicial separation." This may be obtained by either party, on the ground of adultery, of cruelty, of desertion without cause for two years and upwards, or of an attempt to commit an unnatural crime: 20 & 21 *Vict. c.* 55, *ss.* 7, 16.

By the 41 Vict. c. 19, s. 4, if a husband shall be convicted of an aggravated assault upon his wife, the court or magistrate, if satisfied that the future safety of the wife is in peril, may order that the wife shall no longer cohabit with her husband, and such order shall have the force and effect of a decree of judicial separation on the ground of cruelty. Such order may also provide for a weekly sum to be paid to the wife by the husband, and that the custody of any children of the marriage under the age of ten years shall be given to the wife.

Desertion.—See *Lawrence* v. *Lawrence* (31 L. J., P. M. & A. 144), where the husband was absent for over two years, and although during that term he had written to his wife, his conduct showed he never had any intention of returning to her. "No one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabita-

tion may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute 'desertion.' But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion,' in my judgment, becomes from that moment impossible to either, at least, until their common life and home have been resumed. In the meantime either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of 'desertion without cause:'" per Lord Penzance in *Fitzgerald* v. *Fitzgerald*, L. R., 1 P. & D. 698; see also *Townsend* v. *Townsend*, L. R., 3 P. & D. 129.

Cruelty.—In *Evans* v. *Evans* (1 Hag. Con. R. 37), Lord Stowell asks "What is cruelty?" and although he declines to lay down a direct definition, he says, "What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. . . . Still less is it cruelty where it wounds, not the natural feelings, but the acquired feelings arising from particular rank and situation . . . and though the court will not absolutely exclude considerations of this sort, where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not other-

wise have existed; of course, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number amongst its necessaries, is not cruelty. . . . I have heard no one case cited, in which the court has granted a divorce without proof given of a *reasonable apprehension* of bodily hurt. I say an *apprehension*, because assuredly the court is not to wait till the hurt is actually done, but the apprehension must be *reasonable*:" see also *Curtis* v. *Curtis*, 1 Swa. & Tr. 192; *Marsh* v. *Marsh*, 1 Swa. & Tr. 312; *D'Aguilar* v. *D'Aguilar*, 1 Hagg. Eccl. R. 779; *Westmeath* v. *Westmeath*, 2 Hagg. Supp. 61; and *Popkin* v. *Popkin*, 1 Hagg. Ecc. R. 765, note (*b*). In *Furlonger* v. *Furlonger* (5 Notes on Cases, 422), an action was brought by a husband against his wife on account of her cruelty; the suit failed for want of evidence, but Dr. Lushington said: "I apprehend that, generally speaking, that would be cruelty if practised by a wife towards her husband, which would be held to be cruelty if done by him towards her. I say, generally speaking; for I think there must be some distinction, necessarily, founded on the great difference between the sexes and the power of the husband, in ordinary circumstances, to protect himself from his wife's violence, still, the same great rule, of damage to life or limb, must prevail." See also *Kelly* v. *Kelly* (2 P. & D. 31, 59). Cruelty condoned is revived by subsequent adultery: *Green* v. *Green*, L. R., 3 P. & D. 121.

Effects of a judicial separation.—Husband and wife judicially separated still remain man and wife, but can enjoy none of the advantages of the union. They can remain apart so long as they both wish, but either can be proceeded against in the Divorce

Court for sufficient cause arising during the separation. The wife is a *feme sole* with respect to her property, and the husband, providing he pays alimony (when decreed), is no longer liable for her contracts and torts.

"The decree of judicial separation is not to be treated as a licence to commit adultery for the future:" per Hannen, J., in *Green* v. *Green* (L. R., 3 P. & D. 124).

Alimony is the allowance made to the wife out of the husband's estate. During a matrimonial suit the husband is obliged to allow his wife alimony, which is usually about one-fifth of the joint income of the husband and wife. It is payable from the date of the service, not of the return of the citation, and ceases at the date of the decree *nisi*: *Wells* v. *Wells and Hudson*, 33 L. J., P. & M. 151. Permanent alimony is allotted after final decree, and the amount is settled by the Court for Divorce and Matrimonial Causes. The Court is not at liberty to allot more than one moiety of the joint income to the wife, although she may have brought more than one moiety of the property into settlement: *Haigh* v. *Haigh*, L. R., 1 P. & D. 709. Where the amount has once been fixed, it requires a very strong case to alter it; the mere fact that the husband has become richer since the separation is not a sufficient reason: *Gandy* v. *Gandy*, 30 W. R. 673.

The following sections of the Divorce Acts, 1857 and 1858, relate to the property of the wife:—

"In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve

upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead: provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate": *sect.* 25, *Act of* 1857. "In every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: provided that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use: provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband": *sect.* 26, *Act of* 1857. "The provisions contained in this Act, and in the said Act of the 20 & 21 Vict. c. 85, respecting the property of a wife who has obtained a decree for judicial separation or an order for protection, shall be deemed to extend to property to which such wife has become or shall become entitled as executrix, administratrix or trustee since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as execu-

trix or administratrix": *sect.* 7, *Act of* 1858. "In every case in which a wife shall, under this Act or under the said Act of 20 & 21 Vict. c. 85, have obtained an order to protect her earnings or property, or a decree for judicial separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied or discharged in respect of any debts, contracts or acts of the wife incurred, entered into, or done between the times of the making such order or decree and of the discharge, variation or reversal thereof; and property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be) shall be deemed to be included in the protection given by the order or decree": *sect.* 8, *Act of* 1858.

Divorce.—A man may get a divorce from his wife upon proving that she has since the marriage been guilty of adultery. A woman is entitled to a divorce if, since the marriage, the husband has been guilty of incestuous adultery; or of bigamy with adultery; or of rape; or of an unnatural crime; or of adultery coupled with cruelty; or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

But if the petitioner has been accessory to,

or connived at, or condoned the adultery of the other party, or if the petition has been presented in collusion with either respondent, the Court will dismiss the petition.

If the petitioner has been guilty of adultery during the marriage, or of unreasonable delay in presenting the petition, or of cruelty to or separation from the other party, the Court *may* refuse to grant the petition: 20 & 21 *Vict. c.* 85, *ss.* 27, 30, 31.

INCESTUOUS ADULTERY is adultery with a woman within the prohibited degrees of consanguinity or affinity.

BIGAMY WITH ADULTERY.—"I think 'bigamy with adultery' means adultery with the person with whom the bigamy is committed:" per Pollock, C. B., in *Horne* v. *Horne*, 27 L. J., P. & M. 50.

ADULTERY COUPLED WITH CRUELTY.—A woman who has obtained a decree for judicial separation by reason of her husband's adultery, may afterwards institute a suit to dissolve the marriage on the ground of her husband's adultery committed subsequently to the decree for judicial separation, coupled with his cruelty to her during the co-habitation: *Green* v. *Green*, L. R., 3 P. & D. 121. For what amounts to cruelty, see p. 64.

DESERTION.—See *ante*, p. 63.

CONNIVANCE.—Sir John Nicholl, in *Rogers* v. *Rogers* (3 Hagg. Ecc. 57), said, "Without doubt, con-

nivance on the part of the husband will, in point of law, bar him from obtaining relief on account of the adultery which he has allowed to take place. *Volenti non fit injuria* is the principle on which the rule has been founded." Commenting on this in *Phillips* v. *Phillips* (1 Robert. 158), Dr. Lushington remarked: "I apprehend that the meaning of this maxim is, that there must be consent. The party must be acquiescing in (it matters not whether actively or passively) and cognisant of the adulterous intercourse of his wife. That consent must be proved, either by direct evidence or by necessary consequence from his conduct." In the same case of *Rogers* v. *Rogers*, Sir John Nicholl, referring to several cases, said: "In these cases it was held not to be necessary that any active steps should be taken on the part of the husband to corrupt the wife—to induce and encourage her to commit the criminal act. Passive acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention and in the expectation that she would be guilty of the crime; but, on the other hand, it has always been held that there must be consent. The injury must be *volenti*.... it must be something more than mere negligence—than mere inattention—than overconfidence—than dulness of apprehension—than mere indifference; it must be intentional concurrence, in order to amount to a bar:" see also *Allen* v. *Allen*, 30 L. J., P. M. & A. 2, and *Gipps* v. *Gipps*, 33 L. J., P. M. & A. 161.

Condonation.—Condonation is a blotting out of the offence imputed, so as to restore the offending party to the same position which he or she held before the offence was committed. Forgiveness of the offence, unless it is followed by conjugal cohabitation, will not amount to condonation: *Keats* v. *Keats*, 28 L. J., P. & M. 57. All condonation is

conditional. Condonation will not be pressed against a wife where a probable motive for continuing cohabitation after certain acts of violence was the fear of being deprived of her children, and of leaving them in the sole control of a harsh and excitable father: *Curtis* v. *Curtis*, 1 Swa. & Tr. 192. See also *Lovering* v. *Lovering* (3 Hag. Eccl. R. 85), where Lord Stowell distinguishes between connivance and condonation, and where the husband having connived at the adultery of his wife with one man was not allowed to complain of her adultery with another taking place at about the same time; and *Dunn* v. *Dunn* (2 Phill. 411), where Sir John Nicholl said, "Adultery forgiven is no ground for separation; condonation bars sentence; but not necessarily where there is subsequent adultery, though it will induce the court to look with particular jealousy into the case; for if the adultery is forgiven with such extreme facility as to show no sense of injury, and no care is taken to prevent it from happening again, then the husband has no ground of complaint, for he has encouraged the adultery by his conduct." In this case the husband had received back his wife on her first elopement, but five weeks after she eloped again with the same man, and Sir John Nicholl left the husband to the superior court for his remedy. On appeal a decree of divorce was pronounced (3 Phill. 6).

Collusion.—Though the court may be satisfied that the adultery is proved, and that the petitioner was neither accessory to nor conniving at it, it will under section 30 of the Divorce Act, 1857, dismiss the petition if it appears that the parties, or their agents, with their knowledge, were acting in concert with each other as to the conduct of and prosecution of the suit: *Lloyd* v. *Lloyd*, 1 Sw. & Tr. 567: see also *Bacon* v. *Bacon and Ashby*, 25 W. R. 560, and *Barnes* v. *Barnes*, L. R., 1 P. & D. 505.

DELAY.—If the interval be very long between the date of the criminal act and the knowledge of it by the party applying for a divorce, and the exhibition of it to the Court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over it: per Lord Stowell in *Mortimer* v. *Mortimer*, 2 Hag. Con. Rep. 313. "Though delay of itself goes for little, the conclusions to which it may give rise may go the length of barring the remedy:" per Cresswell, J. O., in *Boulting* v. *Boulting*, 33 L. J., P. M. & A. 36.

PROVOCATION.—As to where the husband pleaded provocation on the part of the wife, see *Wallscourt* v. *Wallscourt*, 5 Notes on Cases, 121; see also the case of *Best* v. *Best*, 1 Add. 411.

DISCRETION OF THE COURT.—"The discretion to be exercised under the 31st section of the statute should be a regulated discretion, and not a free option subordinated to no rules." "There are cases in which the adultery of the petitioner has been committed under such circumstances that it ought not, in justice, to stand in the way of a divorce. . . . But in cases where the adultery complained of has no special circumstances attending it, and no special features placing it in some catagory capable of distinct statement and recognition, there would, I think, be great mischief in this Court assuming to itself a right to grant or withhold a divorce upon the mere footing of the petitioner's adultery being, under the whole circumstances of each case, more or less pardonable or capable of excuse": per Lord Penzance, in *Morgan* v. , L. R., 1 P. & D. 644.

LUNACY.—The lunacy of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage. Such a suit may be instituted

by the committee of the estate of the lunatic: *Baker* v. *Baker*, 5 P. D. 142. Nor can the husband or wife be prevented from prosecuting a suit for a divorce by reason of the lunacy of the offending party: *Mordaunt* v *Moncreiffe*, 2 P. & M. 109; 2 H. L. Sc. 374.

Effects of a divorce.—By a divorce the *vinculum* is entirely broken, and the man and the wife each stand in the same position as if the other were dead.

After a marriage has been dissolved, the parties are at liberty to marry again, but not until the time limited for an appeal has elapsed, or until that appeal has been dismissed: see *Wilkinson* v. *Gibson*, L. R., 4 Eq. 162, and 20 & 21 *Vict. c.* 85, *s.* 57. The time limited for an appeal, which is to the House of Lords, is three months from the decree, if parliament be then sitting; or, if parliament be not sitting at the end of the three months, fourteen days after its meeting. If one of the parties marry again within the time limited for appeal, the marriage will be declared null and void: *Chichester* v. *Mure*, 32 L. J., P. M. & A. 146. After a divorce a man is no longer liable for a tort committed by his wife during the coverture (*Capel* v. *Powell*, 34 L. J., C. P. 168); such non-liability dating from the date of the decree *nisi*: *Prole* v. *Soady*, L. R., 3 Ch. 220. The decree *nisi* is usually made absolute six months after the pronouncing thereof: 29 *Vict. c.* 32, *s.* 3. Unless the decree is made absolute, the wife cannot bring an action in her own name: *Norman* v. *Villars*, 2 Ex. D. 359.

An action by a divorced wife against her former husband for an assault committed upon her during the coverture, will not lie: *Phillips* v. *Barnet*, L. R., 1 Q. B. D. 436.

Evidence.—The parties to any proceedings instituted in consequence of adultery, and the husbands and wives of such parties, are competent to give evidence in such proceedings: provided that no witness in any proceedings, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall already have given evidence in the same proceeding in disproof of his or her alleged adultery; 32 & 33 *Vict. c.* 68, *s.* 3.

See also *Babbage* v. *Babbage*, L. R., 2 P. & D. 222; and *Hebblethwaite* v. *Hebblethwaite*, L. R., 2 P. & D. 29.

Validity.—The validity of a divorce should be determined by the law of the matrimonial domicile acquired in good faith, that is, not acquired for the purpose of procuring a divorce. The matrimonial domicile is that of the husband.

There is no case which has yet decided that an Englishman, who has married an English woman in England, and subsequently acquired in good faith a foreign domicile, may be divorced for a cause recognized as valid by the law of his new domicile, but not recognized as valid by our law. We submit, however, that the above is the only satisfactory

principle, and that the most recent decision has gone very far to adopt it in its entirety. Where an Englishwoman marries a person not domiciled in England, she thereby acquires his domicile, and a divorce valid by the law of that domicile will be regarded as valid in England, although based upon a ground for which by English law no divorce would have been granted: *Harvey* v. *Farnie*, 5 P. D. 153; 6 P. D. 35. This was a petition for declaration of nullity of marriage: A domiciled Scotchman married an Englishwoman in England, and the wife obtained a decree from a Scotch court for a dissolution of the marriage by reason only of her husband's adultery. He then married the petitioner in England, his former wife being still alive. Her petition was based on the ground that the first marriage having taken place in England, the English courts would not recognize the validity of the divorce for a cause which is insufficient by our law. Her petition was dismissed, the judges in all the courts being of the same opinion. *M'Carthy* v. *De Caix*, (2 Cl. & F. 568) is overruled by this case, which follows *Warrender* v. *Warrender* (2 Cl. & F. 488); see also *Briggs* v. *Briggs*, 5 P. D. 163; *Shaw* v. *Att.-Gen.*, 2 P. & D. 156; *Shaw* v. *Gould*, L. R., 1 Eq. 247; 3 H. L. 55. *Semble*, that a woman deserted by her husband might acquire a domicile distinct from that of her husband: *Le Sueur* v. *Le Sueur*, 1 P. D. 139.

Children.—In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may, from time to time, before making its final decree, make such interim orders, and may

such provision in the final decree as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery: 20 & 21 *Vict. c.* 85, *s.* 35.

"In determining the custody of children, the interests of the children are paramount with the Court. In committing them to the charge of the mother, when the innocent party, the Court acts upon the principle that a wife ought not to be deprived of the comfort and society of the children by reason of the wrongful act of the husband; but it will depart from the rule when it is for the interest of the children that their education should be free from her control": *Browne, On Divorce*, 4 *Edit. p.* 161. The Court of Divorce has no power, on decreeing judicial separation, under section 35 of the Divorce Act, 1857, to vary an order as to the custody of the children: *Curtis* v. *Curtis*, 1 Sw. & Tr. 192. "In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them": 20 & 21 *Vict. c.* 85, *s.* 45; see also 22 & 23 *Vict. c.* 61, *s.* 4.

Protection order.—A woman deserted by her husband can, under the 20 & 21 Vict. c. 85, s. 21, obtain an order from a magistrate, a justice of the peace, or from the judge ordinary of the Divorce Court, for an order to protect any property which she may acquire or become possessed of after the desertion, and she will then, with respect to such property, be considered a *feme sole* from the date of the desertion.

"A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country, to justices in petty sessions, or in either case to the court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrates, or justices, or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order, protecting her earnings and property acquired since the commencement of such desertion from her husband, and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole:* Provided always, that every such order, if made by a police magistrate or justice at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the county court within whose jurisdiction the wife is

resident; and that it shall be lawful for the husband and any creditor, or other person claiming under him, to apply to the court, or to the magistrate or justices by whom such order was made, for the discharge thereof: Provided also, that if the husband, or any creditor of, or person claiming under the husband, shall seize, or continue to hold, any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid. If any such order of protection be made, the wife shall during the continuance thereof be, and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this act if she obtained a decree of judicial separation": 20 & 21 *Vict. c.* 85, *s.* 21; see also 21 & 22 *Vict. c.* 108, *ss.* 7, 8 (*ante*, p. 67). The judge ordinary of the Court for Divorce and Matrimonial Causes may exercise the powers conferred by the above section: 21 & 22 *Vict. c.* 108, *s.* 6. If the police magistrate who has granted the order shall have died or been removed, or has become incapable of acting, the husband or creditor may apply to the magistrate for the time being acting as the successor, and an order for discharge of an order for protection may be applied for to, and be granted by, the court, although the order for protection was not made by the court; and an order for protection made at one petty sessions may be discharged by any later petty sessions, or by the court: 27 & 28 *Vict. c.* 44. The order has a retrospective effect, extending back to the commencement of the desertion: *In the goods of Elliott*, L. R., 2 P. & D. 274. In order to obtain payment of a legacy, the married woman must pro-

duce evidence that the separation is a continuing one, and that no settlement or agreement for a settlement has been made. Her own affidavit is sufficient. *Ewart* v. *Chubb*, L. R., 20 Eq. 454.

DEATH OF HUSBAND OR WIFE.

Where the parties have neither been judicially separated nor divorced, and the husband dies, the wife's status is revived, and she becomes liable for her ante-nuptial contracts and torts, for which action has not been brought against her husband. Her rights and liabilities upon his death, and his rights and liabilities upon her death, are fully dealt with hereafter in treating of the rights and liabilities of husband and wife in regard to each other's property. His then rights in her property, and his then liabilities for her ante-nuptial contracts and torts, will be dealt with *in extenso*, *post*. The succession to either party on death is regulated by the law of the matrimonial domicile at the time of the death.

CHAPTER II.

THE HUSBAND'S RIGHTS IN HIS WIFE'S PROPERTY.

REAL PROPERTY.

THE rights of a husband in his wife's real property may be divided into those that he possesses during her life, and those which he may possess after her death as tenant by the curtesy.

1. *Rights of Husband during Wife's Life.*

No husband married after 31st December, 1882, will acquire by the marriage itself any rights in his wife's real property; and no husband, whenever married, will acquire any rights in his wife's real property, her title to which may accrue on or after 1st of January, 1883, except such rights as are conferred upon him by his wife. All such property may be acquired, held and alienated by the wife as if she were a feme sole: see *M. W. P. A.* 1882, *sects.* 1 (1), 2 *and* 5, *and notes thereon, post.* A wife married after the 8th of

August, 1870, is entitled to the rents and profits of all freehold, copyhold, and customary-hold property which shall prior to the 1st January, 1883, descend upon her during coverture as heiress or co-heiress of an intestate as her separate property, and also to real estate purchased with her earnings: see *M. W. P. A.* 1870, *sects.* 1 *and* 8, *post.*

Subject to these provisions, the law, as given below, still remains in force, except where modified by the rules relating to separate estate or by marriage settlements.

Freeholds.

Husband's interest.—The husband takes during the coverture a freehold interest in all his wife's freeholds, and such interest will pass by the deed of the husband alone: *Co. Lit.* 326*b*, *n.* 2; *Robertson* v. *Norris*, 11 Q. B. 916.

The rents and profits of all her freeholds, including her life estates, belong to the husband during the coverture: *Bacon's Abr., tit. Bar. and Fem. c.* (1); *Kingham* v. *Lee*, 15 Sim. 396; and he, his executors or administrators, may sue for arrears owing at time of wife's death: 32 *Hen.* 8, *c.* 37, *s.* 3. In *Kingham* v. *Lee* (15 Sim. 396), land had been devised to a lady for her life, she keeping the buildings thereon in good repair and committing no waste. Her husband cut and sold timber. Held, that neither her estate nor herself was responsible, but the husband

alone; and held, also, in opposition to the doctrine in *Lord Ormonde* v. *Kynersley* (5 Madd. 369), that such a condition was not in the nature of a trust.

Alienation.—The wife cannot (except by means of a power of appointment) alienate or charge her freeholds without her husband's concurrence in the deed of alienation or charge, and such deed must be duly acknowledged by her in accordance with the provisions of sect. 77 of the Fines and Recoveries Act, 1833, as modified by the Conveyancing Act, 1882, s. 7. Neither can the wife (except by means of a power) dispose of her freeholds by will, even though she has her husband's consent.

For a valuable consideration the wife verbally agreed to convey her lands and tenements to her husband, but died without having executed or acknowledged a deed. Held that, although the husband had performed his part of the agreement, he could not claim her land against her heir: *Williams* v. *Walker*, 9 Q. B. D. 576. A contract by the husband and wife for the sale of her freeholds does not bind her: *Martin* v. *Mitchell*, 2 Jac. & W. 413. The court will not make a peremptory order on a married woman to execute a conveyance of an estate: *Jordan* v. *Jones*, 2 Phil. 170. Certain persons, including married women, agreed to sell an estate at a price to be fixed by arbitration; the award was duly made, but it was held that specific performance could not be enforced against the married women: *Emery* v. *Wase*, 5 Ves. 846. *A fortiori*, an agreement by the husband alone to sell the wife's freeholds will not bind

her (*Bryan* v. *Woolley*, 1 Bro. P. C. 184), even although such an agreement has been acted upon, if there has been no fraud on the part of the wife: *Nicholl* v. *Jones*, L. R., 3 Eq. 696. If the deed of the husband and wife affecting to transfer her real estate is executed and acknowledged, but the certificate of such acknowledgment is not filed in accordance with sect. 85 of the above act, the deed is void as against her until it is filed: *Jolly* v. *Handcock*, 7 Exch. 820. So a lease by husband and wife of her freehold property must be acknowledged by the wife in order to be binding upon her after her husband's death, unless she then adopt it: *Toler* v. *Slater*, L. R., 3 Q. B. 42. A married woman was entitled for life, in the event of her surviving her husband, to a rentcharge. She joined him in executing a mortgage of the estates upon which it was charged, and by the mortgage deed, duly acknowledged, absolutely extinguished and discharged her rentcharge. A portion of the estates was reconveyed by the mortgagees to the husband and released from the mortgage. He afterwards remortgaged the same to the mortgagees, who under a power entered into a contract for sale. The title being objected to on the ground that the rentcharge was still subsisting, parol evidence was produced that the wife had absolutely released her rentcharge. Held, that where the wife joins in a mortgage deed her equity of redemption is not released if there be no express contract on her part to do so, and that the title was too doubtful to be forced on the purchasers: *Re Betton's Trust Estates*, L. R., 12 Eq. 553. Land was held by a trustee of a will upon trust to sell and divide proceeds among the testator's children, two of whom were married women. By a deed in which the *cestuis que trust* joined the land was sold. The two married women and their husbands concurred in the deed, which was not acknowledged. Held, that the deed was inope-

rative as against one of the daughters who had survived her husband: *Franks* v. *Bollans*, 3 Ch. 717. So a mortgage by husband and wife not acknowledged will not bind her interest: see *Price* v. *Copner* (1 Sim. & St. 347), which referred to the non-levying of a fine; but the principle is the same although fines are abolished. If the husband pays off out of his own moneys part of his wife's mortgage debt, his estate will at his death stand in the place of the mortgagee *pro tanto*: *Pitt* v. *Pitt*, T. & R. 180. If he covenants to pay money raised on wife's estate for payment of her debts, and is compelled to pay it by an action brought on the bond, he is entitled to be repaid out of the wife's estate: *Lewis* v. *Nangle*, Ambl. 150. If by deed duly acknowledged the husband and wife mortgage her freeholds, and the equity of redemption is reserved to him and his heirs, unless a recital or special circumstances show an intention to resettle the property, he will only have the equity of redemption in respect to his interest *jure mariti*: *Ruscombe* v. *Hare*, 6 Dow. 1; *Pocock* v. *Lee*, 2 Vern. 604. If a husband and wife mortgage her lands for his benefit, she is regarded as a surety for her husband, and she or her heir will be entitled, after the death of the husband, to have her estate exonerated out of the real and personal estate of the husband: *Huntingdon* (*E.*) v. *Huntingdon* (*C.*), 2 Bro. P. C. 1. Her claim will be preferred to legatees (*Tate* v. *Austin*, 1 P. Wms. 264); and will rank with his other creditors of equal degree: *Pitt* v. *Pitt*, T. & R. 180; *Hudson* v. *Carmichael*, Kay, 613.

Leases.—The Settled Estates Act, 1877, empowers any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates in right of a wife who is seised in fee to demise the same (except the principal mansion-house and the demesnes thereof and other lands usually occupied therewith) for any term not exceeding twenty-one years in

England or thirty-five years in Ireland, provided that such demise be by deed, for the best rent obtainable, without any fine, and the rent to be incident to the immediate reversion. The demise must not be made without impeachment of waste, and must contain a covenant for payment of rent, and also a condition of re-entry on non-payment thereof: *sect.* 46. Such demise will be valid against the wife or any person claiming through or under her: *sect.* 47. By the same act the husband has similar powers with regard to settled estates held by him in right of his wife unless the settlement excludes them. The Settled Land Act, 1882, sect. 61, provides that where a married woman (who if she had not been a married woman would have been a tenant for life, or would have had the powers of a tenant for life under that act) is not entitled for her separate use, she and her husband together shall have the powers of a tenant for life under that act. This act came into operation on the 1st January, 1883.

EXCEPTIONS.—The concurrence of the husband may be dispensed with in cases where he is a lunatic, an idiot, or incapable of executing a deed or making a surrender, or his residence is unknown, or he is in prison, or living apart from his wife, whether by mutual consent, divorce, or from any other cause. An application for an order must be made to the Queen's Bench Division upon summons supported by an affidavit: 3 & 4 *Will.* 4, *c.* 74, *s.* 91. An acknowledgment is not requisite: *Goodchild* v. *Dougal*, 3 Ch. D. 650. The affidavit must show that the husband does not contribute to wife's support (*Ex parte Robinson*, 4 C. P. 205), and must be made by the wife herself: *In re Bruce*, 9 Dowl. P. C. 840. Orders have been made in the following cases and under the following circumstances:—Absence abroad: *Ex parte Gill*, 1 Bing. N. C. 168; *Re Alberici*, 4 W. R. 208; *In re Kelsey*, 16 C. B. 197; except where the absence is

temporary: *Re Squires*, 17 C. B. 176. Imbecility: *In re Woodall*, 3 C. B. 639. Refusal to convey (*In re Mirfin*, 4 Man. & G. 635; *Ex parte Perrin*, 14 C. B. 420), except upon improper terms: *In re Woodcock*, 1 C. B. 437. For form of order, see *Ex parte Duffil*, 6 Scott, N. R. 30; see also *In re Woodall*, 3 C. B. 639.

For other statutory exceptions, see note to sect. 1 of M. W. P. A. 1882, *post*.

For alienation by means of powers, see chapter on "Powers."

Death of husband or wife.—In default of a valid alienation by the husband and wife of her freeholds, she will at his death repossess them in her own right. At her death, in default of her husband being entitled as tenant by the curtesy, her freeholds of inheritance will descend to her heir, to whom they will also descend after the husband's death, were he entitled to the tenancy by the curtesy.

If the husband, not being entitled to curtesy, holds over after the death of his wife, without the consent of her heir, he shall be adjudged a trespasser, and may be proceeded against accordingly: 6 *Anne*, *c.* 18, *s.* 5.

Copyholds.

Husband's interest.—As the husband in right of his wife is seised of her freehold estates during the coverture, so he becomes tenant of her copyhold lands, and is to sit on

the homage and perform the services to the lord. His admission is not requisite, and if the wife takes by descent the husband may even enter in her right before her admittance: *Scriven's Copyholds, 6th Edit.* 124.

If the husband of a feme copyholder makes a lease not warranted by the custom, he forfeits only during his own life: *Hedd* v. *Chalener*, Cro. Eliz. 149. The alienation of the wife's copyholds is subject to the same rules as is the alienation of her freeholds.

Gavelkind Lands.

Husband's interest.—Gavelkind land is only land of socage tenure affected with the custom of gavelkind, and the rights of a husband in his wife's gavelkind land during coverture are the same as in her freeholds: see *Real Prop. Commissioners, 3rd Report.*

2. *Rights of Husband after Wife's Death.*

The estate by curtesy.—Where the wife is seised of or equitably entitled to an estate of inheritance in possession otherwise than as joint tenant, and the husband has had by her issue born alive during the life of the mother, and capable of inheriting such estate, he will, upon her death, be entitled to such estate for his life as tenant by the curtesy of England: *Co. Lit.* 29 *a*, *b*, § 35, 52. The conditions essential to the existence of an

estate by curtesy are—(1) legal marriage; (2) sole seisin or possession of the wife during coverture; (3) issue of the husband born alive during the life of the mother and capable of inheriting the estate; and (4) the death of the wife.

LEGAL MARRIAGE.—If the marriage is voidable, but is not annulled during the wife's life, the husband will be entitled to curtesy: 1 *Cruise*, *T.* 140. As to the requisites of a legal marriage, see *ante*, p. 27.

SEISIN OR POSSESSION OF THE WIFE.—In the following cases it has been held that the wife had the requisite possession of trust estates:—Where before marriage the wife mortgaged her estate in fee, and it remained mortgaged during the coverture: *Casborne* v. *Scarfe*, 1 Atk. 603; where land had been devised in trust to pay debts and convey surplus to daughters equally, one of whom subsequently married and died before the legal estate in the surplus lands was conveyed to her: *Watts* v. *Ball*, 1 P. W. 108. So where money is to be laid out in the purchase of lands in fee to be conveyed to the wife, though the wife dies before conveyance: *Sweetapple* v. *Bindon*, 2 Vern. 536; and so in general wherever the wife has an equitable estate in fee or tail: see *Cunningham* v. *Moody*, 1 Ves. sen. 174; *Dodson* v. *Hay*, 3 Bro. C. C. 405; and *Buckworth* v. *Thirkell*, 3 Bos. & Pul. 652, *n*. Where the wife is entitled to the legal estate the seisin must be in deed, if it is possible. Thus, if a man die seised of lands in fee simple or fee tail, and these lands descend to his daughter, and she marries and has issue, but dies before entry, the husband will not be tenant by the curtesy: *Co. Lit.* 29 *a*. But where no seisin but a seisin in law can be attained by the husband, he will

have his curtesy. Thus, if a wife inherits an advowson or a rent in fee, and having had issue dies without the church having become void or the rent due, the husband will have his curtesy: *Ibid.* The same rule applies to other incorporeal hereditaments, e.g., tithes and commons. As to rent-charges: see *Dethick* v. *Bradbarn*, 2 Sid. 110, 117. Entry is not always necessary to constitute a seisin in deed. If the land is on lease for years, curtesy may be without entry or even receipt of rent, the possession of the lessee being considered the possession of the husband and wife: *De Grey* v. *Richardson*, 3 Atk. 469; see also *Eager* v. *Furnivall*, 17 Ch. D. 115, as to what is a sufficient seisin.

Birth of issue.—The issue must be born alive during the life of the mother. If the mother dies in labour, and the Cæsarian operation is performed, the husband will not have his curtesy: *Co. Lit.* 29 *b*, 3; *Paine's Case*, 8 Co. 34. The issue must be capable of inheriting. Thus, a husband cannot have curtesy of his wife's lands of which she is seised in fee tail female if the only issue is a son, or in fee tail male and the only issue is a daughter. But if the wife have issue by her first husband, yet if her second husband have issue by her, he shall be tenant by the curtesy, for his issue may by chance inherit: 1 *Cruise*, 143. It is immaterial whether issue be born before or after the seisin of the lands, and whether it be living or dead at the time of the seisin, or at the time of the wife's decease: *Co. Lit.* 29 *b*. Evidence of the performance of any vital act—such as the beating of the heart—is sufficient proof that the child was born alive: *Brock* v. *Kellock*, 3 Giff. 58.

Property subject to curtesy.—The property of which a husband may become a tenant by the curtesy includes the wife's free-

holds of inheritance, whether the hereditaments are corporeal or incorporeal.

ESTATE PUR AUTRE VIE.—Curtesy is not incident to an estate *pur autre vie*: *Stead* v. *Platt*, 18 Beav. 50.

COPYHOLDS.—Curtesy is only incident to copyholds by special custom of the manor, and the custom must be strictly followed. Thus, where the custom was that if a man took to wife *a customary tenant*, and had issue and outlived her, he should be tenant by the curtesy, it was held that the husband was not entitled to curtesy out of a customary estate descending to his wife after the marriage: *Case of Sir John Savage*, 2 Leon. 109, 208. By the custom of some manors curtesy is allowed without issue, but is forfeitable upon second marriage: 1 *Cruise*, 291.

GAVELKIND LANDS.—In gavelkind lands a husband may be tenant by the curtesy without having had issue, but the tenancy is only of a moiety, whether he has had issue or not; and he loses it by a subsequent marriage: *Co. Lit.* 30 *a*, *and note* 1; *Rob. Gavelkinds*, *p.* 82.

SEPARATE ESTATE.—Unless expressly excluded by the settlor or donor of property to the separate use of his wife, a husband will be entitled to curtesy out of it if remaining undisposed of by her at the time of her death: see *Bennet* v. *Davis*, 2 P. W. 316, where the husband was expressly excluded, and held to be a trustee for the heir. To exclude the husband, it is sufficient for the donor to declare that the husband shall not be tenant by the curtesy: *Morgan* v. *Morgan*, 5 Madd. 408. If there is no declaration to that effect, and the wife dies without having disposed of her separate estate during her lifetime, or by her will, the husband will have his curtesy: see *Roberts* v. *Dixwell*, 1 Atk. 607—9; *Follett* v. *Tyrer*, 14 Sim.

125; *Appleton* v. *Rowley*, L. R., 8 Eq. 139; *Cooper* v. *Macdonald*, 7 Ch. D. 288. The decisions in *Hearle* v. *Greenbank*, 3 Atk. 716, and in *Moore* v. *Webster*, L. R., 3 Eq. 267, must be considered overruled. In *Eager* v. *Furnivall*, 17 Ch. D. 115, a testator in 1872 devised the fee of certain lands to his daughter to her separate use. She died before him, leaving an infant child. Held, that on testator's death, husband was to have his curtesy.

SEPARATE PROPERTY UNDER M. W. P. ACT, 1882. —The husband's right to curtesy will still exist with regard to the wife's freeholds of inheritance, which are made her separate property by sects. 2 and 5 of the M. W. P. Act, 1882: see notes on these sections, *post*.

Rights and liabilities.—A tenant by the curtesy can make leases, is entitled to emblements, liable for waste, and must keep down the interest of incumbrances on the estate: see *Casborne* v. *Scarfe*, 1 Atk. 606.

Upon birth of issue the husband is able to convey an estate for his life, although before it he can only convey a good estate for the joint lives of himself and wife: *Miller* v. *Manwaring*, 4 Cro. 392. Before the birth of issue the possibility of the husband being a tenant by the curtesy is not a contingent interest which would vest in his trustee in bankruptcy. If, therefore, issue is born after he obtains his order of discharge the estate will belong to him: *Gibbins* v. *Eyden*, L. R., 7 Eq. 371. A tenancy by the curtesy of the equitable estate of a wife is not subject to her equity to a settlement: *Smith* v. *Matthews*, 3 De G. F. & J. 139.

POWER OF TENANT BY THE CURTESY TO MAKE LEASES.—The Settled Estates Act, 1877 (repealing the Act to facilitate Leases and Sales of Settled Estates, 1856), empowers every person entitled to the possession or the receipt of the rents and profits of any unsettled estates as tenant by the curtesy to demise the same (except the principal mansion-house and the demesnes thereof and other lands usually occupied therewith) for any term not exceeding twenty-one years in England or thirty-five years in Ireland, provided that such demise be by deed, for the best rent obtainable, without any fine, and the rent be incident to the immediate reversion. The deed must contain a covenant for payment of rent, and also a condition of re-entry on non-payment thereof. The demise must not be made without impeachment of waste: *sect.* 46. Any such demise will be valid against the wife of the person granting the same and any person claiming through or under her: *sect.* 47. By the Settled Land Act, 1882, the tenant by the curtesy has all the powers of a tenant for life under that act with regard to sales, leases and other dispositions of settled land, and for promoting the execution of improvements thereon: *sect.* 58.

Right to curtesy defeated.—The curtesy of the husband may be defeated by the determination of the wife's estate, *e. g.*, by eviction by title paramount or for breach of condition; by the determination of the fee, where there is a conditional limitation (*Barker* v. *Barker*, 2 Sim. 249, and *Sumner* v. *Partridge*, 2 Atk. 47); by the wife being in certain cases put to her election, and giving up the

estate out of which curtesy is to spring; by adverse possession during the whole period of the coverture (*Parker* v. *Carter*, 4 Hare, 400); by the death of the wife before seisin or possession by herself or her husband; or when the husband's right is expressly excluded: *Co. Lit.* 29*a*, 29*b*, 183*a*, 241*a*, *n.* 4; 1 *Cruise*, *T.* 149.

In *Lady Cavan* v. *Pulteney* (2 Ves. 544 and 3 Ves. 384) A. the wife of B. elected to take an estate tail in opposition to her father's will. A. died and B. claimed as tenant by curtesy. Held, he could not be put to his election between his curtesy and the benefits he took under the same will. The husband is not entitled to curtesy out of his wife's life estate (*Roberts* v. *Dixwell*, 1 Atk. 607), nor out of his wife's dower estate (1 *Cruise*, 149), nor out of an estate in reversion or remainder, unless it comes into possession during the coverture: *Co. Lit.* 29*a*. In *Boothby* v. *Vernon* (9 Mod. 147), there was a devise to a wife for life, remainder to her issue in tail with remainder over. She left surviving her a son who shortly afterwards died. The remainder failed and she was heir-at-law to the devisor. Held, that her husband was not entitled to curtesy.

Divorce. — It is submitted that a husband must lose his curtesy by a divorce, although there is, so far as we are aware, no express authority upon that point. If it were not so, suppose she were to marry again, which of the two husbands would be entitled to curtesy? It has lately been held, in *Frampton* v. *Stephens* (21 Ch. D. 164), that a wife loses her dower by divorce, and *è converso* the husband ought by the same cause to lose his curtesy.

ADULTERY. — The husband's right to curtesy is not barred by his adultery. "The reason of the difference why a wife, in case of an elopement with an adulterer, forfeits her dower, and yet the husband leaving his wife, and living with another woman, does not forfeit his tenancy by the curtesy, is, because the statute of Westm. 2, cap. 34 does by express words, under these circumstances, create a forfeiture of dower; but there is no act inflicting, in the other case, the forfeiture of a tenancy by the curtesy:" per Lord Chancellor *Talbot*, in *Sidney* v. *Sidney*, 3 P. W. 276.

CHATTELS REAL.

No husband married after 31st December, 1882, will acquire by the marriage itself any rights in his wife's leaseholds, and no husband, whenever married, will acquire any rights in his wife's leaseholds, her title to which may accrue on or after 1st January, 1883, except such rights as are conferred upon him by his wife. All such property may be acquired, held and alienated by the wife as if she were a *feme sole:* see *M. W. P. A.* 1882, *sects.* 1 (1), 2 *and* 5, *and notes thereon, post.* A wife married after the 8th August, 1870, is entitled to all leaseholds which shall prior to the 1st January, 1882 come to her during coverture as next of kin or one of the next of kin of an intestate, as her separate property, also to

leaseholds purchased with her earnings: see *M. W. P. A.* 1870, *sects.* 1 *and* 7, and notes thereon, *post.*

Subject to these provisions, the law as given below still remains in force, except where modified by the rules relating to separate estate and by marriage settlements.

Husband's interest.—The leaseholds of the wife become by marriage the property of the husband *sub modo;* during coverture the rents and profits thereof belong to him; he may assign or sub-let them absolutely or by way of mortgage; and they are liable for his debts. In default of assignment and subject to any mortgage or sub-lease her leaseholds will upon the determination of the coverture by his death survive to her unaffected by his will or his debts. If the coverture is determined by her death they become his property *jure mariti*, and there is no necessity for him to take out administration in respect of them: *Co. Lit.* 46*a*, 300*a*, 351*a*; *Moody* v. *Matthews*, 7 Ves. 174; *Incledon* v. *Northcote*, 3 Atk. 430.

The husband may dispose of his wife's leaseholds whether vested or contingent or reversionary, unless the interest is of such a nature that it cannot possibly vest in possession until after the death of the husband: *Duberley* v. *Day*, 16 Beav. 33.

EQUITABLE LEASEHOLDS. — The equitable leaseholds of the wife come within the above rule, unless given to her by the husband, when they will be considered as separate estate: *Sir Edward Turner's Case*, 1 Vern. 7. Thus the husband may dispose of the trust of a term which he has in right of his wife: *Tudor* v. *Samyne*, 2 Vern. 270; *Bates* v. *Dandy*, 2 Atk. 208; *Incledon* v. *Northcote*, 3 Atk. 430. A term assigned before marriage by the wife in trust for herself without the husband's knowledge may be disposed of by him: *Pitt* v. *Hunt*, 1 Vern. 18. But he cannot do so if assigned with his knowledge: *Draper's Case*, 2 Freem. 29.

HUSBAND'S RIGHTS.—Even before alienation the leaseholds of his wife are in a manner the property of the husband. Thus if the freehold of the lands out of which the term is granted vests in him the term is extinguished: *Downing* v. *Seymour*, 2 Cro. 911. Where during coverture a lease for years is granted to the wife, an adverse possession, having its inception during the coverture, may be treated as a possession adverse either to the wife or the husband: *Doe* d. *Wilkins* v. *Wilkins*, 5 Nev. & M. 434. And if a wife, tenant of a term in copyhold, dies before its expiration, the husband continues in possession without a new admission or fine: *Dedicott's Case*, Dyer, 251; *Earl of Bath* v. *Abney*, 1 Burr. 209. An annuity was granted for life out of tithes leased for years. The lessee married and died, and the husband renewed the lease. Held, that the annuity was chargeable on the renewed term generally: *Moody* v. *Matthews*, 7 Ves. 174. The wife's term of years is available for the payment of the husband's debts during his life. Thus, upon an execution against the husband for his debt, the sheriff may sell his wife's term during husband's life (*Co. Lit.* 351), and upon his bankruptcy it will vest in his trustee in

bankruptcy: *Doe* d. *Shaw* v. *Steward*, 1 Ad. & E. 300. But if the husband should grant a rent, common, &c. of his wife's term and die, this would not bind the wife surviving, because the term or possession itself being left to come entire to the wife, all intermediate charges or grants *thereout* by the husband determine with his death, for the title of the wife to such term has relation to the time of their marriage, and so is paramount to all collateral charges or grants made thereout by the husband after: *Bacon's Abr.*, *Bar. and Fem. c.* (2).

Absolute assignments.—If the husband grants the whole of the term upon a condition which is broken, yet the wife's right therein is barred if he himself did not re-enter, but his executor: *Co. Lit.* 46*a*. A grant of all "his right, title and interest in the tithes aforesaid" will pass a lease of the term which the grantor had in right of his wife: *Arnold* v. *Bidgood*, 3 Cro. 318. An equitable assignment of the term is sufficient to defeat the wife's rights. As where a long term of years vested in the husband in right of his wife, and he granted a sub-lease for ten years, and afterwards covenanted for valuable consideration to renew the said lease and to continue to do so during the time he had any right: *Steed* v. *Cragh*, 9 Mod. 43. But it is doubtful whether the court would now hold that the husband's mere contract to sell or underlease the term for years (legal or equitable) will bind her surviving (see query of V.-C. K. Bruce, in *Clark* v. *Burgh*, 2 Coll. 221), unless, perhaps, where the buyer has been let into possession: *Dart's V. & P.*, 5th ed. 1001.

Mortgages.—As the husband can dispose absolutely of his wife's term, *à fortiori* he may mortgage it: *Bates* v. *Dandy*, 2 Atk. 208. Whether the mortgage disposes of all the term or leaves an equity

of redemption in the wife must depend upon the construction of the deed. A husband executed a mortgage of his wife's equitable chattels real, and died in his wife's lifetime without having paid the mortgage money. It was held, upon the construction of the instruments of mortgage, that the transactions were intended solely as a security to the mortgagees for the money lent, and not as a reduction of the chattels real into the husband's possession; consequently that the wife by survivorship was entitled to the equity of redemption: *Clark* v. *Burgh*, 2 Coll. 221. If a man marries a woman possessed of an equity of redemption in a term, and the husband pays off the mortgage debt, the husband will take the re-conveyance of the term, subject to the same equity as the mortgage deed: *Draper's Case*, 2 Freem. 29. If the husband mortgages his wife's leaseholds, and the equity of redemption is reserved to him, her right is unaffected: *Watts* v. *Thomas*, 2 P. Wms. 366. And so it is if it is reserved to him and his wife: *Pitt* v. *Pitt*, 1 T. & R., Ch. Rep. 180. If the mortgage is foreclosed her right will be barred.

Sub-leases.—The residue of the term remaining undisposed of by the husband will survive to the wife. Thus where the wife had a term of forty years, and the husband made a sub-lease for twenty years, upon his death the reversion expectant upon the determination of the sub-lease went to the wife, and the rent thereby reserved to his executors: *Co. Lit.* 46*a*. The rent will go to the executors, because, though she hath the reversion, she is not party or privy to the lease, and the rent is not incident to the reversion. Even although the wife were a party to the under-lease, she would not be entitled to the arrears due on the death of the husband, because they would be apportioned, but she would be entitled to future rent: *Bacon's Abr.*, *Bar. and Fem. c.* (2).

CHOSES IN ACTION.

No husband married after 31st December, 1882, will acquire by the marriage itself any rights in his wife's choses in action; and no husband, whenever married, is entitled to any choses in action of his wife her title to which may accrue on or after 1st January, 1883: see *M. W. P. A.* 1882, *sects.* 1, 2, 5, *and* 24, *and notes thereon*, *post.* A wife married after the 8th August, 1870, is entitled to any money coming to her during coverture prior to 1st January, 1883, as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding 200*l.* coming to her under any deed or will, as her separate property. She is also entitled to certain deposits in savings banks, annuities, moneys in the public stocks and funds, shares in joint stock companies, &c.: see *M. W. P. A.* 1870, *sects.* 1—7, 10, 11, *post.*

Subject to these provisions, the law as given below still remains in force, except where modified by the rules relating to separate estate or by marriage settlements.

Husband's interest.—The wife's choses in action become the husband's if he reduce them into possession during coverture, by

receiving them, or recovering them at law. On such receipt or recovery they are absolutely his own, and do not revert to the wife. He may then dispose of them by will, or they will at his death, go to his executors or administrators: *Bacon's Abr.*, *tit. Bar. and Fem. c.* (3); 2 *Bl. Com.* 434.

A chose in action is a right to recover chattels by action. Property falling under this description include debts owing to the wife on bond or otherwise, arrears of rent, legacies, trust funds, residuary personal estate, money in the funds, money belonging to her in the hands of some third person. Questions have arisen as to whether negotiable instruments and bonds payable to bearer are choses in action which survive to the wife, if not reduced into possession during the coverture. The cases with regard to negotiable instruments are collected in Williams' Law of Executors, 8th ed. vol. i. pp. 855—860, and the conclusions arrived at by its author are as follows:—It may be considered as settled law (1) that a bill or note given to the wife before marriage will survive to her, provided her husband has not reduced it into possession, and (2) that if there be a bill or note made to a married woman during the coverture, the husband may sue alone upon it, or permit his wife to take an interest in it, in which latter case it appears to stand on the same footing as if it had been made to her before coverture: see *Howard* v. *Oakes*, 3 Exch. 136; *Fleet* v. *Perrins*, L. R., 4 Q. B. 500. We are of opinion that bonds payable to bearer would also survive to the wife.

Where husband and wife acquire a joint right or interest in personalty, the husband may dispose of it as he pleases: *Paschall* v. *Thurston*, 2 Bro. P. C. 10.

Where a legacy was bequeathed to a *feme covert* and the executor paid it to the wife, he was ordered to pay it again to the husband: *Palmer* v. *Trevor*, 1 Vern. 261. Where a note was given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she owed him (in the course of carrying on a trade in her own name by the consent of her husband), the property in the note vested in the husband by the delivery to the wife: *Barlow* v. *Bishop*, 1 East, 432. A promissory note made payable to a woman married at the time of the making passes by the endorsement of the husband alone during the coverture: *Mason* v. *Morgan*, 2 Ad. & E. 30. If a married woman indorses a promissory note in her own name, and the maker afterwards promises to pay it, in a suit by the indorsee against the maker, it will be presumed that the wife had authority from her husband to indorse it on that form: *Cotes* v. *Davis*, 1 Camp. 485. It has been held that a husband can sue alone in his own name on a promissory note given to a woman *dum sola* (*McNeilage* v. *Holloway*, 1 B. & Al. 218; *Ex parte Barber*, 1 G. & J. 1); but these decisions were based on the mistaken idea that a negotiable instrument is a chose in possession. If a woman has shares in a joint stock company and marries, the name of the husband, although he has done no act to make himself a member of the company, will be placed on the list of contributories in right of his wife, as well as that of his wife: *Luard's Case*, 1 De G. F. & J. 533. A marriage settlement must expressly or impliedly so state, if the husband is to have his wife's choses in action, otherwise than by reducing them into possession: *Salwey* v. *Salwey*, Ambl. 693.

Reduction into possession.—The husband may reduce his wife's legal choses in action

into possession by issuing execution upon a judgment recovered by him; or without action brought, the wife's choses in action, whether legal or equitable, will be reduced into the husband's possession if they are transferred or paid to him. The husband cannot, generally speaking, reduce by action his wife's equitable choses in action without making a settlement thereout upon her: See Equity to a Settlement, *post.*

The following are examples of reduction into possession:—Where there was a charge on A.'s estate, and A. married the feme holding the charge, it became merged, and did not survive to the wife: *Seys* v. *Price*, 9 Mod. 217. Where a legacy to a married woman subject to a life interest was paid to the husband in the lifetime of the person entitled for life: *Doswell* v. *Earle*, 12 Ves. 473. Where the wife by marriage articles agreed to assign certain sums, to which she was entitled under a will, to trustees, and the executors of the will paid 1,000*l.* to the said trustees, the 1,000*l.* was held reduced into possession: *Cuningham* v. *Antrobus*, 16 Sim. 436. Where the husband was a lunatic, and the wife's money was, by an order in the matter of the lunacy, transferred to the Accountant-General: *Re Jenkins*, 5 Russ. 183. Where the money was lent to husband by the wife's trustee on a mortgage of husband's own property: *Rawlins* v. *Birkett*, 4 W. R. 795; see also *Price* v. *Price*, 11 C. D. 163; and *Widgery* v. *Tepper*, 5 C. D. 516; affirmed on appeal, 7 C. D. 423. The receipt by an agent appointed by husband and wife of money forming part of the estate of an intestate, of which the wife is administratrix, is a

reduction into possession of the wife's distributive share of the money: *In re Barber*, 11 C. D. 442; see also *Re Goods of Harding*, L. R., 2 P. & D. 394.

Examples where there has been no reduction into possession:—Where wife was joined with the husband in suing for a debt due on a bond, and husband died before judgment: *Oglander* v. *Baston*, 1 Vern. 396. Where husband had recovered a judgment for debt of wife and died before execution: *Bond* v. *Simmons*, 3 Atk. 20. Where wife was entitled to a legacy of 600*l.* chargeable, in default of personalty, on the testator's real estate, and the husband verbally agreed with the three devisees of the real estate to sell the legacy to them for 200*l.* apiece, but received the consideration from one only of the devisees, taking interest on the 400*l.* due from the two others: Held, that the 400*l.* was not reduced into possession: *Harwood* v. *Fisher*, 1 Y. & C. 110. Where the feme was the payee of a promissory note payable with interest, and the husband (surviving his wife) had done nothing but receive the interest during her life: *Hart* v. *Stephens*, 6 Q. B. 937. Where there was a reference on petition of husband and wife to ascertain what was due for principal and interest on wife's portion, and payment was made to the husband of the interest due: *Hore* v. *Woulfe*, 2 Ball. & B. 424. Where a woman had a sum of money in the hands of a merchant, and after her marriage the merchant transferred it into the names of the husband and wife, but the only direction given by the husband was to keep it separate from his other monies: *Scrutton* v. *Pattillo*, L. R., 19 Eq. 369. The mere deposit by way of equitable mortgage by a husband of the title deeds of property upon which his wife has a security for the payment of money: *Michelmore* v. *Mudge*,

29 L. J., Ch. 609. Where the husband is not at any time during the coverture in a position to assert his rights by action: *Aitchison* v. *Dixon*, L. R., 10 Eq. 589—(There A., being sole executor and trustee of X.'s will, appointed B. and C. his co-trustees, and by deed assigned all X.'s property to B. and C. and himself upon the trusts of the will. B. opened as trustee a banking account in the name of the executors of X. B. invested share of X.'s estate to which A.'s wife was entitled, or A. in her right, on a debenture which was taken in the names B. and D. as trustees for her.) By an appropriation by the executrix of a mortgage to the same amount: *Blount* v. *Bestland*, 5 Ves. 515. Possession by husband, as executor and trustee of wife's share of residue (*Baker* v. *Hall*, 12 Ves. 497), or merely as trustee: *Wall* v. *Tomlinson*, 16 Ves. 413. Where husband has done nothing with reference to stock except to sign partial transfer to wife: *Wildman* v. *Wildman*, 9 Ves. 174. Where husband dies before legacy left to wife is received: *Brotherow* v. *Hood*, 2 Com. 725. Decree for payment of legacy left to wife, obtained by husband and wife, does not vest it in the husband: *Nightingale* v. *Lockman*, Fitz. 148. Where husband, under a decree to prepare a settlement of stock belonging to the wife, and transferred to the Accountant-General by order, came to an agreement out of court, while they lived apart, but not legally separated, to take part and give up the rest, the agreement not being executed: *Macaulay* v. *Philips*, 4 Ves. 15. Where A., the father of B., after her marriage drew a cheque in her favour upon his bankers for 10,000*l.*, and the bankers gave her a promissory note for the 10,000*l.* 1,000*l.*, part of the principal money due on the note, was paid to C., the husband of B., and he also received the interest due on the remaining 9,000*l.* to the time of his death:—Held, the note survived to the wife: *Nash* v. *Nash*, 2 Mad. 133.

Where husband and wife joined in assigning the wife's share of the residue of an estate before the administration suit was settled, and the husband died before the decree: *Hutchings* v. *Smith*, 9 Sim. 137. Where a testator bequeathed 10,000*l.* to husband and wife to be put in their joint names and that of his executor, the husband and wife to enjoy the interest during their joint lives, or the life of the survivor. The fund was paid into court to the credit of the cause, "to H. & W. their stock account." The dividends unreceived at the death of the husband belonged to the wife by survivorship: *Laprimaudaye* v. *Teissier*, 12 Beav. 206. Where the husband agreed that a legacy to the wife should be set off against a debt due from him to the estate, and husband and wife gave a joint *receipt* for the legacy: —Held, on the death of husband, that as nothing but a release by him or payment could be a discharge from the wife's claim, she was entitled to be paid: *Harrison* v. *Andrews*, 13 Sim. 595. Where the residue of a testator's estate bequeathed to a feme covert is not collected and reduced to a certainty in his lifetime: *Amhurst* v. *Selby*, 11 Vin. Abr. 377, par. 8. Where South Sea Stock was devised to a married woman, and the husband having agreed that it should be settled on trustees for self and wife, dies before the settlement is prepared: *Fort* v. *Fort*, Forrest, 171. Where a married woman was entitled to stock and to cash, and at the husband's request the stock was transferred to trustees for her separate use, and the cash paid to himself, and with the cash he increased the stock, and afterwards became bankrupt; the original stock was held not reduced into possession, but the increase went to assignee on bankruptcy: *Ryland* v. *Smith*, 1 Myl. & Cr. 53; see also *Prole* v. *Soady*, 3 Ch. App. 220; *Nicholson* v. *Drury Buildings Estates Co.*, 7 C. D. 48, where the agreement of the husband precluded the reduction

into possession: *Parker* v. *Lechmere*, 12 C. D. 256, and *Re Birchall*, 29 W. R. 461.

Death of wife.—If the husband survive the wife without having reduced her choses in action into possession, he can only obtain them by taking out letters of administration to her: *Bourne* v. *Crofton*, 2 Moll. 318.

The husband cannot sue for his deceased wife's choses in action till he has administered (*Grosvenor* v. *Lane*, 2 Atk. 180); but if he died before having administered, the choses in action will go to his representatives (*Elliot* v. *Collier*, 3 Atk. 526); but although in equity those claiming under the husband are entitled to the wife's choses in action, they must be recovered not by his representatives but by the wife's: per Lord Tenterden, C. J., in *Betts* v. *Kimpton*, 2 B. & Ad. 276. The husband's rights as administrator are excluded by a limitation to next of kin of the wife: *Anderson* v. *Dawson*, 15 Ves. 537. If the husband become bankrupt, and afterwards become entitled to his wife's choses in action as her administrator, they are liable for his debts: *Ripley* v. *Woods*, 2 Sim. 165; *Harper* v. *Ravenhill*, 1 Taml. 144. In *Ranking* v. *Barnard* (5 Madd. 32), a legacy was left to the wife of A. A., being indebted to testator, becomes bankrupt, and wife dies without asserting her claim to the legacy. Held, that executors of testator might retain legacy against assignees of A., in discharge of debt due to testator.

Death of husband.—The choses in action of the wife, not reduced into possession in the lifetime of her husband, belong to the

wife by survivorship, and not to the representatives or assignees of the husband: *Wilkinson* v. *Charlesworth*, 10 Beav. 324; *Purdew* v. *Jackson*, 1 Russ. 1; *Gaters* v. *Madeley*, 6 M. & W. 423.

Arrears of income of wife's life estate in certain funds belong to the wife by survivorship, and not to the representatives of the husband or his assignee: *Wilkinson* v. *Charlesworth*, 10 Beav. 324. Money in trustees' hands for a feme covert shall go to the feme, if she survive her husband: *Twisden* v. *Wise*, 1 Vern. 161. Money in the hands of a third person, untouched by husband, will belong to the wife surviving: *Fleet* v. *Perrins*, L. R., 3 Q. B. 536, and 4 Q. B. 500 (S. C.). Assignees of H., a bankrupt, not entitled to legacy vested in wife and not reduced into possession: *Gayner* v. *Wilkinson*, Dick. 491; see also *Pierce* v. *Thornely*, 2 Sim. 167. If husband and wife have a decree for money in right of the wife, and the husband die, the wife shall have the benefit of the decree: *Nanney* v. *Martin*, 1 Ch. Ca. 27; see also *Coppin* v. ——, 2 P. W. 496. Where part only of the wife's interest in the choses in action is reduced into possession, the wife shall, on surviving, be entitled to the remainder: *Pigott* v. *Pigott*, L. R., 4 Eq. 549. A bill or note made to a married woman during the coverture will survive to the wife: *Richards* v. *Richards*, 2 B. & Ad. 447; *Gaters* v. *Madeley*, 6 M. & W. 423; *Sherrington* v. *Yates*, 12 M. & W. 855; *Scarpellini* v. *Atcheson*, 7 Q. B. 864.

Protection order.—If the wife obtain a protection order by reason of her husband's

desertion, the wife's choses in action not reduced into possession will become her separate property, if they vest in possession after the desertion, and while the order is operative: *In re Coward and Adam's Purchase*, L. R., 20 Eq. 179; 20 & 21 *Vict. c.* 85, *s.* 21.

Divorce and judicial separation.—If the parties are divorced or judicially separated, the wife's choses in action not reduced into possession will belong to her: *Johnson* v. *Lander*, L. R., 7 Eq. 228; *Prole* v. *Soady*, L. R., 3 Ch. 220; 20 & 21 *Vict. c.* 85, *s.* 25.

CHOSES IN POSSESSION.

No husband married after 31st December, 1882, will acquire by the marriage itself any rights in his wife's choses in possession, and no husband, whenever married, will be entitled to any choses in possession of his wife, coming to her on or after 1st January, 1883: see *M. W. P. Act*, 1882, *sects.* 1 (1), 2 *and* 5, *and notes thereon*, *post.* A wife married after the 8th of August, 1870, is entitled to her earnings and the investments thereof as her separate property: see *M. W. P. Act*, 1870, *sect.* 1, *post.*

Husband's interest.—Except as modified by the Act of 1870, the following was the law in force before the 1st January, 1883 :—All the personal estate—as money, goods, cattle, household furniture, &c.—that were the property and in the possession of a wife, at the time of the marriage, or which came to her during the coverture, became the absolute property of the husband by the marriage. Without his wife's consent he could make any disposition of them *inter vivos*, or bequeath them; and, in default of such disposition or bequest, they would not revert to his wife at his death, but would vest in his executors or administrators: *Bac. Abr.*, *tit. Baron and Feme*; *c.* (3).

These rights of the husband might of course have been varied by an ante-nuptial agreement or settlement. The only exception to the general rule was the wife's paraphernalia (and even that was assets for his creditors) and her separate estate. In no other country have such large rights been given to the husband.

CHOSES IN REVERSION.

No husband married after 31st December, 1882, will acquire by the marriage itself any rights in his wife's choses in reversion; and no husband, whenever married, will acquire any right in his wife's choses in reversion,

her title to which shall accrue on or after 1st January, 1883, except such as his wife shall give him, and she will have over them the same power of alienation *inter vivos* or by will as if she were a *feme sole*: see *M. W. P. Act*, 1882, *sects.* 1, 2 *and* 5. A woman married between the 9th August, 1870, and the 1st January, 1883, is entitled to the reversion in any sum of money not exceeding 200*l.* coming to her during coverture under any deed or will, and which is not subject to her marriage settlement, as her separate property: see *M. W. P. Act*, 1870, *sect.* 7. Subject to these provisions, the law as given below still remains in force, except where modified by the rules relating to separate estate or by marriage settlements.

Husband's interest.—If the wife's choses in reversion, whether vested in interest or contingent, fall into possession during the coverture, they become the property of the husband absolutely; but in default of their falling into possession, they survive to the wife, unaffected by any disposition made by the husband.

A reversion of the wife which cannot fall into possession during the husband's life, for example, if is to vest upon his death, cannot be assigned by

him: *Dalbiac* v. *Dalbiac*, 16 Ves. 122. The husband cannot assign even for value the wife's reversionary choses in action so as to bind her surviving him: *Box* v. *Jackson*, 1 Drury, 48. A husband assigned his wife's reversionary chose in action for value. He survived the person upon whose life the reversion depended, but died without actually reducing the property into possession. Held, that the assignment was void against the wife who survived him: *Ashby* v. *Ashby*, 1 Colly. 553. An assignment by the husband of his wife's reversionary interests in personalty is of course good against every one except the wife surviving him: *White* v. *St. Barbe*, 1 Ves. & B. 405.

Assignment.—The wife alone cannot make a valid assignment of her choses in reversion, neither can the husband and wife assign or release them unless the provisions of Malins' Act (20 & 21 Vict. c. 57) are complied with.

A valid assignment or release under this act requires (1) a deed, (2) that the husband and wife shall be parties to it, (3) that the deed shall be acknowledged by her in the manner prescribed for the acknowledgment of deeds by the Fines and Recoveries Act, as modified by the Conveyancing Act, 1882, s. 7. By virtue of Malins' Act a married woman may dispose of every future or reversionary interest, whether vested or contingent, in any personal estate to which she or her husband in her right may become entitled under any instrument made after 31st December, 1857, except such interests as have been settled on her by riage articles or marriage settlement and any int ts in respect to which she

is restrained from anticipation or alienation. An assignment of a reversionary interest by husband and wife under the above act is not merely an assignment by husband and wife according to their respective interests, but an assignment of the wife's interest discharged from the *jus mariti* of the husband. Therefore the right of their assignee will prevail over the right of the executors of the testator, who bequeathed the reversionary interest, to retain a debt due from the husband to the testator's estate: *Re Batchelor*, L. R., 16 Eq. 481. A wife cannot waive in court her interest in a reversionary chose in action so as to permit her husband to dispose of it: *Batt* v. *Cuthbertson*, 2 Ir. Eq. 200. A *feme covert* was entitled to a reversionary interest in a sum in the funds. All the other persons interested surrendered their interests to her, and the fund was in court. Held that the *feme covert* was unable to dispose thereof. The court has refused to take the consent of a married woman to give up her reversionary interest, partly vested and partly contingent, in a fund in court in favour of a purchaser: *Wade* v. *Saunders*, Turn. & R. 306. A female infant, being entitled to a reversion of a chose in action, covenanted to assign it to trustees on certain trusts. Her husband died before it fell into possession, and it was held she was entitled to the chose in action unaffected by the trusts: *Le Vasseur* v. *Scratton*, 14 Sim. 116. A husband and wife assigned by deed her reversionary interest in a fund to a purchaser for valuable consideration. The husband dying before it vested in possession, it was held that she was entitled to the whole of the fund: *Purdew* v. *Jackson*, 1 Russ. 1. See also *Honner* v. *Morton* (3 Russ. 65), where it is held that if the wife executes an assignment of the fund after her husband's death, which recites the former assignments and is made subject thereto, she does not thereby recognize or confirm those former assignments, nor

does she waive her claim against them by forbearing to impeach the title of the assignees when the interest vests in possession. A wife cannot, even with the consent of her husband, dispose by will of property which she might acquire after his death, but only of property over which he himself has a disposing power: *Scammell* v. *Wilkinson*, 2 East, 552. If a married woman, with her husband's assent, makes a will of personalty in which she has an expectant interest, but that interest does not actually vest in her until after her husband's death, she must, to give validity to her will, re-execute it after his death, her declaration of adherence to the will not being sufficient. So also if her will affects property which (by his will made some years before and never altered) he had bequeathed to her absolutely: *Willock* v. *Noble*, 8 Ch. 778, and 7 H. L. 580. The court has jurisdiction to sanction on behalf of a married woman a compromise of a suit to make a trustee liable for a breach of trust in relation to a fund in which the married woman has a reversionary interest. The married woman should appear separately: *Wall* v. *Rogers*, *Wall* v. *Ogle*, L. R., 9 Eq. 58. It was held in *Hore* v. *Becher* (12 Sim. 467), although it was not necessary for the decision of the case, that where a single woman entitled to an annuity secured by a bond married, her husband could release the security, and therefore the annuity, so as to bind the wife. In *Ellison* v. *Elwin* (13 Sim. 309) by articles entered into on the marriage of a *feme* infant, she and her intended husband agreed to assign, on her attaining twenty-one, a reversionary interest in personalty belonging to her upon the trusts of the settlement. The husband and wife made the settlement after she was twenty-one, and assigned the reversionary interest in accordance with the agreement. It fell into possession after death of husband. Held that, being an infant, she was not bound by articles, and that

after her marriage she and her husband could not make a valid settlement thereof.

EXCEPTION.—By virtue of 3 & 4 Will. 4, c. 74, s. 91, and Malins' Act, a married woman may, in certain cases, dispose of her reversionary interests as if she were a *feme sole*, that is, without her acknowledgment or the concurrence of her husband. See *In re Rogers* (1 C. P. 47), where the husband was living apart from his wife, and the court refused, on husband's application, to rescind the order. However, an order may be rescinded if obtained by fraud or the suppression of facts which ought to have been disclosed at the time of applying for it: *Ex parte Cockerell*, 4 C. P. D. 39.

ASSIGNMENT BY HUSBAND ALONE.—If the husband assign his wife's choses in reversion, the rights of the assignee will be as follows:—(a) If they vest in possession during the coverture, they will belong to the assignee, subject in the case of equitable choses in action to the wife's equity to a settlement; (b) if before they fall into possession the wife dies leaving the husband surviving, they will become the property of his assignee absolutely upon the husband taking out letters of administration to his wife's estate; (c) but if the husband die leaving the wife surviving, the assignee will take nothing.

Death of wife.—If the reversionary chose in action does not vest in possession during the coverture, and the wife predecease the husband, when it so vests he is entitled to it upon taking out letters of administration.

His particular assignee or his trustee in bankruptcy will be entitled under such circumstances:

Drew v. *Long*, 22 L. J. (Eq.) 717. If the husband also die before it vests, his representatives must take out administration to the wife: *Re Goods of Harding*, L. R., 2 P. & D. 394.

Divorce, judicial separation, or protection order.—If a divorce, judicial separation, or protection order is obtained before the reversionary interest vests in possession, it will go to the wife unaffected by any disposition of the husband or of the husband and wife, unless made in accordance with Malins' Act: *Re Insole*, L. R., 1 Eq. 470; *Wilkinson* v. *Gibson*, L. R., 4 Eq. 162; see 20 & 21 *Vict. c.* 85, *sects.* 21 *and* 25.

CHOSES IN AUTRE DROIT.

After 31st December, 1882, no personalty coming to the wife in *autre droit*, *i. e.* as executrix, administratrix, or trustee, will vest beneficially or legally in the husband by marriage or during marriage. She may transfer it without his concurrence or consent, and be sued and sue in respect thereto as if she were a *feme sole*: see *M. W. P. Act*, 1882, *sects.* 1, 2, 5, 18 *and* 24, *and notes thereon*, *post.*

Before the 1st January, 1883, the legal interest in the wife's personalty in *autre droit*

vested in the husband or not, according to whether it was in possession or reversion, but without his consent she could dispose of it by will to her executors: *Scammell* v. *Wilkinson*, 2 East, 552.

Thus a husband could surrender or dispose of a term which his wife had as administratrix, because he could administer in right of his wife without her consent, although she could not administer without the consent of her husband: *Levick* v. *Coppin*, Sir W. B. 801. The goods of the wife in *autre droit* cannot be taken in satisfaction of her husband's debts: *Farr* v. *Newman*, 4 T. R. 621. Payment of money or delivery of goods made *bonâ fide* to a *feme covert* executrix as such is good against her co-executor, although the husband never assented to his wife's acting as executrix and subsequently to the payment refused to allow her to act, provided that the payment and delivery were made *bonâ fide* at her request as executrix without knowledge of his dissent, though it was known she was a *feme covert*: *Pemberton* v. *Chapman*, 7 E. & B. 210. Payment of money due to the wife as executrix is not evidence to maintain action for money had and received to the use of her husband: *Anon.*, 1 Salk. 282.

CHAPTER III.

THE HUSBAND'S LIABILITIES.

WIFE'S ANTE-NUPTIAL CONTRACTS.

The M. W. P. Act, 1870, enacted that no husband married after the passing of the act (9th August) should by reason of his marriage be liable for the debts of his wife contracted before marriage (*sect.* 12). The M. W. P. Act, 1874, declared it to be "not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage," and enacted that any husband married after the passing of the act (30th July) should be liable for such debts, and that he and his wife might be jointly sued therefor, but restricted his liability to certain assets vesting in the husband by reason of the marriage. His liability ceased with the termination of the coverture: *Bell* v. *Stocker*, 10 Q. B. D. 129. See *M. W. P. Act*, 1882, *sect.* 14, *and notes thereon, post.* By this last act

any husband married after December 31st, 1882, is liable for the ante-nuptial debts and contracts of his wife, including any ante-nuptial liabilities to which she may be subject under the acts relating to joint stock companies, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife after making certain deductions (*sect.* 14); but as between him and his wife, in the absence of any contract between them to the contrary, her separate property is primarily liable for all such debts or contracts and for all damages and costs recovered in respect thereof (*sect.* 13): see *notes on the sections*, *post*.

Ante-nuptial debts of women married before 9th August, 1870.—The lapse of time has made this branch of the subject of comparatively little importance with regard to simple contracts, but as specialty contracts can be sued on within twenty years from the time when the right of action arises in regard to them, it is still necessary to treat of it.

The husband is liable to the full extent upon the contracts of his wife made by her before marriage, provided he be sued in her lifetime: *Obrian* v. *Ram*, Mod. 170, 186. If not paid in his lifetime it

survives against her on his death: *Woodman* v. *Chapman*, 1 Camp. 189. If she die before him equity will not help the creditor, even to the extent of the portion she brought to her husband. On the other hand, if judgment has been recovered against him for the debt while she was living and then she dies, equity will not relieve him against the judgment, even if she has brought him no portion: *Heard* v. *Stamford*, 3 P. Wms. 409. An order of discharge obtained by a bankrupt husband will extinguish the debt both as against him and his wife: *Lockwood* v. *Salter*, 5 B. & Ad. 303, and *Miles* v. *Williams*, 1 P. Wms. 249. Where a woman *dum sola* gave a promissory note, and the husband, being sued upon it after the marriage, pleaded the Statute of Limitations, it was held that payments of interest by the wife without the authority of the husband were not sufficient to take the case out of the statute: *Neve* v. *Hollands*, 16 Jur. 933; see also *Pittam* v. *Foster*, 1 B. & C. 248. An express promise by a husband to pay a debt incurred by his wife, for which he is not otherwise liable, is binding: *Harrison* v. *Hall*, 1 M. & Rob. 185.

WIFE'S POST-NUPTIAL CONTRACTS.

As a general rule a husband is only liable for the contracts of his wife when he has expressly or impliedly, by prior mandate or subsequent ratification, authorized her to pledge his credit, or has so conducted himself as to make it inequitable for him to deny, or to estop him from denying, her authority: Thesiger, L. J., in *Debenham* v.

Mellon, 5 Q. B. D. 402. The same judge observes that it is a question of agency; and in *Jolly* v. *Rees*, 15 C. B. (N. S.) 639, it is distinctly laid down that the wife cannot make a contract binding on her husband unless he gives her his authority as his agent so to do; but this doctrine of agency does not prevail in cases where the wife is not provided with necessaries by him; or where they are living apart, without any fault on the part of the wife, and she is not provided for. The law upon this matter may be regarded as definitively settled by the exhaustive judgments in *Debenham* v. *Mellon*. This case was as follows: The husband was the manager of a limited company's hotel at Bradford, and his wife acted as manageress. They cohabited together, and he made his wife an allowance for clothes, but forbade her to pledge his credit for them. She purchased clothes in London, the bills for which were first made out in her name and paid for by her. She afterwards incurred with the same tradesmen a debt for clothes, payment for which was demanded from the husband, with whom previously they had had no communication.

The case was first heard by Bowen,

then in the Court of Appeal by Bramwell, L. J., Baggallay, L. J., and Thesiger, L. J., and finally in the House of Lords by Lord Selborne, Lord Blackburn and Lord Watson. All these judges unanimously approved of the principle laid down in *Jolly* v. *Rees*.

Since the above case was decided the Married Women's Property Act, 1882, has expressly enacted that "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract," and that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown."

1. *Where Husband and Wife are living together.*

Presumption of law as to contracts of wife.—On and after 1st January, 1883, every married woman is presumed to contract with reference to her separate estate. Before 1883, where a husband and wife were living together, there was a presumption that she had his authority to bind him by her contract for articles suitable to that station which he permitted her to assume: *Jolly* v. *Rees*, 15

C. B. (N. S.) 628; *Debenham* v. *Mellon*, 6 App. Cas. 24; 5 Q. B. D. 394.

The husband's liability is not founded upon any rights peculiar to the conjugal state, but on the wider ground of agency. The mere fact of marriage or of cohabitation does not make the wife the agent in law of her husband to bind him and to pledge his credit by her contract, except in the particular case of necessity. It is for the jury to decide whether she had this authority: *Reid* v. *Teakel*, 13 C. B. 627. The death of the husband therefore revokes her authority to bind him: *Smout* v. *Ilberry*, 10 M. & W. 1. In this case a man who had been in the habit of dealing with the plaintiff, for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad. Held, that neither his executors nor she herself were liable for goods supplied to her after his death, but before information thereof had been received by her.

NECESSARIES.—Where the authority of the wife to bind the husband by her contracts for necessaries exists, the question what are necessaries must be left to the jury. He is liable not only for things which are indispensable, as food, clothing, medicine, &c., but he is also liable for articles suitable to the station of life which he permits her to assume. The question whether they are necessaries, and suitable to her estate and degree as his wife, depends, on the one hand, not only on his actual but apparent income as represented to the world by the rate at which he lives and allows her to live; and, on the other hand, it depends partly upon the supply of similar articles which, in fact, she may have had at the time of ordering the goods in question: per Cockburn, C. J., in *Morgan* v. *Chetwynd*, 4 F. & F. 451. Furniture for a house may be considered a

necessary, provided it is suitable to the rank and income of the wife: *Hunt* v. *De Blaquiere*, 3 M. & P. 108. So also may a servant to accompany a wife on a voyage where the husband is in a good position: *White* v. *Cuyler*, 6 T. R. 176. Where a man had paid for articles of domestic use for his wife's niece, it was held evidence for the jury of his wife's authority to charge him for the child's education: *M'George* v. *Egan*, 7 Scott, 112. Where the wife was indicted for keeping a disorderly house, and she had done it with the knowledge of her husband, and she also with his knowledge employed a solicitor to defend her, the husband was held liable for the solicitor's expenses: *Shepherd* v. *Mackoul*, 3 Camp. 326. The costs of a suit justifiably instituted by a wife against her husband for a divorce or a judicial separation are necessaries for which she may pledge his credit (*Stocken* v. *Pattrick*, 29 L. T. 507; *Ottaway* v. *Hamilton*, 3 C. P. D. 393; *Rice* v. *Shepherd*, 6 L. T., N. S. 432); but not in a case where there was little probability of her succeeding, or where the solicitor has not made proper inquiries into all the circumstances of the case: *Baylis* v. *Watkins*, 10 Jur., N. S. 114. Money lent to a wife for conducting an indictment against her husband for an assault upon her is not a necessary: *Grindell* v. *Godmand*, 1 N. & P. 168. The expenses of a wife's funeral, if provided by a stranger, are necessaries: *Ambrose* v. *Kerrison*, 10 C. B. 776.

Presumption of husband's liability might have been rebutted.—The presumption of the authority of the wife to pledge her husband's credit might have been rebutted by proving that the husband had expressly forbidden her to pledge his credit, even although he had

not given notice of such prohibition to the person contracting with her: *Debenham* v. *Mellon*, 6 App. Cas. 24; 5 Q. B. D. 394.

It might also have been rebutted by showing that the wife was amply supplied by the husband with articles suited to the station in life he permitted her to assume: *Seaton* v. *Benedict*, 5 Bing. 28; *Montague* v. *Baron*, 5 D. & R. 532; *nom. Montague* v. *Benedict*, 3 B. & C. 631; S. C. *nom. Montague* v. *Espinasse*, 1 C. & P. 356, 502. Also where the articles, although suitable, were supplied in excess (*Metcalfe* v. *Shaw*, 3 Camp. 22; *Freestone* v. *Butcher*, 9 C. & P. 643); also by the fact that the husband made his wife an ample allowance: *Reneaux* v. *Teakle*, 8 Exch. 680; *Holt* v. *Brien*, 4 B. & Al. 252. The fact that the wife had a separate income might have been sufficient to repel the inference of agency, and so might evidence that the tradesmen had made the bills out in her name, and had drawn bills of exchange on her, which she had accepted in her own name, payable at her own bankers, from her separate funds: *Freestone* v. *Butcher*, 9 C. & P. 643. If credit were given to the wife, the husband was not liable: *Bentley* v. *Griffin*, 5 Taunt. 356. The *onus probandi* that the husband was liable lay on the person seeking to enforce the debt: *Spreadbury* v. *Chapman*, 8 C. & P. 371.

Husband's liability.—Where the husband and wife are living together, the wife has authority, apart from the conjugal relation subsisting between them, to bind him by her contracts in respect to such matters as are generally under the control of the wife:

Manby v. *Scott*, 1 Sid. 109; *Emmett* v. *Norton*, 8 C. & P. 506.

As the wife's agency is not implied from the conjugal relation, we submit that the general presumption of law under the Married Women's Property Act, 1882, that all her contracts bind her separate estate, will not obtain in cases falling within this principle. In *Ruddock* v. *Marsh* (1 H. & N. 601), it was held, that where the wife of a labourer incurred a debt for provisions for the use of the family, the husband was liable, though he had supplied his wife with money to keep the house. In discussing this case, Bramwell, L. J., says, in his judgment in *Debenham* v. *Mellon* (5 Q. B. D. 399), that the authority of the wife does not merely spring out of the contract of marriage, but that the same authority would exist in favour of a sister or housekeeper; and in that case the husband, to be free from liability, must not only forbid her to pledge his credit for such things, but must inform the tradesmen in the neighbourhood with whom she might deal, that her authority was withdrawn. If this view of the case is correct, and we think it is, the wife would have no authority to pledge the husband's credit in case it was not his habit to take credit. The same view is taken in *Manby* v. *Scott*, *supra*, viz., that the wife acts as the husband's servant, and if he is in the habit of buying for ready money, the husband is not liable for goods she may buy. In *Jewsbury* v. *Newbold* (26 L. J., Ex. 247), the fact that she was known by the tradesmen to be a married woman, and supposed to be the defendant's wife, was held to be *primâ facie* evidence that credit was given to the husband. In *Lane* v. *Ironmonger* (13 M. & W. 368), it was held, that the liability of the husband depended upon the fact whether the wife was his agent; and in *Robinson* v. *Nahon* (1 Camp. 245), it

was held, that if a man marries a woman, and holds her out to the world as his wife, he does not discharge himself from his liabilities for necessaries supplied to her by proving a previous marriage between himself and another person, unless he brings home a clear knowledge of the celebration of the first marriage to the person who supplied the necessaries to the second wife.

Where wife carries on a business.—Where the husband and wife are living together, and the wife carries on a business, it will be presumed that she is the agent of her husband in matters with reference thereto: *Phillipson* v. *Hayter*, L. R., 6 C. P. 38.

In *Petty* v. *Anderson* (3 Bing. 170), a wife carried on business on her own account during her husband's imprisonment. He having returned to live after his discharge was held liable for articles plied for the purposes of the business with his knowledge, though the invoices and receipts were in the name of the wife, and she was acknowledged tenant by the landlord, and was rated in her own name. Agency of the wife to make contracts relating to the husband's business may be inferred from her being seen in her husband's country house of business, conducting the business and giving directions to the foreman: *Plimmer* v. *Sells*, 3 N. & M. 422. A., who kept a fruiterer's shop, became in 1824 a bankrupt, but did not surrender to his commission; and from that time till 1833 the business was carried on by his wife. Fruit was supplied to her between 1828 and 1832. A. was seen in London a few times during 1824 and 1833, and was

arrested at his shop; and this was held sufficient evidence to go to the jury, and to show that A.'s wife acted as his agent: *Smallpiece* v. *Dawes*, 7 C. & P. 40. See also *Clifford* v. *Burton* (1 Bing. 199), where the wife served in her husband's shop, and carried on the business in his absence, and offered to pay for goods supplied, if the plaintiff would allow 10*l.* which she claimed, and gave a receipt in full. These facts were taken as evidence of agency. And in *Lord* v. *Hall* (8 C. B. 627), upon an issue as to the indorsement of a promissory note by J. S., it was proved that the wife of J. S. had the general management of his business, that she was in the habit of drawing, accepting, and indorsing bills and notes in her name, and that the name of J. S. was indorsed upon the note in question by his daughter, by the direction and in the presence of her mother, and the jury accordingly found that the indorsement was within the scope of the wife's authority. But in *Meredith* v. *Footner* (11 M. & W. 202), where the wife was the agent of her husband in the matter of her statement as to paying the rent was held not to be evidence against her husband of the terms of his tenancy.

Necessity.—The conduct of the husband, even when he has not authorized the contracts of his wife, may be of such a nature as to estop him from denying her authority to bind him thereby.

Thus, where a husband is living with his wife, but gives her nothing but the shelter of his house, she can pledge his credit for necessaries, although he has forbidden her to do so: *Debenham* v. *Mellon*, 5 Q. B. D. 394.

Ratification.—When the wife has no authority to make contracts to bind her husband, he may by his subsequent ratification become liable upon them: Thesiger, L. J., in *Debenham* v. *Mellon*, 5 Q. B. D. 402.

Where a wife had in one single instance bought goods, which were delivered at the lodgings of her mother, without her husband's knowledge, but for which he subsequently paid, it was held that, in an action for other goods, also bought by the wife from the same tradesman, and delivered at the mother's lodgings, though at a different place, that evidence of these facts were proper to be left to the jury to show agency in the wife, and a sanction of her dealings by the husband: *Filmer* v. *Lynn*, 4 N. & M. 559. The mere fact that the husband has seen the goods in the possession of his wife is no ratification, more especially when at the time of ordering she was acting contrary to her husband's wishes: *Atkins* v. *Curwood*, 7 C. & P. 756. Where a husband had taken his wife to a particular place, and not provided her with funds; but wrote to the person who had provided her with board and lodging in such a way as to imply acquiescence in her remaining there; these facts were left to the jury as evidence of liability: *Jenner* v. *Hill*, 1 F. & F. 269. A wife, unknown to her husband, bought a field from her father, and the husband was put into possession. Ten years after the father attempted to eject the husband, who, being made acquainted with the circumstances, insisted on retaining the field, and the father was held bound to convey it to him: *Millard* v. *Harvey*, 34 Beav. 237. Where a wife accepted a bill of exchange addressed to her husband in her own name, and the husband when it became due said he knew all about it, he was held liable as acceptor: *Lindus* v. *Bradwell*,

5 C. B. 583. A husband is liable for a loan of money to his wife made at his request: *Stevenson* v. *Hordie*, 2 W. Bl. 872. Where a husband promised to repay a loan made to his wife when convenient, although he had not been privy to the loan, it was held that there was evidence of ratification to go to the jury: *West* v. *Wheeler*, 2 C. & K. 714.

2. *Where Husband and Wife are living Apart.*

A separation of the husband and wife may be either with the consent of both parties, or by the act of one of them. The consent may be given by a separation deed or otherwise; and, in the case where the separation is contrary to the wish of one of the parties, it may be caused by the act of the husband or of the wife. The separation may also arise by law; as by divorce or judicial separation, or by imprisonment; or in some other way, as by the lunacy of one of the parties. A husband will only be liable for the contracts of his wife living apart from him when she has not an adequate provision for her maintenance, and even in this case he will not be liable if the separation has been caused by the fault of the wife alone.

Adequate provision.—Where the wife has an adequate provision, she has no authority

to bind her husband by her contracts even for necessaries; and the rule is the same whether the separation is by mutual consent, or has been caused by either of the parties against the wish of the other of them.

Provided there is a competent provision for the wife, whether made by the husband or not, he is not liable upon any contracts made by her after they have separated by consent: *Dixon* v. *Hurrell*, 8 C. & P. 717. The burden of proof lies upon the plaintiff to show that a wife living apart from her husband had an express or implied authority to pledge his credit. Such an authority is implied where the wife has no means, and it lies upon the husband to show that she has a competent provision: *Dixon* v. *Hurrell*, *supra*, and *Johnston* v. *Sumner*, 3 H. & N. 261. Such an authority would not be implied where the wife is capable of supporting herself, or has a sufficient allowance. In the case last cited, the husband and wife separated by mutual consent, when it was verbally agreed that the wife should continue to have the 200*l.* a year settled upon her at the marriage; and it was held that the husband was not liable for necessaries supplied to his wife, the plaintiff having failed to show that the allowance was insufficient, or that she had his authority to pledge his credit. It is not necessary that the allowance should be by deed of separation, and the sufficiency of the allowance is a question for the jury (*Holder* v. *Cope*, 2 C. & K. 437; *Hodgkinson* v. *Fletcher*, 4 Camp. 70); unless the wife, where the separation is by mutual consent, makes her own terms as to her income, although afterwards it proves to be insufficient for her support: *Eastland* v. *Burchell*, 3 Q. B. D. 432; *Biffin* v. *Bignell*, 7 H. &

N. 877. An adequate allowance means such as is sufficient for the support of the wife according to her husband's situation in life: *Liddlow* v. *Wilmot*, 2 Stark. 86. It is for the husband, not the jury, to fix the standard of living for his family: *Harrison* v. *Grady*, 14 W. R. 139. Alimony *pendente lite* ordered to be paid by the husband to the wife is deemed to be a sufficient allowance: *Willson* v. *Smyth*, 1 B. & Ad. 801. A voluntary pension from the crown to a wife during pleasure is not an adequate provision: *Thompson* v. *Harvey*, 4 Burr. 2177. When there is an adequate allowance, but the husband under a mistake of law promises to pay any debts she may incur, he will be bound: *Hornbuckle* v. *Hornbury*, 2 Stark. 177. Notice to tradesmen that the wife has a sufficient allowance is not necessary: *Reeve* v. *Conyngham*, 2 C. & K. 444; *Mizen* v. *Pick*, 3 M. & W. 481. These cases must be considered as overruling *Rawlyns* v. *Vandyke*, 3 Esp. 250. Where a husband has dealt with tradesmen for ready money during his cohabitation with his wife, he need not give notice to them of the separation in order to prevent himself becoming liable upon her contracts for necessaries; but to escape liability he must give such notice to tradesmen with whom he had authorized his wife to deal on credit during their cohabitation: *Wallis* v. *Biddick*, 22 W. R. 76. The authority of a wife to pledge her husband's credit is no greater when the husband is a lunatic than when he is sane and they are living apart; if she has an adequate allowance, he is not bound by her contracts: *Richardson* v. *Dubois*, L. R., 5 Q. B. 51. Where the husband by force compels his wife to execute a deed of separation, and thereby to accept of a very small maintenance, much inferior to her rank and fortune, equity will cancel the deed and refer to the Master to settle proper maintenance: *Lambert* v. *Lambert*, 2 Bro. P. C. 18.

Savings from allowance.—At law the husband was entitled to the savings by the wife out of the allowance he gave to her for her support while living apart from him (*Messenger* v. *Clarke*, 5 Exch. 388); but not in equity, where they were considered part of her separate estate: *Brooke* v. *Brooke*, 25 Beav. 342.

Inadequate provision.—Where there is an inadequate provision for the wife, the husband is liable upon his wife's contracts for necessaries if the separation is by mutual consent, or if it has been caused by the act of the husband alone.

A mere agreement for an adequate provision is not an adequate provision; it must be regularly paid. In *Ewers* v. *Hutton* (3 Esp. 255), in an action for necessaries supplied to the defendant's wife, whom he had turned out of doors, he pleaded that an adequate allowance had been secured to her by a separation deed made subsequently, but this was held to be no defence, as the deed, not having been executed by her trustee, was void, and could not therefore be enforced against the husband. In *Collier* v. *Brown* (3 F. & F. 67), where the wife separated from her husband under an agreement with his father for a specific weekly sum, which was not paid, the husband was held liable for necessaries supplied to his wife. See also *Beale* v. *Arabin*, 36 L. T. 249; *Nurse* v. *Craig*, 2 B. & P., N. R. 148.

Notice of husband to tradesmen. — A mere notice by the husband that he will not pay for goods supplied to his wife will not avail him if under the circumstances of the case he is liable.

But if the husband and wife both deal with the same tradesman, and the latter agrees with the husband not to charge him for goods to be supplied to his wife, the tradesman cannot after that charge the husband for such goods (*Dixon* v. *Harrell*, 8 C. & P. 717), nor can the husband be charged where credit is given to another person: *Harvey* v. *Norton*, 4 Jur., Q. B. 42. Where the husband is liable for necessaries, a general advertisement or particular notice to individuals not to trust her will not prevent such liability attaching upon him: *Harris* v. *Morris*, 4 Esp. 41; *Bolton* v. *Prentice*, 2 Str. 1214.

Onus probandi.—It lies upon the plaintiff to prove that where the wife is living apart from the husband the separation occurred under such circumstances as to make the husband liable: *Clifford* v. *Laton*, 3 C. & P. 15; *Mainwaring* v. *Leslie*, 2 C. & P. 507; *Edwards* v. *Towels*, 6 Scott, N. R. 641.

Separation caused by conduct of husband. — If a husband turns his wife out of doors, or so conducts himself that she is

an adulterer: *Car* v. *King*, 12 Mod. 372; *Manwairing* v. *Sands*, 2 Str. 706. If the wife who has voluntarily left her husband offers to return, and the husband absolutely refuses to receive her, his liability upon her contracts for necessaries is, perhaps, revived from that time: see *Manby* v. *Scott* (1 Sid. 109); and *Child* v. *Hardyman* (2 Str. 875), where it was held that where the husband offered to let the wife live in his garret there was not an absolute refusal. But where the wife has eloped with an adulterer the husband cannot be liable on her contracts until he has actually received her back (*Robison* v. *Gosnold*, 6 Mod. 171); and the husband is discharged, whether the tradesman has notice of the separation or not. A husband is not liable to a penalty under the act 5 Geo. 4, c. 83, s. 3, for neglecting or refusing to maintain his wife where she has left him and committed adultery, although since her departure he has himself been guilty of adultery (*R.* v. *Flintan*, 1 B. & Ad. 227, and *Culley* v. *Charman*, 7 Q. B. D. 89); neither is he liable where he offers to take a wife back who refuses to live with him: *Flannagan* v. *Bishop Wearmouth* (*Overseers*), 8 El. & Bl. 451. Where in pursuance of articles of separation, securing a maintenance to the wife, she quits her husband's home against his wishes, and continues to live apart from him, though he offers to receive her back and provide for her in his house, he is not liable for necessaries even if the maintenance is withdrawn: *Hindley* v. *Westmeath*, 6 B. & C. 200. Where a wife without her husband's consent left the boarding-house in which he had placed her, and ordered goods which were supplied to her, and the tradesman in his presence asks her for the money, or the return of the articles, and it is in the power of the husband to return the articles, he is liable, unless he returns them: *Waithman* v. *Wakefield*, 1 Camp. 119.

Adultery of wife.—A husband is not liable upon his wife's contracts after he becomes aware of her adultery: *Govier* v. *Hancock*, 6 T. R. 603.

In this case the husband had turned his wife out of doors at a time when there was no imputation upon her conduct, and had before committed adultery himself: see also *Emmett* v. *Norton*, 8 C. & P. 506; *Cooper* v. *Lloyd*, 6 C. B., N. S. 519. He is liable, however, for necessaries supplied before he knew of her adultery: *Houliston* v. *Smyth*, 3 Bing. 127. If the husband puts away his wife for adultery he is not liable, even for necessaries, if at the trial it is proved that she was guilty of adultery. If a husband after the wife has been living apart from him in adultery takes her back again, and then puts her out, he will be liable for necessaries supplied to her: *Harris* v. *Morris*, 4 Esp. 41. Condonation is a blotting out of the offence imputed, so as to restore the offending party to the same position which he or she held before the offence was committed. Mere forgiveness of the offence not followed by conjugal cohabitation is not condonation: *Keats* v. *Keats*, 28 L. J., P. & M. 57. Where a wife has committed adultery, and the husband has left her in his house with two children bearing his name without making any provision for her in consequence of the separation, and she continues in adultery, the husband will still be liable for necessaries supplied to her by tradesmen who do not know, and can not be reasonably expected to know, the circumstances under which she is living: *Norton* v. *Fazan*, 1 B. & P. 226. It lies upon the husband to prove the adultery of the wife, and the finding of a jury in the Divorce Court, that she had committed adultery with the co-respondent, although no decree was granted, on account of

the husband's adultery, is not conclusive evidence: *Needham* v. *Bremner*, L. R., 1 C. P. 583.

Necessaries.—Necessaries are those articles which are suitable to the wife's station in life, and not merely articles she is compelled to purchase: *Bazeley* v. *Forder*, L. R., 3 Q. B. 563.

Board and lodging for a wife's servant may be considered necessaries, but not board and lodging for a lap-dog: *Reed* v. *Moore*, 5 C. & P. 200. Money *per se* is not a necessary (*Paule* v. *Goding*, 2 F. & F. 585), and if lent to the wife could not be recovered at law, though in equity the lender was able to recover from the husband so much of the money as had been actually spent upon necessaries, for the supply of which he is liable: *Jenner* v. *Morris*, 3 De G. F. & J. 45 (overruling *May* v. *Skey*, 16 Sim. 588); *Deare* v. *Soutten*, L. R., 9 Eq. 151, and *Johnston* v. *Manning*, 12 Ir. C. L. R., Q. B. 148 The rule of equity will now prevail in all the Divisions of the High Court. In *Harris* v. *Lee* (1 P. Wms. 482), where money was lent to pay the doctor for the cure of an infectious disease communicated to the wife by the husband, it was held that his executors were liable therefor. Where a child is by law (order of the Master of the Rolls) properly in the care of a wife who is living separate from the husband for a justifiable cause, the reasonable expenses of providing for it are necessaries: *Bazeley* v. *Forder*, L. R., 3 Q. B. 559. Otherwise, where the children have not been consigned to her care by law: *Hodges* v. *Hodges*, 2 Peake's Rep. 79. Legal expenses incurred by the wife may be necessaries; *e. g.* an attorney's expenses properly incurred for exhibiting articles of peace on behalf of the wife against the husband (*Shepherd* v.

Mackoul, 3 Camp. 326), even although she has a separate allowance: *Turner* v. *Rookes*, 10 Ad. & El. 47. Expenses incurred by wife in enforcing a marriage settlement and in taking preliminary proceedings for divorce: *Williams* v. *Fowler*, Maclel. & Y. 269. Legal expenses incurred by a deserted wife: (1) preliminary and incidental to a suit for restitution of conjugal rights; (2) in obtaining counsel's opinion as to the effect of an ante-nuptial agreement for a settlement; (3) in obtaining professional advice as to the proper mode of dealing with tradespeople who were pressing her for payment of necessaries supplied to her since the desertion, and how to prevent a distress being levied on furniture belonging to the husband in the house she occupied: *Wilson* v. *Ford*, L. R., 3 Ex. 63; see also *Brown* v. *Ackroyd*, 5 E. & B. 819. The following legal expenses were held not to be necessary: Expenses incurred by wife justifiably living apart from her husband in resisting his endeavours to recover their child over seven years living with her: *Mecredy* v. *Taylor*, 7 Ir. R., C. L. 256; the expense of making for the wife's trustee a counterpart of a deed of separation agreed to by the husband: *Ladd* v. *Lynn*, 2 M. & W. 265. Funeral expenses of a wife voluntarily paid by a stranger are always recoverable against the husband, whether she was justified in leaving him or not, or whether the separation was by mutual consent: *Jenkins* v. *Tucker*, 1 H. Bl. 91.

WIFE'S ANTE-NUPTIAL TORTS.

As to women married before 30th July, 1874.—The husband was personally liable for the torts of his wife committed before her

marriage with him, in respect of which no judgment had been recovered against her.

This is a point of but little importance now, as most actions *ex delicto* are barred by the lapse of six years.

As to women married between 30th July, 1874, and 31st December, 1882.—A husband married between these dates is liable in an action for damages caused by the tort of his wife committed before marriage to the extent only of certain assets.

See M. W. P. Act, 1882, sects. 14 and 15, and notes thereon, *post*. His liability under the Act of 1874 ceases with the termination of the coverture: *Bell* v. *Stocker*, 10 Q. B. D.

As to women married after 31st December, 1882.—A husband married after this date is liable for his wife's ante-nuptial torts to the extent only of all property whatsoever belonging to his wife which he may have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment has *bonâ fide* been recovered against him in respect of any ante-nuptial debts, contracts or torts. See M. W.

P. Act, 1882, sects. 14 and 15, and notes thereon, *post*.

As none of the wife's property vests in a husband married after 1882, either by virtue of the marriage itself or during marriage, his liability is confined to any interest in her property given to him by his wife.

WIFE'S POST-NUPTIAL TORTS.

Husband's liability. — Before 1883, the husband was answerable for all the post-nuptial torts of his wife. In *Wainford* v. *Heyl* (20 Eq. 324), Sir G. Jessel, M. R., states the law on this subject. He says:—"*A fortiori* she [the married woman] is not liable [*i.e.*, her separate estate] for general torts, but her husband is alone liable. Her separate estate may be liable for a fraud relating to the separate estate, *i. e.* dealing with the separate estate by way of fraudulent representation;" and it "may be made liable for an actual appropriation of funds subject to the settlement and the same trusts which create the separate estate. . . Strictly speaking she cannot commit torts; they are the torts of her husband, and therefore she creates as against her husband a liability."

The question remains, how has the old law been affected by recent legislation? The part of the M. W. P. Act of 1882, dealing with the matter, is sub-section 2 of sect. 1. For the reasons stated, in our commentary upon the act (see *post*), we consider that the present law upon the subject may be thus stated. A husband is liable for the general torts of his wife, but her separate estate is also liable, and the wife may be sued alone thereon in all respects as if she were a *feme sole*.

The husband's liability for the torts of his wife is only indirectly affected by the Act of 1882. The person injured by his wife's wrongful act has now two courses open to him when seeking redress: (1) He may either sue the wife alone, in which case her separate property only will be liable for damages and costs; or (2) he may sue the husband and wife jointly. With this exception the law, as given below, remains in force, viz.:—

The husband is answerable for all his wife's torts committed during coverture, in which case the action must be joint against them both, for if she alone were sued it might be the means of making the husband's property liable, without giving him the opportunity of defending himself: *Bacon's Abr. Bar. & Feme* (*L.*) The husband is liable for the general torts of his wife: *Wainford* v. *Heyl*, 20 Eq. 324.

The following are examples of cases in which the husband has been held liable for the torts of his wife committed during coverture:—

For slander, in *Ferguson* v. *Clayworth*, 6 Q. B.

(N. S.) 269; for libel, in *Head* v. *Briscoe*, 5 Car. & P. 484; for assault and battery, in *Watson* v. *Thorpe*, Cro. Jac. 239, and in *Vine* v. *Saunders*, 4 Bing., N. C. 96; for trespass, in *Smalley* v. *Kerfoot*, 2 Str. 1094; for fraud, in *Charlton* v. *Coombes*, 9 Jur. (N. S.) 904; for trover, in *Keyworth* v. *Hill*, 3 B. & Ald. 685; *Catterall* v. *Kenyon*, 3 Q. B. (N. S.) 310.

Torts founded upon contract.—Where a husband is liable for the torts of his wife, the tort upon which such liability is founded must be a tort *simpliciter*, and not one which is either founded upon or connected with a contract.

The oldest authority for this rule is *Cooper* v. *Witham* (1 Levinz, 247; 1 Sid. 375, *S. C.*) Cooper sued husband and wife, for that she, being covert, affirmed herself to be sole, and requested the plaintiff to marry her, which he did, whereby he was disturbed in conscience, and put to great charge by the husband. Held, that the husband was not liable, as the representation was in regard to a contract of the wife, or, in other words, that the action sounded in contract. This decision was followed in the *Liverpool Adelphi Loan Association* v. *Fairhurst* (9 Exch. R. 422), where it was held that an action did not lie against a husband and wife for a false and fraudulent representation by the wife to the plaintiff that she was sole and unmarried at the time of her signing a promissory note as surety to him for a third person, whereby the plaintiff was induced to advance a sum of money to that person. In *Wright* v. *Leonard* (11 C. B. (N. S.) 258), Williams and Willes, JJ., held, that the husband was properly joined as a defendant in an action for her false and fraudulent representa-

tion that certain acceptances were the acceptances of her husband, whereby the plaintiffs were induced to discount them, and sustained loss through their turning out to be forgeries. But Erle and Byles, JJ., differed, on the ground that the false representation was substantially a warranty of a debt, and so in the nature of a contract. All the judges agreed with the principle, but differed as to whether or not the representation was connected with a contract: see also *Rawlings* v. *Bell*, 1 C. B. 951.

Wife agent for her husband.—The wife may, however, as agent for her husband, make a false and fraudulent representation in relation to a contract, for which he will be liable in damages.

A baker, being desirous of selling his business, authorized a broker to find him a purchaser therefor. The broker inserted an advertisement containing a false representation as to the extent of the business done. An intending purchaser asked the wife, who managed the business for her husband, whether the business was as good as the advertisement stated, and she replied in the affirmative. Although the husband was not a party to the misrepresentation, he was held liable because his wife was his agent for the purpose of making representations as to the business: *Taylor* v. *Green*, 8 C. & P. 316. Whether she has or has not acted as his agent is a question for the jury: *Att.-Gen.* v. *Riddell*, 2 Tyr. 523.

A husband is also liable for injuries suffered by a servant obeying the directions of his wife, who acts as the husband's agent in

the business in which such servant is engaged: *Miell* v. *English*, 15 L. T. 249.

In this case, the husband was the owner of a cart, which was so much out of repair as to be unsafe for anyone to ride in it. The wife, who assisted her husband in the management of the business, ordered the servant to load the cart and take certain goods in it. The cart broke down, and he was injured. The husband was held liable in damages, on the ground that, in giving such order, the wife acted as his agent.

Misrepresentation. — Where a married woman makes a false representation with regard to her property, even though not her separate property, she will be compelled to make such representation good to the extent of that property, and such a representation may be by conduct as well as by words: *Savage* v. *Foster*, 9 Mod. 35.

Termination of coverture.—The husband's liability ceases with the termination of the coverture, whether by death or divorce.

Capel v. *Powell* (10 Jur. (N. S.) 1255), decided that a husband, divorced from his wife by decree absolute, is not liable in an action brought after the divorce for wrongs committed by his wife during the coverture.

The husband's liability for the torts of his wife continues so long as the relation of husband and wife subsists, although they be permanently living

apart. *Query*, whether this would be so if she were living in adultery: *Head* v. *Briscoe*, 5 C. & P. 484.

DEVASTAVITS OF WIFE.

This subject requires separate treatment, as the M. W. P. Act, 1882, has made important alterations in regard to the husband's liabilities for the wilful neglect, or default, or any other breach of trust, of his wife as executrix, administratrix, or trustee.

ANTE-NUPTIAL DEVASTAVITS.—The law, as unaffected by recent legislation, was as follows: If a *feme sole*, being an executrix or administratrix, wasted the goods of her testator or intestate, and then married, her husband was liable for such waste: *Kings* v. *Hilton*, Cro. Car. 603. But he was only liable during the coverture, and if she died in his lifetime he was not chargeable after the coverture either at law or in equity, (even if he had received a portion with his wife, *Adair* v. *Shaw*, 1 Sch. & Lef. 263)—except as to what came to his hands, or his wife's hands, after the intermarriage: *Sanderson* v. *Crouch*, 2 Vern. 118; *Norton* v. *Sprig*, 1 Vern. 309.

By the M. W. P. Acts, 1874 and 1882, a husband married after 30th July, 1874, is liable for the devastavits of his wife committed before the marriage to the extent only of the property coming to him through her: see *M. W. P. Act*, 1882, *ss.* 14, 15, *and* 24, *and notes thereon, post.*

POST-NUPTIAL DEVASTAVITS.—The law, as unaffected by recent legislation, was as follows: A husband was liable for all the assets received or devastavits committed, either by himself or his wife, during the coverture, in respect of an estate of which his wife was legal personal representative, and his estate was

liable therefor after his death: *Adair* v. *Shaw*, 1 Sch. & Lef. 243; *Smith* v. *Smith*, 21 Beav. 385; *Clough* v. *Bond*, 3 My. & Cr. 490, *S. C.*; *In re Smith's Estate*, 48 L. J. (N. S.), Ch. 205. The reason assigned for the husband's liability was, that, as the wife could not act alone in administering, his assent must be presumed. In the case of *Paget* v. *Read* (1 Vern. 143), a husband, living apart from his wife, was held liable in equity for his wife's wasting of goods, which were devised to her for life only. In *Tyler* v. *Bell* (2 My. & Cr. 89), it was decided, that, although the husband of an administratrix may have become liable to make good to the next of kin of the intestate the assets received by himself, or his wife, during the coverture; yet, if the husband, at his death, makes his wife his executrix, and she possesses assets more than sufficient to answer the demands of the next of kin, after paying the other debts, the estate of the husband is discharged, and, therefore, the next of kin cannot sue an administrator *cum testamento annexo* of the husband as to assets in this country. This decision follows *Adair* v. *Shaw* (*supra*), where it was decided, that the estate of the husband of an administratrix was discharged from so much of the intestate's estate received by the husband during the coverture, as, after his death, came to his widow, the administratrix.

A husband is liable for his wife's post-nuptial devastavits during marriage committed before the 1st January, 1883, but not for those subsequently committed.

Where the wife accepts any trust, or the office of executrix or administratrix, after the 31st December, 1882, her husband is not subject to any liability unless he has acted or intermeddled in the trust or administration; her separate estate is alone liable: see *the M. W. P. Act*, 1882, *sects.* 14, 15, *and* 24, *and notes thereon*, *post*.

CHAPTER IV.

WIFE'S RIGHTS IN HER HUSBAND'S PROPERTY.

REAL PROPERTY—DOWER.

DOWER is that part of the husband's real estate which comes to the wife upon his death. Formerly there were five kinds of dower—(1) At common law; (2) By custom; (3) *Ad ostium ecclesiæ;* (4) *Ex assensu patris;* and (5) *De la plus belle.* Of these the first two alone now exist; (5) perished with military tenures, and (3) and (4) were abolished by the Dower Act, 1833, which Act also modified dower at common law.

DOWER AT COMMON LAW.

"Dower at common law is that portion of lands or tenements, which the wife hath for term of her life of the lands or tenements of her husband after his decease for the sustenance of herself and the nurture and education of her children."—*Co. Litt.* 31*a*.

Questions upon dower at common law can

only arise with regard to women married before the 1st January, 1834; and as such questions are of rare occurrence and will within a few years practically come to an end, we shall only briefly notice the law peculiar to this branch of the subject. Before the Dower Act, the law gave a woman her dower out of all lands of which her husband was solely seised at any time during the coverture. As this right was indefeasible by the husband alone and could only be released with the wife's concurrence, by an expensive legal ceremony, it put a great impediment in the way of alienation of land, and various devices were adopted to prevent the right attaching. The effect of the Dower Act is practically to extinguish the wife's right to dower in every case except where the husband dies intestate as to his realty. Even then her claim to dower is barred if he has, either in the conveyance of the lands to him or elsewhere by deed, declared that any widow he might leave should not be entitled to dower out of his lands; and as, from a mistaken conception of the purpose of the Act, such a declaration became a common form in conveyances, the right of dower has become of little value; and the extension of dower to

equitable, as well as to legal estates, is a sorry compensation.

DEFINITION.—Dower at common law is the right of the wife upon her husband's death to hold for her life the third part of the lands of which he was solely seised for an estate of inheritance in possession at any time during the coverture, provided that any issue that she might have could by any possibility have inherited.

As the fact of seisin depended upon the husband, it was sufficient if he was seised in law, otherwise it would have been in his power to defeat the wife's right. As we have seen, his own right of curtesy depends upon actual seisin where it is possible. The condition as to her being the wife of a natural-born or naturalized subject, which formerly existed, does not apply since the Naturalization Act, 1870, which provides (*sect.* 2), that real property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a British subject.

The inconveniences of dower induced the courts to give the benefit of a trust term to a purchaser or mortgagee against the wife, although he took with notice of her claim to dower, and it had been created subsequently to the marriage or to the vesting of her right: *Wynn* v. *Williams*, 5 Ves. 130. A dowress, however, was not deprived of her right in such case in favour of an heir or devisee: *Banks* v. *Sutton*, 2 P. Wms. 707. The learning as to outstanding terms assigned to attend the inheritance has become, so far as dower is concerned, of such little importance even in deducing title, that it is sufficient to refer to Shelford's Real Property Statutes and Preston's Abstracts of Title for further information upon this subject.

Equitable estates.—There could be formerly no dower out of an equitable estate, nor out of an estate partly legal and partly equitable: *Co. Litt.* 29 *a*, *note* 6; *Chaplin* v. *Chaplin*, 3 P. Wms. 229; *Att.-Gen.* v. *Scott*, Forrest. 138.

There could be no dower of an estate of inheritance partly legal and partly equitable. A. devised her fee simple estates to B. upon trust to pay several annuities, among others an annuity of 300*l.* to B. himself and his heirs:—Held, that dower was not claimable out of the annuity, as it was only an equitable interest, and the legal estate, being for life, was not commensurate therewith: *Lyster* v. *Mahony*, 1 Dr. & War. 236. Mr. Fearne took advantage of this state of the law, and invented an ingenious limitation, which gave the purchaser of a fee simple estate an unfettered power of alienation over it, without the concurrence of his wife or a trustee, and at the same time effectually prevented his wife's right to dower attaching. This limitation was as follows:—The vendor granted the estate unto the purchaser and his heirs to such uses as the purchaser should by deed or will appoint, and in default of such appointment, to the use of the purchaser for life, with remainder to trustees in case his life estate should determine by forfeiture or otherwise in his lifetime, nevertheless upon trust to pay the rents and profits to him, with remainder upon his decease to his heirs. By the exercise of his general power of appointment the purchaser was able to dispose of the estate as he pleased; and although, by the rule in *Shelley's case*, he took an estate of inheritance, yet the vested remainder in the trustees prevented him being seised of the legal inheritance in possession out of which alone dower was claimable. Such a limitation does not now

bar dower, because it can be claimed out of an estate of inheritance, although, as in this case, it is partly legal and partly equitable.

Dower of Women married after 1833.

Dower is the right of a wife upon her husband's death to hold for her life the third part of the lands of which he died seised or possessed for an estate of inheritance in possession, whether legal or equitable, or in part legal and in part equitable, provided that any issue she might have had by him could by any possibility have inherited the said lands, and that he died intestate with regard to them, without her right having been barred.

Requisites of dower.—In order that dower may exist, there must be (1) a lawful marriage; (2) a possibility that issue by wife may inherit; (3) death of husband. The seisin of husband is no longer necessary.

Legal marriage.—In order that a woman may be entitled to dower she must have been the lawful wife of her deceased husband: see *Chapter I.*, p. 27, as to the requisites of a legal marriage.

Issue.—The issue that may be born must be capable of inheriting, but it is not necessary that the wife should have had any issue.

"In every case where a woman taketh a husband seised of such an estate in tenements, &c., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband had, as heir to the husband, of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man and to the heirs which he shall beget of the body of his wife, in this case the wife had nothing in the tenement, and the husband hath an estate but as donee in special tail. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife die, living her husband, and after the husband takes another wife and dies, his second wife shall not be endowed in this case, for the reason aforesaid": *Co. Litt. s.* 53. Thus if A. grants Whiteacre to himself and his wife, with remainder to the heirs of their two bodies, with remainder to his heirs, and his wife dies, and then he marries again and dies without issue, his second wife shall not have dower, although issue by her might have inherited the remainder in fee, because during the coverture he was only seised of an estate in special tail which her issue could not by any possibility inherit: see *Co. Litt.* 31 b. As contradistinguished from curtesy, it is not essential to dower that the wife shall actually have issue by her husband; the possibility of issue is sufficient. The law does not set any bounds to the possibility of having issue at the most advanced age, and therefore it has been held, that though a man marries a woman of 100 years of age, she shall have her dower, though by possibility of nature she cannot have issue: *Park's Dower*, 81.

DEATH OF HUSBAND.—It seems to have been the old law, that where the death of husband could not be certainly proved, as where he was absent beyond seas, the wife could recover dower conditionally, viz. that if he returned from beyond seas she should render back her dower to the feoffee of the husband without suit, and receive the profits in the meantime, with sufficient sureties on her part to do the same, or otherwise the tenant to keep the land. The question of the death of the husband, when brought in issue on a writ of dower, was not triable by a jury but by the court *per testes*, and it was said that its judgment was final: *Park's Dower*, 248.

The property subject to dower.—A woman is entitled to dower out of all hereditaments, whether corporeal or incorporeal. Thus, she is dowable out of lands, manors, tithes, advowsons, rents, *profits à prendre*, such as common appendant or in gross (if certain), mills, fairs, markets, franchises, parcel of an honour, tolls, courts, fines, heriots, open mines.

She is not entitled to dower out of realty bought with partnership moneys held by partners for partnership purposes, unless the equitable presumption of its conversion into personalty is rebutted by an agreement to the contrary between the partners. Lindley, J., in his treatise on the Law of Partnership, says (p. 670, 4th ed.) the true rule is stated in *Darby* v. *Darby* (3 Drew. 506), "that whenever a partnership purchases real estate for the partnership purposes and with the partnership funds, it is as between the real and personal representatives of the partners personal estate." This rule does not apply to co-owners not

being co-partners, nor to partners in profits where they are only co-owners of the land producing them.

All shares in companies declared by statute to be realty, such as New River shares, &c., are subject to dower.

Dower is not claimable out of a personal annuity given to a man and his heirs: *Holdernesse* v. *Carmarthen*, 1 Bro. C. C. 377, nor out of chattels real. A widow is not entitled to dower out of an estate in which her husband had only the legal interest: *Noel* v. *Jevon*, 2 Freem. 43.

THE QUALITY OF THE ESTATE.—Dower can only be claimed out of an estate in inheritance (*i. e.*, an estate in fee simple or fee tail) in possession. For example, A. entitled to Whiteacre in fee in possession grants it to B. for life, reserving rent, and then marries C. A. dies in B.'s lifetime, C. would not be entitled to dower out of the land or out of the rent: *Low* v. *Burron*, 3 P. Wms. 263. If in this case the lease was for years, C. would be entitled to dower out of the lands, but not out of the rent, as the husband would still be seised of an estate of inheritance, the possession of the lessee being equivalent to the husband's possession. The result would be the same if B. surrendered his life estate to A. If there is a vested estate intervening between the husband's life estate and his remainder in fee or in tail, there is no estate of inheritance in possession out of which dower is claimable. But if there be a grant of land to A. for life, then to B. for life, with remainder to the heirs of A. or to A. in fee simple, and B. dies in A.'s lifetime, the estate for life would be united to the remainder in fee, so as to make it an estate of inheritance in possession. The same result would follow if B. released his estate to A.: *Duncomb* v. *Duncomb*, 3 Lev. 437; where the grant was to A. for life, remainder to B. and his heirs for the

life of A. in case A.'s estate determined by forfeiture or otherwise during his lifetime, with remainder to the heirs male of the body of A., remainder over. The intervening vested estate of B. prevented the life estate and remainder in tail of A. coalescing, and so the widow was not entitled to dower. If in such a case, since the Dower Act, B. was merely a trustee for A., dower would be claimable, as his estate would be in possession, though partly legal and partly equitable (*sect.* 2). Lands were granted to A. for life, remainder to B., the son, for life, remainder to the first and other sons of B. in tail, remainder to right heirs of A. A. died in lifetime of B., who was A.'s heir. B. died without issue, leaving a wife: was she entitled to dower? Yes, because the contingent remainder to B.'s issue was destroyed by the descent of the inheritance upon him: *Hooker* v. *Hooker*, 2 Barnard. K. B. 200, 232, 379, S. C. This would not be the case now, as contingent remainders are preserved from destruction. If there be tenant in special tail, remainder to him in general tail or fee, and his wife die without issue and he marry again, his second wife shall be entitled to dower, because a tenancy in tail after possibility of issue extinct is only a life estate, and that merges in his remainder in fee: *Bacon's Abr. Title Dower B.* (3). A widow is entitled to dower out of lands of which her husband was tenant in tail, although he died without issue: *Paine's case*, 8 Co. Rep. 34 a. But if a rent *de novo* be granted in tail without any remainder over and tenant in tail takes wife and dies without issue, she is not entitled to dower, as the rent sinks into the land for its benefit. If there had been a remainder over, she would have been entitled as against the remainderman: *Chaplin* v. *Chaplin*, 3 P. Wms. 229.

A widow is entitled to dower out of a defeasible estate of her husband so long as it exists. Thus, suppose a tenant in tail in remainder bars

his issue only and conveys to a purchaser and his heirs, and the preceding estate determines—so long as the tenant in tail or his issue are living, the widow of purchaser would be entitled to dower: *Seymour's case*, 10 Rep. 95 b.

In the case of an estate of inheritance with an executory devise over, the widow is entitled to dower as against the executory devisee. In *Smith* v. *Spencer* (4 W. R. 729), it was held that the husband was entitled under a will to an equitable estate in fee simple in certain hereditaments determinable in the event, which took place, of his dying without leaving issue living at his decease, and held, also, that his widow was entitled to dower. See also *Moody* v. *King* (2 Bing. 447), where there was a legal estate in fee with an executory devise over.

Joint estate.—There can be no dower out of a joint estate: *Co. Litt.* 37 b.

This rule gave rise to the first device made use of to prevent dower attaching upon the purchase or mortgage of lands. The grant was taken to the purchaser and a trustee for him as joint tenants, but as this method necessitated the trustee's concurrence in every conveyance, and entirely failed of its purpose if the trustee died before conveyance in the lifetime of the purchaser, it was abandoned in favour of Fearne's form of uses to bar dower: see *ante*, p. 151. If the joint tenancy is severed the widow would be entitled to dower (*Reynard* v. *Spence*, 4 Beav. 103), otherwise the widow of the survivor is alone entitled to dower: *Broughton* v. *Randall* (Cro. Eliz. 502), where father and son were both hanged from one cart, and the son was seen to struggle the longer. There is no presumption as to survivorship in cases where two or more persons perish by some common calamity.

The widow of a tenant in common is entitled to dower, and in such a case the dower will be assigned in common too, for her estate is simply a continuance of her husband's estate.

Right of dowress.—A dowress is entitled to quarantine; to have a third of the lands subject to dower assigned to her; is entitled to emblements; and can grant leases.

QUARANTINE.—The widow is entitled to quarantine, that is, the privilege of continuing in the capital messuage or mansion house, or some other house whereof she is dowable, forty days after her husband's death, whereof the day of his death is counted one; and during this time she is to be provided with all necessaries at the expense of the heir, and before the end thereof to have her dower assigned to her. See 9 Hen. 3 (Magna Charta), c. 7; *Bac. Abr. Bar. & Feme* (*B*).

DOWER.—A dowress has an estate for life in a third of the property subject to her right. If before dower is assigned timber is cut down upon the estates out of which it is claimable, the widow is entitled for life to a third of the interest upon the investment of the proceeds: *Bishop* v. *Bishop*, 10 L. J. (N. S.) Ch. 302. Where land belonging to an infant, subject to his mother's right of dower, was taken by a railway company, and the purchase-money, as determined by valuers, was paid into court, it was held that the dowress was entitled to have the value of her right of dower, as determined by the valuers, paid to her out of the fund in court: *Re Hall's Estate*, L. R., 9 Eq. 179. She is entitled to emblements (*Fisher* v. *Forbes*, 9 Vin. Abr. 373, pl. 82), also to arrears of dower not ex-

ceeding six years: *Curtis* v. *Curtis*, 2 Bro. C. C. 620. By the common law, where the land of which the widow is dowable consists of arable land, pasture, woods and meadow, she is entitled to have assigned to her a third of each kind of land, but if, with her consent, any one be assigned in lieu of all the rest it will be good; so, too, she may accept one of three manors in lieu of a third of each: *Bac. Abr. Dower*, D 2. If the heir assigns dower of lands of which the husband was seised but the wife not dowable, she is tenant in dower of such lands, and so she is if she exchanges for such lands that which has been assigned to her for dower. The heir may assign a recompense in lieu of dower, but it must be a pecuniary rent or a rent in kind, issuing out of the land. The assignment of dower must be absolute; not subject to any condition or reservation: *Wentworth's case*, Cro. Eliz. 451. The heir and the widow may agree as to the assignment of dower, otherwise it ought to be assigned by metes and bounds. She cannot enter until it be assigned to her and set out either by the heir, terre-tenant, or sheriff. An assignment does not require any deed or writing: *Rowe* v. *Power*, 2 B. & P. (New), 1.

Mines.—The widow is entitled to dower out of mines worked during the coverture, whether by the husband or by lessees for years, whether they pay pecuniary rents or rents in kind. It makes no difference whether the mines are under the husband's own land or under land belonging to other persons who granted him the minerals or strata absolutely, reserving the surface, for such a grant is a grant of a real hereditament in fee simple. But dower is not due of mines or strata unopened, whether under the husband's soil or under the soil of others. If the land assigned in dower contains an open mine, the dowress may work it for her own benefit. Dower of mines may be assigned either collectively with

other lands or separately of themselves. It is to be assigned by metes and bounds, if practicable; otherwise by a proportion of the profits or separate alternate enjoyment of the whole for short proportionate periods: *Stoughton* v. *Leigh*, 1 Taunt. 402; see also, on mines, *Dickin* v. *Hamer*, 1 Drew. & S. 284.

Leases.—The Settled Estates Act, 1877 (repealing the Act to facilitate Leases and Sales of Settled Estates, 1856), empowers every person entitled to the possession or the receipt of the rents and profits of any unsettled estates as tenant in dower to demise the same (except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith) for any term not exceeding twenty-one years in England or thirty-five years in Ireland, provided that such demise be by deed for the best rent obtainable without any fine, and the rent to be incident to the immediate reversion. The deed must contain a covenant for payment of rent, and also a condition of re-entry on non-payment thereof. The demise must not be made without impeachment of waste: *sect.* 46. Any such demise will be valid against any person claiming through or under her husband: *sect.* 47. The tenant in dower is not a tenant for life under the Settled Land Act, 1882.

Excessive assignment.—If the heir, a minor, make an excessive assignment of dower, he can, when of full age, have a writ of admeasurement of dower.

But not if he were of full age when he assigned, or if after assignment the dowress improves the lands, or if at assignment, in measuring out the land, the value of a mine in her portion was overlooked: *Stoughton* v. *Leigh*, 1 Taunt. 402; *Saunders' case*, 5 Co. 12 a. If

the sheriff assign excessive dower, the heir may have a *scire facias* to obtain an assignment *de novo*: *Stoughton* v. *Leigh*, *supra*.

Procedure to enforce dower.—Proceedings to enforce dower may be taken either in the Queen's Bench Division or the Chancery Division of the High Court.

At law.—The Common Law Procedure Act, 1860, s. 26, abolished all writs of right of dower, writs of dower *unde nihil habet*, and plaints for freebench or dower in the nature of such writs and every *quare impedit*; and provided that in lieu thereof an action should be brought, commencing with a writ of summons, indorsed with a notice that the plaintiff intends to declare in dower, or for freebench, or in *quare impedit*, as the case may be.

The action should be commenced in the Queen's Bench Division. It is suggested in the 11th edition of Chitty's Forms, p. 609, that where dower is sued for, the indorsement on the writ should be as follows:—"The plaintiff's claim is in dower for her third part [*here state the nature of the property, as ten acres of arable land, ten acres of meadow land, ten acres of pasture land, and ten acres of other land*], with the appurtenances, in the parish of in the county of as her dower [*or* freebench], as widow of G. H., her husband, whereof she hath nothing."

This action must be brought within twelve years, and the writ of summons may be indorsed with a claim for arrears of dower not exceeding six years.

The forms of indorsement given in the Judicature Acts are to be found in *App. A., Sect. IV.* 30 *and* 48.

In equity.—Owing to the defective nature of the

legal remedy, recourse was usually had to equity by the widow when seeking assignment of dower. The court either directs an inquiry as to the right of dower and the assignment of it to be made in chambers, or orders a commission to issue. It forms part of the decree, that upon the assignment of dower possession of the land must be delivered to the dowress: *Goodenough* v. *Goodenough*, Dick. 795. She is also entitled to an account of arrears of dower not exceeding six years (3 & 4 Will. 4, c. 27, s. 42), and the widow is entitled to such arrears from the death of her husband, and not merely from the date of her claim: *Mundy* v. *Mundy*, 2 Ves. 128. She is not entitled to interest on arrears of dower: see *Bright's Husband & Wife*, Vol. i. 428, *and cases there cited.* For forms of decrees, see *Pemberton's Orders*, 3*rd ed.* 329.

Costs of action.—In an ordinary suit for an assignment of dower, no costs will be given against a defendant unless he sets up an improper defence (*Stormont* v. *Thickins*, 13 L. T., N. S. 533), or the defence is vexatious (*Bamford* v. *Bamford*, 5 Hare, 203), or there is no ground for the defence: *Harris* v. *Harris*, 11 W. R. 62.

How Dower may be barred.

The different ways in which the right to dower might have been barred before 1834, were—1. By a legal term created previously to the time when the right of dower attached; 2. By the different forms of uses to bar dower; 3. By a legal jointure; 4. By an equitable jointure; 5. By divorce;

6. By the elopement of the wife and her subsequent adultery; 7. By laches of the widow; 8. By alienage of the widow; 9. By waiver of the wife; 10. By a fine; 11. By a recovery. Of these, 1, 2, 8, 10 and 11 have ceased to exist; but the Dower Act enacts that—(a) an alienation by the husband *inter vivos* or by will of the lands subject to dower; (b) the debts of the husband; (c) a declaration against dower in the deed conveying the lands to the husband, or by any deed executed by him; (d) a declaration against dower in the husband's will; or (e) a devise of land to the wife; shall also be sufficient to bar the wife's right to dower.

Trust terms.—A woman was barred of her dower, both at law and in equity, by a legal term, created previously to her right of dower attaching on the estate, of which an assignment had been obtained by a purchaser in trust to attend the inheritance: *Noel* v. *Jevon*, 2 Freem. 43; *Bevant* v. *Pope*, ibid. 71; *Lloyd* v. *Lloyd*, 4 Dr. & War. 354.

An act was, however, passed in 1845 to render the assignment of satisfied terms unnecessary (8 & 9 Vict. c. 112); and *sect.* 2 provides that every term of years then subsisting or thereafter to be created becoming satisfied after the 31st December, 1845,

and which, either by express declaration or by construction of law, shall become attendant upon the inheritance or reversion of any land, shall, immediately upon the same becoming so attendant, absolutely cease and determine.

USES TO BAR DOWER.—See *ante*, p. 151.

Legal jointure.—The inconveniences of dower in regard to the obstacles which it presented to the alienation of lands were early felt, and the 6th section of the famous Statute of Uses (27 Hen. 8, c. 10) provided a partial remedy therefor, by enacting that where the husband provides a competent livelihood for the wife for her life of freehold lands, tenements or hereditaments, to take effect in possession or profit immediately after his death, such provision shall bar her right to dower.

The requisites of a legal jointure are six, viz., (1) it must take effect in possession of profit immediately upon the death of the husband; (2) it must be for the wife's life, or for a greater estate; (3) it must be made to herself, and to no other for her; (4) it must be made in satisfaction of her whole dower, and not of part of her dower; (5) it must be expressed to be in satisfaction of her dower; (6) it must not be made during marriage. If made during coverture, she can elect between the jointure and her dower.

Under the act a jointure made upon an infant would bar her of her dower: *Harvey* v. *Ashley*, 3 Atk. 612; *Drury* v. *Drury*, 3 Bro. P. C. 492.

As legal jointures are of very rare occurrence, having been practically superseded by marriage settlements, it is unnecessary to refer to any other cases on the subject.

Equitable jointure.—An equitable jointure is any provision, however inadequate or precarious it may be, which an adult, previously to marriage, accepts in lieu of dower: *Sugden's New Statutes relating to Property*, *p.* 245.

Equity will sometimes imply an intention to bar the wife of her dower. Thus, where a provision was made for the livelihood and maintenance of the wife after her husband's death, although it was not expressed to be in bar of dower: *Vizard* v. *Longdale*, cited in 3 Atk. 8; *Hamilton* v. *Jackson*, 2 J. & Lat. 295. Under the old law an equitable provision in bar of dower did not bind an infant, unless it was as certain a provision as her dower: *Drury* v. *Drury*, 3 Bro. P. C. 500; *Caruthers* v. *Caruthers*, 4 Bro. C. C. 500. By marriage articles provision was made for the jointure (*eo nomine*) out of certain lands contracted to be bought, or out of the purchase-money if the purchase went off, and out of future-acquired property if the former was not sufficient, but there was no declaration that the jointure was to be in bar of dower. Held, that it barred dower even out of fee simple lands subsequently acquired: *Re Dwyers*, 13 Ir. Eq. Rep. 431.

Questions of title rarely arise in respect to what is or what is not an equitable jointure, because the conveyance by a vendor bars his wife's dower. If an equitable jointure is made after marriage, the widow will be put to her election between such a provision and her dower. A testamentary provision

made by the husband for the wife is considered to be an equitable jointure.

Divorce, or adultery of wife.—If the husband and wife are divorced, the wife's right to dower ceases; so it does if the wife has left her husband and afterwards committed adultery, and her husband has died without being reconciled to her. A judicial separation does not cause a forfeiture of the dower: *Statute of Westminster*, 13 Edw. 1, c. 34; *Co. Lit.* 32 *a* & *b*; 2 *Bl.* 130; *Frampton* v. *Stephens*, 30 W. R. 726.

A woman forfeits her dower by adultery, without reconciliation, even though she originally departed from her husband's house in consequence of his cruelty (*Woodward* v. *Dowse*, 10 C. B., N. S. 722), or of his misconduct: *Bostock* v. *Smith*, 34 Beav. 57; see also *Hetherington* v. *Graham*, 6 Bing. 135. A woman does not lose a jointure by elopement.

Laches of widow.—A widow's right to sue in equity for dower was held to be barred, where she had not for upwards of twenty years taken any proceedings either at law or in equity to have it assigned to her: *Marshall* v. *Smith*, 34 L. J. (N. S.) Ch. 189.

It would now be barred by neglecting to bring an action to establish her right within twelve years after such right accrued to her: 37 & 38 Vict. c. 57, s. 1.

Waiver by widow.—A widow may give up her claim to dower.

But where a widow joined with the heir-at-law in a mortgage deed, by which it was expressed that for the purpose of extinguishing her right to dower she granted and conveyed the property, and the mortgage debt was subsequently paid off, the widow's right to dower revived: *Meek* v. *Chamberlain*, 30 W. R. 228. Dower was held to have been released by a deed of conveyance in fee to a purchaser free from incumbrances, to which the wife of the vendor (married before 1834) was a party, and which was duly acknowledged by her, although in the operative parts of the deed her name was by mistake omitted: *Dent* v. *Clayton*, 10 Jur., N. S. 671.

Husband's alienation.—If the husband makes an absolute disposition of any land, either *inter vivos* or by will, his widow will not be entitled to dower thereout: *Sect.* 4 *of Dower Act.*

Before the Dower Act a widow was not, as a rule, put to her election between a gift to her by her husband's will and her dower out of lands devised away from her (*Birmingham* v. *Kirwan*, 2 Sch. & Lef. 444), except where certain provisions were considered to be inconsistent with such a right. For examples, see *Miall* v. *Brain*, 4 Mad. 119; *Parker* v. *Sowerby*, 4 De G. M. & G. 321; *Bending* v. *Bending*, 3 K. & J. 257. Where a testator, after directing his debts to be paid by his executors, devised his real and personal estate subject thereto to trustees upon certain trusts, being partly for the benefit of his widow; Lord Romilly, M. R., doubted if *sect.* 4 deprived the

widow of dower, although *sect.* 9 was sufficient to do so: *Rowland* v. *Cuthbertson*, L. R., 8 Eq. 466. This dictum of Lord Romilly is dissented from in *Lacey* v. *Hill*, L. R., 19 Eq. 346; where a testator by his will made in 1861 devised all his real estate, and bequeathed all his personal estate to trustees upon trust for sale and conversion, and to invest surplus, after payment of debts, and, out of income of investments, to pay annuity to his wife. The testator (who married in 1845) died entitled to freeholds and copyholds which he had purchased. Held, that the widow was barred of any right to dower both by *sects.* 4 and 9 of the Dower Act. All partial estates and interests created by any disposition or will of the husband are valid and effectual as against his widow's right to dower (*sect.* 5).

A widow has no right against the heir-at-law of her deceased husband to be indemnified in respect of a mortgage created by the husband: *Jones* v. *Jones*, 4 K. & J. 361.

Debts, &c.—All debts, incumbrances, contracts and engagements to which the husband's land is subject or liable shall be valid and effectual as against the right of his widow to dower: *Sect.* 5 *of Dower Act.*

It was held in *Spyer* v. *Hyatt* (20 Beav. 621) by Lord Romilly, that despite this section the widow's right to dower or freebench has still priority over the mere creditors of the deceased. But this decision seems hardly consistent with the plain words of the section and with the opinion of the late Mr. Joshua Williams, that "the effect of the act is evidently to deprive the wife of her dower except as against her husband's heir-at-law": *Williams' Real Property*, 14*th edit. p.* 251.

Declaration in a deed.—A widow is not entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or in any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land: *Sect.* 6 *of Dower Act.*

Such a declaration used to be a common form in conveyances, although it is now obsolete. Where a widow claims dower out of her husband's lands, it is advisable that the title deeds should be examined on behalf of the heir, to see if any of them contains such a declaration. Even if the deed containing the declaration is not executed by the husband, the widow is barred of her dower: *Fairley* v. *Tuck*, 27 L. J., Ch. 28. A conveyance of real estate, made before the Act to a married man, containing the ordinary uses to bar dower, with a declaration "that his then present or any future wife might not be entitled to dower," does not exclude the dower of a woman he married after the Act, because *sect.* 14 provides that the act shall not give to any deed . . . executed before the 1st January, 1834, the right of defeating or prejudicing any right to dower: see also *Clarke* v. *Franklin*, 4 K. & J. 266. "Land" includes gavelkind land: *Farley* v. *Bonham*, 30 L. J., Ch. 239.

Declaration in the husband's will.—A widow is not entitled to dower out of any land of which her husband dies wholly or partially intestate, when he, by his will, de-

clares his intention that she shall not be entitled to dower out of such land, or out of any of his land: *Sect. 7 of Dower Act.*

We have seen that by a declaration contained in a deed the husband can bar his wife's dower. He can equally do so by a declaration made in his will. If such declaration is general, she will not be entitled to dower out of any of his lands, even as against the heir-at-law. If the declaration is limited to certain of his lands, it will not bar her right of dower out of any other lands as to which he may die intestate. As any devise bars her right, this question as to whether the declaration is general or limited can only arise between her and her husband's heir-at-law.

Devise of real estate to wife.—Where a husband devises any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention is declared by his will: *Sect. 9 of the Dower Act.*

The effect of this section will be more readily understood from the following illustration. Suppose the husband to be possessed at the time of his death of three estates, out of which dower is claimable, viz. Whiteacre, Blackacre, and Greenacre. By his will he gives a life interest in Whiteacre to his wife. By reason of a lapse Blackacre and Greenacre descend to his heir. The life interest devised to the wife

will bar her right to dower out of Blackacre and Greenacre.

Before this act the widow was not put to her election between her dower and any gifts she took by the will, unless the intention she should elect was expressed in the will. Under this act a devise of any land (not personalty), or of any estate or interest therein, will bar her dower out of any of her husband's lands, unless a contrary intention is declared by the will.

As to a bequest of personalty.—No gift or bequest made by a husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will: *Sect.* 10 *of Dower Act.*

A bequest of personalty never operated in bar of dower unless an intention to that effect clearly appeared in the will: *Ayres* v. *Willes*, 1 Ves. sen. 230. Where a man bequeathed an annuity to his widow, and directed that if she made any claim on the rest of his property, the said annuity was not to be paid; she was held entitled to dower as well as to the annuity: *Wetherell* v. *Wetherell*, 4 Gif. 51.

Agreements not to bar dower.—Any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or out

of any of them, will be enforced: *Sect.* 11 *of Dower Act.*

Lord St. Leonards advises that—"In purchasing an estate free from dower by force of this act, it should be ascertained that the seller has not bound himself by agreement not to bar his wife's dower": *Sugden's V. & P.* 14th ed. p. 458; but such a requisition rarely occurs in practice.

Dower subject to restrictions.—The right of a widow to dower is subject to any conditions, restrictions or directions declared by the will of her husband: *Sect.* 8 *of Dower Act.*

Priority of legacies in bar of dower.—Legacies bequeathed to widows in satisfaction of dower are still entitled to priority over other legacies: *Sect.* 12 *of Dower Act.*

In *Roper* v. *Roper* (3 Ch. D. 714) it was held that a widow is not entitled to priority over other legatees in respect of an annuity bequeathed to her by her husband "in lieu, bar, and satisfaction of dower," where the only real estate of the testator was conveyed to him with a declaration against dower; nor where the testator leaves no real estate: *Acey* v. *Simpson*, 5 Beav. 35. In *Stahlschmidt* v. *Lett* (1 Sm. & G. 415) a widow dowable out of her husband's lands, having elected to take an annuity given by the will in lieu of her dower, the testator's estate being insufficient to pay the legacies in full, it was held she was entitled to priority over the other legatees.

Dower by Custom—Freebench.

This kind of dower varies according to the custom and usage of the place, and is to be governed accordingly.

Gavelkind.—By the custom of gavelkind in Kent the wife is entitled to a moiety so long as she keeps herself chaste and unmarried: *Co. Lit.* 33 *b*. It is not necessary that the husband should die seised of the lands.

Borough English.—By the custom of Borough English, the widow shall have the whole of her husband's lands in dower, which is called her freebench: *Boraston* v. *Hay*, Cro. Eliz. 415. The reason is stated in Bacon's Abr. vol. 2, p. 767, to be that, as the youngest son inherited the land, the wife, who was entrusted with the younger children, had the whole of it during her life.

Copyholds.—A widow is not dowable except by custom, and the quantity and duration of her interest are regulated by the custom obtaining in each particular manor, generally a third for her life; in the Manor of Taunton Deane the wife even took the inheritance. It is generally *durante viduitate*, sometimes only during chaste widowhood. In some manors the widow of a copyholder for lives is entitled to freebench. As a rule the widow is only entitled to freebench out of the lands of which her husband dies seised, but by the custom of some manors, as Cheltenham, the right attaches to all the copyholds of which the husband is seised in possession at any time during the coverture. The widow of a *cestui que trust* is not dowable of a trust either of copyholds or of customary freeholds, and the wife of a trustee is not entitled to dower.

Rights and liabilities.—Freebench (subject to the custom of the manor) gives the widow all the rights and liabilities of dower at common law. Her estate is a continuance of her husband's, and there is no need of her admittance. Freebench is not subject to the husband's debts unless secured on the copyholds.

Barring of Freebench.

Generally, if the husband surrender his copyhold and die, the subsequent admission of the surrenderee will bar freebench.

Before the Wills Act, 1837, the surrender by a husband to the uses of his will and the admission of the devisees in trust would bar freebench. Since the act a devise of copyholds will bar it (sect. 3): *Lacey* v. *Hill*, L. R., 19 Eq. 346. An infant is bound by a legal jointure, but as copyholds are not within the Statute of Uses she is not bound by a jointure of copyholds, and she will have the right to elect between her freebench and the jointure. Except in certain manors, alienation by the husband bars freebench. A lease by husband is such an alienation *pro tanto*, and agreement for value will also bar it. Copyholds are not within the Dower Act (*Powdrell* v. *Jones*, 2 Sm. & G. 407); which case also decided, that where by the custom of the manor the wife's freebench could be only destroyed by her voluntary surrender, she would not be barred by the uses employed to bar dower at law. Freebench is also barred by unity of the copyhold with the freehold, as by enfranchisements and by husband's forfeiture: see *Scriven's Copyholds*.

PERSONALTY.

If a husband dies intestate wholly or partially as to personalty, leaving his wife surviving him, she will be entitled to a third of such personalty, after payment of her husband's debts, if he leaves a child or children, or his or their lineal representatives, also surviving him; or to a moiety thereof if he leaves no such child, children, or lineal representatives: *Statute of Distributions* (22 & 23 *Car. II. c.* 10), *ss.* 5, 6.

It will be observed that the widow is only entitled in case of her husband's intestacy, and it is hardly necessary to add that her right may be barred by a marriage settlement: see *Drury* v. *Drury*, 4 Bro. C. C. 505, cited in note. Where the husband by marriage settlement covenanted to leave a certain sum of money to his wife, and then died intestate, it was held that her distributive share was a satisfaction *pro tanto* of the covenant: *Blandy* v. *Widmore*, 1 P. Wms. 324; see also *Garthshore* v. *Chalie*, 10 Ves. 1. Where upon marriage a certain sum was settled upon trust for wife "in satisfaction of any dower or thirds which she could or might claim at common law out of all or any of the estates, real, personal or freehold," her right under the Statute of Distributions was barred: *Gurly* v. *Gurly*, 8 Cl. & F. 743, and *Colleton* v. *Garth*, 6 Sim. 19. See *Slatter* v. *Slatter* (1 Y. & C. Exch. 28), where it was held that an agreement between husband and wife contained in a separation

deed did not bar her right to thirds, as she could not make a valid contract. Where a husband by his will gives his wife a legacy in satisfaction of thirds, she will not be barred of her right under the Statute of Distributions: *Sympson* v. *Hornsby*, 3 Ves. 335; *Pickering* v. *Lord Stamford*, 3 Ves. 332. The special customs of London and York as to distribution of estates of intestates were abolished by 19 & 20 Vict. c. 94, as to all persons dying after 1856. A widow, as such, cannot take under a limitation to the next of kin of her husband according to the Statute of Distributions: *Cholmondeley* v. *Ashburton*, 6 Beav. 86.

CHAPTER V.

THE WIFE'S RIGHTS IN HER OWN PROPERTY.

EQUITABLE SEPARATE ESTATE.

SEPARATE estate is either equitable or statutory. The latter is of comparatively recent origin; while in equity, for more than two centuries, a married woman has been considered capable of possessing property for her own use independently of her husband. It is important to bear in mind the distinction between these two different classes of separate estate, especially since the Married Women's Property Act, 1882, has practically abolished the common law doctrine as to the effect of marriage upon the property of the wife. The importance of equitable separate estate has not been materially decreased by the above-mentioned Act; and it will still be necessary for the practitioner to be well acquainted with the rules regarding it. Many questions will arise with respect to the property of women married before the

passing of that Act, and it has by no means lessened the necessity of vesting property in trustees for married women. In most cases, where it is desired to restrain married women from alienation of their separate property, it will be advisable to give them only the equitable interest therein. We shall treat of statutory separate property in our notes upon the Act, and, so far as possible, shall not touch upon it in our consideration of equitable separate estate.

Sect. 1.—Creation of Equitable Separate Estate.

Definition.—Equitable separate estate may be defined as that equitable interest of a married woman in any kind of real and personal property, with regard to which she has, unless restrained by the instrument creating such interest, the same power of disposition as if she were a *feme sole*.

As to this definition it is important to notice—(1) that separate estate only exists during marriage; and (2) that equitable separate estate depends entirely upon the doctrine of trusts, and upon having trustees: *Newlands* v. *Paynter*, 4 My. & Cr. 408.

If formerly land or personalty were given to a mar-

ried woman for her separate use without vesting it in trustees, still in equity the intention was carried into effect, and the wife's interest protected by the conversion of her husband into a trustee for her. Thus, in *Bennet* v. *Davis* (2 P. Wms. 316), the testator devised to his daughter, whose husband was both extravagant and impecunious, certain lands in fee for her separate use without appointing any trustees. The husband became bankrupt, and the court held that it could supply the want of trustees by making him a trustee for his wife. A similar devise contained in the will of a testator dying after 1882 would vest both the legal and equitable fee in the married woman. In *Rollfe* v. *Budder* (Bunb. 187), it was decided that a bequest of a bond to a married woman for her sole and separate use vested the interest in her in a court of equity, as much as if it had been vested in trustees for her separate use. A husband may give property to his wife for her separate use and constitute himself her trustee, but the transaction must be unequivocal: *Mews* v. *Mews*, 15 Beav. 529. In *Fox* v. *Hawks* (13 Ch. D. 822), a husband, being about to leave England for a residence in India, executed an assignment by deed to his wife, who was to remain in England, of a leasehold dwelling-house, "to hold the same unto the wife, her executors, administrators, and assigns, as her separate estate." No trustees were appointed, the husband and wife being the only parties to the deed. The title deeds were allowed to remain in the possession of the wife. It was held that the deed of assignment operated as a valid declaration of trust in favour of the wife: see also *Darley* v. *Darley*, 3 Atk. 399; *Haselinton* v. *Gill*, 3 T. R. 620, notes; *Lee* v. *Prieaux*, 3 Bro. C. C. 381; *Newlands* v. *Paynter*, 4 My. & Cr. 408; *Parker* v. *Brooke*, 9 Ves. 583; and *Rich* v. *Cockell*, 9 Ves. 369. It was, however, desirable that trustees should be appointed, especially where the words relied upon as

creating separate estate are ambiguous: *Adamson* v. *Armitage*, 19 Ves. 416; and *Gilbert* v. *Lewis*, 1 De G. J. & S. 38 (*post*, pp. 185, 188). If a fund is given to the separate use of a woman, there is a sufficient declaration to exclude the law of community where she has married a foreigner, by the law of whose domicile such a community is the result of marriage: *De Serre* v. *Clarke*, 18 L. R., Eq. 587.

Duration. — The character of separate estate may be attached to a gift of property to a *feme sole*, and it will be effectual to exclude the marital rights of any husband she may marry.

See *Tullett* v. *Armstrong* (1 Beav. 32), where Lord Langdale says, "That property given to a woman for her separate use, independent of any husband, may . . . . be enjoyed by her during her coverture as her separate estate, although the property originally, or at any subsequent period or periods of time, became vested in her when discovert." In *Clark* v. *Jaques* (1 Beav. 36), an annuity was bequeathed to an unmarried lady for her separate use, without power of anticipation. She married, became a widow, and married again. No disposition having been made by her while discovert, it was held that the annuity was for her separate use, without power of anticipation during the second marriage: see, also, *Dixon* v. *Dixon*, 1 Beav. 40. By a marriage settlement the income of the trust funds was, during the life of L., to be for her separate use, independently of the control of her intended husband, without power of anticipation. Held, that the trust for her separate use revived on her second marriage: *Hawkes* v. *Hubback*, L. R., 11 Eq. 5.

If property be given to the separate use of a woman already married, it will depend upon the words used whether it will retain that character in any subsequent coverture.

Thus, in *Benson* v. *Benson* (6 Sim. 126), the testator directed the interest of 10,000*l.* to be for the separate use of his daughter, Jane Lane, the wife of J. Lane, for her life, free from the debts of her husband. J. Lane died, and his widow married again. Held, that the trust for her separate use ceased on the death of her first husband. If the words "any husband," or "husband or husbands," had been used, the decision would have been different. See, also, *Knight* v. *Knight*, 6 Sim. 121; *Re Gaffee's Settlement*, 7 Hare, 101; *Bradley* v. *Hughes*, 8 Sim. 149. In *Shafto* v. *Butler* (40 L. J., Ch. 308), S. settled an estate during the joint lives of himself and his wife, for her separate use without power of anticipation. The wife obtained a divorce and married again without a settlement. Held, that the trust for separate use and the restraint revived again.

Extent.—Where property is settled upon a married woman for her separate use for life, with remainder as she shall, notwithstanding her coverture, by deed or will appoint, with remainder, in default of appointment, to her executors or administrators, it is an absolute settlement for her sole and separate use: *London Chartered Bank of Australia* v. *Lempriere*, L. R., 4 P. C. 572.

Creation.—Separate estate may be created expressly by appropriate words; by implication from the acts or conduct of a person; or by operation of law.

Expressly created.—Separate estate may be expressly created without the use of technical words, provided that the intention to do so is manifested: *Darley* v. *Darley*, 3 Atk. 399.

The expressions used for this purpose may be divided into two classes, viz., those which are sufficient *per se;* and those which are ambiguous and require to be construed in connection with the nature of the instrument, the context, and the surrounding circumstances.

Expressions sufficient per se.—The following phrases have been held to be sufficient *per se*:—"For her separate use:" *Massy* v. *Rowen*, L. R., 4 H. L. 294, 299, 300. "Sole and separate use:" *Parker* v. *Brooke*, 9 Ves. 583. "For her own use, independent of her husband:" *Wagstaff* v. *Smith*, 9 Ves. 520. "For her own use and benefit, independent of any other person:" *Margetts* v. *Barringer*, 7 Sim. 482, and *Glover* v. *Hall*, 16 Sim. 568. "Free of control of any present husband or husband to come:" *Anderson* v. *Anderson*, 2 M. & K. 427. "Her receipts to be a sufficient discharge:" *Lee* v. *Prieaux*,

3 Bro. C. C. 381; *Cooper* v. *Wells*, 11 Jur. (N. S.) 923. "The husband is to have no control:" *Edwards* v. *Jones*, 14 W. R. (M. R.) 815.

Ambiguous Expressions.—In considering this question it is necessary to bear in mind that the rules relating to separate estate have been slowly evolved in courts of equity, and that the tendency to protect the property of married women has become more and more apparent in the later decisions. Hence it is difficult to reconcile or distinguish all the decisions upon the subject, but it will be safe to assume that the later decisions in favour of married women are more likely to be followed in analogous cases. Fortunately this difficulty will, in future, be obviated, at least with regard to all property coming to married women, their title to which may accrue after 1882. Where the words relied upon as creating separate estate are ambiguous, the nature of the instrument, the context, and the surrounding circumstances, are taken into account in determining whether the marital rights of the husband are excluded. To a non-legal mind it would seem to be quite clear that if the words "for her *separate* use," or "*sole and separate* use," attached to a gift to a woman, whether married or

single, are sufficient *per se* to create separate estate, the words "for her *sole* use" would be equally efficacious; but the case of *Massy* v. *Rowen* (L. R., 4 H. L. 288) shows that although the word "separate" is technical, no such meaning attaches to the word "sole."

The following classification may be of service in construing ambiguous expressions:—

(1.) The nature of the instrument itself may be sufficient to show that it was the intention of the donor to create separate estate.

(2.) Where such is not the case, the context may show whether or not it was intended to create separate estate.

(3.) Where both these *indicia* are lacking, surrounding circumstances may indicate the intention.

(4.) Unless an intention to create separate estate can be implied from the nature of the instrument, the context, or surrounding circumstances, the marital rights of the husband will not be excluded.

1. NATURE OF THE INSTRUMENT.—Where by marriage articles the husband agreed that his intended wife "should enjoy and receive the issue and profits:" *Tyrrell* v. *Hope*, 2 Atk. 558. Where a woman, about to marry, settled property in trust for "her own sole use, benefit, and disposition:" *Ex parte Ray*, 1 Madd.

199. Lord Hatherley, in *Massy* v. *Rowen* (L. R., 4 H. L. 288), says, "Taking the word *sole*, as applied to a marriage settlement, to a case of contemplated devolution of property upon a lady at a time when she is about to put herself in such a position that, unless she be guarded and defended as to that which is her property and under her own control and engagements, the husband will acquire, together with her, an interest in it—in all these cases the word "sole" finds its ready and appropriate meaning in its being a provision to secure the property against the control of the husband, and to give to her the sole and absolute disposition of it."

2. CONTEXT.—Where trustees had a discretionary power as to the payment of the annual produce of a trust fund unto and for the benefit of a widow for life, it was held, on her marrying again, that they had a discretion to pay the wife the income for her separate use: *Austin* v. *Austin*, 4 Ch. D. 233. Where a trust deed for providing pensions for widows, provided that any recipient of a pension who should dispose of it, or encumber it, should lose all right thereto, and a widow, entitled to such pension, married again, it was held that the pension was for her separate use: *Re Peacock's Trusts*, 10 Ch. D. 490. The appointment of trustees is regarded as a signification of intention to create separate estate, and this construction will probably more readily obtain where the trust is executory. Thus, in *Adamson* v. *Armitage* (19 Ves. 416), by a codicil to a will there was a bequest to a single woman, with a direction that the executors should vest it in the hands of trustees to be selected by them, the income arising therefrom to be "for her sole use and benefit." In *Shewell* v. *Dwarris* (Johns. 172), a testatrix gave a legacy to her nephew on the express condition that he should be living with his wife, if alive, at decease of testa-

trix; but in case they should not be living together as man and wife, then one half of the legacy was bequeathed to the wife absolutely and one half to the nephew. Vice-Chancellor Wood said, "Common sense requires that upon the construction of this will, looking to the context, the bequest to the wife though in terms to her 'absolutely,' should be construed as a bequest to her for her separate use." In *Massey* v. *Parker* (2 My. & K. 174), a legacy was given to a single woman "for and under her sole control;" but the context "that her mother should have no control whatever over her property" was sufficient to show that the words were not intended to exclude the rights of a husband. Where, in the same instrument, there are gifts expressed to be for the sole and separate use of a woman, and other gifts where those words, or words equally clear, are not used, the latter gifts will not, as a rule, be separate estate. Thus, in *Roberts* v. *Spicer* (5 Madd. 491), one legacy was given directly to a married woman "to and for her own use and benefit," and another legacy was given to trustees in trust for her, with a direction "that the same should not be subject to the debts, or in any manner under the control of the husband:"—held, that the first legacy was not separate estate. In *Wills* v. *Sayers* (4 Madd. 409), there was a bequest to a married woman "for her sole and separate use," and another bequest "for her own use and benefit:"—held, that the former alone was her separate property. In *Lumb* v. *Milnes* (5 Ves. 517), the capital was held to be separate estate, but not the interest. In *Kensington* v. *Dollond* (2 M. & K. 184), where the life interest was given to one woman for her own "sole and separate use," with remainder to her daughter "for her own use and benefit," it was decided that the daughter did not take it as separate estate. A decision difficult to reconcile with the above cases was given recently in *Re Tarsey's Trust*

(L. R., 1 Eq. 561), where a pecuniary legacy was given to A., a widow, for life, for her sole and separate use and benefit free from the control of any husband and trustees were interposed, and a residuary bequest was given to her "for her own sole use and benefit absolutely." A. married again, and it was held that these words must be construed with the rest of the will, and that the testator having contemplated the future marriage of A., the residue became her separate property, the words being construed in connection with marriage.

3. SURROUNDING CIRCUMSTANCES.—Where the gift of property is made to a married woman, or to a woman about to marry, and the gift is in contemplation of marriage, the words "sole use," or words of a like nature, will be sufficient to give her such property for her separate use. (*Quære*, if the gift is by a husband to his widow.) We submit that this principle is now virtually established, although, when the doctrines of separate estate were less settled than at present, there were decisions which conflict with it: see *Packwood* v. *Maddison*, 1 S. & S. 232, and *Tyler* v. *Lake*, 2 R. & M. 183; where Lord Brougham said that the case of *Stanton* v. *Hall* (Ibid. 175) had established the rule that, "If a sufficient strength of negative words is not to be found in the gift or limitation, you are not allowed to fish about for indications of intention from other parts of the instrument;" and he added, "I take the principle, therefore, to be now thoroughly established that Courts of Equity will not deprive the husband of his rights at law, unless there appears to be a clear intention manifested by the testator that the husband should be so excluded." He accordingly held that a direction to pay part of the proceeds of converted property to two married women "unto their own proper and respective hands, to and for their own use

and benefit," and in case they should be dead, then to pay their shares to their respective husbands for their own use and benefit, did not give to the married women the separate estate therein. This decision was quoted with approval by Lord Westbury in *Gilbert* v. *Lewis* (1 De G. J. & S. 38; see also *Massy* v. *Hayes*, Ir. Rep., 1 Eq. 110; *Lewis* v. *Mathews*, L. R., 2 Eq. 177); but it has not been followed in later cases. Thus, in a very recent case, it was decided that a legacy given to a married woman for her "sole use and disposal," vests in her as separate estate: *Bland* v. *Dawes*, 17 Ch. D. 794. In *Alt* v. *Alt* (4 Gif. 84), the husband before marriage wrote to his intended wife's mother stating, "If your daughter has or may have money, my wish and intention would be that it should be settled for her *sole and entire use.*" Upon bill after marriage, the court decreed a settlement to her separate use. In *Hartford* v. *Power* (Ir. Rep., 2 Eq. 204), a testator appointed his only daughter and her husband executrix and executor of his will, and bequeathed 2,000*l.* to her "for her sole use and benefit." Legacy held to be separate estate; see also *Inglefield* v. *Coghlan* (2 Coll. 247). So a legacy given to a married woman "for her own use and at her own disposal": *Prichard* v. *Ames*, 1 T. & R. 222. Bequest in trust to pay dividends, &c. into the proper hands of a married woman: *Hartley* v. *Hurle*, 5 Ves. 545. Bequest of two bonds and a mortgage to a married woman, with a direction that they should be delivered up to her whenever she should demand the same: *Dixon* v. *Olmius*, 2 Cox, 414. A bequest by a mother to her married daughter of articles of plate, jewels, &c. to and for her own use: *Re Brymer's Trusts*, 24 L. T. 263.

In *Gilbert* v. *Lewis* (1 De G. J. & S. 38), property was left to a woman "for her sole use and benefit" by the will of her first husband, but no

trustees were appointed. Lord Westbury, in giving judgment that separate estate was not thereby created, said, "There is not, so far as I am aware, any single case of a will containing simply these words, in which they have been made the foundation of a decision, that the devisee took a separate estate." The nearest authority is that of *Adamson* v. *Armitage*, *supra*, p. 185, before Sir William Grant, but in that case the money was directed to be vested in trustees, whom the executors should choose and name, the income arising therefrom to be for a woman then unmarried "for her sole use and benefit." In another case, *Cox* v. *Lyne* (Y. 562), it was held that a gift by a husband's will to his wife "for her sole use and benefit" was to her separate use, but this case was by Lord Westbury in *Gilbert* v. *Lewis*, *supra*, said to be "most erroneously reported."

4. INTENTION NOT INFERRED.—An intention to create separate use will not be inferred where there is a gift to an unmarried woman "to and for her use" (*Jacobs* v. *Amyatt*, 1 Madd. 376, note), or "to her own proper use and benefit" (*Blacklow* v. *Laws*, 2 Hare, 49), and there is no other evidence of intention. *A fortiori* would this be the case if no such words as "to her use" were added to the gift.

Contract with husband.—Separate estate may be expressly created by contract with the husband either before or during coverture.

In *Tyrrell* v. *Hope* (2 Atk. 558), an agreement was made before marriage between the future husband and wife that her lands should be settled, so as to give her a remainder in fee for her sole and separate

use, after a life interest to her mother. The ante-nuptial settlement omitted the words "for her sole and separate use," but upon the wife remonstrating, the husband, before the marriage, gave her a note in writing to the effect that the lands should be to her separate use, as had been agreed. Held, that the note was sufficient to give her the separate estate. In *Simmons* v. *Simmons* (6 Hare, 352), V.-C. Wigram was of opinion, though it was not necessary for his decision, that admitting a parol agreement with the husband before marriage, that particular chattels of the wife should be possessed by her for her separate use, is not binding upon him; yet if the agreement be acted upon by the chattels being placed under the dominion of the trustees of the marriage settlement and treated as separate property, the case is very different from that of an agreement which has never been acted upon. Where a woman before marriage agrees with her intended husband that her personal estate and the rents and profits of her lands shall be at her own disposal, all the produce or increase of it, or that which comes in lieu of it, shall be also at her disposal: *Gore* v. *Knight*, 2 Vern. 534. In giving judgment Lord Keeper Wright says: "It appears not that any other estate came afterwards to the lady, and therefore what she died possessed of is to be taken to be the separate estate, or the produce of it, unless the contrary had been made appear; and as she had a power over the principal, she consequently had it over the produce of it, for the sprout is to savour of the root and to go the same way:" see also *Petts* v. *Lee*, 4 Vin. Ab. 131, pl. 8. A *bonâ fide* purchase by wife from the husband, through the medium of trustees, for her separate use may be sustained against creditors, although the husband was indebted at the time, and even though the object is to preserve from his creditors the subject of the purchase for the family: *Arundell* v. *Phipps*, 10 Ves. 139.

Trading of wife.—Where a husband permits his wife to trade separately, the trade property will be separate estate.

A man, voluntarily and after marriage, allowed his wife for her separate use to make profit of all butter, eggs, pigs, poultry, and fruit produced by his farm beyond what was used in the family. Held, that money so made was her separate property, and she was allowed to come in as a creditor in respect to part of it lent to her husband during his lifetime: *Slanning* v. *Style*, 3 P. Wms. 334. In *Ashworth* v. *Outram* (5 Ch. D. 923), A., for thirteen years prior to her marriage, carried on the business of fruit preserving at a house occupied by X., to whom she acted as housekeeper. During this time X. only used the house for business purposes. Then A. and X. married and lived there together, but A. continued to carry on the fruit preserving business in her maiden name. Her business banking account was transferred into X.'s name, but she signed all cheques in his name, and he never interfered in the business, and often said it belonged to A. Held, that the business was A.'s separate property: see also *Wood* v. *Wood*, 19 W. R. 1049. *Re Whittaker*, W. N. 1882, p. 71, shows that the evidence of the widow requires corroboration. A woman may before marriage, with the consent of her intended husband, convey all her stock-in-trade and furniture to trustees, to enable her to carry on her business separately, and if the husband does not intermeddle with them and there is no fraud, such effects (though fluctuating) are not liable for his debts; but whether the trade is carried on solely by the wife or jointly with the husband, is a question of fact for the jury; and if they determine the latter, the stock-in-trade is liable to the debts of the husband, but

even in such a case the furniture is not, though removed to the husband's house. It is no objection to such a settlement that there is no inventory of the goods intended to be thus settled: *Jarman* v. *Woolloton*, 3 T. R. 618. By a settlement before marriage, thirty-two cows and the increase and produce arising therefrom, the property of the woman, were assigned to trustees for her separate use, the husband covenanting to permit her to carry on the trade of a cowkeeper to her own sole use. After the marriage the wife, with the profits of her trade, purchased four more cows. Held, that the settlement was good against the creditors of the husband, and that the cows purchased after the marriage were also protected by it: *Haselinton* v. *Gill*, 3 T. R. 620, n. A *feme sole* who kept a horse and chaise to visit her customers before marriage, by deed conveyed to trustees "all her household furniture, goods, and chattels" (specified in a schedule, in which the horse and chaise were not included), and "all her stock-in-trade, materials, and other articles belonging to her in and about her business." After marriage she used the horse and chaise as before. Held, that the horse and chaise passed to the trustees by the deed, and were not liable to be taken in execution for the debts of the husband: *Dean* v. *Brown*, 2 C. & P. 62.

Impliedly created.—Separate estate may be created by implication from the acts and conduct of a party.

Gifts from husband to wife.—Presents from a husband to his wife will be deemed

separate estate when made to her absolutely, but not when given for her personal adornment.

In *Grant* v. *Grant* (34 Beav. 623), where the property in dispute was personal property, Sir John Romilly, M. R., says:—"The mere question here is, whether the husband has used words which are equivalent to a declaration of trust. In the first place, these words need not be in writing. . . . They must be clear, unequivocal, and irrevocable, but it is not necessary to use any technical words. . . . Any words that show that the donor means, at the time that he speaks, to divest himself of all beneficial interest in the property, are, in my opinion, sufficient for the creation of the trust. I think it is also sufficient, for the purpose of showing that the trust has been created, if he afterwards states he has so created the trust, though there was no witness except the donee present at the time the trust was created." Where a husband agreed that the wife should take two guineas of every tenant that renewed a lease with him that was allowed to be the wife's separate money: *Calmady* v. *Calmady*, 3 P. Wms. 339; see also *Mews* v. *Mews*, 15 Beav. 529. In *Baddeley* v. *Baddeley* (9 Ch. D. 113), a husband by deed poll recited as follows:—"Whereas I am beneficially possessed of the ground rents hereby intended to be settled. . . . I do hereby settle, assign, transfer, and set over unto my wife as though she were a single woman" several leasehold houses and the ground rents thereof. The deed was voluntary. Held, that this deed was not void as an intended assignment from husband to wife, but operated as a declaration of trust. This decision appears to be contrary to the doctrine of *Richards* v. *Delbridge* (L. R., 18 Eq. 11), but it must

be remembered that formerly there could be no valid assignment at law from husband to wife of leaseholds. The case appears to come within the principle of *Grant* v. *Grant* (*supra*, p. 193), that the declaration of trust requires no technical words, and that the husband's intention to divest himself of his beneficial interest is clear. See also *Fox* v. *Hawks*, 13 Ch. D. 822, *ante*, p. 179. But in *Breton* v. *Woollven* (17 Ch. D. 416), V.-C. Hall, under similar circumstances, held that the rule in *Richards* v. *Delbridge*, *supra*, viz., that an imperfect gift will not be upheld as a declaration of trust, applied to gifts from husband to wife. Such cases as these cannot happen with regard to conveyances or assignments made on or after 1st January, 1883, when the Married Women's Property Act, 1882, came into operation.

A legacy of 995*l.* to a married woman was paid by cheque to order of herself and husband; they went together to his bankers and placed 195*l.* to the husband's credit, and opened a separate account with the balance of 800*l.* in the wife's name. She always dealt with this account as a *feme sole*. Held, that the 800*l.*, even if it had been reduced into possession by the husband, had been given by him to the wife, and belonged to her for her separate use: *Parker* v. *Lechmere*, 12 Ch. D. 256. Evidence must be adduced to show that the husband intended to confer a gift upon his wife. Thus, in *Lloyd* v. *Pughe* (L. R., 8 Ch. 88), a wife, being executrix of her father, paid money she received as such into a bank to an account in her own name as executrix. Her husband paid money of his own to this account, and the wife drew cheques upon the account for payment of his debts and of household expenses. Held, that the wife was merely the agent of the husband, and that at his death the money remaining in the bank belonged not to her but to his estate. So investments by wife in her own name of moneys received by her out of the

proceeds of her husband's business, or saved by her out of sums given by husband for household purposes, and the like, belong to the husband: *Barrack* v. *McCulloch*, 3 Kay & J. 110.

Gifts from strangers.—Presents to a married woman by persons other than the husband are considered to be her separate property, although not declared to be so when given.

In *Graham* v. *Londonderry* (3 Atk. 393), the plaintiff was the husband of Lady Londonderry, who was originally the wife of Lord Londonderry. The question at issue was whether certain articles were the separate property or the paraphernalia of Lady Londonderry. First, as to diamonds given her by Governor Pitt, her first husband's father, upon her marriage to his son, the Lord Chancellor said: "This court of latter years has considered such a present as a gift to the separate use of the wife, and I am of opinion she is entitled in her own right." Secondly, as to four diamonds set about the picture of a Regent of France. Lord Londonderry, upon returning from France, delivered this picture to his wife, and said it was a present sent by the Regent. "If," said the Lord Chancellor, "this be considered as a present from the Regent of France, it falls under the same rule, for, being a present by a stranger during the coverture, it must be construed as a gift to her separate use." In *Carnegie* v. *Carnegie* (30 L. T. 460, affirmed 31 L. T. 7), the plaintiff, formerly the wife of Admiral Carnegie, but since divorced, claimed a sum of 10,000*l.* as belonging to her for her separate use. The admiral denied that

it was ever so settled, and also contended that if it had been, she had waived her claim. The money had been given to Mrs. Carnegie by her uncle, Mr. Hope, and letters from him to her were in evidence, which, in the Vice-Chancellor's opinion, showed his intention that the sum should be paid into the account of Mrs. Carnegie at Coutts', where all the money to her account then stood to her separate use. Held, that the 10,000*l.* had been given for her separate use, and that nothing had been done by the wife to waive her rights. See also *Kirk* v. *Paulin*, 7 Vin. Abr. 95, pl. 43.

Created by operation of law.—Separate estate may be created by operation of law, independently of the act of a party.

Savings.—Savings out of separate property and arrears thereof are separate property.

This was decided in 1705 in *Gore* v. *Knight*, 2 Vern. 535 (*supra*, p. 190). See also *Fettiplace* v. *Gorges*, 1 Ves. 45; *Butler* v. *Cumpston*, L. R., 7 Eq. 16; *Duncan* v. *Cashin*, L. R., 10 C. P. 554. As to arrears, see *Ashton* v. *McDougall*, 5 Beav. 56, and *Spicer* v. *Dawson*, 5 W. R. (M. R.) 431. But the dividends of separate estate received by a wife after her husband's death, and railway stock representing part of her separate property sold after his death, are not separate estate: *Mayd* v. *Field*, 3 Ch. D. 587. Furniture purchased from time to time by a married woman out of moneys belonging to her separate estate, in renewal of furniture which had been settled to her separate use, was held to be the wife's separate property: *Duncan* v. *Cashin*, L. R.,

10 C. P. 554. Where a wife is separated from her husband, the savings of her separate allowance are separate estate. Savings out of money remitted to a wife for her maintenance by a husband living apart from her, will be regarded as separate estate: *Brooke* v. *Brooke*, 25 Beav. 342. Where the husband is a lunatic, and an annual sum is ordered to be allowed out of his income for the separate maintenance of his wife, the savings out of such allowance are separate estate, although the order does not expressly state that the allowance is for her separate use. The savings amounted to 20,000*l.*: *Re goods of Tharp*, 3 P. D. 76. Where husband and wife are living apart, and have agreed not to interfere with property that either may subsequently acquire, all so acquired by the wife will be her separate property. And where the wife has been deserted by her husband, or judicially separated from him, her subsequently-acquired property will be separate estate, and it will retain that character if they should cohabit again: *Haddon* v. *Fladgate*, 1 Sw. & Tr. 48; *Cecil* v. *Juxon*, 1 Atk. 278.

Sect. 2.—The Wife's Power of Disposition.

One of the usual incidents attaching to several ownership of property is the power which the owner possesses of disposing of it during his lifetime, or by his will, without the concurrence of any other person. The capacity to acquire and hold separate estate was naturally followed by the power to dispose of it, and a married woman is able, without her husband's consent, to sell it or

make a gift of it during her lifetime, and to determine by her will who shall possess it after her death. It must be remembered that we are only treating of equitable separate estate, and that a wife cannot dispose of the legal estate in lands, her title to which accrued before 1883, without the concurrence of her husband in the deed of conveyance, and her separate acknowledgment of it; except by means of a power of appointment. With this qualification the law is as follows:—

Alienation. — A married woman has the same power of disposition of her separate estate as if she were a *feme sole*, unless restrained by the instrument creating it.

In *Hulme* v. *Tenant* (1 Bro. C. C. 18), Lord Chancellor Thurlow says, "The rule laid down in *Peacock* v. *Monk* (2 Ves. sen. 190), that a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole* is the proper rule." She may alienate her separate property, real or personal (*Sturgis* v. *Corp*, 13 Ves. 190); mortgage, pledge, or charge it (*Pybus* v. *Smith*, 1 Ves. 189; *Wagstaff* v. *Smith*, 9 Ves. 520); or dispose of it by will, without any express power. As to her power of disposing of the equitable fee of lands given to her separate use, by alienation *inter vivos* or by will, see *Stead* v. *Nelson*, 2 Beav. 245; *Major* v. *Lansley*, 2 Russ. & My. 355, and *Taylor* v. *Meads*, 34 L. J. (N. S.) Ch. 203. In the last-mentioned case

freehold cottages were vested in trustees upon trust for Elizabeth Meads (wife of Percy Meads), her heirs and assigns, and to be assigned, released, conveyed, or otherwise well and effectually assured by her to any person or persons whomsoever, his, her, or their heirs and assigns, in such manner as she should at any time or times, notwithstanding her coverture, direct or appoint by any instrument in writing to be by her signed, *sealed*, and delivered in the presence of and attested by two or more credible witnesses, and in default of any such direction or appointment, in trust for her, her heirs and assigns for ever, &c. Elizabeth Meads never formally exercised her special power of appointment, but by her will gave and devised her real and personal estate to her husband Percy Meads. The will was properly executed under the 1 Vict. c. 26, but was not *sealed*. The questions were (i) whether the will of Elizabeth Meads operated as a valid execution of the power of appointment vested in her; and if not (ii), whether she had not, irrespective of her special power of appointment, a power of disposition by will as an incident of the separate estate. Sir John Romilly, M. R., held that the will operated as a valid execution of the power, and consequently abstained from any decision as to the second question. On appeal, Lord Westbury, L. C., overruled the decision of the Master of the Rolls, and decided that the will was not a valid execution of the power, but held that Elizabeth Meads had, as incident to her separate estate, a power of disposition by will. He said, "If a power be created to be executed by deed or instrument in writing, although the words seem to indicate instruments *inter vivos* only, yet it is settled that it may be well executed by will. . . . . Wherever the power is in terms a power to appoint by will, and the will is required to be under seal, the statute applies, and makes the requisition null; but it does not apply where the power is to

appoint by an instrument under seal, for no will can execute a power that requires an instrument under seal, unless the will answers the description of such an instrument, which a will without a seal does not. As to whether in a case where real estates are conveyed or devised to trustees in fee, upon trust for the sole and separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee as she would have if she were a *feme sole*. Can she convey the equitable fee without the necessity of the instrument being acknowledged in the manner required by the statute for the abolition of Fines and Recoveries: and can she during coverture devise the equitable estate by a will executed in conformity with the statute?" The Lord Chancellor gave judgment in the affirmative. A wife may make a valid lease of her separate estate without her husband joining in the lease: *Allen* v. *Walker* (L. R., 5 Exch. 187.) The husband will be deprived of his curtesy in case the wife should exercise her power of alienation by deed or will: *Appleton* v. *Rowley*, L. R., 8 Eq. 139; *Cooper* v. *McDonald*, 7 Ch. D. 288. Several Irish cases seem to conflict with the rule laid down in *Peacock* v. *Monk*, (p. 198), so far as regards a married woman's contingent interests: *Mara* v. *Manning* (2 J. & L. 311) is quoted in a text book as an authority for the rule that where property is limited to the separate use of a married woman upon a contingency which has not happened she cannot, pending the contingency, dispose of her interest in the property. Lord St. Leonards, however, did not go so far as to decide that a married woman cannot specifically assign her contingent separate estate. The trustees at the instance of the wife committed a breach of trust by lending part of the trust funds to the husband, who afterwards was discharged as insolvent. In case of the insolvency of the husband

the trustees were to pay the interest of the trust funds to the wife for her separate use. Held, that this contingent interest of the wife was not bound to make good to the trustees the money advanced by them at her request. This case was decided in 1845 before the doctrine as to the liability of a married woman's separate estate for her general engagements was settled. In *Bestall* v. *Bunbury* (13 Ir. Ch. Rep. 318), it was held by the Court of Appeal, upon the authority of *Mara* v. *Manning*, *ante*, that if realty is settled upon a married woman for her separate use on a contingency, viz., the insolvency of her husband, she cannot dispose of it until the contingency arises. It is submitted that these cases cannot be taken as settling the general rule as to a married woman's power to dispose of contingent interests settled to her separate use. At the most they can only be considered as deciding that where her interest is contingent upon her husband's insolvency, the making of such a provision would be defeated if she had the power to dispose of the interest before the contingency happened. The decision might possibly be supported on the ground that limiting an estate upon such a contingency might be considered equivalent to a restraint upon anticipation until the contingency happened; but that view does not appear to have occurred to the court in the recent case of *Re Smallman's Estate* (Ir. R., 8 Eq. 249), where it was held, that under ss. 22 and 68 of the Irish Fines and Recoveries Act, 1834, a married woman can, by deed acknowledged, dispose of an interest in realty limited to her separate use, contingent upon the insolvency of her husband, although the contingency has not arisen. The authority of *Bestall* v. *Bunbury* and *Mara* v. *Manning* was questioned as conflicting with later English decisions.

The alterations made by the M. W. P. A. 1882, will be dealt with in the notes to sections 1 (1), 2, and 5,

of that Act, *post;* it will be enough here to say, that the point raised by the Irish cases quoted cannot arise as to any property vesting in a woman after 1882.

Trustees.—The interposition of trustees does not interfere with the woman's power of disposition: *Hall* v. *Waterhouse*, 13 W. R. 633.

Unless the instrument creating the trust expressly says that the consent of the trustees shall be obtained to any disposition: *Essex* v. *Atkins*, 14 Ves. 542. Where a trustee has received notice of a charge made by a married woman on her separate property in his hands he will be bound to see that it is carried out (*Hodgson* v. *Hodgson*, 2 Kee. 704); and if she has pledged her estate the trustees must hold it to the uses she appoints: *Pybus* v. *Smith*, 3 Bro. C. C. 340.

Gifts to husband.—A married woman may give the same interest in her separate estate to her husband as she may to any other person: *Essex* v. *Atkins*, 14 Ves. 542.

Her intention of making a gift to him may either be expressed or implied. The onus of proving that the transfer of the corpus of her separate property to the husband is intended as a gift lies upon the husband: *Rich* v. *Cockell*, 9 Ves. 375. Thus the transfer may be a loan: see *Woodward* v. *Woodward* (3 De G. J. & S. 672), where a married woman was allowed to prove as a creditor in an administration

suit on account of a loan to the husband out of her separate estate. And see also *Green* v. *Carlill* (4 Ch. D. 882), where evidence was allowed to show that a cheque, although paid into the husband's account, still remained the property of the wife. In *Knight* v. *Knight* (11 Jur. (N. S.) 617), a husband lent separate moneys of his wife on mortgage, and the security was taken to the husband and wife and the survivor of them, the fact being concealed that the money was separate property, and the wife being misled. The deed was rectified by making the loan her separate property. In *Greenhough* v. *Shorrock* (4 N. R. 40), a wife mortgaged her life interest in the dividends of consols given to her separate use to secure 400*l.*, and "such further advances as might be made either to her or her husband." Held, that a further advance made to the husband was well charged without some further act or the signature of the wife. The wife may by her conduct show her intention to make her husband a gift of the whole or part of her separate property. As in *Gardner* v. *Gardner* (1 Giff. 126), where the husband employed moneys (part of the separate estate of his wife) in his business, and for his family expenditure, with her knowledge and assent; and as in *Darkin* v. *Darkin* (17 Beav. 578), where the wife had allowed savings of her separate estate to be invested by her husband in the purchase of real estate in his own name. Where it is a fund in court it will not be paid to the husband, unless the wife's consent is given in court: *Milnes* v. *Busk*, 2 Ves. 488; see also *Jones* v. *Cuthbertson*, L. R., 7 Q. B. 218; affirmed, L. R., 8 Q. B. 504.

Receipt of income by husband.—The husband may be expressly authorized by his

wife to receive the income of her separate estate, or her conduct may show that he receives it with her permission. In either case he cannot afterwards be called to account therefor.

In *Caton* v. *Rideout* (1 Mac. & Gord. 599), a married woman entitled for her separate use to the dividends of certain stock standing in the names of trustees, of whom her husband was one, permitted these dividends for a number of years to be paid to her husband's bankers to his separate account, and he made use of these funds as his own property. Held, that a course of dealing was proved as existing between the husband and wife, which showed that the money was paid to the husband as husband, and not as trustee, with the consent of the wife, and that she was therefore disentitled from claiming any part of the money as against the husband's estate: see also *Powell* v. *Hankey*, 2 P. Wms. 82. In *Rowley* v. *Unwin* (2 K. & J. 138), the trustees allowed the husband, with the wife's acquiescence, to use 1,000*l*., part of trust funds settled to her separate use without power of anticipation, for four years. Held, that the wife was not entitled to interest upon that amount during that period: see also *Howard* v. *Digby*, 2 Cl. & F. 634. In the case of the lunacy of a wife the husband has been allowed part of the income for her support (*Att.-Gen.* v. *Parnther*, 3 Bro. C. C. 441), and for the extraordinary expenses occasioned by her malady: *Edwards* v. *Abrey*, 2 Ph. 37.

Husband's liability.—If no intention (express or implied) of giving the income of the separate estate can be proved, the husband

will have to account for arrears of income received by him.

It was once thought that not more than one year's income could be recovered from the husband: see cases collected in note to *Ex parte Elder*, 2 Madd. 286. But this was decided by analogy to the rule as to arrears of pin money at a time when the doctrine of separate estate was in its infancy. The real question is, whether expressly or impliedly the wife has consented to her husband's receiving the income of her separate estate. If she has consented, no arrears are recoverable: and if she has not consented, all the arrears are recoverable. The correct rule is laid down in *Dixon* v. *Dixon* (9 Ch. D. 589), where all the cases on the subject are reviewed by Sir G. Jessel, M. R. He says: "As I understand the law, the wife is entitled to recover the arrears of her separate income. It is not like pin money. If she consents to her husband receiving her income, and they have lived together, then she is not entitled to any account of it, either as against the trustee who may pay it to her husband or as against the husband himself. The whole of that depends on her consent." The facts of this case were as follows:—The trustee of certain stock for the separate use of a married woman, having improperly transferred it into the joint names of the husband and himself, the husband for six years received the dividends, after which the trustee died, and the husband, without his wife's knowledge, sold out the stock and applied the proceeds to his own use. Some time after he left his wife. Held, that though the wife might have been presumed to have assented to the husband's actual receipts of the dividends while the stock remained intact, yet no such assent could be presumed after it had been sold, and that she was entitled to recover

as against her husband and the estate of the deceased trustee the arrears of dividends which had accrued since that time as well as to have the trust fund replaced. In *Parker* v. *Brooke* (9 Ves. 583), where leaseholds were given for the separate use of the wife, but no trustees were appointed, the husband having possession was held accountable, and a purchaser, with notice of the wife's rights, was compelled to restore the property and account for the profits.

Limitation to power of disposition.—A married woman before 1883 could only dispose of the separate estate which was vested in her in possession or interest at the time of making such disposition.

In *Pike* v. *Fitzgibbon* (14 Ch. D. 837), V.-C. Malins decided that such of the separate property of the defendant Lady Louisa Fitzgibbon as was immediately before the death of her husband and was at the time of the decree vested in her or any other person or persons for her, was chargeable with moneys secured by certain indentures to which she was a party, and which were executed during the coverture, including separate property which had come to her since such execution. In *Flower* v. *Buller* (15 Ch. D. 665), Denman, J., upon the authority of this case, decided that a married woman can give a valid charge on her expectancy under a will or as one of the next of kin of a living person, and that such a charge will be enforced after that person's death against separate estate bequeathed by her will to the married woman. But upon appeal, in *Pike* v. *Fitzgibbon* (17 Ch. D. 454), it is laid down clearly that the general engagements and assignments of a married woman can only affect the separate estate vested in her at the time of

entering into them, and not property which may subsequently accrue to her for her separate use, or in regard to which there is a restraint upon anticipation. Nor would the court, in an action to obtain payment of a married woman's debt out of her separate property, grant an injunction upon an interlocutory application to restrain her from alienating her separate estate: *National Provincial Bank* v. *Thomas*, 24 W. R. 1013; see also *Robinson* v. *Pickering*, 16 Ch. D. 371, 660; see also *McHenry* v. *Davies*, L. R., 6 Eq. 462.

As to the limitations placed on a married woman contracting after 1882, see the M. W. P. A. 1882, s. 1 (4), and notes thereon, *post*.

Sect. 3.—Liability of Separate Estate.

The property of a *feme sole* is of course liable for all her debts, whether they are simple contract, specialty, judgment, or crown debts. When equity permitted a married woman to be the owner of property over which her husband had no control, and in which he took no interest, it should logically have made that property liable for her contracts, *quasi* contracts, and torts: but the full liability never existed until this year, and owes its origin to the first section of the M. W. P. Act, 1882, which provides, that a married woman shall be capable of "suing and being sued either in contract or in tort, or otherwise in all respects as if she were a

feme sole," and any damages or costs recovered against her shall be payable out of her separate property and not otherwise.

Ante-nuptial contracts and torts.—Where a woman enters into contracts or commits torts *dum sola*, her *personal* liability is suspended during coverture, but her separate estate, whether equitable or statutory, is liable therefor.

Before the M. W. P. A. of 1870, it was necessary to sue first the husband and wife jointly, but if nothing could be recovered from the husband, then the plaintiff was entitled to proceed against the wife's separate estate: *Biscoe* v. *Kennedy*, 1 Bro. C. C. 18, n. and *Chubb* v. *Stretch*, L. R., 9 Eq. 555. That Act exempted husbands, who married on and after 9th August, 1870, from any liability for their wives' ante-nuptial *debts*, and provided that the wife should be liable to be sued for, and any property belonging to her for her separate use should be liable to satisfy, such debts as if she had continued unmarried (*sect.* 12). This section did not affect the husband's liability for his wife's breach of a contract other than that creating a debt. It is not necessary since 1870 to join the husband in suing a married woman for debts contracted before her marriage: *Williams* v. *Mercier*, 9 Q. B. D. 337. As we have already stated (p. 117), this Act was amended in 1874, so as to make the husband liable to the extent of the property coming to him through his wife, and the liability of the wife's separate estate was extended so as to include her ante-nuptial torts, and the breach of any contract made by her before marriage. (*Sect.* 2.) Section 13

of the M. W. P. Act, 1882, provides that all sums recovered against a wife in respect of her ante-nuptial debts, contracts, or torts, or for any costs relating thereto "shall be payable out of her separate property; and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable" for all such debts and costs. This section also expressly provides that this liability shall include "any sums for which she may be liable as a contributory either before or after she has been placed on the list of contributories under and by virtue of the Acts relating to joint stock companies:" see *notes on this section under the M. W. P. Act*, 1882, *and the authorities there cited.*

Post-nuptial contracts.—Every contract entered into on and after January 1st, 1883, by a married woman with respect to and to bind her separate property, is binding upon the separate property which she is possessed of or entitled to at the date of the contract, and also all separate property which she may thereafter acquire, and every contract made by her on and after that date shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shown: see *M. W. P. Act*, 1882, *sect.* 1, *and notes thereon, post.*

Every contract of a married woman made by her before January 1st, 1883, with express reference to her separate estate, or which

from the nature of the contract itself must be intended to be so referred is binding upon the separate estate of which she was able to dispose at the time of entering into such contract: *Wainford* v. *Heyl*, L. R., 20 Eq. 321, 324; *Pike* v. *Fitzgibbon*, 17 Ch. D. 454.

It was not till 1861 that the court laid down the general rule that the contracts of a married woman bind her separate estate. At one period it was thought that the only way in which a married woman could affect her separate estate was by instruments which were supposed to be in the nature of the execution of a power of appointment over it; so that while it was held to be bound by her bonds, bills, promissory notes, and other written instruments, it remained unaffected by her other engagements. Lord Chancellor Cottenham, in the year 1840, showed the weakness of this theory. He says, in *Owens* v. *Dickenson* (1 Cr. & Ph. 48), "A written memorandum of agreement signed by a married woman cannot be an execution of a power when it neither refers to the power nor to the subject-matter of the power, nor indeed in many of these cases has there been any power existing at all. . . . If a married woman enters into several agreements of the sort, and all the parties come to have satisfaction out of her separate estate, they are paid *pari passu;* whereas if the instruments took effect as appointments under a power, they would rank according to their priorities of date." The correct view of the matter is taken by Lord Thurlow in *Hulme* v. *Tenant*, 1 Bro. C. C. 16. According to him "the separate property of a married woman being a creature of equity, it follows that if she has a power of dealing with it she has the other power incident to property in general, viz. the

power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, 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." The case of *Johnson* v. *Gallagher* (3 De G. F. & J. 494), decided by Lord Justice Turner, placed the law on a sound basis, and we refer to his judgment (pp. 508—523), for an exhaustive history of the question. Where the trustees of a married woman are not parties to an action to charge her separate estate, the judgment debt will only be declared a charge thereon without prejudice to any claim of the trustees: *Collett* v. *Dickenson*, 11 Ch. D. 687. In *King* v. *Lucas* (17 W. N., 159), where policies of assurance on the husband's life were by a post-nuptial settlement assigned to trustees upon trust to invest the proceeds and pay the income to the wife "during her life for her sole and separate use, and so that the same should not be subject to the debts, control or engagements of any future husband" with whom she might intermarry; Kay, J., held, that the absence of restriction showed an intention to give the wife a power of disposition during her then present coverture, and a separate estate which she was then capable of binding.

It is needless to give examples of cases where a married woman contracts expressly with reference to her separate estate. Where she has not done so expressly, the following rules apply. The onus of proving that a married woman living with her husband contracted with reference to her separate estate

lies upon the person seeking to make that estate liable for contracts made before 1st January, 1883. Whether she did so contract is for the court to decide, having regard to all the circumstances of each case: *Johnson* v. *Gallagher*, 3 De G. F. & J. 494. As to contracts made since that date, we have seen that it will lie upon the married woman to prove that her contracts were not made with respect to her separate estate, *ante*, p. 209.

The intention to bind the separate estate has been implied in the following cases and under the following circumstances:—*Matthewman's case*, L. R., 3 Eq. 781. In this case a married woman having separate estate contracted to take shares in her own name in a joint stock company, which was afterwards wound up. The court held that, under the circumstances of the case, it must be presumed that the contract was entered into upon the credit of her separate estate, and as the deed of settlement of the company did not exclude married women from being shareholders so as to bind their separate estate, she was placed on the list of contributories in her own right, so as to bind her separate estate: see also *Ex parte Luard*, 8 W. R. 73. The head note in *Picard* v. *Hine* (L. R., 5 Ch. 274) is, "Where a married woman contracts a debt which she can only satisfy out of her separate estate, that estate will be made liable to the debt;" but the case itself does not justify that doctrine, as the married woman was living apart from her husband at the time she made the contract. A married woman's separate estate has been held liable for costs in a matrimonial cause improperly instituted by her against her husband: *M.* v. *C.*, L. R., 2 P. & D. 414;

see also *Miller* v. *Miller*, ibid. 13. Contracts made by a married woman living apart from her husband bind her separate estate: *Johnson* v. *Gallagher*, 3 De G. F. & J. 494; *Hodgson* v. *Williamson*, 15 Ch. D. 87; *Murray* v. *Barlee*, 4 Sim. 82; *McHenry* v. *Davies*, L. R., 10 Eq. 88. Where a married woman makes contracts in reference to a business she carries on separately from her husband an intention to bind her separate estate would probably be presumed: *Pollock's Principles of Contracts*, *2nd ed.* 84. The separate property of a wife in the hands of the court has been held liable for the costs of the suit instituted in respect thereof: *Barlee* v. *Barlee*, 1 S. & S. 100. The separate estate of a married woman was held liable to pay a bill of exchange accepted by her in payment of goods supplied to her for carrying on a business in which she had been engaged while a widow, both she and her husband telling the vendor that she was carrying on the business on her separate account: *Symonds* v. *Wilkes*, 10 L. T., N. S. 153.

The intention to bind the separate estate has *not* been implied in the following cases: — *Re Pugh* (17 Beav. 336), where the wife of a lunatic instructed a solicitor to act for her and her children in a suit to which she was not a party, and which did not relate to her separate estate; *Callow* v. *Howle* (1 De G. & Sm. 531), where the solicitor of a husband and his wife transacted business relating to her separate estate; *Davidson* v. *Wood* (11 W. R. 561, 791), where the wife of a lunatic pledged her husband's credit for necessaries. The costs of proving a married woman's will exercising a power of appointment over a fund was held not to be a charge upon such fund: *Adamson* v. *Hammond*, L. R., 3 P. & D. 141. In an Irish case (*Burke* v. *Tuite*, 10 Ir. Ch. Rep. 467), it was held that separate estate in realty cannot, by reason of the Statute of Frauds, be bound without

writing. This decision is apparently based on the mistaken idea that the contracts of a married woman are a charge upon her property. The truth is, that just as a man's lands are liable to the payment of his debts, whether contracted by writing or not, so the separate property in realty of a married woman is liable for the payment of her debts, whether the contract is in writing or not, provided they were contracted with reference thereto.

Extent of Liability.—The separate estate of a married woman being bound by the contracts made with reference thereto, the question arises, how far those contracts affect the *corpus* of the property where the married woman has a limited interest only, as, for instance, a life estate with a power of appointment over the remainder. In 1861, Lord Justice Turner, in *Johnson* v. *Gallagher*, 3 De G., F. & J. 517, classified the cases on this subject as follows:—(1) Where the power of appointment is general by deed or writing or by will; (2) where it is by will only, and the power has been exercised; (3) where there has been a limitation in default of appointment, and the power has not been exercised. In cases falling under the third class his lordship said there could not "be any reasonable doubt that the debts and engagements of a married woman cannot prevail against the parties entitled in default of appointment:" see also *Nail* v. *Punter*, 5 Sim. 555; *Paul* v. *Paul*, 20 Ch. D. 742, overruling *Paul* v. *Paul*, 15 Ch. D. 580. In cases falling under the first class, the courts have constantly held the *corpus* of the property to be subject to the debts and engagements of the married woman: see a late case, *Hodgson* v. *Williamson*, 15 Ch. D. 87. Lord Justice Turner considered the second class open, but *Hughes* v. *Wells* (9 Hare, 749) and *Heatley* v. *Thomas* (15 Ves. 596) are direct authorities in favour of its liability. There are other cases conflicting with this opinion.

In *Vaughan* v. *Vanderstegen* (2 Drew. 165), where there was a power to appoint by will only, and the power was exercised, V.-C. Kindersley held that the property appointed was not liable for the appointor's debts, but see 2 Drew. 363, where the question was again discussed. In *Blachford* v. *Woolley* (8 L. T. 322), V.-C. Kindersley held that it was not liable to the payment of her separate account, not being separate estate. In *Shattock* v. *Shattock* (L. R., 2 Eq. 182), real and personal property was settled on E. S., the wife, for life, for her separate use, then to the children of the marriage, then, in default of children, as E. S. should by deed or will appoint, and in default of appointment as to the real estate, for E. S., her heirs and assigns, and as to the personal, for her next of kin. E. S. died without having had a child, and she appointed by will. Held, that the holder of a promissory note of E. S. was not entitled to payment out of the appointed estate, as he was not the appointee. But these cases were disapproved of in *The London Chartered Bank of Australia* v. *Lemprière*, L. R., 4 P. C. 572, which settles the general principle that, where property is settled upon a married woman for her separate use for life with remainder as she shall by deed or will appoint, with remainder, in default of appointment, to her executors or administrators, it is an absolute settlement for her sole and separate use without restraint upon anticipation, and vests in equity the entire *corpus* in her for all purposes. In this case there was no question as to the exercise of the power of appointment; but in *Re Harvey's Estate*, *Godfrey* v. *Harben* (13 Ch. D. 216) this point arose. There real and personal property were settled on a married woman for life, with a general power of appointment by will, with remainder in default of appointment for her children or next of kin. She, by will, appointed the property in favour of her daughter, and it was held that the appointed property was liable to the payment of the

appointor's debts, as if it were her separate property. The decision in *The London Chartered Bank, &c.* v. *Lemprière*, supra, was followed by Sir George Jessel, M. R., in *Mayd* v. *Field* (3 Ch. D. 587), where personal property was settled on the wife in trust as she should by deed or will appoint, and subject thereto for her separate use for life, and if she survived her husband (which happened) for her absolutely. In *Hodges* v. *Hodges* (20 Ch. D. 749), a married woman was entitled to the income of a fund in court for her life for her separate use without power of anticipation, with remainder in trust for her children, and in default of issue in trust for such persons as she should by will appoint, and in default of appointment to her absolutely. She had no children and was past the age of child-bearing, and it was held that whether she did or did not exercise the power of appointment, the fund would at her death be assets for the payment of her debts. By sect. 4. of M. W. P. Act, 1882, the execution of a general power by will by a married woman will have the effect of making the property appointed liable for her debts and other liabilities as if it were her separate estate.

Post-nuptial torts.—The separate property of a married woman is liable for all her torts committed on or after January 1st, 1883, and it is submitted that this liability will include not only the separate property belonging to her when the tort was committed, but also all her subsequently-acquired separate property: see *M. W. P. Act*, 1882, *s.* 1, *and notes thereon*, *post.*

As to torts committed before that date the law is as follows:—

The separate estate of a married woman is liable for her fraud relating to the separate estate, but not for her general torts: *Wainford* v. *Heyl*, L. R., 20 Eq. 324.

In *Savage* v. *Foster* (9 Mod. 35), Margaret Brown was tenant for life, and her daughter the defendant was tenant in tail in remainder of certain lands under a marriage settlement. At the solicitation of the daughter and her husband, who were aware of her title, the mother re-settled the property in consideration of the marriage of another daughter upon herself for life, with remainder in fee to the other daughter's husband, who after the death of the mother sold it to the plaintiff. The defendant tried to set up her title against *Savage*, but it was decreed that she should levy a fine to him to extinguish her rights. Although the land was not settled to her separate use, this case may be taken as an authority that the fraud of a married woman in relation to certain property belonging to her, is binding upon that property, whether separate estate or not.

The separate estate of a married woman is also liable for an actual misappropriation by her of property, subject to the same settlement and the same trusts which create the separate estate: *Wainford* v. *Heyl*, L. R., 20 Eq. 324.

In *Clive* v. *Carew* (1 J. & H. 199), certain property was settled to the separate use of the wife without any restraint upon anticipation. It consisted of a pearl necklace given for her separate use for life, with remainders over, and other jewels and

effects given for her separate use absolutely. The husband became bankrupt, and the wife first pawned and then sold the necklace. Held, that the other jewels and effects were liable to make good the value of the pearl necklace improperly sold by her. See also *Brewer* v. *Swirles* (2 Sm. & G. 219), where the married woman had a general power of appointment by deed or will over property settled to her separate use for life, with remainder to her next of kin in default of appointment. She induced the trustees to lend the fund on unauthorized security. Held, that neither she nor her appointees could recover the fund from the trustees. In *Jones* v. *Higgins* (L. R., 2 Eq. 538), it was held that acquiescence by a married woman in a breach of trust in respect to her separate estate debars her from claiming it against the defaulting trustees. *Secus*, if she were restrained from anticipation (*Davies* v. *Hodgson*, 25 Beav. 186), although arrears would be liable: *Pemberton* v. *M'Gill*, 1 Dr. & Sm. 266.

Quasi contracts.—The separate property of a married woman is liable for obligations arising *quasi ex contractu* since December 31st, 1882, but it is not liable for obligations arising *quasi ex contractu* before that date.

Its non-liability arose from the fact that it was only liable for those of her contracts made with reference thereto, and a quasi contract is neither a true contract nor a tort. In *Wright* v. *Chard* (4 Drew. 673), the court refused to make the separate estate of a married woman liable for the rents of an estate which she had claimed and received as her separate estate, under the mistaken impression that

it was her own estate. It was decided in *Jones* v. *Harris* (9 Ves. 486), that an annuity granted by a feme covert, and charged upon her separate estate, being void for want of the insertion of the clause of redemption in the memorial, the consideration could not be recovered out of her separate estate, though part of the money was applied to the payment of fines upon admission to copyholds. See also *Bolton* (*Duke*) v. *Williams*, 4 Bro. C. C. 297. The M. W. P. Act, 1882, has altered the law on this subject, and she may now be sued "either in contract or in tort or *otherwise*." (Sect. 1 (2).)

Costs.—The separate estate of a married woman is liable for costs ordered to be paid by her. In *Bryant* v. *Bull* (10 Ch. D. 153), where a married woman had been ordered to pay costs, and had failed to do so, a receiver was appointed of the dividends of stock to which she was entitled to her separate use for life: see also *Morrell* v. *Cowan*, 6 Ch. D. 166.

Bankruptcy.—No married woman except she is carrying on a trade separately from her husband is subject to the bankruptcy laws. If she is so trading, she is, in respect of her separate property, subject to the bankruptcy laws as if she were a *feme sole*. *M. W. P. Act*, 1882, *sect.* 1 (5); *see notes thereon*, *post*.

In *Ex parte Holland* (L. R., 9 Ch. 307), Mellish, L. J., expressed a doubt as to whether a married woman, a trader, might not be made a bankrupt; but in *Ex parte Jones*, *In re Grissell* (12 Ch. D. 484), it was

held that a married woman was not liable to the bankruptcy law even though she had separate estate, and had contracted engagements after her marriage, and that the M. W. P. Act, 1870, had made no difference in this respect. In his judgment, James, L. J., says, that a married woman is not a debtor, and no proceedings in bankruptcy can be maintained against her. It is clear, also, that a married woman is not personally liable upon her contracts. She was not so liable before the Act of 1882 (see *Durrant* v. *Ricketts*, 8 Q. B. D. 177), and it contains no provisions altering the law on this subject. Her separate property is alone liable for her contracts.

Sect. 4.—Restraint upon Alienation.

In *Tullett* v. *Armstrong* (1 Beav. 22), Lord Langdale clearly explains the reason for the introduction of this novel fetter upon alienation. "Separate estate operates as a protection to a married woman against the legal power over the wife's property which is vested in the husband . . . . but the power of alienation remaining in the wife the separate estate unfettered is no protection against the moral influence of the husband, and many instances have occurred and daily occur in which the wife, under the persuasion or influence of her husband, has been and is induced to exercise her power of alienation in his favour or for his benefit, and thus defeat the

protection intended for her. But as the separate estate itself owed its origin and support to the courts of equity it was understood that the same courts might so modify it as to secure the protection which was intended, and accordingly it was intimated by Lord Thurlow, that if a gift clearly expressed that the separate estate should be incapable of assignment in anticipation, or of alienation, that intention would be carried into effect, and his lordship being of that opinion himself set the example in a case in which he personally took an interest, and from that time [about 1790] it has been usual to introduce into wills and settlements, a clause giving to women real and personal estate for their separate use, independently of their husbands, without power of assignment by way of anticipation, or of alienation, and such clauses, though their operation . . . . is anomalous and irreconcileable with the ordinary legal rules affecting the limitations of estates and the legal incidents of property, have been repeatedly approved and carried into effect by this court."

Its effects.—A married woman may be restrained from alienating her separate property,

and from receiving the income thereof until it is actually due: *Pybus* v. *Smith*, 3 Bro. C. C. 340.

In *Tollands* v. *Burdett* (12 W. R. 562), a testator bequeathed his residuary estate to trustees in trust to pay the income "when and as the same should be due and received" to C., a married woman, for her separate use, with a clause against anticipation. The residue consisted mainly of a bond debt, the interest on which was payable only yearly. Held, that only arrears of interest actually due and payable could be assigned.

Exists only during coverture.—The restraint upon alienation is annexed to the separate estate, and like it has its existence only during coverture, being suspended while the woman is discovert, although capable of arising upon marriage: *Tullett* v. *Armstrong*, 1 Beav. 1.

In this case a testator gave property to trustees in trust for his wife for life, with remainder to M. A. T., then a *feme sole*, for life, in such manner that it should not be anticipated, and that no husband should have any control over it. M. A. T. was a *feme sole* at the death of the testator, but married in the lifetime of the widow. Held, that both the separate use clause and the restriction upon alienation became effectual on her marriage. In *Hawkes* v. *Hubback* (L. R., 11 Eq. 5), a trust for the separate use of the intended wife, independently of her "intended" husband with a restraint upon anticipation, was held to extend to a second marriage: see also *Shafto* v. *Butler*, 40 L. J., Ch. 308.

As separate estate only exists during coverture, a woman while a *feme sole* may dispose of it, although there is a restraint upon anticipation annexed thereto.

In *Woodmeston* v. *Walker* (2 Russ. & M. 197), a testator directed that an annuity should be purchased for the life of a single woman for her separate use without power of anticipation. Reversing the decision of the M. R., the Lord Chancellor held, that she being single was entitled to have at once the price to be paid for the annuity: see also *Jones* v. *Salter*, Ibid. 208; *Brown* v. *Pocock*, Ibid. 210. In *Newton* v. *Reid* (4 Sim. 141), a testator gave a sum of money for the separate use of his daughter a *feme sole*, and declared that she should not be at liberty to sell or dispose of it, and if she attempted so to do that such sale should be void. She married, and it was held that the restraint on alienation was void, there being no gift over. It is submitted that this decision is clearly wrong. If she had disposed of it *before* marriage her disposition would have been valid, but to hold that the validity of a restraint upon anticipation during marriage depends upon a gift over is a startling proposition. *Semble*, a single woman might be prevented from alienating separate estate by means of a clause of forfeiture, and a gift over: see *Brown* v. *Pocock*, 2 Russ. & M. 211, so stated by Sir Edward Sugden in his argument, and *Woodmeston* v. *Walker*, Ibid. 204.

Absolute gifts before 1883.—Where an absolute gift to a married woman of a fund producing income followed by a restraint upon anticipation vested in her before 1883,

the restraint upon anticipation prevented her from alienating the fund during coverture, *sed quære* as to a fund not producing income: v. *Meux*, 1 Coll. 138.

This case was followed by Sir G. Jessel, M. R., in *Re Ellis's Trusts* (L. R., 17 Eq. 409), but as to the effect of a clause restraining anticipation on an absolute gift of a fund producing no income he declined to pronounce an opinion. In *Re Sarel* (10 Jur. (N. S.) 876), the fund consisted of a pecuniary legacy and of a share of residuary personalty, which the executors had paid into court, and it was not to be alienable by the wife or her husband. As a restraint upon alienation and a restraint upon anticipation are synonymous terms, V.-C. Wood had in this case virtually decided the point raised by the M. R., as he ordered that the fund should be retained, and the dividends only paid to the wife during coverture, although in a case decided two years previously (*In re Sykes' Trusts*, 2 J. & H. 415), he appears to have been of a contrary opinion. *In re Croughton's Trusts* (8 Ch. D. 460), a testatrix bequeathed to a married woman by name, describing her as married, a reversionary share of a fund of mixed, real, and personal estate expectant on a life interest. The will declared that every gift thereby made to a married woman should be for her separate use, without power of anticipation, and that her receipts alone should be a good discharge for the same. The tenant for life died in the lifetime of the testatrix, who nevertheless did not alter her will. The married woman's share of the residue being represented by a sum of cash standing in court uninvested, upon petition by the married woman to have the cash paid out to her upon her separate receipt, it was held that she was so entitled. V.-C. Bacon based his decision upon the direction in the will that

her receipts alone should be a sufficient discharge. "A sufficient discharge for what?" he asks, and replies—"For the payment of the sum of money which is what her share of residue really comes to." It is submitted that the proper reply would have been—"For the payment of the income of that sum of money when invested." On principle, it would appear that the mere accident as to whether a fund is represented by cash or consols, ought not to make any difference; if the fund is uninvested it should be forthwith invested. Compare the decision with *Re Gaskell's Trusts* (11 Jur. (N. S.) 780, *post*, p. 228), where the facts were almost identical, and the decision was the other way. In a subsequent case (*Re Benton*, 19 Ch. D. 277), the same judge decided differently, but his decision was based upon the fact that the will directed the trustees to convert the real and personal estate of the testatrix and invest the proceeds, so that it was really a gift of an income-producing fund, although the residuary estate at the time of the hearing of the special case consisted partly of a sum of cash. In a very recent case (*Re Clarke's Trusts*, 21 Ch. D. 748), the ruling in *Re Ellis's Trust*, *supra*, was followed by Fry, J., as to a sum of consols, and the ruling in *Re Croughton's Trusts* followed as to a sum of cash. In *Re Taber's Estate* (30 W. R. 883), 10,000*l.* bequeathed to a married woman for her separate use without power of anticipation, or alienation, was paid to her on her separate receipt (V.-C. Bacon).

Absolute gifts after 1882. — It is submitted that where an absolute gift to a married woman, without the intervention of trustees, of a fund producing income, vests in a married woman after 1882, a restraint upon anticipation annexed thereto will not prevent

her alienation of the fund during coverture, except, perhaps, as against purchasers, who take with notice of the restriction.

Where an absolute gift to a married woman of a fund not producing income vests in a married woman after 1882, a restraint upon anticipation will not disentitle her from having the fund paid to her: see *M. W. P. Act*, 1882, *ss.* 1 *and* 19, *and notes thereon*, *post.*

Perpetuities.—A clause restraining anticipation in a gift to a class which may contain unborn persons is invalid: *In re Michael's Trusts*, 46 L. J., Ch. 651; *Armitage* v. *Coates*, 35 Beav. 1. *Semble*, where, under a limited power of appointment, property is appointed to the separate use of a married woman, with a restraint upon anticipation, and such restraint transgresses the rule against perpetuities, the restraint will be rejected, but the appointment will be good.

See *Fry* v. *Capper*, Kay, 163—V.-C. Page Wood; *Re Teague's Settlement*, L. R., 10 Eq. 564—V.-C. James; *Re Cunynghame's Settlement*, L. R., 11 Eq. 324—V.-C. Malins.

We submit that as the restraint upon anticipation is admitted to be anomalous and irreconcileable with the ordinary legal rules affecting the limitations of estates, and the legal incidents of property, there is no reason why it should not transgress the rule against perpetuities, if it is necessary for the protection of a married woman. In *Buckton* v. *Hay* (11

Ch. D. 645), Sir George Jessel reluctantly followed the rule of *Fry* v. *Capper*, although his judgment would have been to the opposite effect in the absence of authority, as that rule prevents a father appointing to his daughters, under a settlement, in the way most beneficial to them. V.-C. Hall, in *Herbert* v. *Webster* (15 Ch. D. 610), in a similar case decided that the restraint was valid, following V.-C. Page Wood's decision in *Wilson* v. *Wilson* (4 Jur., N. S. 1076).

Creation of restraint on alienation.—No particular form of words is necessary to create a restraint on alienation.

The following cases show what expressions have been held to be sufficient:—"Where, as in *Miss Watson's case*, there is a gift or settlement of property to the separate use of a married woman, and it is expressed to be without power of anticipation, it is clear that alienation by her is restrained: see *Parkes* v. *White*, 11 Ves. 221; *Sockett* v. *Wray*, 4 Bro. C. C. 483; *Jackson* v. *Hobhouse*, 2 Mer. 487."—1 W. & T. L. C., Eq. 575. A direction that the trustees are to receive the income "when and as often as the same should become due," and to pay it to such person as the married woman might from time to time appoint, or to permit her to receive it for her separate use, and that her receipts, or the receipts of any person to whom she might appoint the same, "after it should become due," should be valid discharges for it: *Field* v. *Evans*, 15 Sim. 375; *Baker* v. *Bradley*, 7 De G. M. & G. 597. Whether the restraint is upon the power of anticipation, or of alienation, the effect is the same: *In re Croughton's Trusts*, 8 Ch. D. 460. Where the income of a fund was payable to such persons as a married woman should by writing, but not by way of anticipation, appoint, and in default of appointment there was a gift to her separate use:

Brown v. *Bamford*, 1 Ph. 620. A declaration that a married woman should not sell, charge, mortgage, or encumber real estate devised to her in fee, followed by another declaration that she should take it for her own sole and separate use and benefit and disposal: *Baggett* v. *Meux*, 1 Coll. 138; *Steedman* v. *Poole*, 6 Hare, 193. Where legacies, given to married women for their respective sole, separate, and inalienable use and benefit, were paid into the court under the Trustee Relief Act, the court refused to part with the money, but ordered the dividends to be paid on the separate receipts of the married women during coverture: *Re Gaskell's Trusts*, 11 Jur., N. S. 780.

The following are examples in which the expressions used have been held *not* sufficient to restrain alienation:—A direction by a testator that certain stock bequeathed by his will to his wife for her separate use for her life, should remain during her life, and be (under the order of the trustees) made a duly-administered provision for her, and the interest given to her on her personal appearance and receipt, by the banker the trustees might appoint: *In re Ross's Trusts*, 1 Sim., N. S. 196. A direction that the wife is to receive separate property "with her own hands from time to time," so that her receipts alone for what should be actually paid into her own proper hands should be good discharges: *Parkes* v. *White*, 11 Ves. 221; *Acton* v. *White*, 1 Sim. & St. 429; *Ross* v. *Sharrod*, 11 W. R. 356. A direction to pay dividends to such persons, and in such manner and form as the wife should from time to time during her life, notwithstanding her coverture, by any note or writing under her hands appoint, and in default of appointment, into her proper hands for her separate use, and after her death to her husband: *Clarke* v. *Pistor*, cited 3 Bro. C. C. 568; *Pybus* v. *Smith*, 1 Ves. 189. A direction as to stock bequeathed to

the separate use of a legatee with a general power of appointment by deed or will, that in case an appointment should be made by deed the same should not come into operation until after her death: *Alexander* v. *Young*, 6 Hare, 393.

Contracts and torts.—The contracts and torts of a married woman, which would otherwise be binding upon her separate estate, are not binding upon it if she be restrained from anticipation thereof, even after that restraint, by reason of the termination of the coverture, ceases to be operative: *Jackson* v. *Hobhouse*, 2 Mer. 483 (1817); *Roberts* v. *Watkins*, 46 L. J., Q. B. 552.

CONTRACTS.—In *Clive* v. *Carew* (1 J. & H. 199), Lord Hatherley (then V.-C. Page Wood) gave liberty to apply upon the determination of the coverture, because, on that event happening, there might be a possibility of making the separate estate (which the defendant was restrained from anticipating) liable. This view was taken by V.-C. Malins in *Pike* v. *Fitzgibbon* (14 Ch. D. 837), who decided that such of the property of the defendant as was immediately before the death of the husband and at the time of the decree vested in her, *including* any separate property as to which during coverture she was restrained from anticipation, was liable in satisfaction of her covenant made during the coverture. In this case, as well as in *Martin* v. *Fitzgibbon* (17 Ch. D. 454), the V.-C. held, that after-acquired separate property is liable for the general engagements of a married woman. Both these decisions were appealed against, and the two appeals were heard together. The Lords Justices

(James, Brett, and Cotton), overruling the decision of the V.-C., unanimously held that the general engagements of a married woman can be enforced only against so much of the separate estate to which she was entitled, free from any restraint upon anticipation, at the time when the engagements were entered into, as remains at the time when judgment was given, and not against separate estate to which she became entitled after the time of the engagements, nor against separate estate free from a restraint on anticipation to which she was entitled at the time of the engagements: see also *Davies* v. *Ballenden*, 17 W. N. 92. If there is a clause against anticipation, creditors cannot be paid a debt beyond the arrears of interest actually due on the separate estate when the debt was contracted: *Fitzgibbon* v. *Blake*, 3 Ir. Ch. R. 328. Nor will future income during coverture be liable for her breach of trust in making away with other property under the trust: *Clive* v. *Carew*, 1 J. & H. 199. Although interest for many purposes is treated as accruing *de die in diem*, a married woman cannot effectually assign an apportioned part of the interest for the current year up to the date of the assignment, but can only deal with the interest after it has become payable according to the terms of the instrument: *In re Brettle*, 2 De G. J. & S. 79. The interest or dividends already accrued and payable are, of course, assignable: *Claydon* v. *Finch*, L. R., 15 Eq. 266. A restraint upon anticipation will not prevent the wife from barring the entail and acquiring the equitable fee, and so acquiring the power to defeat the husband's right to curtesy by a devise of the estate: *Cooper* v. *Macdonald*, 7 Ch. D. 288. A clause against anticipation does not exempt a married woman from the ordinary consequences of lapse of time and acquiescence: *Derbishire* v. *Home*, 3 De G. M. & G. 80. Where a married woman entitled to the income of property held on trust for her sepa-

rate use, with a restraint upon anticipation, joined with her husband in a power of attorney to receive or to sue for any moneys due to them, or either of them: it was held, that the trustee was not justified in paying the attorney the wife's separate income: *Kenrick* v. *Wood*, L. R., 9 Eq. 333.

TORTS.—In *Jackson* v. *Hobhouse* (2 Mer. 488), Lord Eldon says, "If, where a fraud has been committed by a married woman, the parties who have sustained loss by reason of the fraud are to be held entitled to have their loss made good out of property settled to her separate use without power of anticipation, husbands will only have to exercise their marital influence in such a manner as to induce the committal of fraudulent acts by their wives in order to obtain the benefit of property settled to their separate use without power of anticipation; and thus disappoint the intention of the settlor of the property." This dictum was followed in *Clive* v. *Carew* (1 J. & H. 199, 206), where V.-C. Wood said that, "upon the whole it is the sounder course to adhere to the view taken by Lord Eldon in *Jackson* v. *Hobhouse*, namely, that having once sanctioned this species of protection to a married woman by making it impossible for her in any way whatever to deal with the fund, the court . . . . must go on to hold her interest protected even against her own fraudulent acts," and his opinion is quoted and approved in *Arnold* v. *Woodhams* (L. R., 16 Eq. 29): see also *Pemberton* v. *M'Gill*, 1 Drew. & Sm. 266; *Stanley* v. *Stanley*, 7 Ch. D. 589.

Where restraint may be set aside.—Notwithstanding that a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to the court to

be for her benefit, by judgment or order made after 1881, with her consent, bind her interest in any property: *Conveyancing Act*, 1881, *sect.* 39.

Before this Act it was held that the court had no power to interfere for the purpose of enabling a married woman to dispose of property in regard to which she was restrained from anticipation, although to have done so would have been greatly for her benefit: *Robinson* v. *Wheelwright*, 6 De G. M. & G. 535; *Tussaud* v. *Tussaud*, 9 Ch. D. 375; *Smith* v. *Lucas*, 18 Ch. D. 531. But where costs were incurred by a married woman in defending a suit by her husband to set aside a settlement by which an annuity was settled on her for her separate use without power of anticipation, the costs were charged on the annuity under 23 & 24 Vict. c. 127, s. 28, notwithstanding the restraint: *Re Keane*, L. R., 12 Eq. 115. In *Skinner* v. *Todd* (30 W. R. 267), B., a married woman entitled as tenant for life to the rents and profits of settled property for her separate use without power of anticipation, had by the settlement a power to direct repairs. Held, that the cost of work ordered by her in pursuance of the power was payable out of her interest. The separate estate, although accompanied by a restraint upon anticipation, is liable for a married woman's ante-nuptial debts under sect. 12 of M. W. P. Act, 1870: *Sanger* v. *Sanger*, L. R., 11 Eq. 470. And where the husband has been joined under sect. 3 of M. W. P. Act, 1874, the costs of his successful defence have been also added to the original debt and costs against her: *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773. Sect. 39 of the Conveyancing Act, 1881, only applies to judgments or orders made after the commencement of the Act. Application under it must be made by summons in chambers and not by petition: *Re Lillwall's Settlement*,

W. N. 1882, p. 6. In *Hodges* v. *Hodges* (20 Ch. D. 749), a married woman was entitled to the income of a fund in court for her life for her separate use without power of anticipation, with remainder in trust for her children, and in default of issue, in trust for such persons as she should, whether covert or sole, by will appoint, and in default of appointment, to herself absolutely. She having had no children and being past the age of child-bearing, and having contracted a number of debts, for payment of which the creditors were pressing her and causing her great annoyance, she with her husband applied to the court to exercise its power under this section to remove the restraint on anticipation, and to order part of the fund to be paid out to her, to enable her to pay her debts. Held, that whether she did or not exercise her power of appointment, the fund would at her death be subject to the payment of her debts, and that under the circumstances the restraint on anticipation ought to be removed, and a portion of the fund paid out to the applicant. The order was made upon the evidence of the married woman's consent, afforded by an affidavit made by her in support of the application, and a letter written by her to her solicitors strongly urging them to obtain the money for her. But, *quære*, whether such an order ought in general to be made without ascertaining the consent of the married woman by a separate examination in the ordinary way. See also *Tamplin* v. *Miller* (30 W. R. 422), where V.-C. Hall having, under the circumstances of the particular case, made the order asked for, said he should require very strong grounds to be presented to him before acceding to applications under this section.

Settled Estates Act, 1877; Settled Land Act, 1882.—A restraint on anticipation does not prevent a married woman exercising any power under these Acts.

DIVORCE AND JUDICIAL SEPARATION.—Where there has been a divorce or judicial separation, the woman divorced or separated is entitled to have paid to her, as if she were a *feme sole*, a legacy bequeathed to her for her sole and separate use with a restraint upon anticipation: see *Munt* v. *Glynes*, 41 L. J., Ch. 639. This was a case of judicial separation, and the will contained a direction "that for the purpose of securing to her the separate enjoyment without power of anticipation against any husband for the time being, the trustee should settle the legacy in such manner as would carry out the said purpose."

SECT. 5.—DEVOLUTION OF SEPARATE ESTATE.

A married woman may make a will of her separate estate without the consent of her husband, but any separate estate remaining undisposed of at her death will devolve according to the rules of the common law.

Thus her real estate of inheritance will descend to her heir, subject to the husband's rights (if any) as tenant by the curtesy: *Roberts* v. *Dixwell*, 1 Atk. 607; *Appleton* v. *Rowley*, L. R., 8 Eq. 139. Her chattels real belong to her husband *jure mariti*: *Archer* v. *Lavender*, Ir. R., 9 Eq. 220. Her choses in possession belong to her husband *jure mariti*: *Molony* v. *Kennedy*, 10 Sim. 254; *Johnstone* v. *Lumb*, 15 Sim. 308; *Askew* v. *Rooth*, L. R., 17 Eq. 426. Her choses in action will belong to her husband upon his taking out administration: *Proudley* v. *Fielder*, 2 My. & K. 57. On the death of a married woman having separate property, her creditors may proceed for payment of their debts out of her separate estate liable therefor: *Owens* v. *Dickenson*, 1 Cr. & Ph. 48; *Gregory* v. *Lockyer*, 6 Madd. 90. Her separate estate is equitable assets, and therefore the executor

of a married woman has no right of retainer thereout: *Re Poole's Estate*, 46 L. J., Ch. 803. But separate property created by the Married Women's Property Act, 1882, will, it is submitted, be legal assets: see *M. W. P. Act*, 1882, *sect.* 1, *and notes thereon, post.*

SECT. 6.—REMEDIES IN RESPECT OF SEPARATE ESTATE.

Every married woman has in her own name against all persons whomsoever, including her husband, the same civil remedies and the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property, whether statutory or equitable, as if such property belonged to her as a *feme sole;* but no criminal proceeding can be taken by the wife against the husband while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning such property, unless it shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert his wife: *M. W. P. Act*, 1882, *sect.* 12. The Act of 1870 gave similar remedies, but in respect only of the property made by that Act separate property, and that belonging to her before marriage which her husband by writing under his hand had agreed should be her separate property. The exception as to criminal proceedings against the husband was not inserted in the Act of 1870. Equitable separate estate being created by equity was protected by equitable remedies, and after the Common Law Procedure Act, 1857, was also to a certain degree protected in law. Thus, in *Allen* v. *Walker* (L. R., 5 Exch. 187), a married woman alone made a lease of her separate property to the defendant, who entered under the

lease. The husband then brought an action for trespass, conversion, and assault arising out of such entry. Judgment was given for the defendant. As in equity, the husband had no more right than a mere stranger to interfere with the wife's lessee, the court "entertained no doubt that a court of equity would grant a perpetual injunction against the plaintiff's entering upon or continuing to occupy land the separate property of his wife," and also in regard to such an assault, that if at law the husband had recovered judgment, equity would interfere to prevent him reaping the fruits of such judgment. See also *Duncan* v. *Cashin* (L. R., 10 C. P. 554), where it was held, on an interpleader summons, that the court would protect the separate property of the wife, and directed the sheriff to withdraw where he had seized furniture bought by her out of the savings of her separate estate. *A fortiori* a wife's separate property would be protected in any court since the Judicature Acts. It was generally by means of injunctions that equity protected separate estate. Thus a husband would be restrained from alienating or interfering with his wife's separate estate: *Green* v. *Green*, 5 Hare, 400, n.; *Wood* v. *Wood*, 19 W. R. 1049. In the latter case a husband by a post-nuptial deed settled a house and business (including an hotel) to the separate use of his wife, to be managed by her for the benefit of herself as if she were a *feme sole*. An injunction was granted to restrain him from in any way interfering with the business, and even from entering the house. Equity will also protect by injunction the wife's separate property from her husband's creditors: *Newlands* v. *Paynter*, 4 M. & C. 408.

Costs.—A bill filed to deprive a married woman of her separate estate being dismissed, costs were given to both husband and wife, who had joined in their defence: *Kevan* v. *Crawford*, 6 Ch. D. 29.

PARAPHERNALIA.

Definition.—The paraphernalia of the wife include such apparel and ornaments as are suitable to the wife's condition in life, such as pearls, rings, &c., to be worn as ornaments only, excluding the jewellery to which she is entitled as her separate property (*ante*, p. 195): *Graham* v. *Londonderry*, 3 Atk. 393..

Old family jewels are not included, unless they have been given or bequeathed to the wife (*Jervoise* v. *Jervoise*, 17 Beav. 566), but jewels and chamber-plate bought out of pin-money are considered to be so given: *Offley* v. *Offley*, Prec. Ch. 26.

Disposition.—The husband may dispose of his wife's paraphernalia during his lifetime, but he cannot dispose of it by his will; nor can the wife dispose of her paraphernalia during her husband's lifetime.

In *Graham* v. *Londonderry* (*supra*), L. C. Hardwicke decided that whatever jewels [not being her separate estate] a wife wears for the ornament of her person, the husband may alien in his lifetime; but if the husband does not sell her paraphernalia, but only pledges it, and leaves a sufficient estate to redeem the pledge, she is entitled to have it redeemed: *Tipping* v. *Tipping* (1 P. Wms. 729) is a very early and

important decision (1721), that a husband cannot bequeath his wife's paraphernalia. See also *Seymore* v. *Tresilian*, 3 Atk. 358; *Northey* v. *Northey*, 2 Atk. 77; *Marshall* v. *Blew*, Ibid. 217. These cases overrule the case of *Clarges* v. *Albemarle* (2 Vern. 244), which decided that the husband could bequeath his wife's paraphernalia.

How defeated.—The wife's right to her paraphernalia (except wearing apparel) may be barred by her husband's debts: *Townshend* v. *Windham*, 2 Ves. sen. 1.

Lord Hardwicke, in this case, says: "As to the paraphernalia, the rule of law is, that where the husband dies indebted, the wife is not entitled thereto. In Croke Car. there is a case that the wife was entitled only to one gown." See also *Ridout* v. *E. of Plymouth*, 2 Atk. 104; *Parker* v. *Harvey*, 4 Bro. P. C. 604; and *Willson* v. *Pack*, Prec. Ch. 295. The wife is, however, entitled to marshal against all the other assets, both real and personal, except, perhaps, lands specifically devised, so that, if such assets are sufficient to pay his debts in full, she will not lose her paraphernalia. Thus she can marshal against:—General personal estate undisposed of by the will. Real estates expressly devised, in trust to pay debts: *Incledon* v. *Northcote*, 3 Atk. 438; *Boyntun* v. *Boyntun*, 1 Cox, 106. Real estate descended to the heir: *Snelson* v. *Corbet*, 3 Atk. 369. Real or personal estate devised or bequeathed subject to payment of debts. General pecuniary legacies, and specific bequests not charged with payment of debts: *Tipping* v. *Tipping*, 1 P. Wms. 729. As to specific devises not charged with payment of debts, there is a conflict of authorities. Lord Hardwicke, in

Probert v. *Clifford* (2 P. Wms. 544, note), refused to establish a precedent in favour of the wife as against specific devisees; but Sir John Trevor, M. R., in *Tynt* v. *Tynt* (2 P. Wms. 542) decided in her favour. The late Mr. Joshua Williams was of opinion that since the statute 3 & 4 Will. 4, c. 104, a widow is entitled to be paid out of any part of her husband's estate; and, therefore, that even if there was, prior to that statute, an exception, it no longer existed: *Williams' Real Assets*, 118.

The wife's right to her paraphernalia may also be barred by a settlement before marriage.

Thus, where by marriage articles a woman agrees to have no part of the husband's personal estate but what her husband should bequeath to her by will, she is barred of her paraphernalia: *Cholmely* v. *Cholmely*, 2 Vern. 82. Where, also, by marriage articles land is settled on intended wife for life in bar and satisfaction of her dower and thirds and all other parts of the real and personal effects of her intended husband: *Read* v. *Snell*, 2 Atk. 642.

PIN-MONEY.

Definition.—Pin-money is a sum allowed the wife by the husband for her ordinary personal expenses, to save her the trouble of a constant recurrence to her husband upon every occasion of a milliner's bill, &c. It is intended for the wife's expenditure on her person, to meet her personal expenses, and to deck her person suitably to her husband's dignity, that is, suitably to the rank and station of his wife: *Howard* v. *Digby*, 8 Bligh, N. R. 224.

In the above case, the Lord Chancellor goes on to say, "Now the purpose is not the purpose of the wife alone, it is for the establishment; it is for the joint concern; it is for the maintenance of the common dignity; it is for the support of that family whose brightest ornament, very probably, is the wife." See also *Jodrell* v. *Jodrell* (9 Beav. 45), where it was held that there is annexed to the wife's pin-money an implied duty of applying it towards her personal dress, decoration and ornament. In *Howard* v. *Digby*, *supra*, F., upon her marriage with C. (afterwards Duke of Norfolk), was entitled to 1,000*l.* a year pin-money. She was insane from 1782 to 1815, the time of her husband's death, and pin-money had not been paid. It was held that she had no claim to it.

Arrears.—A wife is not entitled to claim arrears of pin-money for more than one year.

See *Aston* v. *Aston*, 1 Ves. sen. 267; *Townshend* v. *Wyndham*, 2 Ves. sen. 1; *Peacock* v. *Monk*, Ibid. 190; *Offley* v. *Offley*, Prec. Ch. 26; *Warwick* v. *Edwards*, 1 Eq. Abr. 140; *Cornwall* v. *Mountague*, 1 Eq. Abr. 66. Where, however, the wife was entitled to 300*l.* a year pin-money, and for years she had only received 200*l.*, but her husband had promised that she should have it at last, she was held entitled to all the arrears: *Ridout* v. *Lewis*, 1 Atk. 269. Where the husband finds his wife in clothes and necessaries, she will not be entitled to any arrears of pin-money not paid during such time: *Fowler* v. *Fowler*, 3 P. W. 353; *Thomas* v. *Bennet*, 2 P. W. 341; *Powell* v. *Hankey*, 2 P. W. 82. In *Foss* v. *Foss* (15 Ir. Ch. 215), it was held that more than a year's arrears might be recovered where there had been a receiver over the property liable to pay it, and also by a purchaser for valuable consideration of the pin-money, but in this case, as to arrears, separate estate and pin-money appear to have been regarded as the same, which is clearly wrong.

The legal personal representatives of a deceased wife have no claim to arrears of pin-money, not even to such arrears as she would have been entitled to: *Howard* v. *Digby*, 8 Bligh, 251, 261, 267.

Disposition.—A wife may dispose of the savings from her pin-money as separate estate: *Herbert* v. *Herbert*, *Milles* v. *Wikes*, 1 Eq. Abr. 66.

Settlements.—In settlements where the property is small and the husband and wife are living together, and the case is not one of contempt, it is not usual to settle any money on the wife for her separate use by way of pin-money: *Harpur* v. *Ball*, 8 Ir. Eq. R. 404, where the court refused to make such a settlement out of a sum of 1,400*l*.

Subject to property tax.—Pin-money is subject to property tax (*Ball* v. *Coutts*, 1 Ves. & B. 292), where it was also held not to be liable to deductions for alimony, as it is clear of maintenance.

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EQUITY TO A SETTLEMENT.

It has been already stated that a wife's legal choses in action do not become the property of her husband until he has reduced them into possession by receiving them, or recovering them by action. If a husband has to seek the assistance of a Court of Equity in order to reduce his wife's equitable choses in action into possession, her equity to a settlement arises, as the court, acting upon the principle that "he who seeks equity must do equity," will refuse to order payment of the fund to him, unless he will make a settlement upon her thereout, or unless some good reason exists why it should not be made. The doctrine of the wife's equity to a settlement will gradually become obsolete, as it only arises where the husband claims in right of his wife, and he will not now have any rights in his wife's choses in action, her title to which may accrue on or after January 1st, 1883.

Definition.—An equity to a settlement may be defined as the right of a wife to a settle-

ment upon herself and her children out of her unsettled equitable choses in action, which she may assert for herself as plaintiff, or against her husband or his assignees seeking to reduce them into possession through the instrumentality of a Court of Equity: *Milner* v. *Colmer*, 2 P. Wms. 639.

The wife can assert her equity to a settlement against the husband's trustee in bankruptcy and his assignees for valuable consideration, and *à fortiori* against volunteers claiming through him: *Oswell* v. *Probert*, 2 Ves. 680; *Tidd* v. *Lister*, 3 De G. M. & G. 857, and *Duncombe* v. *Greenacre*, 28 Beav. 472. An exception is made with regard to a life interest belonging to her, if she is living with her husband and he is neither bankrupt nor insolvent: *Vaughan* v. *Buck*, 13 Sim. 404; *Elliott* v. *Cordell*, 5 Madd. 149. Also with regard to a life interest assigned for valuable consideration by the husband, or by the husband and wife while living together, and prior to his bankruptcy or insolvency: *Elliott* v. *Cordell*, 5 Madd. 149; *Jewson* v. *Moulson*, 2 Atk. 417. But the wife's right will prevail, in respect of a life interest, against the husband's trustee in bankruptcy: *Lumb* v. *Milnes*, 5 Ves. 517; *Squires* v. *Ashford*, 23 Beav. 132. It is obvious that if the wife's equity to a settlement could be defeated by her husband's assignment for value, the right would be of little value. In *Macaulay* v. *Philips* (4 Ves. 19), Lord Alvanley remarked, "It would be whimsical then, that the assignment by the husband for valuable consideration should put the assignee in equity in a better position than the husband himself is at law. The guard of this court upon the wife's interest would be very singular if the husband, not being entitled at law, might assign it

for valuable consideration to another person, who would be entitled in equity." See also Sir William Grant's observations in *Wright* v. *Morley*, 11 Ves. 12.

Property affected.—Where the property, though in its nature legal, becomes, from collateral circumstances, the subject of a suit in equity, it has been held, in certain cases, that the wife's right to a provision out of it will attach.

In *Sturgis* v. *Champneys* (5 My. & Cr. 97), the plaintiff, as the assignee of an insolvent debtor, whose wife was entitled for her life to real property, came into equity to enforce her title to the rents during the joint lives of the husband and wife, in consequence of the legal estate being outstanding in mortgagees. Upon the application of the wife, a settlement upon her out of the income of the estate was directed by Lord Chancellor Cottenham. This decision was followed by V.-C. Stuart in *Barnes* v. *Robinson* (9 Jur. (N. S.) 245), and also in *Newman* v. *Wilson*, 31 Beav. 34. In *Hanson* v. *Keating* (4 Hare, 1), a husband and wife assigned by way of mortgage the equitable interest of the husband in right of his wife in a term of years. The mortgagee applied to equity for a foreclosure and assignment of the term as against the husband and wife and the trustees of the legal estate. Held, that the wife was entitled to a provision for her life by way of settlement out of the mortgaged premises. *Wortham* v. *Pemberton* (1 De G. & Sm. 644) carries this doctrine much further. It decided (1) that a wife was entitled to a settlement out of an estate of which she was tenant in tail in possession where the legal estate was vested in trustees for a term of years to secure a jointure, and (2)

on the authority of *Elibank* v. *Montolieu* (5 Ves. 737), that the wife could as plaintiff assert her right to a settlement. It was held, that the settlement could not be made beyond the jointure term. In *Gleaves* v. *Paine* (1 De G. J. & Sm. 87), Lord Westbury intimated that had not the case of *Sturgis* v. *Champneys* been decided so long ago he should not have been disposed to follow it, and that it ought not to be extended. It has been decided, that where a husband mortgages leaseholds which he possesses in right of his wife, and the mortgagee brings an action for foreclosure, the wife has no equity to a settlement: *Hill* v. *Edmonds*, 5 De G. & S. 603; *Hatchell* v. *Eggleso*, 1 Ir. Ch. Rep. 215. By a separation deed between husband and wife, a party indebted to the wife for a sum secured by his promissory note covenanted to hold it on the trusts of the deed. Held, that it became subject to the wife's equity to a settlement: *Ruffles* v. *Alston*, L. R., 19 Eq. 539.

The wife's equity to a settlement includes all unsettled property to which she is entitled, whether it vest in her in interest before or after marriage: *Barrow* v. *Barrow*, 18 Beav. 529; *Brooke* v. *Hickes*, 12 W. R. 703.

It attaches only on what the husband takes in right of the wife, and not to what the wife takes in her own right.

On this ground Lord Justice Turner refused to make a settlement upon a wife out of trust moneys to be laid out in the purchase of lands to be settled upon her as equitable tenant in tail: *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 271. In another case, a testator devised real estate upon trust after the death of E. by sale or mortgage to raise and pay a

debt due to A., and subject thereto for A. and others as tenants in common in fee. A. held the title deeds by way of equitable mortgage, and her husband deposited them with her bankers, and by deed assigned the debt to them as a security for it. Subsequently by deed acknowledged A. and her husband conveyed her interest under the will, and the debt to the same bankers. The real estate was sold and money paid into court. Held, that the wife had no equity to a settlement: *Cooke* v. *Williams*, 11 W. R. 504. Where the husband and wife are entitled to a fund or to an annuity as tenants by entireties a wife has no equity to a settlement out of the income of the fund or out of the annuity during their joint lives: *Atcheson* v. *Atcheson*, 11 Beav. 485; *Ward* v. *Ward*, 14 Ch. D. 506. And in *Re Bryan* (14 Ch. D. 516), it was held that a married woman has no equity to a settlement out of property given to her and her husband during their joint lives and the life of the survivor of them.

The wife's equity to a settlement is attached by the court to the right to receive the property, and is not an obligation fastened upon the property itself: *Osborn* v. *Morgan*, 9 Hare, 432.

If, therefore, the husband obtains payment of a wife's equitable chose in action without the aid of a court of equity, *e. g.* where a trustee pays him a legacy bequeathed to his wife, she has no equity to a settlement, as the receipt of the husband is a good discharge for the trustee. It is clear, also, that a married woman cannot have an equity to a settlement out of her reversionary interests so long as they remain reversionary: *Osborn* v. *Morgan*, 9 Hare, 432.

See also *Pickard* v. *Roberts*, 3 Mad. 384; *Woollands* v. *Croucher*, 12 Ves. 174; *Sperling* v. *Rochfort*, 8 Ves. 164; *Box* v. *Box*, 2 C. & L. 605.

A trustee is always justified in refusing to pay over the wife's fund to the husband, even at her request, and in paying it into court so as to afford her an opportunity of asserting her equity to a settlement, and he will be entitled to his costs as between solicitor and client as of course, unless his conduct is simply vexatious or capricious: *Re Swan*, 2 H. & M. 34; *In re Bendyshe*, 3 Jur., N. S. 727.

In *Penfold* v. *Bouch* (4 Hare, 271), it was held the trustee was not justified, as two-thirds of the fund had already been settled on the wife.

How asserted.—In all cases where the wife can obtain a settlement as defendant she can equally obtain it as plaintiff or petitioner.

Elibank (*Lady*) v. *Montolieu*, 5 Ves. 737 (where the wife asserted her claim to a share of the personal estate as one of the next of kin of an intestate); *Steed* v. *Calley*, 2 My. & K. 52 (where the husband was of unsound mind, and the court, in consideration of the poverty of the parties, made an order on the petition of the wife that the dividends should be paid to her for her life). See also *Wortham* v. *Pemberton*, 1 De G. & Sm. 644. In *Re Robinson* (12 Ch. D. 188), it was decided that a married woman entitled to a residuary share in an estate, as

to which an ordinary administration judgment has been made, may by petition, pending the accounts and inquiries, and before further consideration, enforce her equity to a settlement.

Children.—Where the husband has agreed to make a settlement, or a settlement has been decreed, the children may, in the event of the wife dying before execution thereof without having waived her right, commence an action to enforce the contract or decree. In no other circumstances can the children assert a right to have the settlement executed.

Wallace v. *Auldjo*, 2 Drew. & Sm. 216; *Murray* v. *Lord Elibank*, 13 Ves. 1; *De la Garde* v. *Lempriere*, 6 Beav. 344; *Lloyd* v. *Williams*, 1 Madd. 450; *Rowe* v. *Jackson*, Dick. 604; *Lloyd* v. *Mason*, 5 Hare, 149; *Groves* v. *Perkins*, 6 Sim. 584.

Wife's misconduct.—The wife's misconduct does not of itself exclude her equity to a settlement, and *à fortiori* it is not excluded where the husband is also culpable.

In *Ball* v. *Montgomery* (2 Ves. 191), it was held that, although the wife was living in adultery, yet, as the husband did not maintain her, he was not entitled to all the fund. See also *Carr* v. *Eastabrooke*, 4 Ves. 146; *Re Lewin's Trust*, 20 Beav. 378; *Greedy* v. *Lavender*, 13 Beav. 62; *Ball* v. *Coutts*, 1 V. & B. 292; *Barrow* v. *Barrow*, 18 Beav. 529; *Duncan* v. *Campbell*, 12 Sim. 616.

How defeated.—The wife's equity to a settlement may be defeated by a transfer of the fund to the husband or his assignee; by an adequate settlement having been made on the wife; by agreement; or by fraud.

Transfer of Fund.—In *Murray* v. *Lord Elibank* (10 Ves. 84), Lord Eldon said, "Previously to a bill a trustee who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband," but not after a bill filed. In *Knight* v. *Knight* (L. R., 18 Eq. 487), a testatrix gave the residue of her estate to three sisters and one brother equally, and appointed the husband of one of the sisters her sole executor. A large balance was due to the estate by him, which he was unable to pay, and which exceeded his wife's share. Held, as he was therefore not entitled to receive anything in right of his wife, she had no equity to a settlement. A wife has no equity to a settlement out of arrears of past income of real or leasehold property which the husband has assigned to an assignee for value: *Re Carr's Trusts*, L. R., 12 Eq. 609

Adequate Settlement.—See *Re Erskine's Trusts*, 1 K. & J. 302. Thus, where 22,000*l.* consols were already settled on wife and children, the court refused to settle a further sum of 2,000*l.*: *Spicer* v. *Spicer*, 24 Beav. 365. In another case the wife was possessed of an income of 1,700*l.* a-year. She had settled 300*l.* on her husband on condition they lived apart. No blame attached to him, and on his marriage he had given up an appointment worth 300*l.* a-year. Under these circumstances the court refused to settle any part of a fund of 6,000*l.* which had devolved upon her as one of the

next of kin of an intestate: *Giacometti* v. *Prodgers*, L. R., 8 Ch. 338.

AGREEMENT.—Even in the absence of an adequate settlement the wife cannot assert her equity if the marriage settlement either expressly excludes it or clearly imports the intention to exclude it: *Carr* v. *Taylor*, 10 Ves. 574.

FRAUD.—*Re Lush's Trusts*, L. R., 4 Ch. 591. In this case, a woman two months after marriage wrote a paper purporting to give her husband, in consideration of the marriage, her reversionary interest in a trust fund. She intentionally dated the paper before the time of the marriage, and signed it in her maiden name. Her husband assigned the reversionary interest for value. Held, on appeal, that she had been guilty of a fraud which prevented her claiming her equity to a settlement as against the purchaser. She commenced the acts constituting the fraud under the coercion of her husband, but continued and completed them in the absence of such coercion.

DEBTS.—Before the 9th of August, 1870, the wife's equity to a settlement was defeated if her debts on marriage exceeded the amount of the fund: *Bonner* v. *Bonner*, 17 Beav. 86; *Barnard* v. *Ford*, L. R., 4 Ch. 247.

Waiver.—The wife may waive her equity to a settlement by her consent, given in open court, to the receipt of the fund by the husband: *Beaumont* v. *Carter*, 32 Beav. 586.

But no person connected with the husband ought to be present when the consent is taken: *In re Bendyshe*, 3 Jur., N. S. 727. A wife may waive her right even after the decree or contract at any time until the settlement is completed: *Wallace* v. *Auldjo*, 2 Dr. & S. 216; *Hodgens* v. *Hodgens*, 11 Bligh, N. S.

62; *Fenner* v. *Taylor*, 2 R. & M. 190. But under peculiar circumstances waiver by the wife has not been permitted, *e. g.*, where the husband had been committed to prison for marrying a ward of court, and was released upon his undertaking to make a settlement upon her: *Stackpole* v. *Beaumont*, 3 Ves. 89. The consent of the wife cannot be taken if she is under age: *Stubbs* v. *Sargon*, 2 Beav. 496; *Abraham* v. *Newcombe*, 12 Sim. 566; *Shipway* v. *Ball*, 16 Ch. D. 376. But the marriage of a ward of court during her infancy, without the sanction of the court, and without any settlement, does not prevent her consent being taken after she comes of age: *Bennett* v. *Biddles*, 10 Jur. 534. Waiver by the wife will not be permitted until the amount of the fund has been ascertained: *Edmonds* v. *Townsend*, 1 Anstr. 93; *Sperling* v. *Rochford*, 8 Ves. 164, 180. But in *Packer* v. *Packer* (1 Coll. 92), waiver was permitted although the fund was liable to a deduction for costs untaxed. The waiver may be withdrawn before the transfer of the fund to the husband has been completed: *Penfold* v. *Mould*, L. R., 4 Eq. 562. It may also be withdrawn when it has been given in ignorance of its effect; see *Watson* v. *Marshall* (17 Beav. 363), where the court did not know the husband was insolvent, and the wife had forgotten it (the insolvency having occurred eighteen years before), and was ignorant of its effect. If the husband is bankrupt a wife cannot waive her right to a settlement, so that his trustee in bankruptcy may get the fund, but she may waive it in favour of his assignee for value: *Barker* v. *Lea*, 6 Madd. 330; *Whittem* v. *Sawyer*, 1 Beav. 593.

Mode of obtaining payment.—The usual mode of obtaining payment of the fund is upon petition, and where the whole fund is to be paid to the husband an affidavit that

the fund is not settled is not sufficient. It must be shown either that there is no settlement or what is the nature of the settlement: *Britten* v. *Britten*, 9 Beav. 143.

For the nature of the evidence required, see *Woodward* v. *Pratt*, L. R., 16 Eq. 127, and *Wilkinson* v. *Schneider*, L. R., 9 Eq. 423. But where the fund is less than 200*l.* the court will not put the parties to the expense of a petition, although it must still be proved that there was no settlement: *Elworthy* v. *Wickstead*, 1 J. & W. 69; *Hedges* v. *Clarke*, 1 De G. & S. 354. Even an affidavit as to no settlement was dispensed with where the fund was divisible into shares of less than 10*l.* each: *Veal* v. *Veal*, L. R., 4 Eq. 115.

Amount settled.—The amount that will be settled is at the discretion of the court, and will depend upon the particular circumstances of each case—for example, whether or not there has been an adequate settlement upon the wife, the misconduct of the husband, &c.: *Barrow* v. *Barrow*, 18 Beav. 529; *Scott* v. *Spashett*, 3 Mac. & G. 599.

Under ordinary circumstances a moiety will be settled: *Re Merriman's Trust*, 10 W. R. 334; *Spirett* v. *Willows*, L. R., 1 Ch. 520; *Re Suggitt's Trusts*, L. R., 3 Ch. 215; *Re Grove's Trusts*, 3 Giff. 575, 583. No distinction will be made between a life interest or an absolute interest as to the amount to be settled: *Taunton* v. *Morris*, 8 Ch. D. 453; 11 Ch. D. 779.

The whole of the fund, or its income, has been settled under the following circumstances and in the following cases:—Where the husband by his cruelty

has compelled the wife to separate from him: *Oxenden* v. *Oxenden*, 2 Vern. 493; *Nicholl* v. *Danvers*, 2 Vern. 671; *Williams* v. *Callow*, 2 Vern. 752 (the whole of the interest of a fund); *Eedes* v. *Eedes*, 11 Sim. 569. Where the husband was insolvent or bankrupt: *Brett* v. *Greenwell*, 3 Y. & C. Exch. 230; *Beresford* v. *Hobson*, 1 Madd. 362 (a fund of 2,500*l.*, although wife had a separate income of 200*l.* a year); *Duncombe* v. *Greenacre*, 29 Beav. 578 (the whole of the fund settled, excluding husband's mortgagees); *Kœber* v. *Sturgis*, 22 Beav. 588 (the whole of life interest, the bankrupt husband having been guilty of cruelty towards his wife); *Re Hooper's Trusts*, 6 W. R. 824; *Gardner* v. *Marshall*, 14 Sim. 575 (wife unprovided for, and husband had received large sums from her family); *Scott* v. *Spashett*, 3 M. & G. 599 (the whole of the fund, excluding husband's assignee for valuable consideration, there having been no settlement, and husband having already received the wife's property to double the value of the fund); *In re Kincaid*, 1 Dr. 326 (in this case the fund was under 200*l.*); *Nicholson* v. *Carline*, 22 W. R. 819; *Smith* v. *Smith*, 3 Giff. 121 (husband was a partner in a bankrupt firm indebted to testatrix in a sum largely exceeding 13,000*l.*—13,000*l.* settled); *Dunkley* v. *Dunkley*, 2 De G. M. & G. 390 (a fund of 10,000*l.* settled); *Conington* v. *Gilliatt*, 25 W. R. 69; *Re Cutler*, 14 Beav. 220; *Squires* v. *Ashford*, 23 Beav. 132 (the whole income—72*l.*—of life interest, although wife was living with husband and was receiving a further income of 42*l.*—this settlement was against his assignees in bankruptcy); *Taunton* v. *Morris*, 8 Ch. D. 453, and 11 Ch. D. 779 (husband insolvent fifteen years previously; estate paid no dividend; whole of life interest, 500*l.*, settled on wife). Where the husband deserted his wife and made no provision for her maintenance: *Gilchrist* v. *Cator*, 1 De G. & S. 188 (the husband also treated his wife cruelly); *Re Ford*, 32 Beav. 621; *Rishton* v.

Cobb, 9 Sim. 615. A woman is not deserted when her husband leaves her in the course of his duty (as a soldier ordered abroad) and she refuses to accompany him: *Bullock* v. *Menzies*, 4 Ves. 798. Upon the husband and wife living together again, the separate allowance settled upon the wife may lapse (see *Head* v. *Head*, 3 Atk. 295), and the husband may thereafter entitle himself to apply to have the order varied. Where the husband had married his wife for the sake of her money, and there had been a divorce, *à mensâ et thoro*, on account of his adultery: *Barrow* v. *Barrow*, 5 De G. M. & G. 782 (the income of a fund of 10,000*l.* settled). Inability of husband, by reason of poverty, to maintain his wife: *In re Cordwell's Estate*, 20 Eq. 644 (here the husband was only receiving 12*s.* a week, and had a wife and six children). Where a husband has received and spent property belonging to his wife and a very small fund remains, having regard to the requirements of herself and children, and she becomes entitled to further property: *Re Merriman's Trust*, 10 W. R. 334. Where a separation has taken place between husband and wife without misconduct on the part of either, but by reason of ill health of wife, and the husband does not contribute to her support: *Croxton* v. *May*, 18 W. R. 375. Where the wife eloped with her intended husband, and prior to the marriage was made a ward of court, the marriage being disapproved of by her friends: *Like* v. *Beresford*, 3 Ves. 506, in this case the husband had assigned the fund for valuable consideration, in order to provide necessaries for himself and wife. Where the fund is small: *In re Tubb's Estate*, 8 W. R. 270 (fund under 200*l.*); *Ward* v. *Yates*, 1 Dr. & Sm. 80 (fund about 240*l.*; husband had been bankrupt, and had received large amounts in right of his wife). At one time it was considered that 200*l.* was the lowest

sum liable to the wife's equity (*Foden* v. *Finney*, 4 Russ. 428), but that doctrine is now exploded: *Re Cutler*, 14 Beav. 220.

Less than the whole, but more than a moiety, has been settled in the following cases:—Three-fourths where the husband, without sufficient cause, separated from his wife leaving her unprovided for: *Coster* v. *Coster*, 9 Sim. 597. Three-fourths also in *Spirett* v. *Willows* (L. R., 1 Ch. 520); and in *Walker* v. *Drury* (17 Beav. 482), as against assignee for value. Three-fifths in *Napier* v. *Napier* (1 Dr. & War. 407). Two-thirds in *Suggitt's Trusts*, L. R., 3 Ch. 215; *Carter* v. *Taggart*, 5 De G. & S. 49; *Vaughan* v. *Buck*, 1 Sim. (N. S.) 284.

In *Milner* v. *Colmer* (2 P. Wms. 639), about a third was settled. In *Aubrey* v. *Brown* (4 W. R. 425), only 950*l.* out of 1,200*l.* was settled, although husband had deserted his wife, was insolvent, and was living in adultery. His assignees for value took the remaining 250*l.*

Form of settlement.—The usual form of settlement gives the income of the fund to the wife for her life for her separate use, without power of anticipation, with power to her to appoint by will amongst her children, and in default of appointment the *corpus* to be divisible in equal shares among such of them, who being a son or sons shall attain twenty-one, or being a daughter or daughters shall attain that age or marry, with benefit of survivorship, with ultimate remainder to the husband with the usual powers of maintenance, accu-

mulation, and advancement: *Carter* v. *Taggart*, 1 De G. M. & G. 286.

In *Oliver* v. *Oliver* (10 Ch. D. 765), Fry, J., held that the settlement ought to contain a power for wife alone to appoint by deed or will among children. The court will not interfere with husband's ultimate right in default of children if he survives his wife: see also *Walsh* v. *Wason*, L. R., 8 Ch. 482; and *Re Noake's Will*, 28 W. R. 762. Sir George Jessel, M. R., has approved, in the absence of any special circumstances, such as bankruptcy, or misconduct, or desertion by the husband, and where he assents to the whole fund being settled, a form of settlement, the trusts of which are for the wife for life for her separate use without power of anticipation, and subject thereto for the husband for life, or until he shall become bankrupt, or shall do anything which, if his life interest were not qualified, would alienate, incumber, or charge it, and subject thereto for the children (attaining twenty-one, or being daughters attaining that age or marrying with consent of guardians before that age) as tenants in common in equal shares: *Smithers* v. *Green*, 2 Seton on Decrees, 675, 4th edit. This form provided for advancement of children, but purposely omitted power of appointment of wife among children, as well as provision for maintenance (inserted in *Croxton* v. *May*, L. R., 9 Eq. 404), the fund being under the control of the court. For other modes of settlement under special circumstances, see *De Martana* v. *De Martana*, 24 W. R. 200; *Smith* v. *Matthews*, 3 De G. F. & J. 139, 154; *Kernick* v. *Kernick*, 4 N. R. 533. To save the expense of a settlement, the fund is sometimes ordered to be brought into court, and the interest paid to wife for life. This was done in *Bagshaw* v. *Winter* (5 De G. & Sm. 466), and the trusts after wife's death were the same as in *Carter* v.

Taggart, 5 De G. & Sm. 55. The fund being small, may, to save expense, be settled by the order: *Watson* v. *Marshall*, 17 Beav. 365; *Walker* v. *Drury*, 17 Beav. 482. The order sometimes provides that the interest of the fund shall be paid to the wife for life, with liberty to the persons interested to apply on her death: *Ex parte Pugh*, 1 Drew. 202; *In re Kincaid*, 1 Drew. 326; *In re Cutler*, 14 Beav. 220. In a very early case (1743) where the husband refused to make the settlement decreed, and had received a great part of the wife's property, the court ordered the whole of the accumulated interest to be paid to the wife after her husband's death: *Bond* v. *Simmons*, 3 Atk. 20. Where a husband is ordered by the court to execute a settlement on his wife, no arrangement will be binding until it has been sanctioned by the court: *Macaulay* v. *Philips*, 4 Ves. 15; where it was decreed that the husband should lay proposals before the Master for a settlement of the fund. He agreed with his wife, out of court, that they should live apart, and that he should receive one part and his wife the other part of the fund. Held, that the agreement did not bind the wife, and that he having died the whole fund belonged to her.

POWERS.

While by the common law marriage acted as a transfer of much of the wife's property to the husband, it did not affect any powers of disposition over property which were vested in her. Powers are divided into—(1) Common law powers, which enable the donee to pass the seisin or legal estate, such as the power of sale given to executors by a direction in the will that they should sell the testator's lands; or a power of attorney; or a power conferred by Act of Parliament; (2) Equitable powers, which enable the donee to pass the equitable estate; and (3) Powers operating by means of the Statute of Uses, which empower the donee to limit a use, such use being converted by the statute into the legal estate. It is clear that a married woman may validly execute any of these powers without the concurrence of her husband or her acknowledgment, whether the power be general or particular, and whether the property be real or personal: *Downes* v. *Timperon*, 4 Russ. 334.

Creation.—No precise form of words is necessary for the creation of a power, if the intention to create it is clearly indicated: *Berchtoldt* v. *Hertford*, 7 Beav. 172.

A devise of a fee simple estate by a husband to his wife for her life, and then to be at her disposal, provided it be to any of his children, if living; if not, to any of his kindred that his wife shall please; gives the wife an estate for life with a particular power of appointment over the fee: *Tomlinson* v. *Dighton*, 1 P. W. 149. But where there is a devise in fee to a *feme covert*, with a power to dispose of the estate without the control of her husband, the power is void, as being inconsistent with the fee given to her in the first instance, for a power is an authority enabling one person to dispose of an interest which is vested in another: *Goodill* v. *Brigham*, 1 B. & P. 192. A woman may, in contemplation of marriage, surrender her copyholds, in order to reserve to herself a power of appointment over them: *Doe* d. *Blomfield* v. *Eyre*, 3 C. B. 557. An agreement with the husband previous to marriage, that the wife shall have power to appoint her estate by deed or will, will create an equitable power of appointment: *Bramhall* v. *Hall*, Ambl. 467.

See cases collected at pp. 214—6, as to the effect of a limitation to a married woman for life, with a power of disposition by will or deed added.

Execution.—A married woman may execute a power, whether appendant, in gross, or simply collateral, and as well over a copyhold as freehold estate, and the concurrence of

her husband is in no case necessary: *Sugden's Powers*, 8th ed. 153, 154.

A married woman, although an infant, can cise a power by deed, whether collateral, appendant, appurtenant, or in gross, as regards personal property: *Re Cardross's Settlement*, 7 Ch. D. 728; see also *Re D'Angibau* (15 Ch. D. 228), decided by James and Brett, L.JJ. (diss. Cotton, L. J.), affirming a decision of Jessel, M. R. She may also exercise a power simply collateral over real property during her minority: *Sugden's Powers*, 8th ed., pp. 177, 178. Where by a marriage settlement a wife had a life interest, with a power of appointment over the remainder, and the settlement contained the usual power of sale and exchange, it was held that the power of sale was not affected by her exercise of her power, and that the trustees of the settlement could make a good title to a purchaser: *Re Brown's Settlement*, L. R., 10 Eq. 349. A married woman may execute a power of leasing over lands settled to her separate use: *Dowell* v. *Dew*, 1 Y. & C., C. C. 345. Where a trustee of shares in an unlimited company for a married woman joined with her and her husband in a deed, whereby the shares were assigned upon trust for the wife for life for her separate use, and after her death as she should by deed or will appoint, and the husband having died, the trustee transferred the shares to the widow, who executed the deed of transfer, it was held that this was a valid appointment: *Marler* v. *Tommas*, L. R., 17 Eq. 8. A married woman may dispose of a reversion over which she has a power of appointment, and the disposition will hold good, though no conveyance of the reversion is executed: *Wright* v. *Lord Cadogan*, 1 Bro. P. C. 486. She may also make a valid appointment of a contingent interest: *Guise* v. *Small*, 1 Anstr. 277. See *Skinner* v. *Todd* (30 W. R. 267)

as to what will constitute an execution of a power. Where a woman being a donee of a power marries, the power is not suspended or extinguished except it is given expressly to her "*being sole*," or the exercise of the power was limited to a former coverture: *Gibbons* v. *Moulton*, Finch, 346; *Antrim* v. *Buckingham*, 1 Ch. Ca. 17; 2 Freem. 168; *Horseman* v. *Abbey*, 1 J. & W. 381. In *Wood* v. *Wood* (L. R., 10 Eq. 220), a general power of appointment was given to a *feme sole* under a settlement of her property, with subsequent trusts in default of appointment for herself and any future husband. Held, that the power could be exercised during coverture. A power to a woman to appoint "during and notwithstanding the coverture," cannot be exercised during widowhood (*Burnham* v. *Bennett*, 2 Coll. 260), and where by a marriage settlement the power is to be exercised "at any time or times thereafter during the coverture," it cannot be exercised during widowhood or a subsequent coverture: *Morris* v. *Howes*, 4 Hare, 599; *Horseman* v. *Abbey*, 1 J. & W. 381. Where a married woman is to appoint, "at her decease," she can only appoint by will: *Freeland* v. *Pearson*, L. R., 3 Eq. 658. *Quære*, whether an injunction would be granted to restrain a husband from preventing his wife executing a power: *Middleton* v. *Middleton*, 1 J. & W. 94. It has been held that where a husband and wife, having a joint power of appointment by deed over the wife's estate, agree in writing to sell it, specific performance of the agreement will not be enforced against them: *Martin* v. *Mitchell*, 2 J. & W. 425; but this decision was based on the inability of a married woman to contract, and there is no reason now why such an agreement should not be enforced. Although a woman is judicially separated from her husband, she may still join with him in exercising a power given to them to be exercised jointly: 20 & 21 *Vict. c.* 85, *s.* 26. Where by a

marriage settlement a trustee can advance children with consent of wife, he can do so, although the consent has been given after the second husband has assigned her life interest: *Whitmarsh* v. *Robertson*, 1 Coll. 570.

Appointment to husband. — A married woman may exercise a power in favour of her husband, and the appointment will be good, unless the wife shows that it was executed under circumstances sufficient to invalidate it: *More* v. *Freeman*, 1 Bro. P. C. 237; *Nedby* v. *Nedby*, 5 De G. & S. 377.

See also *Wood* v. *Wood* (L. R., 10 Eq. 220), where an appointment in favour of the donee of the power and the husband was held valid. A sum of money in the public funds being given by will to trustees for the separate use of a *feme covert*, with a general power of appointment over it to take effect after her death, the wife appointed the fund to her husband, and on a bill filed by husband and wife against the trustees to transfer the fund to him, the court, on examination of the wife, decreed the same accordingly: *Frederick* v. *Hartwell*, 1 Cox, 193. It was held in *Doe* d. *Hartridge* v. *Gilbert* (5 Q. B. 423), that a demise by a wife to her husband in pursuance of a power of leasing is void, on the ground that, being a power coupled with an interest, it required a bargain between independent persons, as the conditions annexed to a leasing power are for the benefit of the remainderman. *Quære*, whether under the present law such a demise would not be good, unless it was proved that the husband had exercised undue influence over his wife.

Release and extinction of powers.—Before the passing of the Act for the Abolition of Fines and Recoveries, 1833, a married woman could only release a power by means of a fine or recovery. This act, however, gives her the capacity to release or extinguish any power which she may possess with regard to lands of any tenure, or money subject to be invested in the purchase of lands; but the release or extinguishment must be by deed, in which the husband joins, and it must be acknowledged by her: *sect.* 77.

This act also provides that the power of disposition thereby given to a married woman shall not prevent her exercising any other powers she may have, except so far as regards such powers as she has suspended or extinguished by a disposition made by virtue of the act: *sect.* 78. And she may still bind her interest by election without a deed acknowledged under the statute: *O'Fay* v. *Burke*, 8 Ir. Ch. Rep. 225. Malins' Act, 1857, gives a married woman a similar power to release or extinguish any power over personal estate to which she is entitled under any instrument made after 31st December, 1857, except a marriage settlement, or agreement for a marriage settlement. This act also contains a proviso similar to that contained in sect. 78 of the Fines and Recoveries Act: *supra*. The Conveyancing Act, 1881, enables any person to release a power simply collateral (sect. 52); but a married woman must acknowledge the deed of release in cases where, before this act, her acknowledgment was necessary to bind her interest in the subject-matter to which the power relates.

Statutory Powers.

In treating of the real property and reversionary interests of a married woman, her power of disposition with respect thereto conferred by the Act for the Abolition of Fines and Recoveries, 1833, and Malins' Act, 1857, has already been considered, as well as the powers conferred upon her by the Settled Estates Act, 1877, and the Settled Land Act, 1882. In order that she may exercise any powers under the Settled Estates Act, 1877, it is necessary that she be separately examined whether the subject-matter of the application is or is not settled for her separate use: *sect.* 50. Such examination may, however, be dispensed with where the court is satisfied that the order asked for is beneficial to all parties, and that the delay necessary for taking the examination would be prejudicial: *Re Halliday's Settled Estates*, L. R., 12 Eq. 199; see also *Re Marshall's Settled Estates*, L. R., 15 Eq. 66. The exercise of such powers shall not cause a forfeiture, and they may be exercised although the settlement contains a restraint on anticipation (*sect.* 50), and even if she is an infant (*sect.* 52), but she must be separately examined: *Re Broadwood's Settled Estates*, L. R., 7 Ch. 323. Sect. 61 of the Settled Land Act, 1882, provides as follows: "The foregoing provisions of this act do not apply in the case of a married woman. Where a married woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life under the foregoing provisions of this act, is entitled for her separate use, or is entitled

under any statute passed, or to be passed, for her separate property or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this act. Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this act. The provisions of this act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised. The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section. A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this act." The Vendor and Purchaser Act, 1874, sect. 6, provides that where any freehold or copyhold hereditament is vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*. The Conveyancing Act, 1881, enacts that where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband as beneficial owner, and in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of

the husband in the same terms as the covenant implied on the part of the wife: *sect.* 7 (3). A married woman, whether an infant or not, shall, by virtue of this act, have power, as if she were unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do, and the provisions of this act relating to instruments creating powers of attorney shall apply thereto: *sect.* 40.

WILLS.

Real property.—By the common law there was no power to make a will of lands, except of gavelkind tenure, or where it was permitted by the special custom of certain cities, as London and York. Equity, however, permitted a person, by means of uses, to dispose of the equitable estate in real property; but when uses were abolished by the Statute of Uses (27 Hen. 8, c. 10), this mode of testation necessarily came to an end. The Statute of Wills (32 Hen. 8, c. 1) gave power to dispose of lands by will; but another statute (34 Hen. 8, c. 5), passed soon after, expressly enacted that any will of lands made by a *feme covert* should not be good at law. This prohibition was not removed by the Wills Act, 1837: see *Willock* v. *Noble*, L. R., 8 Ch. 778; L. R., 7 H. L. 580. With a few exceptions—*e. g.* the wife of a man banished or transported for life, or a woman judicially separated or having a protection order—no married woman could, till the year 1883, dispose by will of the legal estate in

lands, unless by means of a power of appointment. The M. W. P. Act, 1882, empowers any married woman to dispose by will of the legal as well as of the equitable estate in her lands, provided, of course, that the legal estate is vested in her. This only affects the will of a married woman dying after the 31st December, 1882. Subject to this recent alteration, the law is as follows:—

A married woman can, without the concurrence of her husband, dispose by will of the legal estate in lands, by means of a power of appointment to uses.

A general devise of real estate by a married woman is a good execution of a general power of appointment over real estate, unless a contrary intention appears by her will: *Wills Act*, 1837, *sect.* 24; *Thomas* v. *Jones*, 2 J. & H. 475; 1 De G., J. & S. 63. Where a married woman has power to appoint the remainder by deed or will, and makes a will during coverture, that will be a good disposition, though by the death of her husband in her lifetime the trustees of the land hold for her sole use and benefit: *Bishop* v. *Wall*, 3 Ch. D. 194. Before the Wills Act it was held that where a woman had a general power of appointment by will, a general devise or bequest without referring to the power was a good exercise of the power, on the ground that her will must be intended to be an exercise of it. See *Curteis* v. *Kenrick*, 9 Sim. 443, and *Churchill* v. *Dibben*, *ibid.* 447, n.; but compare *Johns* v. *Dickinson*, 8 C. B. 934. Although the 24th sect. of the Wills Act, 1837, makes a will speak from the death of the testatrix,

yet it does not operate retrospectively, so as to give effect to her will as to property which it was not in her power to dispose of at the time when the will was made: *Noble* v. *Willock*, L. R., 8 Ch. 778; L. R., 7 E. & Ir. App. 580. Where a wife has power to dispose of property by will only, a disposition by deed will be void. Thus in *Doe* d. *Thorley* v. *Thorley* (10 East, 438), where A. devised all his freehold estate to his wife during her natural life, "and also at her disposal afterwards to leave it to whom she pleases," a feoffment by the wife in her lifetime was held void. Where an attestation clause is not required, the mere circumstance that there is an attestation clause specifying certain things does not exclude evidence that other things were done besides those which are attested: *Warren* v. *Postlethwaite*, 2 Coll. 108.

A married woman has full power of alienation by will of lands settled to her separate use: see *Taylor* v. *Meads*, 4 De G. J. & S. 597; *ante*, pp. 198—200.

A married woman, by means of an equitable power of appointment, can appoint by will the equitable interest in lands not her separate property.

EXAMPLE.—Where by marriage articles a woman before marriage reserves to herself a power of disposing of her real property: *Wright* v. *Lord Cadogan*, 2 Eden, 239; *Churchill* v. *Dibben*, 9 Sim. 447, n.; *Rippon* v. *Dawding*, Ambl. 565.

Where a woman is judicially separated from her husband, or has obtained a protec-

tion order, she may dispose by will of her lands as if she were a *feme sole*: 20 & 21 *Vict.* *c.* 85, *ss.* 21, 25.

Analogous to these exceptions are cases where the wives of persons banished or transported for life have been allowed to make wills as if they were *femes sole*: see *Portland* v. *Prodgers*, 2 Vern. 104; *Re Goods of Coward*, 4 Sw. & Tr. 46.

Personalty.—A married woman was not declared by statute to be incapable of making a will of personalty, but, says Lord Cairns, in *Willock* v. *Noble* (L. R., 7 H. L. 589), it was invalid, "not merely because marriage was a gift of her personalty to her husband, but because, in the eye of the law, the wife had no existence separate from her husband, and no separate disposing or contracting power. On this general rule some modifications were engrafted. A married woman, who was an executrix, had as such power to make a will, and to appoint an executor for the purpose of continuing the representation to the original testator; a married woman might make a will with the consent of her husband; a married woman might make a will in the exercise of a power; and a married woman might make a will disposing of

her separate estate or its savings." The law as to a married woman's testamentary power of alienation over personalty is as follows:—

The will of a married woman dying after 31st December, 1882, is as valid as if she were a *feme sole*: *M. W. P. Act*, 1882, *sect.* 1.

The will of personalty of a married woman dying before 1883 is valid, if made in pursuance of a power; so also if made in pursuance of an ante-nuptial agreement, or a post-nuptial agreement for valuable consideration, as such a will is equivalent to a will made by virtue of a power: 1 *Roper*, *H. & W.* 170, *n.*; *Ross* v. *Ewer*, 3 Atk. 160.

See also *Burnett* v. *Mann*, 1 Ves. sen. 156; and *Roscommon* v. *Fowke*, 6 Bro. P. C. 158, 167, n. A general bequest of personalty by a married woman is a good execution of a general power of appointment, unless a contrary intention appears by her will: *Wills Act*, 1837, *s.* 24. *In re Goods of Hallyburton* (L. R., 1 P. & D. 90), a married woman domiciled in Scotland made a will in the English form under a power. The will was not valid by the law of Scotland, but it was held to be entitled to probate here. See also, as to execution of powers by will, the case of *Harvey* v. *Stracey*, 1 Drew. 73. Where a married woman, without referring to her power, gave "all her property and estate whatsoever and wheresoever, and of what nature, kind and quality soever the same might be," to her husband, and she did not possess any property other than that which she had power to appoint, her will was held to be a valid execution

of her power: *Att.-Gen.* v. *Wilkinson*, L. R., 2 Eq. 816. Where a married woman received for her support, during the coverture, part of a fund of which she took the interest for life with a power to appoint the principal, and by her will she appointed the principal to her husband, it was held that he was not entitled to the principal already paid for her support: *Randal* v. *Hearle*, 2 Anstr. 363. Where a married woman has a power of appointment by will, she cannot appoint by deed to take effect after her death: *Marjoribanks* v. *Hovenden*, S. C., 6 Ir. Eq. R. 238.

Where a will of personalty was made in pursuance of a power, the will had to be proved, but the probate was limited to the property comprised in the power, and did not require the husband's consent. The wife's executors did not take *jure repræsentationis*, but only as appointees under the power: *Tugman* v. *Hopkins*, 4 M. & Gr. 389. Where the will affected to dispose of other property not the subject of the power, administration *cæterorum* as to such property was granted to the husband.

The will of personal estate of a married woman dying before 1883 was valid, provided that her husband consented to the particular will, survived her, and gave his consent thereto when it was proved: *Henley* v.

Philips, 2 Atk. 47; *Marlborough* v. *Godolphin*, 2 Ves. sen. 75; *Willock* v. *Noble*, L. R., 7 E. & Ir. App. 580.

When the will was made in pursuance of an express agreement or consent, it was said that a little proof was sufficient to make out the continuance of that consent after her death: 1 *Roper, Husb. & W.* 170, quoting *Brook* v. *Turner*, 2 Mod. 173; but this case refers to an agreement before marriage, and seems to be of doubtful authority. Such a will would be valid as an execution of an equitable power, and the husband's dissent would be immaterial. Although where a will was made with the consent of the husband, his consent, as a rule, could be withdrawn at any time before probate, yet if he had consented to it after his wife's death, he could not retract his consent: *Maas* v. *Sheffield*, 1 Rob. Ecc. 364. Without the husband's knowledge of the contents of a will, the will could not be said to be made with his consent: *Willock* v. *Noble*, *supra*. Where a married woman, with her husband's assent, made a will of personalty in which she had an expectant interest, but that interest did not actually vest in her until after her husband's death, she had, to give validity to her will, to re-execute it after his death; and so also if her will affected property which he had bequeathed to her absolutely: *Ibid.*; see also *Trimmell* v. *Fell*, 16 Beav. 537.

A married woman has full power of alienation by will over personal property settled to her separate use, and over the produce thereof, whether the separate property was derived from her husband or from a third person.

See *Fettiplace* v. *Gorges*, 1 Ves. 45; and in *Rich* v. *Cockell* (9 Ves. 369) it was held that a power of dis-

position by will is incident to trusts for the separate use of a *feme covert*. See other cases given under "*Separate Estate*," p. 197. In *Herbert* v. *Herbert* (Pre. Ch. 44), a *feme covert*, who had pin-money as a separate maintenance settled on her, was held able by a writing, in the nature of a will, to dispose of savings thereout; see also *Sawyer* v. *Bletsoe*, 2 Vern. 329: and in *Peacock* v. *Monk* (2 Ves. sen. 190), where a husband sold part of his wife's effects, which she held to her separate use and had disposed of by will, his representative was held accountable for them to the wife's administratrix. In *Dingwell* v. *Askew* (1 Cox, 427), stock was, in contemplation of marriage, settled on a woman for her separate use. She made a will during coverture, and after her husband's death took a transfer of the stock into her own name. This was held not to be a revocation of the will, nor an ademption of the bequest of the stock.

Where a woman has been judicially separated from her husband, or has obtained a protection order, she can make a will of personalty as if she were a *feme sole*: see 20 & 21 Vict. c. 85, ss. 21, 25, *ante*, *pp.* 66, 77.

A married woman who is an executrix has as such, without her husband's consent, power to make a will, and to appoint an executor for the purpose of continuing the representation to the original testator: *Scammell* v. *Wilkinson*, 2 East, 552.

Revocation of wills by marriage.—Before the Wills Act, 1837, a woman's will was

absolutely revoked by marriage, except a will operating as an appointment under a power. That act provides that every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor or administrator, as the person entitled as his or her next of kin under the Statute of Distribution: *Sect.* 18.

In *Hodsden* v. *Lloyd* (2 Bro. C. C. 534), a woman being about to marry, entered into an agreement with the future husband (without seal or stamp), by which the property was settled upon the survivor for life, with power to the wife to dispose thereof by will made after the marriage; she then immediately made a will, by which she gave her property to the intended husband; and afterwards (on the same day) she married him. The articles resting in agreement gave to him an equitable estate for life, but the will was revoked (not being protected by the power) by the subsequent marriage.

CHAPTER VI.

JOINT OWNERSHIP.

THE usual forms of joint-ownership are joint tenancy, co-parcenary, tenancy in common, and partnership. Omitting co-parcenary, and adding tenancy by entireties, we have all the kinds of co-ownership which can exist between husband and wife. One effect of the M. W. P. Act, 1882, is the practical abolition of the tenancy by entireties. That tenancy arose out of the peculiar doctrine of the common law as to the unity of person of husband and wife, and, as that unity no longer obtains with regard to property, the tenancy by entireties will eventually disappear.

TENANCY BY ENTIRETIES.

Prior to 1883, a conveyance *inter vivos*, or a gift by will, of property to a husband and wife jointly, created a tenancy by entireties. Where such a tenancy exists, neither husband nor wife can dispose of his or her interest in the property without

the consent of the other of them. The husband is entitled to the income thereof during the coverture; and, if undisposed of, the survivor takes absolutely.

REALTY.—For instances of this kind of tenancy in land, see *Co. Litt.* 187; *Green* v. *King*, 2 Bl. 1211; *Doe* v. *Parratt*, 5 T. R. 652. If an estate were limited to A. and B. (husband and wife), and C., and their heirs, A. and B., being considered one person at law, would take a moiety only as joint tenant with C. in fee simple, while *inter se* there would be a tenancy by entireties: *Back* v. *Andrew*, 2 Vern. 120. It is submitted that such a limitation made after 1882 would create a joint tenancy between three persons, and no tenancy by entireties. If a lease were made to husband and wife for their lives with remainder to the survivor, the husband could not by his grant defeat the wife's right of survivorship: 2 *Roll. Abr.* 48, pl. 3.

PERSONALTY.—There could not be a tenancy by entireties of choses in possession or of leaseholds. Such a tenancy is but a modification of joint tenancy, and as at law the wife's choses in possession vested in the husband and he could dispose of her leaseholds (except by will), the incidents of a tenancy by entireties could not arise: see 1 *Roll. Abr.* 343, 344, 349. There could, however, be a tenancy by entireties of choses in action. By an ante-nuptial settlement the wife's father covenanted with the trustees to pay to them during his life an annuity of 60*l.*, to be held by them upon trust to pay the same "unto and to the use of the husband and wife during their joint lives," and after the death of the husband to the use of the wife absolutely, with trusts for the husband if he

survived her. Held, that the husband and wife took the annuity as tenants by entireties, and that the whole of it, during their joint lives, was subject to the husband's debts, and that the wife had no equity to a settlement out of it: *Ward* v. *Ward*, 14 Ch. D. 506; see also *Re Bryan*, *ibid.* 516. If a husband purchases stock or other property and takes the transfer in the names of himself and his wife, it is an advancement for the benefit of the wife absolutely if she survive him, but not otherwise: *Dummer* v. *Pitcher*, 2 M. & K. 262. If a husband makes an investment of his own money in stock or other property in the names of himself, his wife, and a stranger, it is an advancement for the benefit of his wife absolutely if she survive him, and the stranger will be a trustee for her: *Re Eykyn's Trusts*, 6 Ch. D. 115. Where the husband lends out money in the names of himself and his wife upon mortgage, and dies, his wife takes by survivorship if there are sufficient assets, otherwise the settlement, being voluntary, may be set aside: *Christ's Hospital* v. *Budgin*, 2 Vern. 683. Where money was lent by the husband and the securities taken in the joint names of himself and his wife, she was held entitled by survivorship: *Watts* v. *Thomas*, 2 P. Wms. 364. At a testator's death there was a sum of 2,200*l.* stock, his property, standing in the joint names of himself and his wife. He affected to dispose of it by his will, but it was held that the wife was entitled to it by survivorship: *Coates* v. *Stevens*, 1 Y. & C. Ex. 66. In another case where the husband purchased stock in the name of himself and his wife, Lord Eldon said it was *primâ facie* a gift to her in the event of her surviving, unless evidence of contemporaneous acts showing a contrary intention was produced: *Wilde* v. *Wilde*; 1 *Bright's Husband and Wife*, p. 32; see also *Lannoy* v. *Lannoy*, Sel. Ca. Ch. 48 (purchase of stock).

JOINT TENANCY.

Where husband and wife are joint tenants at law of property, their title to which accrued before 1883, the husband may sever the tenancy without the consent of his wife, and during the coverture he will be entitled to the income thereof. Such a tenancy will arise where joint tenants intermarry, or by virtue of a limitation to take effect upon the marriage. Since 1882, a conveyance or a gift to husband and wife during coverture, which before that time would have created a tenancy by entireties, creates a joint tenancy. Any joint tenancy between husband and wife created after 1882 will have all the usual incidents of joint tenancies: see *post*, *p.* 389. Before 1883 the law was as follows:

REALTY.—If lands were given to A. and B. and the heirs of their two bodies, here, if A. and B. be persons who may possibly intermarry, they will have an estate in special tail descendible only to the heirs of their two bodies; so long as they both live they will be entitled to the rents and profits in equal shares [*i.e.*, until they marry, afterwards the whole of the rents and profits will during the coverture belong to the husband]; after the decease of either, the survivor will be entitled for life to the whole; and on the decease of such survivor, the heir of their

bodies, in case they should have intermarried, will succeed by descent, in the same manner as if both A. and B. had been but one ancestor: *Williams' Real Property*, 14*th ed.*, *p.* 137. If an estate were limited to A. and B. and their heirs, and they afterwards intermarried, they were joint tenants thereof: *Co. Litt.* 187 b; *Butler* v. *Baker*, 3 Co. 70. If an estate were limited to husband and wife during their joint lives, the death of either determined the estate. If husband and wife were joint tenants for life, and the husband sowed the land and died before severance, his executor, not his wife, had the emblements; and so if he had been seised in right of his wife: 1 *Roll. Abr.* 727; *Co. Litt.* 55 *b. and note* 7. But in *Rowney's case* (2 Vern. 322), at the suggestion of the court, one moiety went to the executor and the other to the wife. If an estate be limited to husband and wife and the heirs of the body of the husband, the husband and wife are joint tenants for life: *Bac. Abr. Joint Tenants* (*B.*). If lands are given to a woman and the heirs of the body of her husband who is then dead, the wife and issue are joint tenants for life, with remainder to the issue in tail: *Wild's case*, 6 Co. 17. If A. make a grant to the use of himself and such wife as he should marry, and afterwards take a wife, he and his wife are joint tenants. If A. purchases an incorporeal hereditament, and take the conveyance to himself and his wife and B. for their lives and the life of the survivor, and A. then dies indebted, the purchase is not assets; it shall be presumed to be an advancement and provision for the wife, but after her decease, in case B. survives her, then it is a trust for husband's executors, and is applied for payment of his debts: *Kingdon* v. *Bridges*, 2 Vern. 67. If a rentcharge was granted for years or for their lives to a man and his wife who afterwards intermarried, the wife surviving had residue of rent as well as arrears: 1 *Roll. Abr.* 350.

PERSONALTY.—A husband and wife cannot be joint tenants of a chose in possession, but they may be of chattels real: *Roll. Abr.* 349. Where a husband is jointly possessed of a leasehold interest with his wife, their title to which accrued before 1883, he can dispose of it in his lifetime without the consent or concurrence of his wife (1 *Roll. Abr.* 343); but not by his will: 1 *Roll. Abr.* 344. The husband and wife can also be joint tenants of all personal property in which a tenancy by entireties can exist. After 1882, any kind of personal property may be jointly owned by husband and wife, just as it can be by any other two persons not so related to each other. Thus they may now be joint owners of a house, furniture, &c.

TENANCY IN COMMON.

Where prior to 1883 two tenants in common of realty intermarried, they would remain tenants in common. The husband would take the rents and profits during the coverture, unless the wife's estate were for her separate use; but there would be no right of survivorship. If two tenants in common marry after 1882, their respective rights in the property will not be altered by the marriage. There can be no tenancy in common at law of a chose in action, but it can exist in equity. (See *Williams' Personal Property, 9th ed. p.* 339.) Before 1883 there could be in equity a tenancy in common of personal property between husband and wife.

QUASI PARTNERSHIP.

A husband and wife may carry on business as quasi partners, but the wife's liability for the partnership debts will be restricted to her separate property.

In *Re Childs* (L. R., 9 Ch. 508), a trader at Brighton married a widow who was entitled to three-fourths of the profits of a London business. He afterwards bought the remaining one-fourth of the London business, and covenanted with a trustee that three-fourths of the profits of the London business should be for the separate use of the wife. A resolution was duly made for liquidation of the affairs of the trader, and it was held that the assets of the London business were first to be applied in payment of its creditors, and that only the surplus would go to his general creditors. It is submitted that this rule will still obtain. A husband and wife may be partners, and the wife's liability will still be restricted to her separate property.

CHAPTER VII.

MARRIAGE SETTLEMENTS.

A MARRIAGE settlement may be defined as a deed whereby provision is made for a husband and wife and their issue out of real or personal property. Although it is said that the number of marriage settlements bears but a small proportion to the number of marriages, yet there is a growing tendency to lessen that disproportion, and the passing of the M. W. P. Act, 1882, should give a further impetus in the same direction. Formerly married women had two safeguards to prevent their property falling into the hands of their husbands—their settlements on or after marriage, and the separate use with the restraint on anticipation. In future, the husband by the marriage itself will obtain no rights over his wife's property, and this Act may be considered as adding a third safeguard. But this safeguard is illusory; and if, when the wife's powers of disposition were comparatively limited, the settlement of her property upon herself with a restraint on

anticipation was necessary in order to protect it from the influence of the husband, it will be still more necessary now that she has an unrestrained power of alienation over all her property, real and personal, unless settled upon her with a restraint upon anticipation. Marriage settlements may be divided into two classes, those which are made for valuable consideration and voluntary settlements. As marriage is a valuable consideration, the former class include ante-nuptial marriage articles, ante-nuptial settlements, and post-nuptial settlements founded upon ante-nuptial articles, as well as settlements founded upon a valuable consideration other than marriage. All these settlements, as a rule, stand upon the same footing and receive the same interpretation. Those post-nuptial settlements which are not supported by the consideration of marriage, nor by any other valuable consideration, receive a somewhat different interpretation. We shall in the first and second sections treat of these two classes of settlements generally; in the third section, of special covenants and clauses contained in them; in the fourth section, of the construction to which they are liable; and in the fifth and sixth sections, of the rectifi-

cation and cancellation of settlements, including those made in fraud of marital rights.

Section 1.—Settlements Founded on Valuable Consideration.

Marriage articles.—Marriage articles are articles of agreement entered into in contemplation of marriage by the intended husband and wife, and generally by other persons also on their behalf. They are regarded as minutes or heads of the marriage settlement, which the settlement may explain more at large. If not followed by a settlement, the rights and duties of the parties interested will be determined by the articles: *Blandford* v. *Marlborough*, 2 Atk. 545.

A husband by marriage articles covenanted that all the lands which he then had or should purchase should descend to or be settled upon the heirs male of his body by him begotten. No settlement was made pursuant to these articles, and the husband on his second marriage settled his estates to other uses. Held, that the only son of the first marriage was entitled to a specific performance of the articles: *Cusack* v. *Cusack*, 5 Bro. P. C. 116. By marriage articles, a husband covenanted, in consideration of his wife's portion, to settle an estate to his own use, and after his decease to the use of his heirs by his intended wife, and for want of such issue to his own right heirs for ever. The articles did not express any further intention of providing for the children

of the marriage, and made a provision for the intended wife in lieu of dower. No settlement was executed, and the husband mortgaged the estate, and at the same time delivered the articles to the mortgagee. Held, on his death, that under the articles, he was entitled to a life interest only, and the mortgagee took with notice, and could not, therefore, hold as against the issue of the marriage: *Davies* v. *Davies*, 4 Beav. 54. "At present, with the facilities given by the Infants' Settlement Act (18 & 19 Vict. c. 43), there can rarely be any sufficient reason for resorting to articles, instead of at once executing a settlement, except such circumstances of pressure as would preclude the preparation of a formal instrument. There may, however, be cases in which it may be expedient to postpone the settlement, although the parties have time for deliberation and for resorting to professional assistance, as in the case of an estate abroad belonging to an infant:" 3 *Davidson's Conveyancing*, 3*rd edit.* 662.

No action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized: 29 *Car. II. c.* 3, (*Statute of Frauds,*) *s.* 4. The only exceptions to this rule are where the agreement is taken out of the statute by part performance or by fraud.

"It seems necessary for effectuating the object of the statute that the consideration should be set down

in writing as well as the promise" (per Lord Ellenborough, C. J., in *Wain* v. *Warlters*, 5 East, 17); but where marriage is one of the considerations the amount of pecuniary consideration is immaterial: *Prebble* v. *Boghurst*, 1 Swan. 319. The signature of the party must be so introduced as to govern or authenticate every material and operative part of the instrument: *Caton* v. *Caton*, L. R., 1 Ch. 137; L. R., 2 E. & Ir. App. 127. In *Warden* v. *Jones* (2 De G. & J. 76), where there was no time to prepare a settlement before marriage, and the husband said it would do equally well if made afterwards, and no settlement nor agreement for a settlement was made in writing before the marriage, a settlement made after the marriage was held to be voluntary, and therefore void against creditors. So in *L'Estrange* v. *Robinson* (1 Hog. 202), a parol promise before marriage was held not sufficient to support a deed executed after marriage as against creditors. In *Randall* v. *Morgan* (12 Ves. 67), where the wife's father before marriage in a letter to the intended husband said: "The addition of 1,000*l.* is not sufficient to induce me to enter into a deed of settlement . . . . I shall allow my daughter 2,000*l.* at 4 per cent., and if she marries I may bind myself to pay it at my decease to her and her heirs;" and in a second letter after marriage he said the husband might draw "for the interest due on my bond," it was held that the first letter was not sufficient evidence to bind the father. But where a letter was written before marriage saying: "*I have proposed* that one-third of your fortune, &c.," L. C. Loughborough held that that promise was sufficient: *Luders* v. *Anstey*, 4 Ves. 501. In *Moorhouse* v. *Colvin* (15 Beav. 341), where the father said he would give his daughter 2,000*l.*, and proceeded, "nor will that be all, she is and shall be noticed in my will, but to what further amount I cannot say, &c.": he was held not bound to give her more than the 2,000*l.* See also *Kirwan* v.

Burchell, 10 Ir. Ch. 63. In *Re Badcock*, *Kingdon* v. *Tagert* (17 Ch. D. 361), a father in April, 1853, wrote to his daughter's intended husband to the effect that she would have 2,000*l.* at once, 2,000*l.* more at his death, and 2,000*l.* more at her mother's death. The marriage took place eleven months after, and 2,000*l.* was settled, but no reference was made to any future settlement. The mother died in 1870, and the father in 1879. Held that the agreement to settle 4,000*l.* more could not be enforced against the father's estate. In *Goldicutt* v. *Townsend* (28 Beav. 445), a parol promise by the husband's father to make a provision was not held binding, the settlement being made two years after the marriage. In *De Biel* v. *Thomson* (or *Hammersley* v. *De Biel*) (12 Cl. & F. 45), a written promise by the agency of his two sons to settle 10,000*l.* on his daughter was held binding; and in *Loxley* v. *Heath* (27 Beav. 530), where in letters which had passed between the parties prior to the marriage the wife's father had stated what he intended to allow his daughter, Romilly, M. R., said: "Had the marriage taken place on the faith of these letters, it would scarcely have been disputed after the decision in *De Biel* v. *Thomson*, that the wife's father would have been bound." See also *Barkworth* v. *Young*, 4 Drew. 1. And where before marriage, the lady's father wrote: "V. being my only child, of course she will come into the possession of what belongs to me at my decease," "of course I should settle my property (subject to my sister's annuity), on my daughter absolutely and independent of her husband, or in other words, in strict settlement," and "I will take care that my property (which, I suspect, will exceed 4,000*l.*) shall be properly secured upon her and her children after my death;" it was held that the above expressions amounted to a contract to settle the whole of the property of which the father should die seised or

possessed upon his daughter in strict settlement: *Coverdale* v. *Eastwood*, L. R., 15 Eq. 121. Where V. just before his marriage wrote, in answer to a request by the solicitor of the intended wife, "In the event of my marriage with Miss W. taking place before the settlements are ready, I agree to Miss W.'s fortune being settled on herself," it was held that the marriage took place in reliance on the letter, and that there was a binding agreement for a settlement: *Viret* v. *Viret*, 50 L. J., Ch. 69. But where the husband's uncle wrote refusing to make a settlement upon his nephew, but said that one of his estates should come to him, "*unless some unforeseen occurrence should take place*," and the marriage took place without any settlement being prepared: the uncle on refusing to carry out his promise was held not bound by his letter: *Maunsell* v. *White*, 1 Jo. & Lat. 539. In *Glengal (E.)* v. *Barnard* (1 Keen, 769), the father of the intended wife told his solicitor to draw up the settlement, but before it was signed, (but after it was approved,) the father died. It was held that it was not binding, and if it had been executed, the solicitor had no authority as agent to bind either party.

There have been dicta at various times which would imply that a parol promise before marriage, followed by a post-nuptial signed writing, would be sufficient to take the case out of the Statute of Frauds: see *Mountacue* v. *Maxwell*, 1 Stra. 236; *Dundas* v. *Dutens*, 1 Ves. 196; *De Biel* v. *Thomson*, 12 Cl. & F. 45; *Surcome* v. *Pinniger*, 3 De G. M. & G. 571, and *Taylor* v. *Beech*, 1 Ves. sen. 297; but "if it be a correct view of the law, the whole policy of the statute is defeated," said Lord Cranworth in *Warden* v. *Jones*, 2 De G. & J. 85. The better opinion is that a post-nuptial settlement made in pursuance of a parol agreement before marriage is a voluntary settlement, if it purports to be made for no other consideration than the marriage.

A part performance of the agreement is sufficient to take it out of the statute, but the marriage itself is not such a part performance.

"The ground on which the court holds that part performance takes a contract out of the purview of the Statute of Frauds is, that one of the two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract, as, for instance, by taking possession of land, and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract, on the faith of which he induced or allowed the person contracting with him to act, and expend his money:" per L. C. Cranworth, in *Caton* v. *Caton* (1 Ch. 148). In this case, the husband promised, as his wife alleged, to make a will giving her all his property. He made such a will, but subsequently altered it; and it was held that the wife had no remedy. A transfer before marriage of a fund to trustees upon trust agreed to by parol only is a part performance: *Cooper* v. *Wormald*, 27 Beav. 266. So, also, is a transfer of chattels: *Simmons* v. *Simmons*, 6 Hare, 352. But payment of interest after marriage will not constitute a part performance: *Re Gulliver*, 2 Jur., N. S. 700. In *Surcome* v. *Pinniger* (3 De G. M. & G. 571), the wife's father had, before marriage, verbally promised the husband certain leasehold property, which he delivered up to him after marriage. The husband expended money on them and treated them as his own. On the death of his father-in-law, his administrator claimed them; but it was held that there had been sufficient part performance to satisfy the statute. Marriage itself cannot be held as a part performance: *Dundas* v. *Dutens*, 1 Ves. 196. "If it

were," said L. C. Cottenham, in *Lassence* v. *Tierney* (1 Mac. & G. 571), "there would be an end of the statute, which says that a contract in consideration of marriage shall not be binding unless it be in writing; but if marriage be part performance, every parol contract followed by marriage would be binding." See also *Hammersley* v. *De Biel*, 12 Cl. & F. 45; *Warden* v. *Jones*, 2 De G. & J. 76; and *Caton* v. *Caton*, L. R., 1 Ch. 137.

Fraud on the part of either party may make an ante-nuptial agreement valid and binding on that party, although it is by parol only.

"If a person makes any false representations to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood which has so misled the other. That is a principle of universal application, and has been particularly applied to cases where representations have been made as to the state of the property of persons about to contract marriage, and where, upon the faith of such representations, marriage has been contracted. . . . . I think that the principle has been carried, and may be carried, much further; because I think it is not necessary that the party making the representation should know that it was false; no fraud need have been intended at the time. But if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying:" per L. C. Cranworth, in *Jorden* v. *Money*, 5 H. of L. Cases, 210, 212; see

also the remarks of L. C. Lyndhurst, in *De Biel* v. *Thomson*, 12 Cl. & F. 45, and the case of *Bold* v. *Hutchinson*, 5 De G. M. & G. 558.

Validity, &c.—Marriage articles and marriage settlements founded on valuable consideration (*ante*, p. 285) are, in the absence of fraud, good against everybody. Where one of the parties is ignorant of the fraud, the settlement holds good with respect to that party. If a post-nuptial settlement differs from ante-nuptial articles, it is impeachable to the extent of its difference: see *Bovy's case*, 1 Vent. 193; *Wheeler* v. *Caryl*, Ambl. 121.

In *Newstead* v. *Searles* (1 Atk. 265), where a widow on her second marriage settled her estate, with the consent of her second husband, on the children of her first marriage, and afterwards joined with her second husband in a mortgage of the settled estates to persons who had notice of the settlement, the settlement was held binding against the mortgagees. So an ante-nuptial settlement on illegitimate children will stand: *Clarke* v. *Wright*, 6 H. & N. 849. But where the marriage is void, *e. g.* where a man has married his deceased wife's niece, an ante-nuptial settlement fails for want of consideration (*Chapman* v. *Bradley*, 33 Beav. 61; see also *Pawson* v. *Brown*, 13 Ch. D. 202; *Coulson* v. *Allison*, 2 De G. F. & J. 521); but the settlement cannot be set aside ten years afterwards by the husband's representatives: *Ayerst* v. *Jenkins*, L. R., 16 Eq. 275. So limitations in a marriage settlement of the property of the intended wife

in favour of the children of a second marriage and of nephews and nieces are purely voluntary gifts, and not within the consideration of marriage: *Wollaston* v. *Tribe*, L. R., 9 Eq. 44; see also *Johnson* v. *Legard*, 6 Mau. & S. 60. But limitations in default of children in favour of the wife's next of kin, although such next of kin are volunteers, is an irrevocable trust: *Paul* v. *Paul*, 19 Ch. D. 47; affirmed, 20 Ch. D. 742. Where a father settled a lease, on his son's marriage, on the son for life, then on the wife, and then on the issue of the marriage, and the son covenanted to renew the lease and assign it, but did not assign it, and died indebted, the lease was held bound by the articles: *Plowman* v. *Plowman*, 2 Vern. 289. And where lands were conveyed to trustees to husband for life, remainder to wife for life, remainder to issue, and in default of issue as the survivor should appoint, and the husband dying without issue devised the lands; his wife, surviving, was held entitled to exercise her power of appointment: *Bp. of Oxon* v. *Leighton*, 2 Vern. 376. In *Spackman* v. *Timbrell* (8 Sim. 253) and in *Dilkes* v. *Broadmead* (7 Jur., N. S. 56), it was held that assets of a deceased debtor or covenantor settled *bonâ fide* in consideration of marriage were no longer specifically liable to the claims of creditors. See also *Ex parte McBurnie* (1 De G. M. & G. 441), where a trader in insolvent circumstances covenanted by an ante-nuptial settlement to settle 500*l.* on his wife, and the trustees were allowed to prove for it on his bankruptcy, L. J. Knight-Bruce saying, "The settlement appears to have been one which an honest woman, reasonably advised, might have reasonably supposed to be fair and proper. That seems to dispose of the whole case; she is not implicated in any fraudulent intention which the husband might have had." In *Meggison* v. *Forster* (7 Jur. 546), A. gave bonds to B., and deposited the title deeds of his real estate "as a collateral security for the bond deeds."

Subsequently the bonds were settled on B., about to marry, but no reference was made to the title deeds. On A. becoming bankrupt, and no fraud being suggested or insolvency proved against him at the time of the deposit, the trustee of the settlement was held equitable mortgagee of the real estate for the monies due on the bonds. In *Campion* v. *Cotton* (17 Ves. 263 a), the settlement was sustained by the consideration of marriage against the creditors, there being no evidence of fraud on the part of the wife, notwithstanding false recitals that the property was the wife's; voluntary expenditure of the husband in improvements by building and in enfranchising copyholds was also protected. In *Hardey* v. *Green* (12 Beav. 182), the husband and wife agreed to settle all property to which the husband or wife might become entitled to such uses as the wife should appoint, and in default in trust for the husband, wife, and children. At the time neither the husband nor wife had property; the husband was insolvent, and afterwards took the benefit of the Insolvent Act. Property subsequently descended on him, and it was held, as against his assignees, that it was bound by the articles. But there may be evidence of fraud on the part of the wife, as in *Colombine* v. *Penhall* (1 Sm. & Giff. 228), where a solicitor and money-lender, being in insolvent circumstances, settled his money on a woman, with whom he had previously cohabited, and married her, and the property remained under the control of the husband, and two months after the marriage a fiat of bankruptcy was issued against him, it was held that the settlement was in itself an act of bankruptcy and void as against his assignees; V.-C. Stuart saying, "A settlement of property made by a trader with intent to defeat and delay his creditors is not only void against them, but the very act of executing such a settlement is, by the statute law, an act of bankruptcy." And in *Bulmer* v. *Hunter* (L. R., 8 Eq.

46), where a man executed an ante-nuptial settlement, and married a woman with whom he had previously cohabited, with intent to defraud his creditors, the wife being implicated in the transaction, the settlement was held fraudulent and void as against creditors. So in *Fraser* v. *Thompson* (4 De G. & J. 659), the assignees of a bankrupt applied to set aside a settlement of the greater part of the bankrupt's estate made previously to and in consideration of marriage, when the bankrupt was embarrassed and insolvent, and the lady aware of his embarrassments. On appeal, the settlement was held invalid, L. C. Campbell saying, "Marriage is the most valuable of all considerations, but whatever consideration be given for a grant, it is necessary to see what the grantor had in him at the time of the grant. Here he had nothing; and as the wife had full knowledge of the acts of bankruptcy, the settlement cannot be supported. . . . I do not wish to be supposed to question the decision in *Campion* v. *Cotton*, my judgment turns on the acts of bankruptcy known to the wife." In *Townsend* v. *Westacott* (2 Beav. 340), a voluntary settlement by a party considerably indebted, and who became insolvent within three years after, was set aside as fraudulent. The deed was purely voluntary, and was made without any consideration, and when no marriage was in contemplation; although the settlor afterwards married the person upon whom the property was settled. The *onus probandi* that the settlement is fraudulent lies on the creditors: *Richardson* v. *Horton*, 7 Jur. 1144. Upon a covenant upon marriage by the husband with the trustees, in case his wife should survive him, to pay her a sum of money, she is a creditor within the statute against fraudulent conveyances (13 Eliz. c. 5): *Rider* v. *Kidder*, 10 Ves. 360. Where a marriage settlement made by a person indebted goes beyond the immediate objects of the marriage, and there are provisions for collateral

relations from whom no valuable consideration moves, then, *quoad* those objects, the settlement has nothing to do with the marriage, but is to be considered as a settlement purely for the purpose of providing for the relations, and, being without consideration, is absolutely void as against creditors whom it defeats and delays: *Smith* v. *Cherrill*, L. R., 4 Eq. 390. But a settlement by one not indebted at the time in favour of strangers will stand against subsequent creditors, though the settlement be voluntary: *Holloway* v. *Millard*, 1 Madd. 414. A. devised an estate for the benefit of his children, B. purchased such estate, but left the money unpaid, and afterwards settled the estate on his wife and children. The settlement referred to the conveyance, and the conveyance referred to the will. Held, that the settlement conveyed notice of the will, and, consequently, that A.'s children had a lien as against B.'s children for the money left unpaid: *Davies* v. *Thomas*, 2 Y. & Coll. Exch. 234. Where before marriage a husband executed a bond to trustees, binding himself to settle his property in a certain way, and after marriage a settlement was made not in accordance therewith, the wife's rights were held not bound thereby: *Webb* v. *Kelly*, 3 L. J., Ch. 172. Where a bond was given before marriage to settle a jointure, and after marriage a settlement was made on the wife and the issue of the marriage, it was held with respect to a purchaser fraudulent as to the children: *Jason* v. *Jervis*, 1 Vern. 284; see also *Warrick* v. *Warrick*, 3 Atk. 291. So where after marriage lands were settled other than those promised in the articles, the settlement was held void as against creditors; but the trustees of the marriage articles were allowed under the bankruptcy to claim on behalf of the trust fund: *Gates* v. *Fabian*, 19 W. R. 61. Where a bond for 2,000*l.* was given to trustees to be void if the husband should at any time become

possessed of real estate, and should settle it on his wife and issue agreeably to the wishes of the trustees, and where the real estate came to the husband after the death of his wife, his issue by her were held entitled to it: *Prebble* v. *Boghurst*, 1 Swan. 309. A bond given to the wife before marriage as a settlement will be upheld in equity, and not allowed to be extinguished by the marriage: *Acton* v. *Peirce*, 2 Vern. 480. Where before the marriage the intended husband signed a memorandum, agreeing that certain bonds should be transferred to the wife and her son by a former husband, and after the marriage obtained possession of the bonds, and disposed of them, he was held liable to make them good, and that the wife and her trustee were entitled to a lien for the amount upon all other property of the wife which remained in specie, and that the amount must be settled: *Hastie* v. *Hastie*, 2 Ch. D. 304. A voluntary bond in favour of children, though voluntary in its inception, acquires the character of a debt for valuable consideration when marriage takes place, with the knowledge of the obligor, upon the faith of the provision made by the bond: *Payne* v. *Mortimer*, 1 Giff. 118.

VALUABLE CONSIDERATION.—A valuable consideration for a post-nuptial settlement may be a payment of money as a portion, or an additional sum, or even an agreement to pay money, if it is afterwards paid (*Brown* v. *Jones*, 1 Atk. 190; *Colvile* v. *Parker*, Cro. Jac. 158; *Ramsden* v. *Hylton*, 2 Ves. sen. 304; *Russel* v. *Hammond*, 1 Atk. 13; *Stileman* v. *Ashdown*, 2 Atk. 477); or the wife agreeing to resign a contingent interest (*Ward* v. *Shallet*, 2 Ves. sen. 16); or an advancement of a sum of money (*Wheeler* v. *Caryl*, Ambl. 121); or a payment of debts (*Holmes* v. *Penney*, 3 K. & J. 90); or a settlement of the wife's own money (*Pott* v. *Todhunter*, 2 Colly. 76);

or where a vested reversion was settled by the husband and wife on the wife for her separate use, the husband surrendering his right to receive the rents and profits during coverture (*Hewison* v. *Negus*, 16 Beav. 594); or where A. mortgaged his own estates for 5,000*l.* for the benefit of B., and B., pursuant to an agreement to that effect with A., conveyed his estates not only as an indemnity to A., but also for the benefit of his (B.'s) children and their issue (*Ford* v. *Stuart*, 15 Beav. 493); or where a relative of the wife advanced the husband 150*l.* on his promissory note to meet the interest on the mortgage, which was then in arrear: this was held sufficient consideration for the settlement of a freehold estate worth, beyond a mortgage to which it was subject, about 1,300*l.* (*Bayspoole* v. *Collins*, L. R., 6 Ch. 228; see also *Thompson* v. *Webster*, 4 Drew. 628), or the wife joining with her husband in a fine, and parting with her jointure: *Cottle* v. *Fripp*, 2 Vern. 220; *Scot* v. *Bell*, 2 Lev. 70. A promise by an infant on his marriage to settle when of age, and a settlement made accordingly, is not fraudulent: *Lavender* v. *Blackstone*, 2 Lev. 146; see also *Middlecome* v. *Marlow*, 2 Atk. 519. Where the husband agreed to settle 4,000*l.* on his wife, secured by his bond and judgment, with a proviso that it should be void if he afterwards settled lands of the value of 100*l.* a year upon his wife, and where he afterwards settled lands of more than that value (the wife's friends having increased her settled fortune), the settlement on the husband's bankruptcy was held not impeachable as voluntary as to its excess beyond the 100*l.*: *Maguire* v. *Nicholson*, Beat. 592. Where an aunt promised to settle, and did settle, an estate on her nephew if he would move into a larger house, which he accordingly did, at a great expense; this was held a sufficient consideration to make a subsequent sale by her of the estate void: *Townend* v. *Toker*, L. R., 1 Ch. 446. The money paid as a con-

and it was held that the wife's right to the property by survivorship was not barred); *Ashton* v. *M'Dougall*, 5 Beav. 56 (where the reversion was settled for the wife's separate use, and she took no steps to confirm the deed while a widow, yet it was held that she by remaining passive must be considered to have ratified it); *Ives* v. *Medcalfe*, 1 Atk. 63; nor was the infant wife bound with respect to property settled to her separate use: *Simson* v. *Jones*, 2 Russ. & M. 365; *Johnson* v. *Johnson*, 1 Keen, 648: but as to her chattels real and personalty, as her husband in default of settlement could alienate the one, and the other vested in him on the marriage, she was absolutely bound: *Trollope* v. *Linton*, 1 Sim. & S. 477; *Simson* v. *Jones*, 2 Russ. & M. 365. But where the infant wife's money was settled on herself and husband for their lives with remainder to the children, with remainder to the wife's next of kin, and the husband died without issue, the trust for the next of kin was held inoperative: *Gibbs* v. *Grady*, 20 W. R. 257. Neither parent nor guardian has any power to bind the real estates of their infant wards by settlement made upon their marriage: *Simson* v. *Jones*, 2 R. & M. 365; *Field* v. *Moore*, 7 De G. M. & G. 691; *Re Murray*, 3 Dru. & War. 83; nor by a settlement made after marriage: *Field* v. *Moore*, *supra*; *Stamper* v. *Barker*, 5 Madd. 164; nor has the Court of Chancery the power: *Field* v. *Moore*, *supra*; *Savill* v. *Savill*, 2 Coll. 721. In *Brown* v. *McClintock* (7 Ir. Eq. R. 347), where an infant covenanted by marriage articles to settle her real estate, and after she came of age and during the coverture she executed a settlement in pursuance of the articles, but did not levy a fine, she was held bound neither by the settlement nor articles; and in *Lecky* v. *Knox* (1 Ball & B. 210), where an infant tenant in quasi tail covenanted to settle her estate when of age and died before reaching twenty-one, the remainderman was not held bound by the covenant. Where marriage

articles, executed when the lady was a minor, contained a covenant by the husband to settle her interest in real and personal estates, including after-acquired property, on the usual trusts, and the wife died without having confirmed the articles, leaving surviving her husband and an only child, her heiress-at-law, who claimed an interest under the articles in the personal estate, and also the real estate attempted to be settled as heiress-at-law of her mother; it was held that she was bound to elect under or against the settlement: *Brown* v. *Brown*, L. R., 2 Eq. 481. Where the wife is an infant at the time of executing the settlement, she cannot take the benefit of any part of the deed without giving effect to the whole: *Anderson* v. *Abbott*, 23 Beav. 457; see also *Willoughby* v. *Middleton*, 2 J. & H. 344; but in *Smith* v. *Lucas* (18 Ch. D. 531), it was held that a covenant in the form of an agreement by an infant in an ante-nuptial settlement to settle future-acquired property, if for her benefit, is voidable only, not void, and is binding, until she has elected to disaffirm it, upon property coming to her during coverture for her separate use, but not upon property with a restraint on alienation; and that her election, being a contract by a married woman, only binds separate property to which she is entitled at the date of the confirmation. Such an election made by a woman married after 1882 would now bind her after-acquired property: see the M. W. P. Act, 1882, s. 1 (1). In *Milner* v. *Harewood* (18 Ves. 259), it was declared that a "partial accession at the age of twenty-one to a settlement by a female infant would be considered an election to abide by the whole:" see also *Durnford* v. *Lane*, 1 Bro. C. C. 106; *Barrow* v. *Barrow*, 4 K. & J. 409; *Davies* v. *Davies*, L. R., 9 Eq. 468; *Merryweather* v. *Jones*, 4 Giff. 509. Where after the death of her husband the widow consented to a decree which ordered part of his property to be

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paid to the trustees of the settlement, she was held to have assented to the whole: *White* v. *Cox*, 2 Ch. D. 387. If a reversionary or contingent interest fell into possession after the husband's death it belonged to the wife, although included in the settlement (*Le Vasseur* v. *Scratton*, 14 Sim. 116; *Cuningham* v. *Antrobus*, 16 Sim. 436); and a bill filed by the issue of the marriage against the father and mother for a specific performance, after the mother's interest had become an interest in possession, but whilst the fund remained outstanding, was dismissed: *Borton* v. *Borton*, 16 Sim. 552. "If upon the marriage, the personal estate vests in the husband, and he is adult, the court can, of course, enforce the settlement of it; but if the property does not vest in the husband, as in the case of reversionary interests, or of personal estate settled to the separate use of the infant, the infant cannot be absolutely bound by any settlement that the court may make:" per Turner, L. J., in *Field* v. *Moore*, 7 De G. M. & G. 714. In *Williams* v. *Williams* (1 Bro. C. C. 152), where whatever should come to the wife from the mother *or otherwise* was to be settled, the Lord Chancellor said that "to bind an infant the marriage settlement must be fair and reasonable, and not tend to deprive her of anything. . . . I think 'or otherwise' relates to the mother only; if it was to extend further, I should think it unreasonable." Where fraud enters into the transaction, the rules given above may not hold good, *e. g.* in *Sharpe* v. *Foy* (L. R., 4 Ch. 35), where a settlement of a female infant's real estate was made, but was not confirmed on her coming of age, and the estate was mortgaged, the mortgagee being told that there was no settlement; he was held entitled to priority over the persons interested in the settlement. Where a settlement on a ward of court has been proposed to the court and accepted, and the marriage takes place, the parties

are not at liberty to vary it: *Cook* v. *Fryer* (1 Hare, 498); and where the marriage took place immediately after the ward came of age, the court held that its jurisdiction still existed and reformed a settlement: *Money* v. *Money*, 3 Drew. 256. In the settlement of a female ward of court provision must be made for the children of any future marriage: *Rudge* v. *Winnall*, 11 Beav. 98.

Section 2.—Voluntary Settlements.

A settlement not made in consideration of marriage or for any other valuable consideration is a voluntary settlement.

Validity.—A voluntary settlement of real or personal property is good against the settlor and volunteers claiming through him.

A. made a voluntary settlement of an estate upon his wife, and two days afterwards devised the same. The settlement was held binding: *Bale* v. *Newton*, 1 Vern. 464. And in *Dill* v. *Haddington*, (8 Cl. & F. 168), where the husband by a post-nuptial contract promised his wife 3,000*l.*, to be paid at Whitsunday or Michaelmas after his death, and the wife survived her husband, but died before she had received the 3,000*l.*, her representatives were held entitled to it. But in *Holloway* v. *Headington* (8 Sim. 324), where by a post-nuptial settlement all the wife's present and future-acquired property was settled on the wife for life, remainder to the husband, &c., the court refused to compel the husband (now living apart from the wife) to perform the trusts of this voluntary settlement. A married woman, being formerly incapable of contracting, could not bind her

property by a post-nuptial settlement (see *Lanoy* v. *Duke and Duchess of Athol*, 2 Atk. 448), except with respect to her separate estate. Settlements made by the Court of Chancery will stand: *Wheeler* v. *Caryl*, Ambl. 121. A volunteer under a voluntary bond is a creditor as much entitled to the protection of the statute of Elizabeth as a creditor for value, and a subsequent voluntary settlement will be set aside, although the volunteer debt may only be a post-obit one: *Adames* v. *Hallett*, L. R., 6 Eq. 468.

A voluntary settlement of real property or leaseholds is void as against subsequent purchasers for value, even although they have notice of the settlement.

By 27 Eliz. c. 4 (made perpetual by 39 Eliz. c. 18, s. 3), voluntary conveyances of any estate in lands, tenements, or other hereditaments, and all conveyances of such estates made with any clause of revocation at the will of the grantor, are void against subsequent purchasers for valuable consideration. Where A. by a post-nuptial settlement conveyed an estate to trustees to family uses and reserved a power to sell, the purchase-money to be paid to the trustees to the same uses, and a purchaser paid the money to A., who died insolvent, it was held, that the purchaser was not compelled to pay the money over again, although he had notice of the covenant, as the settlement was voluntary and fraudulent as against a purchaser: *Evelyn* v. *Templar*, 2 Bro. C. C. 148. See also *Gooch's case* (5 Rep. 60 a), where the purchaser also had notice of the settlement; and the following cases, where a post-nuptial settlement was held void as against a purchaser: *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84; *Buckle* v. *Mitchell*, 18 Ves. 100; *Currie* v. *Nind*, 1 Myl. & Cr. 17; *Doe* d. *Otley* v. *Manning*, 9 East, 59;

and *Butterfield* v. *Heath*, 15 Beav. 408, where the settlement was the wife's. A voluntary settlement is void also against a mortgagee: *Chapman* d. *Staverton* v. *Emery*, Cowp. 278; *Townshend* v. *Windham*, 2 Ves. sen. 1. A court of equity, however, will not assist a vendor in defeating a prior settlement made by himself (*Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, T. & R. 281); but it was held in *Peters* v. *Nicholls* (L. R., 11 Eq. 391), that the case of *Smith* v. *Garland* applies only to an unwilling purchaser, not to where the defendant wishes to complete his purchase by having a good title shown. Nor can a purchaser for value of an interest in land require a voluntary deed or agreement affecting the estate to be delivered up to him to be cancelled: *De Hoghton* v. *Money*, L. R., 1 Eq. 154. Where a voluntary settlement of lands is avoided by a subsequent sale for valuable consideration, the volunteers have no equity against the purchase-money payable to the settlor: *Daking* v. *Whimper*, 26 Beav. 568. A mere deposit of title deeds with a banker does not constitute him a purchaser, and the trustees of the settlement are entitled to recover them from him: *Kerrison* v. *Dorrien*, 9 Bing. 76. A voluntary deed may become good by subsequent dealing for value, *e. g.*, the property being sold by the grantee or settled upon his marriage: *Prodgers* v. *Langham*, 1 Sid. 133; *George* v. *Milbanke*, 9 Ves. 190.

A voluntary settlement of real or personal property made in fraud of creditors is void as against them.

By 13 Eliz. c. 5 (made perpetual by 29 Eliz. c. 5), conveyances of landed estates and of goods made for the purpose of delaying, hindering, or defrauding creditors are void as against them, unless made upon

valuable consideration and *bonâ fide* to any person not having at the time of conveyance notice of such fraud. The difference between the 13 Eliz. c. 5 and the 27 Eliz. c. 4, is that, in respect of the latter, every voluntary conveyance is void against a subsequent one for valuable consideration, though no fraud is shown and the party was not indebted at the time; while a creditor, to take advantage of the 13 Eliz. c. 5, must prove that the party was indebted at the time. "A voluntary conveyance by a person not indebted is clearly good against creditors. That constitutes the distinction between the two statutes. Fraud vitiates the transaction, but a settlement not fraudulent by a party not indebted is valid though voluntary:" per Sir Thomas Plummer, M. R., in *Battersbee* v. *Farrington*, 1 Swan. 113. But where the husband was indebted at the time of making the settlement, the trustees were not allowed to urge that it was for a valuable consideration, when it was a mere promise of the husband's father, and even that had been retracted: *Beaumont* v. *Thorpe*, 1 Ves. sen. 27: see also *Townshend* v. *Windham*, 2 Ves. sen. 1; *Walker* v. *Burrows*, 1 Atk. 93; *Barrack* v. *M'Culloch*, 3 K. & J. 110; *Holmes* v. *Penney*, 3 K. & J. 90. "The various instances in which the rule (as to what degree of indebtedness will avoid settlements) has been discussed in recent cases do not appear to lead to any more precise conclusions than this, that the intent to defeat or delay creditors will be inferred when inquiry into the circumstances of the settlor discloses that such must have been the probable result of the settlement, and that, except when an irresistible presumption of fraud is raised by the insolvency of the settlor, the court must draw its own conclusion from the circumstances of each particular case:" 3 *Davidson's Conveyancing*, 678; see also *Thompson* v. *Webster*, 4 Drew. 632, where the same question is discussed. And where a settlement standing alone

would have been held to have been fraudulent against creditors, other deeds of the same date were allowed to be received in evidence showing that they were part of the same transaction: *Harman* v. *Richards*, 10 Hare, 81. To impeach a post-nuptial settlement "a single debt," said Sir R. Arden, M.R., in *Lush* v. *Wilkinson* (5 Ves. 387), "will not do. Every man must be indebted for the common bills for his house, though he pays them every week. It must depend upon this, whether he was in insolvent circumstances at the time." But "it is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent; for, if a man does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside:" per L. C. Hardwicke, in *Stileman* v. *Ashdown*, 2 Atk. 481: see *Townsend* v. *Westacott*, 2 Beav. 340, where Lord Langdale, M.R., said, that, on the one hand, the existence of any debt, and, on the other, the state of something like insolvency, was not the test to set aside a voluntary conveyance. See also *Skarf* v. *Soalby*, 1 Mac. & G. 364. In *Kidney* v. *Coussmaker* (12 Ves. 136)—following *Montague* v. *Lord Sandwich* (12 Ves. 148, n.)—it was held that a settlement after marriage is fraudulent only as against creditors at the time of making it. See also *Holmes* v. *Penney*, 3 K. & J. 90. But if the settlement is once proved to be a deed which against any creditors cannot stand, then the property becomes assets, and is applicable to the payment of debts generally: *Ede* v. *Knowles*, 2 Y. & C., C. C. 172; *Richardson* v. *Smallwood*, Jac. 552. In *Jenkyn* v. *Vaughan* (3 Drew. 419), a post-nuptial settlement was made by a person considerably indebted at the time, and it was held that a subsequent creditor might file a bill, if any of the antecedent debts remained unsatisfied. If the remedy of a creditor is defeated by the settlement, it is no answer to show

that the settlor had sufficient money to pay his debts, if he did not actually pay them: *Spirett* v. *Willows*, 11 Jur., N. S. 70. See, however, *Freeman* v. *Pope*, L. R., 5 Ch. 538. Where a man went bankrupt nine months after the date of the settlement, it lay upon him to prove that at the time of making it he was in a solvent state: *Crossley* v. *Elworthy*, L. R., 12 Eq. 158. A provision for the payment of debts in a voluntary settlement will support it against all future creditors: *George* v. *Milbanke*, 9 Ves. 194. And where a debtor made a voluntary settlement, and at the same time made provision for raising enough money to enable him to pay all his then debts, and having raised the money, he paid some of the debts only, and afterwards became bankrupt, it was held, that the settlement was not void: *Kent* v. *Riley*, L. R., 14 Eq. 190. If the debtor pays his debts, the settlement made while he was indebted holds good: *Curtis* v. *Price*, 12 Ves. 89. Where a settlor was indebted at the date of making a post-nuptial settlement, but the debt was secured by a mortgage, the settlement was held good: *Stephens* v. *Olive*, 2 Bro. C. C. 90. Where a solicitor had not time before the marriage to prepare a settlement, and the husband told the wife it would do equally well after; but no settlement nor agreement for a settlement was made in writing before the marriage, but a settlement was executed shortly after; it was held voluntary and fraudulent against creditors: *Warden* v. *Jones*, 2 De G. & J. 76. Although the settlor is not indebted at the time of making the settlement, yet if he retains too great an interest in the thing settled, creditors will be relieved against such a settlement. Thus, in *Twyne's case* (3 Co. 80 b.), A. made a secret assignment of goods and chattels to B., but still kept in possession; this was held to be a fraudulent gift. See also the remarks of L. C. Hardwicke in *Ryall* v. *Rowles*, 1 Ves. sen. 359. So in *Russel* v.

Hammond (1 Atk. 16), where a father took back an annuity to the value of the estate comprised in the settlement, it was held tantamount to a continuance in possession, and creditors were relieved against such a settlement. And in *Taylor* v. *Jones* (2 Atk. 600), where stock was devised to husband after marriage, and he settled it upon himself for life, wife for life, and then to children; the settlement was fraudulent, as the husband retained possession. So, where A. reserved to himself a power to mortgage and charge the estate with what sums he thought fit, the settlement was held fraudulent as against creditors: *Tarback* v. *Marbury*, 2 Vern. 510. Where A. gave a guarantee to a bank for his son for 1,000*l.*, and afterwards settled leasehold property worth 200*l.* a year on his wife, when his only other property was furniture and a debt of 1,500*l.* from his son, who afterwards became bankrupt; the settlement was held fraudulent as against the bank suing on the guarantee: *Re Ridler*, *Ridler* v. *Ridler*, 22 Ch. D. 74.

Traders.—"Any settlement of property made by a trader not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor before marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee of the bankrupt appointed under this act, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor, when making such settlement, was able to pay all his debts without the aid of the property comprised in such settlement, be void against such trustee. Any covenant or contract made by a trader,

in consideration of marriage, for the future settlement upon or for his wife or children of any money or property wherein he had not at the time of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, upon his becoming bankrupt before such property or money has been actually transferred or paid pursuant to such contract or covenant, be void against the trustee appointed under this act": 32 & 33 *Vict. c.* 71, *s.* 91. In *Ware* v. *Gardner* (L. R., 7 Eq. 317), a trader settled by a post-nuptial settlement all his property, present and future, on his wife for life for her separate use, &c. Five years after he became bankrupt. The settlement was held void, though it did not appear that he was indebted at the time of its execution, except on mortgages of part of the settled property which had since been satisfied; but V.-C. James was clearly of opinion that the trader executed the deed in order to delay and hinder his creditors. This case was decided before the passing of the 32 & 33 Vict. c. 71. A voluntary settlement by a trader was held void, under the 91st section of 32 & 33 Vict. c. 71, in *Re Butterworth*, 19 Ch. D. 588.

Section 3.—Covenants and Clauses.

Independent covenants. — Independent agreements or covenants in consideration of marriage may be binding on one party, though the other party or parties have not performed their agreements or covenants: *Harvey* v. *Ashley*, 3 Atk. 610.

In the above case Lord Hardwicke says, "As soon as the marriage is had the principal contract is executed, and cannot be set aside or rescinded, the

estate and capacity of the parties are altered, the children born of the marriage are equally purchasers under both father and mother; and therefore it has been truly said that marriage contracts ought not to be rescinded, because it would affect the interests of third persons, the issue. . . . Though either the relatives of the husband or wife should fail in the performance of their part, yet the children may compel a performance; if the mother's father, for instance, hath agreed to give a portion, and the husband's father hath agreed to make a settlement, though the mother's father do not give a portion, yet the children may compel a settlement, for non-performance on one part shall be no impediment to the children's receiving the full benefit of the settlement." So in *Crofton* v. *Ormsby* (2 Sch. & Lef. 602), L. C. Redesdale said, "The failure in payment of the consideration in performance of the contract on one part never vitiates a marriage settlement. Indeed, where the performance of it is sought by the defaulting party, he cannot enforce it against the person injured by his default; but that cannot affect the children, they must have the estate. This has been over and over again decided upon marriage contract cases." And in *Lloyd* v. *Lloyd* (2 M. & C. 203), L. C. Cottenham remarked, "That with respect to marriage contracts, there can be no resistance on the part of one, because another contracting party has failed to perform his part of the agreement; and the obvious reason is, that the parties to the contract are not the only persons living having an interest in the subject, but the contract is made by them on behalf of the issue of the marriage." See also the remarks of Romilly, M. R., in *Campbell* v. *Ingilby*, 21 Beav. 567. In *Jeston* v. *Key* (L. R., 6 Ch. 610), by articles previous to marriage the wife's father covenanted to settle certain property, and the husband covenanted to insure his life and to settle the policy and other property on his wife, which, in default of

issue, were to revert to him. The marriage took place, no insurance nor settlement was made, and the wife died without issue. The husband was held entitled to prove for his life interest in his father-in-law's property. Sir G. Mellish, L. J., said: "By reason of the death of the wife without issue nobody can suffer any damage from the husband's failure to perform his part of the agreement. . . . If the husband had died leaving a wife or children, the father would have been entitled to have the settlement made good out of his estate; and now that the father is dead, the husband has a similar right to claim against his estate under his covenant." But where the rights of the issue of the marriage are not affected, the next of kin, who are "volunteers," or in a sense "volunteers," will not be allowed to claim the benefits of the contract against one of the parties who is not permitted to have the benefit of the whole of it: per V.-C. Knight-Bruce, in *Savill* v. *Savill*, 2 Colly. 727. An agreement to settle a jointure in consideration of a portion paid by the wife's father, though the portion was never paid, yet the wife shall have her jointure: *Perkins* v. *Thornton*, Ambl. 502.

The defaulting party cannot compel enforcement.—Although default of payment of the consideration on one part does not vitiate a marriage contract, the defaulting party cannot enforce the contract against the party injured by his default: *Crofton* v. *Ormsby*, 2 Sch. & Lef. 602.

In *Mitford* v. *Mitford* (9 Ves. 87), it was held that no claims can be maintained by the husband, or by any one in his right, while the terms of the contract are unfulfilled on his part: see, also, *Corsbie* v. *Free*, Cr. & Ph. 64. Where, however, the husband agreed

that his property should be settled six months after his death, and the wife's was settled on her marriage, and the husband went bankrupt, the wife had no claim as against the creditors: *Basevi* v. *Serra*, 14 Ves. 313.

Children's rights.—An obligation to make a settlement on the wife and the issue includes an obligation to make a settlement on the issue after the death of the wife: *Prebble* v. *Boghurst*, 1 Swan. 319.

See also the cases of *Harvey* v. *Ashley*, 3 Atk. 612; *Crofton* v. *Ormsby*, 2 Sch. & Lef. 602; *Lloyd* v. *Lloyd*, 2 M. & C. 192, *ante*, pp. 312, 313.

Dependent covenants.—In the case of marriage settlements, the convenants 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: per L. C. Cottenham, in *Lloyd* v. *Lloyd*, 2 M. & C. 192.

See also *Pyke* v. *Pyke* (1 Ves. sen. 376), where there was a covenant by the husband before marriage to settle lands in jointure for the wife, and other parts for the issue of the marriage, her fortune to remain in trustees till such settlement was made. The husband died insolvent without having performed his part, and it was held that the wife's fortune survived for her own benefit, and the issue were not entitled to take it from her. In the case of *Lloyd* v. *Lloyd* (*supra*), Lord Cottenham said: "If the pro-

visions are clearly expressed, and there is nothing to enable the court to put upon them a construction different from that which the words import, no doubt the words must prevail; but if the provisions and expressions be contradictory, and if there be grounds appearing upon the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words." Where the settlement of the husband was to be void, if the wife did not settle her lands in a particular way, and she and her husband joined in settling them otherwise, proceeding as if the husband's covenant were performed, it was held to be no avoidance of the settlement: *Mathews* v. *Jones*, 2 Anstr. 506. Where 4,000*l.* was secured by articles, with a proviso that if the husband did not within two years settle a jointure he should only have the interest for his life, and the wife died within the two years before the settlement was made, it was held that the husband was not entitled to the portion: *Vermuden* v. *Read*, 1 Vern. 68.

Husband's covenants.—A husband may agree to settle all or part of his property on his wife, and such covenant may affect property possessed at the time of settlement, that acquired during the coverture either in his own right or in that of his wife, or that which he leaves at his death. In the last case he has entire freedom of disposal during his life.

A settlement made by the husband will not entitle him in return to his wife's choses in action, unless there be an express agreement to that effect: *Heaton* v.

Hassel, 4 Vin. Abr. 40, pl. 11, n. A settlement made in consideration of his wife's fortune will be confined to her fortune at the time, unless expressed to comprehend future accessions: *Mitford* v. *Mitford*, 9 Ves. 87. "If a man marries, and in consideration of that marriage makes a settlement upon his wife by way of jointure, and in consideration of such portion as she is or may be entitled to, if anything comes afterwards during the coverture to the wife, he is considered as a purchaser, and shall take it. If, on the other hand, the settlement on the wife is in consideration of her present portion or fortune, without reference to what comes afterwards, and the husband does not reduce it into possession, it will survive to the wife:" *Garforth* v. *Bradley*, 2 Ves. sen. 677; see also *Druce* v. *Denison*, 6 Ves. 385; *Carr* v. *Taylor*, 10 Ves. 574. Where A. by marriage articles covenanted "to leave his wife a moiety of his personal estate at his death," this was held to include an annuity in the exchequer which he had at the time of the articles, and which he afterwards disposed of by deed in his lifetime; the Lord Chancellor saying, "For were she to have but a moiety of the estate the husband should have at his death, it would be in the power of him to defeat the articles by alienation or gift; the reason of inserting *at his death* was to explain he meant only a moiety of his estates at his death which has escaped misfortunes and losses:" *Webster* v. *Milford*, 2 Eq. Ca. Abr. 362, pl. 11, n. The effect of a covenant to settle his after-acquired property will materially depend upon the nature of the trusts declared in respect thereto. Thus, where the trusts are such as to require that the husband should be absolute owner, the covenant will not include after-acquired property in which he only takes beneficially a life interest: *St. Aubyn* v. *Humphreys*, 22 Beav. 175; *White* v. *Briggs*, 22 Beav. 176. In *Lewis* v. *Madocks* (17 Ves. 48), the husband cove-

nanted to assure to the use of himself and his wife, and the survivor of them, all such goods, personal estate and effects, that the husband should at any time during the coverture be possessed of as capital, not income, unless laid up as capital. On his death intestate, it was held that real property bought with the husband's money was chargeable in the hands of the heir with the purchase-money, and money expended for repairs, improvements, &c. Commutation money for the half-pay of a naval officer under the Pensions Commutation Act, 1871 (of which half-pay he was in receipt at the time of his marriage), was held not bound by a covenant by him contained in his marriage settlement to settle after-acquired "property" to which he "then was or should become entitled." "Become entitled" means "acquire title:" *Churchill* v. *Denny*, L. R., 20 Eq. 534. Lands were settled at marriage upon trust that if the wife survived she should receive a sum equal to the rents and profits at the time of the marriage. Husband made leases and advanced the rent:—Held, that heir-at-law was entitled to advanced rent: *Lawly* v. *Lawly*, 9 Mod. 32.

Where the settlor agrees "to leave his personal property at his death," he may expend the whole of it, but can neither lay it out in land nor leave it by will: *Cochran* v. *Graham*, 19 Ves. 63; *Fortescue* v. *Hennah*, 19 Ves. 67. A husband had covenanted to secure to his wife the benefits of the pension or annuity payable to the widows of subscribers to a certain fund to which he was a subscriber, "and failing thereof, or in case the said pension or annuity should not be available for her," to pay a yearly sum equal to the pension. At his death he had secured to her 365*l.* a year in the Bombay Military Fund. A deduction from this was first made, and finally, on her second marriage, the allowance was stopped. Held, that the first

husband's estate was bound under his covenant to make good the deficiency: *Taylor* v. *Hossack*, 5 Cl. & F. 380. Where the husband settled 15,000*l.* on himself for life, remainder to his wife and children, and gave a mortgage on his estates to secure the amount, but the estates failed to realise that sum when sold, the trustees were held entitled to retain the annual produce until the 15,000*l.* was made up: *Smith* v. *Smith*, 1 Y. & Coll. Exch. 338. Furniture was settled on the wife, and was sold and exchanged with the consent of the trustees; the new furniture bought to replace it became subject to the trusts of the deed: *Lane* v. *Grylls*, 6 L. T. (N. S.) 533.

Covenants to settle after-acquired property.—Where the covenant is entered into by the husband alone, its operation is clear; but it is difficult to reconcile the decisions as to the effect of covenants by husband and wife to settle after-acquired property of the wife. In *Re Clinton's Trust* (L. R., 13 Eq.), V.-C. Wickens says, p. 304, "The law on this subject is in a very embarrassing state, and the decisions are in fact irreconcileable. . . Such a covenant where the words are future does not affect present property. . . . . The expression, 'become entitled to,' in these and most covenants of the sort applies, I conceive, only to an acquisition of interest by the wife; and this may mean [1] an acquisition of property in which the wife had no interest at the time of marriage, and which

vests in her absolutely during the coverture; or [2], an acquisition of property which she was entitled to in remainder at the time of marriage, and which vests in possession during the coverture; or [3], an acquisition of property in which she had no interest at the time of the marriage, which vests in her by way of future title during the coverture, but does not vest in possession till it is determined. There can be no doubt that the first of these three classes is within the covenant, —the difficulty arises with regard to the other two classes." The difficulty will not arise with regard to settlements made after 1882, as a husband married after that date will not acquire by the marriage itself any rights in his wife's property. It will therefore be no longer necessary for him to covenant to settle his wife's after-acquired property; her covenant alone will be sufficient.

Where the husband alone covenants to settle any property which his wife, or he in her right, might thereafter acquire, property given afterwards for her separate use is not bound by the covenant.

See the cases of *Travers* v. *Travers*, 2 Beav. 179; *Douglas* v. *Congreve*, 6 L. J. (N. S.) Ch. 51; *Thorn-*

ton v. *Bright*, 6 L. J. (N. S.) Ch. 121; *Grey* v. *Stuart*, 30 L. J., Ch. 884. Where the recital in the settlement might by itself have been sufficient to include the wife's after-acquired separate property, yet where in the operative part of the deed the husband alone covenanted to settle, her future-acquired separate estate was held not bound: *Hammond* v. *Hammond*, 19 Beav. 29; *Young* v. *Smith*, L. R., 1 Eq. 180.

A covenant by husband and wife in an ante-nuptial settlement, to settle all the after-acquired property to which during the coverture the wife or the husband in her right shall become entitled, does not include present property, but only those future acquisitions to which the wife becomes entitled during the coverture.

See *Otter* v. *Melvill* (2 De G. & Sm. 257), where such a covenant was held not to extend to property to which, without the knowledge of the husband or the trustees, the wife was at the time of the settlement and marriage absolutely and immediately entitled. Nor to a vested estate in a moiety of a leasehold house; nor to a vested interest in certain monies, the amount of which was not ascertained and distributed till some years afterwards: *Wilton* v. *Colvin*, 3 Drew. 617. A covenant in a settlement to settle "all personal property which the wife, or the husband in her right, should at any time during the coverture become entitled to by transmission, gift, or otherwise, and whether in possession or expectancy," was held not to include a share in tontine debentures to which the wife was entitled in possession at the date of the settlement, which, though of small value then, ultimately became of great value:

In re Browne's Will, L. R., 7 Eq. 231. Where part of the wife's father's estate was overlooked and paid to the wife after her marriage (her father having died more than twenty years before), it was held not bound by a covenant settling all the money "that should during the coverture vest in her:" *Churchill* v. *Shepherd*, 33 Beav. 107. An agreement that everything that should come to the wife by the father's death should be bound by the settlement, was held not to include 6,000*l.* to which the wife was entitled under the settlement of her father and mother: *Green* v. *Ekins*, 2 Atk. 473. In *James* v. *Durant* (2 Beav. 177), the wife's property, which she possessed on marriage, consisting of stocks and shares, was held liable to a covenant by the husband and wife to settle the after-acquired property of the wife, on the ground that it became the husband's by the marriage, and consequently was after-acquired property, to which the husband, in the wife's right, became entitled; but this case was said by Sir J. Wickens, V.-C., in *Re Clinton's Trust* (L. R., 13 Eq. 295), not to be reconcileable with the more recent cases of unimpeachable authority. "During coverture" will be implied, though not expressed in a covenant, although the property included may be defined as property to come from a specified source: *Re Campbell's Policy Trusts*, 25 W. R. 268; see also *Holloway* v. *Holloway*, 25 W. R. 575.

An agreement by husband and wife in an ante-nuptial settlement, for the settlement by the husband and wife of the wife's after-acquired property, is a covenant by the wife as well as by the husband whether the wife is a minor or of full age: *Smith* v. *Lucas*, 18 Ch. D. 531.

In *Ramsden* v. *Smith* (2 Drew. 298), Kindersley, V.-C. says, "It appears to me that in effect the words 'It is hereby further agreed and declared' operate thus: they operate to show that what is comprised in the clause of which these words are the commencement is what all parties intend and agree shall be done, and whatever you find in the clause is agreed to be done by any given party, it is an agreement that that party is to do it; but the party who is to do the thing is the person who is alone bound to perform that agreement." In *Dawes* v. *Tredwell* (18 Ch. D. 354), Jessel, M. R. says, "The rule is that where you have such words as 'it is hereby agreed and declared between and by the parties to these presents' that some one will do an act or make a payment, and that someone is a party to the deed it is a covenant by him with the others and not a covenant by all of them." Thus in *Campbell* v. *Bainbridge* (L. R.; 6 Eq. 269), where it was declared and agreed, and the husband for himself, his heirs, executors and administrators, covenanted that the wife's future separate estate should be conveyed by the husband and wife to the uses of the settlement, the covenant was held by V.-C. Stuart to bind the wife's separate estate. If the wife is a minor, and the covenant is for her benefit, it is voidable only and not void: see *Smith* v. *Lucas*, 18 Ch. D. 531, *ante*, p. 303.

A covenant by husband and wife in an ante-nuptial settlement to settle all the after-acquired property of the wife includes all property given to her afterwards for her separate use, unless it is expressly excluded from the settlement, or there is attached to it a restraint upon anticipation. Such a cove-

nant does not, however, include property left to the wife with a power of appointment.

See *Milford* v. *Peile*, 17 Beav. 602 (where the covenant was that "all property which should come to her absolutely, and not bound by any trust or provision otherwise than for her absolute use"); *Tawney* v. *Ward*, 1 Beav. 563; *Willoughby* v. *Middleton*, 2 J. & H. 344; *Campbell* v. *Bainbridge*, L. R., 6 Eq. 269 (where the wife was left 5,000*l.* to her separate use, free from the control of her husband, but there was no clause against anticipation); and *In re Portadown, &c. Railway Co.*, Ir. Rep., Eq. 293 (where money appointed absolutely to the wife to her sole and separate use, under a power of appointment, was held within the covenant). In *Coventry* v. *Coventry* (9 Jur., N. S. 613), where money was assigned to trustees for the wife's separate use, and the husband and wife both covenanted that any estate real or personal coming to wife "and not being already settled for her separate use, should be settled on the like trusts;" legacies afterwards bequeathed to the wife's separate use were excluded from the covenant. The wife's separate estate may be expressly preserved from falling into the settlement by being expressly excluded by words in the settlement, or by the donor; thus, where the wife was to have "such part of the same as she may require for her separate use independent of her husband, and free in all respects from his debts and engagements," it was held that the money left was not bound by the settlement: *Re Mainwaring's Settlement*, L. R., 2 Eq. 487; see *Re Allnutt*, 22 Ch. D. 275. So where the covenant excepted "any estate or effects *already* settled to her separate use" (*Whitgreave* v. *Whitgreave*, 33 Beav. 532); or where the covenant was to settle future property not otherwise previously settled; and a legacy was left to the wife for her separate use free from her husband's debts, control and en-

gagements: *Kane* v. *Kane*, 16 Ch. D. 207. Where a married woman was entitled under a bequest to her for life, remainder to her child or children, and if she died without issue to her personal representatives; and by a post-nuptial settlement she was entitled for her separate use to all property that should devolve on her during the joint lives of herself and her husband; it was held, that there being no children, the subject of this bequest was not included in the covenant, and that the husband, as general administrator of the wife, was entitled in exclusion of the executor of her will relating to her separate estate: *Re Wyndham's Trusts*, L. R., 1 Eq. 290. A covenant by husband and wife to settle after-acquired property of the wife does not include property to which she subsequently becomes entitled for her separate use as to which there is a restraint upon anticipation: *Brooks* v. *Keith*, 1 Dr. & Sm. 462; *Smith* v. *Lucas*, 18 Ch. D. 531.

Property left to the wife with a power of appointment does not fall within a covenant binding all sums to which she shall become entitled; and where all sums of 500*l.* and upwards were to be settled, and the wife on the same day appointed eleven several sums of 499*l.* 19*s.* 11*d.* to herself, the whole amount was held free from the settlement (*Bower* v. *Smith*, L. R., 11 Eq. 279); but if the wife exercises the power and appoints to herself, and the amount appointed comes within the limits of the settlement, it is bound: *Ewart* v. *Ewart*, 11 Hare, 276. Property appointed to a wife after the marriage in exercise of a power in existence at the time of marriage, and to which property she would have been entitled in default of appointment, was held not within a covenant to settle property which the wife was entitled to at the date of the settlement, or should become entitled to during coverture: *Sweetapple* v. *Horlock*, 11 Ch. D. 745.

Property (real and personal) devised and bequeathed to the husband and wife, their heirs, exe-

was held not subject to a covenant to settle property which the husband or wife or either of them in right of the wife should at any time or times during the said intended coverture become seised or possessed of (*Re Pedder's Settlement Trusts*, L. R., 10 Eq. 585); and where property to which the wife should at any time or times during the said intended coverture become beneficially entitled in possession or reversion derivable directly or indirectly from A. was to be settled, and at the date of the settlement the intended wife was entitled under A.'s will to a fund, subject to the life interest of a person who outlived the wife; it was held that the fund was not subject to the covenant: *Re Jones's Will*, 2 Ch. D. 362 (where *Re Viant's Settlement Trusts*, L. R., 18 Eq. 436, was not followed). And the interest remaining contingent during the whole of the coverture was held not bound by a like covenant in *Dering* v. *Kynaston* (L. R., 6 Eq. 210); and *Atcherley* v. *Du Moulin* (2 K. & J. 186). A contingent reversionary interest which became vested during coverture, but which did not fall into possession till after the wife's death, was held not to be within a covenant of the husband's to settle whatever should come during coverture, whether in possession, reversion, remainder, contingency, or expectancy: *Re Michell's Trusts*, 6 Ch. D. 618; 9 Ch. D. 5. *Grafftey* v. *Humpage* (1 Beav. 46), and *Re Hughes' Trusts* (4 Giff. 432), must now be considered to be of doubtful authority: see V.-C. Wickens' remarks in *Re Clinton's Trusts*, L. R., 13 Eq. 305. A marriage settlement contained a joint covenant by husband and wife to settle "all property which the wife, or the husband in her right, might hereafter become entitled to, either under the will or intestacy of, or by gift from, the wife's father, or any other person;" the husband died and left all his property to his wife; the wife's father died before the husband, and by events which happened after the father's

death a sum of 100*l.* previously reversionary devolved on the widow; it was held, that the 100*l.*, but not the property left by the husband, was subject to the covenant: *Dickinson* v. *Dillwyn*, L. R., 8 Eq. 546; see also *Carter* v. *Carter*, L. R., 8 Eq. 551; *In re Edwards*, L. R., 9 Ch. 97; and *Howell* v. *Howell*, 4 L. J. (N. S.) Ch. 242, where the wife's after-acquired property was limited to that which she acquired during the coverture, and therefore not that coming to her under her husband's will.

The terms of the covenant may be such as to include reversionary interests, although they do not fall into possession during the coverture.

For example, where the words used: "if she is or if she becomes entitled for any interest or estate whatsoever:" dictum of Turner, L. J., in *Mackenzie's Settlement*, L. R., 2 Ch. 348; followed by Malins, V.-C., in *Agar* v. *George*, 2 Ch. D. 706. See also *Butcher* v. *Butcher* (14 Beav. 222), *Re Jackson's Will* (13 Ch. D. 189), *Cornmell* v. *Keith* (3 Ch. D. 767), and *Lee* v. *Lee* (4 Ch. D. 175), where the covenant specifically included reversionary property. On the marriage of a woman (A.) who was entitled in reversion to a share of real and personal property, a settlement was executed by which the husband (B.) covenanted with the trustee (the wife's brother), "that if at any time during A.'s life any real or personal estate should be given or devised, descend or devolve, bequeathed or come to A. or B. in her right," it should be settled "to the intent that the same might be and remain a separate, personal, and inalienable provision for A. during the intended coverture," &c. Held, that the reversionary property was included in this covenant, and that it was inalienable during the coverture; a

sale of it to the trustee was set aside; and advances which had been made to or for A. were to be a charge on A.'s remainder expectant on her coverture ceasing: *Spring* v. *Pride*, 12 W. R. 510; affirmed 10 Jur., N. S. 646. The decision is based upon the peculiar words of the covenant, and that its object and purpose was to secure the property of the lady for the purposes of the settlement.

Where a settlement purports to assign or convey non-existent property, the assignment is equivalent to an agreement to assign or convey such property when it comes into existence. An agreement or covenant to settle specific non-existent property will have the effect of vesting the beneficial interest therein in the parties interested under the settlement when the property subsequently comes into existence.

It is doubtful whether a discharge in bankruptcy would release a husband from a covenant contained in a marriage settlement to settle specific after-acquired property which vests in him after obtaining his discharge. The better opinion is that while his personal liability upon the covenant would no longer exist, the covenant would bind the property when it came into existence, and that he would simply hold it as trustee upon the trusts of the settlement: see *Collyer* v. *Isaacs*, 19 Ch. D. 342, and the remarks of Jessel, M. R., on pp. 351, 352.

Covenant to insure life.—Where the settlor covenants to insure his life, and fails to do

so; or insures and fails to pay the premiums; damages are recoverable against him.

In *Re Arthur*, *Arthur* v. *Wynne* (14 Ch. D. 603), the husband covenanted to insure his life within two years, and assign the policy to the trustees of the settlement, he being then in good health; he took no steps to insure till one day before the expiration of the two years, and was then so ill that he could not insure; on his death two months later, it was held that the trustees could prove against his estate for damages; and in *Re Miller*, *Ex parte Wardley* (6 Ch. D. 790), X. covenanted with the trustees to keep up certain policies of insurance on his life; he afterwards became bankrupt, and the trustees kept up the policies out of other funds applicable (*inter alia*) for that purpose until his death; they proved against X.'s estate for the estimated value of the covenant, but before the amount was paid X. died; it was held, that the trustees were entitled to receive from his estate the actual amount of the premiums they had paid, although the bonuses in respect of the policies exceeded the amount of such premiums. But where trustees had a discretion to continue or vary investments, and the estate comprised a policy of insurance which the tenant for life kept up, and it fell in after her death, her estate was held not entitled to be reimbursed to the amount of the premiums she had paid: *Re Waugh's Trusts*, 46 L. J., Ch. 629.

Covenants by strangers.—If a stranger covenants to settle property on the husband and wife, he is as much bound by the covenant as are the husband and wife.

Where a father, being entitled to a sum of money on mortgage, covenanted on the marriage of his

daughter that a certain specific part of it should be transferred to the trustees of the marriage settlement within three months after his death, and covenanted to pay interest in the meantime, such covenant was held to amount to an actual assignment: *Brownlow* v. *Earl of Meath*, 2 Ir. Eq. R. 383. But where the wife's father covenanted to give, leave, or bequeath unto the wife an equal share with his other children of all the real and personal estate of which he should die seised or possessed, and the wife died before her father, who left his property to his widow and other daughter; the husband was held to have, under the circumstances, no good ground of action against the executor of the father: *Jones* v. *How*, 7 Hare, 267. But where a father on the marriage covenanted to give and bequeath by will to his son 2,500*l.*, or if the son should die before his father leaving his wife, then to the wife; and the father went bankrupt; it was held that the covenant was not to be construed as affecting only assets applicable to payment of legacies, but created a specialty debt against his estate: *Graham* v. *Wickham*, 1 De G. J. & S. 474.

Performance of covenants.—Where there is a covenant in a marriage settlement to settle property upon the trusts of the settlement, or to confer certain benefits upon any of the parties to the settlement, and the covenantor does something which may be regarded as a performance in full or in part of such covenant, it will be considered to have been done in pursuance of the covenant: *Blandy* v. *Widmore*, 1 P. W. 324; *Lechmere* v.

Earl of Carlisle, 3 P. W. 227; *Davys* v. *Howard*, 6 Bro. P. C. 370.

Thus a covenant by a husband to leave his wife 620*l.* was held to be performed by her receiving a larger sum, upon the death of her husband intestate, as her share under the Statute of Distributions: *Blandy* v. *Widmore*, *supra*. A covenant by a father to settle an estate of 200*l.* annual value upon a son was held to be performed by lands descending upon him of that value: *Wilcocks* v. *Wilcocks*, 2 Vern. 558. A covenant by husband to pay the trustees of the settlement certain sums of money to be laid out by them in the purchase of lands, was held to be performed by a purchase by the husband himself of lands for a sum slightly larger than the sums agreed to be paid: *Sowdon* v. *Sowdon*, 1 Bro. C. C. 582. So where A. covenanted to convey and settle lands, or a rent-charge issuing thereout, of the yearly value of 40*l.*, on trustees, to the use of himself for life, and afterwards to his wife for life, in bar of dower, remainder to their heirs; and though A. was not possessed at the time of marriage of any lands, yet he afterwards purchased freeholds of the yearly value of 49*l.* but made no settlement, the covenant was held to be a lien on the lands, and the heir-at-law was not allowed to claim the lands, and also to have the settlement made good out of the personal property: *Deacon* v. *Smith*, 3 Atk. 323. *Semble*, that if a person covenants to grant an annuity out of freehold lands, and afterwards purchases such, they will be bound by the covenant: *Wellesley* v. *Wellesley*, 4 Myl. & Cr. 561. So where by settlement A. covenanted to settle an estate on his wife, but did not so settle it, and subsequently exchanged it for another estate and 1,050*l.*, this second estate and the 1,050*l.* were held bound by the covenant, and A. having died insolvent, the 1,050*l.* was held to be a debt by specialty under the

covenant: *Powdrell* v. *Jones*, 2 Sm. & G. 335. But where A. covenanted to secure to his wife an annuity of 1,000*l.* a year issuing out of lands for her jointure and in bar of dower; and by his will left his wife certain parts of his real and personal estate of considerable value; this was not considered as a satisfaction of the annuity, for to make a devise or bequest a satisfaction for a collateral demand, or performance of a prior contract, it must be *ejusdem generis*, and not land for money, or money for land; or must at least be of such certain and known value and estimation, and so far of the same nature of the thing to be satisfied therewith, as to appear indisputably to be equivalent or superior, not only in gross value, but in annual income, to the debt or demand, or the thing to be performed: *Broughton* v. *Errington*, 7 Bro. P. C. 461. So, in *Barret* v. *Beckford* (1 Ves. sen. 521), L. C. Hardwicke said, "It is a general rule of satisfaction, that the thing to be considered as a satisfaction should be exactly of the same nature and equally certain." Where husband covenanted to give his wife by deed or will 1,000*l.* at his death if she survived him, but died intestate; she was held not entitled to her distributive share in addition to her claim under the covenant: *Lee* v. *D'Aranda*, 1 Ves. sen. 1; see also *Garthshore* v. *Chalie*, 10 Ves. 1. Where A. covenanted to settle 2,000*l.* in trust as B. should appoint, and in default for her separate use for life, then to the husband for life, remainder to her children, and in default for the husband absolutely, and A. paid 1,000*l.* to the trustees of the settlement, and bequeathed 2,800*l.* to B. for her separate use for life without power of anticipation, with remainder to her children; this was held not to be a performance of the covenant: *Tussaud* v. *Tussaud*, 9 Ch. D. 363. The purchase of houses in London, and of lands of the tenure of borough-English, was held not to be a due execution of a covenant to pur-

chase or settle "lands of inheritance:" *Pinnel* v. *Hallet*, 2 Ves. sen. 276. Nor would a purchase of copyholds be generally considered as a performance of a covenant to purchase and settle lands: *Att-Gen.* v. *Whorwood*, 1 Ves. sen. 541; but see *Wilks* v. *Wilks*, 5 Vin. Ab. 293, pl. 39. Where a man describes himself as entitled to land in remainder, and promises when it becomes vested he will settle it, and afterwards he becomes possessed of it by a different title, he is not bound to settle it: *Smith* v. *Osborne*, 6 H. L. Cases, 375. Where A. granted his nephew's wife an annuity on her marriage, and charged it on his land, and after A.'s death a decree was pronounced declaring that he was only entitled to a life interest in such lands; it was held that the wife was entitled to proceed against the personal estate for satisfaction of the annuity: *Monypenny* v. *Monypenny*, 9 H. L. Cases, 114. Where a father covenanted to settle 5,000*l.* on his daughter, whereof 1,000*l.* was to be paid to the husband, and 4,000*l.* was to be a provision for the daughter, her husband, and their issue, and to be paid in the father's lifetime or within two years after his death; it was held that the gift of residue to the daughter by her will made prior to the settlement was adeemed to the extent of the 4,000*l.*; but that there was no ademption as to the 1,000*l.* which had been paid to the husband (*Cooper* v. *Macdonald*, L. R., 16 Eq. 258); and where C. W. covenanted at her decease to leave 1,000*l.* to be settled upon L. for life, then for her husband for life, and with the usual trusts for her children, and the will settled the 1,000*l.* on similar trusts, but omitted the husband's life interest; it was held to be a case of satisfaction, and that neither L. nor her children took anything additional under the will, unless L.'s husband survived her: *Mayd* v. *Field*, 3 Ch. D. 587. Lord W. on the marriage of his son covenanted that he would, by his will, direct his executors to invest 10,000*l.* in trust for his son's wife for life for her separate use,

with remainder to her children. By his will Lord W. directed his trustees to pay an annuity of 2,000*l.* for five years to his son's wife for her separate use, and at the end of five years to his son's wife and children upon the trusts of their marriage settlement. It was held that the sum of 10,000*l.* given by the will was not a satisfaction of the sum payable under the covenant; but that the annuity of 2,000*l.* was a satisfaction of the interest of the sum payable under the covenant, and must abate to that extent: *Bethell* v. *Abraham*, 3 Ch. D. 590, n.

The question whether a gift in a will is a satisfaction of a portion given in a settlement is one of intention. Where the settlement precedes the will the intention to satisfy a covenant must be distinctly expressed or clearly indicated. Great differences in the sums given, and in the limitations of the trust on which they are given, will be taken as indications that a gift in the will was not meant in satisfaction of the covenant. Where, too, the gift by the will is not to the child, but to trustees, to pay debts and legacies, and then to pay the residue to the child, the form of the gift will be taken as an indication that the debt due under the settlement must be satisfied before the residue is declared. There is a marked distinction between "ademption" and "satisfaction." In the former the benefit is given by a revocable instrument, and in any future gift the giver may declare his pleasure as to the second gift being taken in substitution for the first. In the case of the gift by settlement, followed by a will, the persons who benefit have the right to elect which of the gifts they will take—a right which does not arise in the other case: see the judgments of Lords Chelmsford (L. C.), Cranworth, Romilly and Colonsay in *Chichester* (*Lord*) v. *Coventry*, L. R., 2 E. & Ir. Ap. 71. See also, *In re Tussaud's Estate*, 9 Ch. D. 363; and *Paget* v. *Grenfell*, L. R., 6 Eq. 7; where it was held that a gift in the will was not a satisfaction of a covenant in the settlement:

and *Campbell* v. *Campbell*, L. R., 1 Eq. 383; and *Russell* v. *St. Aubyn*, 2 Ch. D. 398, where the gift was held to be a satisfaction. See also *McCarogher* v. *Whieldon*, L. R., 3 Eq. 236.

Election.—Where the benefits covenanted to be settled are not given in identically the same way as promised, the persons interested may be put to their election as to whether they will hold to the covenant, or take the other advantages given instead.

Thus, where wife's father covenanted to leave one moiety of his estate for the husband to take first life interest, and for the wife to take second, and by his will he left a moiety with first life interest to the wife, and second to the husband, it was held a case of election: *Russell* v. *St. Aubyn*, 2 Ch. D. 398. And where A., on his marriage, promised that he would by his will, or some good assurance, grant to his wife 1,000*l.*, and died without having given it, his widow was held not entitled to the 1,000*l.* and also to her distributive share of A.'s personal estate: *Lee* v. *Cox*, 3 Atk. 419. As to where the wife received a provision by way of marriage settlement, in lieu of dower or thirds, and afterwards claimed a third of the undisposed residue of her husband's estate, see *Druce* v. *Denison*, 6 Ves. 385; *Colleton* v. *Garth*, 6 Sim. 19. Where A. covenanted by marriage articles either to settle lands of the value of 400*l.* a year upon himself for life, then to his wife for life, and afterwards to the children, or that the wife should have 3,000*l.* in money in lieu of dower or thirds; and the wife elected to have the 3,000*l.*, but the children insisted on a settlement; a settlement was decreed: *Hancock* v. *Hancock*, 2 Vern. 605.

Validity of Clauses in Settlements.—A husband cannot settle his own property so as to secure a provision thereout for his wife in the event only of his bankruptcy; nor can he give a bond to pay a sum on the happening of that event, except to the extent of the property which he obtained with his wife on marriage: *Lester* v. *Garland*, 5 Sim. 205; *Higginson* v. *Kelly*, 1 Ball & B. 252; *Ex parte Cooke*, 8 Ves. 353.

In *Higinbotham* v. *Holme* (19 Ves. 88), A., on his marriage, settled his freeholds and leaseholds to the use of himself for life, unless he should embark in trade and in the life of his wife become bankrupt, and from his decease or bankruptcy to secure an annuity for his wife, and subject thereto for his heir, executors, &c. On his marriage A. had no intention of going into trade, but afterwards did so, and became bankrupt. The settlement was held void as against his creditors. But where there was a settlement of the husband's estate, on his marriage, in trust to pay the rents, &c., "unto or for the maintenance and support of the husband, wife, and children, or otherwise, if the trustees should think proper to permit the same to be received by the husband during his life, without power to assign, mortgage, charge, &c. the same," it was held, that a trust had been created for the maintenance and support of the wife and children out of the property during the husband's life, and that upon his bankruptcy his assignee in bankruptcy took everything, subject to a proper provision for the wife and children: *Page* v. *Way*, 3 Beav. 20. Where a bond is to be paid only in the event of the wife surviving the husband, or on his

bankruptcy, and the husband becomes bankrupt in the lifetime of his wife, her trustees cannot prove for the amount of the bond: *Ex parte Murphy*, 1 Sch. & Lef. 44. See also *Studdy* v. *Tingcombe*, 5 Ves. 695. And in *Ex parte Cooke* (8 Ves. 353), it was held, that a bond by a husband to pay a sum in the event of his bankruptcy or insolvency was void; yet as the husband had received all his wife's fortune, and had not made a settlement as agreed, and had executed a bond in the penal sum of 10,000*l.* on the condition of paying 5,000*l.* at the end of six months from the date of the bond, proof was admitted under his bankruptcy, not only for the amount of the wife's property agreed to be settled, but for the 5,000*l.*, or so much of the 5,000*l.* as the value of the property of the wife would extend to beyond the sum agreed to be settled. In *Ex parte Shute* (3 Dea. & Ch. 1), a husband obtained 150*l.*, his wife's marriage portion, by executing a bond for 1,200*l.* for self till death or bankruptcy, then for wife, &c.; and on his bankruptcy, the trustees were allowed to prove for the 1,200*l.*, to be invested in stock, for payment during husband's life of interest first on the 150*l.* and then the remainder of the interest to creditors; after the husband's death the 1,200*l.* to go upon the trusts of the bond; see also *Ex parte Hodgson*, 19 Ves. 206. Where a bankrupt has an interest in a fund settled on marriage, and is also liable to contribute thereto, his interest may be made available in satisfaction of his covenant: *Ex parte Gonne, Re March*, 3 Mont. & Ayr. 166. See also *Ex parte Smith* (2 Mont. & Ayr. 536), where the dividends on the amount settled were to be divided between the husband and wife, and the amount not having been wholly settled before the husband's bankruptcy, the trustees were allowed to accumulate the share of the dividends payable to the bankrupt, until the sum which he had agreed to settle was made up. A sum covenanted by the husband

to be paid when demanded by the trustees on the request of the wife is, if demanded before his bankruptcy, provable: *Ex parte Brenchley*, 2 G. & J. 174; *Ex parte Granger*, 10 Ves. 349. But where a husband agreed to repay 1,000*l.*, his wife's fortune, on his death or bankruptcy, and before the latter event gave a mortgage to secure the amount, it was held void as a *nudum pactum*: *Ex parte Robinson*, 1 Moll. 291. Furniture may be settled by a husband on a wife for her separate use, though it remains in the house where he resides with his wife: *Simmons* v. *Edwards*, 16 M. & W. 838. The bonuses on a life insurance, settled on a wife, &c., follow the policy, and are not assets for creditors: *Parkes* v. *Bott*, 9 Sim. 388. In *Manning* v. *Chambers* (16 L. J. (N. S.), Ch. 245), A. settled property on himself for life, then for B. (his son) for life, "or until he shall become bankrupt, and upon his becoming a bankrupt," &c., then for C. (B.'s wife) for her separate use. B. became bankrupt before the deed was signed. Held, that on A.'s death, C. was entitled.

Property not belonging to the husband may be settled on him for his life or until his bankruptcy, but the settlement must clearly show that his interest is to determine absolutely on the happening of either event: *Lockyer* v. *Savage*, 2 Stra. 947.

Thus the wife's property may be so settled: *Ibid.* See also *Ex parte Hinton* (14 Ves. 598), where part of the wife's money having been lent to the husband upon his bond under a power for that purpose, was held provable under the commission of the husband's bankruptcy. In *Stephens* v. *James* (4 Sim. 499), the husband's interest was to cease if he "should do any

act to charge the annuity," and the selling of it to the trustee was held a termination of it. And in *Roffey* v. *Bent* (L. R., 3 Eq. 759), dividends were to be paid to B. for his life, or until he should assign or encumber the same or until he should do or suffer any act whereby the dividends should become payable to another person; and a judgment creditor of B. having obtained a charging order against the trust fund, it was held that a forfeiture had taken place: see also *Montefiore* v. *Behrens*, L. R., 1 Eq. 171; *Oldham* v. *Oldham*, L. R., 3 Eq. 404. But where the wife's money was to be lent to the husband on bond at 5 per cent., and no interest paid till he should decline trade, then the interest to be paid him for life, remainder to the wife &c., and the husband became bankrupt, his assignees were held entitled to the interest of the dividends during the life of the husband: *Stratton* v. *Hale*, 2 Bro. C. C. 490. Where a woman made a voluntary settlement, and transferred stock upon trust in case of her ever marrying, for her husband and children, and afterwards became insolvent, the court dismissed the bill by the assignees to have the fund transferred, although the woman was still single: *Kirk* v. *Cureton*, 1 C. P. C. 191. Where there is a clause in a marriage settlement to advance money to the husband, that clause becomes inapplicable on his bankruptcy: *Boss* v. *Godsall*, 1 Y. & Coll. C. C. 617.

Section 4.—Construction.

Marriage articles.—While executed trusts in marriage articles receive the same construction with regard to limitations affecting them as similar limitations of legal estates, executory trusts will not be construed with

legal strictness, but with regard to the intention of the parties: *Lecky* v. *Knox*, 1 Ball & B. 215.

In marriage articles this intention is presumed from the nature of the instrument to be in favour of the issue. Thus if articles are so worded that if construed strictly, either the husband or wife would take an estate tail, a strict settlement will be decreed, *i. e.* the estate will be limited to the husband and wife for life, with remainder to the issue of the marriage in tail as purchasers: *Trevor* v. *Trevor*, 1 P. Wms. 622; affirmed, 5 Bro. P. C. 122; *Nandike* v. *Wilkes*, Gilb. Eq. Rep. 114. Sometimes words are supplied by the court. Thus articles provided that the wife's portion was to be laid out in land, to be settled on the husband and wife and the heirs of their bodies, and if not laid out in land during their joint lives, and the wife should die first, that the money should go to the wife's brother and sister. The wife died first leaving issue before the money was thus expended; but the court supplied the words "if the wife die without issue," and excluded the brother and sister: *Kentish* v. *Newman*, 1 P. Wms. 234; see also *McGuire* v. *Scully*, Beat. 378. Where the words in articles would, if construed strictly, create a joint tenancy among the children of the marriage, equity will decree a settlement upon them as tenants in common, either with provisions for limiting over the shares of any who die under age without issue, or for making the interests of the children contingent upon their attaining twenty-one if sons, or, if daughters, attaining that age or marrying: *Young* v. *Macintosh*, 13 Sim. 445. Where, in articles, a person has agreed or covenanted to settle chattels upon similar trusts to real estate in strict settlement, the court will order clauses to be inserted

in the settlement preventing the chattels vesting until the tenant in tail shall attain the age of twenty-one years, or die under that age leaving issue: *Duke of Newcastle* v. *Countess of Lincoln*, 3 Ves. 387. Where articles direct personal property of the wife to be settled upon trust for the husband and wife during their joint lives, they will be carried into effect by giving the wife the first life interest to her separate use: *Cogan* v. *Duffield*, 2 Ch. D. 44. But where articles are so framed that the husband and wife have jointly the power of defeating the provision for the issue, or where they show that the parties themselves knew and made a distinction between limitations in strict settlement, and limitations leaving it in the power of one of the parents to bar the issue, a strict settlement will not be decreed: *Howel* v. *Howel*, 2 Ves. sen. 358, 359. Executory trusts in post-nuptial articles will be construed like executory trusts in wills (*Dillon* v. *Blake*, 16 Ir. Ch. Rep. 24); as also will executory trusts in post-nuptial settlements not made in pursuance of ante-nuptial articles: *Rochford* v. *Fitzmaurice*, 1 Con. & Law. 158. In both these cases the intention is not presumed to be in favour of issue, but is to be inferred from the language of the instrument: see *Glenorchy* v. *Bosville*, 1 W. & T. L. C. in Equity, 1, *and the valuable notes thereto for other cases on this subject.*

Usual powers and provisions.—Where articles contain a clause that the settlement shall include the usual powers and provisions, such a clause will authorize the insertion in the settlement of powers of leasing, including the granting of mining and building leases; powers of partition; and provisions for the maintenance, education, and advancement of the children, or issue, during their minority: *Hill* v. *Hill*, 6 Sim. 145. See also *Turner* v. *Sargent* (17 Beav. 515), where the settlement was to be made in pur-

suance of a will. In *Hill* v. *Hill* (6 Sim. 145), Sir J. Shadwell, V.-C., said: "There is a palpable distinction between inserting in a settlement powers for the management and better enjoyment of the settled estates which are beneficial to all parties, and powers which confer personal privileges on particular parties, such as powers to jointure, to raise money for any particular purpose, &c. Powers of leasing, of sale and exchange, of partition, of leasing mines, granting building leases, are powers for the general management and better enjoyment of the estate, and such powers are beneficial to all parties;" and in *Peake* v. *Penlington* (2 V. & B. 311), the clause was held to include power of "selling, exchanging and investing in new purchases," and in *Sampayo* v. *Gould* (12 Sim. 426), the powers of "change of securities and new trustees." A lease of land, without mentioning mines, or "with the mines therein," will entitle the lessee to work opened but not unopened mines. If there be no opened mines, a lease "with all mines therein" will enable the lessee to open mines: *Clegg* v. *Rowland*, L. R., 2 Eq. 160. See also as to mines, *Vivian* v. *Jegon* (L. R., 3 E. & Ir. App. 285), and as to leasing of lands, *Earl of Shrewsbury* v. *Keightley* (L. R., 2 C. P. 130); *Simpson* v. *Bathurst*, *Shepherd* v. *Bathurst* (L. R., 5 Ch. 193); and *In re Shaw's Trusts* (L. R., 12 Eq. 124), where the court refused to allow trustees to grant leases of real estate for a term not exceeding ten years. Where trustees have a power to purchase real estate, and to hold the realty as personalty, they may also sell it: *Tait* v. *Lathbury*, L. R., 1 Eq. 174. Where trustees had a power of sale of real estate, and were to invest the proceeds in lands or in government or real security, which, when purchased, should be liable to the same trusts, estate, and limitations as the trust premises and the proceeds of the sale were invested in a mortgage, they were held to be personalty: *Atwell* v.

Atwell, L. R., 13 Eq. 23. See also as to powers of sale and exchange, *Webb* v. *Sadler* L. R., 8 Ch. 419, and *In re Frith and Osborne*, 3 Ch. D. 618.

In the absence of words indicating an intention to introduce a hotchpot clause, the court, on executing marriage articles, refused to insert it: *Lees* v. *Lees*, Ir. R., 5 Eq. 549.

Marriage settlements.—The court cannot take into consideration the hardship of any individual case, but must judge upon settlements as they find them, and as the parties have thought fit to make them. It would be to no purpose to make deeds, if the court should construe them according to what may be the convenience or inconvenience of the parties. The safe rule of construction in general is, to interpret the words according to their plain natural import, unless by so doing some manifest absurdity or inconvenience would follow, which is sufficient to satisfy the judge that the person using the words must have used them in some sense different from what would be their ordinary meaning. The strict meaning of the words used will also be departed from where long usage and the canons of the court force the court to construe the words otherwise: *Cotton* v. *Cotton*, cited 3 Y. & Coll. Exch. 149; *Smyth* v. *Foley*, ibid. 142; *Scarisbrick* v. *Lord Skelmersdale*,

4 Y. & Coll. Exch. 108; and *Walmsley* v. *Vaughan*, 1 De G. & J. 124.

The following cases will serve as illustrations of the effect of certain words in creating certain estates:—A. settled all his real and personal property on his wife and heirs of her body by him begotten, obliging her to give each of their children 1,000*l.* a piece on attaining twenty-one, and to divide the residue equally amongst them at her death; this gave the wife an estate for life only, with remainder in fee to the children as tenants in common: *Louther* v. *Westmoreland*, 1 Cox, 64. Where a lady was seised of lands *ex parte maternâ*, and they were settled, with an ultimate limitation, to the persons who would on her death become entitled thereto in case she had died intestate and without having been married, it was held that the settlement did not interrupt the line of descent, and that the persons entitled under this ultimate limitation were her heirs *ex parte maternâ*, and not her heirs general: *Heywood* v. *Heywood*, 11 Jur., N. S. 633. Gavelkind land was limited by settlement to X. for life, with remainder to the right heirs of A. (who was dead) and B. (who was living) as tenants in common; it was held that B. took a vested remainder in fee; and that on her death in X.'s lifetime it descended on her gavelkind heirs, and not on her heirs-at-law: *Hawes* v. *Hawes*, 14 Ch. D. 614. Land was conveyed to a trustee, his heirs and assigns, to certain uses, and after the determination of those uses to the use of the trustee, his heir and assigns, upon trust to receive the rents and profits and pay them to A., a married woman, for her separate use, and after the determination of that estate to stand seised of the said lands to such uses and upon such trusts as A. should by will appoint, and in default of appointment, to the uses of the heirs and assigns of A.; it was held, that the trustee took

the legal estate in fee, and that A. took an equitable estate for life, with an equitable remainder to her heirs and assigns, which two estates united, according to the rule in *Shelley's case*, and gave her the equitable estate in fee: *Cooper* v. *Kynock*, L. R., 7 Ch. 398.

Time of vesting.—If the settlement clearly and unequivocally makes the right of a child to a provision depend upon his surviving both or either of the parents, a court of equity has no authority to control such disposition. If the settlement is incorrectly or ambiguously expressed—if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest—the court leans strongly towards the construction which gives a vested interest to a child, when that child stands in need of a provision; usually as to sons at the age of twenty-one, and as to daughters at that age or marriage: per Sir William Grant, M. R., in *Howgrave* v. *Cartier*, 3 Ves. & B. 85.

See, also, Lord Cottenham's remarks in *Whatford* v. *Moore* (3 My. & Cr. 270): "The only reasonable course is to adopt the rule which has been generally recognised, of leaning in favour of a construction which includes all the children, if the instrument affords fair ground for doing so; but if not, to give effect to the plain meaning of the words used." See,

also, *Woodcock* v. *Duke of Dorset* (3 Bro. C. C. 569), *Hope* v. *Lord Clifden* (6 Ves. 499), and *Powis* v. *Burdett* (9 Ves. 428), where it was held that children need not outlive their parents to become entitled. "If the words," said Knight Bruce, L. J., in *Currie* v. *Larkins* (12 W. R. 516, affirming 10 Jur., N. S. 8), "are absolutely compulsory, they must be submitted to, but not otherwise." In this case the son, who died intestate in the lifetime of his father, was held entitled under a clause, "and for and after the death of the survivor of the husband and wife, upon trust for the benefit of all and every the child or children of the said intended marriage, to be divided between and amongst them, share and share alike, and to be paid or assigned to such child or children respectively at their respective age or ages of twenty-one years, or day or days of marriage . . . . and should become a vested and transmissible interest . . . . after the decease of the survivor of the husband and wife." See, also, *Re Crosse's Will* (32 L. J., N. S., Ch. 346), where Kindersley, V.-C., said, "A settlement being in contemplation of marriage, a general intention to provide for the husband, wife, and children, is assumed *à priori*, and there is no reason for making any difference as between children . . . . no reason for making a distinction in benefiting the objects." Where the fund was to go to the child or children of the marriage equally, "to be a vested interest and paid to such child or children at twenty-one," with maintenance and accumulation clauses, but no survivorship or accruer clause on a child dying under twenty-one; and if there were no issue the fund was to revert to the settlor; and there were several children, one of whom died under twenty-one; it was held, that the whole fund vested in the children who attained twenty-one. In *Re Colley's Trusts* (L. R., 1 Eq. 496), and in *Re Orlebar's Settlement Trusts* (L. R.,

20 Eq. 711), all the children who attained twenty-one were held entitled. In the latter case, the fund in case of any child surviving E. H., the mother, was to be transferred unto "all and every the child or children of the said E. H., and the issue of such of the said children as might be then dead." But where property was settled upon trust for the husband for life, wife for life, and after the death of the survivor, if they should leave any issue who being daughters should marry or attain twenty-one, or being sons attain twenty-one, to transfer the fund unto and equally among all such issue when they should attain twenty-one, or be married if a daughter or daughters with consent, and if any such issue should die before they should actually become entitled to or receive their portion leaving issue, then such issue should take their father's or mother's share; and there was a gift over if the husband or wife should die without issue, &c.; two children died under twenty-one, a third died a bachelor over twenty-one, and the fourth child, who alone survived his parents, was held entitled to the whole fund; Sir W. M. James, L. J., saying "The instrument as it stands seems to my mind fairly and plainly to carry into effect the intention of the settlor, which I take to have been that no child of the marriage who died in the lifetime of the parents should take a share, but that if he left children, his children should take in his stead: *Jeyes* v. *Savage*, L. R., 10 Ch. 555. The vesting of the shares of children on their birth is not negatived by a gift over on the following contingency, "in case the said J. shall have no child or children on the body of E. by him begotten, or having any such child or children, all of them shall happen to die before they become entitled to their respective shares;" since "become entitled" would mean "become entitled to payment:" *Jopp* v. *Wood*, 11 Jur., N. S. 833. Where property was to be divided amongst all and every the children of W., in such

shares and proportions as he should by will appoint, and W. died before executing the power, it was held that though one child died before W., yet as W. had failed to exercise the power, the representatives of the deceased child were held entitled to her share: *Lambert* v. *Thwaites*, L. R., 2 Eq. 151. A father, tenant for life, had power to charge the estate for the younger children of any woman whom he might marry to the extent of 3,000*l.* if there should be but one or two such children, of 4,000*l.* if there should be three, and of 5,000*l.* if there should be four or more, "to vest in, be paid to, or divided amongst the child or children respectively, for whom the same respectively shall and may be charged, or to or among him, her, their, or his, her, and their respective issues," at such ages or times, "with such maintenance meanwhile" as he should appoint. There were five children of the marriage (*i. e.* four younger children), three daughters and two sons. One daughter died under twenty-one and unmarried, and a second died leaving issue. After the death of these two daughters the father appointed the 5,000*l.*, as to 2,500*l.* for the surviving daughter, as to 2,000*l.* for one of the sons, and as to 500*l.* for the infant children (of whom one had since died) of the deceased daughter. Held, that the whole sum had become appointable under the power, and the interest of the 500*l.* was applicable for the benefit of the grandchild during her minority. Sir James Bacon, V.-C., said, "The power, as I read it, is originally a power to charge without regard to any events which should happen, except only the event of certain numbers of children coming into existence. The moment this event happens the power is in its full vigour:" *Knapp* v. *Knapp*, L. R., 12 Eq. 238. Where by a post-nuptial settlement a fund was to be divided among A.'s children who were then alive in such way as he should appoint, "and in case of the death of any of the children before they should become entitled, his or her share to go equally among

the survivors of such children, and if but one the whole to that one;" and A. appointed to a child who died in his lifetime; it was held that "entitled" meant "entitled in possession," and that the surviving children took the appointed share: *Beale* v. *Connolly*, Ir. R., 8 Eq. 412.

Younger children.—It is now settled that, ordinarily speaking, where provisions are made for younger children to the exclusion of an eldest son, and a younger son becomes an eldest son before the time of vesting, or, according to the language used in some of the authorities, before the time of distribution, such younger son is to be excluded: per Lord Gifford, M. R., in *Windham* v. *Graham*, 1 Russ. 340.

See also the cases of *Chadwick* v. *Doleman*, 2 Vern. 528; *Broadmead* v. *Wood*, 1 Bro. C. C. 77; *Savage* v. *Carroll*, 1 Ball & B. 265. In *Stanhope* v. *Collingwood* (L. R., 4 Eq. 286), A. was entitled to estate D. for life, remainder to his first and other sons in tail male, with remainder over, and upon his marriage a settlement of his wife's fortune was made upon him and her for their several lives, and after the death of the survivor upon trust for the children of the marriage "other than and except an eldest or only son for the time being entitled to estate D. for an estate in tail male in possession, or remainder immediately expectant on the decease of A." in the usual manner, with a power of appointment in the parent or survivor. Upon B., the eldest son, coming of age, D. was resettled, B. receiving a rent-charge, and being made tenant for life, after the death of A., remainder

to his first and other sons, &c. At the death of A., who survived his wife, part of the fund remained unappropriated. Held, first, upon the construction of the whole settlement, that the period for ascertaining whether a child was excluded was the period of division; and secondly, that as B. was not at that time entitled to an estate tail male in possession or remainder he was not excluded. On appeal, however (L. R., 4 E. & Ir. App. 43), it was held that, though the period for ascertaining whether a child was excluded was the period of division, yet that, as the estates were resettled by the act of the *de facto* eldest son prior to that period, his character as eldest son was not thereby affected, and he was excluded from participation in the trust fund. In *Re Bayley's Settlement* (L. R., 9 Eq. 491; affirmed, on appeal, L. R., 6 Ch. 590), where limitations were to wife for life, remainder to the children other than the eldest or only son, with a gift over in case any younger son should become an eldest son before attaining twenty-one, it was held that the class of younger children was to be ascertained at the death of the wife, and with reference to the family estate, and did not include a younger son who, after attaining twenty-one, became an eldest son, and then died in the lifetime of the wife. And in *Re Rivers's Settlement Trust* (40 L. J., Ch. 87), a second son who attained twenty-one, and on his father's death succeeded to the title, but died before the period of distribution, was held to be excluded as an "eldest son" from sharing in certain unappropriated trust funds; but his younger brother, who succeeded to the title, and was living at the period of distribution, was held entitled. In *Cope* v. *Earl De la Warr* (L. R., 8 Ch. 982), a settlement contained a clause providing that if any person should succeed to the earldom, the estate should shift as if the person so succeeding were dead without male issue; and it was held, that the estate shifted

the moment the baron succeeded to the earldom. In *Tuite* v. *Bermingham* (L. R., 7 E. & Ir. Ap. 634), it was held that the only son of a marriage could not succeed to an estate which had been limited to A. and his heirs in tail male "except an eldest son;" and did not come within a proviso giving the estate to A. and "all and every other the sons of the body of A., save and except an eldest son; "eldest" and "first born" were to be treated as synonymous terms. In *Re Forster's Estate* (Ir. R., 4 Eq. 152), where a term of years in certain lands was by a settlement vested in trustees, upon trust, out of the rents, issues and profits of the said lands and premises, by annual payments, or sums of 500*l.* in each year, and not otherwise, to raise a sum of 3,000*l.* for younger children; it was held that the charge did not operate to create a charge for six years only, and that no sum having been raised, the estate was not discharged at the end of that time, although the rents were sufficient to have satisfied the charge.

"Next of kin."—Under a limitation to the wife's "next of kin," the husband is not entitled; nor is a wife entitled under a limitation to the husband's "next of kin:" *Garrick* v. *Lord Camden*, 14 Ves. 372; *Watt* v. *Watt*, 3 Ves. 244.

Where property was to go to the "legal representatives in a due course of administration," it was held that the next of kin were entitled: *Briggs* v. *Upton*, L. R., 7 Ch. 376. Under a limitation to the wife's "next of kin or personal representatives," the husband was held not entitled; "It seems hardly conceivable," said Sir William Grant, "that in a marriage settlement a limitation to the wife's "next of kin" can be introduced except for the purpose o

excluding the husband; and if the intention was to exclude him by the first words 'next of kin,' he cannot be let in under the subsequent words, 'personal representative:'" *Bailey* v. *Wright*, 18 Ves. 49. The wife is no "relation" of the husband: *Worseley* v. *Johnson*, 3 Atk. 758. But where in default of issue an estate was to go to the wife's next of kin, and the wife was illegitimate and died without issue, the husband was held entitled as administrator: *Hawkins* v. *Hawkins*, 7 Sim. 173. By a marriage settlement chattels real were assigned to trustees upon certain trusts for the benefit of the husband and wife and their issue, and in default of issue for the benefit of the husband absolutely; with a proviso that, in the event of the wife marrying again after the husband's death, the trustees should apply the rents as was theretofore provided for in the event of the deaths of the husband and wife. There was no issue, the husband died intestate, and the wife married again. Held, that the wife was entitled, as one of the husband's next of kin, to her share of the property put in settlement. "The widow was claiming not as under the settlement, but as the widow of her husband who died intestate, and she is entitled to her share of his personalty unless the settlement bars her right; there is no clause to that effect:" per Sullivan, M. R.: *O'Brien* v. *Hearn*, Ir. R., 4 Eq. 103. Where property of both husband and wife was settled, and they were afterwards both drowned in the same ship, and the trusts of the settlement failed, it was held that there had been no reduction into possession by the husband, and that each fund went to the next of kin of the settlor: *Wollaston* v. *Berkeley*, 2 Ch. D. 213. Children may take under limitations to a wife's next of kin; and where E. M., the wife, died leaving a father, a mother, and a child, and the limitation was "to such person or persons as at the time of the death of E. M. should be next of kin," it was held that these three took as joint tenants (*Withy*

v. *Mangles*, 10 Cl. & F. 215); where the ultimate trusts were for the wife's next of kin, "under and according to the Statute of Distribution," it was held that the next of kin took as tenants in common, not as joint tenants (*Re Ranking's Settlement Trusts*, L. R., 6 Eq. 601); and where the ultimate trust of a wife's fund was to such persons as under the Statute of Distribution would be entitled if she had died intestate and without having been married, it was held that the only child of the marriage was entitled: *Re Ball's Trust*, 11 Ch. D. 270; but this decision was disapproved of by Jessel, M. R., in *Emmins* v. *Bradford*, *infra*. Where the ultimate trust in a widow's settlement was for her next of kin, as if she had died intestate and "without having been married," the children of a former marriage were held not entitled (*Emmins* v. *Bradford*, *Johnson* v. *Emmins*, 13 Ch. D. 490 (overruling, therefore, *Upton* v. *Brown*, 12 Ch. D. 872). Where the limitation was "to next of kin of said A. P. of her own blood and family, as if she had died sole and unmarried," it was held that the next of kin took as under the Statute of Distribution: *Cotton* v. *Scarancke*, 1 Madd. 45. Where the limitation was to "husband's next of kin or personal representatives in a due course of administration according to the Statute of Distribution," the wife and executors were held not entitled, but his next of kin: *Kilner* v. *Leech*, 10 Beav. 362.

"**Executors or administrators.**"—The husband is entitled under a limitation to the wife's executors or administrators: *Daniel* v. *Dudley*, 11 Sim. 163.

Where the wife's property in default of appointment was to go to her "personal representatives," it was

held to mean "executors or administrators," and not "next of kin": *In re Best's Settlement Trusts*, L. R., 18 Eq. 686. Where the ultimate trust of a copyhold estate belonging to the husband was for his executors or administrators, and a similar trust was declared with respect to the executors or administrators of the wife as to a copyhold estate which was her property, and the wife took out administration to her husband, she was not allowed to hold the former estate for her exclusive benefit, but for the benefit of herself and of her husband's next of kin: *Wellman* v. *Bowring*, 3 Sim. 328. Where the ultimate trust was to the wife's executors or administrators, her husband was held entitled: *Allen* v. *Thorp*, 7 Beav. 72. Where in a marriage settlement the ultimate trusts of the wife's chattels were for the executors or administrators of the wife of her own family, and the ultimate trusts of the husband's chattels were for his executors or administrators of his own family, it was held that the wife's next of kin and the husband's executors or administrators were respectively intended: *Smith* v. *Dudley*, 9 Sim. 125.

Heirs.—The husband is not entitled under a limitation to the right heirs of his wife, even though the wife dies without issue: *Newenham* v. *Pittar*, 7 L. J., N. S., Ch. 300.

"Unmarried," "without having been married."—*Semble*, the words "unmarried" or "without having been married," used with reference to a wife in a settlement, are intended merely to exclude the marital right of the husband, and not to deprive her children

of rights in her property to which they would otherwise be entitled.

Thus, in a marriage settlement, where the ultimate trust of personalty was to such persons as would have been entitled to the personal estate of the wife, "in case she had died unmarried and intestate," it was held to mean "not under coverture at the time of her death:" *Pratt* v. *Mathew*, 2 Jur., N. S. 364; affirmed on appeal, 2 Jur., N. S. 1055. See also *Maugham* v. *Vincent*, 9 L. J., N. S., Ch. 329; *S. C.*, 4 Jur. 452. But compare *Emmins* v. *Bradford*, 13 Ch. D. 490, *ante*, p. 355.

Words supplied by the Court.—Where the settlement clearly shows that certain words have been omitted, the court will supply them.

Thus a trust in a post-nuptial settlement was for a wife for life, and after her decease for "all and every child or children of the marriage, who being sons or a son should attain twenty-one" equally, and if there should be but one such child, the whole in trust for such child, "*his or her* executors and administrators," followed by clauses directing that the income of the presumptive share of any child during minority should be applied for "his or her" maintenance. Held (reversing the Master of the Rolls' decision), that daughters who attained twenty-one were entitled to share: *In re Daniel's Settlement Trusts*, 1 Ch. D. 375. So where a fund was settled on husband and wife "during their joint lives," the court held that these words must be taken to mean "during their joint lives and the life of each of them:" *Smith* v. *Oakes*, 14 Sim. 122. And in *Re Palmer's Settlement Trusts* (L. R., 19 Eq. 320), the court held that "survivor" should in one place be read as "other." So marriage articles providing that the wife's portion was to be laid out in land to be

settled on the husband and wife and the heirs of their bodies, "and if not laid out in land during their joint lives, and the wife should die first, that the money should go to the wife's brother and sister;" and the wife died first, leaving issue before the money was thus expended; the court supplied the words "if the wife die without issue," and excluded the brother and sister: *Kentish* v. *Newman*, 1 P. W. 234. See also *M'Guire* v. *Scully*, Beat. 378. In *Re Estate of Charles Blake* (19 W. R. 765), lands were by settlement limited to the use of the first son of C. B. by J. P. (his intended wife) lawfully to be begotten, and the heirs male of the body of such son, with remainder to the use of the second, third, and other sons of the said C. B. severally and successively in tail male; it was held that the eldest son of C. B. by his second marriage (there being no issue by J. P.) was entitled as tenant in tail in preference to the second son of such marriage.

Maintenance of children.—Where income is to be applied at trustee's discretion after wife's death to the maintenance and education of children, the husband is entitled to have it, or a sufficient part, so applied, though he be of sufficient ability to maintain his children: *Stocken* v. *Stocken*, 4 Sim. 152.

Where there is a trust for maintenance in a marriage settlement, and the father has maintained the children without calling for contribution from the fund, he is entitled to be recouped out of the accumulations (*Mundy* v. *Earl Howe*, 4 Bro. C. C. 223); but this principle does not apply to the case of a voluntary settlement after marriage: *In re Kerrison's Trusts*, L. R., 12 Eq. 422. Where trustees were

empowered to apply 2,000*l.* towards effecting the promotion of F. W. in the army, and laid out 800*l.*, but the abolition of purchase in the army prevented any further sum being laid out, it was held that the residue of the 2,000*l.* could not be raised for the benefit of F. W.: *In re Ward's Trusts*, L. R., 7 Ch. 727. A power to raise portions by mortgage includes a power to raise also the incidental costs of the mortgage: *Armstrong* v. *Armstrong*, L. R., 18 Eq. 541. Where there is a discretionary trust, equivalent to a power of applying the whole or part of income for or towards maintenance, and the trustees pay the whole of the income of the trust fund to the husband without exercising any discretion, it may be recovered back from the estate of the husband: *Wilson* v. *Turner*, 22 Ch. D. 521.

Investments. — Trustees of settlements coming within the operation of Lord St. Leonards' Act, 1860 (23 & 24 Vict. c 38), may invest the trust funds in any security in which cash, under the control of the court, may be invested, notwithstanding prohibitive or restrictive words in the instrument creating the trust: *In re Wedderburn's Trusts*, 9 Ch. D. 112.

But Lord St. Leonards' Act, 1859 (22 & 23 Vict. c. 35), s. 32, provides that trustees may invest in certain securities, including real securities, "where they should not by the instrument creating the trust be expressly forbidden to do so." In the above case the trustees were forbidden to invest in any other than government or parliamentary stock, and under the Act of 1859 could not invest otherwise; but by apply-

ing to the court they came within the Act of 1860, and avoided the restrictions placed upon them by the terms of the trust. Although trustees may have full power to change investments, yet if infants are concerned the court may refuse to allow them the discretion: *Bethell* v. *Abraham*, L. R., 17 Eq. 24. Where trustees can invest money in the purchase of lands or hereditaments in fee simple, they may invest in the purchase of freehold ground rents (*In re Peyton's Settlement Trust*, L. R., 7 Eq. 463); but where they are to invest in "real securities," they cannot invest in long leaseholds (*In re Boyd's Settled Estates*, 14 Ch. D. 626), unless they are for a long term of years at a peppercorn rent, without onerous covenants: *In re Chennell*, *Jones* v. *Chennell*, 8 Ch. D. 492. Bonds of a French railway company, the payment of which within fifty years was secured by a sinking fund guaranteed with interest in the meanwhile by the imperial government, were held not within the "securities of a foreign country:" *In re Langdale's Settlement Trusts*, L. R., 10 Eq. 39. A tenant for life, although an infant, can exercise a power to consent to a change of investment: *Re Cardross's Settlement*, 7 Ch. D. 728. 10,000*l.*, part of a settled sum of 15,000*l.*, was allowed by the trustees to remain in a business in breach of trust, and it was held that the tenant for life under the settlement was entitled to four per cent. only on the 10,000*l.* and the accumulated profits of the business as income, and that the residue of the profits formed part of the settled fund: *Re Hill*, *Hill* v. *Hill*, 50 L. J., Ch. 551. When renewable leaseholds for lives have been settled, and, on the refusal of the lessor to renew, sold under the Settled Estates Act, 1877, the purchase-money must be invested for the benefit of all persons entitled in succession under the settlement: *Re Barber's Settled Estates*, 29 W. R. 909. Where new shares were granted to A., (who was entitled to the "interest, dividends, shares of profits,

or annual profits") out of a sum reserved for contingencies from the net earnings of the half-year; it was held that the new shares were capital, not income: *In re Barton's Trusts*, L. R., 5 Eq. 238.

Joint tenancy.—Where a joint tenant assigns to trustees of his marriage settlement his share of the estate, it is a severance of the joint tenancy: *Baillie* v. *Treharne*, 17 Ch. D. 388.

In the above case a reversionary share in personal property was settled on the marriage of one of two joint tenants. Held, that the property having fallen into possession during the coverture, the marriage operated as a severance of the joint tenancy. In *Caldwell* v. *Fellowes* (L. R., 9 Eq. 410), A., a joint tenant in fee of real estate in reversion expectant on the death of B., executed a settlement on her marriage, by which it was covenanted that all the estate and effects, real and personal, to which she was then or should thereafter become entitled, should be settled. Held, that the joint tenancy was severed by the settlement.

Settlement perfected by will.—An incomplete voluntary settlement may be confirmed and perfected by the will of the settlor, but it then operates as a testamentary instrument (although not admitted to probate), and is subject to the doctrines applicable to wills: *Bizzey* v. *Flight*, 3 Ch. D. 269.

Domicile.—Where the settlement indicates the intention of the parties that it shall be

construed according to English law, it will be so construed, although one of the parties is not a domiciled Englishman: *Chamberlain* v. *Napier*, 15 Ch. D. 614.

Where a settlement was made on a marriage in England between a domiciled Turkish subject and an English lady on the faith of his promise to reside in England, it was held governed by English law: *Colliss* v. *Hector*, L. R., 19 Eq. 334. Where a domiciled Scotchman made a settlement which he intended should operate as a will, which by the law of Scotland is not revoked by marriage, and afterwards became domiciled in England, the settlement was held valid as a testamentary disposition: *In the Goods of Reid*, L. R., 1 P. & D. 74.

Costs of settlement.—The husband is liable for the costs of the settlement, and the fact that the lady is an infant does not vary the case, as the settlement may justly be considered a necessary suitable to her estate and condition: *Helps* v. *Clayton*, 34 L. J., C. P. 1.

Section 5.—Rectification of Settlements.

The jurisdiction with respect to the rectification and cancellation of instruments is assigned to the Chancery Division of the High Court, by the 34th section of the Judicature Act, 1873. With regard to marriage settlements, they will not be rectified on the ground of mistake, unless the mistake was common to

both parties; mere unilateral mistake will not of itself be a sufficient ground for rectification. Questions of rectification mostly arise where there have been articles followed by settlements, but rectification may be ordered upon parol evidence alone. The Divorce Court has power, after a decree for dissolution or nullity of marriage has been made final, to make orders rectifying marriage settlements.

Settlement differing from articles.—Where articles are entered into before marriage, and a settlement is made after marriage different from those articles, the court will set up the articles against the settlement: per L. C. Talbot in *Legg* v. *Goldwire*, 1 W. & T., L. C. in Eq. 17.

Where, by ante-nuptial articles on the marriage of an adult lady, it is agreed that her property shall be settled to the separate use of the lady, but nothing is said as to a clause against anticipation, the court will not, as it would in the case of an infant, direct a clause against anticipation to be inserted: *Symonds* v. *Wilkes*, 11 Jur., N. S. 659. Where a post-nuptial settlement professes to be made in pursuance of ante-nuptial articles, and has been acted upon for a long time, it will not be rectified in accordance with a mere recital of the articles contained in it, when the recital is the only proof of the contract: *Mignan* v. *Parry*, 31 Beav. 211. But where the written instructions were produced, showing that the property

was to go absolutely to the wife on her surviving her husband without issue, and there was no issue, the settlement was reformed more than thirty years after it was made: *Wolterbeek* v. *Barrow*, 23 Beav. 423; see also *Coates* v. *Kenna*, 7 Ir. R., Eq. 113. In *Smith* v. *Iliffe* (L. R., 20 Eq. 666), a post-nuptial settlement of wife's property was rectified, because it had not been made in accordance with her wishes. Where the father covenanted to pay the husband 200*l.* a year, and the husband died insolvent, and his creditors claimed the annuity, the court, being satisfied that it was intended to be paid as a provision for the wife and children, ordered the settlement to be amended accordingly: *Pearce* v. *Verbeke*, 2 Beav. 333. Where a settlement is directed to be made by a will, and is improperly framed, it may be rectified by the will: *Glenorchy* v. *Bosville*, Cas. temp. Talbot, 3. By an ante-nuptial agreement, signed by the intended husband and wife and the parents of the wife, the parents agreed to appoint a share of certain real estate (which was subject to their life interest, and to the appointment of them and the survivor of them) to the wife, and the husband agreed that "he would settle" his wife's reversionary share of the said real estate upon the usual trusts for the husband and wife, and their children. The wife's father, having survived her mother, released the power and granted the estate after his death, giving his said daughter a share. The wife predeceased the husband, and left two children. The property being still reversionary, an action was brought by the husband and one of the children against the other child, the wife's heir at law, for specific performance of the agreement. Held, that the agreement bound the wife, as having assented to her father's stipulation, and also her heir at law, and specific performance was ordered accordingly: *Lee* v. *Lee*, 4 Ch. D. 175.

If both articles and settlement are made before marriage, the settlement will not in general be controlled by the articles, unless the settlement contains a statement that it is made in pursuance of the articles: *Legg* v. *Goldwire*, 1 W. & T., L. C. in Eq. 17.

See also *West* v. *Errissey*, 2 P. Wms. 349, and *Pritchard* v. *Quinchant*, Amb. 147.

Mistake.—Where the settlement does not carry out the intention of the parties thereto, it may be rectified, upon proof that the mistake was mutual, and such proof may be in writing or by parol; but the mistake must be clearly established by evidence anterior to or contemporaneous with the deed.

The court will rectify a settlement on the ground of mistake only when both parties have done that which neither of them intended: *Bradford* v. *Romney*, 30 Beav. 431; *Rooke* v. *Lord Kensington*, 2 K. & J. 753. In *Bedford* (*D.*) v. *Abercorn* (*M.*), (1 Myl. & C. 312), articles executed before marriage stipulated that estates should be limited to the first and other sons of the marriage in tail, but it being proved that the intention was to limit the estates to the first and other sons in tail male, the court, after the marriage had taken place, directed that the settlement should be so executed. "If it can be shown that the settlement was intended to be in conformity with the articles, yet if there is clear and satisfactory evidence showing that the discrepancy

has arisen from a mistake, the court will reform the settlement and make it conformable to the real intention of the parties:" per L. C. Cranworth in *Bold* v. *Hutchinson*, 5 De G. M. & G. 568. In *Eaton* v. *Bennett* (34 Beav. 196), where the marriage settlement was executed, as the husband alleged, contrary to the agreement, but yet before the marriage he knew the contents, and executed it under protest and reserving his right to set it aside; it was held that he could not after the marriage sustain a suit to set it aside. See also *Sells* v. *Sells* (1 Dr. & Sm. 42), where the Vice-Chancellor said: "In the absence of authority I should be establishing a very dangerous precedent if I were to hold the mistakes of one of the parties sufficient for rectifying a settlement." And in *Thompson* v. *Whitmore* (1 J. & H. 268), where a clause did not carry out the intention of the intended wife, and the husband objected to it altogether, but ultimately waived his objection, and his attention was not called to the form of the clause and the intention of his wife; this was held not a case of mutual mistake. And in *Breadalbane* (*M.*) v. *Chandos* (*M.*) (2 My. & Cr. 739), L. C. Cottenham said: "In order to justify the court in taking such a course" (*i. e.*, the correcting the settlement upon the ground of mistake or misapprehension) "it is obvious that a clear intention must be proved, it must be shown that the settlement does not carry into effect the intention of the parties. If there be merely evidence of doubtful or ambiguous words having been used, the settlement itself is the construction which the parties have put upon those doubtful or ambiguous words . . . . it must be proved, not only that the contract was different from that which the settlement carried into effect, but that there was no change of intention, by which the circumstance that a settlement did not follow the terms of the original contract might be explained." A strict settlement

in tail without power of revocation of real estate, which formed practically the settlor's entire fortune, was rectified on the ground of mistake: *Welman* v. *Welman*, 15 Ch. D. 570. But the omission of a power of revocation is not a satisfactory reason for setting aside a settlement: *Henry* v. *Armstrong*, 30 W. R. 472. Where it was obvious on the face of a settlement, and was admitted by all parties that a clause in the settlement had been inserted by mistake, the fund was distributed as if the clause had not been there: *In re De la Touche's Settlement*, L. R., 10 Eq. 599. And where a general power of appointment by the wife had been struck out by one of the trustees and the solicitor's clerk, without the express directions of the wife, it was ordered to be restored: *Harbidge* v. *Wogan*, 5 Hare, 258. In other cases where mutual mistake has been proved, the court has rectified settlements, *e. g.* by transposing a clause so as to bring daughters within the scope of a power of appointment (*Fenton* v. *Fenton*, 1 Dr. & Wal. 66), by making a declaration that certain property included in the settlement had been included by mistake (*Marq. of Exeter* v. *March. of Exeter*, 3 My. & Cr. 321), by securing the wife's fortune to her in case of the husband's bankruptcy (*Higginson* v. *Kelly*, 1 Ball & B. 252), by making a bond by husband to trustee for wife's fortune proveable on his bankruptcy, in favour of younger children as against the heir (*Ex parte Verner*, 1 Ball & B. 260). See also *Roberts* v. *Kingsly*, 1 Ves. sen. 238; *Heneage* v. *Hunloke*, 2 Atk. 457; *Uvedale* v. *Halfpenny*, 2 P. Wms. 151; *King* v. *King-Harman*, 7 Ir. R., Eq. 446; and *Hamil* v. *White*, 3 J. & L. 695. A settlement has been rectified after the lapse of thirty-five years upon parol evidence alone where it was clearly proved that there had been a mutual mistake: *McCormack* v. *McCormack*, 1 Ir. Ch. D. 119, overruling V.-C.'s decision reported in Ir. R., 11

Eq. 130: see also *Tomlinson* v. *Leigh*, 14 W. R. 121; *Lackersteen* v. *Lackersteen*, 6 Jur., N. S. 1111; *Wilkinson* v. *Nelson*, 7 Jur., N. S. 480; *Townshend* v. *Stangroom*, 6 Ves. 328.

The mutual mistake of the parties may, however, be proved by the evidence of the plaintiff alone.

By a post-nuptial settlement real estate belonging to the wife was conveyed unto A. and his heirs, "to the use of" A., his executors and administrators, during the life of the wife, "upon trust" to pay the rents and profits to her for her separate use; and from and after her decease, in case of the death of her husband in her lifetime, "to the use of the heirs and assigns" of the wife for ever, but in case of the wife predeceasing the husband, then to the use of the husband, his heirs and assigns for ever. The wife having survived her husband, she brought an action against A.'s legal personal representative to have the settlement rectified, on the ground that by a technical mistake in the form of the settlement her equitable life estate and the legal estate in the remainder did not coalesce within the rule in *Shelley's case*, so as to give her, as was intended in the events that had happened, an absolute estate in fee. The plaintiff's case was supported by an affidavit by herself alone. Held, that her uncontradicted affidavit was sufficient, and the settlement was ordered to be rectified, so as to vest the legal estate in fee simple in the plaintiff, a conveyance of the outstanding legal estate was held also to be unnecessary: see form of order for rectification; *Smith* v. *Iliffe* (L. R., 20 Eq. 666) discussed; *Hanley* v. *Pearson*, 13 Ch. D. 545. Upon the marriage of a widow with a retired solicitor who had formerly

acted as her solicitor, the whole of her property, amounting to more than 20,000*l.*, was vested in trustees upon trust to pay the income to the wife for her life, and after her death to the husband for his life; and as to the capital, upon trust after the death of the wife, to pay one moiety thereof to his executors, administrators or assigns, and to hold the other moiety upon such trusts as the wife should by deed or will appoint. By another deed executed contemporaneously, the husband, by the exercise of a power given to him by the will of his father, charged some estates of which he was tenant for life, with remainder to his issue in tail male, with the payment of an annuity of 1,000*l.* to the wife for her life. The settlement was prepared by the husband himself the night before the marriage, and was brought by him to the wife for execution on the morning of the marriage day. She had no independent professional advice. After the husband's death she brought an action for the rectification of the settlement, by omitting the trust of a moiety of the capital for the husband. The trustees and one of the next of kin to the husband were made defendants. The plaintiff deposed that her husband had told her that he wished every farthing of her property to be settled upon herself, and that she was willing to allow him a life interest; that he said he would employ counsel; that the settlement did not carry out her intentions; and that she did not know what its provisions were until after the husband's death. Held, that it was the duty of the husband to have explained to the wife in most unmistakeable terms, and with due opportunity for deliberation, the provision in his favour, and that as the settlement on the face of it was not such as the court would have sanctioned in the absence of agreement, the burden of proof was on the representatives of the husband, and the plaintiff was entitled to the rectification which she claimed. Held, also, that the

plaintiff's claim to retain the benefit of the settlement made on her by her husband was no bar to the rectification. Held, also, that it was not necessary that the other next of kin should be made parties to the action, but that the drawing up of the judgment must be suspended for fourteen days, and that notice of the judgment must be served on those of the next of kin who were not parties: *Lovesy* v. *Smith*, 15 Ch. D. 655. The plaintiff, a widow with children, being possessed of property left by her first husband, married, and marriage articles were prepared upon instructions given by the intended husband the night before the marriage, by which the wife's property was limited in the first instance to him for life. The bill was filed by the wife to rectify the settlement against the husband and the solicitor who prepared the settlement. Held, by the vice-chancellor, that upon the evidence the limitations were contrary to the intention of the plaintiff, and that the husband, as having undertaken as the agent for the wife to have a settlement, was bound to have such a contract prepared as the court would sanction, and such contract would give the wife the first life estate in her own property. A decree was therefore made to rectify the settlement accordingly. The husband was ordered to pay the costs of the suit: *Clark* v. *Girdwood*, 7 Ch. D. 9. By a marriage settlement executed in pursuance of articles made under the order of the court on the marriage of a lady, an infant and a ward of court, personalty of the wife was limited on death of the husband, and in default of children, both of which events happened, to the wife, as she should by will appoint, and in default to her next of kin. Upon her uncontradicted evidence that this was not in accordance with her intention, held, that she was entitled to have the settlement rectified by limiting the property, in the events which had happened, to herself, her executors, and administrators

absolutely; and declaration to that effect ordered to be indorsed on the settlement: *Smith* v. *Iliffe*, L. R., 20 Eq. 666. By a marriage settlement the property of the intended wife was settled upon her for life for her separate use without power of anticipation, with a power of appointment over the *corpus* by her will, and in default of appointment for her next of kin. Upon her unsupported evidence the settlement was rectified after her husband's death, by directing that the property should be held in trust for the wife absolutely: *Cook* v. *Fearn*, 48 L. J., Ch. 63.

A settlement may be rectified upon a petition as well as by an action.

By a mistake in pencil directions given to a clerk or stationer, a clause of a sentence was inserted in a marriage settlement which on the face of the deed was repugnant to the sense, and which led to a highly improbable result. The fact of the mistake was not admitted by all parties. The court, on petition under the Trustees Relief Act, did not order the settlement to be rectified, but prefacing the order with a declaration that it appeared that the words in question were inserted by mistake, made an order for the distribution of the fund as if the clause had not been inserted: *In re De la Touche's Settlement*, L. R., 10 Eq. 599. By a marriage settlement the wife's interest in real estate was granted and assigned to trustees, their executors, administrators and assigns, upon the usual trusts in a settlement, with the omission of the word "heirs" in every case in which the fee simple was evidently intended to be passed. Held, upon petition under the Trustees Relief Act, that the deed must be rectified by the insertion of the word "heirs," in order to effect the intention of the parties: *In re Bird's Trusts*, 3 Ch. Div. 214.

Costs.—Unless a solicitor has been guilty of fraud the court cannot order him to pay the costs of an action for rectification, rendered necessary by his carelessness or negligence; the proper remedy is in an action for damages: *Clark* v. *Girdwood*, 7 Ch. D. 9, 23 As a rule the costs of all parties are payable out of the *corpus* of the property: *Ibid.*

Effect.—Where deeds affecting the legal estate in real property are rectified, it is better that the decree should direct the execution of proper conveyances; other deeds are usually rectified by indorsement of a copy of the decree: See *Seton on Decrees*, pp. 1231, 1232, and 1343.

Divorce.—The court, after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of any ante-nuptial or post-nuptial settlement made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage, or of their respective parents, as to the court may seem fit: 22 & 23 *Vict. c.* 61, *s.* 5.

Where the court is moved to exercise its discretion under this section, the relative amounts contributed by each party, the conduct of each, the total amount of their joint income, the relation it bears to the requirements of the parties, and their respective

prospects of increased income, are all elements to be considered. But as these elements are not capable of exact expression in figures, the result must be a general one, and vary with the details of each case: *March* v. *March and Palumbo*, L. R., 1 P. & D. 440; see also *Chetwynd* v. *Chetwynd*, 35 L. J. (M.) 21; and *Wigney* v. *Wigney*, 30 W. R. 722. The court may make the order for the parents, for the children, or for both parents and children (*March* v. *March and Palumbo*, *supra*); but will not make any order until the decree *nisi* has been made absolute (*Horne* v. *Horne*, 30 L. J. (M.) 111); and if the respondent does not appear at any stage of the proceedings for the divorce, he need not have notice sent to him of the application for the order settling the property: *Horne* v. *Horne*, *supra*; see also *Lawrence* v. *Lawrence*, 32 L. J. (M.) 124. By the 41 Vict. c. 19, s. 3, the court may exercise the power vested in it, notwithstanding that there are no children; but this section is not retrospective, and does not apply to a settlement when the decree was made absolute before the Act came into operation (*Yglesias* v. *Yglesias*, 4 P. D. 71), although it does apply to the settlements of persons against whom a decree *nisi* only was pronounced: *Ansdell* v. *Ansdell*, 5 P. D. 138. Before the passing of the 41 Vict. c. 19, the court had no power to deal with marriage settlements where there was no issue living at the time of the order, although there might have been at the date of the decree: *Bell* v. *Bell*, 1 Sw. & Tr. 565; *Thomas* v. *Thomas*, 2 Sw. & Tr. 89; *Bird* v. *Bird*, L. R., 1 P. & D. 231; *Corrance* v. *Corrance and Lowe*, L. R., 1 P. & D. 495; and *Graham* v. *Graham and Griffith*, L. R., 1 P. & D. 711. In *Sykes* v. *Sykes and Smith* (L. R., 2 P. & D. 163), it was held that the court had no power under the 22 & 23 Vict. c. 61, s. 5, to divest a guilty wife of settled property, except in favour of the husband or children of the marriage.

The Wife the offending Party.—Where the wife is the offending party, the court has no jurisdiction to allow any part of the property to be settled on her, but by refusing to make any order with regard to a part may leave it in her possession; and in making arrangements with regard to the wife's property the court will take into consideration the costs with which she will be burdened in defending the suit (*Bacon* v. *Bacon and Bacon*, 29 L. J. (M.) 125); but in *Bent* v. *Bent and Footman* (30 L. J. (M.) 175), 1,000*l.* out of 1,678*l.* of unsettled property was ordered to be settled on trust, the income to be applied for the benefit of the wife so long as she conducted herself properly and remained unmarried, the fund to be for the children; and the 1,000*l.* damages awarded against the co-respondent was ordered to be paid to the husband in lieu of the sum settled on the wife. In *Pratt* v. *Jenner* (L. R., 1 Ch. 493), the trustees were directed to hold the wife's fortune as if she were dead, and the husband accordingly obtained an order that the money should be paid to him. In *Thompson* v. *Thompson and Barras* (7 L. T. (N. S.) 396), the court refused to deprive the husband of any advantage he derived from the settlement. In *Bullock* v. *Bullock* (L. R., 2 P. & D. 389), where the husband allowed his wife an annuity under a previously executed separation deed, the court decreed that a like sum should be payable to the husband out of the moneys which the wife was entitled to under a post-nuptial settlement, on the same trusts as though she were dead. In *Carstairs* v. *Carstairs, Billson, and Dickenson* (33 L. J. (M.) 170), a wife, after a decree *nisi* of dissolution of marriage on the ground of her adultery, became entitled to 500*l.*, the only property she possessed. The court refused to order that a part of this should be applied to the repayment of costs incurred by the husband, although she had been guilty of gross misconduct, and had increased the

costs of the suit by an unfounded counter-charge against the husband. In *Paul* v. *Paul and Farquhar* (L. R., 2 P. & D. 93), the trusts were for the wife for life, then to the husband for life, and afterwards to the children; and the court decided that during the joint lives of the husband and wife the income should be applied for the children. In *Grant* v. *Grant* (2 Sw. & Tr. 522), a husband obtained a decree *nisi* for dissolution of marriage against his wife, and died before it could be made absolute, it was held that the suit had abated by the death of the husband, and that no other party had a right to move in the matter; but in *Smithe* v. *Smithe* (L. R., 1 P. & D. 587), where the husband died after a decree absolute dissolving a marriage, it was held that the guardian of the children of the marriage was the proper person to petition for an alteration of settlements, and the court ordered the respondent to surrender for the benefit of the children her interest in the property settled which came from the husband, but refused to strip her of property settled which came from her father, it not being more than sufficient to maintain her in her station of life: see also *Ling* v. *Ling and Croker*, 4 Sw. & Tr. 99. In *Bacon* v. *Bacon and Bacon* (29 L. J. (M.) 125), the court directed that two-thirds of the bulk of the property to which the wife was entitled under certain trusts should be settled on the children immediately, and the remaining one-third after her death or re-marriage; in *Seatle* v. *Seatle* (30 L. J. (M.) 216), where the wife was entitled to the interest of 4,000*l.*, one-half was vested in trustees named by the husband for the maintenance and education of the children of the marriage; and in *Pearce* v. *Pearce and French* (30 L. J. (M.) 182), where the property was settled on the husband for life, afterwards for the wife for life, with remainder to the children, the court directed that after the husband's death the

property should be held for the benefit of the children as if the wife were dead. As to whether the court has power to order a provision for the maintenance and education of a child above sixteen years of age, see *Webster* v. *Webster*, 31 L. J. (M.) 184; and *Ryder* v. *Ryder*, 2 Sw. & Tr. 225. The court will require full information as to the husband's means when asked to vary the settlement of the wife's moneys in favour of the children: *Webster* v. *Webster and Mitford*, 32 L. J. (M.) 29. The court cannot interfere with a power of appointment vested in the wife (*Seatle* v. *Seatle*, 30 L. J. (M.) 216, and *Davies* v. *Davies*, 37 L. J., P. & M. 17); and where funds were vested in trustees for the benefit of the children of the marriage, and in default thereof as the wife should appoint; the wife was divorced, there were no children, and the wife appointed to herself; it was held a good appointment: *Bond* v. *Taylor*, 2 J. & H. 473. The court will not vary the provisions for appointing new trustees: *Hope* v. *Hope and Erbody*, L. R., 3 P. & D. 226.

The Husband the offending Party.—Where the husband is the offending party, and he takes an interest in the wife's money, the court will direct the application of it in favour of the mother and child: *Boynton* v. *Boynton*, 30 L. J. (M.) 156. Where the husband had settled 724*l.*, and the wife's father had settled 700*l.* and some leaseholds, on the wife for life, and after her death for the husband for life, and after the death of the survivor upon the children of the marriage, the court refused to touch the 724*l.*, but ordered the trustees to deal with the wife's contribution as if her husband were dead: *Johnson* v. *Johnson*, 31 L. J. (M.) 29.

Section 6.—Revocation and Cancellation of Settlements.

Revocation of settlements.—If a settlement has been duly executed, and thereby real or personal property has been conveyed or assigned to trustees, it cannot be revoked unless it contains a power of revocation; but upon failure of the trusts created by the instrument, there will be a resulting trust for the settlor.

See *M'Donnell* v. *Hesilrige* (16 Beav. 346), where a *feme sole* in contemplation of her marriage with B., settled her property, and then married C. The settlement contained no power of revocation, and it was held to be irrevocable. In *Page* v. *Horne* (11 Beav. 227), a settlement was executed and the intended husband and wife revoked it, and married the next day, but the revocation was held to be invalid. *Semble*, a covenant to pay a sum of money to the trustees of a settlement may be revoked by subsequent agreement between the parties thereto: *Robinson* v. *Dickenson*, 3 Russ. 399. For examples of resulting trusts, see *Robinson* v. *Dickenson* (*supra*) and *Mitford* v. *Reynolds* (16 Sim. 130), where the consideration failed in the one case because the marriage was void, and in the other case because it never took place. Money was vested in trustees upon trust to pay the interest to the husband for life, and after his death to the wife for life, and after the death of the survivor to pay the principal to such persons as the survivor should direct. The wife joined the husband in executing a deed-poll whereby they appointed the money immediately to the husband. After the personal examination of the wife, the court ordered the

money to be paid to the husband, and the settlement to be cancelled: *Macarmick* v. *Buller*, 1 Cox, 357. Where A. on his marriage assigned a term for 1,000 years in trust for himself for life, remainder to his wife for life, remainder to the heirs of the bodies of the husband and wife, remainder to the husband's right heirs; and the wife died, leaving issue; the whole term vested in the husband, and he could assign it: *Webb* v. *Webb*, 1 P. W. 132. Where there was a proviso in the settlement that if the wife survived her husband, they not having issue between them, she might revoke the settlement, and the husband died leaving a son who died in the lifetime of his mother, the wife was held entitled to revoke it: *Holt* v. *Burley*, 2 Vern. 651. Stock, the property of the wife, was settled for the husband and wife for their joint lives, then to the children by the present or future husband; if no children, to be assigned to wife. Held, after the death of the husband and of a child who had attained a vested interest, that the wife was entitled absolutely, without regard to the possibility of there being children by a future marriage: *Hanson* v. *Cook*, 4 L. J., Ch. 45. Where the wife had power of appointment, and appointed to herself, it was held that she was entitled to have the fund transferred to her: *St. John* v. *Gibson*, 12 Jur. 373. Where the wife's property has been settled, giving life interests to herself and husband and after trusts for children, and in default of issue and of appointment by the wife, an ultimate trust for wife's next of kin; although the impossibility of having issue is admitted, the husband and wife are not entitled to the corpus of the settled fund: *Paul* v. *Paul*, 20 Ch. D. 742, overruling *Paul* v. *Paul*, 15 Ch. D. 580. But where a woman of fifty-two, who had been a widow for twenty-four years, was entitled absolutely, in default of children, to a fund; it was held, that the trustees were justified in paying it over to her: *Re Taylor's Settlement Trusts*, 43

L. T. 795. Where the trusts of a marriage settlement were void for remoteness, the money resulted to the settlor (*Re Nash's Settlement Trusts*, 30 W. R. 406), also where the person was dead at the time of the deed: *Re Corbishley's Trusts*, 14 Ch. D. 846.

Cancellation.—A settlement may be set aside where the consideration fails; where it has been executed under circumstances showing fraud or undue influence; where it is of an improvident character; or where it has been made in fraud of creditors, or of the marital rights of the husband.

As to failure of consideration, see *Coulson* v. *Allison* (2 De G. F. & J. 521), and *Chapman* v. *Bradley* (4 De G. J. & S. 71), where the marriages were invalid, and *Mitford* v. *Reynolds* (16 Sim. 130). As to improvident settlements, see *Everitt* v. *Everitt* (L. R., 10 Eq. 405); *Prideaux* v. *Lonsdale* (1 De G. J. & S. 433). As a rule, a voluntary settlement must be dealt with by cancelling it where there has been a mistake (*Hoghton* v. *Hoghton*, 15 Beav. 278), unless the settlor agrees to a rectification: *Turner* v. *Collins*, L. R., 7 Ch. 329. As to marriage settlements set aside as being in fraud of creditors, see *ante*, pp. 307—312. The mere suppression or destruction of a marriage settlement does not affect its validity: *Bates* v. *Heard*, 1 Dick. 4; *Garland* v. *Radcliffe*, 1 Dick. 11; *Eyton* v. *Eyton*, 2 Vern. 380; and *Sanson* v. *Rumsey*, 2 Vern. 561.

Settlements in fraud of marital rights.—No husband married after 31st December,

1882, will acquire by the marriage itself any right in his wife's property, and therefore there can be no such thing as a settlement in fraud of marital rights with regard to marriages after that date.

The law prior to that date was that a settlement of the woman's property made by her before marriage, without the knowledge or consent of her then intended husband, did not bind him, although he might not have known that she possessed the property.

See *Goddard* v. *Snow*, 1 Russ. 485; *Downes* v. *Jennings*, 32 Beav. 290; *Carleton* v. *Earl Dorset*, 2 Vern. 17. In *Prideaux* v. *Lonsdale* (1 De G. J. & S. 433), the husband had been told before the marriage of the settlement, but had not consented to it, and it was set aside; but in *Wrigley* v. *Swainson* (18 L. J., Ch. 396), where the husband had reason to believe that a settlement was intended, and raised no objection until three years after the marriage, the settlement was held good. Where a widow, previous to an intended marriage with G., conveyed with G.'s approbation all her estate to trustees to pay the rents and profits to such uses as she, whether sole or covert, should appoint; and a few days afterwards, B., by a stratagem, induced her to marry him the day after she first thought of it, the deed was held valid against B., for he was not, when the deed was prepared, "her then intended husband": *Strathmore* v. *Bowes*, 1 Ves. 22. See also *England* v. *Downs* (2 Beav. 522), where a deed was prepared without the privity or consent of "her then intended husband," and the husband was not able to show that he was "the then intended husband," and the settlement was upheld.

Where the husband had by his conduct precluded his intended wife from the power of retiring from the marriage or of stipulating for a settlement, he was not allowed to have the settlement set aside, though it had been executed without his knowledge: *Taylor* v. *Pugh*, 1 Hare, 608.

CHAPTER VIII.

MARRIED WOMEN'S PROPERTY ACTS.

In treating of the rights and powers conferred and the duties imposed upon married women by the Married Women's Property Acts of 1870, 1874, and 1882, it will not be necessary to do more than briefly mention the status of wives independently of these Acts, and to refer to the earlier pages of this book, where the different topics are fully considered. The Acts of 1870 and 1874 have been repealed by the Act of 1882, but such repeal does not affect any act done or right acquired while either of these Acts was in force, or any right or liability of any husband or wife married before 1883 to sue or be sued under them. The different sections of the repealed Acts will be compared with those of the present Act, and the decisions on them will be embodied in our notes. The effect of "her husband," under the repealed Acts are printed in the Appendix.

MARRIED WOMEN'S PROPERTY ACT, 1882.

[45 & 46 VICT. c. 75].

ARRANGEMENT OF SECTIONS.

Sect.
1. Married woman to be capable of holding property and of contracting as a *feme sole*.
2. Property of a woman married after the Act to be held by her as a *feme sole*.
3. Loans by wife to husband.
4. Execution of general power.
5. Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.
6. As to stock, &c. to which a married woman is entitled.
7. As to stock, &c. to be transferred, &c. to a married woman.
8. Investments in joint names of married women and others.
9. As to stock, &c. standing in the joint names of a married woman and others.
10. Fraudulent investments with money of husband.
11. Moneys payable under policy of assurance not to form part of estate of the insured.
12. Remedies of married woman for protection and security of separate property.
13. Wife's ante-nuptial debts and liabilities.
14. Husband to be liable for his wife's debts contracted before marriage to a certain extent.
15. Suits for ante-nuptial liabilities.
16. Act of wife liable to criminal proceedings.
17. Questions between husband and wife as to property to be decided in a summary way.
18. Married woman as an executrix or trustee.
19. Saving of existing settlements, and the power to make future settlements.
20. Married woman to be liable to the parish for the maintenance of her husband.
21. Married woman to be liable to the parish for the maintenance of her children.
22. Repeal of 33 & 34 Vict. c. 93; 37 & 38 Vict. c. 50.
23. Legal representative of married woman.
24. Interpretation of terms.
25. Commencement of Act.
26. Extent of Act.
27. Short title.

An Act to consolidate and amend the Acts relating to the Property of Married Women.

[18th August, 1882.]

Whereas it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria,

chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act, 1870:"

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. *Married woman to be capable of holding property and of contracting as a feme sole.*]—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

We shall treat of this sub-section under the three heads of "Acquiring," "Holding" and "Disposing."

"Acquiring."—By the common law the capacity of a married woman to acquire property during the coverture was very limited. Any real property given to or descending upon her during that time vested in possession in her husband, and all that she acquired in it was the reversion expectant upon his death: see *ante*, pp. 80—87. Her rights in leaseholds, her title to which accrued during the coverture, were of the most trifling value. She was entitled to the reversion expectant upon his death if she survived him,

subject, however, to his right of selling or charging the term: see *ante*, pp. 94—98. If her reversionary interests in personalty fell into possession while the marriage continued, she lost them also (*ante*, pp. 109—115), and her husband could also acquire her choses in action by reducing them into possession: *ante*, pp. 99—108). The husband's rights in the last two classes of property were modified if they were subject to the control of a Court of Equity, as in that case the wife was entitled to an equity to a settlement thereout: *ante*, pp. 243—258. Any choses in possession, given to the wife during the marriage, vested absolutely in the husband; in other words, she acquired no interest whatever in them (*ante*, pp. 108, 109). By the creation of separate estate equity further interfered on behalf of the wife (see *ante*, pp. 177—236), and to a large extent corrected the injustice of the common law. But the creation of equitable separate estate was not an adequate or complete remedy. One of its defects was that its existence depended upon the intention of the donor or settlor of property, and, in the absence of proper professional advice, ignorant testators and settlors often failed to use such words as by the construction of the court were sufficient to manifest that intention: *ante*, pp. 183—189. Hence, cases of admitted hardship frequently occurred, and by the omission of two or three words the whole or part of the property intended to be given for the wife's own enjoyment, independent of her husband, became the property of a worthless or spendthrift husband, and available for the payment of his debts. Until the passing of the Divorce and Matrimonial Causes Act, 1857, a wife deserted by her husband had no right to her earnings or to any property acquired subsequent to the desertion as against her husband or his creditors, except as to property settled to her separate use. Under this Act

she can apply to a magistrate, &c. for an order to protec "her earnings and property acquired since the com mencement of such desertion, from her husband an all creditors and persons claiming under him," an by virtue of the order "such earnings and propert shall belong to the wife as if she were a *feme sole*: sect. 21. By another section of the same Act woman judicially separated from her husband i from the date of the decree and whilst the separatic continues, "considered as a *feme sole* with respect property of every description which she may acqui or which may come to or devolve upon her:" sect. 2 See the sections of the Divorce Acts given on pp. —68, 77. See *In re Kingsley's Trust* (26 Beav. 84 and *In re Rainsdon's Trusts* (4 Drew. 446), where was held that a married woman who had obtain a protection order could obtain payment to herself money in court; and of money in the hands trustees (*Cooke* v. *Fuller*, 26 Beav. 99). In *Ba* v. *The Bank of England* (4 K. & J. 564), it w decided that she can also transfer stock standing the name of her testator and receive dividends there as a *feme sole*. A protection order has a retrospect effect, extending back to the commencement of desertion: *In the goods of Elliott*, 2 P. & M. 2 Certain shares in a joint stock company, to wh a married woman was entitled as one of the next kin of her uncle, were transferred by the admi trator of the uncle into the joint names of the h band and wife. This was done in pursuance of arrangement between them, intended to be a bind agreement, and under which the shares were to come the property of the survivor. The husb deserted his wife, and she obtained a protection or Afterwards the company resolved upon a volunt liquidation, and 900*l.* had to be refunded to the band and wife in respect of the capital of their sha

The wife claimed this 900*l.* as coming to her after the protection order, and it was held that there had been no reduction into possession by the husband, and that the money belonged to the wife: *Nicholson* v. *Drury Buildings Estate Company*, 7 Ch. D. 48; see, also, *In re Insole*, L. R., 1 Eq. 470. The benefits of the Divorce Acts are however confined to a very small class of the community, and they cannot be regarded as doing anything more than giving abnormal rights to a few married women whose status is of a peculiar character. Practically the position of a woman deserted by her husband is that of a *feme sole*, and the legislature interfered to prevent him taking advantage of his marital rights when he neglected to perform the duties devolving upon him in his marital capacity. The Acts give the wife the power of obtaining a judicial separation, and as a natural sequence determine her rights and capacities when she has obtained a decree therefor.

By the Married Women's Property Act, 1870, certain classes of property were declared to be the wife's "separate property," viz.:—

(1) The earnings of any married woman acquired after 9th August, 1870, in a business carried on separately from her husband, or so acquired through the exercise of any literary, artistic, or scientific skill (sect. 1);
(2) All investments thereof (sect. 1);
(3) Certain deposits of a married woman in savings banks, life annuities, public stocks or funds, joint stock company's shares, &c., shares in friendly societies, &c. (sects. 2—5);
(4) Personal property coming to a woman married after 9th August, 1870, as next of kin or one of the next of kin of an intestate, and sums of money under 200*l.* by deed or will (sect.

;

(5) The rents and profits of any freehold, copyhold, or customaryhold property coming to a woman married after 9th August, 1870, as heiress or co-heiress of an intestate (sect. 8); and

(6) Certain policies of insurance of a married woman (sect. 10).

It will be seen at a glance that this Act was only a tentative measure. It provided for cases where by *intestacy*, property real or personal came to married women, and cases where sums of under 200*l.* were given to them by *deed or will;* but it will be observed, that the Act only applies even in these cases to women married after the passing of the Act, and that the rents and profits only of the realty belong to them for their separate use. The wife had no power of alienating such realty without her husband's consent, and as intestacy is generally provided against by persons possessing property, the scope of the Act was comparatively limited. Further remedial legislation was necessary, and at last an Act has been passed which is certainly intended by its authors to be final. This Act of 1882 has swept away nearly all the old common law rules with regard to the proprietary relation of husband and wife, and its provisions are so important and wide-reaching that it is very necessary to see what its effect will be. It supplies a complete remedy for most of the defects already mentioned. The acquisition of separate estate does not now depend upon the construction of instruments or upon the provisions of former Acts, and its existence no longer rests upon the doctrine of trusts. Equitable separate property will continue to exist and will still be created, but in future, except in cases where the property is vested in trustees for her separate use, a married woman will acquire the legal as well as the beneficial interest in property given to her by, or acquired by her from, persons

having both the legal and equitable interest therein. An indirect effect of this section is the abolition of tenancies by entireties. As a married woman can acquire any real property as her separate property in the same manner as if she were a *feme sole* she will be able to become a joint tenant with her husband. If, therefore, lands are now given to a husband and wife in fee simple, they will be joint tenants both at law and in equity. Each will be entitled to receive a moiety of the rents and profits, and each will be able to dispose of his or her interest without the consent of the other. The unity of person of the husband and wife is also destroyed, and hence if lands are given to them and a stranger in fee simple, the husband and wife *inter se* will be joint tenants, instead of tenants by entireties, and the stranger will be one of three joint tenants instead of one of two joint tenants as formerly: see *ante*, pp. 277, 278. With regard to joint tenancies in personal property, any personalty may be acquired by husband and wife as joint tenants or tenants in common, and each will be entitled to a moiety of the income thereof: see *ante*, pp. 280—282. As to personal property like stocks, &c., standing in the joint names of husband and wife, their respective rights therein will be considered under sections 8 and 9. It remains to be considered what effect the Act will have upon the ordinary limitations of real property to married women. Equitable separate estate is founded upon the doctrine of trusts, but trusts are no longer essential to the existence of separate property. Suppose by deed or will an estate is now given to trustees and their heirs to hold to the separate use of a *feme covert*, with remainder to the use of her heirs. Irrespectively of this Act the trustees would take the legal estate, and the married woman the equitable estate. But now, for the purposes of acquiring real property, she is in the position of a

feme sole, and there is no need of trustees to make it her separate property. Again, what will be the effect of a limitation of real estate to trustees and their heirs upon trust "that a wife may receive and enjoy the profits?" Then, again, lands are sometimes devised to a married woman for her sole and separate use without the intervention of any trustee, and equity, acting upon the principle that it will never allow a trust to fail for want of a trustee, has hitherto made the husband a trustee for his wife. It is submitted that if in the first two cases there should be no restraint upon anticipation, the legal as well as the equitable fee will vest in the wife. In the last-mentioned case we think that she will take the legal estate also even where there is a restraint upon anticipation: see *ante*, p. 225.

"Holding."—An absolute right of property over any thing confers upon its owner the power of using it in any way he pleases, to the exclusion of every other person, and also the power of disposing of it in any way he pleases, without the concurrence of any other person, provided, of course, that such powers are not exercised in a way forbidden by the law. The power of user includes the enjoyment of the property and the receiving of the rents and profits, and that of disposition includes alienation by will as well as *inter vivos*. Omitting for the present the proprietary rights of married women in equity and by statute, let us examine in what respects her proprietary rights at law come short of this definition of an ordinary owner's absolute right of property. By the common law the rents and profits of all the freeholds, customaryholds and copyholds of a married woman, whether vested in her at marriage or subsequently, belonged to her husband during the coverture. Her husband became tenant of the lands, in the case of copyholds without admission, and she

had no right to their enjoyment during the coverture except by his permission: see *ante*, pp. 80—87. The rents and profits of all her leaseholds belonged to him also during the coverture. The marriage itself operated as a legal assignment of the term to the husband, and by disposing of it during his lifetime he could deprive her of it absolutely: see *ante*, pp. 94—98. Her choses in action became the property of her husband absolutely, if he reduced them into possession during the coverture by receiving them or recovering them at law (see *ante*, pp. 99—108), and her reversionary interests became his similarly if they fell into possession during the coverture (see *ante*, pp. 109—115), while by the marriage itself she ceased to hold her choses in possession, they becoming at once the property of the husband: see *ante*, pp. 108, 109. The alterations introduced by the Divorce and Matrimonial Causes Acts, 1857 and 1858, as to married women who have obtained protection orders and women who have been judicially separated from their husbands have already been stated, pp. 385—387. It has been also seen that the Married Women's Property Act, 1870, enlarged the classes of separate property (*ante*, p. 387). We shall now set out in detail the proprietary position of a wife married after the 31st December, 1882, in the absence of any settlement or agreement for a settlement. She will remain tenant of her freeholds, customaryholds, copyholds and leaseholds, and solely entitled to the rents and profits thereof. The only rights which her husband will obtain therein will be such as she may confer upon him. She will be able, without his consent, to exclude other persons from the enjoyment or user of the property. Several difficult questions may arise out of this novel position of the wife. Suppose that she permits her husband to live in her house, will he acquire any interest therein, or will he be regarded as a guest simply? It is submitted that he

will be tenant at will to his wife, and if she gives him notice to quit and he refuses to go, he will then become a tenant by sufferance. Again, suppose a husband, against the will of his wife, enters upon her lands, will he be a trespasser? These points will be dealt with more at large under section 12, which treats of a married woman's remedies for the protection and security of her separate property. As by the sub-section under consideration a married woman will hold her real and personal property in the same manner as if she were a *feme sole*, she will, it is submitted, be entitled to all the remedies which an ordinary proprietor possesses. A married woman is also entitled to all other kinds of personalty absolutely; that is, she will retain what she possesses at marriage, and that which may come to her during the coverture will be equally her own, to the exclusion of her husband. In regard to marriages after 1882, a husband will have no marital rights as to property, and therefore there cannot be in future any such thing as a fraud by the intended wife upon such rights: see *ante*, p. 380. The Act does not affect the operation of a marriage contracted before 1883 upon the then property of the wife, but all kinds of real and personal property coming to her after 1882 will become her separate property. Under sections 2 and 5 we shall treat of the kinds of property which are by this Act made the separate property of married women. Difficulties will doubtless arise under this section with regard to the acquisition of property by the wife from her husband. It is submitted that it will still depend upon the intention of the husband whether presents from him to his wife are to be regarded as separate estate or paraphernalia: *ante*, pp. 192—195. By the 50th section of the Conveyancing Act, 1881, freehold land or a chose in action could be conveyed by a husband to his wife alone, or jointly with

another person, but the sub-section, under consideration, enables him to transfer any property to her just as if she were a stranger to him. The effect of this will be to establish the rule in *Richards* v. *Delbridge* (L. R., 18 Eq. 11) with regard to gifts from husband to wife, and an imperfect gift made after 1882 will not be upheld as a declaration of trust. Wherever, therefore, a gift requires a deed to perfect it, it will not be difficult to distinguish between the property of the husband and wife respectively. But the creditors of the husband will find it far from easy to prove that chattels passing by delivery have not been given by him to his wife, if the married couple are sufficiently unscrupulous to seek to save his property by declaring it has been given to the wife. It would have been better if the Act had provided that gifts from husband to wife should be evidenced by writing. It is true that if given in fraud of creditors they can be set aside, but that will be hard to prove; while, if writing were required, evidence of the nature and time of the transaction would be forthcoming. Questions of interpleader will probably often arise under this Act, which enables choses in possession to be so easily transferred to the wife.

"Disposing."—Voluntary alienation of property may be either *inter vivos*, or by will, and as these two modes are distinct it will be convenient to treat of them separately.

Alienation inter vivos.—It has been observed that one of the incidents attaching to the sole and absolute ownership of property is the right of disposing of such property in any way the owner pleases, without the necessity of obtaining the consent of any other person. By the common law a married woman's right of alienation was very limited, even in regard to that part of her property which did not by operation of marriage pass to her husband.

The wife could not alienate or charge her freeholds, customaryholds, or copyholds, without her husband's concurrence, even although such alienation or charge was expressed to be made subject to the rights of the husband therein. Besides his consent to the deed of alienation, or in the case of copyholds to the surrender, she had before 1833 to concur in levying a fine, a most cumbrous and expensive legal formality; and although the Fines and Recoveries Act abolished that ceremony, it substituted an acknowledgment therefor made after separate examination before a judge, or commissioner, or steward. She could not alienate or charge her leaseholds, nor assign her choses in action. Until Malins' Act (1857) came into operation she was unable, even with her husband's consent, to dispose of her reversionary interests in personalty: see *ante*, pp. 111—114. It is true that a married woman might convey by means of a power of appointment (whether given her while single or during the coverture), without the consent of any husband she might have, and without an acknowledgment (*Doe* d. *Blomfield* v. *Eyre*, 3 C. B. 557; 5 C. B. 713; and see *ante*, pp. 260—263); but this was an innovation upon the common law. A married woman could dispose of her equitable separate estate as if she were a *feme sole* (see *ante*, pp. 197—207); but she could not dispose of the legal interest in realty, even although settled for her separate use, without her husband's consent to the deed, and her acknowledgment (*Lechmere* v. *Brotheridge*, 2 N. R. 219), except when lands were vested in her as a bare trustee (Vendor and Purchaser Act, 1874, s. 6). A very small class of married women under the Divorce Acts, 1857 and 1858, could dispose of property as if they were unmarried. The Act of 1870 created new kinds of separate property, but did not enlarge a married woman's power of alienation. The present Act gives to a married woman an

absolute right of alienation over her separate property. She can convey the legal and beneficial interest in realty without the consent of her husband, and without any of the formalities required by the Fines and Recoveries Act, as amended by the Conveyancing Act, 1882. She will also be able to convey or release her reversionary interests in personalty without complying with the formalities required by Malins' Act, and her chattels real and other personalty will also be at her sole disposal. The Act does not affect the property of women married before 1883, which vested in them in interest or in their husbands in their right before that time, and the requisites of alienation of such property will continue to be the same as formerly.

Restraint upon anticipation.—The full power of alienation given to a married woman by the Act is, however, subject to "any restriction against anticipation at present attached, or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument": see sect. 19, *post*, p. 454.

Disposition by will.—A married woman's power of disposition by will has already been dealt with: see *ante*, pp. 268—276. The Divorce Act, 1857, s. 25, specially declared that a woman judicially separated from her husband could dispose of her separate property as a *feme sole*, but made no such express declaration respecting property acquired by a woman having a protection order, although by allowing her to hold property as a *feme sole*, it by that means allowed her to dispose of it by will or otherwise: see *In the goods of Elliott*, 2 P. & M. 274. The Married Women's Property Act, 1870, also

treated a married woman as a *feme sole* with respect to the separate property thereby created, and therefore allowed her to dispose thereof by will. A married woman henceforth will have a complete unrestricted power of alienation over both her real and personal property.

Without the intervention of any trustee.—In equity it has been declared that the express intervention of trustees is not required, for the husband will, for failure of others, be held as trustee: see *ante*, p. 178. But we have already seen the advantage of appointing trustees; and as it will be still wise to make marriage settlements, in order to prevent the wife parting with her property to her husband, property will still be vested in trustees for her benefit.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or

proceeding shall be payable out of her separate property, and not otherwise.

CONTRACTS.—By the common law a married woman was incapable of binding herself by a contract, although she might, as agent, contract so as to bind her principal, whether he were her husband or some other person. In *Liverpool Adelphi Loan Association* v. *Fairhurst* (9 Exch. 429), Pollock, C. B., says, "A *feme covert* is unquestionably incapable of binding herself by contract; it is altogether void, and no action will lie against her husband or herself for breach of it." She could not even indirectly be made liable for a contract, as, for example, for a tort founded upon a contract; and neither she nor her husband could be sued for it: see *ante*, p. 143. A married woman could, however, acquire a right under a contract made with her. "It is settled law that a married woman, though incapable of making a contract, is capable of having a chose in action conferred upon her:" per Jervis, C. J., in *Dalton* v. *Midland Counties Railway Company*, 13 C. B. 474. She could therefore obtain an interest in and sue, or join in suing, upon a contract to pay for her services: *Brashford* v. *Buckingham*, Cro. Jac. 77; or on a promissory note given to her: *Guyard* v. *Sutton*, 3 C. B. 153; or on a covenant to pay her an annuity: *Bendix* v. *Wakeman*, 12 M. & W. 97; or for shares bought by her with her own moneys in her own name: *Dalton* v. *Midland Counties Railway Company*, *supra*, subject to an objection being taken, if she sued in her own name, that her husband was not joined as plaintiff. The exceptions to this incapacity were as follows. By the custom of London the wife of a freeman trading separately from her husband was bound by her contracts, and he was not liable upon them, even if after her death he promised to pay her debts so contracted:

Bac. Abr. Custom of London (*D*). Other wives who might contract as if they were unmarried were, the wife of the King of England, the wife of a person civilly dead, or of an alien husband who had never been within the realm; by statute, a wife judicially separated from her husband, whilst so separated, or one who had obtained a protection order, while the desertion of her husband lasted: 20 & 21 *Vict. c.* 85, *ss.* 26, 21. Section 10 of the M. W. P. Act, 1870, enabled a married woman to effect a policy of insurance upon her own life, or the life of her husband for her separate use as if she were a *feme sole*. The most important exception to a married woman's incapacity to contract, viz., with regard to her separate estate, has already been noticed (see pp. 209—214). A married woman could bind herself, by her contract, as to real property, under the following circumstances: by a contract under seal, acknowledged by her, under 3 & 4 Will. 4, c. 74: *Crofts* v. *Middleton*, 8 De G. M. & G. 192; *Cahill* v. *Cahill*, W. N. 1883, p. 86; where she had a power of appointment, by her contract complying with the formalities required by the power (Sug. Powers, 8th ed. 206), and *semble*, such formalities might be supplied: *Stead* v. *Nelson*, 2 Beav. 245; and where she had the equitable separate use in realty: see *ante*, p. 198. The M. W. P. Act of 1870 did not confer upon a married woman a general capacity of entering into contracts. Indirectly it enlarged her power of contracting by creating new kinds of separate property, with reference to which she had the same power of contracting as she had over her separate estate. In *Howard* v. *Bank of England* (L. R., 19 Eq. 301) Jessel, M. R., speaking of this Act, says: "It does appear to me that the present Act gives no power to contract to a married woman which she did not possess before. It does make certain property, property to her separate use, to that extent carrying with it a power

to contract in respect of that property which every married woman previously possessed in a Court of Equity." In *Summers* v. *City Bank* (L. R., 9 C. P. 587), Lord Coleridge, C. J., says: "Our decision, under these circumstances, must not be taken to affirm, nor will it affirm the general proposition that under this Act, and without reference to particular circumstances, a married woman can contract." By the subsection under consideration a statutory power of contracting has been conferred upon every married woman, but she is still protected from personal liability, as her contracts will only bind her separate property. A wife could contract with her husband with regard to her equitable separate estate, but she could not contract with him at law: *Phillips* v. *Barnet*, 1 Q. B. D. 439, per Blackburn, J. Under the present law a wife may contract with her husband just as if she were unmarried. This new power affects her legal position in many respects. It is submitted that she may now make a valid contract with her husband for a separation between them without the concurrence of trustees on her behalf (see *ante*, pp. 52, 53), and that her covenant in a separation deed to release her claims upon her husband for support, and to accept the sum allowed by the deed in lieu of alimony, would be a valuable consideration, and so prevent the deed being considered a voluntary deed: *ante*, p. 55—59. Even before this Act it was decided that a married woman could validly contract to live apart from her husband: *Besant* v. *Wood*, 12 Ch. D. 605, *ante*, p. 60. She may also make any other contract with her husband, *e. g.*, of partnership: *Re Childs*, L. R., 9 Ch. 508. By section 24 the word "contract" includes the acceptance of any trust, or of the office of executrix or administratrix. She may therefore now become a trustee, executrix, or administratrix, just as if she were a *feme sole*, and her husband's concurrence will not be necessary. A married woman cannot, how-

ever, contract so as to bind her separate estate if there is annexed to it a restraint upon anticipation. (See sect. 19).

QUASI CONTRACTS.—It is submitted that a married woman may now be sued upon any obligation arising *quasi ex contractu* after 1882, as she may now be sued either "in contract or in tort, or otherwise, in all respects as if she were a *feme sole*." The anomalies before mentioned (*ante*, pp. 218, 219) will, therefore, no longer exist.

TORTS.—Prior to 1883 a husband was liable for his wife's torts committed during marriage, except such as were connected with or founded upon a contract. The wife was not personally liable for her torts, and her separate estate was only liable for a fraud relating thereto, *e. g.*, dealing with the separate estate by way of fraudulent representation, or for an actual appropriation of funds subject to the settlement and the same trusts which created the separate estate (*Wainford* v. *Heyl*, per Jessel, M. R.; see *ante*, pp. 141—146); but where a wife had been judicially separated from her husband, or where she had obtained a protection order and it was still in force, the wife alone was liable for her torts committed while the separation or desertion continued: 20 & 21 *Vict. c.* 85, *ss.* 26, 21. As by the common law the property of the wife was practically transferred to the husband, it was just that he should be responsible for her wrongs. But this Act prevents a husband, married after 1882, acquiring any rights in his wife's property otherwise than by contract with her; and the question arises, whether by this sub-section his common law liability is taken away. It is submitted that as the common law liability of the husband is not expressly taken away it must still remain, and that the Act has made no alteration in his liability

other than indirectly by giving the injured person the right to make the separate estate of the wife answerable in damages for the wrong done to him. It has not even made the wife's separate estate primarily liable as between her and her husband. In an action brought in respect of the wife's tort, it is submitted that the plaintiff may either sue the wife alone—in which case her separate property alone will be liable for damages and costs; or he may sue the husband and wife jointly and obtain judgment against the husband alone; or he may have the wife's separate property made liable therefor, and obtain judgment against the husband for the residue of the damages and costs not recovered out of her separate estate. It would seem advisable that the wife should in no case be sued alone, as any damages or costs recovered against her are payable out of her separate property and not otherwise, and the decision in the action would bar the plaintiff's right to proceed against the husband in case the separate property is insufficient to satisfy the judgment. The husband's liability for his wife's torts ceases with the termination of the coverture by death or divorce (*Capel* v. *Powell*, 10 Jur., N. S. 1255), but continues so long as the relation of husband and wife subsists, although they are permanently living apart: *Head* v. *Briscoe*, 5 C. & P. 484. The wife, after the husband's death, is liable for all torts committed by her during the marriage in respect to which an action has not been brought and judgment given, or which are not barred by any Statute of Limitations: see *Vine* v. *Saunders*, 4 Bing. N. C. 96. For the respective liabilities of husband and wife for her breaches of trusts and devastavits, see *ante*, pp. 146, 147, and *post*, Sect. 24; and as to ante-nuptial torts of wife, see *ante*, pp. 139—141. It is submitted that a married woman will now be able to sue alone, not only in respect of torts relating to her separate property, but

also in respect of personal torts; but that her right of action in the latter case will not debar her husband from suing also for any wrong to him arising out of the same tortious act.

SUING AND BEING SUED.—With regard to actions in which a married woman was a party, the practice prior to the coming into operation of this Act was regulated by Ord. XVI. r. 8 of the Judicature Acts. Subject to the power given by this rule to the court or a judge to allow a married woman to sue or be sued alone, she could only sue as plaintiff by her next friend, according to the former practice of the Court of Chancery, and the husband was joined as a defendant: *Roberts* v. *Evans*, 7 Ch. D. 830. An exception was made by sect. 11 of the Married Women's Property Act, 1870, which empowered a married woman to sue alone in respect of her separate estate created by that Act; but not to be sued alone: *Hancocks* v. *Lablache*, 3 C. P. D. 197. It was necessary in an action against a married woman to join her husband as a co-defendant. The head-note in *Atwood* v. *Chichester* (3 Q. B. D. 722) states in effect that when a married woman has separate estate, without power of anticipation, a creditor to obtain payment thereout must join as defendants her husband and the trustees of her settlement; but this is clearly wrong. The judgments only refer to separate estate, and her contracts do not bind her separate estate, to which is annexed a restraint upon anticipation: *Chapman* v. *Biggs*, W. N. 1883, p. 92. In order to charge the wife's equitable separate estate, her trustee was not a necessary party to the action (*Davies* v. *Jenkins*, 6 Ch. D. 728; *Picard* v. *Hine*, L. R., 5 Ch. 274); but when it was sought to obtain an order directing the trustee to pay the amount recovered by the judgment, he was a necessary party (*Collett* v. *Dickenson*, 11 Ch. D. 687), and it is submitted that this rule will still obtain. A married woman is now

under no incapacity to sue; her capacity to be sued is qualified by the fact that, although she may be sued alone, she cannot be made personally liable. The rule laid down in *Ortner* v. *Fitzgibbon* (50 L. J., Ch. 17), and *Durrant* v. *Ricketts* (8 Q. B. D. 178), that the procedure under Ord. XIV. does not apply to the case of married women, will still hold good; and subject to the exception introduced by section 1 (5) they will not be liable to the bankruptcy laws. It will not be necessary for her to give security for costs when she sues alone (*Threlfall* v. *Wilson*, 8 P. D. 18; *Severance* v. *Civil Service Supply Association*, 48 L. T. 485), and she will be able to sue *in formâ pauperis* alone without special leave. Any relief may be obtained by her, and against her, except such as would make her personally liable. As she has full capacity to contract, a decree for specific performance may be obtained against her, and an injunction may also be granted against her. One effect of this sub-section is to remove a married woman from the list of persons under disability, and in future the provisions of the Statutes of Limitations will apply to her as if she were unmarried. If a *feme sole* is a party to an action, and marries, it will not be necessary to obtain leave to amend the parties to the action, as no amendment will be required.

Damages and Costs.—It is submitted that the effect of this sub-section is to make the separate property of a married woman, whether equitable or statutory, liable for any damages or costs in any action in which she sues or is sued. For cases in which it was held liable before the Act, see *ante*, pp. 212, 213. The liability will attach to the separate property which she has at the time of judgment, as to which no restraint upon anticipation exists, whether such separate property is in possession or in expectancy. In *The National Provincial Bank* v. *Thomas* (24

W. R. 1013), the Court refused an injunction upon an interlocutory application made in an action to obtain payment of a debt out of separate property to restrain a married woman from alienating it *pendente lite*; but V.-C. Malins, in *Robinson* v. *Pickering* (16 Ch. D. 371), granted a similar injunction, and it is submitted that it should be granted in all cases where such alienation would be likely to deprive the plaintiff of his remedy. Before the Act, the following rules obtained with regard to costs. The separate estate of a married woman was liable for costs where it was the subject-matter of the action: *Barlee* v. *Barlee*, 1 S. & S. 100. But if there was a restraint upon anticipation, the costs could not be charged on future income, but could be paid out of arrears: *Moore* v. *Moore*, 1 Col. 54. As to costs of litigation between husband and wife, see *Walrond* v. *Walrond*, John. 18; *Lampert* v. *Lampert*, 1 Ves. 21. Where a husband and wife sued or defended jointly, the costs were payable by him or to him alone. See generally, as to costs, Morgan and Davey's Costs, 256—263. For cases in which costs have been ordered to be paid out of separate estate, with a restraint upon anticipation, under the 12th section of the M. W. P. Act, 1870, which makes such estate liable for a married woman's ante-nuptial debts: see *ante*, pp. 232, 233, 470.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

Before this Act came into operation contracts made by a married woman did not bind her separate estate, unless they were made with express reference thereto, or the nature of the contract was sufficient to show that

it was her intention to bind her separate estate: see *ante*, pp. 209—214. It was often difficult for a trader to prove that a married woman had contracted with him on the faith of her separate estate; and if he could not prove it, and the husband was not liable, he was without a remedy. The burden of proof will now be upon the wife, if she seeks to escape liability upon her contracts; and this may give rise to many controversies between husband and wife as to who is really liable upon her contracts. Before 1883 the presumption of law was, that where husband and wife were living together she had his authority to bind him by her contract for articles suitable to that station which he permitted her to assume: see *ante*, pp. 121—124. Where they were living apart, the presumption was that her contracts bound her separate estate and not her husband. The presumption is now made general, and exists where they are living together. It is submitted that in the latter case the husband will still be alone liable upon contracts made by his wife in respect to such matters, *e.g.*, household expenditure, &c., as are usually under the control of the wife, or where the wife carries on her husband's business for him: see *ante*, pp. 124—126. The presumption that the wife contracted with reference to her separate estate may also be rebutted by her proving that her husband expressly authorized her to enter into the contracts, or that he has ratified them, or that he refused to provide her with things necessary for her subsistence. But in all these cases it is submitted that unless the tradesmen knew of the husband's liability, and gave credit to him, and not the wife, she will still be liable upon her contracts as well as her husband. She will be in the position of an agent who contracts on behalf of an undisclosed principal. The person contracting with her may, when he discovers that the husband authorized the contract, elect either to sue her or her husband. If she is made to pay the debt or perform her part of

the contract, she will have her remedy against her husband. As to the husband's liability for the contracts of his wife when she is living apart from him, see *ante*, pp. 129—139.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

This sub-section alters the law as declared in *Pike* v. *Fitzgibbon* (17 Ch. D. 454) by the Court of Appeal. It was there decided that a judgment upon a contract made with a married woman could only reach the separate property which she had at the time of the contract, or the residue of such property belonging to her at the date of the judgment. If, therefore, between the time of making the contract and of the judgment, a wife alienated all her separate property, the creditor had no remedy: see also *Smith* v. *Lucas*, 18 Ch. D. 531, and *ante*, pp. 206, 210. The wording of this sub-section is not free from obscurity, but it is clear that, although it declares that a contract of a married woman binds the separate property she was possessed of at the time of making it, the contract does not create a charge upon it; and if at the time of getting the judgment it has all been disposed of, the creditor will not be able to follow it. It is submitted that the creditor will be able to enforce his judgment against all the separate property which she possesses at the date of the judgment, and that, probably, would be ascertained by an inquiry. The separate property to which a restraint upon anticipation is annexed will still be unavailable to the

creditor, unless the restraint has been removed before judgment: see *sect.* 19. The extent to which the contracts of a married woman affect the corpus of property where she has a limited interest to her separate use, with a power of appointment over the corpus, has already been dealt with: *ante*, pp. 214—216. It is submitted that the word "acquire" is equivalent to "become possessed of or entitled to," and therefore includes a remainder in real estate, reversionary interests in personalty, and, in fact, any property in which she may have any beneficial interest in possession or expectancy.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws, in the same way as if she were a *feme sole*.

A married woman may carry on a trade either as a principal or as an agent, and in the latter case she may be an agent for her husband or for a stranger. It is only where she is trading on her own account that she can in any way be subject to the bankruptcy laws. It is submitted that if she is carrying on business in partnership with her husband, this will be carrying on a trade separately from her husband, as, *quà* her own interest, she is a principal, and that her exemption is only where she is acting as his agent. Whether the wife is or is not trading separately from her husband will be a question of evidence. It is submitted that the presumption will still hold good, that where the husband and wife are living together, and the wife carries on a business, she is only the agent of her husband: *Phillipson* v. *Hayter*, L. R., 6 C. P. 38. See *ante*, pp. 126, 127, for other cases in which it has been held that the wife was trading as the agent of her

husband. It is submitted that in those cases where before the Act the trade, property, and the profits of the trade, or the profits alone (the stock in trade belonging to the husband), belonged to the wife as her separate property, she will be considered as trading separately from her husband. See *Ashworth* v. *Outram* (5 Ch. D. 923), and the cases cited *ante*, pp. 191, 192, as to what constitutes separate trading by the wife. Before this Act a married woman could not be made a bankrupt: see *Re Grissell*, 12 Ch. D. 484, and *ante*, pp. 219, 220. The exceptions to this general rule were as follows:—Before 1883 a married woman could be made a bankrupt—(a) where she was trading as a *feme sole* by the custom of London in respect of debts contracted in the course of such trading (*Lavie* v. *Philips*, 3 Burr. 1783); (b) where the husband was civilly dead, *e. g.* where he was in exile, or had been transported (*Ex parte Franks*, 7 Bing. 762); (c) where she was living apart from her husband under a decree for judicial separation, or a protection order: 20 & 21 *Vict. c.* 85, *ss.* 21, 26; *Ramsden* v. *Brearley*, L. R., 10 Q. B. 147. A woman married before 9th August, 1870, cannot during coverture be made a bankrupt in respect of debts contracted by her whilst single, such debts having become her husband's; and the M. W. P. Act of 1870, although it made her separate property liable for her ante-nuptial debts, did not, it is submitted, make her also liable to bankruptcy in respect of them. An order under section 5 of the Debtors Act, 1869, has been made against a married woman for payment when judgment was recovered against her in an action in which she did not appear, and therefore did not plead coverture: thus rendering her liable to imprisonment in default of obeying the order: *Dillon* v. *Cunningham*, L. R., 8 Ex. 83.

No provision similar to this sub-section was inserted in the M. W. P. Act of 1870, nor was it then required, because the only separate property

liable for the fulfilment of a married woman's engagements was that which she had at the time of making them. This Act makes a married woman's after-acquired property also liable for her contracts, and it is for her protection that she is, to the extent of her separate property, made subject to the bankruptcy laws, as a certificate of discharge will free her after-acquired property from any liability. It is submitted that by the combined effect of this sub-section and of section 19, her separate property with a restraint upon anticipation will still be exempt from liability. It is true that where a married woman has been sued under section 12 of the Act of 1870, such property has been made liable for her ante-nuptial contracts (see *post*, p. 440); but that case is not analogous to this sub-section, because upon marriage the property might have been so settled in order to defeat her creditors, and if without the husband's knowledge of the fraud the settlement could not have been set aside. On the other hand, in making contracts with a married woman, the person contracting knows that her separate estate without power of anticipation is not liable upon her contracts; while in contracting with a single woman, there is no restraint upon anticipation, because it only exists during coverture.

2. *Property of a woman married after the Act to be held by her as a feme sole.*]—Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or

devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Before this Act came into operation, the marriage itself acted as a conveyance of nearly all the wife's property to the husband. Now, so far as a woman's proprietary rights are concerned, any marriage solemnized after 1882 will not affect them, any more than it will affect the proprietary rights of her husband. The property which she has at the time of marriage, and all property coming to her after marriage, will be her separate property. This section does not preclude a woman entering into any contract as to the destination of her property. Thus, she may, in the settlement made upon her marriage, covenant to settle her present or after-acquired property upon the trusts of the settlement. The Act does not alter the devolution of the property of the wife upon her death intestate, and such devolution will follow the rules stated *ante*, p. 234. The husband's rights at common law in his wife's real and personal property have already been referred to in the notes to the first sub-section of section 1 of this Act. It will not be necessary under this section to consider what construction the words "acquired" or "devolve" should receive. It is clear that a woman who marries after 1882 will have the same rights as to acquisition, holding, or disposition, of her property as if she were a *feme sole*, and her receipt or discharge for the payment or transfer of any fund or property to her will be sufficient. As her husband will acquire no rights

in her property, the doctrine as to an equity to a settlement will not concern women marrying after 1882; nor can they make a settlement in fraud of marital rights, for the sufficient reason that their husbands will not be entitled to any rights in their property. It is submitted that the husband's right to curtesy out of his wife's lands is not taken away by this Act, inasmuch as it has been held that a husband is entitled to curtesy out of his wife's separate estate: see *ante*, pp. 90, 91.

3. *Loans by wife to husband.*]—Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

This section is apparently copied from the 5th section of Bovill's Act (28 & 29 Vict. c. 86). This Act permitted persons, under certain conditions, to lend money to persons in trade under an agreement to receive a rate of interest varying with the profits of the trade, without incurring the liabilities attaching to partners (*sect.* 1); "but in the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into

any arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan . . . . until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied:" *sect.* 5. The section under consideration differs from Bovill's Act, in that it applies in express terms only to bankruptcy; but it is submitted that it will be construed so as to reach the other cases expressly provided for by Bovill's Act; and will therefore include cases of liquidation by arrangement and composition with creditors, and the administration of her assets when she dies in insolvent circumstances: see *Judicature Act*, 1875, *sect.* 10. It has been decided that section 5 of Bovill's Act does not deprive a lender of his right to retain any security which he may have taken (*Ex parte Sheil*, 4 Ch. D. 789; and *Ex parte Mills*, L. R., 8 Ch. 569); and it is submitted that the same rule will be followed in the case of women lending money to their husbands, and taking a specific security. The policy of this section is evidently to protect creditors, and to discourage the wife of a trader lending to her husband her separate property for the purposes of his business. It will be better for her, if she wishes to lend money to a person in trade, to lend it to a stranger; as in that case, unless the interest is to vary with the profits of the business, she would rank *pari passu* with his other unsecured creditors. It is submitted that if the trustees of a married woman have power to lend part of the settled property to her husband for the purposes of his business, they will rank *pari passu* with his unsecured creditors. A married woman may take advantage of Bovill's Act (which was said by Jessel, M. R., in *Pooley* v. *Driver*, 5 Ch. D. 458,

to be merely declaratory of the law), to lend money to her husband without incurring the risks of a partner. Unless the present Act had contained some such provision as that under consideration, a husband could carry on trade with apparently an ample stock and capital, and then, in the event of his failing, his creditors would find that nearly all the capital had been lent to him by his wife out of her separate property. This section being clearly designed for the protection of trade creditors, it is submitted that, despite the words "*or otherwise*," it will not apply to cases where the wife has lent money to her husband not in trade. Before this Act a married woman has been allowed to prove as a creditor in an administration action in respect of a loan to her husband out of her separate estate: *Woodward* v. *Woodward*, 3 De G. J. & S. 672. So, also, where she has mortgaged her lands for his benefit: see *ante*, p. 84.

4. *Execution of general power.*]—The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

The question how far a married woman's contracts affect the *corpus* of property in which she has a limited interest only with a power of appointing the remainder or reversion, has been already considered: see *ante*, pp. 214—216. It is submitted, that under this section the property appointed will be liable for her debts, although she had no interest in the property during her life. The section only refers to general appointments by will. The 27th section of

the Wills Act, 1837, enacts that a devise or bequest in general terms of real or personal property shall include any property coming within the description of the property over which the testator may have a general power of appointment. As the will of a married woman dying after 1882 will be as valid as if made by a *feme sole*, this section of the Wills Act becomes important in considering the subject. In the administration of the estate of a married woman the property appointed will be the last resorted to for the payment of her debts. Unless the power of appointment is exercised, the property will belong to those entitled in default of appointment, just as in the case of a man failing to execute a general power of appointment.

5. *Property acquired after the Act by a woman married before the Act to be held by her as a feme sole.*]—Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

In treating of the scope of this section it will be necessary to divide women married before 1883 into two classes, viz.: those married before the 9th August, 1870, and those married after that date. Section 1 of

the Act of 1870 applies to women married before it was passed, as well as to those married afterwards. It provided that "the wages and earnings of any married woman acquired or gained by her after the passing of this Act, in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipt alone shall be a good discharge for such wages, earnings, money, and property." The Act of 1870 only created new classes of separate property, and did not give separate property a legal existence. It was therefore held, in *Re Poole's Estate* (6 Ch. D. 739), that the earnings of a married woman since the passing of that Act were equitable assets. It is submitted that her earnings, &c., after 1883 will be her legal property, and will upon her death vest in her executor *virtute officii*, and so be legal assets. As to what constitutes separate trading, see *ante*, pp. 191, 192. In *Laporte* v. *Cosstick* (23 W. R. 131), it was settled that if a husband takes such a part in his wife's business as to make himself personally liable, the business is not carried on separately from the husband within the meaning of the Married Women's Property Act, 1870. Blackburn, J., said: "Separate, here, does not mean bodily separate. The husband and wife may very well live together, and yet there may be a separate trading. The husband might for this purpose be only in the position of a lodger; but where, as here, the husband takes such a part in carrying on the business as to make himself personally liable, there cannot be a separate trading:" see also *Lovell* v. *Newton*, 4 C. P. D. 7, and *Ashworth* v. *Outram*, 5 Ch. D. 923. Sections 7

and 8 of the Act of 1870, only apply to women who married on or after 9th August, 1870. They provided, that "where any woman married after the passing of this Act shall during her marriage become entitled to any personal property as next of kin, or one of the next of kin of an intestate, or to any sum of money not exceeding 200*l.* under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same;" and, "where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same." The word "entitled," used in the 7th section of the Act of 1870, was held to mean "entitled in possession," in a case where, before the Act, the wife, then a *feme sole*, was entitled in expectancy: *Lane* v. *Oakes*, 30 L. T. 726. This case followed *Archer* v. *Kelly* (8 W. R. 684), in which Kindersley, V.-C., held that "becomes entitled" signified a change of position from expectancy to possession: see also *ante*, pp. 319—330, as to the construction of this and similar expressions in marriage settlements. The wider scope of section 5 of the present Act is evident upon comparing it with sections 1, 7 and 8 of the Act of 1870. It applies to women whenever married; to all kinds of property, whether coming to them by gift, deed, will, intestacy or otherwise, and it gives them the legal as well as the beneficial interest.

"Shall accrue."—It is submitted that the decision in *Lane* v. *Oakes* (*supra*) is not applicable to the

words of this section. Instead of "become entitled," the words used are, "her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue." These words appear to be used on purpose to make it clear that the rights of husbands in property to which the wife was entitled under any instrument executed or made before 1883 should remain unaffected. In order to make the meaning of this section more apparent, the following supposititious cases and opinions are appended. Under the will of a testator dying before 1883, A. and B., two married women, are each entitled upon the death of C. to the following different kinds of property: (1) Estates in fee simple, (2) leaseholds, and (3) to a sum of 5,000*l.* consols. No settlement was made upon their marriage, and the gifts were made directly to them, without the intervention of trustees and not to their separate use. A. and B. are also entitled to choses in action conferred upon them in 1882. A. married her present husband in 1869, and B. in 1873. C. died on the 1st February, 1883. What are the respective rights of A. and B. and their husbands in the foregoing different classes of property? In all these cases the title of the married woman accrued before 1883. A.'s husband will therefore have the legal estate in the realty during the coverture, and will take the rents and profits. She will only be able to dispose of it with his concurrence and by deed acknowledged. Her only right in the leaseholds will be contingent upon surviving him and his not having disposed thereof. He can reduce the 5,000*l.* into possession, and it will become his own, subject to her equity to a settlement: see *ante*, pp. 243—58. If the chose in action is legal, he has during the coverture the right to reduce it into possession: see *ante*, pp. 101—6. The rights of B. and her husband are precisely the same as those of A. and her husband. Now, suppose A. and B.

are entitled as before upon the death of C., as coheiresses and next of kin to a person who died in 1882, the rights of A. and her husband will be the same as before mentioned. But although B.'s husband will still have the legal estate, she will be entitled to the rents and profits of the realty as her separate property (*quære*, whether entitled to the corpus: see *Re Voss*, 13 Ch. D. 504). B. will also be entitled to the beneficial interest in the leaseholds and in the consols, but in order to convey or transfer them, her husband's concurrence will still be necessary, unless in the latter case she has registered the stock in her name: see *Howard* v. *Bank of England*, L. R., 19 Eq. 295. Where a married woman takes after 1883 as the appointee of a particular power arising under an instrument executed or made before 1883, her title to the property appointed will be considered to have accrued before 1883, because a person taking under a particular power of appointment takes under the instrument creating the power.

6. *As to stock, &c. to which a married woman is entitled.*]—All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the commissioners for the reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the governor and company of the bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all

shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the governor and company of the bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the postmaster-general, the commissioners for the reduction of the National Debt, the governor and company of the bank of England, the governor and company of the bank of Ire-

land, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

Sections 6—10 of the present Act supersede sections 2—5 of the Act of 1870, except as to rights acquired and liabilities incurred by virtue of such sections. The much wider range of the present Act will appear upon comparing the subjoined summary of the provisions of each of these Acts respectively.

The Act of 1882 applies to—	The Act of 1870 applies to—
(1) Deposits in any bank.	Deposits in savings banks and post office savings banks.
(2) Annuities granted by the National Debt Commissioners or by any other person.	Annuities granted by the said Commissioners only.
(3) Public stocks and funds of any amount.	Public stocks and funds not less than 20*l.*
(4) All shares, stock, debenture, debenture stock, or other interest of or in any corporation, company, or public body, municipal, commercial or otherwise, with no limitation as to fully paid-up shares or liability.	Fully paid-up shares, debenture, debenture stock of any incorporated or joint stock company, to the holding of which no liability is attached.
(5) All shares, &c. in any provident, friendly, benefit, building or loan society, without limitation as to liability.	All shares, &c. in such societies to which no liability attaches.

All these different classes of property standing in the sole name of a married woman on January 1st, 1883 (sect. 6), or subsequently placed, registered, &c. in her sole name (sect. 7), or standing on the 1st January, or subsequently placed, &c. in her name jointly with any person or persons other than her husband (sect. 8), are to be considered her separate

property, unless and until the contrary be shown, although they are not expressed to be to her separate use. This will entitle her, without the concurrence of her husband, to receive or transfer such property, and to receive the dividends, interest, and profits thereof, and will indemnify the companies, societies, corporations, &c. making such transfers and payments. It will be no longer necessary, as it was under the Act of 1870, for a married woman to apply to a company to register stock in her name as "a married woman entitled to her separate use." The mere fact that the stock is standing in her name is *primâ facie* evidence that it is her separate property. Such a presumption may, of course, be rebutted by evidence, *e. g.* that she is a trustee of the stock, or that some one else has placed it in her name without her knowledge: *Pugh and Sharman's Case*, L. R., 13 Eq. 566. Under the Act of 1870, it was necessary for a company, before registering stock in the name of a married woman under that Act, to investigate her title (*R.* v. *Carnatic Rail. Co.*, L. R., 8 Q. B. 299); but that will be of course no longer necessary. Section 7 of the Act of 1870 only gave a married woman the beneficial interest, so that until the stock had been placed under section 3 in her name as a married woman entitled for her separate use she could not transfer it without the concurrence of her husband: *Howard* v. *Bank of England*, L. R., 19 Eq. 295. For cases where, under section 3 of the Act of 1870, stock was transferred into a married woman's name, see *Re Bartholomew's Estate* (5 W. N. 234), and *Re Butlin's Trusts* (5 W. N. 251). The statutory indemnity given by section 6 of the present Act is new. It is submitted that, with regard to the classes of property coming within these sections, the husband has no right to reduce them into possession. If the husband has transferred stock into his wife's name before

the Act, it will *primâ facie* be an advancement for her, and will be her separate property.

The Postmaster-General has issued the following notification as to deposits by married women in the Post Office Savings Bank:—"(*a*) All deposits which, on the 1st of January, 1883, are standing in the sole name of a married woman will be deemed, unless and until the contrary is shown, to be the separate property of such married woman; and the fact that any deposit is standing in the sole name of a married woman will be considered *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to withdraw and receive the same, without the concurrence of her husband. (*b*) All deposits which, on or after the 1st of January, 1883, are made in the sole name of any married woman will be deemed, unless and until the contrary is shown, to be her separate property, and payment of such deposits, and all interest accruing thereon, will be made to the receipt of such married woman alone, without the concurrence of her husband. (*c*) Where any deposit stands, on the 1st of January, 1883, or is at any time thereafter made, in the name of a married woman jointly with any other person or persons, whether such married woman is expressed to be a trustee or not, such married woman will be deemed entitled to such deposit, so far as her interest therein extends, as her separate property, and the concurrence of her husband in any receipt, or other proceeding relating to such deposit, will not be required. (*d*) Any woman who marries while she is a depositor should forward to the controller of the savings bank a certificate of her marriage, together with her deposit book, and the deposits will thereupon be entered in her married name, but she will not, by so doing, lose any power of receiving payment of the same, or of any interest thereon,

without the concurrence of her husband, but the deposits will remain her separate property. (*e*) If any deposit is made by a married woman by means of moneys of her husband without his consent, the husband may apply, by summons or otherwise in a summary way, to any judge of the High Court of Justice in England or in Ireland, or in England to the judge of the county court of the district, or in Ireland to the chairman of the Civil Bill Court of the division, in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the Civil Bill Court, may, upon such application, order such deposit, and the interest thereon, or any part thereof, to be paid to the husband, and may make such order for the costs of and consequent on the application as he thinks fit. (*f*) No deposit of the husband made by or in the name of his wife in fraud of his creditors will be valid as against such creditors; but any moneys so deposited may be followed for the benefit of the creditors. (*g*) Deposits belonging to a married woman may be bequeathed by her will to any person she may choose, but in the event of her dying without a will, her husband, if he survives her, will be entitled to such deposits." Similar instructions have been given as to Post Office Annuities.

7. *As to Stock, &c. to be transferred, &c. to a Married Woman.*]—All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding

section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into, or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which, so far as any liability may be incident thereto, her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company.

Before the Married Women's Property Acts a married woman could make her separate estate liable

upon a contract to take shares in a company, whose deed of settlement did not prevent married women being shareholders, and she might be made a contributory: *Mrs. Matthewman's Case*, L. R., 3 Eq. 781; and, generally speaking, so might her husband: *Luard's Case*, 1 De G., F. & J. 533; *D'Ousley's Case* (Eur. Arb.), L. T. 137; even if he disapproved of the purchase: *Scarisbrick's Case* (Eur. Arb.), L. T. 105. But in a late case the estate of the husband was held not to be liable where he had bought shares in the name of his wife, the company having accepted her as a shareholder without any misrepresentation or concealment on the part of the husband: *Re London, Bombay, and Mediterranean Bank*, 18 Ch. D. 581. See *Ex parte Rhodes* (7 W. R. 510) as to a case in which neither husband nor wife might be liable. Upon the marriage of a female shareholder or contributory the husband became liable: *Burlinson's Case*, 3 De G. & S. 18; *Lang's Case*, L. R., 4 App. Cas. 547, and *sect.* 78, *Companies Act*, 1862. By the M. W. P. Act, 1870, a married woman could only be a member of a company in respect of fully paid-up shares or stock, to the holding of which no liability was attached. Section 78 of the Companies Act provides, that "if any female contributory marries, either before or after she has been placed on the list of contributories, her husband shall, during the continuance of the marriage, be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be deemed to be a contributory accordingly." In *The West of England Bank, Ex parte Hatcher* (12 Ch. D. 284), it was held that the liability of a husband, under this section, upon the winding-up of a company to contribute to its assets was not limited by the M. W. P. Act, 1874, to the interest acquired by him in right of his wife, but that he was liable as a contributory in his own right.

Section 7 of the present Act, with regard to shares, &c. allotted to, or placed, registered, or transferred in or into, or made to stand in the sole name of a married woman, excludes the husband's liability and makes her separate property alone liable. The effect of this may be to induce companies to alter their articles of association so as to exclude married women from being shareholders, or at any rate to be careful about admitting them; or else, if they have no separate estate, neither they nor their husbands will be liable: *Re London, &c. Bank*, 18 Ch. D. 581, and *Ex parte Rhodes*, 7 W. R. 510. It is submitted that the decision in the *West of England Bank Case*, *supra*, will not be followed as to women shareholders marrying after the passing of the Act.

8. *Investments in joint names of married women and others.*]—All the provisions hereinbefore contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the commissioners for the reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time,

shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

9. *As to stock, &c. standing in the joint names of a married woman and others.*]—It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint

names of such married woman and any other person or persons not being her husband.

The effect of these sections is to allow a married woman to be joint owner of stock, &c. with any persons or person other than her husband, without the latter having any interest therein. She will be able with her co-owners to receive or transfer the same and to give a good receipt for the dividends, interest, &c. Where the stock is standing in her name jointly as aforesaid, the presumption will be that she is beneficially entitled. But the presumption may be rebutted by showing that she is a trustee, executrix, or administratrix, as she may be under this Act: see *sects.* 18, 24. Where such property is standing in her name jointly with her husband, there is no presumption under this Act as to the nature of her interest. It is submitted that the former rules still apply as to investments in stocks standing in their joint names on January 1st, 1883: see *Dummer* v. *Pitcher*, 3 M. & K. 262; *Re Eykyn's Trusts*, 6 Ch. D. 115, *and other cases cited ante*, p. 279. If the husband subsequently purchases stock in the name of himself and his wife, the presumption will be that she will take only in case she survive him, but that meanwhile he will take the dividends. If a third person purchases stock, &c. in the name of the husband and wife after 1882, the presumption will be that each will be entitled equally to the dividends, &c., and that the survivor will take absolutely. The marginal note to section 9 is inaccurate.

10. *Fraudulent investments with money of husband.*]—If any investment in any such deposit or annuity as aforesaid, or in any

of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband: and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

This section amends and extends section 6 and the

proviso in sections 2—5 of the Act of 1870. It provides a remedy for the husband whose money has been invested by the wife without his consent, and for creditors when the husband has either made a fictitious investment in his wife's name, or has really transferred his money to her. A wife could not be guilty of larceny by taking the goods of her husband (1 Hale, 514), but it is presumed that this only applied where husband and wife were living together; not where the wife was judicially or otherwise separated from her husband (but see section 16). At common law a husband could not make a gift of land to his wife (*Co. Litt.* 187 b), except by means of the Statute of Uses (27 Hen. VIII. c. 10), but in equity it has been allowed, provided that the gift was really *bonâ fide*, and was not made for the purpose of defrauding creditors: *Lucas* v. *Lucas*, 1 Atk. 270; *Walter* v. *Hodge*, 2 Swanst. 92; *M'Lean* v. *Longlands*, 5 Ves. 71. A husband could convey a copyhold to his wife, and *vice versâ*, provided that the husband was not lord of the manor: *Bunting* v. *Lepingwell*, 4 Rep. 29; *Firebrass* d. *Symes* v. *Pennant*, 2 Wils. 254. A gift to the wife, even though given to her for the purpose of keeping it from his creditors, was good against the husband, and volunteers claiming under him: see *Curtis* v. *Price*, 12 Ves. 89. In *Parker* v. *Lechmere* (12 Ch. D. 256), a legacy due to a married woman was paid by a cheque for 995*l.* drawn to the order of the husband and wife. The husband and wife endorsed the cheque, and then went together to the husband's bankers, when the wife handed the cheque to the manager, and in the presence and with the assent of the husband told the manager to open an account in her own sole name, and to place to the credit of it 800*l.*, part of the 995*l.*, and to credit the residue to the husband's current account. The wife drew cheques in her sole name, and the husband never interfered with the account. It was held that,

supposing the husband to have reduced the legacy into possession, he had given the 800*l.* to his wife. See *ante*, pp. 192—195, 392, 393, as to gifts from husband to wife; and pp. 293, 300, 307—312, as to when gifts are made in fraud of creditors. As between the husband and wife such gifts would be valid against the husband. As to what constitutes "order and disposition or reputed ownership," see Robson's Bankruptcy, 4th ed. chap. xxi.; and Bankruptcy Act, 1869, sect. 15.

11. *Moneys payable under policy of assurance not to form part of estate of the insured.*]—A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the in-

sured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending

and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured, shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

A married woman may now validly contract, and therefore she may contract to assure her life or the life of her husband. Before 1870, it was held that a wife had an insurable interest in the life of her husband. So long as any of the objects of the trust exist, the policy of assurance will not be assets of the insurer; but if a husband insures his life for the benefit of his wife and children, and his wife dies childless, he could then, it is submitted, deal with the policy as his own. This section extends and amends section 10 of the Act of 1870. It provides for the appointment of a trustee by the insured, whereas the Act of 1870 declared that the Court of Chancery, or (in England) the judge of the County Court, or (in Ireland), the chairman of the Civil Bill Court, should appoint a trustee, to receive and invest the moneys payable under the policy. In *Holt* v. *Everall* (2 Ch. D. 266), a husband, who before the passing of the Married Women's Property Act, 1870, had insured his life, and had paid one premium on the insurance, after the passing of the Act gave up the policy and received instead a policy at the same premium for a sum payable to the separate use of his wife if she survived him, and to him if he survived her. He was at that time in embarrassed circumstances, and soon after came under liquidation by arrangement, and then died. His wife had separate income subject

to a restraint on anticipation. It was held that the insurance must be taken as effected after the passing of the Married Women's Property Act, and that, whether the subsequent premiums were paid by the husband out of his own money or out of the income of the wife's separate estate, the money payable on the insurance did not go to the trustee in bankruptcy, but to the widow, by virtue of the Married Women's Property Act, which modified the 91st section of the Bankruptcy Act, 1869. *In re Mellor's Policy Trusts* (6 Ch. D. 127), a husband effected a policy for the benefit of his wife and children under the Married Women's Property Act, 1870. The husband died insolvent, and the wife being in poor circumstances, so that the income of the policy moneys was not sufficient to support her and the children, the moneys were distributed as if the husband had died intestate.

This section is likely to remove a difficulty to which the Act of 1870 gave rise. Most insurance offices held that as that Act made no provision for the surrender of policies effected under it, they must of necessity lapse in the event of the bankruptcy of the assured if it resulted in an inability to continue the payment of his premiums. This Act enacts that the receipt of the trustee duly appointed shall be a discharge to the office for the value thereof in whole or *in part*. If therefore the assured should become bankrupt, and the trustee has no funds available for the payment of the premium, the office can accept a surrender, because the trustee can give a valid receipt for a part of the sum assured.

12. *Remedies of married woman for protection and security of separate property.*]—Every woman, whether married before or after thi Act, shall have in her own name against al persons whomsoever, including her husband

the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Sect. 11 of the Act of 1870 provided that a married

to a restraint on anticipation. It was held that the insurance must be taken as effected after the passing of the Married Women's Property Act, and that, whether the subsequent premiums were paid by the husband out of his own money or out of the income of the wife's separate estate, the money payable on the insurance did not go to the trustee in bankruptcy, but to the widow, by virtue of the Married Women's Property Act, which modified the 91st section of the Bankruptcy Act, 1869. *In re Mellor's Policy Trusts* (6 Ch. D. 127), a husband effected a policy for the benefit of his wife and children under the Married Women's Property Act, 1870. The husband died insolvent, and the wife being in poor circumstances, so that the income of the policy moneys was not sufficient to support her and the children, the moneys were distributed as if the husband had died intestate.

This section is likely to remove a difficulty to which the Act of 1870 gave rise. Most insurance offices held that as that Act made no provision for the surrender of policies effected under it, they must of necessity lapse in the event of the bankruptcy of the assured if it resulted in an inability to continue the payment of his premiums. This Act enacts that the receipt of the trustee duly appointed shall be a discharge to the office for the value thereof in whole or *in part*. If therefore the assured should become bankrupt, and the trustee has no funds available for the payment of the premium, the office can accept a surrender, because the trustee can give a valid receipt for a part of the sum assured.

12. *Remedies of married woman for protection and security of separate property.*]—Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband

the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Sect. 11 of the Act of 1870 provided that a married

woman might maintain an action for the recovery of her separate property created by that Act, and also of "property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property," and be entitled, as a *feme sole*, to all remedies, civil and criminal, *against all persons* for the protection of such property; and in any indictment or other proceeding it was to be sufficient that it should be described as her property. It will be seen by comparing this section with the above section how limited was the protection afforded by it. It only applied to a small part of separate property. Women married before 9th August, 1870, were entirely excluded, except as to earnings, &c. falling under section 1, unless the husband signed a written consent in the terms of the section, and even then the property coming to the wife after marriage could not be included. The equitable separate property coming during the coverture to a woman married on or after that date, by deed or will, except as to sums of money not exceeding 200*l.*, was also excluded. Sect. 12 of the present Act applies to all kinds of separate property, whether equitable or created by the M. W. P. Acts. *Semble*, that under the Act of 1870 a wife could have sued her husband in tort, as he is not excepted. However that may be, this power is expressly given by the Act.

Before the M. W. P. Acts a married woman could sue her husband upon a contract made with him with reference to her separate estate (see *Woodward* v. *Woodward*, 3 De G. J. & S. 672; *Horrell* v. *Horrell*, 46 J. P. 295), or his executors: *Green* v. *Carlill*, 4 Ch. D. 882. A husband and wife could not commit a tort against each other, because in law they were one person. In *Phillips* v. *Barnet* (1 Q. B. D. 436), it was held that a wife, after being divorced from her husband, could not sue him for an assault committed

upon her during coverture; and in *Re Williams* (50 L. J., Ch. 495) and *The Midland Insurance Co.* v. *Smith* (6 Q. B. D. 561), the ground of the decision was that a wife could not commit a tort against her husband. As to the former law about crimes committed by the husband and wife against each other, see *ante*, pp. 46, 47. This section must be read with sect. 16, which gives the husband reciprocal remedies against the wife in respect of his property. For the meaning of desertion under the Divorce Acts, see *ante*, pp. 63, 64.

As to the civil remedies which a wife formerly had against her husband and others, see *ante*, pp. 235, 236. The effect of this section is to preclude husband or wife suing each other for personal torts, but it is submitted that this express exception, construed with sect. 1, sub-s. 2, *ante*, makes it clear that a married woman can now sue any person other than her husband for personal torts. It is useless to set out in detail what civil and criminal remedies a married woman possesses under this section, as she is now in the position of a *feme sole*.

The former law as to the competency of husband and wife to give evidence against each other is given in Best's Evidence, 7th ed. pp. 176, 177. Husband and wife "are considered as one and the same person in law, and to have the same affections and interests; from whence it has been established as a general rule that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case:" *Bac. Ab. Evidence, A.* 1. "This rule was not limited to protecting from disclosure matters communicated in nuptial confidence, or facts, the knowledge of which had been acquired in conse-

quence of the relation of husband and wife; but was an absolute prohibition of the testimony of the witness to any facts affecting the husband or wife, as the case might be, however the knowledge of those facts might have been acquired. But the rule only applied where the husband or wife was party to the suit or proceeding, in which the other was called as a witness, and did not extend to collateral proceedings between third parties. . . . . And the declarations of a wife acting as the lawfully constituted agent of her husband, were admissible against him, like the declarations of any other lawfully constituted agent." Common law exceptions are not wanting, *e. g.*, on an indictment against a man for assault and battery of his wife, or *vice versâ*, the injured party is a competent witness. By 16 & 17 Vict. c. 83, husbands and wives are competent and compellable to give evidence, except in criminal proceedings; but (sect. 3) "no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage:" see also 28 & 29 *Vict. c.* 104, *and* 32 & 33 *Vict. c.* 68. The Act of 1870 made no alteration in the law in this respect. In proceedings under this section the husband and wife are "competent" but not "compellable" to give evidence against each other.

s ante-nuptial debts and liabilities.]

to be liable after her marriage shall continue her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a

contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

WIFE'S LIABILITY.—Before the Act of 1870, the

effect of marriage upon the wife's ante-nuptial contracts and torts was to relieve her from all liability at law during the coverture; but if the debts, &c., were not recovered from the husband during the coverture, and she survived him, her liability arose again. In equity her separate estate was liable for her ante-nuptial debts if she and her husband were jointly sued and nothing could be recovered from the husband, on the ground apparently that the settlement of her own property upon herself was in fraud of creditors: see *Biscoe* v. *Kennedy*, 1 Bro. C. C. 18, n.; and *Chubb* v. *Stretch*, L. R., 9 Eq. 555—V.-C. M. The decisions in these cases would have been the same, it is presumed, if there had been a restraint upon anticipation. By section 12 of the Act of 1870, which relieved the husband of all liability for his wife's ante-nuptial *debts*, her separate estate was made liable therefor, and as her liability was to be the same "as if she had continued unmarried," the fact that a restraint upon anticipation was annexed thereto did not exempt it: *Sanger* v. *Sanger*, L. R., 11 Eq. 470; see *ante*, p. 232. Under that section it was not necessary to join the husband as a defendant: *Williams* v. *Mercier*, 9 Q. B. D. 337. The separate estate of a woman who married between 8th August, 1870, and 30th July, 1874, is therefore alone liable for her ante-nuptial *debts*. The Act of 1874 made the husband liable to the extent of certain assets (see *note to sect.* 15), extended the liability of the wife so as to include damages arising from her ante-nuptial torts and breaches of contract before marriage, and provided that they should be jointly sued therefor. The separate estate of a woman who married between 30th July, 1874, and 1st January, 1883, is liable for the residue of ante-nuptial debts, &c., not recovered from her husband, and that although she is restrained from anticipation: *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773. The present Act

does not alter the rights and liabilities of any woman married before the 1st January, 1883, except that it makes all the separate property to which she becomes entitled by virtue of it (see *note to sect.* 5) liable for her ante-nuptial debts, &c. This section extends the liability of the separate estate of a woman who marries on or after 1st January, 1883, by making it liable for "any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories," and by making it primarily liable as between her and her husband, in the absence of any agreement to the contrary. Section 19 provides that if a woman settles her own property upon herself, a restraint upon anticipation will not exempt such separate property from liability. It will be noticed that a married woman is not, by this section, made personally liable; her liability during coverture begins and ends with her separate property. As the existence of separate property no longer depends upon the doctrine of trusts, it is submitted that a married woman's liability under this section is a legal liability, and that the Statutes of Limitations will run in her favour. In *Lang's case* (L. R., 4 App. Cas. 547), it was decided that a married woman cannot be settled on the list of contributories of a company in the absence of her husband, but there seems to be no reason why a woman marrying after 1882 should not be so settled.

14. *Husband to be liable for his wife's debts contracted before marriage to a certain extent.*]—A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which

she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

Husband's Liability.—At common law the husband was personally liable during the coverture for his wife's ante-nuptial debts[1] and contracts (see *ante*, pp. 118, 119), devastavits (see *ante*, p. 146), and torts

(see *ante*, p. 139), whether he had any portion with her or not, because the marriage virtually transferred her proprietary rights to him, and he was made liable in favour of creditors, so that no person's act should prejudice another: *Bac. Abr.*, *Bar. & Feme*, *F. & L.* After her death he was liable as her administrator to the extent of the assets he took: *Turner* v. *Caulfield*, Ir. R., 7 Ch. D. 347. A husband married between 9th August, 1870, and 30th July, 1874, is not liable for his wife's ante-nuptial debts (*sect.* 12, *M. W. P. Act*, 1870), but his liability for her other contracts not resulting in debts, and for her torts, and devastavits, was not taken away. A husband married between 30th July, 1874, and 1st January, 1883, is liable for his wife's ante-nuptial debts, contracts, and torts, to the extent only of the following assets: *sect.* 5, *M. W. P. Act*, 1874.

(1) The value of the personal estate in possession of the wife which shall have vested in the husband.

(2) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession.

(3) The value of the chattels real of the wife which shall have vested in the husband and wife.

(4) The value of the rents and profits of the real estate of the wife, which the husband shall have received, or with reasonable diligence might have received.

(5) The value of the husband's estate, or interest, in any property real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or to any other person.

(6) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall, with his consent, have transferred to any person with the view of defeating or delaying her existing creditors.

From these assets had to be deducted what he had already paid in discharge of his wife's debts, and the amount of any judgment recovered against him under that Act. An attempt was made in *Fear* v. *Castle* (8 Q. B. D. 380), to limit the deduction in respect of judgments to judgments recovered before the action was commenced, but the court held that the words used in the Act meant any judgment recovered before a subsequent judgment was obtained. As the matrimonial domicile is the domicile of the husband, it was held, that a husband having an English domicile, who married a lady in Jersey (where a husband is fully liable for his wife's ante-nuptial debts), came within the protection of this section: *De Greuchy* v. *Wills*, 4 C. P. D. 362. As to what is an ante-nuptial debt, see *Conlon* v. *Moore*, 9 Ir. R., C. L. 190. In *Bell* v. *Stocker* (10 Q. B. D. 129), it was decided that, under the Act of 1874, a husband is not liable after his wife's death. How is the liability of a husband, marrying after 1882, affected by the present Act? His liability extends to all property belonging to his wife which he shall have acquired or become entitled to from or through his wife. As by the marriage itself a husband acquires no rights in his wife's property, except what she gives him *inter vivos*, or by will, or what comes to him through his wife upon her death intestate, it is submitted that any property given by the wife to the husband, as well as his interest in her real and personal property after her death, will be available, but that this does not apply to cases in which the property has been transferred to him, or in trust for him, for valu-

able consideration (whether marriage or any other valuable consideration), unless in fraud of creditors, and with his knowledge of the fraud. This section is so worded as to be free from the ambiguity which gave rise to the difficulty in *Fear* v. *Castle* (*supra*). It is submitted that the husband's full liability as a contributory in respect of his wife's shares under sect. 78 of the Companies Act, 1862 (see *ante*, p. 425), is by implication removed, because the section under consideration says—" he shall not be liable for the same [*i. e.* in respect of his wife's ante-nuptial debts, &c., including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid] any further or otherwise." If the inquiries to determine what property of the husband is liable under this section are likely to be complicated, it would be better for the creditor to bring his action in the Chancery Division, where the administrative machinery is better adapted for such business.

15. *Suits for ante-nuptial liabilities.*]—A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property

of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

This section supersedes the procedure under sections 3 and 4 of the Act of 1874: see *Appendix*, p. 473. It removes the following difficulty which arose under the wording of section 4. If the husband confessed assets to the full amount of the debt sought to be recovered, and in the result the assets proved to be insufficient, it was doubtful whether the balance could be recovered from the wife's separate estate—*i. e.* whether the "residue, if any, of such debt or damages" was the balance after deducting the amount of the joint judgment against the husband and his wife's separate estate, or whether it was the balance after deducting the amount actually realised upon the judgment. By the present Act it is clear

that the latter is intended. The husband may now be sued alone; formerly the husband and wife had to be sued jointly. In *Bell* v. *Stocker* (10 Q. B. D. 129), it was held, that as section 1 of the Act of 1874 enacted that a husband and wife married after the passing of the Act might be "jointly" sued, his liability terminated with the coverture, even although he had received assets through his wife. It is submitted that, as this section contemplates an action brought against the husband alone, he may be sued after the termination of the coverture whether by the death of the wife or by divorce. In an action brought against a husband under the Act of 1874, it was held that it was not necessary that the statement of claim should contain an allegation that the husband had received assets of the wife, and that it was sufficient to allege simply that the husband was liable for the debt, leaving it to his option whether or not he should plead that he had no assets: *Mathews* v. *Whittle*, 13 Ch. D. 811.

Costs.—The general rule is that costs are in the discretion of the court, Ord. LV. r. 1 of the Rules of the Supreme Court; but under this section if the husband is not found liable the court has no discretion, but must give judgment in favour of the husband for his costs of defence. Under the Act of 1874, a creditor has been allowed to add the costs of the husband to the costs and debts ordered to be paid out of the separate estate of the wife: *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773. It is submitted that if the husband has been added as a co-defendant without sufficient cause, the creditor will not be allowed to add the husband's costs to the amount to be paid to him by the wife. Unless there is a joint demand against the husband and wife the husband should not be made a co-defendant. It is submitted that, as between the husband and wife, in

the absence of any contract to the contrary, her separate estate is primarily liable for her ante-nuptial debts, &c., he will have a claim against such estate in respect of any sum recovered against him under this section. If married after 1882, such claim will be against all her separate estate, but if married before only against so much thereof as owes its existence to the present Act.

16. *Act of wife liable to criminal proceedings.*]—A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

See *sect.* 12 *and notes thereon.* Under the Acts of 1870 and 1874 there was no criminal or civil remedy given to the husband against the wife with respect to his property. For the former law, see *ante*, pp. 47, 437. There have been several convictions already under this section, where wives had eloped, taking with them property of their husbands.

17. *Questions between husband and wife as to property to be decided in a summary way.*]—In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or

shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions

of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

This section amends and greatly extends sect. 9 of the Act of 1870. The chief differences are the following:—

	Act of 1870.	Act of 1882.
1.	Either *husband or wife* may apply in a summary way.	Either *husband, wife, "or any such bank, corporation, company, public body, or society as aforesaid, in whose books any stocks, funds, or shares of either party are standing,"* may apply in a summary way.
2.	By *summons or motion.*	By *summons or otherwise.*
3.	To Court of Chancery in England or Ireland, or county court in England.	To High Court of Justice in England or Ireland, to county court in England, *to chairman of the civil bill court in Ireland.*
4.	Respecting *property declared by this Act to be the separate property of the wife.*	As *to the title to or possession of property.*
5.	The judge may make such order and direct such enquiry as he sees fit.	The judge or chairman may make such order and direct such enquiry to be made in such manner as he sees fit, *or may direct application to stand over from time to time.*
6.		Either party may remove to High Court of Justice, as of right, proceedings in the county court or civil bill court, in which such courts would not have had jurisdiction but for the M. W. P. Acts.

This section applies to husband and wife whenever married. The applicant may apply to a county court in England or the civil bill court in Ireland irrespectively of the value of the property, but the defendant or respondent may, as of right, have the proceedings removed into the High Court of Justice in all cases in which the inferior court would not have had jurisdiction if the Married Women's Property Acts had not been passed. As to the jurisdiction of county courts, see 1 *Pitt Lewis' County Court Practice, book ii.*

of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

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2.	By *summons or motion.*	By *summons or otherwise.*
3.	To Court of Chancery in England or Ireland, or county court in England.	To High Court of Justice in England or Ireland, to county court in England, *to chairman of the civil bill court in Ireland.*
4.	Respecting *property declared by this Act to be the separate property of the wife.*	As *to the title to or possession of property.*
5.	The judge may make such order and direct such enquiry as he sees fit.	The judge or chairman may make such order and direct such enquiry to be made in such manner as he sees fit, *or may direct application to stand over from time to time.*
6.		Either party may remove to High Court of Justice, as of right, proceedings in the county court or civil bill court, in which such courts would not have had jurisdiction but for the M. W. P. Acts.

This section applies to husband and wife whenever married. The applicant may apply to a county court in England or the civil bill court in Ireland irrespectively of the value of the property, but the defendant or respondent may, as of right, have the proceedings removed into the High Court of Justice in all cases in which the inferior court would not have had jurisdiction if the Married Women's Property Acts had not been passed. As to the jurisdiction of county courts, see 1 *Pitt Lewis' County Court Practice, book ii.*

c. 1. Application may now be by petition as well as by motion or summons. The costs are at the discretion of the court, except that any bank, corporation, &c. is to be treated as a stakeholder. This section is enabling only, and does not take away any right of action which any party interested possesses irrespectively of it. It might be more convenient that the rights of the parties, instead of being determined in a summary way, should be tried by action in the ordinary way. By virtue of this section questions as to the equity to a settlement of a wife married before 1883, or as to the reduction into possession of her *choses in action* by her husband, may be determined.

18. *Married woman as an executrix or trustee.*] —A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.

As to a husband's rights in his wife's choses *in autre droit*, see *ante*, pp. 115, 116; and see also "*Devastavits of*

Wife," pp. 146, 147, for a statement of the law with regard to the respective liabilities of husband and wife where the wife is an executrix, administratrix or trustee. The Divorce Act, 1858, says (sect. 7), that a woman who is judicially separated from her husband, or who has obtained a protection order, is to be a *feme sole* as respects her powers as an executrix, administratrix, or trustee, from the time of the sentence of separation or the commencement of the desertion, "and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix": see *Bathe* v. *Bank of England*, 4 K. & J. 564. The Vendor and Purchaser Act, 1874, enacted (sect. 6), that "when any freehold or copyhold hereditaments shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*." Before the present Act it was not advisable to appoint a single woman an executrix, administratrix, or trustee, because of the legal disabilities that would arise upon her marriage. It has been seen how these disabilities interfered with a married woman's power of disposition. By virtue of this Act, a woman married after 1882 may accept these offices without her husband's consent; she may exercise without his concurrence the powers incident to her fiduciary position, *e. g.* the conveying of any kind of property; and her separate estate will alone be liable for any breaches of trust and devastavits by her unless the husband intermeddles with the trust. With regard to women married before this Act who are trustees of real estate, this section confers upon them no new power of disposition, and it is submitted that any conveyance of such estate, unless they are bare trustees, will require their husband's concurrence in the deed, and their acknowledgment of it under the Fines and Recoveries Act. Where, however, married women are trustees of the different classes of property enumerated in this section

(see also sections 6—9), her husband's concurrence is not necessary unless he is a co-executor, co-administrator, or co-trustee.

19. *Saving of existing settlements, and the power to make future settlements.*]—Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Any woman married before the passing of this

Act on whom a settlement, either ante-nuptial or post-nuptial, has been made, will have her rights in property coming to her after 1882 determined by the covenants in the settlement. We have seen (p. 320) that where the husband has alone covenanted to settle his wife's after-acquired property, such property given for the wife's separate use is not bound thereby; and consequently, with such a covenant in a settlement, a wife married before 1883 will hold property, her title to which accrues after 1882, free from the control of her husband, and it will not come within the terms of the settlement. Indirectly, therefore, settlements made before 1883 are affected by this Act. Where, however, the covenant has been entered into by the husband and wife, property afterwards given to the wife for her separate use is bound (*ante*, p. 323); so an agreement by the husband and wife is a covenant by the wife as well as by the husband (*ante*, p. 322); and in either of these cases property coming to the wife after 1882, although free from the marital rights of the husband, will be bound by the terms of the settlement. This section applies not only to a settlement made and completed, but to an "agreement for a settlement;" and, therefore, if marriage articles have been drawn up and the parties married before 1883, any property coming to the wife under sect. 5 of this Act must be settled in accordance with the terms of the articles. If the parties married after 1883, we have seen (p. 320) that a husband need not covenant to settle the after-acquired property of his wife, but that the wife's covenant alone will be sufficient. If she, therefore, covenants to settle her after-acquired property, all property coming to her afterwards will be bound, unless it is expressly excluded from the settlement, or there is attached to it a restraint upon anticipation. The doctrine of the restraint on anticipation is fully discussed at pp. 220—234; the chief point of

difficulty with reference to it is where, before 1882, an absolute gift of a fund not producing income was made directly to a married woman. That difficulty after 1882 will not arise: see *ante*, p. 226. All settlements founded on valuable consideration (which includes marriage) are, in the absence of fraud, good against everybody (see *ante*, p. 293); and all voluntary settlements made in fraud of creditors are void as against them: see *ante*, p. 307. These are the rules governing a "settlement or agreement for a settlement made or entered into by a man;" and what amounts to fraud, and the various degrees of indebtedness that will invalidate a voluntary settlement, have been before stated: *ante*, pp. 295, 296, 308—11. If a woman settles her own property upon herself, with a restraint on anticipation, the restraint will be invalid to the extent of any ante-nuptial debts that she may have contracted. No reference is made as to her liability for her breaches of contract, or for torts committed before marriage; but it is submitted that the principle of this section would be extended so as to include such liability: see *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773. If property is settled by the husband or some other person upon the wife for her separate use, with a restraint upon anticipation, such property will not be assets for either her ante-nuptial or post-nuptial creditors.

20. *Married woman to be liable to the parish for the maintenance of her husband.*] —Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or

parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given, under the provisions of the Acts relating to the relief of the destitute poor, to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole*, by the same actions and proceedings as money lent.

The only difference between this section and section 13 of the Act of 1870, is that now the liability of the married woman to maintain her husband is expressly restricted to her separate property. By section 13 of the Act of 1870, the justices could make an order upon a married woman having separate property to pay a certain sum weekly or otherwise towards the maintenance of her husband, and might, in default of payment, have committed her to prison, although her earnings might have been only sufficient for her

M. W. P. Act, 1870, by specifically declaring that she should be liable to maintain "her children," had clearly made no alteration in the law respecting the maintenance of her grandchildren. The 43 Eliz. c. 2, s. 7, enacted that the father, grandfather, mother, grandmother, and children of every poor and impotent person or other person not able to work, being of a sufficient ability, should be liable to maintain such person; and in *R.* v. *Cornish* (2 B. & Adol. 498), Lord Tenterden said:—"There is nothing in the statute of Elizabeth to show that the obligation of the grandfather is absolute only in the event of the father being unable" to maintain the child. Until the M. W. P. Act, 1870, was passed, the wife had no liability cast upon her to support her children whilst the husband was alive; now, if the husband has no means, and the wife has separate property, she will be liable for their maintenance. It is submitted that, as between the husband and wife, the husband, if of sufficient ability, will be primarily liable for the maintenance of the children, and that, in the event of an order being made upon the wife, she will be able to recover from him the sums spent in obedience to the order. A man marrying a woman who has children at the time of such marriage, whether legitimate or illegitimate, is bound to support them until they reach the age of sixteen, or until the mother dies (4 & 5 Will. 4, c. 76, s. 57); but it will be seen that no such liability is thrown on the mother to support her husband's children, she is only liable "for the maintenance of her children and grandchildren." The question may arise whether a purchase by a married woman after 1882 in the name of her children will be presumed to be an advancement. Before the Act of 1870 it seems there was no presumption of advancement in such a case: see *Re De Visme*, 2 De G. J. & S. 17, per Turner, L. J.) The same view was taken by Jessel, M. R., since the Act of 1870, in the case of *Bennet* v. *Bennet*

(10 Ch. D. 474), and it is submitted that no presumption will arise under the present Act, which has only added to and not created her legal liability.

22. *Repeal of* 33 & 34 *Vict. c.* 93, *and* 37 38 *Vict. c.* 50.]—The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

The repealed Acts will be found printed *in extenso* at pp. 465—474.

23. *Legal representative of married woman.*]—For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

M. W. P. Act, 1870, by specifically declaring that she should be liable to maintain "her children," had clearly made no alteration in the law respecting the maintenance of her grandchildren. The 43 Eliz. c. 2, s. 7, enacted that the father, grandfather, mother, grandmother, and children of every poor and impotent person or other person not able to work, being of a sufficient ability, should be liable to maintain such person; and in *R.* v. *Cornish* (2 B. & Adol. 498), Lord Tenterden said:—"There is nothing in the statute of Elizabeth to show that the obligation of the grandfather is absolute only in the event of the father being unable" to maintain the child. Until the M. W. P. Act, 1870, was passed, the wife had no liability cast upon her to support her children whilst the husband was alive; now, if the husband has no means, and the wife has separate property, she will be liable for their maintenance. It is submitted that, as between the husband and wife, the husband, if of sufficient ability, will be primarily liable for the maintenance of the children, and that, in the event of an order being made upon the wife, she will be able to recover from him the sums spent in obedience to the order. A man marrying a woman who has children at the time of such marriage, whether legitimate or illegitimate, is bound to support them until they reach the age of sixteen, or until the mother dies (4 & 5 Will. 4, c. 76, s. 57); but it will be seen that no such liability is thrown on the mother to support her husband's children, she is only liable "for the maintenance of her children and grandchildren." The question may arise whether a purchase by a married woman after 1882 in the name of her children will be presumed to be an advancement. Before the Act of 1870 it seems there was no presumption of advancement in such a case: see *Re De Visme*, 2 De G. J. & S. 17, per Turner, L. J.) The same view was taken by Jessel, M. R., since the Act of 1870, in the case of *Bennet* v. *Bennet*

(10 Ch. D. 474), and it is submitted that no presumption will arise under the present Act, which has only added to and not created her legal liability.

22. *Repeal of* 33 & 34 *Vict. c.* 93, *and* 37 38 *Vict. c.* 50.]—The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

The repealed Acts will be found printed *in extenso* at pp. 465—474.

23. *Legal representative of married woman.*]—For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

The ordinary meaning of the term "legal personal representative" is executor or administrator: *Price* v. *Strange*, 6 Madd. 159; and *Taylor* v. *Beverley*, 1 Coll. 108. An executor is "the person to whom the execution of a last will and testament of personal estate is by the testator's appointment, confided:" 2 *Black. Comm.* 203. "To appoint an executor is to place one in the stead of the testator, who may enter to the testator's goods and chattels and who hath action against the testator's debts and performance of his will:" *Swinburne*, *Pt.* 4, *s.* 2, *pl.* 2. An administrator is a person appointed by the court to distribute the personal estate of a deceased person in cases where there is no executor to him, either because the deceased died intestate or no executor was appointed, or having been nominated has not accepted, or having accepted has died without administering. It was only by agreement with her husband that a married woman could make a will of her personal estate. Where she made a will in pursuance of a power, the executor took as appointee under the power, and if she had personal estate not subject to the power, her husband was entitled to administration *cæterorum*. A married woman has now full power of testation, and therefore her executor will resemble an ordinary executor. It is submitted that the husband's rights, upon the death of his wife intestate, are not affected by this Act, and the husband's right, in exclusion of all other persons to be his wife's administrator, still exists. The 29 Car. 2, c. 3, s. 25, provides that the Statute of Distributions "shall not extend to the estates of *femes covert* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as he might have done before the making of the said Act." As the administrator of his wife the husband is still liable, to the extent of the assets coming to him as such administrator, debts and other liabilities which survive. If he

die without having taken out administration, administration *de bonis non* will be granted to his legal personal representative: *Fielder* v. *Hanger*, 3 Hagg. Ecc. 769. But when the wife is an executrix, and dies intestate, administration to the goods of her testator will not as a rule be granted to the husband. The words of this section are wide enough to vest the legal estate of land to which the wife was entitled in her legal personal representatives; but it is submitted that such an important change in the devolution of real property would not be implied, but must be expressly made, as in the case of trust and mortgage estates by the Conveyancing Act, 1881, s. 30.

Before this Act, separate estate, whether real or personal, was always equitable assets (*Owens* v. *Dickenson*, 1 Cr. & Ph. 48); but now, in all cases where under this section the wife's personal representative, as such, is capable of recovering her property, such property will be legal assets.

24. *Interpretation of terms.*]—The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

four.

See *ante*, pp. 115, 116, as to the husband's rights and powers with regard to his wife's choses in *autre droit*, and pp. 146, 147, for the husband's liabilities for the ante-nuptial and post-nuptial devastavits of his wife. The effect of this section is to relieve the husband from all liability with regard to devastavits or breaches of trust, committed after 1882, by his wife, unless he has acted or intermeddled in the trust or administration. It is submitted that he will still be answerable as the administrator of his wife to the extent of the assets he receives for her breaches of trust and devastavits: see *Adair* v. *Shaw* (1 Sch. & Lef. 243, *ante*, p. 147). Formerly a wife could be appointed an executrix, but could not prove the will without her husband's consent, nor could the husband compel the wife to accept the office against her will, unless the office devolved upon her while single; but if he administered without the will being proved, she could not decline or avoid the executorship during his life, but after his death she might refuse if she had never intermeddled with the administration. In *Adair* v. *Shaw* (1 Sch. & Lef. 243) it was considered that a *feme covert* executrix was answerable for waste committed by her husband during the coverture, and this was followed in *Soady* v. *Turnbull*, L. R., 1 Ch. 494. As to what is included in the term "thing in action, or chose in action, see *ante*, p. 100.

25. *Commencement of Act.*]—The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

26. *Extent of Act.*]—This Act shall not extend to Scotland.

27. *Short title.*]—This Act may be cited as the Married Women's Property Act, 1882.

APPENDIX TO CHAPTER VIII.

MARRIED WOMEN'S PROPERTY ACT, 1870.

(33 & 34 VICT. c. 93.)

An Act to amend the Law relating to the Property of Married Women. [9th August, 1870.

WHEREAS it is desirable to amend the law of property and contract with respect to married women:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. *Earnings of married women to be deemed their own property.*]—The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic or scientific skill, and all investments of such wages, earnings, money or property, shall be deemed and be taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money and property.

2. *Deposits in savings banks by a married woman to be deemed her separate property.*]—Notwithstanding any provision to the contrary in the Act of the tenth year of George the Fourth, chapter twenty-

enabling the commissioners for the reduction of the national debt to grant life annuities and annuities for terms of years, or in the Acts relating to savings banks and post office savings banks, any deposit hereafter made and any annuity granted by the said commissioners under any of the said Acts in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, shall be deemed to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman; provided that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this Act, order such deposit or annuity or any part thereof to be paid to the husband.

3. *As to a married woman's property in the funds.*]—Any married woman, or any woman about to be married, may apply to the governor and company of the Bank of England,* or to the governor and company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds, and not being less than twenty pounds, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to or made to stand in the books of the governor and company to whom such application is made in the name or intended name of the woman as a married woman entitled to her separate use, and on such sum being entered in the books of the said governor and company accordingly, the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman; provided that if any such investment in the funds is made

* By sect. 14 of the 34 & 35 Vict. c. 47 (The Metropolitan Board of Works (Loans) Act, 1871), it is enacted, "Section three of the Married Women's Property Act, 1870, shall, as regards the governor and company of the Bank of England, extend and apply to consolidated stock; and for that purpose this section shall be deemed part of that Act."

by a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this Act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband.

4. *As to a married woman's property in a joint stock company.*]—Any married woman, or any woman about to be married, may apply in writing to the directors or managers of any incorporated or joint stock company that any fully paid up shares, or any debenture or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be transferred and the dividends and profits paid as if she were an unmarried woman; provided that if any such investment as last mentioned is made by a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this Act, order such investment, and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

5. *As to a married woman's property in a society.*]—Any married woman, or any woman about to be married, may apply in writing to the committee of management of any industrial and provident society, or to the trustees of any friendly society, benefit building society, or loan society, duly registered, certified, or enrolled under the Acts relating to such societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the society in the name or intended name of the woman as a

woman entitled to her separate use, and it shall be the duty of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right, or claim shall be deemed to be the separate property of such woman, and shall be transferable and payable with all dividends and profits thereon as if she were an unmarried woman; provided that if any such share, benefit, debenture, right, or claim has been obtained by a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this Act, order the same and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

6. *Deposit of moneys in fraud of creditors invalid.*] Nothing hereinbefore contained in reference to moneys deposited in or annuities granted by savings banks or moneys invested in the funds or in shares or stock of any company shall as against creditors of the husband give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if this Act had not passed.

7. *Personal property not exceeding 200l. coming to a married woman to be her own.*]—Where any woman married after the passing of this Act shall during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same.

8. *Freehold property coming to a married woman, rents and profits only to be her own.*]—Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to

the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same.

9. *How questions as to ownership of property to be settled.*]—In any question between husband and wife as to property declared by this Act to be the separate property of the wife, either party may apply by summons or motion in a summary way either to the Court of Chancery in England or Ireland, according as such property is in England or Ireland, or in England (irrespective of the value of the property) the judge of the county court of the district in which either party resides, and thereupon the judge may make such order, direct such inquiry, and award such costs, as he shall think fit; provided, that any order made by such judge shall be subject to appeal in the same manner as the order of the same judge made in a pending suit or on an equitable plaint would have been, and the judge may, if either party so require, hear the application in his private room.

10. *Married woman may effect policy of insurance.*]—A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman.

As to insurance of a husband for benefit of his wife.]—A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland

according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the civil bill court of the division of the county, in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

11. *Married women may maintain an action.*]—A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property.

12. *Husband not to be liable on his wife's contracts before marriage.*]—A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried.

13. *Married woman to be liable to the parish for the maintenance of her husband.*]—Where in England the

husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband as by the thirty-third section of The Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife who becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by such and the same actions and proceedings as money lent.

14. *Married woman to be liable to the parish for the maintenance of her children.*]—A married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children: provided always, that nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children.

15. *Commencement of Act.*]—This Act shall come into operation at the time of the passing of this Act.

16. *Act not to extend to Scotland.*]—This Act shall not extend to Scotland.

17. *Short title.*]—This Act may be cited as "The Married Women's Property Act, 1870."

MARRIED WOMEN'S PROPERTY ACT (1870) AMENDMENT ACT, 1874.

(37 & 38 VICT. c. 50.)

An Act to amend the Married Women's Property Act (1870). [30th July, 1874.

WHEREAS it is not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and the law as to the recovery of such debts requires amendment:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

1. *Husband and wife may be jointly sued for her debts before marriage.*]—So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed so far as respects marriages which shall take place after the passing of this Act, and a husband and wife married after the passing of this Act may be jointly sued for any such debt.

2. *Extent to which husband liable.*]—The husband shall, in such action and in any action brought for damages sustained by reason of any tort committed by the wife before marriage or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; and in addition to any other plea or pleas may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or, confessing his liability to some amount, that he is not liable beyond what he so confesses; and if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned.

3. *If husband without assets he shall have judgment for costs.*]—If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife.

4. *Joint and separate judgment against husband and wife for debt.*]—When a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife.

5. *Assets for which husband liable.*]—The assets in respect of and to the extent of which the husband shall in any such action be liable are as follows:

(1.) The value of the personal estate in possession of the wife, which shall have vested in the husband:

(2.) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession:

(3.) The value of the chattels real of the wife which shall have vested in the husband and wife:

(4). The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received:

(5.) The value of the husband's estate or interest in any property real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or to any other person:

(6.) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors:

Provided that when the husband after marriage pays any debt of his wife, or has a judgment bonâ fide recovered against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable.

6. *Extent of Act.*]—This Act shall not extend to Scotland.

7. *Short title.*]—This Act may be cited as "The Married Women's Property Act (1870) Amendment Act, 1874."

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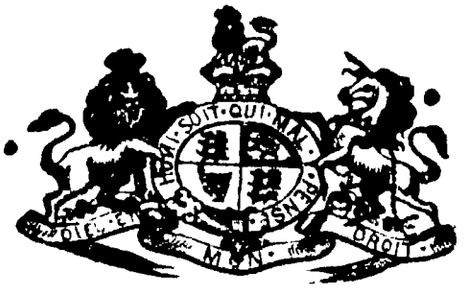
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